

AVENA & OTHER MEXICAN NATIONALS: THE LITMUS FOR *LaGRAND* & THE FUTURE OF CONSULAR RIGHTS IN THE UNITED STATES

Good foreign policy says you want your neighborhood to be peaceful and prosperous. A good foreign policy starts with being friends with your neighbors . . . and we're very good friends with our neighbors to the South, the Mexicanos.¹

INTRODUCTION

Mexican national César Roberto Fierro Reyna has been on death row in Texas for the past two decades.² Fierro may soon be executed³ despite the discovery of compelling evidence found, in part, by the Mexican government that he did not commit the murder for which he was sentenced.⁴ U.S. officials never notified the Mexican government of his detention, and Mexican officials only learned of the whereabouts of their citizen when they later received a letter from Fierro's mother.⁵ Because of the delay, Mexican consular officials did not discover strong evidence that police coerced Fierro's written confession until more than a decade after a jury used it to sentence Fierro to death.⁶

1. Mexican President Vincente Fox, Remarks to University of Toledo Faculty, Students and Community at University of Toledo's Savage Hall (Sep. 6, 2001), at <http://www.whitehouse.gov/news/releases/2001/09/20010906-11.html>.

2. See *Fierro v. Cockrell*, 294 F.3d 674, 676-79 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 1621 (2003).

3. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. 128 (Feb. 5) [hereinafter *Avena Order*]; Case Concerning the Vienna Convention on Consular Relations (Mex. v. U.S.), Application Instituting Proceedings Submitted by the Government of the United Mexican States (Jan. 9, 2003) ¶ 168, at 26 [hereinafter Application] (noting that Fierro has exhausted his primary appeals and the State of Texas may schedule his execution at any time). Fierro's latest petition for writ of *certiorari* was recently denied. See *Fierro*, 294 F.3d 674, *cert. denied*, 123 S. Ct. 1621 (2003). Mexico had filed an *amicus curiae* brief in support of Fierro's petition. *Id.*

4. Death Penalty Information Center, *Mexican Embassy Raises Questions of Innocence, Fairness in Case of Cesar Roberto Fierro*, at <http://www.deathpenaltyinfo.org> (last visited Apr. 9, 2003) [hereinafter DPIC]; *A Texas Tragedy: the Shocking Case of César Fierro*, at <http://www.cesarfierro.com/summary.htm> (last visited Apr. 9, 2003) [hereinafter *A Texas Tragedy*].

5. *A Texas Tragedy*, *supra* note 4; Application, *supra* note 3, ¶ 166, at 26.

6. See generally *A Texas Tragedy*, *supra* note 4; see *infra* notes 146 *et seq.* and accompanying text for further discussion regarding Fierro.

The Vienna Convention on Consular Relations⁷ entitles Fierro, as a Mexican national, to be notified by police that he may contact his consulate if arrested in a country that is a party to the Convention.⁸ Due to the likely differences in language, culture and legal systems, the treaty “embodies a presumption of prejudice when a foreign national is arrested.”⁹ The U.S. joined the Vienna Convention over thirty years ago,¹⁰ and understands and enjoys the protection the treaty provides to its citizens arrested abroad.¹¹ Indeed, the U.S. Department of State emphatically describes its mission to assist U.S. citizens arrested abroad as “essential.”¹²

In 1979 upon arrest in El Paso, Texas, César Fierro was never informed of his rights to contact the Mexican consulate.¹³ Without notification, Fierro could not avail himself of the important services only consulates can provide to protect their nationals in criminal matters.¹⁴ Consulates commonly have

7. Vienna Convention on Consular Relations and Optional Protocol on Disputes, *done* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, art. 36 [hereinafter Convention].

8. *Id.* art. 36, ¶ 1(b).

9. Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 604 (1997).

10. Convention, *supra* note 7 (entered into force for the U.S. on Dec. 24, 1969).

11. See U.S. Department of State, *Assistance to U.S. Citizens Arrested Abroad*, available at <http://travel.state.gov/arrest.html> (last visited Apr. 9, 2003) [hereinafter *Assistance to U.S. Citizens*] (“We stand ready to assist incarcerated citizens . . . [we] monitor conditions in foreign prisons and immediately protest allegations of abuse against American prisoners. We work with prison officials to ensure treatment consistent with internationally recognized standards of human rights and to ensure that Americans are afforded due process under local laws.”) This document references Article 36 of the Vienna Convention and its provision for unimpeded access between U.S. consular officers and U.S. citizens when in treaty member countries, as well as Bilateral Consular Conventions between the U.S. and some nations. *Id.* Significantly, the State Department alludes to consular notification and access to exist based on comity and diplomatic relations where no treaty is in force. See *id.*

12. *Id.* “Consular services include: *Upon initial notification of arrest*: - visiting the prisoner as soon as possible. . . - providing a list of local attorneys . . . - providing information about judicial procedures in the foreign country; - notifying family and/or friends . . . - relaying requests to family and friends for money or other aid . . .” *Id.* In addition, this document provides a comprehensive list of “on-going” and “discretionary” support to incarcerated Americans. *Id.*

13. DPIC, *supra* note 4; *A Texas Tragedy*, *supra* note 4; Application, *supra* note 3, at 26, ¶ 165.

14. Application, *supra* note 3, ¶ 165, at 26; see *A Texas Tragedy*, *supra* note 4 (noting Mexican officials’ belief that prompt notification of Fierro’s detention would have led them to intervene in the case and, based on their abilities in Mexico, uncover later-discovered evidence of coercion by police that allegedly led to Fierro’s confession and ultimately his conviction and sentence); *Fierro*, 294 F.3d at 676 (noting that the state habeas court found that the detective had presented false testimony regarding the circumstances of Fierro’s confession); see also *Assistance to U.S. Citizens*, *supra* note 11 (listing the various services provided by the State Department to Americans incarcerated abroad); Application, *supra* note 3, ¶¶ 20-26, at 4-6. Mexico asserts its foreign service officers’ provision of similar consular services for its nationals by operation of its law, such as protecting “the dignity and fundamental rights of Mexicans abroad in accordance with international law,” consular duties “to notify the Foreign Ministry of Mexico as to the plight of Mexicans abroad,” protect the rights of nationals abroad, visit detainees and provide representation. *Id.*

access to witnesses and evidence essential to a foreigner's defense at trial and crucial to sentencing, whereas a local attorney, especially a public attorney, may not have the time or resources to obtain this information.¹⁵ In Fierro's case, communication with his consulate and the evidence it could have procured may have made the difference between freedom and twenty years in jail.¹⁶ More significantly, evidence derived from consular services could have prevented Fierro's death sentence and his eventual execution.¹⁷

Fierro is just one of the fifty-four Mexicans currently on death row in the United States, none of whom were provided with consular notification.¹⁸ The failure of law enforcement to abide by the Vienna Convention's notification requirements prevented these persons from exercising their right to request that police notify their consulate of their detentions.¹⁹ Furthermore, efforts by Mexico and the detained nationals to seek redress for violations of the Convention have failed in U.S. political and judicial contexts.²⁰ Consequently, Mexico has put the matter before the International Court of Justice ("I.C.J.")²¹ against the U.S. for its conceded "systemic violation"²² of the treaty in not informing detained Mexicans or their consulates of their right to communicate.²³

Many countries and their nationals convicted in the U.S. share the frustrations felt by Mexico and its nationals on U.S. death row.²⁴ Such countries

15. See *A Texas Tragedy*, *supra* note 4; see also Margaret Mendenhall, *A Case for Consular Notification: Treaty Obligation as a Matter of Life or Death*, 8 SW. J.L. & TRADE AM. 335, 346-48 (noting that consular officers can generally (1) provide comfort and communication through visits and humanitarian aid to detained persons; (2) provide for an adequate defense by helping to "obtain and certify documents [and evidence] from the home country;" and (3) procure effective defense counsel where a public attorney may be inexperienced, which is especially important in capital cases.) Mendenhall also describes the case study of a Mr. Wamba, Argentine consul general to the U.S., who intervened in the capital trial of Victor Hugo Saldano to replace Saldano's counsel because he did not object to an expert's testimony that cited race as a factor to be considered by the jury when determining the defendant's presentation of future danger to society. *Id.* at 354-55. Mendenhall argues Wamba's efforts directly resulted in saving Saldano from being executed and indirectly led to a Texas statutory change eliminating race as a legitimate factor in sentencing. *Id.*

16. See *A Texas Tragedy*, *supra* note 4.

17. *Id.*

18. See Application, *supra* note 3.

19. *Id.*

20. Application, *supra* note 3, ¶¶ 28-64, at 6-13, ¶¶ 67-267, at 13-40 (briefly reporting on the U.S. procedural history of each of the fifty-four *Avena* Mexican subjects on death row).

21. The I.C.J. serves as the main judicial arm of the United Nations to settle disputes falling under its limited jurisdiction between nations. Pieter H.F. Bekker, *ASIL Insights: World Court Consular Notification and Death Penalty Challenge Revisited: Mexico v. United States*, The American Society of International Law, available at <http://www.asil.org/insights/insigh95.htm> (Jan. 2003).

22. *Id.*

23. Application, *supra* note 3, ¶ 1, at 1, ¶ 280, at 43-44.

24. See Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 99 (Apr. 9) [hereinafter *Bread Order*]; see also Case Concerning the Vienna Convention on Consular Relations (F.R.G. v. U.S.), 1999 I.C.J. 104 (Mar. 3) [hereinafter *LaGrand*].

and their citizens have sought and failed to realize redress in U.S. courts for violations of the Vienna Convention, and their quest for international adjudication is not new.²⁵ However, prior I.C.J. cases have not resulted in relief for the foreign nationals held in the U.S.²⁶ Indeed, in the face of an explicit I.C.J. “Provisional Measures Orders” (“PMO”)²⁷ to stay executions because of alleged (and often conceded) Vienna violations, the executions have proceeded.²⁸ In the case of Karl and Walter LaGrand, two German brothers convicted of murder in Arizona, Arizona executed Walter in defiance of an I.C.J. order of stay.²⁹ Afterward, Germany maintained its action, seeking a final judgment from the I.C.J. regarding its citizens’ Vienna Convention rights in the U.S.³⁰ *LaGrand* resulted in an unprecedented decision against the U.S. that provided not only some answers as to the status of rights and remedies under the Vienna Convention, but many other unanswered questions as well.³¹

U.S. Citizenship and Immigration Services³² reports arrests of well over one million Mexicans by U.S. authorities in a recent year, representing over ninety-five percent of foreign nationals arrested in the U.S.³³ Virtually none

Order]; *La Grand Case (F.R.G. v. U.S.)*, Summary of the Judgment (June 27, 2001) [hereinafter *LaGrand Judgment*].

25. See *Breard Order, LaGrand Order and LaGrand Judgment*, *supra* note 24.

26. See *Breard v. Greene*, 523 U.S. 371, 378 (1998); *F.R.G. v. U.S.*, 526 U.S. 111-112 (1999). The federal government and judiciary declined to be bound by the *Breard* and *LaGrand* Orders which directed the U.S. to “take all measures at its disposal to ensure that” the foreign subjects in question were not executed prior to a final I.C.J. judgment in matter. *Breard Order*, *supra* note 24, ¶ 41; *LaGrand Order*, *supra* note 24, ¶ 29; see also discussion *infra* Part II.

27. Provisional measures orders are the I.C.J.’s functional equivalent of a preliminary injunction to bar the act of a party in order to prevent harm to another party’s rights prior to a final ruling in a case.

28. See *Bekker*, *supra* note 21.

29. Amnesty International, *United States of America: A Time for Action—Protecting the Consular Rights of Foreign Nationals Facing the Death Penalty*, AI Index: AMR 51/106/2001 (Aug. 2001) [hereinafter *AI Report*]. Arizona executed the other *LaGrand* brother, Karl Lagrand, prior to the I.C.J. order. *Id.*

30. *LaGrand Judgment*, *supra* note 24.

31. See discussion *infra* Parts II and IV.

32. U.S. Citizenship and Immigration Services (USCIS) replaced the functions of the former Immigration and Naturalization Service (INS) as of March 1, 2003. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *THIS IS USCIS*, at <http://www.uscis.gov/graphics/aboutus/thisimm/index.htm> (last visited Nov. 11, 2003).

33. INS STATISTICS DIV., U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *IMMIGRATION FACT SHEET 1996* (Oct. 1997), at <http://www.uscis.gov/graphics/shared/aboutus/statistics/110.htm> and <http://uscis.gov/graphics/shared/aboutus/statistics/299.htm> (reporting 1,598,016 Mexicans apprehended among an all-countries total of 1,649,986 persons, which is ~96.9 percent); see also U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *EXECUTIVE SUMMARY: ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000*, at <http://uscis.gov/graphics/shared/aboutus/statistics/2000ExecSumm.pdf> (Jan. 31, 2003) (“Mexico is the largest source country for unauthorized immigration to the United States. The estimated unauthorized resident population from Mexico [was about] . . . 4.8 million in January 2000 The new estimates are based

of these often uneducated and non-English speaking persons³⁴ receive notice of their consular rights, and certainly not “without delay”³⁵ as required by the Vienna Convention.³⁶ The U.S. judicial and political responses to an I.C.J. order of stay for executions³⁷ and any future judgment in Mexico’s *Avena* case will ultimately reveal the effectiveness of the *LaGrand* decision in providing relief for foreign nationals, the overwhelming majority of which are Mexicans who were (and will be) unduly deprived of consular notification and access rights by U.S. officials.³⁸

Part I of this comment reviews the applicable law of consular access by detained foreign nationals as provided by the Vienna Convention. Part II details the two prior I.C.J. cases concerning U.S. violations of the Vienna Convention that provide the legal backdrop for the analysis of *Avena*. Part III provides the factual background of U.S. violations and the arguments of both state parties in *Avena*, and compares Mexico’s own compliance with the Vienna Convention to U.S. practice. Part IV questions the implications of the current PMOs and any future *Avena*-like judgments against the U.S. in light of precedent. The comment concludes with recommendations for legal and non-legal action to resolve the problem of consular notification unique to Mexicans arrested in the United States.

ary 2000 The new estimates are based primarily on the foreign-born population counted in the 2000 Census and annual INS statistics (immigrants admitted, deportable aliens removed, and nonimmigrant residents admitted”). These statistics provide evidence of the magnitude of the Mexican population in the U.S. that therefore become a majority of the foreign nationals arrested here. *Id.*

34. See Patrick Timmons, *La Abogada de Mexico: Sandra Babcock’s Battle Against the Death Penalty*, THE TEX. OBSERVER, October 25, 2002, available at <http://www.texasobserver.org> (last visited Nov. 22, 2003).

[The] profile of the Mexican national who finds himself in jail charged with a capital offense is somebody who has certainly not graduated from high school, has as little as a first-grade education, and who often has some form of neurological impairments due to exposure to pesticides and head injuries. There is an extraordinarily high incidence of head injuries amongst Mexican nationals who grew up in parts of rural Mexico. Often Mexican nationals accused of capital crimes don’t speak English and are inherently more vulnerable than a U.S. national for all these reasons I’ve mentioned. They don’t understand the legal system, they don’t trust their lawyers because most of their lawyers don’t speak Spanish. So they really need the help of the consulate to overcome all of those barriers.

Id. Babcock directs the Mexican government-funded Mexican Legal Capital Assistance Program which has provided legal aid to Mexican nationals charged with capital crimes or on death row in the U.S. since September 2000. *Id.*; see also Application, *supra* note 3, ¶¶ 25-27, at 5-6.

35. Convention, *supra* note 7, art. 36(1)(b).

36. See AI Report, *supra* note 29, at 4; see also Application, *supra* note 3, ¶ 268-279, at 40-43 (describing the “pattern and practice of violations” by the U.S.).

37. *Avena Order*, *supra* note 3 (Mexico has already requested and received a provisional measures order from the I.C.J.).

38. Timmons, *supra* note 34 (140 Mexican nationals await capital trials in the U.S. in addition to the 54 named in *Avena* who are currently on death row.).

I. CONSULAR NOTIFICATION AND ACCESS RIGHTS UNDER THE VIENNA CONVENTION

A. History

The 1963 Vienna Convention on Consular Relations generally governs consular issues *de jure* between the United States, Mexico and the majority of the world's nations.³⁹ States have traditionally appreciated a foreign consulate's function to communicate with and provide protection to its nationals.⁴⁰ Prior to and since the entry into force of the Vienna Convention, the U.S. entered bilateral and multilateral treaties concerning consular relations with many countries.⁴¹ In 1942, Mexico and the U.S. promulgated the Mexico–United States Consular Convention.⁴² Many of these pre-Vienna treaties with the U.S. provided for notice to the appropriate consulate of its national's detention; mandatory forwarding of any communication between the consul and the detainee; and permission for the consul to visit, privately communicate and arrange for legal representation for the detainee.⁴³

Since the Vienna Convention, Mexico and the U.S. have signed a Memorandum of Understanding on Consular Protection of Mexican and United States Nationals.⁴⁴ The Memorandum mirrors the Vienna Convention by providing for notification of detained foreign nationals of their right to consular access, the right to contact consular officers, and the facilitation of communication between consuls and their nationals.⁴⁵ Similar to the Convention, the Memorandum provides for meeting places that permit confidential interviews between consuls and nationals, and allows consular officers to be

39. Convention, *supra* note 7. Since entry into force on March 19, 1967, 165 countries have become signatories. U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE, AND OTHER LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM, at Part 5 n.1, at http://travel.state.gov/consul_notify.html (last visited Apr. 5, 2003) [hereinafter CONSULAR NOTIFICATION].

40. Howard S. Schiffman, *Breard and Beyond: The Status of Consular Notification and Access under the Vienna Convention*, 8 CARDOZO J. INT'L & COMP. L. 27, 32 (2000).

41. *See, e.g.*, Convention Relating to Consular Officers, June 6, 1951, U.S.-U.K.-Ir., 122 U.N.T.S. 1953, 2174 (mutually covering consular relations between the U.S. and Britain and its dependencies and many of the former British colony States); Consular Convention, June 1, 1964, 19 U.S.T. 5018 (mutually covering consular relations between the U.S. and the former Soviet republics); CONSULAR NOTIFICATION, *supra* note 39 (providing a comprehensive list of bilateral and multilateral consular relations treaties to which the U.S. is a party, and including a table of those states party to the Vienna Convention).

42. Consular Convention Between the United States of America and the United Mexican States, Aug. 12, 1942, U.S.-Mex., art. 6, 57 Stat. 800.

43. Schiffman, *supra* note 40, at 32.

44. Memorandum of Understanding on Consular Protection of Mexican and United States Nationals (May 7, 1996), available at http://www.migracioninternacional.com/docum/memora_i.html (last visited Sep. 29, 2003).

45. *Id.*

present at judicial proceedings.⁴⁶ While not legally binding, the Memorandum encourages good faith compliance with consular access rights by Mexico and the U.S. as to the foreign country's nationals.⁴⁷

B. Purpose

The Vienna Convention typifies the purpose of consular relations agreements. The nations that adopted the Convention "believ[ed] that an international convention on consular relations, privileges and immunities would . . . contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems. . . ."⁴⁸

Article 5 of the Vienna Convention defines many consular functions, including "helping and assisting nationals"⁴⁹ of the foreign state. Because States recognize that "[o]ne of the most important responsibilities of the consul is to protect the nationals of the sending state,"⁵⁰ the Convention provides for unimpeded communication between the detained foreign national and his consul.⁵¹ Indeed, the U.S. itself emphasized the essential function and importance of open communication between consuls and detained nationals when it asserted their rights in *United States v. Iran*, its own prior case at the I.C.J.⁵²

C. Article 36

Article 36 of the Vienna Convention, entitled "Communication and Contact With Nationals of the Sending State," provides for reciprocal communication and access between foreign consular officers and their nationals in the receiving state.⁵³ Paragraph 1(b) imposes duties on receiving state officials. It provides that receiving state officials shall inform the relevant con-

46. *Id.*

47. CONSULAR NOTIFICATION, *supra* note 39.

48. Application, *supra* note 3, at 2 (discussing the preamble to the Convention, *supra* note 7).

49. William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 264 (1998).

50. *Id.* at 264 (The Vienna Convention uses the term "sending State" to refer to the nation from which the foreign national is a citizen while present in the "receiving State").

51. Convention, *supra* note 7, at art. 36.

52. See *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. Pleadings at 174 ("[T]he consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication . . . is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations. . . .").

53. Convention, *supra* note 7, art. 36(1) ("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. . . .").

sulate upon the request of the detained foreign national “without delay.”⁵⁴ Paragraph 1(b) also directs receiving state officials to forward “any communication addressed to the consular post” by the detained person, again “without delay.”⁵⁵ Finally, receiving state officials must inform the detainee, “without delay,” of his or her rights to communicate with and have access to the consulate.⁵⁶

Article 36, paragraph 1(c) discusses the rights of consular officers. It empowers consular officers to visit, converse and correspond with a detained national and to aid in procuring legal counsel.⁵⁷ Consular officers retain these visitation and communication rights with the detained national both before and after any conviction.⁵⁸

Finally, paragraph 2 mandates that consular rights provided in Article 36(1) be exercised in accordance with the domestic laws of the receiving state.⁵⁹ The domestic law of the receiving state, however, “must enable full effect to be given to the purposes for which the rights accorded under [Article 36] are intended.”⁶⁰

54. *Id.* art. 36(1)(b). The text of the article states:

[I]f 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 subparagraph. . . .

Id.

55. *Id.*

56. *Id.*

57. *Id.* art. 36(1)(c). The text of the article states:

[C]onsular officers 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.

Id.

58. *Id.*

59. *Id.* art. 36(2). The text of the article states:

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.

Id.

60. *Id.*

D. The Jurisdiction & Provisional Measures Order Power of the I.C.J.

Mexico brings its current action against the U.S. at the I.C.J. under the Optional Protocol Concerning the Compulsory Settlement of Disputes.⁶¹ The Optional Protocol supplemented the Vienna Convention to give compulsory jurisdiction to the I.C.J. over state “disputes arising out of the interpretation or application of the Convention.”⁶²

The power of the I.C.J. to issue PMOs stems from Article 41 of the I.C.J. statute. Article 41 provides that the Court “shall have the power to indicate . . . any provisional measures which ought to be taken to preserve the respective rights of either party.”⁶³ I.C.J. PMOs serve to maintain the status quo so as to protect state parties’ rights that might otherwise be irreparably harmed.⁶⁴

The U.S.’s execution of foreign nationals despite I.C.J. orders to the contrary creates a major source of contention between the United States and foreign states.⁶⁵ In addition, the treaty’s silence as to a remedy for violations creates much of the contemporary controversy surrounding foreign capital defendants.⁶⁶ Part IV, *infra*, considers such issues in light of the I.C.J. cases, discussed below, which addressed the U.S.’s Vienna Convention violations.

II. PRECEDENT FOR *AVENA*

The Republic of Paraguay and the Federal Republic of Germany brought the U.S. before the I.C.J. for violations of the Vienna Convention in the *Breard* and *LaGrand* cases, respectively.⁶⁷ These two important cases provide the legal context for *Avena* and its implications in the U.S.

61. Vienna Convention on Consular Relations and Optional Protocol on Disputes, *done* Apr. 24, 1963, Optional Protocol Concerning the Compulsory Settlement of Disputes, 21 U.S.T. 77, 596 U.N.T.S. 261, art. I [hereinafter Optional Protocol]. Note that the Optional Protocol’s provision for compulsory jurisdiction of the I.C.J. for Vienna dispute subjects the U.S. to I.C.J. jurisdiction in *Avena* despite the U.S.’s withdrawal of its submission to the statute of the I.C.J.

62. Optional Protocol, *supra* note 61, at art. 1.

63. Statute of the International Court of Justice, June 26, 1945, chapt. III, art. 41, ¶ 1, 59 Stat. 1005, 1062; *see also* Optional Protocol, *supra* note 61.

64. Bekker, *supra* note 21.

65. *Mexico’s President Snubs Bush*, CBSNEWS.com, Aug. 15, 2002, at <http://www.cbsnews.com/stories/2002/08/15/deathpenalty/main518772.html> (last visited Oct. 8, 2003); *Breard* Order, *supra* note 24; *LaGrand* Order *supra* note 24; *LaGrand* Judgment, *supra* note 24; Application, *supra* note 3.

66. The Vienna Convention provides consular communications rights but no remedy in the even the rights are violated. Mexico seeks a meaningful remedy at law that where the U.S. violates the Convention; the U.S. relies mainly on the doctrine of procedural default to bar Vienna claims not brought at trial. *See* Application, *supra* note 3, ¶ 281, at 44.

67. *Breard* Order, *supra* note 24; *LaGrand* Order, *supra* note 24; *LaGrand* Judgment, *supra* note 24.

A. Angel Breard

In 1993, a Virginia jury convicted Paraguayan national Angel Francisco Breard of attempted rape and murder.⁶⁸ Less than two weeks before his execution, scheduled on April 14, 1998, Paraguay sought relief before the I.C.J., claiming the U.S. violated the Vienna Convention by not advising Breard of his consular access rights upon arrest or at any time thereafter.⁶⁹ Paraguay learned of Breard's conviction and detention in 1996 on its own accord, and without notification from U.S. authorities.⁷⁰ Upon discovering Breard's whereabouts, Paraguay instituted proceedings before U.S. federal courts seeking to commute Breard's death sentence based on the Vienna claim.⁷¹

Breard filed federal *habeas corpus* petitions on his own behalf, which were comprised of claims under the Vienna Convention.⁷² The District Court for the Eastern District of Virginia ruled the claim was procedurally barred for not having been brought at trial, and the Fourth Circuit Court of Appeals affirmed.⁷³ Additionally, these same courts denied Paraguay's actions for relief.⁷⁴ Both Breard and Paraguay then petitioned for writs of *certiorari* before the Supreme Court, which was ultimately granted.⁷⁵

Prior to the Supreme Court ruling, Paraguay asked the I.C.J. to direct the U.S., via a PMO, to stay Breard's execution pending a final decision by the I.C.J.⁷⁶ The I.C.J. found Paraguay had established a *prima facie* case that urgently required it to direct the U.S. to prevent the pending execution.⁷⁷ In its April 9, 1998 Order, the I.C.J. unanimously ruled⁷⁸ that the U.S. "should

68. *Breard v. Greene*, 523 U.S. 371, 373 (1998).

69. *Breard Order*, *supra* note 24, ¶ 2.

70. *Id.*

71. *Id.* ¶ 3.

72. *Breard Order*, *supra* note 24, ¶ 3; *Breard*, 523 U.S. at 373.

73. *Breard Order*, *supra* note 24, ¶ 3; *Breard*, 523 U.S. at 373 (citing *Breard v. Netherland*, 949 F. Supp. 1255, 1266 (E.D. Va. 1996); *Breard v. Pruett*, 134 F.3d 615, 620 (1998)).

74. *Breard*, 523 U.S. at 374 (citing *Republic of Paraguay, v. Allen*, 949 F. Supp. 1269, 1272-73 (E.D. Va. 1996); *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998)).

75. *Breard*, 523 U.S. at 373-74.

76. *Breard Order*, *supra* note 24, ¶ 9. Under normal circumstances, a state must fully exhaust all available domestic remedies before seeking relief from the I.C.J. In light of the scheduled execution, however, the I.C.J. accepted Paraguay's application and request for the indication of Provisional Measures.

77. *Id.* ¶¶ 23, 39.

78. *Id.* ¶ 41 (Declarations of three I.C.J. judges qualified the "unanimous" provisional measures order.); *see id.* at Declaration of President Schwebel (noting the U.S.'s apology to Paraguay and its efforts to avoid Vienna violations in the future, but that he voted for the Order recognizing the "incontestable urgency" of the matter, though with "disquiet" due to the limited briefing in the matter), Judge Abdul G. Koroma (voting for the Order but declaring himself "[t]orn" as to the propriety of the grant in light of respect due to the sovereignty of the U.S. criminal justice system's conviction of Breard), and Judge Shigeru Oda (voting in favor of the Order for "humanitarian reasons," but arguing that the uncontested U.S. violation of the Vienna Convention removed any dispute; that "[t]he Court does not have jurisdiction to decide matters relating to capital punishment and its execution, and should not intervene in such

take all measures at its disposal” to stall Breard’s execution pending the I.C.J.’s final judgment in the matter.⁷⁹

Five days later, on the day of the execution, the Supreme Court jointly denied both Breard’s and Paraguay’s petitions.⁸⁰ The Court first indicated that Breard procedurally defaulted his Article 36 claim for not having raised the issue at trial.⁸¹ Despite the call of the Vienna Convention that domestic law “must enable full effect to be given to the purposes for which the rights accorded” under Article 36,⁸² the Court held that international law clearly mandated that “the procedural rules of the forum State govern the implementation of the treaty in that State.”⁸³

Breard’s claim also failed under the “last-in-time” doctrine, whereby a statute enacted subsequent in time to a treaty, renders inconsistent treaty provisions null.⁸⁴ Congress passed the Antiterrorism and Effective Death Penalty Act (“AEDPA”) in 1996 that supported the doctrine of procedural default for *habeas* petitions. Under AEDPA, a petitioner alleging a treaty violation will not be provided an evidentiary hearing when the claimant failed to raise the allegation in state court.⁸⁵ Thus, because assertion of Vienna violations was subject to this “last-in-time” rule, the court barred Breard’s Article 36 claim.⁸⁶

Regarding prejudice, the court found Breard’s claim, that had he been permitted consular access he would have accepted the State’s offer to forgo the death penalty in return for a plea of guilty “speculative.”⁸⁷ Additionally, the court denied Paraguay’s claims based on a lack of a private right of action for a foreign state asserting Vienna Convention violations.⁸⁸ It found that the sovereign immunity clause within the Eleventh Amendment to the U.S. Constitution barred Paraguay’s suit;⁸⁹ that no consequences continued for the

matters[;]” that the U.S. apology and promise to Paraguay to prevent future violations released the U.S. from responsibility; that consular contact for Breard would not have changed the judicial procedure against him; and that provisional measures are granted to prevent the imminent breach of rights, a risk not currently faced by Breard or Paraguay, making the current grant improper).

79. *Id.* ¶ 41.

80. *Breard*, 523 U.S. at 378.

81. *Id.* at 375.

82. Convention, *supra* note 7, art. 36(2).

83. *Breard*, 523 U.S. at 375.

84. *Id.* at 376 (citing *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)); *see also* *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (holding that where a federal statute and a treaty conflict, “the one last in date will control the other”).

85. *Id.* (citing 28 U.S.C.A. §§ 2254(a), (e)(2) (Supp. 1998)).

86. *Breard*, 523 U.S. at 376-77.

87. *Id.* at 377.

88. *Id.*

89. *Id.* (reciting the Eleventh “Amendment’s ‘fundamental principle’ that the States, in the absence of consent, are immune from suits brought against them . . . by a foreign State . . .” (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329-30 (1934))).

failure to notify the Paraguayan consulate,⁹⁰ and that neither Paraguay nor its Consul General had standing to raise due process civil rights claims.⁹¹ The Court also deferred to the Executive branch's role to conduct diplomatic discussion with Paraguay.⁹² Finally, it stated that the Governor of Virginia retained the discretion to await a final I.C.J. decision, but that "nothing in our existing case law allows us to make that choice for him."⁹³ On April 14, 1998, in the hours following the Supreme Court's *Breard* decision, Virginia Governor James S. Gilmore did not act to stop the execution.⁹⁴ The State of Virginia lethally injected Breard that same night.⁹⁵

The previous evening, Secretary of State Madeleine Albright had asked Governor Gilmore to stay Breard's execution pending an I.C.J. decision.⁹⁶ Albright's request contrasted with the U.S. Solicitor General's position in its *amicus* brief filed in *Paraguay v. Gilmore*⁹⁷ that urged the Supreme Court to deny relief to Paraguay. Interestingly, neither Albright nor the Solicitor deemed the I.C.J.'s order binding.⁹⁸ Paraguay withdrew its I.C.J. action later in 1998, preventing the I.C.J. from reaching a final judgment on the issue of consular rights.⁹⁹

In *Breard*, "the first case where an international tribunal . . . intervened in ongoing domestic proceedings and issued a ruling to postpone the execution of a criminal sentence,"¹⁰⁰ the Supreme Court found it "unfortunate that this matter comes before [the court] while proceedings are pending before the I.C.J. that might have been brought to that court earlier."¹⁰¹ Seemingly in response to the Supreme Court's concern for punctuality, Mexico brought

90. *Breard*, 523 U.S. at 377-78.

91. *Id.* at 378. Individuals rather than foreign nations have standing for civil rights claims such as deprivation of due process of law. 42 U.S.C. § 1983 (1994).

92. *Breard*, 523 U.S. at 378.

93. *Id. Cf.* Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT'L L. 679, 680 (1998) (deeming the I.C.J.'s Breard Order binding and that even if it wasn't, the federal government's foreign affairs power could compel the Supreme Court and Virginia to comply); Carlos Manuel Vasquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683 (1998) (questioning the Clinton administration's claim that the choice to comply lay solely with the Governor of Virginia).

94. Tenagne Tadesse, *The Breard Aftermath: Is the U.S. Listening?*, 8 SW. J.L. & TRADE AM. 423, 424 (2001).

95. Kelly Trainer, *The Vienna Convention on Consular Relations in the United States Courts*, 13 TRANSNAT'L LAW. 227, 248 (2000).

96. *Breard*, 523 U.S. at 378.

97. See Brief for the United States as Amicus Curiae, *Paraguay v. Gilmore* (No. 97-1390).

98. *Cf.* Henkin, *supra* note 93, at 680.

99. See Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 99 (Nov. 10).

100. William J. Aceves, *Application of the Vienna Convention on Consular Relations (Paraguay v. United States) Provisional Measures Order*, 92 AM. J. INT'L L. 517, 522 (1998).

101. *Breard*, 523 U.S. at 378.

Avena in advance of any definitively-scheduled executions of its nationals on death row, the majority of whom remain in state court on first instance appellate proceedings and likely will not face execution for several years.¹⁰²

B. Karl & Walter LaGrand

In 1984, Arizona convicted brothers Karl and Walter LaGrand for the murder of an employee during an unsuccessful bank robbery.¹⁰³ Law enforcement did not notify, upon arrest or anytime thereafter, either of the LaGrands, both German nationals, of their right to consular access.¹⁰⁴ However, in 1992, ten years after their arrest, the brothers contacted the German consulate at the advice of a third party.¹⁰⁵ Not until 1998 were the brothers formally notified of their right to speak with the German consulate.¹⁰⁶ By that date, the LaGrands had exhausted their appellate options in state court.¹⁰⁷ Germany then assisted the brothers in filing Vienna Convention claims, which failed for procedural default in the U.S. district and circuit courts.¹⁰⁸

Since 1992, Germany had accepted that Arizona did not know of the LaGrands' German nationality, despite Arizona having information indicating they were likely not U.S. citizens.¹⁰⁹ On February 23, 1999, the day before Karl's scheduled execution, an Arizona State attorney admitted that Arizona had known that the brothers were German since the arrest in 1982.¹¹⁰ Upon this revelation, and with the brothers' executions pending, Germany hastened to file an application before the I.C.J. based on Article 36 violations.¹¹¹

Arizona executed Karl as scheduled on February 24, 1999.¹¹² Germany filed its I.C.J. action roughly a week later on March 2, 1999, the day before Walter's scheduled execution.¹¹³ Germany sought a PMO to enjoin the U.S.

102. Application, *supra* note 3, ¶¶ 69-267, at 13-40 (providing the procedural status in U.S. Courts of the 54 *Avena* subjects).

103. Trainer, *supra* note 95, at 248.

104. *Id.* (recognizing that the U.S. conceded the violation of Article 36 as to the LaGrands); LaGrand Judgment, *supra* note 24, ¶¶ 37-42.

105. Jennifer Lynne Weinman, *The Clash Between U.S. Criminal Procedure and the Vienna Convention on Consular Relations: An Analysis of the International Court of Justice Decision in the LaGrand Case*, 17 AM. U. INT'L L. REV. 857, 867 (2002).

106. *Id.* at 867 n.52.

107. *Id.* at 868-69.

108. *Id.* at 870.

109. LaGrand Order, *supra* note 24, ¶ 3.

110. *Id.*

111. LaGrand Case (Ger. v. U.S.), 1999 I.C.J. 104, ¶ 5 (Mar. 2) [hereinafter *LaGrand Application*]. Germany filed its application with the I.C.J. within one week after learning of Arizona's knowledge that the LaGrands were German.

112. *Id.* ¶ 8.

113. *Id.* Prior to Arizona's admission that authorities were aware that the LaGrands were German nationals, Germany presumably waited to file their I.C.J. action as they determined

from executing Walter; for declaratory and compensatory relief; and satisfaction for Karl's prior execution.¹¹⁴ The I.C.J. unanimously¹¹⁵ granted Germany's request for a PMO on March 3, 1999 and directed the U.S. to "take all measures at its disposal" to prevent Walter's death.¹¹⁶ In light of the pending execution, the I.C.J. granted the request without hearing arguments from the U.S.¹¹⁷

Two hours before the execution,¹¹⁸ Germany asserted the I.C.J. order by filing motions at the Supreme Court to enjoin the U.S. and Arizona from executing Walter.¹¹⁹ The Supreme Court flatly rejected Germany's motions.¹²⁰ The Court disclaimed its original jurisdiction for cases affecting consuls because Walter did not fall into that category.¹²¹ It also rejected the motion against the U.S. based on sovereign immunity principles.¹²² The Court also held that, as in *Breard*, Arizona was immune from Germany's action based on the Eleventh Amendment, and the Vienna Convention did not support a foreign state's ability to assert a claim against an individual U.S. state.¹²³ Finally, the Court remarked on the "tardiness" of Germany's pleas in that the "action was filed within only two hours of a scheduled execution"¹²⁴

A few hours later, Arizona put Walter to death.¹²⁵ However, rather than dismiss the I.C.J. action, Germany maintained the action in order to obtain a final judgment. Germany asked the I.C.J. to find that the U.S. violated Article 36, and that the U.S. procedural default bar to Vienna claims was in breach of its treaty obligations.¹²⁶ Germany further asserted that the U.S. vio-

they did not have a claim against the U.S. for violations under the Vienna Convention, though the treaty does not discuss issues such as knowledge on the part of the receiving state.

114. *Id.* ¶ 15.

115. LaGrand Order, *supra* note 24, ¶ 29 (The Court voted unanimously in favor of the Order but not unequivocally); *Id.* at Separate Opinion of President Schwebel (voting in favor of the Order based on its substance, but with "profound reservations" regarding the procedure of both Germany's late filing yet arguing that exigency mandated issuance without hearing a U.S. rebuttal, and the Court's grant of the Order *ex parte* as potentially in violation of the Rules of the Court); *Id.* at Declaration of Judge Shigeru Oda (also voting in favor of the Order but "solely for humanitarian reasons" and "with great hesitation" because he felt that Germany's request did not accord with the "fundamental nature of provisional measures.").

116. *Id.* ¶ 29.

117. International Court of Justice, Press Release, *The Court Calls on the United States to Prevent the Execution of Walter LeGrand pending a Final Decision* (Mar. 3, 1999), at http://www.icj-cij.org/icjwww/ipresscom/iPress1999/ipresscom9909_igus_19990303.htm (last visited Nov. 19, 2003).

118. Federal Republic of Germany v. U.S., 526 U.S. 111, 112 (1999).

119. *Id.* at 111.

120. *Id.*

121. *Id.* at 112.

122. *Id.*

123. *Id.* at 112; *Breard*, 523 U.S. at 377

124. *F.R.G.*, 526 U.S. at 112.

125. Trainer, *supra* note 95, at 249; *see also F.R.G.*, 526 U.S. at 112.

126. LaGrand Judgment, *supra* note 24, ¶ 2.

lated the Order by executing Walter, that the U.S. must assure future compliance with the treaty, and provide a method of review and reconsideration for criminal cases comprising Vienna violations.¹²⁷

On June 27, 2001, the I.C.J. issued its judgment establishing its jurisdiction and the admissibility as to all of Germany's submissions.¹²⁸ The Court also found that the U.S. violated Article 36, paragraph 1(b), for not informing the LaGrands of their consular rights.¹²⁹ The Court found the initial breach of paragraph 1(b) further violated paragraphs 1(a) and (c) of Article 36, in that Germany's right to communicate, assist and visit the LaGrands under 1(a) and (c) was compromised between 1982 to 1992 due to the notification failure.¹³⁰ Significantly, the Court established that the LaGrands personally held rights under paragraph 1; thus, the U.S. breached its obligations to both Germany and to the brothers themselves.¹³¹ Further, the I.C.J. determined that the doctrine of procedural default did not per se violate Article 36, but that as applied in this case, it prevented Germany from assisting the LaGrands.¹³² Thus, procedural default in this instance violated the mandate that the receiving State give full effect to the treaty through its domestic law "by not permitting the review and reconsideration . . . of the convictions and sentences of the LaGrand brothers."¹³³

Reviewing U.S. efforts to comply with the Order to prevent Walter's execution, the I.C.J. considered the legal effect of its PMOs.¹³⁴ The I.C.J. deemed the object and purpose of its provisional measures article was to enable it to fulfill its basic function to settle international disputes via the power of binding decisions.¹³⁵ The I.C.J. explicitly held for the first time that the power to indicate provisional measures must be binding.¹³⁶ Further support derived from the general rule, that parties must abstain from prejudicing the rights of other parties in dispute, can only be effectuated through binding injunctions to preserve the status quo.¹³⁷

Finding binding power in its March 3, 1999 Order, the I.C.J. examined U.S. compliance with its call to take all measures to prevent Walter's execution.¹³⁸ The U.S. transmitted the Order to the Governor of Arizona, as di-

127. *Id.* ¶ 4.

128. *Id.* ¶ 128(1)-(2).

129. *Id.* ¶ 128(3).

130. *Id.* ¶¶ 65-78.

131. *Id.*

132. *Id.* ¶¶ 79-91.

133. *Id.* ¶ 128(4).

134. *Id.* ¶¶ 92-116.

135. *Id.*

136. *Id.* ¶¶ 92-116, 128(5).

137. *Id.* ¶¶ 92-116 (citing *Electric Company of Sofia and Bulgaria*, 1939 P.C.I.J. (ser. A/B) No. 79, at 199 (Dec. 5). The Court also looked to Article 94, ¶ 1 of the U.N. charter requiring that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." *Id.* (citation omitted).

138. *Id.*

rected by the Order, though without commentary.¹³⁹ The U.S. Solicitor General's letter to the Supreme Court described orders of the I.C.J. as non-binding.¹⁴⁰ Noting that the Governor of Arizona permitted Walter's execution despite receiving a recommendation of stay from the Arizona Board of Clemency,¹⁴¹ the I.C.J. found the sum of these actions insufficient, putting the U.S. in breach of the Order.¹⁴² The I.C.J. next examined the U.S.'s nationwide efforts to notify its federal, state and local authorities of consular notification duties as to foreign detainees.¹⁴³ It held that these efforts satisfied Germany's request for an assurance against future violations.¹⁴⁴

Germany also requested that the U.S. be directed to "ensure in law and practice the effective exercise of the rights under Article 36" upon any future arrests of German nationals.¹⁴⁵ The I.C.J. noted this request, asked the court to rule on the substance of U.S. law, and reiterated its finding that procedural default did not per se violate Article 36.¹⁴⁶ However, the I.C.J. held that should German nationals¹⁴⁷ be detained, convicted and sentenced to "severe penalties"¹⁴⁸ in the U.S., in violation of the Vienna Convention, "an apology would not suffice," and "it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention."¹⁴⁹ This implicitly means that U.S. procedural default cannot bar a Vienna Convention claim. However, the I.C.J. clearly stated the obligation to provide "review and reconsideration"¹⁵⁰ "can be carried out in various ways," and that "[t]he choice of means must be left to the United States."¹⁵¹

139. *Id.*

140. *F.R.G.*, 526 U.S. at 113 (Breyer, J., dissenting).

141. LaGrand Judgment, *supra* note 24, ¶¶ 92-116.

142. *Id.* ¶¶ 92-116, 128(5).

143. *Id.* ¶¶ 117-127, 128(6).

144. *Id.*

145. *Id.* ¶ 4.

146. *Id.* ¶¶ 79-91.

147. As to whether the LaGrand Judgment applies exclusively to German nationals, see LaGrand Judgment, *supra* note 24, at Declaration of President Guillaume; see also AI Report, *supra* note 29, at 3 (arguing that the declaration by Guillaume clarifies that the principles in the judgment apply to all nationalities); Weinman, *supra* note 105, at 898-900 (arguing that the LaGrand judgment can successfully be incorporated into the U.S. criminal justice system, that it "should apply equally to all member countries," and advising that the U.S. should not narrowly read the decision as applying only to German nationals because any remedial purpose of the decision will fail and prejudice will befall those nations that cannot bring forth an I.C.J. action to protect their nationals due to economic and political constraints).

148. LaGrand Judgment, *supra* note 24, ¶¶ 117-127, 128(7). Note that "severe penalties" remains undefined in the judgment, but arguably conceives of all capital cases. See *id.* at Separate Opinion of Vice-president Shi (referring to paragraph 128(7)), Shi observes that "a sentence of death . . . is a punishment of a severe and irreversible nature.").

149. *Id.* ¶¶ 117-127.

150. *Id.*

151. *Id.* ¶¶ 117-127, 128(7).

LaGrand established answers to some of the questions raised by the *Breard* affair. The I.C.J.'s holdings that the Vienna Convention embodies individual rights are significant: the U.S. must provide "review and reconsideration" for convictions and sentences concluded in violation of Vienna; and I.C.J. PMOs are binding. Critical questions remain, however, such as whether the judgment applies solely to Germans or to all foreign nationals arrested in the U.S. and what the practical effect of the I.C.J.'s holding that Article 36 creates individual, enforceable rights will be. A judgment in *Avena* may resolve some of these important unknowns.

III. AVENA & THE QUALITY OF CONSULAR ACCESS FOR MEXICANS ARRESTED IN THE UNITED STATES

A. *The Facts of Avena: U.S. Practice of the Vienna Convention as to Mexicans*

Mexico brought its action on behalf of itself and fifty-four of its nationals currently on the U.S. "death row," none of whom were notified of their consular rights "without delay" as mandated by Article 36.¹⁵² At best, Mexico notes four cases where "some attempt" was made, though not "without delay."¹⁵³ For example, two individuals were notified of consular rights at their arraignments.¹⁵⁴ Mexico claims that in at least thirty-six of the cases authorities knew or had at least some evidence those arrested were likely not U.S. citizens.¹⁵⁵ These defendants either possessed I.N.S. identification cards or were registered with the I.N.S. as permanent residents, yet law enforcement still failed to notify Mexican officials.¹⁵⁶

152. Application, *supra* note 3, ¶ 272, at 41. The 54 Mexicans in question are on death row in the following states: Arizona (1), Arkansas (1), California (28), Florida (1), Illinois (3), Nevada (1), Ohio (1), Oklahoma (1), Oregon (1), and Texas (16). *Id.* ¶ 1, at 1, ¶¶ 67-267, at 13-40; *see also* *Avena* Order, *supra* note 3, ¶ 2, at 2.

153. Application, *supra* note 3, ¶ 68, at 13.

154. *Id.* ¶ 94, at 17, ¶ 102, at 18 (Marcos Esquivel-Barrera was informed by the prosecution during arraignment close to a week after arrest that he had the right to "contact and assistance of the Mexican Consul General" and Arturo Juarez Suarez received notice at arraignment two days after arrest and after he had provided incriminating statements to the police). Mexico also cites Eduardo David Vargas who was informed of his consular rights by immigration officials but never by police officials upon his detention for suspicion of murder, despite knowledge of his Mexican nationality. *Id.* ¶ 150, at 24.

155. *See generally id.* at 14-31, 33-34, 36-38 (demonstrating that 36 of 54 defendants possessed identification cards or were registered with the I.N.S. as permanent residents). Mexico makes various claims as to these 54 nationals: (1) the individual told police during initial detention that he was Mexican, born in Mexico or went to school in Mexico; (2) authorities were "aware" the arrestee was Mexican; (3) police records indicated that the individual was Mexican; (4) the individual was arrested with an I.N.S. card or was registered with the I.N.S. as a permanent resident; or (5) the prosecutor referred to the defendant's Mexican nationality at trial or had immigration records. *Id.*

156. *Id.*

Mexico concurrently filed a request for a PMO with its application, asking that the I.C.J. order the U.S. to make efforts to prevent the pending (though unscheduled) executions of three of the inmates who “risk execution within the next six months.”¹⁵⁷ In the January 2003 request Mexico asserted that César Roberto Fierro Reyna could face execution as early as February 14, 2003.¹⁵⁸ Factually significant in its allegation of a coerced confession given in the absence of any notification of consular access rights,¹⁵⁹ Fierro’s latest writ of *certiorari* to the Supreme Court was denied on March 31, 2003.¹⁶⁰ As of November 2003, Fierro Reyna remains alive, but faces execution scheduling at any time.¹⁶¹

Fierro’s case exemplifies the substantive reasons Mexico seeks redress for consular notification violations of behalf of so many of its nationals. In 1980, a Texas jury convicted Fierro of the 1979 murder of Nicolas Castanon, an El Paso taxicab driver.¹⁶² Fierro had signed a written confession to the murder while in police custody.¹⁶³ He unsuccessfully moved to suppress the confession before trial, claiming he had signed the statement involuntarily.¹⁶⁴ Fierro alleged that detective Al Medrano told him during his initial interrogation that Mexican police just over the border in Ciudad Juarez had raided his mother’s home and would hold his mother and step-father in jail and torture them until he confessed to the murder.¹⁶⁵ Fierro claimed Medrano showed him letters seized from his mother and he confessed in order to release his parents.¹⁶⁶

Medrano denied knowledge of these allegations and claimed that Fierro himself suggested his mother was being detained by Juarez police.¹⁶⁷ However, he stated that he had breakfast with Juarez Police Commandante Jorge Palacios on the morning of the raid.¹⁶⁸ The jury convicted Fierro based on the written confession to Medrano and the testimony of an alleged eyewitness.¹⁶⁹ Fierro’s appellate challenges regarding the involuntary nature of his confession failed before state and federal courts.¹⁷⁰

157. *Avena Order*, *supra* note 3, ¶ 11, at 4-5.

158. *Id.* ¶ 11, at 5.

159. Application, *supra* note 3, ¶¶ 165-167, at 26 (claiming Mexico only learned of Fierro’s detention through information provided by his mother); *A Texas Tragedy*, *supra* note 4; *see also* DPIC, *supra* note 4.

160. *Fierro v. Cockrell*, 294 F.3d 674 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 1621.

161. Application, *supra* note 3, ¶ 168, at 26.

162. *Fierro*, 294 F.3d at 677-78.

163. *Id.* at 677.

164. *Id.* at 677-78.

165. *Id.* at 677; *A Texas Tragedy*, *supra* note 4.

166. *Fierro*, 294 F.3d at 677 n.3.

167. *Id.* at 677 n.5.

168. *Id.*

169. *Id.* at 678.

170. *Id.*; *see Fierro v. Texas*, 706 S.W. 2d 310, 316 (Tex. Crim. App. 1986); *Fierro v. Lynaugh*, 879 F.2d 1276 (5th Cir. 1989), *cert. denied sub non*, *Fierro v. Collins*, 494 U.S. 1060 (1990).

In 1994, Fierro filed a state *habeas* petition based on a newly discovered police report documenting Medrano's 1979 telephone conversation with Palacios, who "stated that they had raided the house [of Fierro's parents] this morning . . . and had in custody the mother of the suspect . . . and her common law husband . . ." ¹⁷¹ Based on this and other evidence contradicting Medrano's prior trial testimony, the Texas state *habeas* trial court concluded the confession was likely coerced and recommended a new trial. ¹⁷²

The Texas Court of Criminal Appeals adopted these findings and held that Fierro's due process rights were violated by the perjured testimony. ¹⁷³ Based on its perceived credibility of the eyewitness testimony, however, a majority of the court determined that it was more probable than not that the jury would have found Fierro guilty despite suppression of the coerced confession. ¹⁷⁴ Mexico claims that El Paso police knew Fierro was Mexican but never informed him of his right to contact the consulate. ¹⁷⁵ Mexico posits prompt notification would have led to the consulate's intervention, specifically that consular officials would have immediately procured the release of Fierro's parents from their illegal detention. ¹⁷⁶ The Mexican government further declares that its efforts were crucial in tracking down the new evidence. ¹⁷⁷

Excepting the slim chance of clemency, Fierro's fate depends not only on the success or failure of *Avena* before the I.C.J., but if and how U.S. courts or the Executive branch implement the Order and any final judgment issued before his likely execution.

B. Claims & Judgment Requested by Mexico

In *Avena*, Mexico claims the U.S. violated its international legal obligations under Article 36(1)(b) of the Vienna Convention to both Mexico and to its arrested nationals by failing to inform Mexico of the nationals' detention and the nationals of their right to consular contact "without delay." ¹⁷⁸ Mexico asserts this claim on behalf of the 54 Mexicans named in the application, and

171. *Fierro*, 294 F.3d at 678.

172. *Id.*

173. *Id.* (citing *Ex Parte Fierro*, 934 S.W. 2d 370, 371-72 (1996), *cert. denied*, 521 U.S. 1122 (1997)).

174. *Fierro*, 294 F.3d at 678-79.

175. Margaret A. Jacobs, *Foreigners' Convictions Raise Rights Issue*, WALL ST. J., Nov. 4, 1997, at Law, available at <http://www.cesarfierro.com/clips.htm> ("In Mr. Fierro's case, Mexican authorities say they could have alleviated the pressure to confess. Francisco Molina Ruis, the attorney general of the state of Chihuahua, said in court papers in Mr. Fierro's appeal that he would have personally investigated the parents' detention and probably ordered their release.").

176. *A Texas Tragedy*, *supra* note 4.

177. Jacobs, *supra* note 175.

178. Application, *supra* note 3, ¶ 280(a)-(b), at 43 (citing Convention, *supra* note 7, art. 36(1)(b)).

for all Mexican nationals who are being or have been arrested for capital murder.¹⁷⁹ Mexico characterizes the U.S. violations as ongoing.¹⁸⁰

Mexico alleges that the U.S.'s violation of its duty to Mexico to ensure open communication with its arrested nationals under 36(1)(b) of the Vienna Convention prevented Mexico from exercising its right to fulfill its consular duties under articles 5 and 36 of the Convention.¹⁸¹ Mexico cites the Vienna Convention's article 36, paragraph 2, mandate that municipal law give full effect to the rights embodied in article 36, paragraph 1.¹⁸² Based on 36(2) and article 26 of the Vienna Convention on the Law of Treaties, Mexico claims that U.S. municipal law prevents Mexico and its nationals from vindicating their rights under article 36 and thus the U.S. continues to violate 36(2).¹⁸³

Mirroring the judgment requested in past applications by Paraguay and Germany, Mexico requests that the I.C.J. declare (1) the U.S. has repeatedly violated the Vienna Convention through "arresting, detaining, trying, convicting, and sentencing to death Mexican nationals without advising of their Article 36 rights"; (2) Mexico is entitled to restitution; (3) the U.S. must not apply procedural default or other municipal law to bar Article 36 claims; and (4) the U.S. must comply with the Vienna Convention for any future detention of the fifty-four Mexicans or any other Mexicans in its territory, by any power available domestically or internationally.¹⁸⁴ Mexico additionally desires that the I.C.J. declare the right to consular notification under the Vienna Convention to be a human right.¹⁸⁵

Mexico wishes the U.S. be directed to (1) re-establish the pre-Vienna violation status as to the 54 Mexicans named in *Avena*; (2) ensure U.S. domestic law gives full effect to the intended purposes of Article 36; (3) provide a meaningful remedy at law for Vienna Convention violations, including removal of a procedural penalty for failure to raise a Vienna Convention claim at trial; and (4) fully guarantee to Mexico that the Vienna Convention violations will cease to occur.¹⁸⁶

C. The Avena Order for Provisional Measures

Within a month of Mexico's January 9, 2003 application and accompanying request for a PMO, the I.C.J. issued a PMO.¹⁸⁷ To prevent "irreparable

179. *Id.* ¶ 280(b), at 43.

180. *Id.* ¶ 280(a), at 43.

181. *Id.* ¶ 280(c), at 43-44.

182. *Id.* ¶ 280(d), at 44. (citing Convention, *supra* note 7, art. 36(2)).

183. *Id.* (citing Vienna Convention on the Law of Treaties, *done* May 23, 1969, 8 I.L.M. 679).

184. *Id.* ¶ 281, at 44-45.

185. *Id.*

186. *Id.*

187. *Id.* ¶ 284, at 45; *Avena Order*, *supra* note 3, ¶ 9, at 4, ¶ 59, at 15.

prejudice”¹⁸⁸ and protect its interest in the lives of those among the *Avena* subjects¹⁸⁹ who it found were on the verge of consummated execution,¹⁹⁰ Mexico asked the I.C.J. to order the U.S. to “take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos, and Mr. Osvaldo [Netzahualcóyotl] Torres Aguilera are not executed pending final judgment in these proceedings.”¹⁹¹

*D. “But I’m an American!”—Mexican Practice
under the Vienna Convention*

This phrase particularly exemplifies the stark practical difference between the Mexican and the American arrested in the other’s country. Upon arrest, Americans demand to speak to some U.S. representative without any knowledge of the Vienna Convention and, those that do not make the request, are routinely informed of their Vienna Convention rights by Mexican officials.¹⁹² The Mexican, however, often does not know nor is informed by U.S. officials of his or her right to speak with the closest Mexican consulate.¹⁹³ A brief look at Mexican practice of providing consular access to U.S. nationals detained in Mexico gives some perspective as to the disparity of treatment of Mexican arrestees in the U.S. despite the Vienna Convention’s clear mandate for consular access rights.

More Americans are arrested in Mexico than in any other foreign country.¹⁹⁴ Specifically, the Mexican states of Baja California Norte and Baja California Sur (collectively “Baja”) claim more arrests of Americans each year than the balance of the Mexican states combined.¹⁹⁵ Upon arrest in Baja, Mexican officials routinely notify Americans that they may contact the American consulate.¹⁹⁶ In addition, Mexican authorities, both state and fed-

188. *Avena Order*, *supra* note 3, ¶ 28, at 8, ¶ 34, at 9, ¶ 55, at 14 (referring to the risk of execution of at least three Mexican nationals before the I.C.J. is able to rule on the merits).

189. *Id.* ¶ 13, at 5 (citing Mexico’s asserted “paramount interest in the life and liberty of its nationals and to ensure the Court’s ability to order the relief Mexico seeks”); *but see id.* at Declaration of Judge Shigeru Oda (voting in favor of the Order but referencing his “doubts” as to the propriety of the Order via prior declarations in similar cases; for example in *LaGrand* (LaGrand Order, *supra* note 24, ¶ 6, countering that “[i]f the request in the present case had not been granted, the Application itself would have become meaningless . . . [and] I would have had no hesitation in pointing out that the request for provisional measures should not be used to ensure that the main Application continues.”)).

190. *Id.* ¶ 55, at 14 (conceding Mexico’s assertion that three of its nationals “are at risk of execution in the coming months, or possibly even weeks”).

191. *Id.* ¶ 59(a), at 15.

192. Interview with Greg Garland, Consular Officer at the United States Consulate in Tijuana, Baja California Norte, Mexico, in San Diego, California (Mar. 24, 2003) (interview notes on file with the author) [hereinafter Interview].

193. *See* AI Report, *supra* note 29, at 4; *see also* Application, *supra* note 3, ¶ 268-279, at 40-43 (describing the “pattern and practice of violations” by the U.S.).

194. Interview, *supra* note 192.

195. *Id.*

196. *Id.*

eral, contact the American consulate to notify them of the detention of U.S. citizens as a matter of course.¹⁹⁷

While the logistics of Mexican prisons can present barriers to confidential communications between Americans and their consuls and/or attorneys, Americans receive the comfort and fundamental assistance their consulate can provide practically as a matter of right.¹⁹⁸ Apparently, the American arrested in Mexico receives the benefits of the Convention regardless of any request or claim on his or her own behalf.¹⁹⁹

IV. IMPLICATIONS OF AVENA IN THE UNITED STATES AND ABROAD

A. Differences from *Breard* & *LaGrand*

Avena differs in scope from the prior cases before the I.C.J. which raised U.S. violations of Article 36. *Breard* and *LaGrand* concerned just a few foreign nationals arrested in the U.S. On the other hand, Mexico's action concerns 54 of its citizens, the entirety of Mexicans currently sentenced to death across the U.S. The large number of persons concerned may make the case infinitely more visible to the U.S., Mexico and the international public.

Regarding timing, Paraguay and Germany filed their I.C.J. applications just days before the scheduled executions of Angel Breard and Walter LaGrand.²⁰⁰ Indeed, both the I.C.J. and the Supreme Court questioned the propriety of such late filings.²⁰¹ However, many of the *Avena* subjects remain in state *habeas corpus* or other appellate proceedings, likely making any execution years away.²⁰² Indeed, only three of the 54 Mexicans in question have

197. *Id.*; see also Jacobs, *supra* note 175 ("In the case of Mexico, where the issue has been widely covered by the media, the government has 'almost always notified the American Consulate when a U.S. citizen is arrested in Mexico,' according to Luis Cabrera, who heads the Mexican consulate in Phoenix.").

198. Interview, *supra* note 192. Since Mexican officials routinely inform foreign national arrestees from Vienna Convention signatory countries of their consular rights, it is doubtful that criminal defendants have had to raise Convention violation claims in Mexican courts. Mr. Garland has yet to hear of such a case in Mexico. *Id.*

199. Interestingly, Mr. Garland notes that some U.S. nationals of Mexican descent will decline to reveal their citizenship to Mexican officials so as to *avoid* contact with the U.S. consulate, often due to prior criminal records in the United States. Eventually, however, Mexican officials often discover their citizenship and will notify the American consulate of their detention. *Id.*

200. See *Breard*, 523 U.S. at 374; *F.R.G.*, 526 U.S. at 111.

201. See *LaGrand* Judgment, *supra* note 24, ¶ 49-63; see also *F.R.G.*, 526 U.S. at 112 (noting that Germany's March 2, 1999 motions were "filed within only two hours of a scheduled execution . . . about which the Federal Republic of Germany learned in 1992. Given the tardiness of the pleas and the jurisdictional barriers [of sovereign immunity and the Eleventh Amendment] we decline to exercise our original jurisdiction").

202. *But see Avena Order*, *supra* note 3, ¶ 55, at 14 (conceding Mexico's assertion that three of its nationals "are at risk of execution in the coming months, or possibly even weeks"); see also *id.* ¶ 11, at 4-5 (claiming that all *Avena* subjects potentially face execution

exhausted their state and federal appellate options and await state execution scheduling, for which Mexico has asked and received the I.C.J. Order to the U.S. to act to stay the executions.²⁰³

Avena follows *LaGrand* in one aspect of the relief sought. Mexico prays that the I.C.J. equate and declare “consular notification under the Vienna Convention is a human right.”²⁰⁴ The I.C.J. refused to recognize a human right in *LaGrand*, holding instead that Article 36 should be construed as creating individual rights.²⁰⁵ If the I.C.J. had proclaimed a human right, such a declaration might give human rights organizations the standing they currently lack to enforce the Vienna Convention rights in U.S. courts. However, it probably would not aid an individual defendant’s success in U.S. courts. The benefits of such a decision likely lie in increasing political pressure on the U.S. to ensure compliance with Vienna over time.

In further contrast, Mexico, via its request in *Avena*, attempts to extend the limits of the I.C.J.’s power. Mexico asks the Court to bar “the imposition, as a matter of municipal law, of any procedural penalty for the failure timely to raise a claim or defense based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention.”²⁰⁶ This request refers specifically to the U.S. domestic doctrine of procedural default that now bars almost all of the *Avena* subjects’ Vienna Convention claims.²⁰⁷ Whether the I.C.J. removes the procedural bar raises the question of its power under international law to reorder the U.S. criminal justice system.

In *LaGrand*, the I.C.J. found that procedural default did not violate the Vienna Convention except as applied to bar Walter’s claim. The I.C.J. left the means to the U.S. to circumvent the procedural bar. The U.S., in *Avena*, claims to have provided the means through its system of clemency.²⁰⁸ Mexico now asks the I.C.J. to directly eliminate procedural default as a bar to Vienna claims.²⁰⁹ The Court will likely not make such a declaration to avoid threatening U.S. sovereign integrity and to prevent becoming a “court of appeal of national criminal proceedings.”²¹⁰

before the end of 2003, providing the basis for the application because of the risk of irreparable harm).

203. *Avena Order*, *supra* note 3, ¶ 31, at 8.

204. *Id.* ¶ 8, at 3-4; Application, *supra* note 3, ¶ 281, at 44.

205. *LaGrand Judgment*, *supra* note 24, ¶¶ 65-78.

206. Application, *supra* note 3, ¶ 281, at 44-45.

207. *Id.* ¶ 117-127.

208. *Avena Order*, *supra* note 3, ¶ 44, at 11.

209. Application, *supra* note 3, ¶ 281, at 44.

210. *LaGrand Judgment*, *supra* note 24, ¶¶ 49-63.

*B. The Avena Provisional Order & Future Judgment
after Breard & LaGrand*

Mexico appears to have learned from the mistakes made by Paraguay and Germany. The U.S. Supreme Court, in *Breard* and *LaGrand*, attacked the “tardiness”²¹¹ and “eleventh hour”²¹² nature of the sovereign seeking relief and of the I.C.J.’s hurried issuance of the PMOs in those cases.²¹³ The I.C.J. itself also questioned the propriety of Germany’s mere application in its *LaGrand* judgment.²¹⁴

However, *Avena* eliminates this judicial concern for punctuality because, while three of the Mexican nationals have exhausted their appellate options and face death at any time, no executions have been scheduled as of the time of this publication. As mentioned above, the large majority of *Avena* subjects remain in the purgatory of trial and direct and collateral appeals, making it likely that any executions will occur in the distant future.

In the *LaGrand* Supreme Court decision, Justice Breyer’s dissent emphasized that the majority’s judgment rested on summary conclusions which, in his view, “suggest a need for fuller briefing.”²¹⁵ *Avena*’s relatively early filing implies that the Supreme Court ruling would be augmented by the opportunity for further review for proper adjudication, with potentially the guidance of an I.C.J. judgment in hand.

The current Order tells the U.S. to restrain Texas and Oklahoma from scheduling the executions of three Mexicans who have exhausted their appeals.²¹⁶ In response to the Order, Texas, through a gubernatorial spokesman, declared “there is no authority for the federal government or this World Court to prohibit Texas from exercising the laws passed by our legislature.”²¹⁷

Arguably, *LaGrand*’s holding regarding the force of PMOs leaves no question as to the U.S.’s duty to make all efforts to comply with the I.C.J.’s

211. See *F.R.G.*, 526 U.S. at 112; see also *Breard*, 523 U.S. at 378 (“It is unfortunate that this matter came before us while proceedings are pending before the I.C.J. that might have been brought to that court earlier.”).

212. See *F.R.G.*, 526 U.S. at 112, 113 (Breyer, J., dissenting).

213. *Id.* at 111.

214. *LaGrand* Judgment, *supra* note 24, ¶¶ 49-63; see *Breard*, 523 U.S. at 378 (“It is unfortunate that this matter came before us while proceedings are pending before the I.C.J. that might have been brought to that court earlier,” implying that had Paraguay acted earlier to facilitate issuance of an I.C.J. judgment, the Supreme Court would not then have had to rule on Paraguay’s petitions during concurrent international litigation); cf. *Avena Order*, *supra* note 3, ¶ 54, at 14-15 (noting the Supreme Court’s lament that Paraguay had not filed their application with the I.C.J. sooner).

215. *F.R.G.*, 526 U.S. at 114 (Breyer, J., dissenting).

216. *Avena Order*, *supra* note 3, ¶ 59(a), at 15.

217. C. Bryson Hull, *Texas Snubs World Court on Execution Stays*, REUTERS, Feb. 6, 2003, at http://www.cjcb.org/press/texas_snubs.html (last visited June 24, 2003).

Avena Order.²¹⁸ The Texas Executive branch correctly states that the World Court cannot directly interfere with the exercise of its internal law. However, the federal foreign affairs power²¹⁹ in combination with the *LaGrand* judgment should give the federal government the political power to compel Texas, Oklahoma, or any other state to temporarily halt execution scheduling.

In the *LaGrand* Order, the I.C.J. mandated that the U.S. “should take all measures” to prevent the execution of Walter LaGrand prior to an I.C.J. judgment.²²⁰ In a small but significant change from the *LaGrand* Order, the I.C.J. said in the *Avena* Order that the U.S. “shall take all measures” to delay any executions of the 54 Mexicans who experienced violations of the Vienna Convention.²²¹ What remains in question is the scope of “all measures” available (or amenable) to the U.S. to take to direct the individual states to usurp their convictions. *LaGrand* now provides clear guidance to the Supreme Court as to the positive effect of PMOs, which will now truly be tested by the *Avena* Order. At a minimum, the *LaGrand* ruling refutes the Supreme Court’s assertion of the last-in-time doctrine in *Breard* that blocked Breard’s claim under the Vienna Convention, via AEDPA, and prevented him from bringing a *habeas* petition that could have spared his life. Thus, *LaGrand* should give additional persuasiveness to the existing *Avena* Order, and any new *habeas* petitions filed by the *Avena* subjects citing these instruments.

Further, *LaGrand* provides, while leaving the manner of implementation to the United States, the framework to create a remedy for violations, which the Vienna Convention itself appears to lack. With regard to *Avena*, the U.S. claims that its system of clemency satisfies the I.C.J.’s mandate in *LaGrand* for “review and reconsideration” of convictions adjudged in violation of the Vienna Convention.²²² Mexico derides the suggestion that “the standardless,

218. Several authors predict what minimum efforts must now be taken by the U.S. to comply with any future I.C.J. provisional measures orders in light of the *LaGrand* judgment. See, e.g., Howard S. Schiffman, *The LaGrand Decision: The Evolving Legal Landscape of the Vienna Convention on Consular Relations in U.S. Death Penalty Cases*, 42 SANTA CLARA L. REV. 1099, 1125-27 (2002) (arguing that at a minimum, compliance with future orders would demand that the federal executive branch unequivocally support a stay of execution and communicate this support to state and judicial officials); see also Vasquez, *supra* note 93, at 689, 691 (arguing in a pre-*LaGrand* article in reference to *Breard* that “our Constitution does not leave the decision whether to comply with ICJ orders, be they technically ‘binding’ or not, to state Governors,” and that an executive order to stay Breard’s execution could fairly have been given considering “the President’s authority to execute treaties, combined with his foreign affairs power” and the executive branch’s expedience).

219. See generally Vasquez, *supra* note 93, at 688-89.

220. *LaGrand* Order, *supra* note 24, ¶ 29. see William J. Aceves, *The Vienna Convention on Consular Relations: Recent Developments*, 2003 INTERNATIONAL CIVIL LIBERTIES REPORT (Paul L. Hoffman, ed., 2003), at http://sdshh.com/ICLR/ICLR_2003/9_Aceves.pdf (based on essay that will appear in 97 A.J.I.L. (forthcoming 2003)).

221. *Avena* Order, *supra* note 3, ¶ 59(a) (emphasis added); Aceves, *supra* note 220.

222. *Avena* Order, *supra* note 3, ¶ 44.

secretive and unreviewable process that is called clemency” fulfills the I.C.J.’s direction in *LaGrand*.²²³ This suggests the possibility that an *Avena* judgment may pick up where *LaGrand* left off by at least indicating that executive clemency fails to provide sufficient “review and reconsideration” in these cases. While the I.C.J. would likely continue to leave the manner to the U.S., this baseline and any suggestions from the court as to what procedures would be sufficient will be highly significant by guiding the *Avena* subjects and their counsel with a substantive method to seek relief. As relief for violations remains out of reach, specific methods of relief suggested by the I.C.J. to the U.S. run to the core of the dispute for Mexicans as well as any other nationals who will endure Vienna Convention violations in the future. A viable path to relief should be offered by the I.C.J. Moreover, a clear statement that the holdings of *LaGrand* apply to all nationals may well be necessary to effectuate the standards of the Vienna Convention in the United States.

CONCLUSION

Mexico’s *Avena* case must be construed as a necessary evil because “[t]hese cases strain U.S. relations with normally friendly countries.”²²⁴ U.S. and Mexican affairs are intertwined to the extent that further exacerbation of the problem could deadlock trade, immigration and other joint U.S.–Mexico projects. As shown by Mexico’s President Vicente Fox’s cancellation in 2002 of a meeting with President Bush because of the execution of a Mexican national who had been denied consular notification,²²⁵ the tensions are real. However, U.S. federalist principles continue to present legal hurdles to direct implementation of *LaGrand* or a future I.C.J. ruling in *Avena*.

Thankfully, *LaGrand* and a future *Avena* ruling are not necessarily incompatible with U.S. domestic law.²²⁶ The I.C.J.’s mandate to provide review and reconsideration in cases involving Vienna violations is just and can be implemented as an available *habeas* claim. When state and federal justice departments tire of these claims they are uniquely positioned to resolve field policies so that foreign defendants receive consular notification as a matter of course.

From a non-legal perspective, education and discussion among the defense bar and prosecutors and a clear policy statement from the State Department must occur. Defense attorneys, by notifying defendants to contact

223. *Avena Order*, *supra* note 3, ¶ 45, at 12.

224. Schiffman, *supra* note 218, at 1134.

225. *Mexico’s President Snubs Bush*, *supra* note 65.

226. See Weinman, *supra* note 105, at 884-903; see generally Daniel J. Lehman, *The Federal Republic of Germany v. The United States of America: The Individual Right to Consular Access*, 20 LAW & INEQ. 313, 327-338 (2002) (suggesting that the defense bar must raise Vienna claims at trial, making the determination of prejudice and subsequent suppression or other relief more common).

their consulate, may eliminate a future claim of consular access denial, but in the process may gain exculpatory evidence in a timely fashion. Moreover, prosecutors who encourage foreign defendants to interact with their consulate satisfy ethical obligations to ensure that all available evidence is provided to a jury, which can only increase their credibility. Ideally, the magnitude of the *Avena* case and the value of Mexican relations should spur the State Department to make further efforts to convince justice departments to comply with the requirements of the Vienna Convention, regardless of any eventual judgment in the case.

In addition, Mexico must continue to make efforts to educate its populace as to their rights. Some possibilities include media campaigns and information at the border, for if Mexican citizens and their families know their rights, the problem can be solved at the source.

Notwithstanding educational measures by Mexico, the U.S. must remember the value of friendly foreign relations, especially at a time when international cooperation is integral to combating terrorism, the drug trade, and the spread of new diseases in our rapidly-globalizing world. The existence of *Avena* reveals Mexico's recognition that diplomatic solutions with the U.S. have failed. In 2001, President Fox remarked, "[f]or us in Mexico, today we know that we have friends, that we have a partner, and that we have a better future for us and for our people."²²⁷ Regardless of the outcome of *Avena* at the I.C.J., President Fox's pronouncement rings hollow unless the U.S. "take[s] all measures at its disposal,"²²⁸ whether judicially or politically, to comply with the fundamental spirit of the Vienna Convention and respect the citizenry of its Mexican partner.

227. Mexican President Vincente Fox, Remarks to University of Toledo Faculty, Students and Community at University of Toledo's Savage Hall (Sep. 6, 2001), at <http://www.whitehouse.gov/news/releases/2001/09/print/20010906-11.html> (referring to the United States in a joint speech with President George W. Bush at which both officials emphatically proclaimed mutual U.S.-Mexico friendship of broad scope).

228. See Breard Order, *supra* note 24, ¶ 41(I); LaGrand Order, *supra* note 24, ¶ 29(I)(a). See also *Avena Order*, *supra* note 3, ¶ 59(I)(a), at 15.

POST-SCRIPT: "CAN THE ISLAND OF TOBAGO PASS A LAW TO BIND THE RIGHTS OF THE WHOLE WORLD?"²²⁹

November 17, 2003 marked the first decision issued by the Supreme Court concerning a petition of one of the Mexican citizens named in the *Avena* case, since the I.C.J.'s issuance of a provisional measures order in that case.²³⁰ The Supreme Court denied Osbaldo Torres' petition without comment except for the dissents by Justices John Paul Steven and Stephen Breyer.²³¹ Justice Stevens concluded that, in light of the I.C.J.'s "authoritative interpretation of Article 36 in the *LaGrand Case*," his dissent in *Breard v. Greene* should have been directed at the merits of that court's holding and not at the procedural grounds.²³²

Both Stevens and Breyer relied on the supremacy clause to establish that treaties are the law of the land,²³³ and thus the U.S.'s ratification of the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes submits the U.S. to the jurisdiction of the I.C.J. on disputes arising from the Vienna Convention.²³⁴

Breyer listed Torres' and Mexico's arguments, which included: (1) the supremacy clause and the self-executing nature of the Vienna Convention making it binding law; (2) the Vienna Convention's establishment of individual rights per *LaGrand* and its holding that U.S. law "must enable full effect to be given" to the treaty; (3) that procedural default violates the treaty; (4) that whether or not an individual would have requested consular assis-

229. See *Torres v. Mullin*, No. 03-5781, 2003 U.S. LEXIS 8548, at *14 (S. Ct. Nov. 17, 2003) (citing *Buchanan v. Rucker*, 103 Eng. Rep. 546 (K.B. 1808)).

230. *Id.* at *1. Some facts in Torres' case can be found in *Torres v. Mullin*, 317 F.3d 1145 (10th Cir. 2003), *cert. denied*, No. 03-5781, 2003 U.S. LEXIS 8548 (S. Ct. Nov. 17, 2003). For example, the prosecution's evidence showed that Torres and his co-defendant parked near the home where the murders took place, took a gun from the trunk of their car, broke down the front door of a home and shot the two resident victims. *Id.* at 1149. They were later arrested a few blocks away. *Id.* The sole eyewitness to the killings was one of the victim's eleven year-old son who saw the co-defendant shoot his father. *Id.* The first trial resulted in a hung jury and mistrial, followed by a second trial convicting Torres and the co-defendant of murder and burglary. *Id.* Two judges out of a three-judge panel of the Tenth Circuit denied Torres' *habeas* claims based on: (1) insufficiency of the evidence to show intent and proof beyond a reasonable doubt for malice murder or burglary; (2) improper jury instructions; (3) prosecutorial misconduct; (4) destruction of evidence; (5) and the Eighth Amendment. See *id.* Judge Henry based his dissent on grounds that the jury instructions failed to require the jury to find intent for aiding and abetting a malicious murder. *Id.* at 1162, 1164-1168. Henry also found an insufficient record to support a murder conviction, but that the deferential standard of review precluded turning over the conviction on that basis. *Id.* at 1162. Based on the failure of the jury instructions to properly instruct on the intent element for malice murder, Judge Henry would grant the writ, vacate the murder convictions, and order a new trial. *Id.* at 1162, 1168.

231. See *id.*

232. *Torres*, 2003 U.S. LEXIS 8548, at *1-2.

233. *Id.* at *4-5 (citing U.S. CONST. art. VI, § 2.)

234. *Id.* at *11.

tance is immaterial; and (5) that the *Avena* I.C.J. Order issued to specifically prevent Torres' execution pending conclusion of *Avena* binds the U.S. after *LaGrand*.²³⁵ Breyer found these arguments substantial, in that they raise the question before the Supreme Court as to whether the I.C.J. has been given the power by treaty to interpret the Vienna Convention in the way that it is.²³⁶ Because the answer "may well be yes," Breyer believes that a decision on Torres' petition should await the *Avena* decision and further briefing.²³⁷ Because the Court's denial removes any federal barrier to Oklahoma's pending execution,²³⁸ Osbaldo Torres may not live to see the answer.

Alan Macina*

235. *Id.* at *8-13 (citing Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. 128 (Feb. 5)).

236. *Id.* at *13-14.

237. *See id.* at *14.

238. *See id.* at *13 ("Oklahoma might set an execution date within 60 days of our denying certiorari").

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