
**Case Concerning Avena and other Mexican Nationals
(Mexico v. United States of America)**

INTERNATIONAL COURT OF JUSTICE

General List No. 128 (March 31, 2004)
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Author's Note: In an earlier case filed by Germany against the US, the International Court of Justice (ICJ) ordered the US to delay Walter LaGrand's execution. He was a German citizen convicted of murder by an Arizona court. He was not given his right to speak with a German consular officer when he was arrested. In 2001, after his execution, the ICJ held that the US had failed to take all measures to ensure that LaGrand was not executed, pending a full decision of the ICJ on whether there was in fact a breach of the treaty; and of so, what remedies would be appropriate. (Over 170 State parties had then signed the treaty discussed below.) The Court held that the US therefore breached its treaty-based obligation to provide such notice to non-citizen defendants when they are arrested in the US.

Mexico brought this subsequent action, on behalf of its citizens who were on death row in various states of the US. Mexico alleged a like breach under like circumstances. US law provides that if a defendant does not raise such issues before they are convicted, they have procedurally *waived* their right to do so. In many of the cases, there was no doubt as to the substantive guilt of the defendant.

Court's Opinion: THE COURT ... delivers the following Judgment:

1. On 9 January 2003 the United Mexican States (hereinafter referred to as "Mexico") filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter referred to as the "United States") for "violations of the Vienna Convention on Consular Relations" of 24 April 1963 (hereinafter referred to as the "Vienna Convention") allegedly committed by the United States.

...

3. ... By an Order of 5 February 2003, the Court indicated the following provisional measures:

- (a) The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;
- (b) The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.

...

13. In the course of the written proceedings, the following submissions were presented by the Parties:

... the Government of Mexico respectfully requests the Court to adjudge and declare

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the fifty-four Mexican nationals on death row ... violated its international legal obligations to Mexico...;

(2) that the obligation in Article 36 (1) of the Vienna Convention requires notification before the competent authorities of the receiving State interrogate the foreign national or take any other action potentially detrimental to his or her rights;

(3) that the United States, in applying the doctrine of procedural default [i.e., waiver by defendants failing to timely raise their Vienna Convention rights] ... to preclude the exercise and review of the rights afforded by Article 36 of the Vienna Convention, violated its international legal obligations to Mexico...;

...

and that, pursuant to the foregoing international legal obligations,

(1) Mexico is entitled to ... and the United States therefore is under an obligation to restore the status quo ante, that is, reestablish the situation that existed at the time of the detention and prior to the interrogation of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States' international legal obligations, specifically by, among other things,

- (a) vacating the convictions of the fifty-four Mexican nationals;
- (b) vacating the sentences of the fifty-four Mexican nationals;
- (c) excluding any subsequent proceedings against the fifty-four Mexican nationals any statements and confessions obtained from them prior to notification of their rights to consular notification and access;

...

- (f) preventing the application of any municipal law doctrine or judicial holding that requires an individualized showing of prejudice as a prerequisite to relief for the violations of Article 36;

(2) the United States ... is under an obligation to take all legislative, executive, and judicial steps necessary to:

- (a) ensure that the regular and continuing violations of the Article 36 consular notification, access, and assistance rights of Mexico and its nationals cease;
- (b) guarantee that its competent authorities, of federal, state, and local jurisdiction, maintain regular and routine compliance with their Article 36 obligations;

...

15. The present proceedings have been brought by Mexico against the United States on the basis of the Vienna Convention, and of the Optional Protocol [to which the U.S. was then a party] providing for the jurisdiction of the Court over "disputes arising out of the interpretation or application" of the Convention. ... These criminal proceedings have been taking place in nine different States of the United States, namely California (28 cases), Texas (15 cases), Illinois (three cases), Arizona (one case), Arkansas (one case),

Nevada (one case), Ohio (one case), Oklahoma (one case) and Oregon (one case), between 1979 and the present.

...

17. The provisions of the Vienna Convention of which Mexico alleges violations are contained in Article 36. ... Article 36 relates, according to its title, to “Communication and contact with nationals of the sending State.” Paragraph 1 (b) of that Article provides that if a national of that State “is arrested or committed to prison or to custody pending trial or is detained in any other manner,” and he so requests, the local consular post of the sending State is to be notified. The Article goes on to provide that the “competent authorities of the receiving State” *shall* “inform the person concerned without delay of his rights” in this respect [italics added]. Mexico claims that in the present case these provisions were not complied with by the United States authorities in respect of the 52 Mexican nationals the subject of its claims. [Two of the original fifty-four death row inmates were dropped from this action for procedural reasons]. As a result, the United States has according to Mexico committed breaches of paragraph 1 (b).

...

19. ... According to Mexico’s account, in 50 of the specified cases, Mexican nationals were never informed by the competent United States authorities of their rights under Article 36, paragraph 1 (b), of the Vienna Convention and, in the two remaining cases, such information was not provided “*without delay*,” as required by that provision [italics added]. Mexico has indicated that in 29 of the 52 cases its consular authorities learned of the detention of the Mexican nationals only after death sentences had been handed down. In the 23 remaining cases, Mexico contends that it learned of the cases through means other than notification to the consular post by the competent United States authorities under Article 36, paragraph 1 (b).

...

21. On 9 January 2003, the day on which Mexico filed its Application and a request for the indication of provisional measures, all 52 individuals the subject of the claims were on death row. However, two days later [as a result of this I.C.J. decision] the Governor of the State of Illinois, exercising his power of clemency review, commuted the sentences of all convicted individuals awaiting execution in that State, including those of three individuals named in Mexico’s Application. ... The Court notes that, at the date of the present Judgment, these three individuals [convicted in Oklahoma courts] have not been executed, but further notes with great concern that, by an Order dated 1 March 2004, the Oklahoma Court of Criminal Appeals has set an execution date of 18 May 2004 for Mr. Torres.

...

48. ... [T]he Court will now turn to the merits of those claims.

ARTICLE 36, PARAGRAPH 1

58. Mexico asks the Court to find that

the obligation in Article 36, paragraph 1, of the Vienna Convention requires notification of consular rights and a reasonable opportunity for consular access *before* the competent authorities of the receiving State *take any action* potentially detrimental to the foreign national’s rights

[italics added].

59. Mexico contends that, in each of the 52 cases before the Court, the United States failed to provide the arrested persons with information as to their rights under Article 36, paragraph 1 (b), “without delay.” It alleges that in one case, Mr. Esquivel, the arrested person was informed, but only some 18 months after the arrest, while in another, that of Mr. Juárez, information was given to the arrested person of his rights some 40 hours after arrest. Mexico contends that this still constituted a violation, because “without delay” is to be understood as meaning “immediately,” and in any event before any interrogation occurs. ... Mexico mentions that, in a third case (Mr. Ayala), the accused was informed of his rights upon his arrival on death row, some four years after arrest. Mexico contends that in the remaining cases the Mexicans concerned were in fact never so informed by the United States authorities.

...

61. The Court thus now turns to the interpretation of Article 36, paragraph 1 (b), having found ... that it is applicable to the [above named] 52 persons.... It begins by noting that *Article 36, paragraph 1 (b), contains three separate but interrelated elements: the right of the individual concerned to be informed without delay of his rights...; the right of the consular post to be notified without delay of the individual’s detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person [italics added].*

...

63. The Court finds that the duty upon the detaining authorities to give the ... [above] information to the individual arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national. Precisely when this may occur will vary with circumstances. ...

64. The United States has told the Court that millions of aliens reside, either legally or illegally, on its territory, and moreover that its laws concerning citizenship are generous. The United States has also pointed out that it is a multicultural society, with citizenship being held by persons of diverse appearance, speaking many languages. The Court appreciates that in the United States the language that a person speaks, or his appearance, does not necessarily indicate that he is a foreign national. Nevertheless, and particularly in view of the large numbers of foreign nationals living in the United States, these very circumstances suggest that it would be desirable for enquiry routinely to be made of the individual as to his nationality upon his detention, so that the obligations of the Vienna Convention may be complied with. The United States has informed the Court that some of its law enforcement authorities do routinely ask persons taken into detention whether they are United States citizens. Indeed, were each individual to be told at that time that, should he be a foreign national, he is entitled to ask for his consular post to be contacted, compliance with this requirement under Article 36, paragraph 1 (b), would be greatly enhanced. The provision of such information could parallel the reading of those rights of which any person taken into custody in connection with a criminal offence must be informed prior to interrogation by virtue of what in the United States is known as the “Miranda rule;” these rights include, inter alia, the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed at government expense if the person cannot afford one. The Court notes that, according to

the United States, such a practice in respect of the Vienna Convention rights is already being followed in *some* local jurisdictions [italics added].

76. ... The Court notes that the clear duty to provide consular information under Article 36, paragraph 1 (b), does not invite assumptions as to what the arrested person might prefer, as a ground for not informing him. It rather gives the arrested person, once informed, the right to say he nonetheless does not wish his consular post to be notified. It necessarily follows that in each of these 47 cases [the others being U.S. citizens, or dual nationals, to whom this right does not apply], the duty to inform “without delay” has been violated.

82. According to the United States, the purpose of Article 36 was to facilitate the exercise of consular functions by a consular officer:

The significance of giving consular information to a national is thus limited ... It is a procedural device that allows the foreign national to trigger the related process of notification ... [It] cannot possibly be fundamental to the criminal justice process.

83. The Court now addresses the question of the proper interpretation of the expression “without delay” in the light of arguments put to it by the Parties. The Court begins by noting that the precise meaning of “without delay,” as it is to be understood in Article 36, paragraph 1 (b), is not defined in the Convention. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties [textbook §7.2].

87. The Court thus finds that “without delay” is not necessarily to be interpreted as “immediately” upon arrest. It further observes that during the Conference debates on this term, no delegate made any connection with the issue of interrogation. The Court considers that the provision in Article 36, paragraph 1 (b), that the receiving State authorities “shall inform the person concerned without delay of his rights” cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would [not] be a breach of Article 36.

88. Although, by application of the usual rules of interpretation, “without delay” as regards the duty to inform an individual under Article 36, paragraph 1 (b), is not to be understood as necessarily meaning “immediately upon arrest,” there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.

89. With one exception, no information as to entitlement to consular notification was given in any of the cases.... Indeed, the information was given either not at all or at periods very significantly removed from the time of arrest. In the case of Mr. Juárez , the defendant was informed of his consular rights 40 hours after his arrest. The Court notes, however, that Mr. Juárez’s arrest report stated that he had been born in Mexico; moreover, there had been indications of his Mexican nationality from the time of his initial interrogation by agents of the Federal Bureau of Investigation (FBI) following his

arrest. It follows that Mr. Juárez’s Mexican nationality was apparent from the outset of his detention by the United States authorities. In these circumstances, in accordance with its interpretation of the expression “without delay” (see paragraph 88 above), the Court concludes that the United States violated the obligation incumbent upon it under Article 36, paragraph 1 (b), to inform Mr. Juárez without delay of his consular rights....

90. The Court accordingly concludes that, with respect to each of the individuals ... [with one exception] the United States has violated its obligation under Article 36, paragraph 1 (b), of the Vienna Convention to provide [consular access] information to the arrested person.

101. The Court would first recall that, in the case of Mr. Juárez..., when the defendant was informed of his rights, he declined to have his consular post notified. Thus in this case there was no violation of ... Article 36, paragraph 1.

102. In the remaining cases, because of the failure of the United States to act in conformity with Article 36, paragraph 1 (b), Mexico was in effect precluded (in some cases totally, and in some cases for prolonged periods of time) from exercising its right under paragraph 1 (a) to communicate with its nationals and have access to them. As the Court has already had occasion to explain, it is immaterial whether Mexico would have offered consular assistance, “or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights,” which might have been acted upon.

...
ARTICLE 36, PARAGRAPH 2
...

108. Article 36, paragraph 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 [italics added].

109. ... Mexico contends that:

The United States uses several municipal legal doctrines to prevent finding any legal effect from the violations of Article 36. First, despite this Court’s clear analysis in *LaGrand*, US courts, at both the state and federal level, continue to invoke default doctrines to bar any review of Article 36 violations—even when the national had been unaware of his rights to consular notification and communication and thus his ability to raise their violation as an issue at trial, due to the competent authorities’ failure to comply with Article 36.

111. ... The following brief definition of the rule was provided by Mexico in its Memorial in this case and has not been challenged by the United States: “a defendant who could have raised, but fails 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.” The rule requires exhaustion of remedies, inter alia, at the state level and before a habeas corpus motion can be filed with federal courts.

...

LEGAL CONSEQUENCES OF THE BREACH

115. Having concluded that in most of the cases brought before the Court by Mexico in the 52 instances, there has been a failure to observe the obligations prescribed by Article 36, paragraph 1 (b), of the Vienna Convention, the Court now proceeds to the examination of the legal consequences of such a breach and of what legal remedies should be considered for the breach.

...

119. The general principle on the legal consequences of the commission of an internationally wrongful act was stated by the Permanent Court of International Justice ... as follows: “It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form” [per textbook §2.5 above on State responsibility].

...

121. ... It follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals’ cases by the United States courts ... with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.

...

141. The Court in the *LaGrand* case left to the United States the choice of means as to how review and reconsideration should be achieved, especially in the light of the procedural default rule. Nevertheless, the premise on which the Court proceeded in that case was that the process of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant concerned.

...

145. In this respect, Mexico recognizes the efforts by the United States to raise awareness of consular assistance rights, through the distribution of pamphlets and pocket cards and by the conduct of training programmes, and that the measures adopted by the United States to that end were noted by the Court in its decision in the *LaGrand* case. Mexico, however, notes with regret that

the United States programme, whatever its components, has proven ineffective to prevent the regular and continuing violation by its competent authorities of consular notification and assistance rights guaranteed by Article 36.

146. In particular ...

Mexico has demonstrated, moreover, that the pattern of regular non-compliance continues. During the first half of 2003, Mexico has identified 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.

...

153. For these reasons,

THE COURT,

...

Finds that, by not informing, without delay upon their detention, the 51 Mexican nationals referred to ... above of their rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations of 24 April 1963, the United States of America breached the obligations incumbent upon it under that subparagraph.

...

Finds that, in relation to the 49 Mexican nationals referred to ... above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to communicate with and have access to those nationals and to visit them in detention, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1 (a) and (c), of the Convention.

...

Finds that, should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention....
