



One of the Mexican nationals in the *Avena* case, Osbaldo Netzahualcóyotl Torres Aguilera, was arrested by Oklahoma law enforcement authorities in July 1993 and was charged with having committed two murders during a burglary. He was not informed of his rights under the Vienna Convention and was convicted of murder and sentenced to death. Efforts in federal court to vacate the conviction and sentence as a remedy for the treaty violation were unsuccessful.<sup>6</sup> Separately, Torres filed a petition with the Oklahoma Pardon and Parole Board for clemency.

After the issuance of the *Avena* decision, the Legal Adviser of the U.S. Department of State wrote on April 23, 2004, to the Oklahoma Pardon and Parole Board, recounting the principal findings of the International Court of Justice. Further, the Legal Adviser stated:

The Department of State requests that in its review of the case the Pardon and Parole Board give careful consideration to the pending clemency request of Mr. Torres, including by considering the failure to provide Mr. Torres with consular information and notification pursuant to Article 36 of the VCCR and whether that failure should be regarded as having ultimately led to his conviction and sentence. We request that the Board give particular attention to the representations of the Government of Mexico on Mr. Torres' behalf.<sup>7</sup>

On May 7, the Oklahoma Pardon and Parole Board recommended that Torres be granted clemency.<sup>8</sup> On May 11, the Legal Adviser sent a second, nearly identical letter to the governor of Oklahoma.<sup>9</sup> On May 13, the governor commuted Torres's sentence to life without possibility of parole. Among other things, the press release issued by the governor's office stated:

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."<sup>10</sup>

In addition to pursuing clemency, Torres had filed an application for postconviction relief from the Oklahoma Court of Criminal Appeals, asking it to take account of the ICJ's decision in *Avena*. On the same day that the governor commuted Torres's sentence, the Oklahoma Court of Criminal Appeals issued an order staying execution and remanding the case for an evidentiary hearing on whether Torres had been prejudiced by the VCCR violation or by ineffective assistance of counsel. The five-judge panel was split, with three judges in favor of the order

<sup>6</sup> *Torres v. Mullin*, 317 F.3d 1145 (10th Cir. 2003), *cert. denied*, 124 S.Ct. 562 (2003). For Justice Breyer's dissent regarding the denial of the petition for certiorari, see 124 S.Ct. at 562 ("This case raises important questions concerning the relation between, on the one hand, the domestic law of the United States, and, on the other, decisions of the International Court of Justice interpreting the Convention.").

<sup>7</sup> Letter of William H. Taft IV, U.S. Dep't of State Legal Adviser, to Susan B. Loving, chairperson, Oklahoma Pardon and Parole Board (Apr. 23, 2004) (on file at GWU).

<sup>8</sup> Office of Governor Brad Henry, Press Release: Governor Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), at <<http://www.governor.state.ok.us/>>.

<sup>9</sup> Letter of U.S. Dep't of State Legal Adviser William H. Taft IV to Brad Henry, Governor of Oklahoma (May 11, 2004) (on file at GWU).

<sup>10</sup> Office of Governor, *supra* note 8.

and two dissenting. In explaining the relevance of the *Avena* decision to the court's stay and remand, Judge Charles S. Chapel, in a concurring opinion, stated:

The Vienna Convention is a multinational treaty respecting consular relations, which provides that law enforcement authorities shall inform detained foreign nationals of their right to contact consular officials for assistance. Both the United States and Mexico are signatories to the Convention. The Convention itself does not specify an enforcement mechanism. That mechanism is contained in the Optional Protocol, ratified along with the Convention itself, which provides that states may bring disputes under the Vienna Convention to the International Court of Justice for binding resolution. Under the treaty's terms, while states ratifying the Vienna Convention are free to accept or reject the Optional Protocol, acceptance creates a binding obligation. The United States proposed this provision on dispute settlement and was instrumental in drafting the Optional Protocol, was the first state to bring a case under its provisions, and has consistently looked to the International Court of Justice for binding decisions in international treaty disputes, including those brought under the Vienna Convention. The United States was the first to bring a case in the International Court of Justice specifically under the Optional Protocol. The United States has also defended against eleven cases brought in the International Court of Justice, including *Avena*.

There is no question that this Court is bound by the Vienna Convention and Optional Protocol. The Supremacy Clause provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."<sup>11</sup> The federal government's power to make treaties is independent of and superior to the power of the states. Every state or federal court considering the Vienna Convention, for any reason, has agreed that it is binding on all jurisdictions within the United States, individual states, districts and territories. Several courts have expressed concern that any failure of United States courts to abide by the Vienna Convention may have significant adverse consequences for United States citizens abroad. "Treaty violations not only undermine the 'Law of the Land,' but also international law, where reciprocity is key. If American law enforcement officials disregard, or perhaps more accurately, remain unaware of the notification provision in Article 36, then officials of foreign signatories are likely to flout those obligations when they detain American citizens."<sup>12</sup> I share those concerns.

At its simplest, this a matter of contract. A treaty is a contract between sovereigns. The notion that contracts must be enforceable against those who enter into them is fundamental to the Rule of Law. This case is resolved by that very basic idea. The United States voluntarily and legally entered into a treaty, a contract with over 100 other countries. The United States is bound by the terms of the treaty and the State of Oklahoma is obligated by virtue of the Supremacy Clause to give effect to the treaty.

As this Court is bound by the treaty itself, we are bound to give full faith and credit to the *Avena* decision. I am not suggesting that the International Court of Justice has jurisdiction over this Court—far from it. However, in these unusual circumstances the issue of whether this Court must abide by that court's opinion in Torres's case is not ours to determine. The United States Senate and the President have made that decision for us. The Optional Protocol, an integral part of the treaty, provides that the International Court of Justice is the forum for resolution of disputes under the Vienna Convention. . . . In order to give full effect to *Avena*, we are bound by its holding to review Torres's conviction and sentence in light of the Vienna Convention violation, without recourse to procedural bar. Common sense and fairness also suggest this result. Torres, like many foreign nationals, was unaware he had the right to contact his consulate after his arrest for murder. Torres's Vienna Convention claim was generated by the State of Oklahoma's initial failure to comply with a treaty. I believe we cannot fulfill the goal of a fair and just review of Torres's case if we refuse to look at his Vienna Convention claims on the merits.

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<sup>11</sup> [Editor's Note: U.S. CONST. Art. VI.]

<sup>12</sup> [Editor's Note: *United States v. Carrillo*, 70 F.Supp.2d 854, 860 (N.D. Ill. 1999).]

