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CHAPTER 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. UNGA Resolution on Consular Notification

On December 20, 2018, U.S. Representative to the UN for Economic and Social Affairs Kelley Currie delivered the U.S. explanation of vote on a UN General Assembly resolution put forward by Mexico regarding the International Court of Justice's decision in *Avena*. See *Digest 2004* at 37-43 for discussion of the ruling in *Avena*; see *Digest 2008* at 175-93 for discussion of the U.S. Supreme Court decision in *Medellín*. Ambassador Currie's remarks are excerpted below and available at <https://usun.usmission.gov/explanation-of-vote-before-the-vote-on-mexicos-unga-resolution-on-the-international-criminal-court-of-justice-avena-decision/>.

* * * *

The United States believes that it is inappropriate that Mexico has brought this bilateral matter to the UN General Assembly. We are also disappointed that Mexico failed to consult with the United States prior to circulating the draft resolution. We will vote “no” on this resolution.

Our vote should not be interpreted as a repudiation of our international obligations regarding consular notification and access. On the contrary, the United States continues to take very seriously our international obligations with respect to consular notification and access.

We will vote “no” to affirm that the UN General Assembly is not the appropriate venue for this issue. The United States continues to take steps with respect to the *Avena* judgment, and we have engaged in close and extensive consultations with Mexico.

The United States notes that the United States Supreme Court has held, in *Medellin v. Texas*, that the ICJ's *Avena* decision does not constitute directly enforceable federal law and that U.S. obligations could be discharged through the adoption of federal legislation.

This resolution will not alter the force of the Supreme Court's decision as binding upon the United States government. Accordingly, legislation that would facilitate actions consistent with the *Avena* judgment in the United States was included in the President's Fiscal Year 2019 budget request.

The State Department has engaged directly with relevant state authorities in the United States, urging them to take the necessary steps to give effect to the *Avena* decision.

The United States has closely consulted with Mexico on its efforts to implement the *Avena* judgment, and has kept Mexico informed of its efforts. Mexico's decision to introduce this resolution was unfortunate. We call on all delegations to vote "no" on this resolution.

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2. Engagement with states regarding *Avena*

On November 14, 2018, U.S. Department of State Legal Adviser Jennifer G. Newstead sent a letter to Governor Greg Abbott of Texas regarding Roberto Moreno Ramos, a Mexican national whose case was addressed by the ICJ in *Avena*. The text of the body of the letter appears below.

* * * *

As the Legal Adviser of the U.S. Department of State, I am writing with regard to the case of Roberto Moreno Ramos, a Mexican national scheduled to be executed in Texas on November 14, 2018, and the cases of five other Mexican nationals convicted of capital crimes in Texas and still awaiting execution dates.

The United States and Mexico are both parties to the Vienna Convention on Consular Relations (Vienna Convention), which requires, among other things, that states inform foreign nationals upon their arrest of the option to have their consulate notified of the arrest, and provide such notification upon request and without delay. In 2004, the International Court of Justice (ICJ) found that the United States breached these obligations in the case of Mr. Ramos and 51 other Mexican nationals in the *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.) 2004 I.C.J. 12 (March 31),¹ and directed the United States to provide effective judicial review and reconsideration of any claims of actual prejudice to the affected Mexican nationals.

¹ The ICJ found that the United States had breached its obligations under Article 36 of the Vienna Convention with respect to Mr. Ramos, specifically Article 36(1)(b), by failing to inform Mr. Ramos of his option to have the Mexican consulate notified of his arrest and failing to provide such notification; Article 36(1)(a) by failing to enable Mexican consular officers to communicate with and have access to him; and Article 36(1)(c) regarding the right of consular officers to visit him and arrange for his legal representation. The ICJ also noted that Mr. Ramos's case was one of only three where the United States was in breach of its obligations under Article 36(2) because his criminal proceedings had already reached a stage "at which there is no further possibility of judicial reexamination" because his conviction and sentence had already become final by the time of the *Avena* judgment.

Shortly after the ICJ's judgment, the United States withdrew from the Vienna Convention Optional Protocol under which the ICJ had asserted jurisdiction to hear the dispute. However, this withdrawal did not directly alter the status of the ICJ's *Avena* decision.

In *Medellin v. Texas*, 552 U.S. 491 (2008), the United States Supreme Court held that the ICJ's *Avena* decision does not constitute directly enforceable federal law and that a Presidential Memorandum alone could not render it so. Under the federal legal framework currently applicable to this matter, the actions of the State of Texas will determine whether the United States carries out the actions called for by the *Avena* decision. I respectfully request that Texas take the steps necessary to give effect to the *Avena* decision with respect to Mr. Ramos' case and those of the other Mexican nationals referenced in the *Avena* decision who, to the best of the Department of State's knowledge, remain in Texas custody.²

Your assistance in this matter is important to the interests of the United States and its citizens, including Texans detained abroad. The United States relies on foreign governments' reciprocal enforcement of the consular notification and access provisions of the Vienna Convention and other applicable consular agreements to obtain access to U.S. citizens detained abroad, many of whom are from Texas, and a perception of unaddressed U.S. noncompliance could put those citizens at risk. The United States has other important foreign policy interests in complying with the consular notification and access provisions of the Vienna Convention, including maintaining strong relations with Mexico.

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B. CHILDREN

1. Adoption

In April 2018, the State Department released its Annual Report to Congress on Intercountry Adoptions. The Fiscal Year 2017 Annual Report, as well as past annual reports, can be found at <https://travel.state.gov/content/adoptionsabroad/en/about-us/publications.html>. The report includes several tables showing numbers of intercountry adoptions by country during fiscal year 2017, average times to complete adoptions, and median fees charged by adoption service providers.

Suzanne Lawrence, Special Advisor for Children's Issues at the U.S. Department of State, provided a special briefing on March 23, 2018 on the release of the Fiscal Year 2017 Annual Report on Intercountry Adoption. That briefing is excerpted below and available at <https://www.state.gov/suzanne-lawrence-special-advisor-for-childrens-issues-on-the-release-of-the-fiscal-year-2017-annual-report-on-intercountry-adoption/>.

* * * *

² Cesar Roberto Fierro Reyna (El Paso County), Ignacio Gomez (El Paso County), Felix Rocha Diaz (Harris County), Juan Carlos Alvarez Banda (Harris County), and Ramiro Rubi Ibarra (McLennan County).

In addition to the Intercountry Adoption Act of 2000, the United States became a party to the Hague Convention on Intercountry Adoption in 2008. And those are two pieces of legislation that guide us each and every day—that, and the really important goal of ensuring that every child deserves the security and love of a permanent family. It's ... inspiring, but we are also inspired by the adoptions that we help complete every day. And that inspiration further fuels our dedication as we work with the foreign countries, with the adoption service providers, with families, and with the broader adoption community.

We know that we owe it to all of those people—especially to the adoptive families and to the children who are being adopted, as well as the birth parents—that intercountry adoptions are ethical and transparent. And what that means, really, in a practical sense, is that we're out there each and every day, here in Washington and around the world through our embassies and consulates, advocating for children and putting in place safeguards so that we can protect against any abuses of the intercountry adoption system.

I know you've received a copy of the report, and maybe you've had some time to look at it. I thought it would be helpful to provide a little bit of context and also to focus on three areas that I thought would be of most interest.

So let's start with the numbers. You've seen that the report has a lot of numbers in it. The overall number of adoptions to the United States in Fiscal Year 2017 was 4,714. And that does represent a decline of 658 from the previous year. And again, to provide some context for this year's numbers, I think the most important thing to note is that this is a decrease in intercountry adoptions, which is a global trend over the last decade. Other receiving countries report similar reductions in the number of children adopted internationally.

I think another thing that is ... helpful in looking at the numbers is that even with those lower overall numbers due to the global decline, U.S. families consistently provide homes to 50 percent of the adopted children who are placed internationally. I think that speaks a lot to Americans and the families that are continuing to open their hearts and their homes to children in special situations. The United States actually receives the most special needs children, the most sibling groups, and the most children over age nine, and that's worldwide.

The other thing I would say about the numbers is that when you look at that decline in 2017, it was primarily driven by internal changes in just two countries. The first is China, and the reason for that is something that I'm sure many of you are aware of, that there has been a growing, a rising middle class in China. And so we've seen an increase in domestic adoptions, and so that would explain China's role in that decline. And the other country that represents the primary drive behind the reduction in last year's report is that... in the Democratic Republic of Congo, and that's really an internal decision that was made there where the country actually no longer issues exit permits to adopted Congolese children who are seeking to depart the country with their adoptive parents. So I hope that's been helpful in understanding all those numbers and drawing out what we think are some of the more significant facts.

The other thing that I would point out are the barriers. What are the barriers to intercountry adoption? And when we look at what those barriers are, we find the most common one is that, unfortunately, we do continue to hear from families who are harmed by illicit and illegal practices in intercountry adoption. Sadly, even one case of corruption or fraud reduces confidence in the system. And you know these are families that just want to give a child a loving home, but unfortunately, they would lose that chance because of corrupt or unethical practices. We work together with these families to identify and address the vulnerabilities, and then in the work that we carry out every day, we look to provide appropriate monitoring and oversight of

adoption service providers, and that's really to protect these families' children, both birth and adoptive, and again, to preserve the future of intercountry adoption.

The last thing that I wanted to draw out from the report is really what can we do? What does the Department do? What is our response to these barriers? Because I think this is an area where the Department of State can and does make a difference. We take very seriously our legal mandate to ensure appropriate monitoring and oversight of these adoption agencies and service providers so that we can preserve the future of intercountry adoption. And we work very closely with Congress to ensure that we fulfill our obligations under the law.

* * * *

... The report does give some information about children who are adopted from the United States, so you may have seen that statistic in Fiscal Year 2017. It's a small number, 83 children, that were adopted from the United States and they went to seven different countries—the vast majority to Canada, the next group to the Netherlands, and then the third ranking there would be Ireland.

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...[W]e want to ensure that the practice of intercountry adoption is ethical and sustainable. And so these are really the cornerstones of what we're working towards. ...[L]egally we have the obligation to provide oversight for the accrediting entity that works with adoption service providers to monitor their activities. All of that is part of a long-term plan to ensure the viability of intercountry adoptions, again by ensuring the system is ethical and transparent. That benefits adoption service providers, it benefits the adoption community, it benefits children and families here in the United States and internationally.

As I mentioned earlier, the ability to work with foreign governments who are sending countries is determined by their confidence in what we do. And that's why we need to build that confidence through our monitoring and oversight. If we don't do that, they can consider suspending placement of children with U.S. families or even closing intercountry adoptions altogether. Because ... there were concerns about the move to a new accrediting entity, we have had numerous calls with stakeholders, with adoption service providers, with adoption advocacy groups, with members of Congress, with their staffers. So we have done a lot of information. They have had the opportunity to talk to the leadership of the new accrediting entity. And you might be interested in a message from our assistant secretary that went onto our website where he actually goes into some great detail about the designation of the accrediting entity and what they do, which is supervision of the adoption service providers. But there is a fairly lengthy letter there from him that I think would go to some of the concerns that you have pointed out.

* * * *

2. Abduction

a. Annual Reports

As described in *Digest 2014* at 71, the International Child Abduction Prevention and Return Act (“ICAPRA”), signed into law on August 8, 2014, increased the State Department’s annual Congressional reporting requirements pertaining to countries’ efforts to resolve international parental child abduction cases. In accordance with ICAPRA, the Department submits an Annual Report on International Parental Child Abduction to Congress each year and a report to Congress ninety days thereafter on the actions taken toward those countries cited in the Annual Report for demonstrating a pattern of noncompliance. See International Parental Child Abduction page of the State Department Bureau of Consular Affairs, <https://travel.state.gov/content/childabduction/en/legal/compliance.html>.

Annual reports on international child abduction are available at <https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/for-providers/legal-reports-and-data/reported-cases.html>.

b. Hague Abduction Convention

On March 1, 2018, the 1980 Hague Convention on the Civil Aspects of International Child Abduction entered into force between the United States and Armenia. See March 7, 2018 State Department media note, available at <https://www.state.gov/united-states-armenia-hague-convention-on-international-child-abduction/>. The United States had 77 partners under the Convention as of March 2018. As explained in the March 7, 2018 media note:

The Convention provides a civil law mechanism for parents seeking the return of children who have been wrongfully removed from or retained outside their country of habitual residence in violation of custodial rights. Parents seeking access to children residing in treaty partner countries may also invoke the Convention. The Convention is important because it establishes an internationally recognized legal framework to resolve international parental child abduction cases. The Convention does not address who should have custody of the child; rather it addresses where issues of child custody should be decided.

Cross References

Children, **Chapter 6.C**

Enhanced consular immunities, **Chapter 10.D.3**