AALS Panel – *Mexico v. U.S.A.* (Avena) – Arguments of the United States

[*Association of American Law Schools Panel on the* Avena Case *(Mexico v. U.S.A.), Co-Sponsored by the sections on Immigration Law, International Human Rights and North American Cooperation – AALS Annual Meeting – January 4, 2004, Atlanta, GA*]

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A. Introduction

With this note I would like to present the arguments that the United States made in the *Avena* case a few weeks ago at the International Court of Justice. There are a number of issues to discuss, but I will make one basic point: that Mexico, in the arguments it presented to the Court and in the relief it requested, greatly overreached. Mexico overreached primarily in four ways: first, by bringing claims that have not been finally resolved in the U.S. criminal justice system in complete disregard of longstanding, settled international law principles of exhaustion of local remedies; second, by alleging that the U.S judicial review and executive clemency processes cannot provide effective remedies for breaches of the Convention through "review and reconsideration," as required by the International Court's decision in the *LaGrand* case; third, by rejecting, without cause, *LaGrand*'s review and reconsideration remedy in its entirety; and fourth, by asking the Court not only to act as a court of criminal appeal of last resort by assessing the facts of individual cases and determining whether the individual Mexican nationals have received a fair trial, but by asking the Court, as well, to act as a legislative and administrative body of ultimate authority by specifying the means by which the United States must carry out its international obligations of informing Mexican nationals of their ability to have their consular officials notified of their detention and of implementing remedies for any breaches of the Convention.

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[*] Office of the Legal Advisor, U.S. Department of State. The text of this presentation was adapted from the arguments made to the Court by the Legal Adviser and other representatives of the United States in the oral proceedings in December 2003.

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Though I will touch on all of these points, I will focus my remarks on the second – the means through which the United States implements review and reconsideration, that is the means by which the United States takes account in its courts and its executive clemency processes of any breaches of the Convention in particular cases.

B. Analysis of the Arguments

I. Review and Reconsideration

The International Court of Justice considered the Vienna Convention on Consular Relations less than three years ago in the *LaGrand* case. The Court's judgment there stands for the principle that where there has been a failure to provide consular information and notification, as required by Article 36, paragraph 1, of the Convention, and a foreign national is subsequently convicted of a crime and sentenced to a severe penalty, the State in breach shall, *by means of its own choosing*, provide "review and reconsideration" of the conviction and sentence, taking into account the breach.

The *LaGrand* judgment broke new ground in two respects. First, the Court called for the United States to take actions to implement its obligations under the Vienna Convention by reviewing and reconsidering the results of a criminal proceeding. This was striking because no State party had previously understood that it was required to take account of a failure to carry out its obligations under the treaty in the administration of its criminal laws. In a second respect, the Court went even further. It undertook to direct a sovereign State to include a specific new procedural step within its domestic legal system – namely, a targeted review and reconsideration of a criminal conviction and sentence in certain cases. In doing this, the Court expressly left it to the United States to carry out this obligation in its domestic law by means of its own choosing. The United States has conformed its conduct to the Court's interpretation of the treaty in *LaGrand*. But this has been possible only because the Court left to the United States the choice of the proper means.

The Court traveled a considerable distance in *LaGrand*; now, less than three years later, in the *Avena* case, Mexico has asked it to go further, much further and for no good cause. In disregard of basic principles of State sovereignty and the Convention's specific object and purpose to regulate consular relations between States, Mexico has asked the Court to interpret and apply the treaty as if it were intended principally to govern the operation of a State's criminal justice system as it affects foreign nationals. Mexico has also asked the Court to find in the Convention a requirement that consular officers may intervene in an ongoing criminal investigation, including in the interrogation process, and participate in the foreign national's defense, like an attorney. With regard to remedies, Mexico would have the Court

intrude even more deeply into the U.S. criminal justice system. Mexico has asked the Court to decide that the Convention requires not review and reconsideration, as *LaGrand* provided, but automatic exclusions of evidence and the voiding of convictions and sentences in all cases of breach. Mexico seeks a set of remedies given by no national court for a breach of Articles 36, remedies without precedent in international law.

In fact, the Convention sets out particular obligations and rights that are not nearly as expansive as Mexico has suggested. The obligations are to inform a detained national that his consular officer will be notified of his detention if he so wishes and, if the detained person says that he does wish it, to notify the consular officer of the detention. The sending State's consular officer thereafter may give assistance consistent with the domestic law of the receiving State. Significantly, however, the Convention does not confer a right on the detained person to any assistance from his consular officer. Nor may a detained person complain in the domestic courts of the receiving State if he has not received consular assistance after requesting it.

And since there is no obligation on the sending State to provide assistance either promptly or at all, there cannot possibly be a rule requiring the receiving State to suspend its investigation and the orderly operation of its criminal justice system until the consular officer arrives, as Mexico would have it. Such a rule would hold the administration of justice in receiving States hostage to the calendars of consular officers. Mexico has identified not a single State party to the Convention that applies such a rule, and its unprecedented claim that the Convention imposes such a requirement must be rejected.

II. Remedies

1. Domestic Competence

With regard to remedies, this case also rests at the sensitive intersection between international legal obligations regarding the conduct of consular relations, and a sovereign State's domestic criminal law. The International Court, in *LaGrand*, traversed that intersection carefully. It left to the United States to carry out its treaty obligations in its criminal justice system as it deemed appropriate – by means of its own choosing.

The role of Court in *Avena* is to interpret the Convention. It has no authority to create, revise, or implement a State's domestic law. Thus, when the Court fashions remedies for breaches of international law, it does not attempt to penetrate the sovereignty of a State and itself reconfigure State systems to meet the international obligation. Instead, the Court assumes that States, having voluntarily undertaken the obligations contained in the treaty, may be counted on to carry them out. This

assumption concerning the bona fides of a sovereign State and its elected or appointed public officials is, indeed, essential to the Court's authority and the Court's effectiveness. Mexico's proposed remedies of vacatur of convictions and sentences and exclusion of evidence pay no heed to the Court's proper role.

Even though the United States did not agree with the Court's judgment in *LaGrand*, because that decision left the means of implementation to the United States, the United States has conformed its conduct to that judgment. The United States has continued its extraordinary efforts to improve compliance throughout the United States with the requirements of Article 36, paragraph 1 of the Convention, and the United States provides review and reconsideration of convictions and sentences consistent with the Court's interpretation in *LaGrand* of Article 36, paragraph 2, in cases in which a breach of paragraph 1 has occurred. The United States implements review and reconsideration through the combined operations of the judicial process and executive clemency proceedings. I will spend the remainder of my time on this topic.

2. Clemency

In its written and oral pleadings, Mexico has focused particularly critical attention on the clemency process. The gist of Mexico's complaint is that in most cases clemency is not granted. This is true, but it in no way supports Mexico's claim that convictions and sentences are not and cannot be reviewed in the clemency process taking account of any treaty breach. They can and have been reviewed there.

Every state where a Mexican national faces capital punishment has careful procedures that give each individual a full opportunity to have his clemency application fairly heard. Two points are particularly noteworthy. First, these clemency procedures allow for broad participation by advocates of clemency, including an inmate's attorney and the sending State's consular officer. Indeed, participation is not limited to the consular officer. The President of Mexico, in several instances, and even Pope John Paul II, in the case of a non-Mexican national in Missouri, have personally made clemency pleas to state governors on behalf of defendants convicted of capital crimes. Second, these clemency officials are not bound by principles of procedural default and finality, standards of prejudice, or any other limitations on judicial review. They may consider any facts and circumstances that they deem appropriate and relevant, including specifically Vienna Convention claims.

Take, for example, a post-*LaGrand* case, that of Javier Suarez Medina in Texas. In front of witnesses, Suarez Medina shot an undercover police officer eight times. He confessed to the killing, but clearly would have been convicted regardless of his confession. The sufficiency of the evidence of his guilt was never in doubt, and the

fundamental fairness of his trial was examined at multiple stages of post-conviction review. When Mexico brought the case to the attention of the Department of State, the Department's Legal Adviser contacted the Governor of Texas and the state Board of Pardons and Paroles, drawing attention to the failure to provide consular information and inviting consideration of that fact and of the International Court's decision in *LaGrand* during the clemency proceedings. The Chairman of the Board met personally with Mexican officials to discuss the clemency petition and Mexico's views regarding the failure to provide consular information. All Board members received Mexico's written synopsis of its presentation along with copies of all the materials that Mexico supplied. To allow adequate time to review and consider the materials submitted on the consular information issue, the Board extended the deadline for its consideration.

Mexico quarrels with the outcome of clemency review, but it is clear that the Board reviewed and reconsidered carefully Suarez Medina's conviction and sentence in light of the Vienna Convention.

III. Due Process

Mexico also has failed to provide the Court with any basis for concluding that the U.S. judicial system does not provide fair trials to foreign nationals in accordance with the highest standards of due process of law. That system too is capable of remedying the consequences of any breaches of the Convention that have been properly raised, and both trial and appellate courts are required to assure this. Essentially, Mexico complains in *Avena* that judicial review in the United States cannot provide the review and reconsideration called for by *LaGrand* because, even when it is timely raised, courts will not provide a remedy for a claim labeled as a claim for relief under the Vienna Convention *as such*. Similarly, Mexico complains that the doctrine of procedural default often will preclude reviewing courts from providing relief for a Vienna Convention claim – again presented *as* a Vienna Convention claim – if the claim was not first raised at trial. It is irrelevant, according to Mexico, that whatever substantive harm a particular defendant points to, as the result that flowed from the breach of Article 36, may be fully evaluated by U.S. courts under a different legal heading. In other words, to Mexico, it is the labels that courts apply that count for everything. If a U.S. court does not label its review as Vienna Convention review, anything else it does is irrelevant and by definition inadequate.

But the touchstone for review and reconsideration under *LaGrand* is a mechanism that allows for an individualized consideration of the conviction and sentence to assess the impact of the breach of the Vienna Convention on essential guarantees of a fair trial and that permits a determination of whether some revision in the convic-

tion or sentence should be required. In evaluating U.S. compliance with its international legal obligations, it cannot matter what *labels* the United States uses as a matter of its municipal law in providing a mechanism that lives up to those standards. What matters is whether the United States complies with the substance of its obligations. As long as the United States provides a mechanism that allows a conviction and sentence to be reviewed and reconsidered taking into account any breach of Article 36 and any impact that breach has had on essential elements of a fair trial, it has satisfied the standard described in *LaGrand*.

U.S. courts can entertain and provide relief for any claim that essential guarantees of due process have been violated as a result of a breach of the Vienna Convention. It is true that a court in the United States generally will not grant relief to an individual for a claim cast as a claim for a breach of the Vienna Convention as such. But for the reasons I just explained, that is not a bar to satisfying the requirements of *LaGrand*. What matters is *substance*, not the *label* placed on judicial review. And the courts can entertain any and all claims alleging that a breach of the Convention has resulted in harm to a specified right that is essential to a fair trial.

It is also true that if a defendant fails to raise a claim under the Vienna Convention at the proper time, he will generally be barred by the procedural default rule from raising the claim on appeal. Here again, however, as long as the defendant has preserved his claim relating to the underlying injury, an injury to some substantive right – such as a claim that he did not understand that he was waiving his right to counsel in an interrogation – *that* claim will be addressed. As a result, an examination of the impact of the Article 36 breach on the trial and its fundamental fairness – which is at the core of review and reconsideration called for by *LaGrand* – is fully available. And even if the defendant has *not* properly preserved his claim, in addressing whether an exception to the procedural default rule applies, courts will still often address whether the defendant has suffered any prejudice from the injury he claims. Thus, even in technically deciding that they cannot entertain a claim, courts often provide a review that assesses whether the alleged error resulted in any prejudice to the defendant in any event. Thus, the judicial process is fully sufficient to provide review and reconsideration that protects all fundamental rights.

A good example is the case of *Valdez v. Oklahoma*.[1] There, the Vienna Convention claim had been defaulted, but an Oklahoma court entertained a claim of ineffective assistance of counsel. It overturned Mr. Valdez's sentence because it concluded that the trial counsel had been ineffective in failing to uncover significant mitigating evidence that was subsequently discovered through the intervention and assis-

[1] Valdez v. State, 46 P.3d 703 (Okla. Crim. App. 2002).

tance of Mexican consular officials. Thus, the court effectively granted relief based on the very same substance that underpinned the Vienna Convention claim – namely, the consequences that followed in that case from an absence of consular assistance.

C. Conclusion

Let me end with a caveat. Despite what I have said about the straightforward nature of the legal issues in this case – that is, whether the Court should go further than its Judgment in *LaGrand* and whether the United States provides review and reconsideration – I want to be clear that in other ways this case is not an easy one. No case that touches on the question of whether another person shall live or die is easy. Judges, juries, prosecutors, clemency boards, governors and other competent authorities of the United States involved in the individual claims that made up the *Avena* case have thought deeply about the decisions that they have been called upon to make, and they will continue to struggle to make those decisions in the future. The Judgment in *LaGrand* makes clear, however, that, in the end, it is *these* persons, not the International Court of Justice, that have the responsibility for these decisions as they carry out their different functions according to law. The International Court in *LaGrand* left that responsibility where it belongs – to them. Thus, this case is really about the proper scope of international law and, in particular, the proper interpretation and application of international law by an international tribunal. It is from this perspective that the *Avena* case is straightforward and it is in this way that Mexico has overreached.