



Spring 3-1-2003

**Case Concerning Avena and Other Mexican Nationals (Mexico v. United States) No. 128 (I.C.J. Feb. 5, 2003), [http://www/icjciij.org/icjwww/docket/imus/imusorder/imus\\_i\\_order\\_20030205.PDF](http://www.icjciij.org/icjwww/docket/imus/imusorder/imus_i_order_20030205.PDF)**

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlucdj>



Part of the [International Law Commons](#), and the [Law Enforcement and Corrections Commons](#)

### Recommended Citation

*Case Concerning Avena and Other Mexican Nationals (Mexico v. United States) No. 128 (I.C.J. Feb. 5, 2003)*, [http://www/icjciij.org/icjwww/docket/imus/imusorder/imus\\_i\\_order\\_20030205.PDF](http://www/icjciij.org/icjwww/docket/imus/imusorder/imus_i_order_20030205.PDF), 15 Cap. DEF J. 553 (2003).

Available at: <https://scholarlycommons.law.wlu.edu/wlucdj/vol15/iss2/24>

This Special content is brought to you for free and open access by the Law School Journals at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Capital Defense Journal by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

**Case Concerning Avena and Other Mexican  
Nationals (Mexico v. United States)  
No. 128 (I.C.J. Feb. 5, 2003),  
[http://www/icj-  
cij.org/icjwww/docket/imus/imusorder/imus\\_i  
order\\_20030205.PDF](http://www/icj-cij.org/icjwww/docket/imus/imusorder/imus_i<br/>order_20030205.PDF)**

*I. Facts*

In the *Avena* case, Mexico applied to the Registry of the International Court of Justice (“I.C.J.”) on January 9, 2003, instituting proceedings against the United States for violations of the Vienna Convention on Consular Relations (“Vienna Convention”), specifically, Article 36, Section 1 (“Article 36”).<sup>1</sup> The application stated that fifty-four Mexican nationals were arrested, detained, tried, convicted and sentenced to death in the United States.<sup>2</sup> Mexico further alleged that in the case of forty-nine of the detained nationals no attempt was made at any time to adhere to the provisions of Article 36, that the United States delayed the required notification in four other cases and that one defendant was afforded his Vienna Convention rights only in an unrelated non-capital case.<sup>3</sup>

*II. Holding*

The I.C.J. issued provisional measures stating that the United States “shall take all measures” to ensure that it will not execute Cesar Roberto Fierro Reyna (“Reyna”), Roberto Moreno Ramos (“Ramos”), and Osvaldo Torres Aguilera (“Aguilera”), three Mexican nationals, pending final judgment.<sup>4</sup> The court also

---

1. Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), No. 128 (I.C.J. Feb. 5, 2003), <http://www.icj-cij.org>; see Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1), 21 U.S.T. 77, 100-01, 596 U.N.T.S. 261, 293, 294 (stating consular rights for foreign nationals). The Vienna Convention binds countries and presents “reciprocal rights” to the participating countries and their citizens. Amanda E. Burks, *Consular Assistance for Foreign Defendants: Avoiding Default and Fortifying a Defense*, 14 CAP. DEF. J. 29, 35 (2001) (discussing the decisions of international, state and federal courts with respect to the Vienna Convention). The United States ratified the Vienna Convention on December 24, 1969, and incorporated its substantive and procedural obligations. *Id.*

2. *Avena*, No. 128 at ¶ 2 (I.C.J. Feb. 5, 2003), <http://www.icj-cij.org>.

3. *Id.*

4. *Id.* at ¶ 59(a) (stating that the U.S. “shall take all measures necessary to ensure that . . . [defendants] are not executed pending final judgment”) (emphasis added). Provisional measures are similar to a temporary injunction in American domestic practice. THOMAS BUERGENTHAL &

stated that the United States “*shall* inform the [c]ourt of all measures taken in implementation of this order.”<sup>5</sup>

### III. Analysis

Mexico based the allegations on the *LaGrand Case*.<sup>6</sup> *LaGrand* involved two brothers, Karl (“Karl”) and Walter (“Walter”) *LaGrand*, who were German nationals sentenced to death in Arizona.<sup>7</sup> The *LaGrand* brothers first learned of their rights under Article 36 long after their convictions and sentences became final.<sup>8</sup> Federal habeas corpus was unavailing because they had not raised their Vienna Convention claims in state court.<sup>9</sup> After Karl’s execution, and on the eve of Walter’s execution, Germany brought an action against the United States in the I.C.J.<sup>10</sup> The provisional measures in *LaGrand* included that, in the case of Walter *LaGrand*, the United States “*should* take all measures” to ensure Walter was not executed, “*should*” inform the I.C.J. of all measures taken in furtherance of the order and “*should*” transmit the order to the Governor of Arizona.<sup>11</sup> These provisional measures were ignored by the United States and the State of Arizona.<sup>12</sup> Walter was executed on schedule.<sup>13</sup>

In its final judgment in *LaGrand*, the I.C.J. held that Article 36 rights accrue to both the individual and the sending state; it also held that the United States cannot use the procedural default doctrine to avoid enforcing those rights.<sup>14</sup> The court determined that if the receiving state fails to comply with Article 36,

SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW 89 (West Group 3ed., 2002).

5. *Avena*, No. 128 at ¶ 59(b) (I.C.J. Feb. 5, 2003), <http://www.icj-cij.org> (emphasis added).

6. Case Concerning *LaGrand* (Fed. Republic of Germany v. United States), No. 104 (I.C.J. June 27, 2001), <http://www.icj-cij.org> (holding that the Vienna Convention confers individual rights to foreign defendants, and a proper remedy should be afforded if a violation of the Convention occurs).

7. *Id.* ¶ 14.

8. *Id.* ¶ 16.

9. *LaGrand v. Stewart*, 133 F.3d 1253, 1261-62 (9th Cir. 1996) (stating that Walter raised the Vienna Convention Claim in the federal habeas petition to the United States District Court for the District of Arizona, but not in any state proceedings).

10. *LaGrand*, No. 104 at ¶ 29-30 (I.C.J. June 27, 2001), <http://www.icj-cij.org>.

11. *Id.* at ¶ 32 (emphasis added).

12. *Id.* at ¶ 30-34. On March 9, 1999 Germany brought an action against the United States in the Supreme Court requesting an injunction to halt Walter’s execution. *Federal Republic of Germany v. United States*, 526 U.S. 111, 111-12 (1999) (declining to assert jurisdiction over Germany’s request); *see also* Burks, *supra* note 1 at 32-33. The Supreme Court dismissed the case because jurisdictional barriers prevented the court from exercising its original jurisdiction and because Germany was late in bringing this action. *Federal Republic of Germany*, 526 U.S. at 111-112. The United States Department of State did forward the I.C.J. order, which only included the provisional measures, to the Governor of Arizona. *LaGrand*, No. 104 at ¶ 1, ¶ 91 (I.C.J. June 27, 2001), <http://www.icj-cij.org>.

13. *LaGrand*, No. 104 at ¶ 34 (I.C.J. June 27, 2001), <http://www.icj-cij.org>.

14. *Id.* at ¶ 88-91.

resulting in extended detention or excessive penalties, the receiving state must afford review and reconsideration of the conviction and sentence.<sup>15</sup>

Mexico's pleadings and arguments were based on three main points. First, that Mexican nationals sentenced to death in the United States were not afforded their Vienna Convention rights under Article 36.<sup>16</sup> Second, that this failure violated the United States' legal obligation to Mexico in its own right and as the consular protector of its citizens.<sup>17</sup> Third, that Mexico's repeated protests to the United States had been answered only by apologies after the executions.<sup>18</sup>

Mexico requested a final judgment that focused on two remedies. It first requested *restitutio in integrum*.<sup>19</sup> This remedy would apply to the fifty-four sentenced persons and would require placing them in the position they would have been in had they been accorded their Article 36 rights.<sup>20</sup> In effect, each case would be set back to the point of arrest. Second, Mexico requested assurance that the pattern of violations which took place would not be repeated in future cases.<sup>21</sup> Mexico also requested provisional measures pending final judgment—that no executions occur and no execution dates be set and that the United States report to the I.C.J. any actions taken to ensure that no executions occurred and that no execution dates were set.<sup>22</sup>

The primary response of the United States, in both the pleadings and arguments, was that violations of Article 36 could be considered in clemency proceedings.<sup>23</sup> The United States stated that it made a conscious effort to provide review and reconsideration during clemency proceedings and that “[c]lemency proceedings provide a more flexible process that is best suited for achieving, without procedural obstacles, the review and reconsideration . . . [the I.C.J.] called for.”<sup>24</sup> The United States stated that upon request, the government of the United States would inform a court of its international obligations.<sup>25</sup> In effect, the United States continued to assert its right to ignore Article 36 violations during all judicial proceedings, and to apply the procedural default doctrine, so long as the Article 36 violations were considered in the clemency proceedings.

---

15. *Id.*

16. *Avena*, No. 128 at ¶ 2 (I.C.J. Feb. 5, 2003), <http://www.icj-cij.org>.

17. *Id.* at ¶ 7.

18. *Id.* at ¶ 6.

19. *Id.* at ¶ 7. An entitlement to “*restitutio in integrum*” is an entitlement to the “reestablish[ment of] the situation which would, in all probability, have existed if [the violations] had not been committed.” *Id.* (alterations in original).

20. *Id.* at ¶ 7-8(5)(2).

21. *Id.* at ¶ 8(5)(4).

22. *Avena*, No. 128 at ¶ 18(a)-(d) (I.C.J. Feb. 5, 2003), <http://www.icj-cij.org>.

23. *Id.* at ¶ 36-37.

24. *Id.* at ¶ 37.

25. *Id.* at ¶ 38.

The I.C.J. did not specifically decide in this preliminary case whether the United States' position is in violation of *LaGrand*. It did, however, decide that the executions of Reyna, Ramos, and Aguilera would cause "irreparable prejudice to any rights that may subsequently be adjudged."<sup>26</sup> It therefore issued provisional measures forbidding their executions and ordered the United States to report measures taken to ensure that those persons are not executed.<sup>27</sup>

It is important to note two differences between *LaGrand* and *Avena*. *LaGrand* was a splintered decision; *Avena* is a unanimous opinion.<sup>28</sup> In addition, the language of *Avena* is stronger than the language of *LaGrand*. For example, in *LaGrand*, the I.C.J. indicated that the United States "should take all measures" to ensure that Walter LaGrand was not executed and "should inform" the court of measures taken.<sup>29</sup> In *Avena*, however, the I.C.J. ordered that the United States "shall" implement all measures necessary to ensure that Reyna, Ramos and Aguilera are not executed and "shall inform" the court of measures taken.<sup>30</sup> These differences, unanimity and the adoption of mandatory language, appear to represent a stronger stance by the I.C.J. This may be a manifestation of international antipathy to the American death penalty system in general and its imposition without regard to international law in particular.

#### IV. Application

The *Avena* Case presents various issues that are important to United States authorities and capital defense practitioners. Article 36 imposes requirements upon the detaining authorities to notify the detained individual of his Vienna Convention rights and to contact the relevant consulate. Practitioners should raise Article 36 issues pretrial. Even if relief is not granted, Article 36 claims cannot later be subjected to procedural default.

The United States reiterated its policy that Article 36 violations must be considered in clemency proceedings.<sup>31</sup> In the *LaGrand* Case, the I.C.J. ruled that in the instance of Vienna Convention violations, a review and reconsideration is required for every case.<sup>32</sup> The United States stated that it has made a conscious effort to provide review and reconsideration during clemency proceedings because such proceedings are a flexible process to afford the review and recon-

---

26. *Id.* at ¶ 55.

27. *Id.* at ¶ 59(a)-(b).

28. *Avena*, No. 128 at ¶ 59(a)-(b) (I.C.J. Feb. 5, 2003), <http://www.icj-cij.org>; *LaGrand*, No. 104 at ¶ 128 (I.C.J. June 27, 2001), <http://www.icj-cij.org>.

29. *LaGrand*, No. 104 at ¶ 32(a)-(b) (I.C.J. June 27, 2001), <http://www.icj-cij.org>.

30. *Avena*, No. 128 at ¶ 59(a) (I.C.J. Feb. 5, 2003), <http://www.icj-cij.org> (emphasis added).

31. *Id.* at ¶ 36.

32. *LaGrand*, No. 104 at ¶ 88-91 (I.C.J. June 27, 2001), <http://www.icj-cij.org>.

sideration the I.C.J. required.<sup>33</sup> The United States stated that review and reconsideration will occur for all of the Mexican nationals sentenced to death.<sup>34</sup> Counsel representing a death-sentenced foreign national should determine whether that person received Article 36 rights. If not, the Article 36 violations must be strenuously raised in clemency proceedings.

Priya Nath

---

33. *Id.* at ¶ 37.

34. *Avena*, No. 128 at ¶ 36 (I.C.J. Feb. 5, 2003), <http://www.icj-cij.org>.

