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THE CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS (MEXICO V. UNITED STATES): A MEXICAN PERSPECTIVE ON THE FIGHT FOR CONSULAR RIGHTS

*Michael R. Steinmark**

I. INTRODUCTION

IN 1998 and 1999, Paraguay and Germany instituted proceedings against the United States in the International Court of Justice (ICJ) regarding the denial of consular rights afforded under article 36 of the 1963 Vienna Convention on Consular Relations (article 36 or Vienna Convention) to nationals of each respective country.¹ On January 9, 2003, the world witnessed the continuation of this multilateral consular rights imbroglio as Mexico instituted proceedings in *The Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)* (the *Avena* case or *Avena*).² Extant literature treating *Avena* has failed to adequately consider the case from the Mexican perspective as compared to treatment from the American perspective.³ This article begins to fill this void by considering some of the problems associated with the *Avena* case from the Mexican point of view, including the law and policy underlying Mexico's position in the case and the significance of the *Avena* case within the context of Mexican-American extradition relations.

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1. Anthony N. Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. TEX. L. REV. 1115, 1202-09 (2002).

2. Note, *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_iorder_20030205.PDF, 15 CAP. DEF. J. 553 (2003). Please note that the hyperlink provided in the article's title is incorrect; the correct link is: http://www.icj-cij.org/icjwww/docket/imus/imusorder/imus_iorder_20030205.PDF.

3. See *id.*; see also Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: U.S. Position Before International Court of Justice in Mexican Death Penalty Case*, 97 AM. J. INT'L L. 434 (2003).

II. THE AVENA CONFLICT: CONSULAR RIGHTS AND EXTRADITION LAW AND POLICY

A. INTRINSIC PROBLEMS IN THE DENIAL OF CONSULAR RIGHTS

Article 36 of the Vienna Convention and ICJ case law provided the law underlying the *Avena* decision. Article 36(1) provides a number of consular rights for nationals of one country (the sending state) who are arrested in another country (the receiving state).⁴ These rights include: (1) the right of consular officials and arrested or otherwise detained nationals of the sending state to communicate freely with each other while in the receiving state; (2) the rights of consular officials to be notified without delay of requests for assistance by arrested or detained nationals, to visit, converse, and correspond with arrested or detained nationals, and to aid such nationals in securing legal counsel; and (3) the right of arrested or detained nationals to be notified of their consular rights as provided under article 36.⁵ Additionally, article 36(2) prohibits the use of domestic laws and regulations to interfere with the exercise of the rights granted in the provision.⁶ In its 2001 *LaGrand* decision, the ICJ recognized that the failure of the receiving state to quickly notify both the arrested or detained national of his article 36 rights and his respective consular officials of the arrest or detention will deny, *de facto*, the national's rights granted under the Vienna Convention because those who are unaware of their rights are unable to exercise them.⁷ Realizing this *de facto* impediment to the exercise of article 36 rights contradicts article 36(2), the ICJ determined that a receiving state is in violation of its Vienna Convention obli-

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4. See Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 262.
 5. *Id.* art. 36(1)(a)-(c) ("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 and 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.").
 6. *Id.* art. 36(2) ("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.").
 7. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 104, ¶ 74 (June 27), available at <http://www.icj-cij.org/igjwww/idocket/igus/igusframe.htm>.

gations if it does not notify the sending state's consular officials, without delay, of the arrest or detention of the national, even if that national does not attempt to exercise his article 36 rights.⁸

The basis for Mexico's initiation of proceedings in the *Avena* case consists of a combination of both the substantive and procedural aspects of article 36 and the application thereof after the *LaGrand* decision.⁹ Mexico is concerned that when its nationals face criminal prosecution in the United States, especially in capital cases, their inability to exercise their consular rights simply because they do not know the rights exist will have grave repercussions.¹⁰ Mexico alleges that in at least forty-nine of the fifty-four capital punishment cases addressed in *Avena*, the United States made no effort to attempt to comply with procedural requirements for timely notification to the arrestee under article 36 or to Mexican consular officials under *LaGrand*.¹¹ Mexico fears these procedural failures in the United States translate into the substantive denial of consular rights in capital cases. Furthermore, Mexico believes this denial of consular rights may often be the deciding factor in the imposition of the death penalty because of its view that consular assistance is capable of solving or at least assisting in solving "problems arising from incompetent legal representation, lack of communication between Mexican nationals and their defence [sic] counsel and cultural barriers."¹² For example, Mexican Foreign Ministry lawyer Juan Manuel Gomez Robledo noted that Mexican nationals facing prosecution without consular assistance often suffer representation by inexperienced public defenders who cannot communicate with their clients because of an insurmountable language barrier, while Mexican nationals facing prosecution with consular assistance enjoy representation by experienced, Spanish-speaking counsel.¹³ This difference translates into more equitable trials for Mexican nationals who receive consular assistance.¹⁴

The denial of consular rights to Mexican nationals facing prosecution in the United States is certainly problematic on its face because it may result in the execution of Mexican nationals based on procedural or representational errors rather than factual guilt. Mistakes happen in the American legal system. For example, a Mexican national on death row in Texas escaped execution after a post-trial investigation revealed both his inno-

8. *See id.*

9. Application Instituting Proceedings, *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2003 I.C.J. Pleadings 128, at 2-6, 40-43 (Jan. 9), available at http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iapplication_20030109.PDF [hereinafter Application Instituting Proceedings].

10. *Id.*

11. *Id.* ¶ 68.

12. *Id.* ¶ 67.

13. Bruce Zagaris, *Mexico Sues U.S. in ICJ over Consular Rights in Death Penalty Cases*, 19 INT'L ENFORCEMENT L. REP. 107, n. 4 (2003).

14. *Id.*

cence and a likelihood of malfeasance by police and prosecutors.¹⁵ Mexico's concern arises from the uncertain answer to the question of how many Mexican nationals have been executed in the United States due to undetected mistakes that could have been avoided by Mexican nationals exercising their consular rights.¹⁶ In addition to the practical, real-world implications of an improperly imposed death sentence, there are certain legal issues underlying Mexico's disapproval of the United States' failure to comply with its obligations under the Vienna Convention.

B. MEXICAN EXTRADITION LAW AND POLICY

In order to understand more fully the legal issues providing the foundation for Mexico's position in the *Avena* case, it is necessary to look to key principles of Mexican law, in particular key elements of the Mexican Constitution, regarding the issue of extradition. In general, Mexican law endows its courts with jurisdiction over Mexican nationals for all criminal acts committed at home or abroad.¹⁷ In addition, the Mexican Constitution specifically bans the extradition of Mexican nationals.¹⁸ This anti-extradition policy is tempered somewhat by the Mexican Extradition Law, which provides for the extradition of nationals in "exceptional cases as determined by the Executive" and which was recently upheld by Mexico's Supreme Court in 2001.¹⁹ Even in exceptional cases, however, Mexico refuses to extradite its nationals without assurances that the receiving state will either not seek the death penalty or not enforce it.²⁰ The reason for this policy on extradition lies in Mexico's stance on execution. Although the death penalty is still technically a part of Mexican jurisprudence, the Mexican penal code provides no means of implementing the penalty.²¹ Consequently, execution has not been a part of the Mexican penal system since 1937 when Mexico last executed a prisoner.²²

In addition to not imposing the death penalty, the Mexican Supreme Court decided in October 2001 that it was unconstitutional for Mexico to

15. Cragg Hines, *Consular Rights, Station House Wrongs*, HOUS. CHRON., Feb. 21, 2003, available at <http://www.mexico-info.com/leadstories/chron/consular-rights.htm>.

16. *See id.*; see also Application Instituting Proceedings, *supra* note 9, at 2-6.

17. Rishi Hingoraney, *International Extradition of Mexican Narcotics Traffickers: Prospects and Pitfalls of the New Millennium*, 30 GA. J. INT'L & COMP. L. 331, 341 (2002).

18. Argiro Kosmetatos, Comment, *U.S.-Mexican Extradition Policy: Were the Predictions Right About Alvarez?*, 22 FORDHAM INT'L L.J. 1064, 1101 (1999).

19. Rodrigo Labardini, *Extradition from Mexico Allowed with Assurances that Life Imprisonment Will Not Be Imposed*, 18 INT'L ENFORCEMENT L. REP. 408, p. 14 (2002).

20. *See id.* at n. 73.

21. Gretchen Peters, *Mexico's Death-Penalty Juncture: One State Votes on Reinstating Executions, While World Court Orders US Not to Kill 3 Mexicans*, CHRISTIAN SCI. MONITOR, Feb. 7, 2003, available at <http://www.csmonitor.com/2003/0207/p06s02-woam.html>.

22. *Id.*

impose a *de jure* life sentence.²³ The court substantially relied on the Mexican constitutional prohibition against unusual punishments.²⁴ The court deemed life imprisonment an unusual punishment due to its conceptual contradiction with Mexico's policy against non-rehabilitative punishments.²⁵ In Mexico, punishment for criminal malfeasance is not considered an end, but rather a means to an end—the rehabilitation and reintegration of the criminal into society.²⁶ Despite this policy or perhaps as an implicit realistic acknowledgment that some criminals cannot be rehabilitated, the Mexican Supreme Court is willing to allow *de facto* life imprisonment sentences: the imposition of lengthy sentences to be served consecutively or the imposition of lengthy sentences on individuals who will certainly die before ever serving out their entire sentence.²⁷ Notwithstanding this apparent contradiction, the Mexican Supreme Court's ruling has translated into the Mexican government's refusal to extradite nationals without assurances that the extradited individual will not face *de jure* life imprisonment.²⁸

C. THE NEXUS OF CONSULAR RIGHTS AND EXTRADITION LAW AND POLICY

Mexico takes strong positions on the extradition of Mexican nationals for trial in another country, the denial of substantive consular rights, and failures to adequately notify Mexican nationals and consular officials in accordance with consular rights requirements. These positions are connected because both Mexico's anti-extradition and pro-consular rights policies protect Mexican nationals from mistreatment. Mexican President Vicente Fox felt so strongly about the issue that he cancelled a 2002 meeting with American President George W. Bush after Bush and Texas Governor Rick Perry proceeded with the execution of convicted murderer Javier Suarez Medina, a Mexican national.²⁹ The Mexican public views the denial of consular rights not as a diplomatic or political issue, but rather as a human rights issue and source of outrage.³⁰ Their response has been compared to the American public's reaction to the 1994 caning of American teenager Michael Peter Fay in Singapore.³¹ Ultimately, Mexican concerns are rooted not only in the potential mistreatment of Mexican nationals, but also in the history of Mexico fighting for the systematic recognition and protection of the consular rights of its citizens in the face of what it alleges is America's systematic denial of those

23. David P. Warner, *Bringing White-Collar Criminals to Justice – Fugitive Apprehension and Return and Obtaining Evidence Abroad*, 11 U.S.-MEX. L.J. 171, 176 (2003).

24. *Id.* at n. 46.

25. *Id.*

26. Labardini, *supra* note 19, at n. 44.

27. Warner, *supra* note 23, at 176.

28. Labardini, *supra* note 19, at n. 1.

29. Hines, *supra* note 15.

30. Peters, *supra* note 21.

31. *Id.*

rights.³²

III. MEXICO'S FIGHT FOR CONSULAR RIGHTS

The story of Mexico's struggle for recognition of consular rights of its nationals does not begin with the *Avena* case, nor even with article 36 of the 1963 Vienna Convention, but rather dates to an earlier bilateral agreement that the United States and Mexico entered into more than twenty years prior to the Vienna Convention.³³ The 1942 Consular Convention between Mexico and the United States recognized the need for some formal structure within which the two countries could deal with the issues that would undoubtedly arise from "their geographic proximity and the frequent interstate travel of their respective citizens."³⁴ Since the 1942 agreement, Mexico has continually reaffirmed the high degree of importance that it places on consular protection of its nationals as demonstrated by the following: the establishment in 1981 of a separate agency within the Mexican Foreign Ministry, "devoted exclusively to the protection of the rights of Mexican nationals abroad;" the 1986 creation of the Program of Legal Consultation and Defense for Mexicans Abroad; the 2000 creation of the Mexican Capital Legal Assistance Program, which "strives to enhance the quality of legal representation available to Mexican capital defendants;" and most recently the 2002 issuance of the Governing Law of the Mexican Foreign Service, which provides "a comprehensive legal framework pursuant to which Mexican consular officials must intervene directly to protect the rights of Mexican nationals."³⁵

Additionally, in response to its nationals being denied consular rights, the Mexican government has fought an uphill battle in American courts. The problem begins on the state trial court level, where many Mexicans fail to raise consular rights issues because American law enforcement officials (police and prosecutors alike) fail to do their part in providing notice of article 36 rights to Mexican nationals on trial.³⁶ The problem persists and permeates the entire judicial process all the way to the highest appellate level because the doctrine of procedural default bars any consideration of consular rights issues when they are raised on appeal without first being raised at the trial court level.³⁷ Despite this problem and other similarities regarding the failure of law enforcement officials to warn defendants of certain rights, the *Avena* case most likely will not have the same effect as the 1966 case of *Miranda v. Arizona*, which created an affirmative law enforcement duty that provided a means of circumventing the problem of procedural default.³⁸ It seems unlikely that the U.S. Supreme Court will impose a requirement that law enforcement

32. Application Instituting Proceedings, *supra* note 9, at 4-6, 40-43.

33. *Id.* at 4.

34. *Id.*

35. *Id.* at 4-5.

36. *Id.* at 6-7.

37. *Id.*

38. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

officials warn arrested or detained Mexican or other foreign nationals of their article 36 rights such that failure to notify may always be an issue on appeal.³⁹

The problem for Mexican nationals persists in federal courts as well. On the federal level, attempts to use *habeas corpus* have failed to overcome the problems associated with procedural default. This failure stems from Mexican nationals' frequent inability to prove cause for not raising article 36 claims in lower courts, even where the trial-level omission was the result of U.S. law enforcement officials or court-appointed counsel failing to inform the accused Mexican nationals of their rights.⁴⁰ Additionally, based primarily on the obsolete pre-*LaGrand* interpretation of the U.S. Department of State, many U.S. federal courts have held that article 36 does not afford any individual rights to Mexican nationals. This interpretation seemingly contradicts the ICJ holding in *LaGrand* that prohibits the domestic application of the doctrine of procedural default when American officials failed to uphold the notification requirements under article 36.⁴¹ In addition to the procedural defaults suffered by individual Mexican national defendants attempting to use the American appellate judicial process to obtain relief from judgments in violation of article 36, the Mexican government has also failed to obtain injunctive relief even in the face of clear and conceded article 36 violations.⁴²

Mexican nationals and the Mexican government have been as unsuccessful in obtaining relief for article 36 violations from the American executive branch as they have been in obtaining relief from the American judiciary.⁴³ Mexican authorities, including its President and Foreign Minister, have repeatedly appealed to the U.S. Department of State, the U.S. Secretary of State, the Boards of Pardons and Paroles of Texas and Oklahoma, the Secretary of State of Texas, the Governors of Texas and Oklahoma, and various other officials to provide some sort of relief for often admitted violations of article 36.⁴⁴ Yet time after time, Mexico only receives an apology after the execution of one of its nationals.⁴⁵

IV. CONCLUSION: CONSULAR RIGHTS, EXTRADITION, AND THE WAR ON DRUGS

Although the harm suffered by Mexico and Mexican nationals because of the failure of U.S. officials to provide notification of consular rights under article 36 and the U.S. court system's seemingly blind-eye to such failures is considerable in its own right, it also carries significance in a broader context. For example, despite Mexico's legal, philosophical, and

39. See Application Instituting Proceedings, *supra* note 9, at 7; see also Hines, *supra* note 15.

40. Application Instituting Proceedings, *supra* note 9, at 7-8.

41. *Id.*

42. *Id.* at 8-9.

43. *Id.* at 9-13.

44. *Id.*

45. *Id.*

doctrinal opposition outlined above to Mexican nationals facing criminal prosecution abroad, extradition relations between Mexico and the United States have been improving.⁴⁶ This progress and its continuation are particularly crucial to the war on drugs, which is hampered by Mexico's restrictive extradition policy creating a safe haven for drug traffickers in Mexico.⁴⁷ Furthermore, one author has noted that "despite the recent signs of increased cooperation on this matter, the existence of several practical and theoretical obstacles stand in the way of making the extradition of Mexican narcotics traffickers a common practice."⁴⁸

One obstacle is Mexico's fear that its nationals will not receive fair trials in the United States because of the United States' alleged systematic refusal to recognize and protect the consular rights of Mexican nationals under article 36.⁴⁹ After all, what incentive will the Mexican government have to extradite its nationals to the United States when Mexico doubts they will receive a fair trial there, and when Mexico knows that its courts have jurisdiction under Mexican law to prosecute the criminal conduct of Mexican nationals? Ultimately, resolving the consular rights controversy in favor of increasing protection of the article 36 rights of Mexican nationals in the United States is not only in the best interest of Mexican nationals and the Mexican government, but also of the United States, especially in regard to the ever-important war on drugs.

46. Labardini, *supra* note 19, at n. 5.

47. Hingoraney, *supra* note 17, at 353, 362-63.

48. *Id.* at 363.

49. Application Instituting Proceedings, *supra* note 9, at 40-43.