

## CASE NOTES

# *Avena and Other Mexican Nationals (Mexico v. United States of America)*

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### I. INTRODUCTION

*Avena and Other Mexican Nationals*<sup>1</sup> was the third in a trilogy of cases submitted to the International Court of Justice (the “Court”) against the United States for violations of the Vienna Convention on Consular Relations (the “Vienna Convention”).<sup>2</sup> In *Avena*, Mexico alleged that the United States had violated Mexico’s rights and those of 52 Mexican

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<sup>1</sup> *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, [2004] 43 ILM 581 (“Avena”).

<sup>2</sup> Vienna Convention on Consular Relations and Protocols (1963) 596 U.N.T.S. 262 (entered into force 24 April 1963). The two previous cases were *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States) (Provisional Measures)* [1998] I.C.J. Rep. 248 and the *LaGrand Case (Germany v. United States) (Merits)* [2001] 40 I.L.M. 1069 (“LaGrand”).

nationals under Article 36 of the Vienna Convention.<sup>3</sup> Article 36 sets out the right of foreign nationals to be informed immediately of their right to contact their consulate and the right of the consulate to be notified immediately of the detention of their nationals by the receiving state.<sup>4</sup> Article 36 further requires states parties to give full effect to these requirements in their domestic law.<sup>5</sup>

The Mexican nationals alleged to have been denied these rights were on death row for the commission of capital offences under United States law, and were at various stages of their appeals in the United States criminal justice system.<sup>6</sup> In response to a request from Mexico, the Court issued an

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<sup>3</sup> Mexico had initially seized the Court in respect of 54 Mexican nationals, but subsequently withdrew the claims in relation to two of those nationals: *Avena*, above n. 1, para. 7. Mexico sought to add two other Mexican nationals to those for which Mexico sought relief, but the Court decided that it was too late to add these cases as it would impinge on procedural equality between the parties: *ibid.*

<sup>4</sup> Article 36(1) reads in full:

With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

- (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with access to consular officers of the sending State;
- (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
- (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

<sup>5</sup> Article 36(2) provides: "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

<sup>6</sup> *Avena*, above n. 1, para. 20.

order of interim measures in respect of three Mexican nationals who were in greatest danger of execution pending the outcome of the case.<sup>7</sup> In these circumstances, Mexico was able to seek a judgment from the Court that would not only fully articulate the standards to which United States officials should be held under the Vienna Convention, but also provide a meaningful remedy for the affected nationals.<sup>8</sup>

## II. OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

The United States raised several objections to the jurisdiction of the Court, as well as to the admissibility of the dispute.<sup>9</sup> Mexico, like Paraguay and Germany, had relied on the Optional Protocol to the Vienna Convention by which parties to that instrument agreed to submit disputes concerning the interpretation or application of the Vienna Convention to the Court.<sup>10</sup> The United States argued that Mexico's claims related to the treatment of Mexican nationals in the United States criminal justice system and thereby challenged domestic court proceedings, rather than simply involving a question of the interpretation or application of an international treaty.<sup>11</sup> The Court took the view that to the extent the Vienna Convention engaged the conduct of the United States municipal courts, the Court had jurisdiction to examine the actions of those courts in light of international law.<sup>12</sup> The other three of the United States jurisdictional claims were dismissed because the Court found that Mexico's submissions raised questions of interpretation of the

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<sup>7</sup> *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States) (Provisional Measures)* [2003] 42 I.L.M. 309.

<sup>8</sup> The Paraguayan and German nationals were all executed in violation of the Court's orders for interim measures. Paraguay then withdrew its case. Germany decided to pursue its case to the merits even though the LaGrand brothers would not benefit from any judgment of the Court.

<sup>9</sup> Mexico's argument that the Court should dismiss the United States' objections to jurisdiction and admissibility for being untimely under the Court's rules was rejected. See *Avena*, above n. 1, paras. 22-25. Both Judge Parra-Aranguren and Judge *ad hoc* Sepúlveda dissented in relation to Mexico's arguments that the Court should not address the United States' objections to jurisdiction and admissibility for being untimely under the Court's rules: *ibid.*, para. 153.

<sup>10</sup> *Ibid.*, para. 1.

<sup>11</sup> *Ibid.*, para. 27.

<sup>12</sup> *Ibid.*, para. 28.

Vienna Convention, rather than those claims being so broad as to render them outside of the Court's jurisdiction.<sup>13</sup>

The United States objections to admissibility of the dispute were also unanimously dismissed.<sup>14</sup> Most notable about the Court's decisions in relation to the United States objections to admissibility was the decision relating to the requirement for foreign nationals to exhaust local remedies prior to the state taking up the claim as its own under the banner of diplomatic protection. The United States argued that all of the Mexican nationals had further avenues of appeal both within the federal and state courts, as well as the possibility of seeking clemency from state officials prior to execution.<sup>15</sup> As none of the Mexican nationals had been denied clemency, there were still remedies that could be exhausted within the United States.<sup>16</sup>

Mexico took the view that the remedies available within the United States were ineffective given that the United States courts had previously held that the Vienna Convention violations could not be argued on appeal if they had not been raised in earlier proceedings (known as the procedural default rule), do not afford individual rights (despite the Court's holding to the contrary in *LaGrand*),<sup>17</sup> or had not caused detriment to the

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<sup>13</sup> See *ibid.*, paras. 29-35 (addressing the second, third and fourth United States objections to jurisdiction). The Court unanimously concluded that it had jurisdiction over the case: *ibid.*, para. 153.

<sup>14</sup> *Ibid.*, para. 153. The United States' objections that the remedies sought by Mexico requiring the Court to act as a court of criminal appeal, and that certain Mexican nationals were also United States nationals and therefore not entitled to consular rights under the Vienna Convention were considered as matters relating to the merits: see *ibid.*, paras. 37, 41-42. Consistent with its holding in *LaGrand*, the Court also decided that allegations concerning Mexico's conduct under the Vienna Convention did not amount to a question as to the admissibility of any claim given the nature of the Vienna Convention: see *LaGrand*, above n. 2, para. 63; and *Avena*, above n. 1, para. 47. Nor had Mexico impliedly waived any rights under the Vienna Convention (which would have required more prolonged and consistent inaction than occurred here), but had brought the alleged breaches of the Vienna Convention to the attention of the United States in a variety of ways: *Avena*, above n. 1, para. 44.

<sup>15</sup> *Avena*, above n. 1, para. 38.

<sup>16</sup> *Ibid.*, para. 38 (arguing that "none of the cases 'is in an appropriate posture for review by an international tribunal'").

<sup>17</sup> *LaGrand*, above n. 2, para. 77 (stating that Article 36(1) "creates individual rights, which, ..., may be invoked in this Court by the national State of the detained person").

claimant.<sup>18</sup> Clemency, Mexico argued, was not to be considered as a remedy to exhaust given that it is an act of grace by the executive, rather than a judicial remedy.<sup>19</sup> Moreover, the time between clemency being denied and execution occurring could be incredibly short, as little as an hour, and it was unrealistic to expect that Mexico wait until this final period of time in order to submit claims to the Court.<sup>20</sup> In any event, for Mexico, any argument as to exhaustion of local remedies was irrelevant given that Mexico sought relief in its own right for the Vienna Convention violations, as well as in the right of its nationals.<sup>21</sup>

Rather than rely on the well-accepted limitations to the requirement to exhaust local remedies, the Court focused on the interdependence of the claims submitted on behalf of Mexico for injury suffered directly and through the Mexican nationals.<sup>22</sup> In such a situation, the court considered that where there was such a convergence of interests then the foreign nationals would not be required to exhaust local remedies.<sup>23</sup> In reaching this conclusion, the Court has effectively created a new exception to the requirement to exhaust local remedies.

This holding of the Court provoked the most commentary in the declarations and separate opinions appended to the judgment.<sup>24</sup> Vice President Ranjeva would have specifically limited the new exception to claims under the Vienna Convention, given the recognition of individual rights in *LaGrand* as well as the inter-related nature of those rights as enshrined in the Vienna Convention, as opposed to permitting a comparable argument in relation to any other international obligation.<sup>25</sup>

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<sup>18</sup> Avena, above n. 1, para. 39.

<sup>19</sup> Avena, Verbatim Record, CR2003/25, para. 309.

<sup>20</sup> *Ibid.*, para. 311.

<sup>21</sup> Avena, above n. 1, para. 40.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> President Shi and Vice President Ranjeva appended declarations to the Court's judgement, and Judges Vereschetin, Parra-Aranguren, Tomka, and Judge ad hoc Sepúlveda appended separate opinions.

<sup>25</sup> Avena, above n. 1, Declaration of Vice President Ranjeva, paras. 11-13.

Judge Vereshchetin specifically disagreed with the Court's reasoning on this issue.<sup>26</sup> He considered that the Court could have adhered to the proposal of the International Law Commission (which was based on an analysis of the Court's jurisprudence) that when there is both a direct injury to the state and an indirect injury through the nationals of a state, then it is the preponderant injury that forms the basis of the claim and determines whether local remedies should be exhausted.<sup>27</sup> Mexico's claims here were predominantly based on the injuries to its nationals and so should have required the exhaustion of local remedies.<sup>28</sup> However, the special circumstances of this case (particularly the risk that the nationals would be executed shortly after the local remedies were exhausted) would have warranted a determination that the local remedies rule would not apply.<sup>29</sup> This approach would have ensured that the inapplicability of the requirement to exhaust local remedies would have been completely limited to the particular circumstances of the case, rather than setting out a new exception to the rule. Judge Parra-Aranguren similarly preferred the approach of the International Law Commission,<sup>30</sup> without, however, admitting the possibility of an exception in the special circumstances of the present case.

Also adverse to the new exception, Judge Tomka would have accepted Mexico's argument that there were no effective remedies available in the United States for the Vienna Convention violations and as such the requirement to exhaust local remedies was inapplicable.<sup>31</sup>

### III. ARTICLE 36(1) OF THE VIENNA CONVENTION

Turning to the merits, the Court considered whether the United States had violated the information and notification requirements of Article

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<sup>26</sup> Avena, above n 1, Separate Opinion of Judge Vereshchetin, para. 1 (describing it as "a highly problematic new legal proposition in respect of the law of diplomatic protection").

<sup>27</sup> *Ibid.*, paras. 5 and 6.

<sup>28</sup> *Ibid.*, paras. 7 and 8.

<sup>29</sup> *Ibid.*, paras. 12 and 13.

<sup>30</sup> See Avena, above n. 1, Separate Opinion of Judge Parra-Aranguren, paras. 23-28.

<sup>31</sup> Avena, above n. 1, Separate Opinion of Judge Tomka, paras. 11-13.

36(1).<sup>32</sup> In assessing whether the United States violated the obligation to inform the 52 Mexican nationals of their right to contact the Mexican consulate, the two critical issues for the Court were ascertainment of the nationality of any detained person and the meaning of “without delay”.<sup>33</sup>

For the purposes of the proceedings before the Court, Mexico conceded that any Mexican national who also held United States nationality would not be entitled to the rights under the Vienna Convention.<sup>34</sup> The main point of contention between the parties on this particular question was which state had the burden of proving the nationality of the particular claimants.<sup>35</sup> Mexico took the position that once it had established the Mexican nationality of each of the 52 nationals,<sup>36</sup> then the burden shifted to the United States to show that they were also United States nationals.<sup>37</sup> The Court agreed with this approach, and found that the United States had failed to discharge this burden for all but one of the Mexican nationals,<sup>38</sup> as the United States had not sought the specific information it required from Mexico to do so.<sup>39</sup>

For 47 of the Mexican nationals, the United States did not contest that consular information had never been given.<sup>40</sup> For the four other Mexican nationals who were entitled to this information, the question of a breach of Article 36(1)(b) turned on whether it was the ascertainment of

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<sup>32</sup> The Court used the term “inform” when referring to an individual being made aware of his or her rights under the Vienna Convention whereas “notify” referred to notice being given to a consular post: Avena, above n. 1, para. 18.

<sup>33</sup> Ibid., para. 52.

<sup>34</sup> Avena, Verbatim Record, CR 2003/24, para. 87.

<sup>35</sup> Avena, above n. 1, para. 54.

<sup>36</sup> Judge Parra-Aranguren voted against most of the operative provisions of the dispositif on the basis that Mexico had not proven that the relevant nationals were Mexican because Mexico failed to submit evidence of its Constitution whereby those born in Mexico automatically acquire Mexican nationality: Avena, above n. 1, Separate Opinion of Judge Parra-Aranguren, paras. 7-11. Unlike the other members of the Court, Judge Parra-Aranguren was presumably unwilling to take judicial notice of the Mexican Constitution.

<sup>37</sup> Avena, above n. 1, para. 55.

<sup>38</sup> Ibid., para. 74 (stating that the United States had proven that he had claimed to be a United States national upon arrest).

<sup>39</sup> Ibid., para. 57.

<sup>40</sup> Ibid., para. 76.

nationality or the arrest that triggered the requirement to provide consular information immediately.<sup>41</sup>

Mexico argued that for consular information to be provided “without delay”, this information was needed before any interrogation took place so that the detained national could be advised on the nature of the foreign legal system, as well as be given assistance in obtaining counsel to make informed decisions.<sup>42</sup> The United States considered that the standard required by Mexico was highly impractical and inconsistent with the practice of states parties under the Vienna Convention.<sup>43</sup> It instead took the view that “without delay” should be understood as meaning in the ordinary course of business and without procrastination or deliberate inaction.<sup>44</sup>

In addition, the United States argued that there was considerable difficulty in identifying who was entitled to consular information at the point that individuals were exposed to law enforcement officials. The United States pointed to the multicultural nature of its society as well as the fact that citizenship is held by a diverse range of people who speak a large variety of languages.<sup>45</sup> The Court considered that this very feature of the United States should warrant that consular information would be accorded on a routine basis. To this end, Mexico had proposed that information on consular rights could be incorporated within the so-called *Miranda* warning: to the litany of “You have the right to remain silent, the right to have an attorney present during questioning, ...” could be added “if you are a foreign national, you have the right to contact your consulate”.<sup>46</sup> The Court endorsed this suggestion.<sup>47</sup>

The Court further decided that information “without delay” would not normally be interpreted, nor would it be consistent with the objects and purposes of the Vienna Convention, to mean immediately upon arrest and

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<sup>41</sup> Ibid., para. 53.

<sup>42</sup> Ibid., para. 78.

<sup>43</sup> Avena, above n. 1, United States Counter-Memorial at 89-100.

<sup>44</sup> Avena, above n. 1, United States Counter-Memorial at 78.

<sup>45</sup> Avena, above n. 1, para. 64.

<sup>46</sup> Avena, Verbatim Record, CR 2004/24, paras 213-214.

<sup>47</sup> Avena, above n. 1, para. 64 and para. 149.



before interrogation.<sup>48</sup> Instead, it decided that “the duty upon the detaining authorities to give the Article 36, paragraph 1(b), information to the individual arises once it is realised that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national”.<sup>49</sup> On this standard, the United States was found to have violated the international law requirement to provide consular information in respect of 51 Mexican nationals.<sup>50</sup>

With respect to the submission that the United States had also failed to notify Mexico under Article 36(1)(b), the Court had regard to the circumstances of different cases, and particularly the evidence submitted by the parties relating to when notice was given to Mexican consular officers. In one case, the Court found that one of the Mexican nationals had chosen not to have his consular post notified,<sup>51</sup> and in another case, a delay of three working days was acceptable.<sup>52</sup> This latter determination was the best indication of a particular standard (namely, three working days) that should be followed with respect to the duty to notify consulates of a national’s arrest immediately. On this basis, the United States was found to have violated this obligation in 49 cases.<sup>53</sup>

Mexico further submitted that the inter-related nature of the rights in Article 36(1), which had been recognised by the Court in *LaGrand*,<sup>54</sup> meant that a violation of the duty to notify Mexico under Article 36(1)(b) necessarily resulted in violations of Article 36(1)(a) and (c). The Court accepted this view in respect of the rights to communicate and have access with nationals under Article 36(1)(a) and with respect to the right of consular officers to visit their detained nationals under Article 36(1)(c).<sup>55</sup> However, in relation to the right of consular officers to arrange for legal representation, the Court noted that this right could be satisfied even in the absence of notification from the United States, as Mexico had learned

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<sup>48</sup> *Ibid.*, para. 85.

<sup>49</sup> *Ibid.*, para. 63.

<sup>50</sup> *Ibid.*, para. 90.

<sup>51</sup> *Ibid.*, para. 93.

<sup>52</sup> *Ibid.*, para. 97.

<sup>53</sup> *Ibid.*, para. 106(2).

<sup>54</sup> *LaGrand*, above n. 2, para. 74.

<sup>55</sup> *Avena*, above n. 1, para. 106(3).

of the detention of its national from other sources.<sup>56</sup> On this basis, a violation of the duty to notify did not inexorably result in a violation of the right to arrange for legal representation. On the facts of the different cases of the Mexican nationals, the Court determined that the United States had breached this requirement in respect of 34 Mexican nationals.<sup>57</sup>

#### IV. ARTICLE 36(2) OF THE VIENNA CONVENTION

Mexico submitted to the Court that the United States had also violated Article 36(2) of the Vienna Convention because it had failed to provide “meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36(1)”.<sup>58</sup> In particular, Mexico challenged the application of the procedural default rule, a United States legal doctrine that prevented Vienna Convention claims from being asserted in domestic proceedings if they had not been raised at trial.<sup>59</sup> The Court had determined in *LaGrand* that, provided there was still an opportunity to provide review and reconsideration of the Article 36(1) violations, Article 36(2) was not violated through the specific application of the procedural default rule.<sup>60</sup> The Court confirmed this position in *Avena*.<sup>61</sup> It was further decided that as all but three of the Mexican nationals still had judicial avenues that could be pursued in the United States, there was no violation of the requirement to provide judicial review and reconsideration for those with pending cases before the United States judiciary. The Court reached this conclusion even though it noted that the procedural default rule had not been revised nor had the United States made any provision to prevent its application in cases concerning the Vienna Convention since the *LaGrand* judgment.<sup>62</sup> The Court therefore

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<sup>56</sup> *Ibid.*, para. 104.

<sup>57</sup> *Ibid.*, para. 106(4).

<sup>58</sup> *Ibid.*, para. 107.

<sup>59</sup> The definition of the procedural default rule adopted by the Court was: “a defendant who could have raised, but failed to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of *habeas corpus*”: *ibid.*, para. 111.

<sup>60</sup> See *LaGrand*, above n. 2, para. 90.

<sup>61</sup> *Avena*, above n. 1, para. 112.

<sup>62</sup> *Ibid.*, para. 113.

found that Article 36(2) was only violated in respect of the three Mexican nationals who had exhausted all judicial avenues.<sup>63</sup>

## V. REPARATIONS

In assessing the legal consequences of the multitude of breaches of Article 36(1) and the three instances of Article 36(2) violation, the Court addressed what would be the “reparation in adequate form” that corresponded to the particular injury.<sup>64</sup> Mexico argued that the appropriate remedy to restore the situation that existed prior to the commission of the unlawful act was *restitutio in integrum* whereby the convictions and sentences of the Mexican nationals would be annulled so that they could be retried with the benefit of their rights under the Vienna Convention.<sup>65</sup>

Rather than order such a far-reaching remedy, the Court reiterated its view from *LaGrand* that in order to ensure performance of the Article 36(1) obligations, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Vienna Convention.<sup>66</sup> Review and reconsideration, which was required of the United States as a

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<sup>63</sup> *Ibid.*, para. 114.

<sup>64</sup> *Ibid.*, para. 119.

<sup>65</sup> *Ibid.*, para. 117. Mexico further submitted that evidence obtained in breach of Article 36 should be excluded from the subsequent proceedings: *ibid.*

<sup>66</sup> *LaGrand*, above n. 2, para. 125; and *Avena*, above n. 1, para. 120.

primary obligation under Article 36(2), was therefore converted into the “remedy to make good these violations”.<sup>67</sup>

The Court decided that it should be left to the United States courts to determine through review and reconsideration “whether in each case the violation of Article 36 committed ... caused actual prejudice to the defendant in the process of administration of criminal justice”.<sup>68</sup> What was crucial for review and reconsideration, according to the Court, was not the outcome of this process but whether a domestic judicial procedure existed that guaranteed that full weight is given to the violation of consular rights.<sup>69</sup> In this regard, the Court emphasised that a judicial form of review and reconsideration was required, and that the United States could not just rely on the executive clemency procedures as currently practiced.<sup>70</sup>

With regard to the breaches of Article 36(2) in relation to the three Mexican nationals who had exhausted judicial avenues of review and reconsideration, the Court did not order any specific reparations for this international law violation. In an unusual step in international adjudication, the Court turned the matter of reparations over to the wrongdoing state. The Court held, “in these three cases it is for the United States to find an appropriate remedy having the nature of review and reconsideration”.<sup>71</sup>

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<sup>67</sup> Avena, above n. 1, para. 121. See also Avena, Verbatim Record CR2003/28, paras. 121-137 (where Mexico argued that when the Court discussed review and reconsideration in *LaGrand* it did so in the context of the primary obligations of states under the Vienna Convention, and so a separate remedy now have to be considered by the Court in the situation where the victims of the violation were still alive to benefit from a reparations holding); Klein, “Avena and Other Mexican Nationals: How the International Court of Justice Lost its Crown”, (Paper presented at the Australia New Zealand Society of International Law 12<sup>th</sup> Annual Meeting, Canberra, 19 July 2004), 3 <<http://www.law.usyd.edu.au/scigl/anzsil/Conferences/2004%20Conference%20Proceedings/conferenceproceedings.htm>> at 24 March 2005 (arguing that the Court should have turned to the secondary rules of state responsibility that come into play when a primary obligation is breached, rather than transforming a primary obligation into a new form of reparations).

<sup>68</sup> Avena, above n. 1, para. 121.

<sup>69</sup> *Ibid.*, para. 139.

<sup>70</sup> *Ibid.*, paras. 140 and 143.

<sup>71</sup> *Ibid.*, para. 152.

Mexico further requested that the Court order that the United States must cease its violations of Article 36 and provide appropriate guarantees and assurances of non-repetition.<sup>72</sup> For the latter, Mexico pointed to “at least one hundred cases in which Mexican nationals have been arrested by competent authorities of the United States for serious felonies but not timely notified of their consular notification rights”.<sup>73</sup> The Court rejected Mexico’s argument that there was a continuing violation in respect of the 52 Mexican nationals that necessitated an order of cessation.<sup>74</sup> For assurances of non-repetition, the Court referred to the efforts that had been undertaken by the United States to ensure better compliance with the obligations under Article 36, as had been discussed in *LaGrand*,<sup>75</sup> and considered that no order additional to what had been decided in *LaGrand* was warranted in this case.<sup>76</sup>

Given the Court’s reliance on its previous holdings in *LaGrand* in respect of its holdings in *Avena*, it is worth noting that the Court did not strictly adhere to the terms of Article 59 of its Statute, whereby judgments of the Court are only binding on the parties before it.<sup>77</sup> Moreover, the Court unequivocally stated at the end of its judgment that “the fact that in this case the Court’s ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States”.<sup>78</sup> The Court clearly considers that all issues related to the violation of consular rights of foreign nationals on death row in the United States have now been fully resolved.

## VI. AFTERMATH OF THE COURT’S JUDGMENT

In view of the Court’s conclusions that reparations was largely a matter for the municipal courts of the United States, it bears considering briefly what steps have been taken within the United States to enforce the judgment.

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<sup>72</sup> *Ibid.*, para. 144 (referring to Mexico’s eighth submission).

<sup>73</sup> *Ibid.*, para. 146.

<sup>74</sup> *Ibid.*, para. 148.

<sup>75</sup> *LaGrand*, above n. 2, para. 124.

<sup>76</sup> *Avena*, above n. 1, para. 150.

<sup>77</sup> Article 59 reads: “The decision of the Court has no binding force except between the parties and in respect of that particular case”.

<sup>78</sup> *Avena*, above n. 1, para. 151.

In particular, the fate of one of the Mexican nationals, Osbaldo Torres, was quite perilous given that a month prior to the Court's judgment of March 31; the Oklahoma Court of Criminal Appeals had set an execution date of May 18 for him.<sup>79</sup> On May 13, the same Oklahoma court halted his execution and ordered that Mr. Torres was entitled to a new hearing so that he could argue that he had been harmed by the United States' violations of his consular rights.<sup>80</sup>

The issue of the wider application of the Court's judgment is now before the United States Supreme Court in the case of José Ernesto Medellín Roja.<sup>81</sup> The Texan Court of Appeals had held that the procedural default rule applied so that the Vienna Convention claims could no longer be raised, and that the Vienna Convention does not accord individuals the right to enforce claims based on that treaty before United States courts.<sup>82</sup> Since this decision, President Bush has stated, "the United States will discharge its international obligations under [*Avena*] by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision".<sup>83</sup> This statement is not free from ambiguity, as the United States has both affirmed that it is bound by the Court's judgment but that United States courts should only give effect to it as a matter of comity.<sup>84</sup> The United States Solicitor General has, however, confirmed that the procedural default rule should no longer be applied in respect of Vienna Convention claims.<sup>85</sup>

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<sup>79</sup> *Ibid.*, para. 21.

<sup>80</sup> *Torres v. Oklahoma*, Order Granting Stay of Execution and Remanding Case for Evidentiary Hearing, No. PCD-04-442 (Ct. Crim. App., 13 May 2004). See also Klein, above n. 67, at 4.

<sup>81</sup> *Medellin v. Dretke*, United States Supreme Court Docket no. 04-5928.

<sup>82</sup> *Medellin v. Dretke*, 371 F. 3d. 270 (5<sup>th</sup> Cir., 2004).

<sup>83</sup> Quoted in United States Solicitor General, Brief for the United States as Amicus Curiae Supporting Respondent in *Medellin v. Dretke*, United States Supreme Court Docket No 04-5928, <<http://www.usjo.gov/osg/briefs/2004/3mer/1ami/2004-5928.mer.ami.html>> at 24 March 2005 (the statement was made in a memorandum from President Bush to United States Attorney General Alberto R. Gonzales).

<sup>84</sup> See Kirgis, "President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights" (2005) American Society of International Law Insight, <<http://www.asil.org/insights/2005/03/insights050309.html>> at 24 March 2005.

<sup>85</sup> *Ibid.* (referring to the amicus brief of the United States Solicitor General).

While the submission to the Supreme Court setting forth the President's view has been a cause for considerable optimism,<sup>86</sup> the full plan of the current United States administration was subsequently revealed when the United States Secretary of State announced that the United States was withdrawing from the Optional Protocol.<sup>87</sup> It now rests with the United States Supreme Court to determine whether the rights of Mexico and those of Mexico's nationals on death row are to be fully vindicated, and whether the Court's ruling in *Avena* will be available for foreign nationals in a similar predicament. 112

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<sup>86</sup> See Liptak, "U.S. Says it Has Withdrawn from World Judicial Body", *New York Times*, (New York) 10 March 2005, 16 (reporting comment of Mexico's counsel that "The president is on our side. I keep having to slap myself.").

<sup>87</sup> *Ibid.*