The Ruling of the International Court of Justice in the Avean and Other Mexican Nationals: Enforcing the Right to Consular Assistance in U.S. Jurisprudence

Adrienne M. Tranel

Follow this and additional works at: http://digitalcommons.wcl.american.edu/auilr
Part of the International Law Commons

Recommended Citation
THE RULING OF THE INTERNATIONAL COURT OF JUSTICE IN AVENA AND OTHER MEXICAN NATIONALS: ENFORCING THE RIGHT TO CONSULAR ASSISTANCE IN U.S. JURISPRUDENCE

ADRIENNE M. TRANEL*

INTRODUCTION ............................................................................................................. 405
I. BACKGROUND .......................................................................................................... 408
   A. TERMS OF ARTICLE 36 OF THE VIENNA CONVENTION ......................... 408
      1. The Importance of the Vienna Convention and the Rights It Provides .............................................................. 411
      2. The Binding Nature of the Vienna Convention and ICJ Decisions ................................................................. 412
   B. ICJ RULINGS REGARDING THE VIENNA CONVENTION ..................... 414
      1. The Breard Case (Paraguay v. United States) .............................................. 414
      2. The LaGrand Decision (Federal Republic of Germany v. United States) .......................................................... 417
      3. Avena and Other Mexican Nationals (Mexico v. United States) ......................... 420
         a. Facts Presented in the Application Instituting Proceedings ................. 421
         b. Provisional Measures Staying the Executions of Three Defendants .......... 423
         c. Relief Mexico Sought for the Alleged Violations ......................... 424

* B.A., Washington University in St. Louis (2000), M.A., Instituto Universitario Ortega y Gasset, Universidad Complutense de Madrid (2002), J.D. candidate, American University Washington College of Law (2005). The author is currently working in the International Human Rights Clinic at the Washington College of Law and is an editor for the American University International Law Review. She wishes to thank all her professors, both collegiate and legal, who contributed to her intellectual pursuit of the law. She also wishes to thank her family and friends for their support during the writing process.
II. ANALYSIS

A. THE RULINGS OF THE ICJ ON THE ISSUES PRESENTED IN
   AVENA AND OTHER MEXICAN NATIONALS

1. The ICJ Correctly Found that It Has Jurisdiction over
   Mexico's Claims and That Mexico's Claims are
   Admissible
   a. Jurisdiction
   b. Admissibility

2. The ICJ Correctly Found that the United States in Fact
   Violated the Vienna Convention in At Least Some of the
   Fifty-Two Cases
   a. Violations of Article 36(1)
   b. Violations of Article 36(2)

3. The Court Correctly Denied Relief in the Form of
   Restitutio In Integrum and Correctly Ordered the United
   States to Grant Meaningful Review and Reconsideration
   a. The ICJ Correctly Denied Mexico Restitutio In
      Integrum Under International Law Standards
   b. The ICJ Correctly Decided that Clemency Does Not
      Constitute Meaningful Review and Reconsideration
   c. The ICJ Has Provided for an Appropriate Remedy in
      the Case of a Vienna Convention Violation

4. The Court Should have Issued an Order of Cessation
   and Non-Repetition

III. RECOMMENDATIONS

A. U.S. INTERPRETATION OF THE VIENNA CONVENTION
   AFTER BREARD, LA GRAND, AND AVENA

B. SUGGESTIONS OF METHODS THROUGH WHICH THE UNITED
   STATES CAN EFFECTIVELY AND EFFICIENTLY IMPLEMENT
   AVENA AS BINDING AUTHORITY

1. Judicial Implementation
   a. U.S. Courts Should Rely on Avena to Find that There
      is a Remedy to the Right Established in LaGrand
   b. U.S. Courts Should Implement the Avena Decision
      by Granting Meaningful Review and Reconsideration
   Through Vacating the Death Penalties
INTRODUCTION

The death penalty is a highly controversial form of punishment both in the United States and abroad. The United States is not in good company with its record for executions. However, the death penalty continues to exist as a form of criminal punishment and courts continue to impose it despite international movements to abolish it altogether. Given general international disfavor for the death penalty, it is disturbing to note that more than 120 foreign nationals are on death row in the United States, and more than half of them are Mexican nationals.


3. See id. (noting that the trend in international law is toward abolition of the death penalty). In fact, recently created U.N. international criminal tribunals forbid capital punishment as a penalty for crimes including genocide, war crimes, and human rights violations. Id.

4. See Anthony N. Bishop, The Unenforceable Rights to Consular Notification and Access in the United States: What’s Changed Since the LaGrand Case?, 25 HOUS. J. INT’L L. 1, 94 (2002) (speculating that Mexico is likely to continue to protest against the use of the death penalty because of the number of nationals it has on death row in the United States).

5. See id. (postulating that Mexico’s protests against the death penalty will remind the United States of its international legal obligations and that this may
International law requires that the United States comply with its duties under the Vienna Convention on Consular Relations and with the decisions issued by the International Court of Justice ("ICJ") regarding this treaty. While the United States appears to be cognizant of these obligations, it continues to violate the Vienna Convention. Most recently, in *Avena and Other Mexican Nationals (Mexico v. United States)*, the ICJ found that the United States violated its duty to provide for consular access in the cases of fifty-two Mexican defendants on death row in multiple U.S. states. This casenote argues that the ICJ correctly found the United States in violation of the Vienna Convention and that the United States must comply with the *Avena* decision through either judicial or non-judicial means.

Part I of this casenote examines the Vienna Convention on Consular Relations and the prior decisions of *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States)* and *LaGrand Case (Germany v. United States)* in order to lead to other cases in the International Court of Justice ("ICJ") for U.S. violations of international law.

6. See discussion infra Part I.A.2 (observing the binding nature of the Vienna Convention and ICJ decisions interpreting the Convention).

7. See discussion infra Part I.B (noting the decisions issued from the ICJ in which it found that the United States violated Article 36 of the Vienna Convention); see also Kelly Trainer, *The Vienna Convention on Consular Relations in the United States Courts*, 13 TRANSNAT’L LAW 227, 230 (2000) (stating that the United States vigorously demands adherence to the Vienna Convention when it comes to U.S. citizens but has a “less than perfect record” when it comes to foreign nationals detained in the United States).

8. 2004 ICJ 128 (Mar. 31).


10. See discussion infra Parts II-III (discussing the ICJ’s holdings in the *Avena* decision and giving suggestions of how the United States may successfully implement this ruling domestically).

11. 1998 ICJ 99 (Nov. 10).

12. 2001 ICJ 104 (June 27).
set the scene for the case most recently decided by the ICJ, Avena. Part I then discusses the details of Avena, finding that the ICJ has, at long last, had an opportunity to rule on an allegation of a U.S. violation of the Vienna Convention, where the ruling is such that the United States can pragmatically incorporate it into U.S. domestic law.

Part II analyzes the ICJ's rulings on particular issues in the Avena decision. This casenote argues that the ICJ correctly denied restitutio in integrum and rightfully ordered the United States to provide meaningful review and reconsideration under the LaGrand rule. The ICJ has provided a more precise definition of meaningful review and reconsideration in Avena, but erred in failing to issue an order of cessation and guarantee of non-repetition.

Part III recommends that the United States implement the Avena decision as controlling authority. The United States may implement the Avena ruling judicially by taking into account the violations of Vienna Convention rights. Alternatively, the American Bar

13. See discussion infra Parts I.A-B (establishing the binding nature of the Vienna Convention and describing the Breard and LaGrand cases as precedent to the Avena case).

14. See discussion infra Part I.B.3 (noting that Avena presents the first opportunity for an ICJ ruling to impact the lives of the defendants in the case of an allegation of a Vienna Convention violation).

15. See discussion infra Part II.A (providing Mexican and U.S. arguments on each issue as well as the relevant international law to determine the outcome of each allegation).

16. See discussion infra Part II.A.3.a (arguing that restitutio in integrum is not an appropriate remedy under international law).

17. See discussion infra Part II.A.3.c (arguing that the Avena remedy is appropriate given the nature of the violation at issue).

18. See discussion infra Part II.A.4 (finding that an order of cessation and a guarantee of non-repetition is appropriate under international law standards).

19. See discussion infra Part III (recommending that the United States should treat the Avena ruling as binding precedent and implement it in whatever method it deems necessary since no international body has authority to force a specific implementation plan).

20. See discussion infra Part III.B.1 (recommending vacatur of the death sentences as a means of judicial implementation of the Avena remedy in the case of an Article 36 violation).
Association ("ABA") Guidelines provide an innovative solution for implementing Article 36 rights outside of the courtroom setting.\textsuperscript{21}

This casenote concludes by suggesting that the United States reconsider its role in the international world, should it wish to provide the benefits of the Vienna Convention to Americans who travel and live abroad.\textsuperscript{22} The United States should begin this reconsideration through acknowledging the \textit{Avena} decision and domestically implementing the ICJ ruling.\textsuperscript{23}

\section*{I. BACKGROUND}

\subsection*{A. TERMS OF ARTICLE 36 OF THE VIENNA CONVENTION}

The Vienna Convention on Consular Relations, created in 1963, is a multilateral treaty that outlines consular relations and functions.\textsuperscript{24} The United States officially ratified the Vienna Convention in 1969.\textsuperscript{25} Article 36 of the treaty secures contact between a foreign

\begin{itemize}
\item \textsuperscript{21} See discussion \textit{infra} Part III.B.2 (considering the ABA Guidelines as one option to implement the ICJ ruling in a meaningful way since it would lead to the application of international law at the domestic court level in the United States).
\item \textsuperscript{22} See discussion \textit{infra} Parts II and III (suggesting that the United States must participate more actively in international law).
\item \textsuperscript{23} See discussion \textit{infra} Part III (describing ways in which the United States may effectively implement the \textit{Avena} decision).
\item \textsuperscript{24} Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention]. \textit{See American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases} 1012 (rev. ed. 2003) [hereinafter ABA Guidelines] (finding substantial evidence showing that American authorities are apt to fail to comply with the obligations under the Vienna Convention and explaining that failure to comply has both practical and legal consequences), available at http://www.abanet.org/deathpenalty/guidelines.pdf (last visited Jan. 29, 2005). The United States has become notorious for its failure to enforce the rights enumerated in the Vienna Convention and, even worse, for its blatant violation of them. \textit{Id.}
\item \textsuperscript{25} See Note, \textit{Too Sovereign But Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?}, 116 Harv. L. Rev. 2654, 2656 (2003) [hereinafter \textit{Too Sovereign}] (noting that the United States was one of the original signatories in 1963 and that the Nixon administration completed the ratification process in 1969).
\end{itemize}
national and his consular post when he is in a "receiving State." While Article 36(1)(a) establishes freedom of communication between non-detained foreign nationals and consular officials, Article 36(1)(b) outlines the rights available to detained individuals while abroad. Upon the foreign national's request, the appropriate authorities of the receiving State must inform the corresponding consulate of the detention. Article 36(1)(b) emphasizes the importance of the detained person gaining knowledge of his rights "without delay" and of the consulate receiving notice of the detention "without delay."

26. See Vienna Convention, supra note 24, art. 36 (noting that contact with the receiving state includes prompt notification when a national of the sending state is arrested, incarcerated, remanded into custody, or any other type of detainment); see also United States v. Chaparro-Alcantara, 226 F.3d 616, 620 n.1 (7th Cir. 2000), cert. denied, 531 U.S. 1026 (2000) (explaining that under the provisions of the Vienna Convention the "receiving State" is the nation in which the person is detained, assuming that it is not his nation of citizenship and the "sending State" is the nation where the person maintains citizenship status).

27. See Roberto Iraola, Federal Criminal Prosecutions and the Right to Consular Notification Under Article 36 of the Vienna Convention, 105 W. VA. L. REV. 179, 184 (2002) (acknowledging that to exercise consular functions effectively, consulates must be able to speak to their nationals).

28. See Vienna Convention, supra note 24, art. 36(1)(b) (stating that upon the individual's request, "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"); see also Trainer, supra note 7, at 229 (describing the difficulties a foreign national has when arrested abroad that compel consular assistance and reiterating that consular relations are essential in the development of friendly relations among nations and for ensuring protection for aliens residing in other states).

29. See Vienna Convention, supra note 24, art. 36(1)(b) (requiring the proficient authorities to contact the consular post corresponding to the nationality of the detained individual).

30. Id. In its application before the ICJ in the spring of 2003, Mexico contended that "without delay" meant almost immediately. See Avena and Other Mexican Nationals (Mex. v. U.S.), 2003 ICJ 128, Application Instituting Proceedings of January 9, ¶ 68 [hereinafter Avena Application] (arguing that even when the United States did attempt to comply with Article 36, it did not do so without delay), available at http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iapplication_20030109.PDF (last visited Jan. 29, 2005). The U.S. State Department, however, has interpreted "without delay" to mean that no deliberate delay should occur and that notification should "certainly" be within seventy-two hours of arrest or detention. See U.S. DEPARTMENT OF STATE,
Article 36(1)(c) of the Vienna Convention specifically mentions that consular officers have the right to communicate with a detained national of the sending State and “to arrange for his legal representation.”

To enforce these international obligations on the national level, Article 36(2) provides that the enumerated rights “shall be exercised in conformity with the laws and regulations of the receiving State.” However, those laws and regulations “must enable full effect to be given to the purposes for which the rights accorded under [Article 36(1)] are intended.”

---

31. See Vienna Convention, supra note 24, art. 36(1)(c) (bestowing upon consular officers the right to visit the detained national but requiring the officers to refrain from action if the individual does not request assistance). However, the right to have legal representation arranged is distinct from actually obtaining legal counsel and advice. See Iraola, supra note 27, at 208-209 (noting that invoking the Constitutional right to counsel achieves a different legal result than invoking the right to speak to a consulate because the rights are distinct under domestic and international law).

32. Vienna Convention, supra note 24, art. 36(2). See Lori Fisler Damrosch, Interpreting U.S. Treaties in Light of Human Rights Values, 46 N.Y.L. SCH. L. REV. 43, 53-54 (2002-2003) (discussing the Supreme Court’s position that the treaty itself places domestic law above treaty law by requiring the treaty rights to conform to State laws and regulations). Some scholars argue that the Vienna Convention could never circumvent domestic criminal codes because it is constructed to conform with, and not to interfere with, local laws. Id.

33. Vienna Convention, supra note 24, art. 36(2). See Memorial of the Republic of Paraguay (Para. v. U.S.), 1998 ICJ 99 Written Pleadings §§ 2.1-2.2 (Oct. 9) [hereinafter Memorial of Paraguay] [taking as fact the U.S. failure to inform Breard of his right to consular notification], available at http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm (last visited Jan. 29, 2005); see also LaGrand Case (F.R.G. v. United States) 2001 ICJ 104, ¶ 15 (June 27) (stating that it was an undisputed fact that the U.S. authorities did not inform Karl and Walter LaGrand of their right to speak to the German consulate). This provision requiring enforcement of consular rights is the sticking point that previous cases have introduced and that is at issue again in Avena. Id. See also Avena Application, supra note 30, ¶ 68 (arguing that U.S. officials in various states failed to inform the detained Mexicans of their right to speak to the Mexican consulate).
1. The Importance of the Vienna Convention and the Rights it Provides

Article 36 of the Vienna Convention grants foreign nationals the right to have access to a consulate—a right that is important for a myriad of reasons. Consular assistance gives the foreign national a better understanding of the legal system of the receiving state and provides better access to a psychological and emotional support system. In addition to acting as cultural liaisons, consular officials can also assist detained foreign nationals by providing bilingual attorneys or by collecting mitigating evidence. Most importantly, if

34. See ABA GUIDELINES, supra note 24 (commenting that consulates have legal representation duties, which include establishing diplomatic assistance, obtaining evidence for the investigation, providing cultural references in order to understand the American legal system, and contacting family and friends). The average citizen who wishes to go abroad for an extensive period of time can clearly understand the importance of the right to consular access under Article 36 of the Vienna Convention. Id.; see also Erik J. Luna & Douglas J. Sylvester, Beyond Breard, 17 BERKELEY J. INT’L L. 147, 184 (1999) (enumerating examples of American citizens who needed consular assistance—particularly when detained or victimized by crime—while volunteering, working, or studying abroad). Yet for the foreign national who is detained while abroad, then charged with a crime, tried, convicted, and sentenced to death, the importance of this right becomes immeasurable. Id.; see also Advisory Opinion 16, Inter-Am. C.H.R. 99, OC/ser. A (1999) (recognizing the international principle that nations that impose the death penalty have a more “rigorous” duty to abide by judicial decrees in cases dealing with an individual’s right to consular notification), available at http://www.l.umn.edu/humanrts/iachr/A/OC-16ingles-sinfirmas.html (last visited Jan. 29, 2005). One of the greatest benefits of the right of consular notification is that it applies reciprocally: Americans abroad have the right to speak to the U.S. consulate just as foreign nationals in the United States have the right to speak to their respective consulates. Id. See also United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ 64, at 6 (May 24) (noting that the United States asserted that Iran violated Article 36 of the Vienna Convention and that the government of Tehran was obligated to secure the release of all the U.S. citizens being held hostage); Iraola, supra note 27, at 180 (finding that when American citizens have been detained abroad, the United States has strongly promoted the use and enforcement of Article 36 rights).

35. See Amanda E. Burks, Consular Assistance for Foreign Defendants: Avoiding Default and Fortifying a Defense, 14 CAP. DEF. J. 29, 53 (2001) (asserting that consulates provide a source of comfort and a “familiar face” to foreign national defendants who experience unease or need additional attention and resources).

36. See Adam Liptak, Mexico Awaits Hague Ruling on Citizens on U.S. Death Row, N.Y. TIMES, Jan. 16, 2004 at A1 (noting that Mexican officials say that
foreign countries allow consular officials to perform their duties effectively, the foreign government is more likely to sentence the foreign national to life in prison, as opposed to the death penalty.\textsuperscript{37} Consular officials can secure legal representation, obtain mitigating evidence from the defendant's country of origin, and provide access to cultural references, all of which arguably contribute to a better legal defense.\textsuperscript{38}

2. The Binding Nature of the Vienna Convention and ICJ Decisions

In the hierarchy of U.S. law, an international treaty receives the same consideration as a federal statute and when there is a conflict between the two, the "later-in-time" rule applies.\textsuperscript{39} The event that came later in time, either the statute or the treaty, will prevail as the legally binding authority.\textsuperscript{41} When dealing with treaties, U.S. domestic law invokes the principle of \textit{pacta sunt servanda}, which obliges State parties to a treaty to perform the treaty in good faith.\textsuperscript{42} All treaties and federal statutes remain a step subordinate to the

Mexican defendants in the U.S. criminal justice system are often "confused, distrustful, unable to speak English and baffled by American procedures"), available at http://www.nytimes.com/2004/01/16/national/16DEAT.html (last visited Jan. 29, 2005). This phenomenon can cause detrimental outcomes that consular officials can help prevent. Id.

37. See id. (referring to Mexican foreign affairs ministry official Victor Manuel Uribe Avina's statement that when "consular protection is permitted to function" cases often result in less serious sentences).

38. See ABA GUIDELINES, supra note 24 (observing the advantages that consular officials provide foreign defendants detained in the United States).

39. See Reid v. Covert, 354 U.S. 1, 18 (1957) (discussing the status of Acts of Congress and treaties and the "later-in-time" rule, which requires that when a statute and treaty are inconsistent, the one that was enacted later in time will triumph, given that Acts of Congress and treaties otherwise receive equal treatment).

41. See Reid, 354 U.S. at 18 (defining further the "later-in-time" rule as giving precedence to the document that was most recently created by emphasizing that both treaties and statutes must be in compliance with the Constitution).

42. See Vienna Convention on the Law of Treaties, May 22, 1969, art. 26, 1155 U.N.T.S. 331, 339 (requiring parties who are bound to a treaty to perform it in "good faith").
Constitution because the U.S. Constitution occupies the top tier of the legal hierarchy. Treaties and federal statutes do trump state law, however, which falls at the bottom of the hierarchical system.

When the United States ratified the Optional Protocol Concerning the Compulsory Settlement of Disputes, it automatically consented to the jurisdiction of the ICJ for "disputes arising out of the interpretation or application of the Convention." The United States is thus consensually bound to the rulings of the ICJ for disputes concerning the Convention. Moreover, the Supremacy Clause in the U.S. Constitution renders the Vienna Convention binding upon states, and, as a self-executing treaty, the Vienna Convention

43. See Reid, 354 U.S. at 5-6 (finding that the Constitution is superior to a treaty in the hierarchy of law because "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."). The Constitution and constitutional rights define much of U.S. law, a choice the United States made when it created the Constitution. Id. See also JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 23 (2nd ed. 1985) (noting that in civil law, as opposed to common law, the legal hierarchy— in order of importance — includes statutes, administrative regulations, and custom).

44. See U.S. v. Pink, 315 U.S. 203, 230-231 (1942) (concluding that formal treaties will govern when there is inconsistent state law); see also Too Sovereign, supra note 25, at 2658 (discussing the U.S. Supreme Court’s expansive interpretation of the treaty power in U.S. v. Pink).

45. See Vienna Convention on Consular Relations, Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 77, 169, 596 U.N.T.S. 487, 488 [hereinafter Optional Protocol] (providing for states parties to concede compulsory jurisdiction to the ICJ in disputes arising out of the interpretation or application of the Convention, unless they agree on another form of settlement within a reasonable period of time); see also Too Sovereign, supra note 25, at 2656-57 (finding that because the United States rejected the compulsory jurisdiction of the ICJ over treaty and international law matters in 1986, the Optional Protocol is important because the ICJ now only has jurisdiction over the United States in cases where a treaty specifically provides for the ICJ’s jurisdiction, which the Vienna Convention accomplishes through the Optional Protocol). Therefore, although the United States has rejected the jurisdiction of the ICJ generally, the ICJ retains jurisdiction over the United States for Vienna Convention disputes. Id.

46. See Optional Protocol, supra note 45 (providing for compulsory jurisdiction of the ICJ over the United States in disputes arising out of the interpretation of the Vienna Convention).

47. See U.S. CONST. art. VI, cl. 2 (affirming that "This Constitution . . . and all Treaties made, or which shall be made, under the Authority of the United States,
necessitates no further legislative implementation to enable its operation.\textsuperscript{48}

**B. ICJ RULINGS REGARDING THE VIENNA CONVENTION**

1. The Breard Case (Paraguay v. United States)

The case of Angel Francisco Breard, a citizen of Paraguay whom the Commonwealth of Virginia charged with attempted rape and capital murder, brought to light U.S. violations of the Vienna Convention.\textsuperscript{49} Throughout Breard’s entire adjudication process, including the appeals in state courts, no one ever informed him of his right to speak to a consulate.\textsuperscript{50} After Paraguayan officials learned of Breard’s detention, conviction, and sentence, both Breard and Paraguay pursued multiple avenues in search of relief, none of which had a positive result.\textsuperscript{51}

shall be supreme Law of the Land”); see also Too Sovereign, supra note 25, at 2657-58 (finding that while domestic criminal law normally falls under the domain of state law in the U.S. federal system, formal treaties preempt state law). Treaties are incorporated into U.S. domestic law through the Supremacy Clause. \textit{Id.} However, some scholars argue that U.S. courts have not always interpreted the Supremacy Clause accurately. \textit{Id.} See also, e.g., Cara Drinan, Note, Article 36 of the Vienna Convention on Consular Relations: Private Enforcement in American Courts after LaGrand, 54 STAN. L. REV. 1303, 1307 (2002) (arguing that U.S. courts have failed to apply \textit{LaGrand} correctly through the Supremacy Clause).

48. See Bishop, supra note 4, at 10-11 (noting that the Vienna Convention is self-executing). \textit{But see} Howard S. Schiffman, \textit{Breard and Beyond: The Status of Consular Notification and Access Under the Vienna Convention}, 8 CARDOZO J. INT’L & COMP. L. 27, 40-42 (2000) (noting that while various U.S. courts have construed the Vienna Convention to be both non-self-executing and self-executing, the more immediate interest of the courts is whether the defendant was “actually prejudiced” by a Convention violation).


50. See Memorial of Paraguay, supra note 33, at 2.13-2.15 (discussing Breard’s petition for habeas corpus and other appeals that the state courts denied).

51. See \textit{id.} at 2.16-2.17 (noting that when Paraguayan officials learned of Breard’s situation, they filed a habeas corpus motion in the United States District Court for the Eastern District of Virginia). Paraguay argued that the United States violated Article 36(2) of the Vienna Convention by allowing the doctrine of procedural default to preclude Breard from bringing his claim in federal court. \textit{Id.} at 4.34-4.35. The federal courts dismissed Paraguay’s separate suit seeking vacatur of Breard’s conviction and sentence. \textit{Id.} The Virginia state courts and the federal
While the Commonwealth of Virginia proceeded to set a date of execution for Breard, Paraguay filed, inter alia, a request with the ICJ for provisional measures of protection so that Breard would not be executed. The ICJ issued an Order of Provisional Measures ("Order") on April 9, 1998, five days before Breard's scheduled execution, stating that "[t]he United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings." Despite the Order, the Commonwealth of Virginia executed Breard as scheduled.

In Breard, the Supreme Court was not ruling on the merits of an allegation of a Vienna Convention violation. Rather, the Court courts concluded that it was too late for Breard to raise a Vienna Convention violation claim. Id. at 2.21. See also Breard, 523 U.S. at 373 (detailing Breard's argument that his denial of the right to consular access was cause for overturning his state court conviction and sentence). The district court denied the motion on procedural default grounds: Breard had to raise the claim in state court or he could never raise it again. Id. See also Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996) (finding that Breard's claim was procedurally defaulted and that, in any event, he could not show cause or prejudice because these grounds cannot be shown through a contention of inadequate counsel; counsel's failure to raise the claim is a risk that the petitioner must bear); Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1272-73 (E.D. Va. 1996), aff'd, 134 F.3d 622 (4th Cir. 1998) (finding that, inter alia, the court lacked subject matter jurisdiction to hear the claim because there was no applicable exception to Eleventh Amendment immunity).

52. See Memorial of Paraguay, supra note 33, at 2.22-2.30 (noting the various applications Paraguay and Breard submitted to the Court of Appeals and the Supreme Court in addition to the diplomatic negotiations initiated in hopes of staying Breard's execution, even while Virginia had already set the date of execution); see also Bishop, supra note 4, at 18 (discussing the procedural history of the Breard decision).

53. See Memorial of Paraguay, supra note 33, at 5.1 (ordering that the U.S. should not execute Breard, pending the final decision in the proceedings).

54. See Bishop, supra note 4, at 23 (stating that Virginia officials executed Breard by lethal injection on April 14, 1998, the date of his scheduled execution); see also Christopher E. van der Waerden, Note, Death and Diplomacy: Paraguay v. United States and the Vienna Convention on Consular Relations, 45 WAYNE L. REV. 1631, 1640 (1999) (distinguishing between the contradictory arguments that the Clinton administration issued at the time of Breard's execution). The Department of Justice argued that the Supreme Court should allow the execution to go forward, while the Department of State urged the Virginia governor to stay the execution pending the ruling of the ICJ. Id.

55. See Breard, 523 U.S. at 378-79 (denying Breard's "petition for an original writ of habeas corpus, the motion for leave to file a bill of complaint, the petitions
denied Breard’s petition for habeas corpus because he had procedurally defaulted the claim and the Court denied Paraguay’s submissions on the grounds that there was not an applicable exception to Eleventh Amendment sovereignty that would allow for a suit against a state. The Court’s denial of Breard’s habeas corpus petition did not reach the issue of whether U.S. authorities had in fact violated his right to consular notification under the Vienna Convention. The United States blatantly disregarded international law by executing Breard despite the ICJ’s Order—an action that provides the resonating complexity in Breard’s case. The U.S. Supreme Court found that the Order deserved “respectful consideration” but was not legally binding. U.S. Government officials recommended to the Supreme Court that the ICJ decision should not necessarily be considered binding. Additionally, the Supreme Court, in dicta, left

for certiorari, and the accompanying stay applications filed by Breard and Paraguay”).

56. See van der Waerden, supra note 54, at 1642 (stating that the Supreme Court denied Breard’s petition for two reasons: (1) the Vienna Convention must be enacted in conformity with U.S. law, which meant that the procedural default rule precluded the petition, and (2) the Antiterrorism and Effective Death Penalty Act of 1996 trumped the Vienna Convention based on the “later-in-time” rule, so that Breard again raised his claim too late).

57. See Breard, 523 U.S. at 377-78 (finding that Paraguay’s petition for certiorari and the application for a stay of Breard’s execution were not cognizable in the U.S. Supreme Court because the Vienna Convention did not expressly provide for a private right of action, there was no Eleventh Amendment exception to state immunity from suit, and Paraguay was not authorized to bring suit under §1983).


59. See infra notes 60-62 and accompanying text (observing the U.S. disregard for international law as evidenced by the Breard decision).

60. See Breard, 523 U.S. at 375 (finding that the ICJ’s Order did not trump the presumption that “procedural rules of the forum State govern the implementation of the treaty in that State”). See generally Mark Weisburd, International Courts and American Courts, 21 MICH. J. INT’L L. 877, 933 (2000) (questioning the assumption that international law should trump domestic law and analyzing that assumption as incorrect).

61. See Memorial of Paraguay, supra note 33, at 5.5 (noting that the Solicitor
open the question of whether the Vienna Convention "confers on an individual the right to consular assistance following arrest." The ICJ responded to these two issues—whether ICJ provisional measures are binding and whether the Vienna Convention creates individual rights—in the *LaGrand* decision just three years later.

2. The *LaGrand* Decision  
(Federal Republic of Germany v. United States)

Following the *Breard* case, the ICJ considered the uncannily similar story of two German brothers executed by the state of Arizona despite numerous pleas for reprieve in which they argued that U.S. officials had violated their right to consular access. The Arizona legal system convicted and sentenced Walter and Karl LaGrand to death without their counsel ever raising the issue of non-compliance with the Vienna Convention.

General of the United States advised the Supreme Court that the ICJ Order did not include "legal compulsion" and Secretary of State Madeleine Albright considered the Order "non-binding"); see also van der Waerden, *supra* note 54, at 1640 (remarking that the Department of Justice did not consider the ICJ order to be binding).

62. See *Breard*, 523 U.S. at 376 (suggesting that certain provisions of the Antiterrorism and Effective Death Penalty Act of 1996 may not make consular assistance an absolute right); see also, e.g., Henry J. Richardson III, *The Execution of Angel Breard by the United States: Violating an Order of the International Court of Justice*, 12 TEMP. INT'L & COMP. L.J. 121, 127 (1998) (positing that the United States went so far as to violate Breard's human right to a fair trial). Some scholars have argued that the Vienna Convention arguably creates a human right and not only an individual right. *Id.*

63. See discussion *infra* Part I.B.2 (explaining the facts, holdings and repercussions of the *LaGrand* decision).

64. See *LaGrand* Case (F.R.G. v. United States) 2001 ICJ 104, ¶ 10 (June 27) (citing Germany's argument that the United States violated international legal obligations under Articles 5 and 36 of the Vienna Convention by executing the LaGrand brothers).

65. See *id.* ¶ 14 (stating that Arizona officials arrested the LaGrand brothers for suspected involvement in an attempted murder and bank robbery, for which the brothers were then tried, convicted, and sentenced to death). The United States admitted that the appropriate authorities had not informed the brothers of their right to speak to a German consulate throughout the trial, conviction, and sentencing process. *Id.* ¶ 15. The brothers raised the issue of the U.S. failure to inform them and the consulate of each entity's rights in their writ of habeas corpus. *Id.* ¶ 23. The district court denied the writ on the basis of the procedural default
Even after U.S. authorities informed the LaGrands of their right to consular access and Germany made diplomatic attempts to stay the execution of the brothers, Arizona authorities executed Karl LaGrand.\textsuperscript{66} Shockingly, Arizona officials executed Walter LaGrand on the same day that the ICJ issued an Order that the United States "should take all measures at its disposal to ensure that Walter LaGrand is not executed."\textsuperscript{67} In an indication of the U.S. perception of the LaGrand Order, and more generally of its attitude toward international law, the United States issued a statement that the ICJ Order indicating provisional measures "is not binding and does not furnish a basis for judicial relief."\textsuperscript{68}

Although Arizona had already executed both of the LaGrand defendants, the ICJ issued a decision on the merits of the case.\textsuperscript{69} Responding to the unresolved issue in \textit{Breard} of whether the Vienna rule. \textit{Id.}


\textsuperscript{68} \textit{LaGrand}, 2001 ICJ 104, ¶ 33. The perception of \textit{LaGrand} in U.S. law has been a disappointment for the school of thought that adheres to the binding nature of the ICJ decisions for Vienna Convention decisions. See Joan Fitzpatrick, \textit{The Unreality of International Law in the United States and the LaGrand Case}, 27 YALE J. INT'L L. 427, 427-28 (2002) (arguing that interpretation of the \textit{LaGrand} decision has not reflected the importance of international law as legal authority).

\textsuperscript{69} See \textit{LaGrand}, 2001 ICJ 104, ¶ 128 (listing the ICJ's holding for each matter brought before it). The ICJ found that the United States violated Article 36 of the Vienna Convention by failing to inform the LaGrands of their right to consular notification and by failing to inform the German consulate of the detention of its nationals. \textit{Id.}
Convention creates individual rights, the ICJ examined provisions 1(b) and 1(c) of Article 36 of the Vienna Convention and determined that the Convention "creates individual rights, which . . . may be invoked in the [ICJ] by the national State of the detained person."\(^70\) The ICJ also responded to the question left open in *Breard* of whether provisional measures are binding\(^71\) by finding that the United States violated the Order staying the execution of Walter LaGrand.\(^72\)

Thus, the ICJ highlighted three major legal obligations that, although exigent at the time of the *Breard* case, were beyond question in *LaGrand*: (1) the duty to comply with the individual rights enumerated in Article 36; (2) the duty to carry out those rights in a meaningful way; and (3) the duty to abide by the binding decisions and provisional measures of the ICJ.\(^73\) When an individual is detained for a prolonged period of time, convicted, or sentenced despite a violation of these obligations, the ICJ found that the United States should allow the "review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention."\(^74\) The ICJ gave the United States wide discretion

\(^{70}\) *See id.* ¶ 77 (holding that Article 36(1) creates individual rights); *see also* *Breard*, 523 U.S. at 376 (holding that the Vienna Convention "arguably" creates individually enforceable rights); *Trainer*, supra note 7, at 257-58 (looking at the drafters' intent in the Vienna Convention to conclude that the treaty clearly bestows private rights upon individuals).

\(^{71}\) *See* discussion supra notes 59-61 and accompanying text (observing the U.S. misinterpretation of the ICJ provisional measures staying the execution of Angel Breard).

\(^{72}\) *See* *LaGrand*, 2001 ICJ 104, ¶ 110 (concluding that the Order "was not a mere exhortation" and that it "was consequently binding in character and created a legal obligation for the United States"). After issuing provisional measures that the United States chose to ignore in both the *Breard* and *LaGrand* cases, the ICJ underscored the binding nature of its Orders and highlighted that the United States was in violation of its legal obligation. *Id.* at 109.

\(^{73}\) *See* Too Sovereign, supra note 25, at 2654 (stating that the *LaGrand* ruling is noteworthy because it declared that ICJ provisions are binding and that the federal structure of the United States cannot be used as an excuse to prevent the government from taking meaningful steps to ensure states' compliance with court orders).

\(^{74}\) *LaGrand*, 2001 ICJ 104, ¶ 125. The terms "review and reconsideration" leave ample room for interpretation. *See* Fitzpatrick, supra note 68, at 432 (arguing that the ICJ left the remedy of "review and reconsideration" open to interpretation
in choosing the means by which review and reconsideration should occur in stating that "[t]his obligation can be carried out in various ways. The choice of means must be left to the United States."75

This language discussing the remedy of "review and reconsideration" is extremely important as the courts test in Avena and Other Mexican Nationals the international obligations LaGrand bestowed upon the United States.76 Avena presents the major issues of what remedy should be provided in the case of a Vienna Convention violation and what the United States should do to implement the Avena ruling effectively.77

3. Avena and Other Mexican Nationals (Mexico v. United States)

The most recent decision regarding a violation of Article 36 of the Vienna Convention came from the ICJ in the spring of 2004 in Avena and Other Mexican Nationals.78 While the facts are almost identical in order to accommodate the variances among different criminal justice systems that would be interpreting the remedy).

75. LaGrand, 2001 ICJ 104, ¶ 125. But see Jeremy White, A New Remedy Stresses the Need for International Education: The Impact of the LaGrand Case on a Domestic Court's Violation of a Foreign National's Consular Relations Rights Under the Vienna Convention, 2 WASH. U. GLOBAL STUD. L. REV. 295, 309-12 (2003) (concluding that despite the discretion given to the United States to carry out the remedy under LaGrand, the United States nevertheless has a duty to perform its international obligations, particularly when the United States is gaining a poor international reputation).

76. See Avena and Other Mexican Nationals (Mex. V. U.S.), 2004 ICJ 128, ¶¶ 120-21 (Mar. 31) (discussing LaGrand as the precedent for determining a remedy for Mexico); see also Avena Application, supra note 30, ¶¶ 1-2 (alleging that the United States violated Articles 5 and 36 of the Vienna Convention); Sarah M. Ray, Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations, 91 CAL. L. REV. 1729, 1759 (2003) (noting that Mexico’s application emphasizes the failure of U.S. courts to comply with the LaGrand ruling).

77. See Avena, 2004 ICJ 128, ¶¶ 117-18 (establishing the Mexican request for relief in the form of restitutio in integrum and the U.S. argument for relief in the form of review and reconsideration as established by LaGrand); see also Ray, supra note 76, at 1763 (suggesting that the ICJ may be willing to “go out on a limb” in Avena in order to prescribe a stronger remedy than the one provided in LaGrand).

78. See generally Avena, 2004 ICJ 128 (detailing the factual findings and the ICJ’s conclusion).
to the factual scenarios presented in *Breard* and *LaGrand*, the ICJ has further outlined its holding in *LaGrand* and has set forth a specific remedy with which the United States must comply. Furthermore, this case presents a precedential opportunity for the United States to implement an ICJ decision in such a way as to have a pragmatic effect on the lives of the defendants now alive, albeit on death row, in the United States.

a. Facts Presented in the Application Instituting Proceedings

In January of 2003, the government of Mexico instituted proceedings in the ICJ against the United States for alleged violations of the Vienna Convention. Mexico claimed that U.S. authorities did not notify “without delay” its fifty-two defendants on death row of their rights under Article 36(1)(b) of the Vienna Convention. The ICJ held by a vote of fourteen to one on several specific aspects of the case that the United States had breached its obligations under the Vienna Convention.

---

79. See discussion supra Part I.B.3.a (summarizing the facts presented in Mexico’s application instituting proceedings before the ICJ).

80. See *Avena*, 2004 ICJ 128, ¶ 153 (enumerating the ICJ’s vote and consequent holding for each claim). The ICJ held by a vote of fourteen to one on several specific aspects of the case that the United States had breached its obligations under the Vienna Convention. *Id.*

81. See discussion infra Part III (suggesting methods by which the United States can actively incorporate the *Avena* ruling into domestic law).

82. See *Avena Application*, supra note 30, ¶¶ 2-3 (alleging that violations of Articles 5 and 36 of the Vienna Convention have resulted in unfair sentences); see also *Too Sovereign*, supra note 25, at 2670 (proposing that the United States will have to interpret *LaGrand* through the most recent application before the ICJ regarding violations of the Vienna Convention, *Avena and Other Mexican Nationals*).

83. Memorial of Mexico (Mex. v. U.S.), 2004 ICJ 128, Written Pleadings, ¶ 89 (June 20, 2003) [hereinafter Memorial of Mexico], available at http://www.icj-cij.org/icijwww/idocket/imus/imusframe.htm (last visited Jan. 29, 2005). Former Governor Ryan of Illinois commuted three convictions and sentences, but Mexico pursued those cases and sought a remedy for the alleged Article 36 violations regardless. *Id.* ¶ 89, n.114. See Verbatim Record (Mex. v. U.S.), 2003 ICJ Pleadings 24 ¶ 84 (Dec. 15, 2003) [hereinafter Verbatim Record of Dec. 15] (referring to fifty-two defendants who allege that U.S. officials violated their Vienna Convention rights), available at http://www.icj-cij.org/icijwww/idocket/imus/imusframe.htm (last visited Jan. 29, 2005). For the purposes of this case note, the number of defendants referred to will be fifty-two, given that Mexico originally submitted fifty-four cases but later withdrew two of them. See *Avena*, 2004 ICJ 128, ¶ 16 (enumerating each defendant’s name and noting that Mexico withdrew two of the defendants’ cases).
Convention before being detained, tried, convicted, and sentenced to death. Although Mexico has been pursuing challenges to the convictions through U.S. domestic judicial proceedings, it further alleged that the United States "refused" to allow relief for the alleged violations and refused to guarantee that further violations will not occur.

The typical scenario in each case includes proceedings against the defendant that began and concluded, in part if not altogether, before U.S. officials notified the Mexican government of the defendant's detention. Mexico claimed that: (1) the United States violated its obligation to Mexico to inform the government of a detained Mexican national; (2) the United States violated its obligation to the individual to inform him of his right to speak to a consulate; (3) the United States violated its obligation to Mexico to allow it access to its citizens; and (4) the United States violated the Convention by

84. See Ray, supra note 76, at 1759 (noting that diplomatic efforts, in addition to judicial efforts, failed to provide the defendants with any relief). Because of the alleged violation, Mexico states that it was not able to exercise its rights or perform its consular functions according to the Vienna Convention. See Avena Application, supra note 30, ¶ 2 (claiming injury to the State of Mexico and to its nationals because they lacked the opportunity to exercise their rights).

85. See Avena Application, supra note 30, ¶ 4 (stating that Mexico has pursued judicial and diplomatic negotiations with the United States, but nevertheless the U.S. government has "refused" to provide adequate relief or guarantees of cessation). Mexico characterizes the dispute as one where the United States and Mexico disagree on the rights included in the Vienna Convention, the meaning of those rights, and the remedy that should be available when a violation occurs. Id. ¶ 5.

86. See Avena Application, supra note 30, ¶¶ 69-267 (identifying each individual case and the stages in which proceedings currently stand); see also Memorial of Mexico, supra note 83, ¶¶ 90-91 (noting that in thirty of the cases, the defendants were tried, convicted and sentenced to death before the Mexican consulate learned of their cases). In twenty-four cases, Mexico learned of the detentions before trial, but the prosecution had already obtained incriminating statements and other incriminating evidence. See Avena Application, supra note 30, ¶ 68 (finding that although the United States made attempts to comply with the consular notification requirement, the United States did not make such attempts before the start of trial, which constitutes "delay"). In forty-nine of the cases, there is "no evidence" that the competent authorities attempted to comply with Article 36 before the government tried, convicted, and sentenced the defendants to death. Id. In only four of the cases does Mexico find that the authorities made some attempt to comply with Article 36 but did not do so "without delay." Id.
failing to give full effect to the rights of the Convention in U.S. domestic law.  

b. Provisional Measures Staying the Executions of Three Defendants

The same day Mexico submitted its application instituting proceedings to the ICJ, it filed a request for the indication of provisional measures. The United States argued that clemency proceedings would fulfill the obligation to provide review and

87. See Avena Application, supra note 30, ¶ 279 (stating its specific claims against the United States, including U.S. unwillingness “to take steps sufficient ‘to enable full effect to be given to the purposes for which the rights accorded under [Article 36(1)] are intended’ (Vienna Convention, Article 36(2))”). But see Ray, supra note 76, at 1769 (arguing that the U.S. Supreme Court is the only court with jurisdiction to issue a remedy to Mexico).

88. See Avena and Other Mexican Nationals (Mex. v. U.S.), 2003 ICJ 128, Request for the Indication of Provisional Measures Order of February 5, 2003 [hereinafter Avena Order], ¶ 2-7 (reiterating Mexico’s arguments regarding the U.S. violations of the Vienna Convention and the need to litigate the issue before the ICJ, which would have no meaning were the Mexican defendants executed on schedule), available at http://www.icj-cij.org/ICJWWW/idocket/imus/imusframe.htm (last visited Jan. 29, 2005). In the application, Mexico argued that, because of the alleged violations by the United States and the pending nature of the cases, the ICJ should indicate provisional measures staying the imminent executions of three defendants as fulfillment of the obligation from LaGrand to grant review and reconsideration where a Convention violation has occurred. Id. Furthermore, Mexico relied on the LaGrand decision to argue that there should be an indication for provisional measures when a Vienna Convention violation has occurred because the appropriate remedy is review and reconsideration, which cannot occur if the defendants are not alive and present to receive a benefit from that remedy. Id. ¶ 3. In opposition to the indication of provisional measures, the United States argued that LaGrand did not establish a right to restoration of the status quo ante under the Vienna Convention. Id. ¶ 30. See also Alan Macina, Avena & Other Mexican Nationals: The Litmus for LaGrand & the Future of Consular Rights in the United States, 34 CAL. W. INT’L L. J. 115, 137 (2003) (concluding that Mexico avoided the mistakes of B Reed and LaGrand by requesting provisional measures very early on in the ICJ’s adjudication of the case). Perhaps in recognition of previous cases where the United States declined to find ICJ Order’s to be binding, Mexico filed its application for provisional measures in a very timely manner. Id. See also Schiffman, supra note 48, at 50-52 (arguing that because the LaGrand decision was only binding on those parties, only German defendants may receive review and reconsideration pursuant to that holding).
reconsideration, whereas Mexico believed that these proceedings were “standardless, secretive and unreviewable.”

After balancing the parties’ interests and finding sufficient urgency in the situations of three defendants, the ICJ indicated provisional measures ordering the United States to “take all measures necessary to ensure” that the appropriate U.S. authorities did not execute the defendants before domestic courts issued a final judgment. To date, the United States has complied with this Order.

c. Relief Mexico Sought For the Alleged Violations

Because *Avena* presents the first opportunity for an ICJ decision to have a practical impact both in the lives of the defendants and in U.S. domestic courts, the remedy the ICJ issued and the application of this remedy in U.S. courts is arguably the most important aspect of this case. In requesting three specific forms of relief, Mexico first asked the ICJ to declare that the United States did in fact violate its obligation to Mexico under the Vienna Convention.


90. *See Too Sovereign,* supra note 25, at 2671 (noting that the provisional measures in *Avena* use mandatory language (“shall”) whereas the *Breard* language was more suggestive (“should”).

91. *See Liptak,* supra note 36 (arguing that had the ICJ not issued that Order, and had the United States not complied with it, those three defendants would currently be dead).

92. *See Avena and Other Mexican Nationals (Mex. v. U.S.),* 2004 ICJ 128, ¶ 153 (Mar. 31) (suggesting specifically in part (10) that the *Avena* case presents the first opportunity for an ICJ decision to have a practical impact in U.S. courts).

93. *See discussion infra* Part III (arguing for the implementation of the *Avena* decision in U.S. courts).

94. *See Memorial of Mexico,* supra note 83, ¶¶ 89-92 (arguing that the United States violated the defendants’ right to speak with the Mexican consulate, and that the United States violated Mexico’s right to provide protection for its defendants).
Mexico sought relief in the form of *restitutio in integrum*, meaning that the situation should be returned to its status as if the violations had never occurred.\(^\text{95}\) Finally, Mexico requested the ICJ to order the United States to cease its violations of the Vienna Convention and to guarantee that further Vienna Convention violations would not occur.\(^\text{96}\)

Mexico’s application reflects its extreme frustration with United States-Mexico relations regarding capital cases.\(^\text{97}\) Mexico cited four

\(^{95}\) See *Avena Application*, supra note 30, ¶ 277 (noting Mexico further requests that it “should be granted *restitutio in integrum* in each case in which competent authorities of the United States sentenced a Mexican national to death following proceedings in which those authorities failed to respect Article 36 of the Vienna Convention”); see also *Memorial of Mexico*, supra note 83, ¶¶ 352-55 (requesting the ICJ to order the United States to take all steps necessary to ensure that *restitutio in integrum* results to the fullest extent possible). This form of relief must enable “full effect to be given to the purposes for which the rights accorded under [Article 36] are intended.” *Id.* In its interpretation of *restitutio in integrum*, Mexico asks that (1) the convictions and sentences of all the defendants in this proceeding be vacated, (2) all evidence obtained in violation of Article 36 be excluded from any future criminal proceeding against these defendants, and (3) the United States must refrain from applying its domestic law in such a way as to preclude the enforcement of Vienna Convention rights. *Id.; see also Avena Application*, supra note 30, ¶ 279 (seeking assurance that appropriate authorities will comply with Article 36 and finding that the only way to ensure compliance is through a modification of municipal law).

\(^{96}\) See *Memorial of Mexico*, supra note 83, ¶¶ 398-406 (arguing that the United States must cease its on-going violations of the Vienna Convention and that it must guarantee not to repeat violations of its international legal obligations).

\(^{97}\) See Vanessa Maaskamp, *Extradition and Life Imprisonment*, 25 LOY. L.A. INT’L & COMP. L. REV. 741, 743-44 (2003) (discussing the complicated relations between Mexico and the United States regarding the death penalty because the Mexican constitution merely contemplates, but does not apply, the death penalty whereas the United States does apply this penalty); see also *Avena Application*, supra note 30, ¶ 39 (arguing that even a declaration of inadequate counsel as a reason for failing to bring the claim at trial court is not adequate cause for the claim to enter appellate or federal proceedings). Mexican nationals have not received any relief in U.S. state courts because generally the doctrine of procedural default applies and therefore the defendants cannot raise their claims in appellate and federal proceedings. *Id. See also Burks*, supra note 35, at 43-44 (arguing that defense attorneys would be well-served to inquire about every defendant’s nationality so an allegation of a Vienna Convention violation can be properly raised at the state court level rather than submitting the allegation to the “rigors” of appellate review or a *habeas corpus* petition). The procedural default rule functions generally to prohibit defendants from raising the Vienna Convention violation at any level but the state court level. *Id.* Yet if a defendant has inadequate
cases in which it filed diplomatic notes with the U.S. government to protest certain executions and to emphasize U.S. failure to provide the defendant with his right to consular notification. In each case, the United States carried out the execution nonetheless, writing a letter of apology after each execution to express its regret that the appropriate authorities had not complied with the Vienna Convention. In light of Mexico's experience with the United States in death penalty cases—consisting of ineffective diplomatic protests and fruitless judicial interventions—it is understandable that Mexico's application insists on redress and remedy in U.S. domestic courts.

d. The Holding of the ICJ in Avena and Other Mexican Nationals

The ICJ ruled on Mexico's application in its decision Avena and Other Mexican Nationals on March 31, 2004. After determining counsel who fails to raise the claim, the defendant is essentially out of luck because inadequate counsel does not constitute "cause" or "prejudice" in showing that the procedural default rule operated unfairly against him. Id. at 44-45. See also Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir. 1997) (finding no showing of prejudice because Murphy did not establish that contacting the Mexican consulate would have changed his guilty plea or sentence). The Fourth Circuit found that a "reasonably diligent attorney" would have uncovered the applicability of the Vienna Convention during the pre-trial process so that it does not constitute cause for demonstrating that the trial would have gone any differently had the defendant had access to his consulate. Id.

98. See Avena Application, supra note 30, ¶¶ 69-267 (citing the cases of Irineo Tristan Montoya, Mario Benjamin Murphy, Miguel Angel Flores, and Javier Suárez Medina, in which Mexico protested the executions through diplomatic notes and asserted the violation of the Vienna Convention).

99. See id. (finding that after the fourth instance in which the United States ignored Mexico's protest to the execution, Mexican President Vicente Fox cancelled an official visit to the United States in protest of the violation of international law). The U.S. government never formally apologized to the Mexican government for the breach. Id.

100. See Macina, supra note 88, at 137 (noting that Mexico is asking the ICJ to expand its power from the LaGrand holding by requesting that the United States not apply its municipal law in such a way as to bar full application of the Vienna Convention rights); see also Ray, supra note 76, at 1766 (observing that the United States is unlikely to comply fully or satisfactorily with the ICJ ruling in Avena so that the U.S. judiciary must implement the decision instead).

101. See generally Avena and Other Mexican Nationals (Mex. V. U.S.), 2004 ICJ 128 (Mar. 31) (holding that the United States violated Article 36 of the Vienna
that the ICJ had jurisdiction to rule on all of Mexico's claims, the ICJ also determined that Mexico's claims were all admissible. Proceeding to the merits of the case, the ICJ found that the United States violated Article 36(1)(b) of the Vienna Convention by not informing the fifty-one defendants of their right to consular access. The ICJ found that the United States should have adequately inquired into the nationality of these defendants, and in forty-seven of those cases the United States should have informed them of their right to speak to a consulate "without delay."

The ICJ further found that the United States violated its obligation to inform Mexico in a timely manner that it was detaining Mexican nationals. The United States also thereby violated Article 36's provisions part I(a) and (c) by depriving Mexico of the opportunity "to communicate with and have access to [forty-nine] nationals and to visit them in detention." With regard to multiple defendants, the

---

102. See id. ¶ 27-35 (overruling, one by one, the U.S. objections to the ICJ's jurisdiction over the various claims).

103. See id. ¶ 37, 40, 42, 44, 47 (declaring that Mexico's claims were admissible based on ICJ precedent).

104. See id. ¶ 153-4 ("by not informing, without delay upon their detention, the 51 Mexican nationals ... of their rights under Article 36, paragraph 1(b), of the Vienna Convention on Consular Relations of 24 April 1963, the United States of America breached the obligations incumbent upon it under that subparagraph.").

105. See id. ¶ 66, 74 (finding that in the case of a fifty-second Mexican national, Mr. Salcido, the U.S. authorities had no indications of Mexican nationality that should have caused a rapid inquiry into the true nature of his citizenship).

106. See id. ¶ 76 (noting that the right to be informed of consular access does not turn upon an officer's assumptions of whether the defendant actually wishes to speak to the consulate).

107. See Avena, 2004 ICJ 128, ¶ 153-55 ("by not notifying the appropriate Mexican consular post without delay of the detention of the forty-nine Mexican nationals ... and thereby depriving the United Mexican States of the right, in a timely fashion, to render the assistance provided for by the Vienna Convention to the individuals concerned, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 1(b).").

108. See id. ¶ 93, 97, 106(3), 153(6) (concluding that of the fifty-one defendants on death row, the United States adequately recognized the consular notification rights of Mr. Juárez (case No. 10) and Mr. Hernández (case No. 34) by either informing them of their right or by directly contacting the consulate for
ICJ found that the United States violated its obligation “to enable Mexican consular officers to arrange for legal representation of their nationals.”109 Finally, the ICJ found that the United States complied with its obligations under Article 36(2) to provide “review and reconsideration” as provided for by LaGrand in all but three cases.110

The ICJ then proceeded to discuss the legal consequences of U.S. breaches of its obligations under Article 36.111 Relying on its LaGrand decision that the United States must provide review and reconsideration in the case of a Vienna Convention violation, the ICJ further clarified this holding in very distinct terms.112 While reiterating the remedy of “review and reconsideration” in the case of a Vienna Convention violation, the ICJ specified that such review and reconsideration must occur “with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.”113

109. See id. ¶ 106(4) (listing the thirty-four cases in which, “by virtue of [the United States’] breaches of Article 36, paragraph 1(b),” the defendants were not able to receive assistance in obtaining legal representation from their consulate).

110. See id. ¶¶ 113-14 (holding that review and reconsideration is still possible in all but three cases because the cases have not “reach[ed] a state at which there is no further possibility of judicial re-examination”).

111. See id. ¶ 115 (reiterating the violation of the United States to fulfill its obligations under Article 36(2) in failing to observe its obligations under Article 26(1)(b)).

112. See id. ¶¶ 120-21 (quoting from LaGrand to establish the principle by which the ICJ must abide in the present decision and stating that the remedy “should consist in [sic] an obligation on the United States to permit review and reconsideration of these national’s cases”); see also William J. Aceves, Avena and Other Mexican Nationals (Mexico v. United States). Provisional Measures Order. At <http://www.ICJ.cij.org>. International Court of Justice, February 5, 2003., 87 AM. J. INT’L L. 923, 929 (2003) (stating that “Avena provides the International Court of Justice with a unique opportunity to clarify its prior judgment in LaGrand”).

113. See Avena, 2004 ICJ 128, ¶ 121 (creating a specific review and reconsideration remedy for failing in an obligation of consular notification, which was absent from the LaGrand decision); see also Drinan, supra note 46, at 1317 (suggesting that “prejudice analysis” could become very important in how U.S. courts evaluate relief for an Article 36 violation). The addition of the “prejudice” analysis could be very influential in U.S. courts. Id.
In deciding that the remedy of review and reconsideration applied to the Avena case, the ICJ denied Mexico's requests for "partial or total annulment of conviction or sentence," \(^{114}\) declined to determine whether the Vienna Convention creates a "human right," \(^{115}\) and denied Mexico's request for application of the exclusionary rule.\(^{116}\) While the ICJ emphasized that the review and reconsideration process should be effective,\(^{117}\) it deferred to the United States in determining the outcome of the review and reconsideration process.\(^{118}\) Finally, the ICJ denied Mexico's request for a guarantee

114. See Avena, 2004 ICJ 128, ¶ 123 (differentiating this case from annulment of conviction precedent because convicting and sentencing the defendants was not a violation of international law, but rather was a breach of a treaty obligation).

115. See id. ¶ 124 (observing that "neither the text nor the object and purpose of the Convention, nor any indication in the traveaux préparatoires," support Mexico's assertion that the right to consular notification and communication is a right under the Vienna Convention); see also Richardson III, supra note 62, at 127 (citing a view that the rights created in the Vienna Convention include a right to a fair trial regarding the imposition of the death penalty). Some commentators are willing to find that the Vienna Convention does create a human right. Id.; see also Bishop, supra note 4, at 43-45 (noting that the ICJ, the Inter-American Court, and the U.S. Supreme Court have all recognized, in one way or another, that Article 36 likely creates individual rights).

116. See Avena, 2004 ICJ 128, ¶¶ 126-27 (finding that the United States would necessarily decide whether to apply the exclusionary rule on a case-by-case analysis); see also analysis infra text accompanying note 224 (perceiving that U.S. courts do not treat a Vienna Convention violation as meritng the remedy of the exclusionary rule because the treaty does not create rights on par with constitutional rights). U.S. domestic law only allows for application of the exclusionary rule when a constitutional right has been violated. Id.

117. See Avena, 2004 ICJ 128, ¶ 138 (concluding that the United States should "guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process").

118. See id. ¶ 139 (highlighting that the crucial aspect is "the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention," and not the outcome of that procedure). The ICJ further wrote that "[t]he rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law." Id. See also Ray, supra note 76, at 1764-65 (arguing that "review" could require a "complete examination of the record" in order to establish whether a Vienna Convention violation actually occurred, and that
of non-repetition and cessation.\textsuperscript{119}

The ICJ's holding in \textit{Avena} is extremely important with regard to U.S. implementation of decisions arising out of Vienna Convention disputes.\textsuperscript{120} Because this case establishes a clear and concise remedy for the rights the ICJ established in \textit{LaGrand}, U.S. courts should begin implementing this decision as the latest authority on the issue of Article 36 rights.\textsuperscript{121}

\section*{II. ANALYSIS}

\subsection*{A. The Rulings of the ICJ on the Issues Presented in \textit{Avena} and Other Mexican Nationals}

In both the \textit{Breard} and \textit{LaGrand} cases, the United States ignored ICJ orders staying the execution of the defendants.\textsuperscript{122} However, the

\begin{flushleft}
\textsuperscript{119} See \textit{Avena}, 2004 ICJ 128, ¶ 150 (determining that the United States has engaged in sufficient activity as to demonstrate its genuine attempt not to repeat and to cease the Vienna Convention violations).

\textsuperscript{120} See Drinan, supra note 46, at 1307-10 (discussing the reasons why U.S. courts have failed to interpret \textit{LaGrand} correctly and the general confusion that U.S. courts maintain about the jurisdiction of the ICJ over Vienna Convention disputes).

\textsuperscript{121} See discussion infra Part III (recommending that the United States implement the \textit{Avena} decision as binding authority given that international law calls for such treatment of the case).

\textsuperscript{122} See Bishop, supra note 4, at 16-42 (finding that Paraguay attempted to enforce the order staying Breard's execution but did not continue to litigate the claim after authorities executed Breard). Breard asked the U.S. Supreme Court to enforce the ICJ's order to stay his execution but the Supreme Court denied all pending requests for relief and officials executed Breard anyway. \textit{Id.} at 22-23. In addition, while Arizona authorities executed Karl LaGrand before his case ever reached the ICJ, an ICJ order stayed Walter LaGrand's execution. \textit{Id.} at 35-37. Arizona, however, ignored the provisional measure and executed him nonetheless. \textit{Id.} See also \textit{Too Sovereign}, supra note 25, at 2666 (noting that Germany pursued its case in the ICJ even though Arizona authorities had executed both of the LaGrand men). Therefore, the ICJ issued its ultimate ruling in the \textit{LaGrand} case with the knowledge that the United States had already executed both LaGrand brothers, which arguably minimized the impact of the decision. \textit{Id.}
\end{flushleft}
United States has honored the ICJ order staying the execution of three of the Mexican defendants. Because U.S. authorities have not yet executed any of the defendants, the Avena ruling is an unprecedented opportunity for the United States to implement an ICJ ruling in domestic courts and to impact practically the defendants' cases.

1. The ICJ Correctly Found that it has Jurisdiction Over Mexico's Claims and that Mexico's Claims are Admissible

a. Jurisdiction

In Avena and Other Mexican Nationals, the ICJ correctly found that it has jurisdiction to consider the merits of the case. Mexico

123. See Liptak, supra note 36 (noting that the U.S. Supreme Court declined to hear the case in which Osbaldo Torres asked the Court to honor the ICJ order staying his execution, but that the Oklahoma attorney general, Drew Edmundson, asked a state appeals court to honor the order “out of courtesy” to the ICJ).

124. See Memorial of Mexico, supra note 83, ¶¶ 346-47 (observing that for the first time, because the Mexican defendants are still alive, the ICJ has an opportunity to grant relief that will benefit the defendants); see also Counter-Memorial of the United States (Mex. v. U.S.), 2004 ICJ 128, Written Pleadings, ¶ 1.13 (Nov. 3, 2003) [hereinafter Counter-Memorial of the United States] (arguing that a different remedy should not be accorded in this case simply because these defendants are alive and the defendants in LaGrand were not), available at http://www.icj-cij.org/icjwww/docket/imus/imusframe.htm (last visited Jan. 29, 2005). The United States remains in denial of the importance of this matter, arguing that the fact that the Mexican defendants are still alive is only a small difference from LaGrand where the German defendants had already been executed at the time of the ICJ’s decision. Id. See also Verbatim Record of Dec. 15, supra note 83, ¶¶ 25-26 (asserting that the ICJ may resolve issues in Avena that were materially impossible to resolve in previous cases, “but which lie at the heart of the present proceedings”). It seems rather credulous and ingenuous, however, to disregard so nonchalantly the difference between life and death. Id.

125. See Avena and Other Mexican Nationals (Mex. V. U.S.), 2004 ICJ 128, ¶ 153 (Mar. 31) (rejecting the objections made by the United States against the jurisdiction of the ICJ); see also Memorial of Mexico, supra note 83, ¶¶ 27-28 (basing jurisdiction on Article I of the Optional Protocol’s mandate that “[d]isputes arising out of the interpretation or application of the [Vienna Convention on Consular Relations] shall lie within the compulsory jurisdiction of the [ICJ]”). In its application instituting proceedings, Mexico argued that the ICJ had jurisdiction based upon the Vienna Convention and the Optional Protocol. Id. See also discussion supra notes 44-48 and accompanying text (establishing that, due to the Optional Protocol, the Vienna Convention is binding upon the United States).
properly asserted in its application to the ICJ that the *Avena* case met the two requirements for jurisdiction under the Optional Protocol: the United States is a party to the Protocol, and the dispute arises out of interpretation and application of the Vienna Convention.¹²⁶

In fact, the United States did not dispute that the ICJ has jurisdiction under the Vienna Convention and the Optional Protocol.¹²⁷ Rather, the United States contested the jurisdiction of the ICJ by arguing that Mexico reached too far in its application and that the ICJ is not a "supreme court of a global State."¹²⁸ However, the ICJ had already spoken on most of the U.S. contests to its jurisdiction.¹²⁹ In *Avena*, as in *LaGrand*, the ICJ needed to do nothing more than apply the relevant international law to the issues, which did "not convert [the] Court into a court of appeal of national criminal proceedings."¹³⁰ The ICJ had jurisdiction to hear the case because all of the United States' objections went to the merits of the case and not to jurisdiction alone.¹³¹

¹²⁶. See *Memorial of Mexico*, *supra* note 83, ¶ 28 (finding that the two requirements for the ICJ to have jurisdiction over a case (1) that the applicants are parties to the Optional Protocol and (2) the dispute arises out of the meaning and scope of the Vienna Convention).

¹²⁷. See *Counter-Memorial of the United States*, *supra* note 124, ¶ 3.1 (agreeing that the ICJ has jurisdiction pursuant to the treaty and the Protocol, but arguing that the dispute did not arise out of the Vienna Convention on Consular Relations).

¹²⁸. See *Verbatim Record (Mex.' v. U.S.), 2003 ICJ Translation of Oral Pleadings 26 ¶ 14 (Dec. 16, 2003)* [hereinafter *Verbatim Record Translation of Dec. 16*], (alleging that such a "super supreme court" role is contrary to ICJ precedent and "the basic principles of international law*), available at http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm (last visited Jan. 29, 2005). The United States argued that Mexico essentially asked the ICJ to be a court of criminal appeal by asking the ICJ to review and vacate convictions and sentences. *Id.*, ¶ 1.12.

¹²⁹. See *LaGrand Case (F.R.G. v. United States)* 2001 ICJ 104, ¶ 128 (June 27) (ruling that the ICJ had jurisdiction to hear all of Germany's claims on the basis of the Optional Protocol).

¹³⁰. See *id.*, ¶ 52 (relating the ICJ's opinion that Germany asked the court to "do nothing more than apply the relevant rules of international law to the issues in dispute").

¹³¹. See *Avena*, 2004 ICJ 128, ¶¶ 28, 30, 34, 35 (concluding that the ICJ has jurisdiction over Mexico's claims in all four of the U.S. objections to the ICJ's jurisdiction); see also *Ray*, *supra* note 76, at 1763 (inferring that the ICJ order of provisional measures indicates a willingness to reach the merits of the *Avena* case
b. Admissibility

Furthermore, the ICJ correctly found Mexico's claims admissible given that the court had already considered many of the United States' arguments against admissibility and found them immaterial.\(^3\) The ICJ clearly held in LaGrand that applying rules of international law did not convert the ICJ into "a court of appeal of national criminal proceedings."\(^3\) As in LaGrand, the ICJ in Avena declined to uphold the United States' arguments that the ICJ converted itself into a court of criminal appeal and that Mexico did not exhaust local remedies.\(^3\)

\(^{132}\) See Avena, 2004 ICJ 128, ¶¶ 37, 40, 42, 44, 47 (Mar. 31) (declining to uphold any of the United States' five arguments against the admissibility of Mexico's claims); see also LaGrand, 2001 ICJ 104, ¶¶ 49-64 (holding that all of Germany's claims were admissible where the United States argued that they were not admissible because (1) Germany asked the ICJ to serve as a court of criminal appeal, (2) Germany inappropriately brought the matter to the ICJ, (3) Germany had not exhausted local remedies, and (4) Germany did not provide parallel remedies in its own practice, thereby violating notions of reciprocity). The ICJ's determination on the admissibility issues was not surprising given its stature in LaGrand regarding similar arguments against admissibility. \textit{Id.}

\(^{133}\) See LaGrand 2001 ICJ 104, ¶ 56 (stating that the ICJ is not a court of criminal appeal for jurisdictional purposes); see also Counter-Memorial of the United States, \textit{supra} note 124, ¶ 4.2 (alleging that there is no reason for the ICJ to consider each case involving a breach of the Vienna Convention on Consular Relations because the United States already possesses the needed review and reconsideration process in its national courts). The United States argued that Mexico's claims were inadmissible because Mexico was asking the ICJ to function as a court of criminal appeal. \textit{Id.} See also LaGrand, 2001 ICJ 104, ¶¶ 58-60 (establishing that Germany was not required to exhaust local remedies when the procedural default rule barred it from doing so). Moreover, the ICJ also stated in LaGrand that the United States could not rely on the rule of exhaustion of local remedies when the procedural default rule effectively prevented the defendants from exhausting local remedies, which is the case here as well. \textit{Id. See also} Counter-Memorial of the United States, \textit{supra} note 124, ¶ 4.5 (explaining that "[e]xhaustion is a well established principle of international law" and that "it is well-settled that failure to exhaust [local] remedies renders such a claim admissible"). The United States argued that Mexico had not exhausted local remedies and, therefore, its claims were inadmissible. \textit{Id.}

\(^{134}\) See Avena, 2004 ICJ 128, ¶¶ 37, 40 (finding that the United States' objections to admissibility could not be upheld because they were based on arguments that required the ICJ to reach the merits of the case).
While the United States also argued that factual issues barred admissibility, the ICJ appropriately found that the factual issues were in dispute and would not necessarily render Mexico’s claims inadmissible. This conclusion further supports the proposition that the ICJ correctly dismissed the United States’ argument that Mexico’s claims were inadmissible.

2. The ICJ Correctly Found That the United States in Fact Violated the Vienna Convention in at least Some of the Fifty-Two Cases

a. Violations of Article 36(1)

In at least some of the fifty-two cases that Mexico presented to the ICJ there were clear violations of Article 36(1) of the Vienna Convention, especially in those cases where defendants had a trial

135. See Memorial of Mexico, supra note 83, ¶ 312 (arguing that detained foreign nationals face greater obstacles than detained nationals); see also Counter-Memorial of the United States, supra note 124, ¶ 4.12 (contending that there cannot be a violation of the Vienna Convention where the detained individual is a U.S. national). The United States claims that some defendants were U.S. nationals at the time of arrest, and that even when Mexico did know about the Vienna Convention violations, its government failed to act promptly. Id.

136. See Avena, 2004 ICJ 128, ¶ 42 (determining that disputes over the nationality of the defendants in the case are ones of merit, not of admissibility); see also Antonio F. Perez, The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice, 18 MICH. J. INT’L L. 399, 407-8 (1997) (discussing the ICJ’s jurisdiction as including legal disputes and extending to advisory opinions). The ICJ also has jurisdiction in more scenarios than the U.S. Supreme Court, for example, because it can render advisory opinions. Id.

137. See Avena, 2004 ICJ 128, ¶ 47 (concluding that even if Mexico’s practices were not in compliance with Article 36, such a finding would not be a bar to admissibility of its claims); see also LaGrand, 2001 ICJ 104, ¶ 63 (finding that the crimes, punishments and remedies vary from State to State, such that the parties to the dispute cannot be expected to have identical remedies when one State does not hand down such severe penalties such as the death penalty). Mexico does not have an obligation to ensure that its own criminal justice contains a system of remedies equal to the one that it asked the United States to provide for in the case of an allegation of a Vienna Convention rights violation. Id. See also Avena, 2004 ICJ 128, ¶ 153 (rejecting all five objections from the United States with regard to the admissibility of Mexico’s claims). Therefore, all of Mexico’s claims are admissible. Id.
and sentencing proceedings without access to the Mexican consulate. The ICJ delineated the Article 36(1) allegations by subsection, thereby finding that the United States breached its duty under Article 36(1)(b) to notify fifty-one of the defendants of their right to speak to the Mexican consulate. Importantly, the ICJ construed the terms “without delay” under Article 36(1)(b) to mean that there is “a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that

138. See Avena Application, supra note 30, ¶ 69-267 (stating the facts of each case including the situations where defendants were sentenced to the death penalty without ever having the opportunity to claim a violation of the Vienna Convention); see also Verbatim Record of Dec. 15, supra note 83, ¶¶ 84-92 (arguing that none of the defendants were dual nationals at the time of their arrests); Verbatim Record of Dec. 16, supra note 128, ¶¶ 4.9-4.12 (arguing that because at least some of the defendants were not Mexican nationals at the time of their arrest, they were not per se entitled to consular notification). Mexico and the United States disputed many of the facts of the case, including whether all the defendants were Mexican nationals at the time of their arrests. Id. See also Verbatim Record of Dec. 15, supra note 83, ¶ 94 (finding that through either judicial proceedings or admissions of U.S. authorities, there has already been a conclusion that violations occurred in twelve cases). Mexico asserted that the United States had gone so far as to concede to violations of Article 36(1) in twelve of the fifty-two cases. Id. See also Counter-Memorial of the United States, supra note 124, ¶ 4.12-4.17 (arguing that many of the defendants were either United States citizens or represented themselves as citizens). The United States maintained that in many cases, the defendants represented themselves to be U.S. citizens and that the competent authorities had no reason to believe otherwise. Id. The United States further argued that many of the defendants had lived in the U.S. for five years or more, were fluent in English, or were familiar with the criminal justice system since they had criminal records. Id.

139. See Avena, 2004 ICJ 128, ¶ 106(1)-(3) (holding that the United States breached its duty under Article 36(1)(b) “to inform detained Mexican nationals of their rights under that paragraph” in fifty-one cases and breached its duty under Article 36(1)(b) to notify the Mexican consular post of the detention of the Mexican nationals in forty-nine cases). Under its consideration of the violation of Article 36(1)(b) and the U.S. duty to inform detained Mexican nationals of their right to speak to a consulate, the ICJ decided two important sub-issues regarding: (1) the question of the nationality of the detained individuals; and (2) the meaning of the terms “without delay.” Id. ¶ 52. The Court found that Mexico had the duty of proving that its defendants had Mexican nationality at the time of arrest, but that if the United States contested that the defendants also had U.S. citizenship, then the United States had the burden of proving as much. Id. ¶ 57.
the person is probably a foreign national." Because the ICJ found that the United States violated its Article 36(1)(b) duty, the ICJ also found that the United States violated its duty under Article 36(1)(a), regarding those same fifty-one defendants, to enable Mexico "to communicate with its nationals and have access to them."

The ICJ found that the United States violated its duty under Article 36(1)(c) "regarding the right of consular officers to visit their detained nationals" with regard to those fifty-one defendants, and the duty "to enable Mexican consular officers to arrange for legal representation of their nationals" in thirty-four cases, as well. Because the Court had the full factual record before it and considered each case on an individual basis, it is likely that the Court correctly found the United States in violation of its obligations under Article 36(1) of the Vienna Convention.

140. See Avena, 2004 ICJ 128, ¶¶ 87-88 (noting that there is not a duty to inform the detained national of his right to speak to a consulate “immediately” upon arrest, as Mexico argued).

141. See id. ¶ 106(3) (noting that the United States breached its duty under Article 36(1)(a) “to enable Mexican consular officers to communicate with and have access to their nationals”). In some cases, U.S. actions effectively prevented Mexico from exercising these rights for prolonged time periods. Id. ¶ 102.

142. See id. (emphasizing the importance of upholding the right of communication regardless of whether or not Mexico chose to utilize it).

143. See id., ¶ 106(4) (listing the names of the fifty-one defendants affected by the actions of the United States).

144. See id. ¶¶ 66-77 (analyzing the facts of seven cases where the United States claimed that the arrested Mexicans were U.S. citizens, thereby showing that the Court considered each case individually with regard to nationality, and stating that it was necessary to examine the expression “without delay” with regard to four particular cases).

145. See Macina, supra note 88, at 131-133 (discussing the case of Cesar Roberto Fierro Reyna, where the Texas Court of Criminal Appeals concluded that Fierro’s confession was likely coerced and his due process rights were violated, as an example of “the substantive reasons Mexico seeks redress for consular notification violations of [sic] behalf of so many of its nationals”). Fierro claimed that police coerced his confession through a threat to his parents. Id. at 132. Mexico contended that had the consulate been aware of Fierro’s detention, it could have extracted his parents from detention. Id. at 133.
b. Violations of Article 36(2)

The ICJ also correctly found that the United States violated Article 36(2) of the Vienna Convention when it failed to give "full effect" to the rights enumerated under Article 36(1) in all but three cases. U.S. municipal law operated effectively to deny the defendants an opportunity to challenge their convictions and sentences because either the procedural default rule precluded the defendants from contesting their sentences, or U.S. courts failed to create an effective remedy for the Vienna Convention violations.

The ICJ properly relied upon prior case law to establish that the procedural default rule effectively precluded the defendants from challenging their convictions and sentences. Looking to LaGrand,

146. See Avena, 2004 ICJ 128, ¶¶ 113-14 (holding that except in the three cases of Mr. Fierro, Mr. Moreno, and Mr. Torres, all other cases did not reach the stage at which there is no further possibility of judicial re-examination of those cases, it was premature for the Court to conclude at this stage that the United States already violated Article 36(2) of the Vienna Convention); see also Macina, supra note 88, at 134 (stating Mexico's argument that U.S. application of municipal law constitutes a violation of Article 36(2)).

147. See Memorial of Mexico, supra note 83, ¶ 209 (arguing that the U.S. refusal to give full effect to the rights of Article 36(1) also constitutes a breach of international treaty law); see also Verbatim Record of Dec. 16, supra note 128, ¶ 4.25 (discussing the extensive program of pamphlet distribution to law enforcement officials that state the duties the officials have when arresting a foreign national). In response, the United States argued that it had made extensive efforts to comply with its obligations under the Vienna Convention. Id. See also Counter-Memorial of the United States, supra note 124, ¶ 6.64 (discussing the Miranda warnings and that a violation of the warnings may include the misunderstanding that results from a language barrier). The United States also argued that the U.S. criminal justice system guarantees due process through many mechanisms, including Miranda warnings, the exclusion of evidence when these warnings are defective, and procedures allowing claims of ineffective counsel to be raised at post-trial proceedings. Id. The United States claimed that in some cases the defendants knew their right to consular access at the time of or shortly after their arrests but declined to contact the Mexican consular, so no breach of Article 36(2) could have occurred, and that in other cases the violation was known but not raised in judicial proceedings, which is also not a violation of Article 36(2). Id. ¶¶ 7.12-7.15, 7.17.

148. See Avena, 2004 ICJ 128, ¶¶ 113, 134 (remarking that the United States has not revised the procedural default rule since the LaGrand decision, such that its present application effectively precludes a defendant from raising an Article 36 complaint); see also Weinman, supra note 67, at 902 (finding that the procedural default rule functions to prevent defendants from bringing their claims at any phase
the ICJ already determined that the procedural default rule may work to prevent a defendant from contesting his case, although the rule is not necessarily a per se violation of international law.\textsuperscript{149} In \textit{Avena}, the procedural default rule also operated in this way because it prevented the defendant from contesting his case, resulting in U.S. domestic courts failing to give full effect to Article 36 rights.\textsuperscript{150}

With regard to Mexico’s second contention—that the United States failed to provide an effective remedy for the violations\textsuperscript{151}—the ICJ correctly denied Mexico’s submission in forty-eight of the cases.\textsuperscript{152} As the Court stated, “all possibility is not yet excluded of ‘review and reconsideration’ of conviction and sentence, as called for in the \textit{LaGrand} case;” because the majority of the cases have not yet exhausted judicial proceedings, it would be “premature” for the Court to find that the United States violated Article 36(2).\textsuperscript{153} As long as there remains an opportunity for U.S. courts to provide review and reconsideration, the World Court cannot order a remedy.\textsuperscript{154}

---

\textsuperscript{149} See \textit{LaGrand Case (F.R.G. v. United States)} 2001 ICJ 104, ¶ 90 (June 27) (finding that although the procedural default rule does not in itself violate Article 36 of the Vienna Convention, it may operate in specific cases to violate Article 36(2) by preventing consular assistance from the sending state).

\textsuperscript{150} See \textit{Avena}, 2004 ICJ 128, ¶ 113 (“[T]he procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial.”); \textit{see also} \textit{Avena} Application, \textit{supra} note 30, ¶¶ 31-42 (citing examples of Mexico’s attempts to seek relief in state and federal courts in the United States).

\textsuperscript{151} See information \textit{supra} note 147 and accompanying text (stating Mexico’s allegations of a violation of Article 36(2) of the Vienna Convention).

\textsuperscript{152} See \textit{Avena}, 2004 ICJ 128, ¶ 113 (finding that in only three of the cases had the proceedings reached a stage where judicial remedies were no longer available). In the three cases where the “conviction and sentence have become final,” the Court concluded that the United States had in fact violated its duty under Article 36(2) to give full effect to the Vienna Convention. \textit{Id}.

\textsuperscript{153} See \textit{id} (concluding that not all the cases have “reached a stage at which there is no further possibility of judicial re-examination of those cases”).

\textsuperscript{154} See \textit{Interhandel case (Switz. v. U.S.)}, 1959 ICJ 346, at 27 (Mar. 21) (finding that a State has the right to an opportunity to redress an alleged wrong within its domestic system before the claimant may take the case to the international plane); \textit{see also} Ian Brownlie, \textit{PRINCIPLES OF PUBLIC INTERNATIONAL
3. The Court Correctly Denied Relief in the Form of Restitutio In Integrum and Correctly Ordered the United States to Grant Meaningful Review and Reconsideration

The *Avena* case presented a unique opportunity for an ICJ decision to have a practical and immediate impact on the lives of the defendants.155 The remedy issued by the ICJ in the case took on new and resonating importance:156 in the event that the United States implements the ICJ decision, the defendants could benefit from the ICJ remedy in a real and tangible way.157 Using this landmark opportunity, Mexico argued that the ICJ should grant a remedy beyond the *LaGrand* review and reconsideration remedy and provide the remedy of *restitutio in integrum*.158 The United States maintained that the *LaGrand* remedy of review and reconsideration was appropriate because there was no major difference between *LaGrand* and *Avena*.159

Ultimately, the difference between the Mexican nationals being alive or executed is not an easily minimized fact.160 Because of this

---

155. See information *supra* notes 122-124 and accompanying text (discussing the unique opportunity the ICJ decision in *Avena* represents).

156. See *LaGrand* Case (F.R.G. v. United States) 2001 ICJ 104, ¶ 128(5), (7) (June 27) (holding that the ICJ order of provisional measures is binding on the United States, and the United States must grant review and reconsideration); see also *Too Sovereign*, *supra* note 25, at 2670 (finding that the *Avena* case will put the precedential value of *LaGrand* to test). None of these holdings, however, has yet been tested in practice before the *Avena* case. *Id.*

157. See Betsy Pisik, Review of Death Sentences Ordered; World Court Rules for 51, *THE WASHINGTON TIMES*, Apr. 1, 2004, at A01 (noting the confidence of the Mexican officials that “the United States will fully comply with the ruling”).

158. See Memorial of Mexico, *supra* note 83, ¶¶ 346-47 (distinguishing the *Avena* remedy as significantly different from the *LaGrand* remedy because Germany did not seek *restitutio in integrum* given that its nationals were no longer alive).

159. See Counter-Memorial of the United States, *supra* note 124, ¶ 8.1 (positing that Mexico’s request for *restitutio in integrum* is “inappropriate” and has “no antecedent in international law”).

160. See Macina, *supra* note 88, at 140 (concluding that the *Avena* case could have far-reaching effects in U.S.-Mexico relations, including in areas such as trade
distinction, the ICJ remains competent to issue a judgment directly applicable to the lives of the defendants.\(^{161}\) This case also presents an opportunity, by way of directly affecting the life or death of the defendants, for the ICJ to provide meaningful review and reconsideration.\(^{162}\) The ICJ correctly held that *restitutio in integrum* is not a viable remedy here because international law does not support the view that *restitutio in integrum* is the appropriate remedy in this situation.\(^{163}\)

a. The ICJ Correctly Denied Mexico *R* *e* *s* *t* *i* *t* *u* *t* *i* *o* *n* *i* *n* *t* *r* *e* *g* *r* *u* *m* Under International Law Standards

In international law, “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”\(^{164}\) The Inter-American Court of Human Rights defines *restitutio in integrum* as including “the restoration of the prior situation” and “the reparation of the consequences of the violation.”\(^{165}\) The International Law Commission (“ILC”) defines

---

161. See Liptak, *supra* note 36 (implying that had the ICJ not issued a ruling staying the execution of Osbaldo Torres, one of the Mexican defendants in the *Avena* case, Mr. Torres would already be dead and the issue would be moot).

162. See *Avena and Other Mexican Nationals* (Mex. V. U.S.), 2004 ICJ 128, ¶¶ 131-38 (Mar. 31) (discussing clemency as not constituting meaningful review and reconsideration); see also Ray, *supra* note 76, at 1764 (arguing that the United States has misunderstood the meaning of review and reconsideration, which calls for retrials or reevaluations of the cases since the violations were discovered).

163. See discussion *infra* notes 165-180 and accompanying text (discussing international law and the remedy of *restitutio in integrum*).

164. See Factory at Chorzów (F.R.G. v. Pol.) 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) (commenting on the potential injustice of limiting the compensation due to the German government to “the value of the undertaking at the moment of dispossession, plus interest to the day of payment”). Such limited restitution would place Germany in a position less favorable than if Poland had obeyed its international obligation in the first place. *Id.*

restitution as the primary form of reparation because it requires a State in violation of a legal principle to “wipe out” the consequences of the illegal act and to return to the situation that existed before commission of the violation.\textsuperscript{166} Along with the ILC, the Restatement of Foreign Relations Law finds that redress should usually restore the situation to its state before the violation occurred.\textsuperscript{167}

Guided by these definitions of \textit{restitutio in integrum}, Mexico argued for such relief as the appropriate remedy in the \textit{Avena} case.\textsuperscript{168} In contrast, the United States insisted that the \textit{LaGrand} decision ordered review and reconsideration as the available remedy for a violation of the Vienna Convention, claiming that \textit{restitutio in integrum} goes beyond the bounds of an appropriate or possible remedy.\textsuperscript{169}

While international law designates restitution as the primary remedy for a violation of an international legal obligation,\textsuperscript{170} international law would not support a holding of \textit{restitutio in


\textsuperscript{167} See \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} § 901 cmt. d (1987) (citing as examples of restitution the restoration of the \textit{status quo ante} “or specific performance of an undertaking”).

\textsuperscript{168} See Memorial of Mexico, supra note 83, ¶ 352-55 (requesting three specific forms of reparation: (1) vacatur of the sentences and convictions of all the Mexican nationals party to this case, (2) suppression of evidence obtained in violation of Article 36 rights, and (3) withholding of the application of municipal law that prevents the defendants from obtaining relief).

\textsuperscript{169} See Counter-Memorial of the United States, supra note 124, ¶ 8.1 (arguing that Mexico asks for a remedy outside the bounds of \textit{LaGrand}, which would require reversal of \textit{LaGrand} and claiming that the remedy of review and reconsideration “satisfied the purposes of reparations”).

\textsuperscript{170} See \textit{International Law Commission Report}, supra note 166, at 237 (noting restitution as the first remedy available when a violation of international law injures a State and that such restitution usually involves “the re-establishment of the situation which existed prior to the commission of the internationally wrongful act”).
*integrum* as the appropriate remedy in the *Avena* case.\(^{171}\) International law places limits on the extent to which full restitution may be granted.\(^{172}\) Namely, restitution may take the form of reversing a juridical act; however, it should not be disproportionate to the violation of international law at hand.\(^{173}\) Referring specifically to the remedy granted in *LaGrand*, the ILC states, "[r]estitution . . . should not give the injured State more than it would have been entitled to if the obligation had been performed." \(^{174}\) The ILC considers the remedy of review and reconsideration from *LaGrand* as proportionate to the "limited character of the rights in issue." \(^{175}\)

---

171. See *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 ICJ 128, ¶¶ 119-121 (Mar. 31) (explaining that the ICJ determines adequate reparation by examining the circumstances surrounding each case and the "precise nature and scope of the injury"); see also *LaGrand Case (F.R.G. v. United States)* 2001 ICJ 104, ¶ 125 (June 27) (requiring review and reconsideration of defendant’s conviction and sentence, rather than *restitutio in integrum*, as the appropriate remedy when the United States violated its obligation under Article 36).

172. See *International Law Commission Report*, supra note 166, at 236 (citing examples of the insufficiency of limited forms of restitution in certain circumstances, but considering the nature of the obligation breached in order to determine the appropriate remedy).

173. See *id.* (responding to concerns that full reparation may have a "crippling" effect on the State required to provide reparation and applying the principle of proportionality to each form of reparation). When restitution involves a burden "out of all proportion to the benefit gained," the situation calls for the exclusion of such restitution. *Id.*

174. See *id.* (explaining that a remedy must remain proportionate to the right and the violation at hand); see also Daniel Bodansky et al, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT’L L. 833, 838 (2002) (stating that the Draft Articles limit the scope of reparations to remedial measures and curtail full reparation with standards of proportionality).

175. See *International Law Commission Report*, supra note 166, at 236, n.518 (noting that the Court in *LaGrand* found that a breach of the notification requirement established under the Vienna Convention on Consular Relations required that reconsideration of the defendant’s conviction take into account the violation of that right). Therefore, the Court applied a remedy proportionate to the violation of international law. *Id.* A balancing test must evaluate the rights of the injured State and the appropriateness of a severe remedy. *Id.* See also Bodansky et al, *supra* note 174, at 849 (discussing the balancing test proposed under the Draft Articles but finding that "[t]he only instance where the balance seems ‘invariably’ to favor restitution is when the failure to provide it would jeopardize the political independence or economic stability of the injured state").
Case law from other international courts defines *restitutio in integrum* as an appropriate remedy in situations where courts can grant such a specific remedy. In contrast, the Inter-American Court granted vacatur, a more limited construction of full restitution, in the *Cantoral Benavides* case, where Mr. Cantoral suffered inhumane treatment while in prison in Peru and continued to suffer psychiatric and physical problems. However, when restoration of the *status quo ante* would have an immediate effect, such as through compensation, then it constitutes an appropriate remedy. Unlike *Cantoral Benavides*, restoring the status quo in *Avena* would bring about immediate effects; therefore, while *restitutio in integrum* certainly remains a viable remedy available at international law, the violation of international law at issue in the *Avena* case fails to compel such a remedy.


178. See *Restatement (Third) of Foreign Relations Law* § 901 cmt. d (1987) (finding that when a mob invades an embassy, then the appropriate remedy would consist of removing the mob, as well as damage compensation, and even monetary compensation for the injuries suffered by the embassy’s staff).

179. See *Factory at Chorzów*, 1928 P.C.I.J. at 47 (stating the definition of *restitutio in integrum* implemented in other international tribunals and discussing the principles used to determine the compensation due for a violation of international law).

180. See *International Law Commission Report*, supra note 166, at 236 (finding that the restoration of the *status quo ante* should not give the injured state more than its entitlement had the offending party performed its obligation). Thus, at the very least, granting *restitutio in integrum* would involve restitution disproportionate to the “limited character of the rights” at stake in this case. *Id.* See also *Counter-Memorial of the United States*, supra note 124, ¶¶ 8.11-8.12 (discussing the substantial burden of conducting new trials for fifty-two defendants). The United States makes a compelling argument that in the jury system, new trials would be expensive, time-consuming and not necessarily accurate, given the passage of time between the detention of the defendants and the current situation. *Id.*
b. The ICJ Correctly Decided that Clemency Does Not Constitute Meaningful Review and Reconsideration

In *LaGrand*, the ICJ gave discretion to the United States to determine the means for carrying out review and reconsideration.\(^{181}\) The ICJ in *Avena* found that while review and reconsideration remain an appropriate remedy for a Vienna Convention violation,\(^{182}\) the United States, in implementing its clemency proceedings, failed to comply adequately with its duty to review and reconsider Article 36 violations.\(^{183}\)

The United States argued that the clemency process does provide the meaningful review and reconsideration required by the *LaGrand* decision.\(^{184}\) Moreover, the United States emphasized that it retained

---

181. *See* *LaGrand* Case (F.R.G. v. United States) 2001 ICJ 104, ¶ 125 (June 27) (holding that the United States could choose the means by which it would grant review and reconsideration); *see also* Bishop, *supra* note 4, at 40-41 (providing meaningful review and reconsideration proves essential to correcting past violations of the Convention and preventing future violations). While the ICJ meant for review and reconsideration to prevent future violations of the Vienna Convention, the United States has not changed its practices with regard to the Convention. *Id.*

182. *See* International Law Commission Report, *supra* note 166, at 236 (noting that review and reconsideration constituted an appropriate remedy when it took into account the violations of international law in *LaGrand* because it reflected the limited nature of the Vienna Convention rights).

183. *See* *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 ICJ 128, ¶ 131 (Mar. 31) (qualifying the phrase “by means of its own choosing” from *LaGrand* such that the United States does not have complete and unbridled discretion to carry out its obligations in any form it wishes); *see also* Priya Nath, *Note*, *Case Concerning Avena and Other Mexican Nationals* (Mexico v. United States) No. 128 (ICJ Feb. 5, 2003), http://www/ICJ-cij.org/ICJwww/docket/imus/imusorder/imus_order_20020205.pdf, 15 CAP. DEF. J. 553, 555 (2003) (finding that, in the *Avena* order for provisional measures, the United States effectively asserted that it would continue to violate Article 36 in judicial proceedings because it could consider the violations later through the clemency process).

184. *See* Counter-Memorial of the United States, *supra* note 124, ¶ 6.68 (asserting that clemency historically acted as a means to ensure fair judicial proceedings and in the modern era constitutes “part of the constitutional scheme for ensuring justice and fairness in the legal process”); *see also* Verbatim Record of Dec. 16, *supra* note 128, ¶¶ 4.23-4.24 (asserting that Mexico failed to prove that the United States provides ineffective review and reconsideration through its courts and clemency process). Specifically in the *Avena* case, the United States declared
complete discretion to determine the judicial process used to carry out review and reconsideration. Mexico countered this argument by defining clemency as merely an act of executive grace that executive officers rarely make available as a practical, viable remedy. Mexico criticized the clemency process for operating without adherence to fixed standards, for the discretionary nature of its decisions, and for largely unreviewable results and concluded that clemency failed to satisfy LaGrand's requirement for a judicial remedy.

The United States possessed the discretion to determine the means for review and reconsideration process, yet clemency proceedings, as an entirely discretionary procedure, cannot replace a judicial remedy. Clemency generally refers to the executive power to the review and reconsideration established in LaGrand unnecessary because most of the cases have not exhausted full judicial proceedings, and clemency remains an available remedy to those defendants. Id. 185. See Ray, supra note 76, at 1764-65 (arguing the unlikelihood that the ICJ granted the remedy of review and reconsideration with the understanding that clemency would satisfy the remedy, and that the United States badly misconstrued the LaGrand holding).

186. See Memorial of Mexico, supra note 83, ¶ 250-252 (claiming that not every defendant can take advantage of the clemency process because political considerations “rather than the merits of the individual case” influence clemency outcomes).

187. See Verbatim Record of Dec. 15, supra note 83, ¶ 273 (criticizing the outcomes of the clemency process as arbitrary because “clemency authorities may by and large follow their own whims and predilections in assessing the merits of a particular clemency process”).

188. See Memorial of Mexico, supra note 83, ¶¶ 243-245 (explaining that the United States could not use executive clemency to fulfill its international obligation to provide a means for reviewing violations of Article 36). The Court in LaGrand contemplated the use of judicial procedures to carry out review and reconsideration. Id.

189. See LaGrand, 2001 ICJ 104, ¶ 125 (leaving the choice of means to the United States for fulfilling the duty of review and reconsideration and acknowledging that the United States could fulfill its obligation in a number of ways); see also Ray, supra note 76, at 1761 (discussing the cases of Valdez and Suarez, where U.S. officials considered granting clemency but the officials ultimately concluded that the cases did not warrant clemency).

190. See Avena, 2004 ICJ 128, ¶¶ 141-143 (“[T]he premise on which the Court proceeded in [LaGrand] was that the process of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant
clemency vests an enormous amount of discretion in the executive making the decision, as well as the evidence he or she may consider and the measures taken. While this discretion may work to the benefit of the defendant in certain cases, clemency proceedings do not function as an essential element in determining the guilt or innocence of a defendant. The ICJ, therefore, correctly found that, at best, clemency proceedings should only supplement judicial proceedings of review and reconsideration.

c. The ICJ Has Provided for an Appropriate Remedy for a Vienna Convention Violation

In its Avena decision, the ICJ provided for an appropriate remedy for when the United States fails to comply with its international legal duties under the Vienna Convention. The ICJ established that if the

---


192. See Murphy, supra note 191, at 436 (noting the clemency power as a discretionary power that executive officers—governors of states—sometimes share with state clemency boards when considering whether to grant clemency to a defendant who committed a state crime).

193. See id. (citing the Valdez v. Oklahoma example, where the governor seriously considered any prejudice that may have occurred because of the Vienna Convention violation, although ultimately concluding that any prejudice was immaterial to the outcome of the case).

194. See Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 284 (1998) (discussing the clemency process as one that occurs outside of judicial proceedings without meaning to “enhance the reliability of the trial process”).

195. See Avena, 2004 ICJ 128, ¶ 143 (finding that clemency proceedings do not constitute the “review and reconsideration” anticipated in LaGrand, but that the proceedings may supplement appropriate judicial proceedings).

196. See id. at 121 (defining adequate reparation for an Article 36 violation in this case as “an obligation on the United States to permit review and
United States violates Article 36, it should permit review and reconsideration, ascertaining whether the violation of Article 36 caused actual prejudice to the defendant in the administration of criminal justice.\(^{197}\) Moreover, the court held that this limitation of review and reconsideration should take place via a qualified process.\(^ {198}\) Accordingly, the ICJ called for the United States, in the case of an Article 36 violation, to “guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process.”\(^ {199}\)

This review and reconsideration process must also consider both the sentence and the conviction.\(^ {200}\)

The ICJ’s ruling is appropriate under international law because it allows the U.S. courts to determine if review and reconsideration is necessary and what kind of remedy should apply.\(^ {201}\) Such a remedy is particularly an appropriate remedy since international law requires that domestic legal systems have an opportunity to adjudicate a claim reconsideration of these nationals’ cases by the [U.S.] courts”). \textit{But see} Ray, \textit{supra} note 76, at 1764-65 (suggesting the possible remedies that the United States could have implemented in order to comply with the ICJ’s order of “review and reconsideration” from \textit{LaGrand}). The author predicts that the United States will continue its record of poor compliance with international legal obligations. \textit{Id}.

197. \textit{See} Avena, 2004 ICJ 128, ¶ 121 (applying this remedy to rectify the fact that the United States committed internationally wrongful acts when it failed to inform the defendants, notify Mexican consulates, and allow Mexico to provide consular assistance to the defendants).

198. \textit{See id.} at 131 (underlining that the phrase “by means of its own choosing” from \textit{LaGrand} “is not without qualification” and emphasizing that the United States must take into account the violations of rights provided by the Convention when implementing the process of review and reconsideration); \textit{see also} Ray, \textit{supra} note 76, at 1764-65 (defining review and reconsideration as a very specific process requiring complete examination of the case as well as possible retrials or exclusion of evidence).

199. \textit{See} Avena, 2004 ICJ 128, ¶ 138 (noting that such measures make the review and reconsideration process effective).

200. \textit{See id.} (considering both the conviction and the sentence would compel U.S. courts to examine the cases very thoroughly); \textit{see also} Ray, \textit{supra} note 76, at 1764-65 (predicting that the ICJ would find that the United States misunderstood the process of review and reconsideration).

201. \textit{See} Avena and Other Mexican Nationals (Mex. V. U.S.), 2004 ICJ 128, ¶ 122 (Mar. 31) (stating that after review and reconsideration, the U.S. courts should take account of any possible Vienna Convention violations). In doing so, the courts should take special note of the underlying prejudice and its origins. \textit{Id}.
and provide an available remedy prior to the defendant taking the claim to the international level.\textsuperscript{202} As the ICJ observed, most of the defendants in \textit{Avena} may not have exhausted their local remedies. As a result, U.S. courts retain a possibility to review and reconsider their cases.\textsuperscript{203} Allowing reconsideration is appropriate given the proportion of the violations that occurred.\textsuperscript{204}

\textit{4. The Court Should Have Issued an Order of Cessation and Non-Repetition}

The ICJ denied Mexico's request for an order of cessation and a guarantee of non-repetition on the grounds that Mexico failed to establish an on-going breach of Article 36.\textsuperscript{205} Because the Court found that the fifty-two individual cases "are in the state of \textit{pendente lite},"\textsuperscript{206} and because the Court found that the United States has been making a good faith effort to comply with Article 36,\textsuperscript{207} it did not find it necessary to order cessation and an assurance of non-repetition.\textsuperscript{208}

\textsuperscript{202} See discussion supra note 154 and accompanying text (observing that the exhaustion rule requires that a claimant exhaust local remedies before raising his claim on the international level).

\textsuperscript{203} See \textit{Avena}, 2004 I.C.J 128, ¶ 113 (noting that the criminal proceedings for most of the defendants still can be "review[ed] and reconsider[ed]" allowing the United States to fulfill its obligation under Article 36 of the Vienna Convention).

\textsuperscript{204} See discussion supra Part II.A.3. (describing the limited nature of the Vienna Convention rights and that international law requires a remedy in proportion to the rights at issue).

\textsuperscript{205} See \textit{Avena}, 2004 ICJ 128, ¶¶ 148-49 (citing the U.S. efforts to notify law enforcement officers of the duty to inform a foreign national of his right to speak to a consulate); see also \textit{STATE DEPARTMENT INSTRUCTIONS, supra} note 30, Part One (establishing methods by which officials should be informing detained foreign nationals of their Vienna Convention right to consular notification).

\textsuperscript{206} See \textit{Avena}, 2004 ICJ 128, ¶ 148 (stating that review and reconsideration is the appropriate measure).

\textsuperscript{207} See id. ¶ 149 (looking to the literature issued by the State Department to find that the United States has made a reasonable effort to inform officials of the Article 36 duties).

\textsuperscript{208} See id. ¶ 150 (relying on \textit{LaGrand} to conclude that no State could ever fully comply with an order of cessation or fully guarantee non-repetition).
Mexico asked the ICJ to order the United States to discontinue its Article 36 violations with respect to Mexico and Mexican nationals, and to “provide Mexico with guarantees of non-repetition” of the Article 36 violations.\textsuperscript{209} While in \textit{LaGrand} the ICJ found that an absolute guarantee of cessation and non-repetition would be logistically impossible,\textsuperscript{210} the ICJ relied on the U.S. argument that it had implemented an extensive program to comply with its Vienna Convention obligations.\textsuperscript{211} Because it appears that this program has not progressed extensively since \textit{LaGrand},\textsuperscript{212} and because an order of cessation and non-repetition complies with international law standards,\textsuperscript{213} the ICJ incorrectly denied Mexico’s request for an order of cessation and a guarantee of non-repetition.\textsuperscript{214}

The evidence substantiates Mexico’s position that the United States has not, in fact, improved its approach to implementing the Vienna Convention since \textit{LaGrand}.\textsuperscript{215} After the attacks of September 11, 2001, U.S. authorities detained hundreds of foreign nationals without informing the appropriate consulates.\textsuperscript{216} Despite the ICJ’s

\begin{footnotes}

\textsuperscript{209} See Memorial of Mexico, \textit{supra} note 83, ¶ 391 (noting that under international law orders of cessation and non-repetition are well-established remedies).

\textsuperscript{210} See \textit{LaGrand} Case (F.R.G. v. United States) 2001 ICJ 104, ¶ 124 (June 27) (stating that no State could ever guarantee non-repetition). In \textit{LaGrand}, Germany presented to the ICJ a list of German Nationals who, despite U.S. assurances that no further Article 36 violations would take place, contended that they had not been informed of their consular rights. \textit{Id.}

\textsuperscript{211} See \textit{id.} (concluding that when a State “repeatedly refers to substantial activities” the State is employing to fulfill its obligations, the State sufficiently expresses its commitment to comply with those obligations).

\textsuperscript{212} See \textit{id.} (deciding that because the United States appeared to be implementing a legitimate program in order to comply with its Vienna Convention violations, a guarantee of non-repetition would not be appropriate).

\textsuperscript{213} See discussion \textit{infra} notes 220-221 and accompanying text (discussing the viability of orders of cessation and guarantees of non-repetition under international law).

\textsuperscript{214} See Bodansky, \textit{supra} note 174, at 840 (finding that cessation is the primary obligation a State must fulfill when it has committed an on-going violation of international law).

\textsuperscript{215} See discussion \textit{infra} Part III.A (discussing U.S. failure to implement the Vienna Convention after \textit{LaGrand}).

\textsuperscript{216} See Daniel J. Lehman, \textit{The Federal Republic of Germany v. the United
decision in *LaGrand* that the Vienna Convention confers individual rights enforceable in courts, state and federal courts have refused to decide whether Article 36 creates such rights.\(^{217}\) Even when courts have ruled in favor of defendants who claim that U.S. authorities violated their Vienna Convention rights, the courts' reasoning does not rely on the *LaGrand* decision.\(^{218}\) Moreover, state officials have complied with the ICJ's orders from February of 2003 to stay the executions of those particular Mexican defendants, but only "out of courtesy" to the ICJ.\(^{219}\)

States have an obligation under international law to discontinue the violation of an international norm, including on-going violations.\(^{220}\) Both cessation of the violation and guarantees of non-repetition are appropriate remedies under international law.\(^{221}\) In accord with these international obligations, the ICJ should have held that because the United States has not implemented an adequate program to give full effect to the rights under Article 36, the United

---

*States of America: The Individual Right to Consular Access*, 20 LAW & INEQ. 313, 316 (2002) (emphasizing the importance of the right to consular access given that more than seven hundred foreign nationals were detained after the attacks of September 11, 2001, and that some consulates are unaware of the exact number of nationals being detained in the United States).

217. *See e.g.,* Bishop, *supra* note 4, at 42 (discussing that courts are not deciding whether the Vienna Convention creates individual rights but instead are concluding that the exclusion of evidence and the dismissal of indictments are not appropriate remedies for a Vienna Convention violation).


219. *See Liptak, supra* note 36 (quoting the Oklahoma attorney general, Drew Edmundson, in his decision to stay the execution of Osbaldo Torres).

220. *See Restatement (Third) of Foreign Relations Law § 901 cmt. c. (1987)* (enumerating the ways a State may be obligated to discontinue a violation). These obligations include discontinuance, revocation, or cancellation of the act in question; abstaining from further violations; or performing an obligatory act that the State failed to perform. *Id.*

221. *See Draft Articles on State Responsibility*, International Law Commission, Article 30 (stating that "[t]he State responsible for the internationally wrongful act is under an obligation: (1) To cease that act, if it is continuing; (2) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.")*, available at* www.un.org/law/ilc/reports/2001/2001report.htm (last visited on Jan. 29, 2005).
States must cease all violations of the Convention and must guarantee to Mexico that it will not repeat such violations. 222

III. RECOMMENDATIONS

A. U.S. INTERPRETATION OF THE VIENNA CONVENTION AFTER BREARD, LA GRAND, AND AVENA

While the United States has submitted to the jurisdiction of the ICJ for disputes arising under the Vienna Convention, 223 the United States has not incorporated the ICJ’s authority in domestic procedures and law. 224 The tension between international law and

222. See LaGrand, 2001 ICJ 104, ¶ 124 (noting that a country that “repeatedly refers to substantial activities which it is carrying out in order to achieve compliance” with obligations under a treaty, is expressing a commitment to follow through with its efforts).

223. See Optional Protocol, supra note 45, Article I (providing for compulsory jurisdiction of the ICJ for disputes regarding the Vienna Convention); see also Schiffman, supra note 48, at 52 (discussing the jurisdiction of the ICJ through the Optional Protocol for the Compulsory Settlement of Disputes, which establishes the ICJ as the means by which disputes are settled regarding the Vienna Convention).

224. See LaGrand Case (F.R.G. v. United States) 2001 ICJ 104, ¶ 33 (June 27) (quoting the United States Solicitor-General as stating that “an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief”); see also Avena Application, supra note 30, ¶ 34 (arguing that state courts’ failure to recognize the Vienna Convention rights as constitutional rights results in the denial of any meaningful relief for foreign defendants). Courts are declining to rely on LaGrand for the proposition that the Vienna Convention creates individual rights, which precludes them from finding a remedy for an alleged violation. Id. See also United States v. Li, 206 F.3d 56, 60 (2000) (finding a presumption against treaties creating individual rights but rather the presumption is that treaties create state rights, which provides no redress for individuals); Schiffman, supra note 48, at 42 (finding that many courts are going so far as to decline to determine whether the Vienna Convention creates individually enforceable rights and are instead looking at whether the violation of the treaty created substantial prejudice to the defendant); Avena Application, supra note 30, ¶¶ 36-42 (proposing that federal courts are essentially misplacing punishment onto Mexican nationals for the failure on the part of the United States to inform the Mexican consulate of the detention of its nationals). Because courts are relying on Breard and not LaGrand, they are finding that the Vienna Convention does not create individually enforceable rights, much less constitutional rights, so that the exclusionary rule is not a remedy available to the defendants. Id. Likewise, actions by the State of Mexico itself in U.S. federal
domestic law with regard to the Vienna Convention right to consular notification demands recognition and the *Avena* decision obviates resolution of this tension.\textsuperscript{225}

The United States is under a legal obligation both to comply with its duties under the Vienna Convention and to comply with any ICJ decision interpreting the Vienna Convention.\textsuperscript{226} As noted above, the United States has consented to the jurisdiction of the ICJ for disputes arising out of the Vienna Convention.\textsuperscript{227} By way of submitting to the ICJ’s jurisdiction, the United States has an obligation to comply with decisions like *LaGrand* and *Avena* that interpreted the Vienna Convention.\textsuperscript{228}

While the United States continues to violate international law, there is very little the international community may do in order to ensure U.S. compliance with its international obligations.\textsuperscript{229} The method by which the United States implements the ICJ rulings is entirely up to the United States.\textsuperscript{230} While no international stronghold will invade the United States and begin enforcing Vienna courts have proven unsuccessful. *Id.* U.S. federal courts have relied on the Eleventh Amendment to hold that the Convention violations are not of sufficient ongoing character to defeat sovereign immunity. *Id.* at 43-47.

\textsuperscript{225} See discussion infra Part III.B.1.c (concluding that U.S. courts will rely on *Avena* as they incorporate international law into their decisions).

\textsuperscript{226} See discussion supra Part I.A.2 (explaining that the Vienna Convention is a binding treaty for the United States and that an ICJ decision interpreting that treaty is also binding authority).

\textsuperscript{227} See discussion supra notes 45-46 and accompanying text (looking to the Vienna Convention and its Optional Protocol as the basis for ICJ jurisdiction over the United States for Article 36 violations).

\textsuperscript{228} See *Too Sovereign*, supra note 25, at 2656-57 (discussing the binding nature of the Vienna Convention and ICJ decisions interpreting the treaty); see also *LaGrand*, 2001 ICJ 104, ¶¶ 42, 45, 48 (holding that the Court has jurisdiction to hear Germany’s submissions); *Avena* and Other Mexican Nationals (Mex. V. U.S.), 2004 ICJ 128, ¶¶ 27-35 (Mar. 31) (finding that the Court has jurisdiction to hear Mexico’s claims).

\textsuperscript{229} See Bishop, supra note 4, at 92 (looking to past decisions regarding Vienna Convention violations to conclude that U.S. courts are not likely to implement ICJ decisions).

\textsuperscript{230} See *Avena*, 2004 ICJ 128, ¶¶ 120-21 (discussing the holding in *LaGrand* as the basis for allowing the United States to choose the means by which it may determine whether to permit review and reconsideration).
Convention rights, the methods by which the United States could choose to enforce Article 36 rights under the Vienna Convention are multitudinous.\textsuperscript{231}

B. SUGGESTIONS OF METHODS THROUGH WHICH THE UNITED STATES CAN EFFECTIVELY AND EFFICIENTLY IMPLEMENT \textit{AVENA} AS BINDING AUTHORITY

1. Judicial Implementation

U.S. Supreme Court reliance on \textit{Avena} as controlling authority is the most effective way to incorporate the ICJ's ruling from \textit{Avena} to U.S. domestic law.\textsuperscript{232} Most commentators agree that the judicial system is the best solution for ensuring implementation of Vienna Convention obligations.\textsuperscript{233} This solution remains stifled because lower courts deny defendants relief in suits regarding the Vienna Convention, thereby precluding those defendants from ever reaching the U.S. Supreme Court.\textsuperscript{234} Thus, the more substantive issue is the

\begin{itemize}
\item \textsuperscript{231} See discussion infra III.B (recommending vacatur of the death sentences as a means of judicial implementation of the \textit{Avena} remedy in the case of an Article 36 violation as well as considering the ABA Guidelines as a possible option to implement the ICJ ruling in a meaningful way as it would result in application of international law at the U.S. domestic court level).
\item \textsuperscript{232} See Ray, supra note 76, at 1767-1768 (noting that while the Constitution makes clear that both statutes and treaties are the supreme law of the land, it is silent on how to resolve conflicts between them). The Supreme Court's own precedent demonstrates that it is the province of the judiciary to resolve conflicts between treaty and statutory obligations. \textit{Id.}
\item \textsuperscript{233} See Lehman, supra note 216, at 339-340 (explaining that the judicial system provides the best protection for Vienna Convention rights because it is insulated from political pressures); \textit{see also} Chad Thornberry, \textit{Federalism vs. Foreign Affairs: How the United States Can Administer Article 36 of the Vienna Convention on Consular Relations Within the States}, 31 \textit{McGeorge L. Rev.} 107, 143 (1999) (discussing the benefits of enforcing Article 36 through the courts versus the law enforcement agencies or state legislatures emphasizing consistency and technical manageability). \textit{But see} Wilson, supra note 2, at 1195 (citing the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases as a viable solution for Article 36 enforcement because they place the duty on the lawyers to inform their clients of the right to speak to a consulate of their country of origin).
\item \textsuperscript{234} See F.R.G. v. U.S., 526 U.S. 111, 111-112 (1999) (declining to exercise original jurisdiction over the case). \textit{But see} Breard, 523 U.S. at 376 (issuing a
question of whether lower courts can directly rely on ICJ decisions as binding authority absent a ruling by the U.S. Supreme Court.\footnote{235}

a. U.S. Courts Should Rely on \textit{Avena} to Find that There is a Remedy to the Right Established in \textit{LaGrand}

Because the United States has consented to the jurisdiction of the ICJ for "disputes arising out of the interpretation or application of the Convention,"\footnote{236} it has consensually bound itself to the rulings of the ICJ for disputes over the Convention.\footnote{237} Thus, since the ICJ issued a ruling on the merits of the \textit{LaGrand} and \textit{Avena} cases, these decisions should be controlling in U.S. courts.\footnote{238} Despite these obligations, U.S. courts have declined the opportunity to follow the \textit{LaGrand} decision and instead have relied primarily on the U.S. Supreme Court decision from \textit{Breard}.\footnote{239}


236. See \textit{Optional Protocol}, supra note 45 (noting that although the United States has rejected the jurisdiction of the ICJ generally, the ICJ retains jurisdiction over the United States for Vienna Convention disputes); see also \textit{Too Sovereign}, supra note 25, at 2656-2657 (finding that because the United States rejected the compulsory jurisdiction of the ICJ in 1986, the Optional Protocol is important because the ICJ only has jurisdiction over the United States in cases where a treaty specifically calls for the Court's jurisdiction, which the Vienna Convention accomplishes through the Optional Protocol).


238. See discussion \textit{supra} Part I.A.2 (concluding that U.S. courts are bound by the ICJ's decisions in disputes arising out of the Vienna Convention).

239. See \textit{Too Sovereign}, supra note 25, at 2674 (discussing U.S. court decisions where the courts have relied on \textit{Breard} and not \textit{LaGrand}, and contending that in cases where courts have recognized that the failure to inform a consulate of a defendant's detention may result in prejudice, which is a recognition based solely on grounds of inadequate counsel); see also \textit{F.R.G. v. U.S.}, 526 U.S. at 112 (declining to exercise original jurisdiction over Germany's appeal to enforce the ICJ's order staying the execution of Walter LaGrand). The U.S. Supreme Court has only issued a ruling on the merits of the \textit{Breard} case, and not \textit{LaGrand}, which in part explains lower courts' reluctance to rely on \textit{LaGrand} as precedential authority. \textit{Id.}
Notably, the U.S. Supreme Court stated in *Breard* that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest."\(^{240}\) However, the ICJ unequivocally held in *LaGrand* that Article 36(1) of the Vienna Convention "creates individual rights, which . . . may be invoked in this Court by the national State of the detained person."\(^{241}\) If U.S. courts were treating the ICJ decision from *LaGrand* as binding precedent, then under the doctrine of *stare decisis* they could not deny that the Vienna Convention creates individual rights.\(^{242}\) By relying on Supreme Court precedent rather than ICJ precedent, however, U.S. courts have held that the Vienna Convention does not create individually enforceable rights.\(^{243}\)

---


241. See *LaGrand Case* (F.R.G. v. United States) 2001 ICJ 104, ¶ 77 (June 27) (basing this decision on both its own reading of the text of the provisions of the Convention as well as previous ICJ jurisprudence).


243. See Wisconsin v. Navarro, 260 Wis.2d 861, 863-864 (Wis. Ct. App. 2003) (concluding that the Vienna Convention does not create an individually enforceable right so that the defendant had no standing to bring his claim); see also Commonwealth v. Diemer, 57 Mass. App. Ct. 677, 683 (2003) (asserting that despite the ICJ's opinion in *LaGrand*, another argument states that international treaties do not create rights that are privately enforceable in federal courts); State v. Lopez, 633 N.W.2d 774, 783 (Iowa 2001) (finding that even if Article 36 creates individually enforceable rights, those rights do not "rise to the level of a fundamental right"); United States v. Emuegbunam, 268 F.3d 377, 390 (6th Cir. 2001) ("Absent express language in a treaty providing for particular judicial remedies, the federal courts will not vindicate private rights unless a treaty creates fundamental rights on a par with those protected by the Constitution."); United States v. Jimenez-Nava, 243 F.3d 192, 197 (5th Cir. 2001) (relying on the State Department's view of treaty interpretation such that the Vienna Convention does not create individual rights and instead creates only state-to-state rights and obligations). Even before *LaGrand*, courts relied on *Breard* to find that the Vienna Convention did not create individual rights on par with constitutional rights. *Id.* See also *Shakleford v. Commonwealth*, 547 S.E.2d 899 (Va. 2001) (declining to find that the failure to inform the defendant of his right to consular notification violated the Vienna Convention or any rights secured under the U.S. Constitution); *Kasi v. Commonwealth*, 508 S.E.2d 57, 64 (Va. 1998) (looking to the Vienna Convention's preamble to conclude that the treaty does not create individually enforceable rights); *Li*, 206 F.3d at 60-61 (claiming that the Vienna Convention does not create rights on par with constitutional rights).
Nonetheless, the courts should rule that the Convention creates individual rights.\textsuperscript{244} There is a chasm between what U.S. courts consider to be the rule of individual rights under treaties (treaties generally do not create individually enforceable rights)\textsuperscript{245} and what international courts believe to be the rule of individual rights under treaties (that treaties do create individual rights).\textsuperscript{246} One could go so far as to infer that U.S. courts may never conclude that an ICJ decision interpreting the Vienna Convention is binding authority\textsuperscript{247} given that they have declined to decide the issue of whether the Vienna Convention creates individual rights, even after \textit{LaGrand}.\textsuperscript{248}

The \textit{Avena} decision, however, facilitates U.S. judicial implementation of Vienna Convention rights because it provides for a remedy that U.S. courts have already stated is appropriate in the case of a violation of Article 36.\textsuperscript{249} U.S. federal courts have used a “prejudice” standard to conclude, without deciding the individual rights issue, that a defendant must show prejudice resulting from the denial of his Vienna Convention rights in order to receive a remedy.\textsuperscript{250} By implementing the \textit{Avena} remedy, courts will effectively acknowledge an individual right to consular access under

\textsuperscript{244} See Madej v. Schomig, 2002 WL 31386480, at 1 (N.D. Ill. 2002) (“After \textit{LaGrand}... no court can credibly hold that the Vienna Convention does not create individually enforceable rights. The International Court of Justice was quite clear on that point”).

\textsuperscript{245} See Iraola, \textit{supra} note 27, at 191 (discussing the holding in \textit{Breard v. Greene} that treaties do not create individual rights).

\textsuperscript{246} See \textit{LaGrand}, 2001 ICJ 104, ¶ 42 (stating implicitly that treaties create individual rights).

\textsuperscript{247} See Schomig, 2002 WL 31386480 at 1 (alleging that for the countries that adopted the Optional Protocol, like the United States, the ICJ decision regarding the Vienna Convention is binding and that “[t]o disregard one of the ICJ’s most significant decisions interpreting the Vienna Convention would be a decidedly imprudent course”).

\textsuperscript{248} See discussion \textit{supra} Part III.A (discussing U.S. courts willful disregard of the \textit{LaGrand} decision); \textit{see also} discussion \textit{supra} note 243 (noting cases that have declined to rely on \textit{LaGrand} or to decide whether the Vienna Convention creates individual rights).

\textsuperscript{249} See discussion \textit{supra} Part II.A.3.c (conveying that the remedy provided for in the \textit{Avena} decision is appropriate in light of the violations that have occurred).

\textsuperscript{250} See Bishop, \textit{supra} note 4, at 53-55 (observing several U.S. federal court cases that invoked the prejudice standard).
the Vienna Convention.\textsuperscript{251} Creating an individual right to consular access is not inconsistent with the Constitution.\textsuperscript{252} Providing for an individual right in U.S. courts would establish a right on par with a federal or statutory right.\textsuperscript{253} If U.S. courts apply the remedy established in \textit{Avena}, they would comply both with the \textit{Avena} decision and with the \textit{LaGrand} decision.\textsuperscript{254}

b. U.S. Courts Should Implement the \textit{Avena} Decision by Granting Meaningful Review and Reconsideration Through Vacating the Death Penalties

In the case where a court determines that there has been an Article 36 violation that resulted in actual prejudice, the ICJ stated in \textit{Avena} that “review and reconsideration should be both of the sentence and conviction.”\textsuperscript{255} Review and reconsideration in the form of vacating

251. \textit{See} \textit{Avena} and Other Mexican Nationals (Mex. V. U.S.), 2004 ICJ 128, ¶ 139 (Mar. 31) (noting that
\[ \text{the rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law ... what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.).} \]

252. \textit{See} Lehman, \textit{supra} note 216, at 328-331 (arguing that the \textit{LaGrand} decision and U.S. law are not mutually exclusive because Congressional intent would be in favor of protecting Americans abroad and thereby in favor of the Vienna Convention’s rights); \textit{see also} Schiffman, \textit{supra} note 48, at 60 (noting that “respectful consideration of international law is wholly consistent with the U.S. Constitution and the Federalist tradition”).

253. \textit{See} discussion \textit{supra} Part I.A.2 (explaining that treaties are on the same hierarchical plane as federal statutes); \textit{see, e.g.}, 28 U.S.C.A. §2255 (2003) (establishing a prisoner’s right to move for vacatur or correction of a sentence when the sentence was imposed in violation of the U.S. Constitution).

254. \textit{See} \textit{Avena}, 2004 ICJ 128, ¶¶ 120-121 (expounding upon the remedy in \textit{LaGrand} to create the remedy of review and reconsideration that takes into account any prejudice that may have occurred to the defendant during the criminal proceedings).

255. Id., ¶ 138; \textit{see also} Nath, \textit{supra} note 183, at 555 (discussing the ineffectiveness of clemency proceedings because they essentially allow the United States to continue to violate Article 36 obligations). In \textit{Avena}, the ICJ refined the U.S. obligation to grant “review and reconsideration” under \textit{LaGrand}. \textit{Id. See also} discussion \textit{supra} Part II.A.3.a. (concluding that \textit{restitutio in integrum} is not an
the death sentences is the remedy that concretely reconciles the obligation of review and reconsideration from LaGrand with the more refined remedy presented in Avena. The invocation of the death penalty is both a violation of one’s individual rights under the Vienna Convention and is a violation of international due process rights. If U.S. courts vacated the death sentences, that decision would comply more directly with international law in this area given that international law generally disfavors the use of the death penalty.

Calling for vacatur of the death sentences would further allow U.S. domestic courts to reassess the appropriateness of the death penalty without needing to negotiate new trials, evidence, or the guilt of the defendants. Furthermore, vacating the death sentences would

appropriate remedy for Mexico in this case). The ICJ interpreted LaGrand to find a middle ground between Mexico’s all-inclusive plea for restitutio in integrum and the U.S. under-inclusive use of clemency as appropriate review and reconsideration. Id. See also LaGrand Case (F.R.G. v. United States) 2001 ICJ 104, ¶ 125 (June 27) (holding that the United States must grant review and reconsideration in the case of a violation of Article 36 of the Vienna Convention). Clemency may be an appropriate application of review and reconsideration when retroactively considering a case concerning defendants who are already dead, but clemency does not provide meaningful review and reconsideration for defendants who are still alive. Id. See also Memorial of Mexico, supra note 83, at 242-44 (arguing that clemency is an ineffective remedy and that despite the fact that the United States has discretion to give effect to Article 36, it may not choose an ineffective remedy).

256. See Avena, 2004 ICJ 128, ¶ 121 (asserting that the appropriate remedy for an Article 36 violation is review and reconsideration with an eye to whether the violation “caused actual prejudice to the defendant”); see also LaGrand, 2001 ICJ 104, ¶ 125 (noting that legitimate review and reconsideration must take “account of the violation of the rights set forth in the Convention”). Although “the choice of means must be left to the United States,” the choice of means should provide actual and meaningful review, not a promise of review. Id. See also Nath, supra note 183, at 555 (implying that clemency proceedings are a meaningless procedure). Clemency proceedings are, essentially, only a promise of review. Id.

257. See Inter-American Court of Human Rights Advisory Opinion OC-16/99 ¶ 137 (October 1, 1999) (stating that failure to recognize the rights under Article 36(1)(b) of the Vienna Convention “is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be ‘arbitrarily’ deprived of one’s life”).

258. See Wilson, supra note 2, at 1198 (suggesting that the overall trend in international law is toward the abolition of the death penalty).

259. See Liptak, supra note 36 (quoting the Mexican foreign affairs minister as
require only a re-sentencing hearing, which reduces the burden on U.S. courts and does not require them to conduct new trials for each defendant.\footnote{260} In some cases, U.S. courts may find that the right to speak to a consulate would have made a significant difference in the case and therefore would merit further reconsideration or even a retrial.\footnote{261} Judges would have the discretion to impose life sentences, however, if a particularly egregious case required it.\footnote{262}

Such a result would not be disproportionate to the "limited character of the rights in issue,"\footnote{263} but would address the fact that the Mexican nationals are still alive and therefore merit some form of practical relief.\footnote{264} An appropriate and meaningful interpretation of review and reconsideration, with an eye to determine whether actual prejudice occurred, would compel U.S. courts to grant vacatur of the sentences to the death penalty.\footnote{265}

\begin{footnotes}
\item[260] See Counter-Memorial of the United States, supra note 124, ¶¶ 8.11-8.14 (discussing the heavy burden of conducting new trials for each defendant); see also International Law Commission Report, supra note 166, at 237 (finding that the form of reparation should not be disproportionate to the issue at hand).
\item[261] See e.g., Memorial of Paraguay, supra note 33, ¶ 2.3-2.12 (noting the differences between the Paraguayan criminal justice system and the American criminal justice system, adding that Mr. Breard’s ignorance of these differences made a significant difference in his legal strategy).
\item[262] See Stephanos Bibos, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 YALE L. J. 1097, 1125-27 (2001) (concluding that at common law, judges had wide discretion to grant sentences for misdemeanors and therefore sentencing was not solely within the province of the jury); see also Chaffin v. Stynchcombe, 412 U.S. 17, 37 (1973) (Stewart, J., dissenting) (finding that judges may reduce a jury-determined sentence in a second trial to that of the first trial, if greater, when in the interest of avoiding vindictiveness).
\item[263] International Law Commission Report, supra note 166, at 236, n.518.
\item[264] See discussion supra notes 122-124 and accompanying text (observing the novelty of the Avena decision given that the defendants are still alive).
\item[265] See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §901 cmt. d (1987) (asserting that international tribunals have wide latitude to determine a remedy and may choose a remedy deviating from the norm, so long as the parties have presented that remedy in their pleadings).
\end{footnotes}
The United States has already interpreted international law as binding on domestic courts.\(^{266}\) For example, as early as 1900 the U.S. Supreme Court acknowledged that "international law is part of our law."\(^{267}\) The president also has the authority to make a binding agreement with a foreign state even when the agreement requires a change in state law.\(^{268}\) The United States cannot avoid its international obligations by asserting its domestic law because international law can require domestic law to change.\(^{269}\)

As U.S. courts look more frequently upon decisions from international jurisdictions when making their decisions,\(^{270}\) it becomes more likely that the judicial system will respond to the need to enforce ICJ decisions in the courts.\(^{271}\) Logically, the courts' adoption of international norms is the most critical factor towards U.S.

---

266. See The Paquete Habana, 175 U.S. 677, 700 (1900) (discussing the historical role of international law in the United States); see also Pink, 315 U.S. at 230 (asserting that a federal executive agreement with a foreign government trumped state law). This case shows that historically, international agreements have been controlling law in the United States. Id.

267. The Paquete Habana, 175 U.S. at 700.

268. See Pink, 315 U.S. at 230 (finding that the President had the authority to make an agreement with the Soviet government where the agreement trumped local New York state law).

269. See Vienna Convention on the Law of Treaties, May 22, 1969, art. 26, 1155 U.N.T.S. 331, 339 (prohibiting a party from invoking its domestic law "as justification for failure to perform a treaty"); see also Missouri v. Holland, 252 U.S. 416, 435 (1920) (holding that the state of Missouri was bound to a treaty that prohibited the killing, capturing, or selling of certain migratory birds despite possible infringement on states' rights under the Tenth Amendment); William J. Aceves, The Vienna Convention on Consular Relations: A Study of Rights, Wrongs and Remedies, 31 VAND. J. TRANSNAT'L L. 257, 292-93 (1998) (noting that the United States has a duty to fulfill its international legal obligations in addition to domestic legal obligations).


271. See discussion supra notes 232-235 and accompanying text (discussing the idea that the judicial system provides the best forum for implementing ICJ decisions as binding authority).
adoption of ICJ rulings and fulfillment of Vienna Convention obligations.272

Evidence supports the suggestion that federal courts implement international law in their decisions.273 The U.S. Supreme Court has also shown a willingness to look at international law in some of its more recent opinions.274 Justices Stevens and Breyer have further expressed an interest in complying with an ICJ decision in the *Avena* case.275 Some lower courts held that the Vienna Convention is enforceable, even without controlling Supreme Court case law to guide the lower courts' holdings.276 Thus, hope exists that U.S. courts will independently incorporate the ICJ decisions into their rulings.277

2. Non-Judicial Implementation of *Avena* to Ensure the United States' Cessation of Article 36 Violations

a. ABA Guidelines are a Workable Enforcement Mechanism for the Vienna Convention Rights

One particularly compelling idea to ensure cessation of Article 36 violations has arisen through the ABA's adaptation of revised Guidelines for the Appointment and Performance of Defense

272. *See* Ray, *supra* note 76, at 1767 (concluding that the U.S. Supreme Court must implement the ICJ ruling in order for it to be effective). *But see* discussion *supra* Part III.B.2.a (arguing that the ABA Guidelines may serve as a means of implementing the rights under the Vienna Convention without contradicting or relying on Supreme Court precedent).


275. *See* Torres v. Mullin, 2003 WL 22697573 (2003) (Stevens, J., dissenting) (finding the *LaGrand* decision as authoritative precedent necessitating consideration); *see also* Torres v. Mullin, 540 U.S. 1035, 1035 (2003) (Breyer, J., dissenting) ("Depending on how the ICJ decides Mexico's related case against the United States, and subject to further briefing in light of that decision, I may well vote to grant certiorari in this case.").

276. *See* discussion *infra* note 283 (noting that two lower court decisions that have relied on ICJ decisions).

277. *See* discussion *supra* notes 270-276 and accompanying text (arguing that domestic court decisions should incorporate international law).
Counsel in Death Penalty Cases. Importantly, these Guidelines are important because they refer specifically to the obligation to apply international law on the domestic court level in the United States. The Guidelines require counsel “at every stage of the case [to] make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals;” defense counsel would also have an affirmative duty to inform his or her client immediately of the right to speak to the appropriate consulate and to gain the client’s consent to speak to the consulate.

Placing the burden on defense counsel to inform the client of his right to speak to the relevant consulate would relieve many of the problems that domestic courts have with enforcement of international norms. It would also relieve problems of timing because once the defendant receives counsel, under the ABA Guidelines, he also would have information about his right to consular notification.

Furthermore, this approach would convert a violation of Article 36 into an issue of adequate counsel, and courts have been positively inclined to consider Article 36 violations in this context. The placement of the duty to inform a defendant of his consular access

278. See ABA Guidelines, supra note 24, at 10.6 (noting that the Guidelines drew applicable standards from the Vienna Convention because it was a related source).

279. See Wilson, supra note 2, at 1195 (remarking that the ABA Guidelines are the first set of standards to refer to the obligation to apply international law in domestic courts).

280. See ABA Guidelines, supra note 24 (finding substantial evidence showing that American authorities are apt to fail to comply with the obligations under the Vienna Convention and explaining that failure to comply has both practical and legal consequences). If counsel receives consent to speak to the consulate, counsel must act on that consent immediately and contact the consulate. Id.

281. See Wilson, supra note 2, at 1198 (observing that domestic courts do not provide effective protection of the rights under the Vienna Convention because to do so would require providing an effective remedy).

282. See id. at 1197-98 (stating that with the burden placed on counsel to raise the Vienna Convention claim, the issue of “without delay” would be resolved).

283. See Valdez, 46 P.3d at 710 (granting Valdez relief on the basis of inadequate counsel where he alleged a violation of his Vienna Convention rights); see also Schomig, 2002 WL 31386480 (noting in dicta that the defendant’s case was never about the Vienna Convention but was rather primarily about the Sixth Amendment right to counsel).
rights on counsel would also allow the defendant to bring a claim of inadequate counsel at later stages of judicial proceedings and he would not be barred from bringing a claim because of the procedural default rule.  

CONCLUSION

This case note has observed that ICJ decisions are binding authority in the United States when they interpret conflicts arising out of the Vienna Convention on Consular Relations. The United States has recognized the importance of the Vienna Convention and it cannot circumvent its obligation to implement this treaty. With the ruling of the Avena case, the United States gains ever more responsibility to fulfill its obligations under the Vienna Convention.

The United States must carefully consider its role in the international legal system and how it will effectively and successfully implement international law on the domestic plane. If the United States wishes to participate in and benefit from international law, then it must be willing to recognize this body of law as cogent, binding authority. An excellent beginning would be

---

284. See analysis supra note 97 (discussing how the function of the procedural default rule prevents defendants from raising claims under the Vienna Convention).

285. See discussion supra Part I.A.2 (elucidating that the Optional Protocol provides for the compulsory jurisdiction of the ICJ for disputes arising out of interpretation of the Vienna Convention).

286. See discussion supra note 34 (remarking that in the Tehran case, the United States argued from the Vienna Convention to secure the release of the U.S. hostages).

287. See discussion supra Part I.A.2 (explaining the jurisdiction of the ICJ over the United States for disputes regarding the Vienna Convention).

288. See discussion supra Part III (advocating that the United States view the ICJ ruling in Avena as binding authority and implement it as such).

289. See discussion supra Part III.B (proposing methods by which the United States can implement the Avena decision both judicially and non-judicially).

290. See discussion supra Parts II-III (suggesting that the United States should rely more heavily on international law).
to acknowledge the gravity of the *Avena* decision and implement the ruling in domestic courts.\textsuperscript{291}

\textsuperscript{291} See discussion *supra* Part III (recommending that the United States implement the ICJ decision in *Avena* as binding precedent).