AVENA AND OTHER MEXICAN NATIONALS (MEXICO V UNITED STATES OF AMERICA):*

MUST COURTS BLOCK EXECUTIONS BECAUSE OF A TREATY?

CONTENTS

I INTRODUCTION

The judgment of the International Court of Justice in *Avena and Other Mexican Nationals (Mexico v United States of America)*[1] considers the obligations that a state bears towards detained foreign nationals under art 36 of the *Vienna Convention on Consular Relations*.[2] The *VCCR* is a multilateral treaty that regulates and defines the activity of the consular post of one state,[3] known as the 'sending state', in the territory of another, known as the 'receiving state'. One aspect of such consular activity is the protection of nationals of the sending state, specifically those detained on criminal charges. Under art 36 of the *VCCR*, the authorities of the receiving state must permit contact between a detained foreign national and a consul of the sending state, so that the consul may assist the detainee with respect to the charges faced.[4]

In *Avena*, Mexico brought a suit on behalf of certain Mexican nationals arrested in various states of the United States. The case focused on those sentenced to death for murder, and awaiting execution. Mexico alleged that 51 of its nationals had not been informed about consular access upon arrest, but were nonetheless convicted and sentenced to death.[5] Mexico asked for reversal of

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* *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [31 March 2004] ICJ <http://www.icj-cij.org> at 1 October 2004.

1 *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [31 March 2004] ICJ <http://www.icj-cij.org> at 1 October 2004 ('*Avena*').

2 Opened for signature 24 March 1963, 596 UNTS 261 (entered into force 19 March 1967) ('*VCCR*').

3 Ibid art 1(a) defines 'consular post' as 'any consulate-general, consulate, vice-consulate or consular agency'.

4 Ibid art 36.

5 *Avena and Other Mexican Nationals (Mexico v US) (Written Pleadings of Mexico)* [20 June 2003] ICJ [11] <http://www.icj-cij.org> at 1 October 2004.

those convictions and sentences.[6] Beyond its implications for the life or death of those Mexican nationals, the suit involved complex questions of the relationship between international obligations and domestic criminal proceedings.

Mexico's claim against the US was subject to the compulsory jurisdiction of the ICJ because both states are party to the *VCCR*, as well as the *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*.[7]

II THE PURPOSE OF CONSULAR ACCESS

The issue of consular protection has had a long history in relations between states. Consular involvement is aimed at ensuring the humane treatment of, and fair proceedings for, detained foreign nationals.[8] A foreign national is typically unfamiliar with both police practices and criminal proceedings in a foreign state, may not be able to speak the local language, and may not be able to take advantage of the criminal justice safeguards due to ignorance or lack of resources.[9] Foreign nationals may be treated discriminatorily on the basis of national origin or, short of overt discrimination, in ways that do not account for cultural differences relevant to assessing their conduct. By advising co-nationals, and by explaining their rights in a way that may be more comprehensible compared to explanations given by local counsel, a consul may be able to help a foreign national defend him or herself more effectively. If a co-national is being treated inappropriately, a consul may approach the authorities of the receiving state.[10]

The scope of the receiving state's obligation is defined by art 36 of the *VCCR*. Article 36 requires consular access for all nationals of a state party to the *VCCR*, even if they are long-term residents of the receiving state.[11] Critically for *Avena*, art 36 requires that a detainee be informed about consular access so that the detainee can decide whether to seek consular assistance. Article 36 provides as follows:

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6 Ibid [407].

7 Opened for signature 24 April 1963, 596 UNTS 487, art 1 (entered into force 19 March 1967) ('*Optional Protocol*'). Article 1 of the *Optional Protocol* provides that

> [d]isputes arising out of the interpretation or application of the *Convention* shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present *Protocol*.

That both States are party to the *VCCR* and the *Optional Protocol* is evident in United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003*, 104–5, 115, UN Doc ST/LEG/SER.E/22 (2003).

8 See *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Advisory Opinion) (Solicitud de Opinión Consultiva presentada por el Gobierno de los Estados Unidos Mexicanos)* (1997) Inter-Am Ct HR OC-16/99 (ser A) 2 ('*Solicitud de Opinión Consultiva*').

9 See generally ibid 5–9.

10 *VCCR*, above n 2, art 38, provides for consular communication with the authorities of a receiving state.

11 See, eg, *LaGrand Case (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466, 475 ('*LaGrand Case*'). This case involved two German nationals who had lived in the US since they were children, and who were not informed of their right to consular access upon arrest.

1. 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 officials 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.

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.

III PRIOR CASES ON CONSULAR ACCESS

Avena is not the first art 36 case filed before the ICJ. In 1979, the US sued Iran over the taking of hostages at US diplomatic and consular facilities in Iran — including the takeover of US consulates in Tabriz and Shiraz and the sequestration of consular officers in those cities.[12] The US based its suit, in part, on the *VCCR*, arguing that the takeover and sequestration violated its right to provide consular protection to US nationals and the concomitant right of US nationals to consular protection.[13] The Court found that there had been a violation of art 36.[14]

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12 *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, 32.

13 *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Pleadings)* [1980] ICJ Rep 174. The memorial of the US Government stated that, '[a]rticle 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others': at 174.

14 *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, 32.

The consular access issue has also generated litigation in the US. Defence lawyers have demanded relief where art 36 had been violated.[15] In cases involving their nationals, foreign governments have entered diplomatic protests, requested clemency from state governors, and filed amicus curiae briefs in courts.[16] US courts have typically denied relief, either on the basis that the claim has not been raised by the foreign national in the trial court and thereby has been defaulted,[17] or on the rationale that the *VCCR* does not require a judicial remedy.[18]

Besides the ICJ, another international court has been involved in the consular access issue. In 1997, Mexico sought an advisory opinion from the Inter-American Court of Human Rights ('IACHR'),[19] which operates under the Organization of American States. The IACHR has the power to issue an advisory opinion on any 'treaties concerning the protection of human rights in the American states',[20] a plain reading of which necessarily encompasses treaties that are not limited to those directly affecting the region.[21]

Although Mexico's request did not in a formal sense implicate any particular US state, the Government of Mexico recited to the IACHR that it was 'taking action on behalf of 38 Mexican nationals who have been sentenced to death in ten federative entities of the United States of America',[22] and the only information it provided to the IACHR arose from US-based cases.[23] Mexico related that it had protested over these cases to the US.[24] The US filed written observations with the IACHR and participated in oral argument, arguing that art 36 creates no judicially enforceable rights for a detained foreign national, and that an apology suffices as a remedy.[25] Costa Rica, El Salvador, Guatemala, Honduras, Paraguay, and the Dominican Republic made written and oral submissions to the Court supporting Mexico.[26] No state supported the US.

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15 *United States of America v Rangel-Gonzales*, 617 F 2d 529 (9th Cir, 1980); *Faulder v Johnson*, 81 F 3d 515 (5th Cir, 1996); *Murphy v Netherland*, 116 F 3d 97 (4th Cir, 1997).

16 *Murphy v Netherland*, 116 F 3d 97, 98 (4th Cir, 1997) (Brief of Mexico).

17 *Breard v Greene*, 523 US 371, 375 (1998); *Ohio v Issa*, 93 Ohio St 3d 49, 75 (Ohio, 2001).

18 *United States of America v Minjares-Alvarez*, 264 F 3d 980, 986 (10th Cir, 2001); *United States of America v Carrillo*, 269 F 3d 761, 771 (7th Cir, 2001); *contra United States ex rel Madej v Schomig*, 223 F Supp 2d 968, 980 (ND Ill, 2002). In this case an Illinois inmate was relieved of his death sentence on the grounds that he had not been informed about consular access, and that this omission had a material effect on the outcome of his trial.

19 *Solicitud de Opinión Consultiva*, above n 8.

20 *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123, art 64 (entered into force 18 July 1978).

21 See *'Otros Tratados' Objecto de la Function Consultiva de la Corte (Advisory Opinion OC-1/82)* (1982) Inter-Am Ct HR (ser A) No 1; *Interpretation of the* American Declaration of the Rights and Duties of Man *within the Framework of Article 64 of the* American Convention on Human Rights *(Advisory Opinion OC-10/89)* (1989) Inter-Am Ct HR (ser A) No 10.

22 *Solicitud de Opinión Consultiva*, above n 8, 1.

23 Ibid 1–2, 9.

24 Ibid 1.

25 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Advisory Opinion OC-16/99) (Written Observations of the US)* (1998) Inter-Am Ct HR (ser A) 20–2.

26 Written observations on file with the IACHR.

Since 1998, three *VCCR* cases relating to arrested foreign nationals have been filed in the ICJ.[27] All three have been against the US, and all three have involved situations in which the detaining authorities failed to inform foreign nationals about the right to consular access, but in which the foreign nationals were nevertheless convicted of crimes. Although art 36 does not make any distinction in regard to the seriousness of the offence, all three of these cases concerned foreign nationals convicted of murder, sentenced to death, and awaiting execution.

The first of these most recent cases considered by the ICJ was the 1998 *case concerning the Vienna Convention on Consular Relations (Paraguay v United States of America) (Provisional Measures)*,[28] which resulted from a suit filed by Paraguay on behalf of a national who faced imminent execution in Virginia. Paraguay argued that, in the event of the conviction of a foreign national who was not informed about consular access, the courts must provide redress.[29] The US argued that a receiving state that violates art 36 by failing to inform a foreign national about consular access is not required to reverse a resulting criminal conviction.[30] The ICJ issued an interim order to the US asking that the Paraguayan national not be executed pending a final judgment.[31]

When the case was taken to the US Supreme Court, the US took the position that the interim order issued by the ICJ at Paraguay's request was not binding. The Supreme Court refused to stay the execution, and it was carried out.[32] The ICJ case continued despite the execution, and Paraguay filed a memorial. However, before the US had replied, Paraguay withdrew the case, preventing it from proceeding to a final judgment and from allowing a resolution of the issues.[33]

In 1999, a second ICJ case was filed against the US, resulting in the ICJ's ruling in the *LaGrand Case (Germany v United States of America) (Judgment)*.[34] On this occasion, Germany sued on behalf of two German nationals sentenced to death in Arizona. One had just been executed, and the other faced imminent execution. The ICJ issued an interim order against the second execution pending a final judgment.[35] On the basis of that interim order, Germany asked the US

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27 *Case concerning the* Vienna Convention on Consular Relations *(Paraguay v United States of America) (Provisional Measures)* [1998] ICJ Rep 248 ('*Breard Case*'); *LaGrand Case* [2001] ICJ Rep 466; *Avena (Judgment)* [31 March 2004] ICJ <http://www.icj-cij.org> at 1 October 2004.

28 [1998] ICJ Rep 248. The question posed in 1997 by Mexico to the IACHR, given its focus on human rights, differed from those issues before the ICJ in the *Breard Case*. Mexico asked the IACHR whether, when the penalty imposed is death, a violation of the right to consular access would implicate principles of due process of law and compromise the right to life. The IACHR ruled that due process would be violated, as well as the right to life: *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Advisory Opinion OC-16/99)* (1999) Inter-Am Ct HR (ser A) No 16 [141] ('*The Right to Information*').

29 *Breard Case* [1998] ICJ Rep 248, 250–1.

30 Ibid 256.

31 Ibid 258.

32 *Breard v Greene*, 523 US 371 (1998).

33 *Case concerning the* Vienna Convention on Consular Relations *(Paraguay v United States of America) (Order of 10 November 1998)* [1998] ICJ Rep 426, 427.

34 [2001] ICJ Rep 466.

35 *LaGrand Case (Germany v United States of America) (Order of 3 March 1999)* [1999] ICJ Rep 9.

Supreme Court to stay the execution. However, the Supreme Court refused and the execution was carried out.[36]

In light of this execution, Germany added a further claim against the US — that this second execution had violated the ICJ's interim order. On the *VCCR* claim, Germany and the US differed on the required remedy where a foreign national has been convicted without having been informed about consular access. Germany argued for a judicial remedy to reverse the conviction and sentence,[37] whereas the US asserted that it would suffice if the receiving state were to apologise after the execution of a foreign national.[38]

Unlike the *Breard Case*, the *LaGrand Case* proceeded to a judgment. The ICJ ruled, for the first time in its history, that interim orders are binding and that the execution was unlawful for that reason.[39] It also found the execution unlawful due to the violation of art 36(2) of the *VCCR*.[40] When a foreign national is convicted and sentenced without having been informed about consular access, the Court held that the receiving state must provide for the 'review and reconsideration' of the conviction and sentence in light of the *VCCR* violation.[41] The Court said that the US could not avoid the obligation to provide 'review and reconsideration' by invoking default rules.[42]

IV MEXICO'S CASE AGAINST THE US IN *AVENA*

In 2003, Mexico filed against the US before the ICJ in *Avena*. *Avena* differed from those suits brought by Paraguay and Germany due to the large number of foreign nationals involved.[43] As in the prior two cases, the ICJ issued an interim order staying executions pending a final judgment.[44] The main issue in *Avena* concerned a receiving state's obligation in the face of a conviction where the foreign national had not been informed about consular access. The US argued that the Court's judgment in the *LaGrand Case* did not require a judicial remedy from a receiving state's courts, but could be satisfied by executive remedy in the form of clemency.[45] Further, the US argued that 'review and reconsideration' as mandated in the *LaGrand Case* did not require that a conviction be reversed, but only that consideration be given as to whether reversal was appropriate on the facts of a case.[46] Mexico argued that reversal was required in every case that proceeded to conviction and sentence and where the foreign national was not advised about consular access.[47] *Avena* thus involved, in significant measure, a request for clarification of what the Court intended in the *LaGrand Case*.

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36 *Federal Republic of Germany v United States*, 526 US 111, 111–12 (1999).

37 *LaGrand Case (Germany v United States of America) (Written Pleadings of Germany)* [16 September 1999] ICJ [6.18]–[6.19] <http://www.icj-cij.org> at 1 October 2004.

38 *LaGrand Case* [2001] ICJ Rep 466, 474.

39 Ibid 508.

40 Ibid 497–8.

41 Ibid 514.

42 Ibid 497–8.

43 See *Avena (Judgment)* [31 March 2004] ICJ [15]–[16] <http://www.icj-cij.org> at 1 October 2004.

44 *Avena and Other Mexican Nationals (Mexico v US) (Provisional Measures)* [5 February 2003] ICJ [59] <http://www.icj-cij.org> at 1 October 2004.

45 *Avena (Judgment)* [31 March 2004] ICJ [136] <http://www.icj-cij.org> at 1 October 2004.

46 Ibid [118].

47 Ibid [117].

A *Exhaustion of Domestic Remedies*

Apart from challenging the merits of Mexico's claim, the US made a series of arguments to the effect that the ICJ lacked jurisdiction and that the case was inadmissible. One of its arguments relating to admissibility was that domestic remedies in the US had not been exhausted.[48] This raised an unusual exhaustion issue because of the dual nature of the rights granted by art 36: those of the sending state on the one hand, and those of the sending state's national on the other.

En route to deciding the exhaustion issue in *Avena*, the ICJ distinguished between suits to vindicate the rights of the sending state and suits to vindicate the rights of a sending state's national, although it acknowledged that the two rights are interwoven.[49] A sending state has rights of its own; if a receiving state fails to inform a detained sending state national about consular access, the right of the sending state to protect its nationals is violated. The ICJ held that a sending state may assert a claim on that basis without an exhaustion of domestic remedies, even if the sending state is also asserting that the individual rights of a national were violated.[50]

Judge Vereshchetin, writing separately, opined that this ruling meant the Court was inappropriately allowing a sending state to avoid the exhaustion requirement, and specifically that it was allowing the sending state to assert the rights of its national without exhausting.[51] Judge Vereshchetin's concerns would seem, however, to be unwarranted. In the majority's analysis, if the sending state seeks relief for a national, the exhaustion requirement must still be met. Stating that a national's rights must be asserted in the domestic legal system, the ICJ observed that '[o]nly when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection'.[52]

B *The Timing of Notification*

A point that remained unresolved by the ICJ in the *LaGrand Case* was the timing of the notification required to be given to a detained foreign national. Article 36(1)(b) of the *VCCR* requires that the information be given to a detained foreign national 'without delay', and that, upon the detainee's request, a consul be contacted 'without delay'. Yet police in the US frequently interrogate shortly after arrest.[53] Mexico argued that the notification must be provided at the time of

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48 Ibid [38].

49 Ibid [40].

50 Ibid.

51 *Avena (Judgment)* [31 March 2004] ICJ [2] <http://www.icj-cij.org> at 1 October 2004 (Separate Opinion of Judge Vereshchetin).

52 *Avena (Judgment)* [31 March 2004] ICJ [40] <http://www.icj-cij.org> at 1 October 2004.

53 See *Miranda v Arizona*, 384 US 436 (1966). The case involved a station house interrogation. Here, the Court formulated the requirements for informing a person upon arrest of the right to silence and of the consequences of giving a statement.

arrest, and in any event prior to interrogation.[54] The US argued that immediate notification is not required.[55]

The ICJ said that the phrase 'without delay' must be considered in light of the fact that the detaining authorities might not know immediately that a detainee is a foreign national.[56] The Court observed that the states which discussed the phrase 'without delay' during the drafting of the *VCCR* did not connect it to the time 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 be a breach of Article 36.[57]

The Court read art 36 as requiring that information about consular access be given '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'.[58] For that reason, the Court said that the duty to inform 'is not to be understood as necessarily meaning "immediately upon arrest"'.[59] However, the Court also said that the authorities must inquire at the time of arrest to ascertain nationality status.[60]

The Court said that the drafting history of the *VCCR* showed no variation in the meaning of the phrase 'without delay' throughout its several appearances in art 36.[61] Thus, both the provision of information to the detainee and, upon a detainee's request, the provision of information to a consul, must occur as soon as the authorities are aware of the detainee's nationality. The Court's finding that an obligation to advise the foreign national exists as soon as nationality status is known suggests that in such cases, any interrogations conducted without the detainee being informed about consular access would constitute a violation that would have to be taken into account in determining whether it prejudiced the outcome of the foreign national's fate. The Court did not, however, elaborate on circumstances that might constitute prejudice.

Writing separately, Judge Tomka said that the majority's view of the point in time at which the obligation to inform arises does not reflect the meaning of art 36, and runs the risk of weakening the protection it affords to a foreign

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54 *Avena and Other Mexican Nationals (Mexico v United States of America) (Written Pleadings of Mexico)* [20 June 2003] ICJ [193] <http://www.icj-cij.org> at 1 October 2004.

55 *Avena and Other Mexican Nationals (Mexico v United States of America) (Written Pleadings of the US)* [3 November 2003] ICJ [6.19]–[6.20] <http://www.icj-cij.org> at 1 October 2004. See also *Avena (Judgment)* [31 March 2004] ICJ [60] <http://www.icj-cij.org> at 1 October 2004.

56 *Avena (Judgment)* [31 March 2004] ICJ [88] <http://www.icj-cij.org> at 1 October 2004; cf *Avena (Judgment)* [31 March 2004] ICJ [15]–[16] <http://www.icj-cij.org> at 1 October 2004 (Separate Opinion of Judge Tomka). Judge Tomka stated that the obligation to inform a detained foreign national arises immediately upon arrest, independently of the knowledge of the detaining authorities of nationality status.

57 *Avena (Judgment)* [31 March 2004] ICJ [87] <http://www.icj-cij.org> at 1 October 2004.

58 Ibid [88].

59 Ibid.

60 Ibid [64].

61 Ibid [86].

national.[62] Judge Tomka points out that art 36 says nothing about the knowledge of the detaining authorities regarding the nationality status of a detainee, and hence does not condition the obligation to inform a foreign national on knowledge of nationality status, or even on the existence of circumstances that might suggest that the detainee is a foreign national. Invoking the legal maxim *ignorantia non excusat*, Judge Tomka said that art 36 can best be implemented by a procedure whereby the detaining authority informs all detainees that if they are of foreign nationality they have the rights provided by the *VCCR*.

The majority comes quite close to this position. After reciting that it is difficult to distinguish who are the foreign nationals from among those arrested,[63] it states:

> were each individual to be told [upon arrest] 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.[64]

As noted, the majority also found that there was an obligation to inquire about nationality status. This suggestion would seem to be the appropriate way to implement art 36. By saying nothing about awareness of foreign nationality, art 36 imposes a requirement to inform each foreign national. As a practical matter, that obligation cannot be met without informing all detainees.

If the authorities fail to ascertain nationality but proceed to interrogate, they violate what the majority finds to be the obligation of the receiving state to ascertain nationality. To be sure, the court did not have before it instances that raised the timing issue sharply, so the issue may remain to be clarified in future cases.

C *Scope of Required 'Review and Reconsideration'*

In *Avena*, the ICJ clarified that the 'review and reconsideration' of which it spoke in the *LaGrand Case* must be carried out by a court, considering that 'it is the judicial process that is suited to this task'.[65] Referring to the *LaGrand Case*, it found that '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'.[66] As to the content of the 'review and reconsideration', it said that convictions need not be reversed in each and every case. Rather, a court must take account of the specific *VCCR* violation and, in particular, the legal consequences for the detainee that stem from that violation.[67]

Furthermore, in relation to the review jurisdiction of domestic courts, the ICJ wrote:

> The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions

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62 *Avena (Judgment)* [31 March 2004] ICJ [14] <http://www.icj-cij.org> at 1 October 2004 (Separate Opinion of Judge Tomka).

63 *Avena (Judgment)* [31 March 2004] ICJ [63] <http://www.icj-cij.org> at 1 October 2004.

64 Ibid [64].

65 Ibid [140].

66 Ibid [141].

67 Ibid [131].

> and severe penalties is an integral part of criminal proceedings before the courts of the US and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the US to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the *Convention*.[68]

The Court's insertion of a prejudice requirement came about oddly, as neither party had argued for it. Mexico asserted that a conviction be reversed without the need for a finding of prejudice.[69] The US had argued that no judicial remedy was needed in this case, and that the review and reconsideration framework laid out in the *LaGrand Case* was sufficient.[70] It was the Court itself that devised a prejudice requirement as a supplement to its position that a judicial remedy is needed. As this issue was not litigated, there is little in the proceedings to indicate what was meant by the requirement.

The US had, however, previously raised the prejudice issue in the *Breard Case*. There, the US argued that a judicial remedy should not be required, even if an additional requirement of prejudice were attached. In oral argument to the Court, the US said that it would be

> problematic to have a rule that a failure of consular notification required a return to the *status quo ante* only if notification would have led to a different outcome. It would be unworkable for a court to attempt to determine reliably what a consular officer would have done and whether it would have made a difference.[71]

This point is undoubtedly valid. It is near impossible to determine how, in a particular case, a consul might have affected the proceedings. A foreign national would only be able to ask a court to speculate that a given aspect of the proceedings might have occurred differently had a consul been involved. The *VCCR*, by requiring consular access, presumes that it is useful.

Since a prejudice requirement could potentially eviscerate the requirement of providing 'review and reconsideration', and since the Court clearly contemplates a serious 'review and reconsideration', prejudice must not be understood to require a finding that the outcome might have been different because of some particular aspect of the proceedings. A foreign national is prima facie prejudiced if he or she is put in the position of defending a criminal case without consular assistance, in circumstances where consular assistance might have been forthcoming.

D *Impact on Domestic Criminal Proceedings*

As previously noted in the *LaGrand Case*, the ICJ ruled that its interim orders are binding on the states against which they are issued. This matter gained no further development in *Avena*. The Court did issue an interim order that was in effect for the 15 months that elapsed until the Court's final judgment was issued.

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68 Ibid [122].

69 Ibid [121].

70 *Avena and Other Mexican Nationals (Mexico v United States of America) (Written Pleadings of the US)* [3 November 2003] ICJ [9.4]–[9.5] <http://www.icj-cij.org> at 1 October 2004.

71 *Case concerning the* Vienna Convention on Consular Relations *(Paraguay v United States of America) (Oral Pleadings of the US)* [1998] ICJ Pleadings 37.

During that time none of the Mexican nationals were executed. Thus, in this instance, the US did not violate the interim order.

The judgment in *Avena* had an immediate impact on one of the Mexican nationals awaiting execution in the US. Osvaldo Torres Aguilera[72] was scheduled to be executed on a date six weeks after *Avena* was issued. Torres Aguilera's attorneys had exhausted all recourse under US law.[73] Based on *Avena*, they approached the Governor of Oklahoma with a request for clemency.[74] The European Union, in letters to both the Governor of Oklahoma and the Oklahoma Pardon and Parole Board, referred to *Avena* as being binding on the US and asked that the execution be stayed so that 'review and reconsideration' of the conviction and sentence could be undertaken.[75] In these letters, the EU recited both its opposition to capital punishment, and its view that consular access is an important guarantee for detained foreign nationals.

Torres Aguilera's attorneys also approached the Oklahoma Court of Criminal Appeals with a request that the case be given the 'review and reconsideration' required by *Avena*. Both the Court and the Governor responded. In *Torres v Oklahoma*,[76] the Appeal Court stayed Torres Aguilera's execution and ordered that a trial court determine 'whether Torres was prejudiced by the State's violation of his *Vienna Convention* rights in failing to inform Torres, after he was detained, that he had the right to contact the Mexican consulate'.[77] Only hours after the Appeal Court's judgment, the Governor commuted Torres Aguilera's sentence to life in prison, citing *Avena* and the art 36 violation.[78]

The Appeal Court issued its order without an explanatory opinion, but Chapel J, in a specially concurring opinion, found that by virtue of the US' ratification of the *Optional Protocol*, his Court was obliged to respect *Avena*.[79] Justice Chapel also analysed the prejudice issue that was left unelaborated by the ICJ. Prejudice would be present, he wrote, if application of a three-pronged test demonstrated that Torres Aguilera was unaware of his right to consular access, that he would have availed himself of it had he been informed about it, and that the Mexican consulate would have provided consular assistance.[80] Following this analysis, a trial court would almost certainly be required to find prejudice in this case.

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72 In *Avena*, the ICJ referred to this individual as 'Osvaldo Torres Aguilera'. During his appeal, the Oklahoma Court of Criminal Appeal referred to him as 'Osbaldo Torres'. Here, the ICJ's spelling is utilised as the preferred mode of referring to Mexican names; however, this distinction should be highlighted.

73 *Torres v Mullin*, 124 S Ct 562, 565 (2003). Here a US Court deferred its decision on granting certiorari until after the ICJ decided on Mexico's related case against the US.

74 Adam Liptak, 'Execution of Mexican is Halted', *New York Times* (New York, US), 14 May 2004, A23.

75 Letter from EU Presidency to Hon Brad Henry, Governor of Oklahoma City, 30 April 2004; Letter from EU Presidency to Susan B Loving, Chairwoman of Oklahoma Pardon and Parole Board, 30 April 2004. Both letters are available from <http://www.international justiceproject.org> at 1 October 2004.

76 *Torres v Oklahoma*, No PCD–04–442, slip op (Okla Ct Crim App, 13 May 2004) ('*Torres*'). This was an order granting stay of execution and remanding case for evidentiary hearing.

77 Ibid 2.

78 Liptak, above n 74.

79 *Torres*, No PCD-04–442, slip op, 5 (Okla Ct Crim App, 13 May 2004) (Chapel J, specially concurring).

80 Ibid 9.

V ASSESSMENT

In *Avena*, the ICJ usefully clarified that a judicial mechanism is contemplated by art 36(2) of the *VCCR*. Hence, a remedy must be provided by a court, beyond and above any executive remedies such as clemency or apologies. However, the prejudice requirement introduced by the ICJ still requires clarification. If construed broadly, a prejudice requirement could undermine the effectiveness of judicial remedies. What is certain is that the *VCCR* contemplates a need for consular access for detained foreign nationals. Any detained foreign national who is denied consular access rights would be presumptively prejudiced, even though determining how consular assistance would have played itself out in a particular case is highly speculative.

The applicability of the judgment in domestic courts is one of *Avena*'s most important aspects, given that most international legal obligations fall on states in a way that requires implementation by the executive branch. Article 36 of the *VCCR*, as construed in the *LaGrand Case* and *Avena*, requires judicial enforcement. This aspect of both judgments could have significant application in regard to human rights obligations, as human rights treaties may, in particular situations, call for a judicial remedy.

The ICJ limited itself to the international convention it was called upon to construe. It did not analyse consular access as a matter of human rights, as the IACHR had done. The Court's jurisdiction was based on the *VCCR*, and on the *VCCR* alone. Given the limitations on the parties' acceptance of the Court's jurisdiction, the ICJ had no jurisdiction over general questions of international law.

Nonetheless, *Avena* may impact significantly upon human rights litigation. The US objected to the claims put forward by Mexico as being inadmissible, on the grounds that they might require changes in domestic administration of criminal justice.[81] The US asserted that Mexico was trying to make the ICJ 'function as a court of criminal appeal'.[82] The ICJ was correct to ignore this objection, however, because whenever a state agrees by treaty that it will afford certain rights, it sheds the mantle of sovereignty that would otherwise allow it to act at will. *Avena* may hold implications well beyond the primary issue of consular access for foreign nationals.

As regards this primary issue, the judgments in the *LaGrand Case* and *Avena* may have a significant impact on the practice of domestic courts around the world. Courts have a significant role to play in a backup capacity in regard to consular access. If violations are committed by the executive branch, redress can be provided by the courts. That courts can act in such a way has been mandated in the *LaGrand Case* and reaffirmed in *Avena*.

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81 *Avena and Other Mexican Nationals (Mexico v United States of America) (Written Pleadings of the US)* [3 November 2003] ICJ [3.2] <http://www.icj-cij.org> at 1 October 2004.

82 *Avena (Judgment)* [31 March 2004] ICJ [37] <http://www.icj-cij.org> at 1 October 2004.

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