SOME THOUGHTS ON ACHIEVING U.S. COMPLIANCE WITH INTERNATIONAL OBLIGATION TO INFORM OTHER NATIONS ABOUT ARREST OF THEIR CITIZENS

Talbot D'Alemberete, Florida State University
SOME THOUGHTS ON ACHIEVING U.S. COMPLIANCE WITH INTERNATIONAL OBLIGATION TO INFORM OTHER NATIONS ABOUT ARREST OF THEIR CITIZENS:
BOYCOTTS?
LEGISLATION?
MIRANDA WARNING?
NOTICE AT ARRAIGNMENT?

Talbot D’Alemberter

Introduction.

The decision of the International Court of Justice in the recent case of Mexico v. United States (Avena) raises the issue of the role of the states in international human rights. Despite the ruling of the ICJ, Jose Ernesto Medellin, a Mexican citizen, was executed even though the United States breached its duty to inform him of his right to have
the Mexican consul informed of his arrest, a right promised in the Vienna Convention on Consular Relations.

The ICJ decision was made after the United States Supreme Court handed down its opinion in *Medellin v. Texas*. *Medellin* rejected the Bush Administration’s attempt to give directions to state courts through the device of an executive memorandum. *Medellin* is a principled decision but it places the United States in the position that, because of its federal system, the United States is without the ability to require state compliance with the treaty provision essential to fulfillment of its international obligation.

This article addresses the 2004 and 2008 *Avena* decisions by the ICJ, the 1998 Paraguay case on the same subject and the 2001 German counterpart, *LaGrand*, looking at legal and extra-legal avenues to address the
difficulties with a federal system where responsibility for conduct of foreign affairs is allocated to a national government but the constituent states are not required to conform to the decisions of that national government. vii

The article then looks at several alternatives for bringing the United States in compliance with its treaty obligations.

*The Convention on Consular Relations, the LaGrand and Avena decisions.*

The Vienna Convention on Consular Relations viii requires that, when a foreign national under arrest requests, “the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State” of such detention and shall inform the detainee of his right “to request assistance from the counsel of his nation.” ix

In the case brought by Paraguay and in the *LaGrand* and
Avena cases, the arresting authorities did neither of these things, yet the persons arrested were tried, convicted and sentenced by state authorities.

To examine the problem, we have to walk into a house of mirrors: Those who were detained did not know of their right to request that their consulate be informed and the state authorities did not inform them of that right as they are required to do under the terms of the treaty. But the failure to promptly inform the foreign national detainee or the consul of his nation, does no practical good where a breach of that duty may not be raised if it is not promptly raised in the trial court. Both the state and the accused have duties of promptness but the state’s failure to inform negated the right of the detained foreign national. As the opinion in LaGrand points out, the application of the procedural default rule means that, in practice, the right to
be informed is an empty right because a person who does not know of their rights to have their consul notified is not able to exercise that right.\textsuperscript{x} In effect, the duty of the accused to promptly raise a failure to inform is higher than the duty of the state to promptly inform the detainee and his nation.\textsuperscript{xi}

The first World Court litigation over this issue was in the Case Concerning the Vienna Convention on Consular Relations (Paraaguay v. United States), a case involving a convicted Paraguayan citizen, Angel Francisco Breard.\textsuperscript{xii}

The United States responded to the “Request for the Indication of Provisional Measures” with the assertion that there was no jurisdiction of the Court since “…the objections raised by Paraguay to the proceedings brought against its national do not constitute a dispute concerning the interpretation or application of the Vienna
The Court entered an order on April 9, 1998 stating, “The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings.” Mr. Breard was executed following court decisions in the United States. The United States did apologize to Paraguay and indicted to the World Court that it had “taken steps to ensure future compliance with its obligations under the Vienna Convention at both the federal and state level.”

In 2001, the ICJ accepted the argument made by Germany in the LaGrand case that, under the Treaty on Consular Relations, it was the duty of the United States to inform Germany when its citizens are arrested.

The case involved two brothers, Karl and Walter LaGrand, German citizens who had long lived in the United States. It was filed after Karl LaGrand was executed and
shortly before Walter LaGrand’s scheduled execution, and sought to raise the issue that had not been raised in United States courts until after conviction and when the case was in the federal phase of post-conviction proceedings. Applying the settled principle of “procedural default” the U.S. courts rejected that argument. The German government also sought “provisional measures” (injunctive relief) to prevent LaGrand’s execution. The original order was issued on March 3, 1999 and the final opinion was issued on June 27, 2001.

The ICJ held that, in the circumstances of LaGrand, the failure to inform Germany, coupled with the operation of the procedural default rule, effectively deprived German from timely knowledge and an opportunity to provide assistance to one of its citizens.
In *LaGrand*, the United States stepped up to the fact of its breach, stating, “… the competent authorities of the United States did not promptly give to Karl and Walter LaGrand the notification required by [the treaty] and the United States has apologized to Germany for this breach and is taking substantial measures aimed at preventing any recurrence…” Still, the United States objected to the portion of the German submission that sought assurances and guarantees of non-repetition, arguing that the submission “goes beyond any remedy that the Court can or should grant, and should be rejected.” In its 2001 *LaGrand* Judgment, the Court held that, “the various competent United States authorities failed to take all the steps they could have taken to give effect to the Order.”

But the court itself did not want to take the step advocated by Germany. Instead, it stated: “… the United
States repeated in all phases of these proceedings that it is carrying out a vast and detailed programme in order to ensure compliance by its competent authorities at the federal as well as at the state and local levels with its obligation…” xxiv and concluded: “taking note of the commitment undertaken by the United States to ensure implementation of the specific measures adopted in performance of its obligations …”xxv

The Mexican case, Avena, raised the same issue as it related to over fifty Mexican citizens who had been arrested and accused of capital crimes where Mexico had not been informed.xxvi

In the original Avena case, the United States predictably lost, just as it had in the German case, LaGrand.xxvii
The Mexican government then followed the example of Germany and sought “provisional measures” from the ICJ\textsuperscript{xxviii}, seeking to block the execution of its citizens. The United States responded to the Mexican request for provisional measures by acknowledging that the Court’s 2004 decision placed an obligation on it to do whatever was in its power to prevent the execution of Mexican nationals who were the subjects of the \textit{Avena} case.\textsuperscript{xxix} Indeed, the United States argued that, because it did not disagree with the interpretation of the 2004 decision, there was no jurisdiction for the court’s action relating to provisional measures.\textsuperscript{xxx}

The United States executive branch did take exceptional steps to demonstrate its respect for the ICJ and the 2004 \textit{Avena} decision. These steps included \textit{amici} appearances in both Texas and federal courts\textsuperscript{xxxi}, attempts
to inform state Attorneys General of the implications that flow from the failure to inform foreign governments when one of their citizens is arrested, appeals to the Texas authorities\textsuperscript{xxxii} and, most remarkably, a presidential memorandum President Bush’s determination that the United States was bound by the decision of the ICJ.\textsuperscript{xxxiii}

That memorandum stated:

“\textquote{I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under the decision of the International Court of Justice in \textit{Avena}, by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision…’’}

Despite this effort, the United States was unable to convince state authorities that they should adhere to a decision of the World Court and the United States Supreme Court ruled in the \textit{Medellin} case that the President was
without power to issue such directions to state courts.\textsuperscript{xiv}

On August 5, 2008, Medillin, a Texas prisoner whose death warrant was specifically addressed by Mexico in its submissions to the ICJ, was executed.\textsuperscript{xv}

The remarkable steps taken by the Executive branch highlight one failure of action and this was identified by a member of the court in the only question propounded to either side during the argument on provisional measures\textsuperscript{xvi} asking, in effect, where was Congress? In responding to this, John Bellinger, the Agent for the United States, noted that the intention of Congress could not be determined through statements of individual members of Congress and Congress had only one way to provide an answer – through passage of legislation.\textsuperscript{xvii} He added, “… under the United States Constitution –it is the executive branch, under the leadership of the President and the Secretary of State, not
the Congress, that speaks authoritatively for the United States internationally.”

Since the Medellin case placed limits on the reach of that executive power, the United States must now turn to other sources to resolve the problem.

Avena is destined to be a very significant case for those who teach international law and U. S. Constitutional Law but this article addresses only the issue of steps that might be taken to bring the United States into compliance with its treaty obligations. If we do not care about this issue, we can simply say that the U.S. 2005 withdrawal from the Optional Protocol and the jurisdiction of the ICJ may mean that we are less likely to have embarrassing decisions by the World Court rendered against the United States in the future. But the United States does care about the issue and is quite insistent on
other nations informing our government when one of our citizens is arrested. A failure to provide an adequate system of communication in the United States will undermine our efforts to protect our own citizens in foreign lands.

*Extra-legal approaches to the Avena problem.*

Some assessment about the interests of states in solving this problem might be a useful predicate for the proposals: Since states have the authority to deal with a number of the core issues of international human rights laws, particularly issues relating to capital punishment, there is a very real risk that they may face international trade pressures for compliance. If South Africa could be moved by boycotts to change apartheid\textsuperscript{xli}, there is a possibility that, with concerted economic pressure, states could be convinced to rethink their human rights regimes.
Our analysis should take into account the German reaction to the executions following the *LaGrand* case, when it worked through the European Community to provide resources for a study of the administration of capital punishment in states, a study that has now been concluded for eight states: Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania and Tennessee.\(^{xlii}\)

After study of twelve issues in these states\(^{xlii}\), the assessment report concluded, “Ultimately, serious problems were found in every state death penalty system.”\(^{xliv}\)

To date, there has been little activity to implement the recommendations of these assessments even though they were all framed to suggest improvements in the system and did not suggest abolition of capital punishment.

It is possible that European leaders or international NGOs could look at this state of facts and mount a boycott
against individual states that have refused to even undertake serious study of the faults in its justice system.

The idea of economic boycotts against subnational units has not yet seen concrete action, but at least one commentator has raised the possibility. Professor Peter Spiro has written about states and international human rights law and he states: “Local authorities now perceive the international marketplace to be an important factor in overall economic prosperity.” Professor Spiro notes the many indications of state concern interest in foreign trade, observing that official trade missions and foreign trade offices are now a significant feature of economic development activities. Professor Spiro argues that this sets up a new dynamic:

“…There are no practical impediments to establishing direct transnational, inter-level contacts where interests might demand them, at the same time
that the niceties of diplomacy no longer appear to impede such communications.

This could have profound consequences for notions of state responsibility. The critical last step in the analysis: insofar as subnational actors see rewards in the global marketplace, they may also be subject to its discipline. …

…A governor would no doubt listen more carefully to a foreign official were his message to implicate exports and investment. Such possibilities exist today in a way that they did not fifty or even fifteen years ago. …”

Of course, as Professor Spiro observes, “On the subject of pending executions, governors now appear to receive a raft of communications from foreign officials, non-governmental organizations and private individuals. None has yet to threaten retaliatory economic action for asserted human rights violations, and, as a result, their impact appears to have remained marginal.”

We might use the example of my home state, Florida, to think about this possibility. Florida’s economy is highly
dependent on tourism. Florida reports it had 84.5 million visitors in 2007, that 991,300 people were employed by the tourism industry and that it received $3.9 billion in sales tax revenue from the $65.5 billion dollars spent on tourism.

Florida looks to other forms of foreign trade as well. In the summer of 2008, the Governor of Florida went to the Farnborough International Air Show in Great Britain to open the Florida pavilion there.

If those who promote foreign visitors and foreign trade were threatened by a well organized boycott like those used in other situations, there would have to be a careful reassessment of issues such as capital punishment or at least a follow up on the critical assessments of their capital crimes administration.
Indeed, sensitivity to the potential risk of international disapproval may have motivated the Florida Office of Tourism and Trade to maintain a website providing information on the right of foreign governments to be informed when one of their citizens is arrested.\textsuperscript{liii} This is prudent because Florida would not have wanted to have its governor on a European trade mission if it were openly snubbing the World Court in the way that Texas did in the \textit{Medellin} case.

Professor Spiro points out that, in addition to foreign appeals to states relating to human rights issues – particularly capital punishment, there are several examples of foreign economic pressure on state governments.\textsuperscript{liv} Conversely, there have been instances where state and local governments have sought to use economic pressure against foreign countries.\textsuperscript{lv}
Legislation and changes to the Miranda warning.

In the situation raised by the *Avena* case and the Medellin execution, there seem to be several possible routes, short of a change in the principle that treaties are not self-executing or some unlikely reappraisal of procedural default rules.

Most obvious is the alternative of a state statute recognizing the decisions of the World Court or a federal statute requiring that recognition could handle this problem.\textsuperscript{lviv} In the abstract, it should not be difficult for the federal government to provide for recognition of decisions by the World Court relating to human rights for, after all, we have figured this out with trade agreements.\textsuperscript{lvii}

An idea that might be very easy to accomplish and very simple would be modification to the language of *Miranda* warnings. This would, in theory, handle the
problem of compliance in most cases.\textsuperscript{lviii} Simply informing someone who is arrested that, if they are a foreign national, they have the right to request that their consulate be informed would also be an effective way to educate law enforcement officials of the treaty rights.

This can be done at arraignment as well as through the \textit{Miranda} warning, and that could be accomplished through a simple adoption of court rules governing arraignment. Indeed, in November of 2000, the Secretary of State of Florida made just such a proposal to the then Chief Justice.\textsuperscript{lix}

\textit{Conclusion.}

The \textit{LaGrand} and \textit{Avena} decisions by the World Court highlight a serious gap in the International Human Rights regime in the United States. If the United States can work out some resolution of this problem, perhaps it can then
move on to other areas that will require state action to fully bring into being the rights we have promised to provide.

END NOTES

\(^1\) President Emeritus and Professor of Law, Florida State University. Past President, American Bar Association. The author is grateful for the assistance and comments from Mark Ellis, Sumner Twiss, Terry Coonan and Laura Fargo.
There are two ICJ opinions in this case. The first, handed down on March 31, 2004 can be found at 2004 I.C. J. 12 and the second, the decision on Mexico’s application for provisional measures, is at 2008 I.C. J. _____.


vii Of course, the national government in the case of Avena had done a lot but had not itself done all that it might to achieve the adherence to its treaty obligations nor to achieve compliance with decisions of the International Court of Justice.

ix Article 36, paragraph (1) (b) of the Convention on Consular Relations.
x LaGrand, 2001 I.C.J. at 473.
xi Medellin, 552 U.S. at ___.
The ICJ had jurisdiction to interpret the treaty under the terms of the treaty even though the United States had renounced general jurisdiction of the ICJ following its decision in *Nicaragua v. United States*. This jurisdiction arose under the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, Apr. 24, 1963, [1970] 21 U.S. T. 325, T.I.A.S. No. 6820. The ICJ stated:

“The Court observes that the United States, without having raised preliminary objections under Article 79 of the Rules of Court, nevertheless presented certain objections to the jurisdiction of the Court. Germany based the jurisdiction of the Court on Article I of the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes of 24 April 1963, which reads as follows:
‘Disputes 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.’"


xxii *Id.* at 484

xxiii *Id.* at 508.

xxiv *Id.* at 512.

xxv *Id.* at 513.

xxvi The United States initially resisted the Mexican case, stating, in its Memorial:
“The facts in the case Mexico has brought to the Court are many and complex. In important respects they are also in dispute. Mexico invites this Court to re-determine the facts and re-weigh the evidence of fifty-four separate criminal cases. These cases have, collectively, been the subject of hundreds of judicial proceedings, thousands of hours of testimony and argument, and extended deliberation by judges and juries, followed in many cases with review by other judges. The records of these proceedings are voluminous. Mexico's summary abstracts of the cases draw selectively from these records, and then imply that the Court can easily make the determinations of fact necessary to support the legal conclusions Mexico proposes. The most casual review of the cases demonstrates, however, that this is not so.”


The Court noted that the earlier case, LaGrand, had settled the issue concerning procedural default:

“The Court has already considered the application of the “procedural default” rule, alleged by Mexico to be a hindrance to the full implementation of the international obligations of the United States under Article 36, in the LaGrand case, when the Court
addressed the issue of its implications for the application of Article 36, paragraph 2, of the Vienna Convention. The Court emphasized that “a distinction must be drawn between that rule as such and its specific application in the present case”. The Court stated:

“In itself, the rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information ‘without delay’, thus preventing the person from seeking and obtaining consular assistance from the sending State.” (*I.C.J. Reports 2001*, p. 497, para. 90.)

---


**xxix** It should be noted that one of the Mexican nationals, Osvaldo Torres, received a commutation of his death penalty from the Governor of Oklahoma after the state Pardon and Parole Board recommended clemency. The Governor’s press release of May 13, 2004 expressly referenced the international obligation. As stated in the press release from the Governor’s office:

“The Governor also noted that Torres had not been notified of his right to contact the consulate of his native Mexico to seek legal representation. Such rights
are ensured under the 1963 Vienna Convention on Consular Relations. Signed by the U.S. in 1969, that treaty is also important in protecting the rights of American citizens abroad.

The International Court of Justice ruled on March 31 that Torres’ rights were violated because he had not been told about his rights guaranteed by the 1963 Vienna Convention. Under agreements entered into by the United States, the ruling of the ICJ is binding on U.S. courts.

“I took into account the fact that the U.S. signed the 1963 Vienna Convention and is part of that treaty,” the Governor said.

“In addition, the U.S. State Department contacted my office and urged us to give ‘careful consideration’ to that fact.”


xxx This argument was persuasive to five members of the ICJ including Judge Thomas Buergenthal, the only United States member of the court. Analysis of this argument
would be an interesting exercise but is beyond the scope of this article.


xxxvi For U.S. and U.K. lawyers, a startling feature of arguments before the ICJ is that, unlike appellate courts in the United States and the United Kingdom, counsel are not interrupted by questions during their oral presentation. In Avena, the presiding judge called for questions from the court after the argument presented for the United States (by four attorneys, including a British barrister) and one of the
judges asked about any interest shown by Congress. The answer, given by John Bellinger, the Agent for the United States, was that conduct of foreign affairs rested under the United States Constitution with the Executive Branch and that the attitude of Congress could not be known until there was legislation. In hindsight, it is unfortunate that there was not a strong effort to adopt legislation as far back as the LaGrand case.

xxxvii Judge Buergenthal, in his dissent, gave an analysis that excused the United States from attempting to act through its Congress: “Instead of seeking legislation, the President of the United States issued the Proclamation of 28 February 2005, ordering all the states of the United States holding any of the Mexicans named in the Avena Judgment to be provided with review and reconsideration. Until the Supreme Court rendered the Medellín decision on 25 March 2008, ruling that the President lacked the power to issue that order, the Executive Branch could reasonably assume that the Supreme Court would uphold the President’s Proclamation; that would have made congressional implementing legislation unnecessary.”


Debora L. Spar & Lane T. LaMure, *The Power of Activism: Assess the Impact of NGOs on Global Business*, 32
The web site for this project, conducted by the ABA Section of Individual Rights and Responsibility is: http://www.abanet.org/moratorium/home.html

The issues studied were, (1) collection, preservation, and testing of DNA and other types of evidence; (2) law enforcement identifications and interrogations; (3) crime laboratories and medical examiner offices; (4) prosecutorial professionalism; (5) defense services; (6) the direct appeal process; (7) state post-conviction proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) the treatment of racial and ethnic minorities; and (12) mental retardation and mental illness.

http://www.abanet.org/moratorium/home.html

http://www.abanet.org/moratorium/home.html


*Id.* at 584.

*Id.*

*Id.* at 584-85.

*Id.* at 587.

See: http://media.visitflorida.org/about/research/

Although the figures are not published for 2007, the official report indicates that, for Florida tourism, the top international markets in 2006 were Canada (2.1 million visitors), United Kingdom (1.3 million), South America (883,000), Germany 206,000, Japan (70,000) and Australia (51,000).
While in Great Britain, the Governor also had meetings with representatives of Lloyd’s of London, then went to France for the kick-off of the Visit Florida marketing campaign. He then traveled to Russia and Spain. This trip was his third business development mission since taking office in 2007 and his trips have included a trip to Brazil which is claimed to have generated “more than $300 million in actual and anticipated sales.”

Moreover, it is not only the Governor who works on international trade issues. See Florida Department of Agriculture and Consumer Services web site: [www.Florida-Agriculture.com](http://www.Florida-Agriculture.com) and the many sites for Florida cities, counties and chambers of commerce that promote international trade.

http://internationalaffairs.flgov.com/arrest/detail.html

Peter Spiro, *The States and International Human Rights*, 66 Fordham L. Rev. 567, 585-87 (1997). The illustrations Professor Spiro uses include the United Kingdom legislation targeting California businesses after that state passed a “unitary tax” that was disadvantageous to British business, the Mexican protest to Proposition 187 in California which would have deprived undocumented aliens of public benefits and the reaction to the Massachusetts measure directed at corporations with business ties to Burma.


Brandon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a*
Indeed, efforts have commenced in Congress including a House Bill, HB 6481 by Rep. Rangel and an effort in the Senate by Sen. Dodd and others to include an amendment to a pending legislative proposal.


The usual warning is: “You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?” I propose adding something as simple as: “If you are the citizen of another country, you have the right to ask that your nation’s consul be informed of your arrest.”

See letter of November 6, 2000 letter to Chief Justice Charles Wells. Although the Florida Supreme Court may have been somewhat distracted at that time, the Chief Justice did respond the next month to indicate his recognition of the problem, but no rule was adopted.