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The Clash Between U.S. Criminal Procedure and the Vienna Convention on Consular Relations: An Analysis of the International Court of Justice Decision in the LaGrand Case

Jennifer Lynne Weinman

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THE CLASH BETWEEN U.S. CRIMINAL PROCEDURE AND THE VIENNA CONVENTION ON CONSULAR RELATIONS: AN ANALYSIS OF THE INTERNATIONAL COURT OF JUSTICE DECISION IN THE *LAGRAND CASE*

JENNIFER LYNNE WEINMAN*

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* J.D. Candidate, May 2003, American University, Washington College of Law; B.A. International Studies, French, 2000, Miami University. I extend my sincere appreciation to the members of the *International Law Review* for their guidance in this process, especially to my editor Brian Appel for all of his help and advice. I am also grateful for all of my family and friends who have given me so much support and encouragement, most importantly my parents, Carol and Russell Weinman for their endless love and support; Graham Lanz for all his love, patience, and understanding; and Jessica Waters for all her caring and friendship. Without all of you, none of this would be possible—I thank you with all of my heart.

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INTRODUCTION

Eighteen years ago, German nationals Karl and Walter LaGrand were arrested in connection with an armed robbery and murder in the State of Arizona.¹ The State charged and convicted the LaGrand brothers with first-degree murder—a conviction that carries the death penalty in the State of Arizona.² Neither Karl nor Walter LaGrand was notified of his right to speak with the German consulate—a right secured by the Vienna Convention on Consular Relations (“Vienna Convention”).³ On June 27, 2001, after an eighteen year legal battle,

1. See John R. Schmertz & Mike Meier, *In Case of Germany v. United States, International Court of Justice Rules that U.S. Has Failed to Comply with Binding Provisional Order to Stay Execution of German National and Had Breached Consular Convention in Failing Promptly to Notify Two German Nationals of Rights to Contact German Consular Officials*, 7 INT'L L. UPDATE 118 (2001) (explaining that Arizona state authorities arrested Karl and Walter LaGrand in the United States on January 7, 1982 on suspicion of involvement in an armed bank robbery). During the attempted robbery, the LaGrand brothers killed the bank manager and seriously injured another bank employee. See *id.*

2. See Peter Finn, *World Court Rebukes U.S. Over Execution of Germans*, WASH. POST, June 28, 2001, at A20 (noting the LaGrand brothers were convicted of first degree murder for killing the bank manager during the attempted bank robbery).

3. See Vienna Convention on Consular Relations, Apr. 24, 1963, preamble, 21 U.S.T. 77, art. 36(b) [hereinafter Vienna Convention] (delineating the rights and duties of states, including the duty to inform a consulate of its national's arrest,

the International Court of Justice ("ICJ") found the United States in violation of the Vienna Convention for not informing the LaGrands of their right to communicate with their consulate.⁴ Unfortunately this decision came too late for the LaGrand brothers, as the State of Arizona executed both before the ICJ announced its ruling.⁵ The LaGrands filed numerous appeals at both the state and federal levels before they became aware of their rights under the Vienna Convention.⁶ After contacting the German consulate, the LaGrands argued to the courts during post-conviction relief proceedings that the State of Arizona violated the Vienna Convention.⁷

The LaGrand brothers were unable to have the merits of their claim addressed during post-conviction proceedings due to a rule of domestic criminal procedure called the "procedural default" rule.⁸

imprisonment, or custody pending a trial); *see also* Finn, *supra* note 2, at A20 (relating that the United States violated the Vienna Convention by neither notifying nor permitting the two German brothers to communicate with their consulate).

4. *See* Press Release, International Court of Justice, The Court Finds That the United States Has Breached its Obligation to Germany and to the LaGrand Brothers Under the Vienna Convention on Consular Relations, 2001/16 (June 27, 2001) [hereinafter ICJ Press Release: U.S. Breached Obligation] (highlighting the fourteen-to-one holding of the ICJ in the *LaGrand Case* that the United States breached its obligation under the Vienna Convention), *available at* http://www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001-16_20010627.htm (last visited Feb. 15, 2002) (on file with author); *see also* Fareed Zakaria, *There's More to Right Than Might* NEWSWEEK, July 9, 2001, at 43 (documenting that this decision was of great international significance, as it appeared in news headlines across Europe).

5. *See* *LaGrand Case* (F.R.G. v. U.S.) 2001 I.C.J. 104 (June 27), *in print at* 40 I.L.M. 1069, 1078-79 (June 27, 2001) (explaining that the State of Arizona executed Karl LaGrand on February 24, 1999, and Walter LaGrand on March 3, 1999), *available at* <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>. Notably, the ICJ did not announce its decision until June 27, 2001, over two years after the execution of Walter LaGrand. *Id.*

6. *See LaGrand Case*, 40 I.L.M. at 1077 (describing the procedural history and noting the LaGrands essentially had three sets of proceedings, the first two which involved the state criminal appellate process). For the duration of the first two sets of proceedings, neither of the LaGrands was aware of his right to contact the German consulate. *See id.* at 1077-78.

7. *See id.* at 1077 (noting the LaGrands notified the German consulate of the criminal case before them in June 1992 after being informed by a third party of their consular rights, not because any Arizona government official had done so).

8. *See LaGrand v. Stewart*, 170 F.3d 1158, 1161 (9th Cir. 1999) (determining

This statutory doctrine prevents convicted defendants from raising new claims on appeal that they did not raise in the lower court.⁹ Additionally, the statutes governing federal habeas corpus relief prevent claims from being addressed at the federal level that the defendant did not raise at the state court level.¹⁰ Because the LaGrands' claims were procedurally barred, no U.S. court ever addressed the claims on their merits.¹¹

The intricacies of diplomatic relations are commonly taken for granted; yet those relations and the movement of people between nations play an important part in the foreign policies of many nations around the world.¹² The drafters of the Vienna Convention designed the treaty to protect basic rights of consular posts to speak with their nationals who are in the custody of a foreign state.¹³ In addition, the Vienna Convention ensures that simple issues, such as a lack of understanding of a foreign state's legal system or language barriers,

that the federal courts could not hear the merits of the LaGrands' claim of a violation of the Vienna Convention because the claim was procedurally defaulted by waiver at the state court level); *see also* discussion *infra* Part II.B (discussing the origins of the procedural default rule in both state and federal law). Every court proceeding in the United States has rejected the possibility of the United States violating the Vienna Convention under the "procedural default" doctrine. *See id.*

9. *See* AZ. R. CRIM. P. 32.2 (West 2001) (mandating that a defendant is precluded from relief for any claim "[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding.").

10. *See* 28 U.S.C. § 2254 (2001) (ordering that federal courts will only entertain a writ of habeas corpus relief if the applicant has exhausted available remedies in state court); *see also* 28 U.S.C. § 2261 (2001) (explaining that as part of the Antiterrorism and Effective Death Penalty Act of 1996, federal courts will only consider an applicant for habeas corpus relief in a capital case if the state court heard and decided the claim, barring certain exceptions).

11. *See LaGrand*, 170 F.3d at 1160 (noting that the court could not address the merits of the LaGrands' claim unless the LaGrands could demonstrate cause for their default that resulted in prejudice to the defense).

12. *See* Kelly Trainer, Comment, *The Vienna Convention on Consular Relations in the United States Courts*, 13 TRANSNAT'L LAW. 227, 231-234 (2000) (arguing that the increase in communication between different states, which includes the movement of people, has led to a world without true borders).

13. *See* Vienna Convention, *supra* note 3 (memorializing that the Vienna Convention was designed with a belief that it would establish privileges and immunities to ensure efficient performance of consulates and to promote friendly and efficient relations among states).

do not prevent a foreign national from receiving a fair trial.¹⁴ The Vienna Convention seeks to make this assurance through communication and cooperation between the foreign state and the nationals' consulates.¹⁵

Many legal commentators and international scholars have criticized the United States for its reliance on the Vienna Convention when its own citizens are parties to a legal action, while the United States lacks a firm commitment to ensuring the same rights for foreign nationals on its own soil.¹⁶ Of the one hundred twenty-three foreigners on death row in the United States, only four were promptly told that they could seek assistance from their consulate.¹⁷

14. See Linda Jane Springrose, Note, *Strangers in a Strange Land: The Rights of Non-Citizens Under Article 36 of the Vienna Convention on Consular Relations*, 14 GEO. IMMIGR. L.J. 185, 195 (noting that although consular officials cannot practice law, the function of the consular post is to assist foreign nationals in understanding what happens to them when they reside in a state with an entirely different legal system); see also Joshua A. Brook & Noah S. Leavitt, *International Court Wrongly Accused*, WASH. TIMES, Aug. 15, 2001, at A14 (noting that when a foreign national faces the death penalty, the assistance of a consulate can often make a significant difference because the consulate can provide better legal representation and research mitigating evidence in the foreign national's state). The ability to provide better legal representation for nationals who face the death penalty is particularly important to states that have banned the death penalty, such as Germany and other European states. See generally Finn, *supra* note 2. See also *2 German Brothers Opt for Gas Chamber in Hopes of Leniency*, CHI. TRIB., Feb. 22, 1998, at 4 [hereinafter *2 German Brothers*] (noting that German Chancellor Schroeder opposes the death penalty even in the most serious of crimes).

15. See Vienna Convention, *supra* note 3, art. 36 (articulating the rights and duties of both the sending and receiving states when a foreign national is taken into custody in the receiving state).

16. See generally Michael C. Dorf, *FindLaw Forum: When U.S. States Execute Citizens of Other Countries*, CNN.COM.LAWCENTER, (July 25, 2001) (explaining that litigation over the *LaGrand Case* and others highlights the conflicts between how the United States views the application of international law to domestic law and how other countries regard the same), available at <http://www.cnn.com/2001/LAW/07/columns/fl.dorf.executions.0725/index.html> (last visited March 2, 2002); see also Finn, *supra* note 2 (quoting senior researcher at Cologne University Department of International Criminal Law in saying that the United States now has an obligation to organize its criminal justice system so as to not violate international treaties); cf. Zakaria, *supra* note 4 (explaining that this criticism extends to U.S. policy concerning other areas of international relations as well).

17. See Eun-Kyung Kim, *Foreigners on Death Row Shortchanged*, ASSOCIATED PRESS, July 10, 2001 [hereinafter *Foreigners Shortchanged*] (noting

The United States would not stand for such treatment of its nationals who are overseas.¹⁸ For example, when the Chinese government shot down a U.S. spy plane in early 2001, President George W. Bush promptly cited the Vienna Convention as justification for why China should allow the U.S. consulate to visit the detained members of the crew.¹⁹

The LaGrands were neither the first nor the last to assert a violation by the United States of their rights under the Vienna Convention.²⁰ The recent case of Angel Breard, a national of Paraguay, sparked the international community's attention, as his claims of violation of the Vienna Convention were also procedurally barred.²¹ The United States executed Breard, but Paraguay withdrew

that since the death penalty was reinstated in the United States approximately twenty-five years ago, very few foreign nationals have actually received assistance from their consulates), *available at* 2001 WL 24710460.

18. *See infra* text accompanying note 19 (discussing an example of when the United States has insisted that foreign states respect its rights under the Vienna Convention).

19. *See generally* Kim, *supra* note 17 (commenting that the United States signed the Vienna Convention to protect its citizens when detained abroad, but the Convention has actually been used more frequently against the United States); *see also* Michael Byers, *A World of Opposition Hits Home*, NEWS & OBSERVER, June 29, 2001, at A19 (noting that as governor of Texas, George W. Bush refused to grant clemency to a brain-damaged Canadian who had been denied rights stating, "People can't just come into our state and cold-blooded murder somebody. That's unacceptable behavior, regardless of their nationality."). Byers went on to point out that as president, George W. Bush has stated that the death penalty and the criminal justice system are domestic matters. *Id.* *See also* Trainer, *supra* note 12, at 240-41 (discussing two other examples of when the United States used the Vienna Convention to its benefit). In 1975, when Syria held two United States citizens in custody, the United States cited the Vienna Convention promising that if Syrian citizens ever found themselves in a similar position in the United States, the United States would promptly contact the Syrian consulate. *Id.* at 241. Later, in 1979, the United States condemned Iran for preventing U.S. citizens from communicating with consular officials during the Iran Hostage crisis. *Id.* The United States petitioned the ICJ, who eventually decided that denying the hostages the right to contact the U.S. government violated the Vienna Convention. *Id.*

20. *See infra* text accompanying notes 21-25 (referencing two other well publicized cases of violations of the Vienna Convention and their accompanying litigation).

21. *See* William J. Aceves, *International Decision: Case Concerning the Vienna Convention on Consular Relations (Federal Republic of Germany v. United States)*, 93 AM. J. INT'L L. 924, 927 (1999) (recognizing that like the LaGrands, Breard also filed petitions in the U.S. Supreme Court, as well as with

its case from the ICJ docket after the United States issued an apology.²² A similar case involves Gerardo Valdez, a national of Mexico, who is currently on death row awaiting execution.²³ He, too, argued that the United States violated the Vienna Convention. Like the LaGrands, Valdez has had no success due to the procedural default rule.²⁴ As these cases demonstrate, this issue will be the subject of continuous dispute unless the international community finds a solution.²⁵ After the ICJ ruling in the *LaGrand Case*, it is clear that the United States can no longer ignore the problem or redress it by a simple apology.²⁶

Finding a remedy raises the difficult question of how international law will impact, or should impact, U.S. domestic laws.²⁷ For years,

the ICJ, but was ultimately executed before the Court addressed the merits of his claims); *see also* *Breard v. Greene*, 523 U.S. 371, 378 (1998) (denying the application for a writ of habeas corpus and a stay of execution for a conviction of attempted rape and capital murder in 1993).

22. *See* Aceves, *supra* note 21, at 927 (explaining that after the United States violated the provisional orders of the ICJ and followed through with the execution of Breard, Paraguay withdrew the case after the State Department issued an apology).

23. *See* Kim, *supra* note 17 (noting that a court in Oklahoma convicted Mexican national Gerardo Valdez of murder). Valdez sat on death row for ten years before the Mexican consulate learned of his conviction. *Id.*

24. *See A Time For Action—Protecting the Consular Rights of Foreign Nationals Facing the Death Penalty*, AMNESTY INTERNATIONAL ON-LINE, AMR 51/106/2001, Aug. 22 2001 [hereinafter *A Time For Action*] (discussing the Valdez case and noting that because Valdez was never informed of his rights to consular access, the Mexican consulate did not learn of the case until two months before his execution), available at <http://www.web.amnesty.org/ai.nsf/recent/AMR511062001> (last visited March 2, 2002). Even though U.S. officials knew Valdez was a Mexican citizen, they did not inform him of his rights. *See id.* Valdez was procedurally barred from raising the claim of the violation of the Vienna Convention. *See id.*

25. *See id.* (noting that the United States' failure to fulfill its obligations has spawned numerous diplomatic and legal initiatives from foreign governments).

26. *See LaGrand Case*, 40 I.L.M. at 1102-03 (June 27, 2001) (holding that if this situation should happen to arise again, the United States can no longer attempt to appease the foreign country with an apology). The holding of the case mandates that the United States review the conviction and sentence of German nationals in the future. *Id.*

27. *See* Finn, *supra* note 2, at A20 (explaining that the ICJ decision in the *LaGrand Case* puts two very emotional issues at center stage: the death penalty and the United States' reluctance to submit to international bodies).

American scholars have debated the tension between international law and domestic law.²⁸ In the *LaGrand Case*, the ICJ not only found the United States in violation of its obligations under the Vienna Convention,²⁹ but also ordered the United States to take affirmative steps to ensure that the same violations do not recur.³⁰ In its decision, the ICJ ordered the United States to review and reconsider the conviction and sentence of a foreign national to determine the impact of a violation of the Vienna Convention.³¹ The United States must determine how it can apply the ICJ Order to its domestic criminal justice system in light of its procedural default rule.³²

This Comment argues that there is a way to harmonize the ruling of the ICJ with precedents set by U.S. courts.³³ Specifically, this Comment contends that the United States can incorporate the ICJ's

28. See e.g., Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 CATH. U. L. REV. 591, 638, 646-47 (2001) (stating that neither lawyers nor political scientists have agreed upon a workable solution that resolves the tension between international law and national sovereignty issues); see also Jehanne E. Henry, Comment, *Overcoming Federalism in Internationalized Death Penalty Cases*, 35 TEX. INT'L L.J. 459, 461 (2000) (summarizing that the heart of the conflict is states' rights and ideas of federalism balanced against the international commitments of the United States). Henry argues that the cases involving the Vienna Convention are worrisome because they demonstrate that the United States does not take its obligations seriously, suggesting a belief that international law is subordinate to domestic law. *Id.* at 460-61.

29. See ICJ Press Release: U.S. Breached Obligation, *supra* note 4 (announcing the holding of the ICJ).

30. See *World Court Rules US Broke Law Over Brothers' Execution*, THE SCOTSMAN, June 28, 2001, at 10 [hereinafter *World Court Rules*] (noting that with at least four other German nationals currently on death row in the United States, the German foreign ministry must receive assurances from the United States that U.S. courts will address the merits of any Vienna Convention claims they may have before foreign nationals are executed).

31. See *LaGrand Case*, 40 I.L.M. at 1103 (voting fourteen justices-to-one that the United States should consider the violations of the Vienna Convention despite the procedural default rule).

32. See e.g., *Take Me to the American Consul!*, CHI. TRIB., July 2, 2001, at 12 (questioning when it is appropriate for an international legal body to meddle in the U.S. legal system in light of the *LaGrand Case*).

33. See *infra* notes 155-57 and accompanying text (arguing that U.S. courts do not need to expressly state that international law is supreme, rather that there are judicial doctrines available to them that would allow for all of the U.S. legal obligations to be respected).

ruling into future cases without significantly altering domestic law.³⁴ Part I considers the factual and procedural background of the Federal Republic of Germany's ("Germany") case against the United States before the ICJ.³⁵ Part II examines the ICJ analysis and decision.³⁶ This section focuses on clearly describing the ICJ's holding, in terms of its characterization of the violation of the Vienna Convention and the remedy it imposed.³⁷ Part III of this Comment recognizes that domestic law need not be altered to accommodate international obligations.³⁸ Rather, through the use of the "cause and prejudice" standard,³⁹ international obligations can be incorporated into the United States' longstanding rules of criminal procedure.⁴⁰ This section concludes by recommending that U.S. courts avoid a narrow reading of the ICJ decision in the *LaGrand Case* and should institute a training program to avoid future violations of the Vienna Convention.⁴¹

34. See *infra* notes 155-57 (explaining that through the use of cause and prejudice, along with other non-legal alternatives, the United States can fulfilled its international commitments without significantly altering domestic law or rules of procedure).

35. See discussion *infra* Parts I.A-B. (documenting the factual and procedural path of the *LaGrand Case* before it reached the ICJ, and explaining how that path affected the outcome of the case).

36. See discussion *infra* Part I.C. (analyzing closely the holding of the ICJ).

37. See discussion *infra* Part I.C. (explaining that in effect, the ICJ recognized the tension between the Vienna Convention on the one hand and domestic criminal procedure on the other).

38. See discussion *infra* Part III.A. (noting that domestic doctrines are available that courts can use to allow foreign defendants to overcome the procedural bar).

39. See discussion *infra* Part III.A (explaining the cause and prejudice standard as a means for the court to excuse the procedural default of the defendant).

40. See discussion *infra* Part III.A (discussing the arguments that foreign nationals could make as a way to demonstrate cause and prejudice).

41. See discussion *infra* Part III.B-C. (arguing there are two additional measures that the United States can take to prevent future violations of the Vienna Convention).

I. BACKGROUND

A. FACTS OF THE CASE

Karl and Walter LaGrand moved with their mother to the United States in 1967, upon her marriage to an American Serviceman.⁴² Their stepfather subsequently adopted them, and although they became residents of the United States, the LaGrands remained German nationals.⁴³ The brothers only returned to Germany once in their lives. They spoke English exclusively and, to most, the two appeared to be regular Americans.⁴⁴ On January 7, 1982, authorities arrested the LaGrand brothers for the murder of a bank manager during a robbery in Arizona.⁴⁵ Due to the LaGrands' financial condition, the court appointed defense counsel.⁴⁶ On February 17, 1984, a jury convicted the LaGrands of murder in the first degree and attempted armed robbery.⁴⁷ Subsequently, on December 14, 1984,

42. See *LaGrand Case*, 40 I.L.M. 1076 (discussing the childhood of Walter and Karl LaGrand) Karl and Walter were born in Germany in 1962 and 1963 respectively; in 1967, at the ages of five and four, they moved to the United States with their mother. *Id.*

43. See *2 German Brothers*, *supra* note 14 (explaining that the brothers were adopted and then the family moved to the United States). Despite adoption by their step-father, the LaGrand brothers always remained German citizens, as their citizenship was not transferred as part of the adoption. See *LaGrand Case*, 40 I.L.M. at 1076.

44. See *LaGrand Case*, 40 I.L.M. at 1076 (discussing some of the U.S. arguments that for all intents and purposes, the LaGrand brothers were practically Americans). The United States pointed out that the brothers had only returned to Germany once for a six-month visit, and the brothers had the "demeanor and speech" typical of Americans and were not known to speak German. *Id.*

45. See *Schmertz & Meier*, *supra* note 1, at 118 (describing the circumstances and consequences of the LaGrand brothers' arrest).

46. See *LaGrand Case*, 40 I.L.M. at 1076 (explaining that because the LaGrands could not afford counsel, the court appointed defense counsel for them). The brothers' counsel did not raise the violation of the Vienna Convention in the lower courts. *Id.*

47. See *id.* (noting the holding of the Superior Court in Pima County, Arizona, where both of the LaGrands were convicted of murder in the first degree, attempted murder in the first degree, attempted robbery, and two counts of kidnapping).

the court sentenced both LaGrand brothers to death.⁴⁸

Throughout the period of their arrest and conviction, the LaGrands were never informed of their right to communicate with the German consulate,⁴⁹ in violation of the Vienna Convention, to which both the United States and Germany are parties.⁵⁰ Nor was the German consulate informed that two German nationals were arrested on criminal charges and faced trial.⁵¹ The German consulate only became aware of the *LaGrand Case* in June 1992 (ten years after the arrest of the LaGrands) when the LaGrand brothers themselves contacted the consulate on the advice of a third party.⁵²

B. PROCEDURAL HISTORY

The defendants sought relief from all available courts and sources, making the procedural history of this case long and complex.⁵³ This

48. See *id.* (explaining that on December 14, 1984, both of the LaGrands were sentenced to death for the first degree murder charge, and additionally, to concurrent sentences of imprisonment).

49. See *generally id.* at 1076-77 (documenting that from the brothers' arrest in January 1982, through their conviction in February 1984, when they began their appeal process, no one notified the German consulate of the LaGrand's arrest or conviction, and no such notification was made until June 1992).

50. See Springrose, *supra* note 14, at 187 (explaining that the United States ratified the Vienna Convention on April 24, 1963 without reservations); see also Vienna Convention, *supra* note 3 (documenting that both the United States and Germany have ratified the Convention).

51. See *LaGrand Case*, 40 I.L.M. at 1076 (noting that the United States did not contest, and in fact admitted, that local officials did not inform the LaGrands of their right to communicate with their consulate, nor did officials inform the appropriate German consulate of the arrest of two of their nationals).

52. See *id.* at 1077 (explaining that the German consulate was not aware of the situation involving the LaGrands until June of 1992, when the LaGrands notified the consulate). The LaGrands themselves were formally notified of their right to speak with the German consulate on December 21, 1998. *Id.* There is some dispute as to when the U.S. officials knew the LaGrands were German nationals. See *id.* Germany argued that the U.S. officials knew of the LaGrands' nationality from the very beginning, whereas the United States argued that the authorities knew possibly as early as mid-1983. *Id.* Cf. *supra* note 16 and accompanying text (suggesting a lack of commitment and respect by the United States for foreign nationals within its territory and providing an example of how the United States may champion international law abroad, but objects to its influence on its own soil).

53. See *LaGrand Case*, 40 I.L.M. at 1076 (explaining that the LaGrands were

Comment will only address the cases and appeals that are directly relevant to the issue decided by the ICJ with respect to the procedural default rule.⁵⁴ After the initial trial court decision that resulted in their conviction, the LaGrand brothers filed various state court appeals.⁵⁵ The state courts denied all the appeals, and upheld the conviction and sentence.⁵⁶ The LaGrands then filed several petitions for post-conviction relief at the state level.⁵⁷ Again, the state court denied all of the claims, and the conviction and sentence stood.⁵⁸ At this point the LaGrand brothers initiated their federal battle for relief through a writ of habeas corpus.⁵⁹

In 1995, the LaGrand brothers first raised the claim that the State of Arizona violated the Vienna Convention in their habeas corpus petition before the U.S. District Court for the District of Arizona ("District Court").⁶⁰ The District Court rejected all claims in that

convicted in February 1984, but the ICJ did not announce its decision until June 2001). Throughout this time period, the LaGrands filed and argued numerous appellate proceedings in state court through direct appeals and post-conviction relief petitions, and in the federal courts through habeas corpus petitions. *Id.*

54. See *infra* notes 97-98 and accompanying text (explaining that the ICJ decision contained a number of holdings, one of which directly implicated the procedural default rule).

55. See *LaGrand Case*, 40 I.L.M. at 1077 (noting that the LaGrands had three groups of proceedings that encompassed their litigation). The first proceeding contained direct appeals to the state conviction and sentence heard by the Arizona Supreme Court. *Id.* The U.S. Supreme Court subsequently denied certiorari to these appeals. *Id.*

56. See *supra* note 55 and accompanying text (documenting that since the direct appeals and petitions for post-conviction relief failed, the LaGrands' original conviction of first-degree murder stood, and they were sentenced to death).

57. See *LaGrand Case*, 40 I.L.M. at 1077 (discussing how the second group of proceedings contained post-conviction relief petitions before the Arizona state courts, all of which were denied). Additionally, rehearing was denied before both the Arizona Supreme Court and the U.S. Supreme Court. *Id.*

58. See *id.* at 1077 (implying that since the LaGrands turned to federal habeas corpus relief, all their claims for post-conviction relief at the state level were unsuccessful).

59. See *id.* (describing the third group of proceedings relating to the petition for habeas corpus relief from the federal government, all of which were denied by the U.S. District Court for the District of Arizona and the Ninth Circuit Court of Appeals, and later denied on certiorari by the U.S. Supreme Court).

60. See *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998) (noting this was an appeal from the denial of the writ of habeas corpus from the United States District

petition, denying any habeas corpus relief.⁶¹ The U.S. Court of Appeals for the Ninth Circuit also refused to consider the LaGrands' claim that the State of Arizona violated their rights under the Vienna Convention.⁶² The court explained that while the State of Arizona did not contest that it had failed to inform the LaGrands of their rights under the Vienna Convention, there was also no dispute that the LaGrands failed to exhaust all state remedies before filing their habeas corpus petition.⁶³

In an attempt to correct the procedural default, Karl LaGrand returned to the state court and presented a claim asserting a violation of the Vienna Convention.⁶⁴ Nonetheless, the state court confirmed the ruling that the claim was procedurally barred by waiver under the Arizona state rules of criminal procedure and dismissed the claim.⁶⁵ In February 1999, the Ninth Circuit again addressed the issue, but found that unless Karl LaGrand could show cause and prejudice for his procedural default, the federal courts would not address the claim on its merits.⁶⁶

Court for the District of Arizona). The court discussed the claim of lack of consular notification in the appeal. *Id.* at 1261.

61. *See id.* (explaining why both the District Court and the Court of Appeals found the LaGrands made an insufficient showing).

62. *See id.* (holding that the claim of a violation of the Vienna Convention was procedurally defaulted and the federal courts could not hear it).

63. *See id.* (explaining that there was little argument that Arizona failed to notify the LaGrands of their rights under the Vienna Convention, and that the LaGrands did not raise this claim in any state court). The Court of Appeals, however, did note that the LaGrands error could be corrected through a sufficient showing of cause and prejudice. *Id.* *See also infra* text accompanying notes 158-165 (discussing the idea that the court may excuse the defendant's procedural default if he can demonstrate cause and actual prejudice resulting from it); *LaGrand*, 170 F.3d at 1161 (explaining that state court exhaustion is a necessary requirement for federal court review under habeas corpus).

64. *See LaGrand*, 170 F.3d at 1161 (noting that when LaGrand took the claim to state court to correct the procedural default at the federal level, the state court dismissed the claim on the ground that it was procedurally defaulted by waiver according to state criminal procedure).

65. *See id.* (confirming the state court holding that the claim was procedurally barred under Arizona Rule of Criminal Procedure 32.2(a)(3)).

66. *See id.* (holding that due to the procedural default at the state level, the federal courts could only address such a claim after a demonstration of cause and prejudice). LaGrand failed to make such showing; thus, the court dismissed this

Germany took diplomatic action in the case against the LaGrands in 1999.⁶⁷ Despite numerous attempted interventions by key officials,⁶⁸ Germany was unable to prevent the execution of Karl LaGrand.⁶⁹ This outcome indicated that diplomatic means would most likely not prevent the execution of Walter LaGrand either.⁷⁰ One day before the scheduled execution of Walter LaGrand, Germany filed an application with the ICJ to address the lack of consular access.⁷¹ Germany also requested that the ICJ take provisional measures in order to prevent further harm to Walter LaGrand before the ICJ had a chance to hear the case.⁷² The ICJ

claim. *Id.*

67. See *LaGrand Case*, 40 I.L.M. at 1078 (June 27, 2001) (noting that Germany intervened in the case in January and early February with the goal of preventing the execution of both LaGrand brothers).

68. See *id.* (describing some of the various means of intervention such as letters by the German Foreign Minister and German Minister of Justice to U.S. federal and state officials, and letters by the German Chancellor and President of Germany to the President of the United States and Governor of Arizona). None of these letters mentioned the lack of consular notification; instead, they focused on German opposition to the death penalty. *Id.* In a letter sent to the Secretary of State two days before the execution of Karl LaGrand, the German Foreign Minister raised the issue of the Vienna Convention. *Id.*

69. See *supra* note 5 and accompanying text (explaining that Karl LaGrand was executed on February 24, 1999).

70. See *World Court Rules*, *supra* note 30 (relating that according to German authorities, when the efforts through diplomatic channels failed, Germany resorted to legal action through the ICJ).

71. See Press Release, International Court of Justice, Germany Brings a Case Against the United States of America and Requests the Indication of Provisional Measures (March 2, 1999) (announcing that Germany brought suit against the United States for the alleged violations of the Vienna Convention), available at http://www.icj-cij.org/icjwww/ipresscom/iPress1999/ipresscom9907_1999_0302.htm. Germany asked the court to find the United States in violation of the Vienna Convention, in addition to requesting that the court declare criminal liability against the LaGrands void because of the violations. *Id.*

72. See *id.* (noting that Germany requested provisional measures “[i]n light of the extreme gravity and immediacy” of the LaGrand case and the pending execution). See generally Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, art. 41(1) (mandating that “[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.”). Prior to the ICJ decision in the *LaGrand Case*, there was some doubt whether these orders for provisional measures were legally binding. See *LaGrand Case*, 40 I.L.M. at

granted this request and issued a provisional measure on March 3, 1999, that stated that the United States should take any necessary measures to ensure that Walter LaGrand not be executed pending final decision by the ICJ.⁷³

Despite this order for provisional measures, the State of Arizona carried out the execution of Walter LaGrand on March 3, 1999.⁷⁴ Neither the Supreme Court,⁷⁵ nor the Department of Justice,⁷⁶ provided any true incentive or reason for the State of Arizona to grant a stay of execution.⁷⁷ Nevertheless, the ICJ continued to debate the issues raised in Germany's application for nearly two years after the execution.⁷⁸

1079. The U.S. position was that they were not, which is one reason that little was done to prevent the execution of Walter LaGrand after this order. *Id.* (explaining that after the order for provisional measures was announced, the Office of the Solicitor General in a letter to the Supreme Court stated that such an order by the ICJ was not legally binding). By declaring that the order for provisional measures was legally binding, the LaGrand decision clarified this ambiguity and subsequently found the United States in violation of an order of the Court. *Id.* at 1102.

73. Case Concerning the Vienna Convention on Consular Relations (F.D.R. v. U.S.), 1999 I.C.J. 104 (Order for Provisional Measures of March 3).

74. *LaGrand Case*, 40 I.L.M. at 1079.

75. See *Federal Republic of Germany v. United States*, 526 U.S. 111, 111-12 (1999) (failing to provide Arizona with any legal reason why the state should delay the execution of Walter LaGrand despite pleas from Germany). This opinion was the Supreme Court's last chance to account for the Order for Provisional Measures of March 3, 1999, yet the Court devoted its only voiced opinion on the matter to claiming the United States had not violated its sovereign immunity, and questioning whether Article III of the Constitution would provide any basis for an objection to a German national being executed in the United States. *Id.* at 112. Further, the Court stated that Germany's attempt to bring a claim on behalf of one of its citizens in custody of the United States most likely violated the Eleventh Amendment of the U.S. Constitution. *Id.*

76. See *supra* text accompanying note 72 (questioning whether an ICJ order for provisional measures is legally binding).

77. See *LaGrand Case*, 40 I.L.M. at 1079 (noting that despite the unprecedented recommendation by the Arizona Board of Clemency to stay the execution in light of the international issues presented by the case, the Governor found no reason to delay going forward with the execution).

78. See ICJ Press Release: U.S. Breached Obligation, *supra* note 4 (summarizing the decision announced that day by the ICJ in the Hague). The ICJ did not announce its decision on the merits of this case until June 27, 2001. *Id.*

C. THE ICJ OPINION IN THE *LAGRAND CASE*

The obligation and purpose of the ICJ is to interpret rights and duties under treaties and international agreements.⁷⁹ For this reason, Germany initiated proceedings against the United States at the ICJ specifically to determine the scope of the rights of a foreign state and a foreign national under the Vienna Convention.⁸⁰ Additionally, Germany sought a remedy that would prevent this situation from occurring again.⁸¹

On June 27, 2001, the ICJ issued its judgment, which was composed of seven holdings, only some of which will be discussed in the context of this Comment.⁸² First, the ICJ found that the United States violated Article 36, paragraph 1 of the Vienna Convention.⁸³ This Article addresses the rights of individuals to have access to their consulates and the rights of states to be notified when their nationals are in custody of another state.⁸⁴

79. See Statute of the International Court of Justice, June 26, 1945, art. 36, 59 Stat. 1055 (defining the jurisdiction of the court as including matters that are provided for in the United Nations Charter or treaties, as well as those where states consent to jurisdiction to resolve disputes over interpretations of treaties, questions of international law, and what remedy is to be fashioned for a breach of international law); see also Henry, *supra* note 28, at 475 (noting that the ICJ as the “principal judicial arm of the United Nations” has expertise in the area of treaty interpretation, and was the appropriate forum for addressing a violation of the Vienna Convention in both the *Breard* and *LaGrand* cases).

80. See *LaGrand Case* (F.D.R. v. U.S.), 1999 I.C.J. 104, para. 14 (Application Instituting Proceedings of Mar. 2) [hereinafter Application Instituting Proceedings] (noting the various submissions of Germany that relate the alleged violations of the Vienna Convention by the United States), available at http://www.icj-cij.org/icjwww.idocket/igus/igusapplication/igus_iapplication_19990302htm.

81. See *id.*, para. 15 (acknowledging Germany’s request to avoid having its rights violated in this way again by the United States).

82. See *LaGrand Case*, 40 I.L.M. at 1101-03 (rendering a decision on seven issues ranging from jurisdiction to admissibility of various submissions).

83. See *id.* at 1102 (holding by a vote of fourteen to one that by failing to inform the LaGrands of their rights of consular access, the United States violated Article 36, paragraph 1(b) of the Vienna Convention).

84. See Vienna Convention, *supra* note 3, art. 36, para. 1 (stating that not only do these rights exist, but that they must be carried out without delay); see also *LaGrand Case*, 40 I.L.M. at 1087-88, 1089-90 (explaining that the provisions of Article 36 do create individual rights and do not just state rights, and noting that individual rights may be invoked by the national State of the detained person, as

The ICJ also found that the United States violated Article 36, paragraph 2 of the Vienna Convention.⁸⁵ This Article provides that the domestic laws of the state in custody of a foreign national reflect the rights contained in the Vienna Convention.⁸⁶ By not allowing the LaGrands to raise the violation of the Vienna Convention in their subsequent appeals, the domestic laws of the United States contradicted its international obligations under the Vienna Convention.⁸⁷ The procedural default rule created a trap from which the LaGrands could not escape.⁸⁸ By not being informed of their right to contact the German consulate, not only were the LaGrands unable to seek assistance from the consulate, but they could not raise this issue in subsequent appeals.⁸⁹

Finally, the ICJ granted Germany's request for action to prevent future violations.⁹⁰ The ICJ noted that the United States took some steps to prevent the recurrence of such violations, which included initiating State Department training for law enforcement officials.⁹¹

was done by Germany in this case on behalf of the LaGrands).

85. See *LaGrand Case*, 40 I.L.M. at 1102 (holding that by allowing the procedural default to prevent the LaGrands from raising a claim of violation of their rights under the Convention, the United States violated Article 36, paragraph 2 of the Convention).

86. See Vienna Convention, *supra* note 3, art. 36, para. 2 (mandating that domestic law of a state give full effect to the purposes and goals of Article 36).

87. See Press Release, International Court of Justice, Summary of the Judgment of 27 June 2001, 2001/16bis (June 27, 2001) [hereinafter ICJ Press Release: Summary of the Judgment] (summarizing the ICJ's finding that under the facts of this case, the procedural default rule prevented rights under Article 36 of the Vienna Convention from being exercised), available at http://www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001_16bis_20010627.htm.

88. See *id.* (developing the idea that domestic rules of procedure prevented the court system from addressing international substantive rights).

89. See discussion *infra* Part II.B. (explaining that, in effect, the nature of the violation created a trap for the LaGrands).

90. See *infra* notes 91-94 and accompanying text (discussing that by Germany bringing the issue to the ICJ, the ICJ was able to fashion a remedy for future foreign nationals who are faced with this problem).

91. See *LaGrand Case*, 40 I.L.M. at 1102 (noting unanimously that the United States has taken some steps to ensure that such a violation of the Convention would not recur); Frank J. Murray, *Arizona Execution Defies the Hague; State Dept. Defers U.S., World Court in Conflict in Their Jurisdictions over Foreign Nationals*, WASH. TIMES, July 8, 2001, at A2 (quoting Karolina Walkin,

The ICJ asserted, however, that the United States was not doing enough to effectively prevent such violations from recurring.⁹² For this reason, the ICJ ordered a unique remedy.⁹³ The Court held:

[S]hould nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36. . . having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.⁹⁴

Essentially, the ICJ held that the U.S. courts can no longer dismiss a claim for a violation of the Vienna Convention solely on the basis of a rule of procedural default, but instead must examine the merits of the claim.⁹⁵ This means that U.S. courts must review the conviction and sentence to determine if the violation of the Vienna Convention has caused such significant harm as to call into question the right of a foreign national to receive a fair trial, and the right of a foreign state to aid its nationals.⁹⁶

spokesperson for the United States Department of State, who described the efforts to train law enforcement officials around the country on international obligations under the Vienna Convention); *see also infra* notes 257-260 and accompanying text (describing the methods the State Department developed to educate law enforcement on the Vienna Convention and asserting that these methods are still insufficient).

92. *See LaGrand Case*, 40 I.L.M. at 1099-00 (explaining that while the United States has undertaken measures to prevent future violations, no state can guarantee a violation of the Vienna Convention will never occur again). The ICJ took the position advocated by Germany, holding that if the United States violates the Vienna Convention again, an apology is insufficient. *Id.* at 1100. The ICJ further held that the United States could no longer allow the procedural default rule to deny foreign nationals the ability to seek redress for violations of the Vienna Convention. *Id.* at 1100-03.

93. *See id.* at 1102 (noting unanimously that the United States has taken steps to ensure that this type of violation of the Convention will not recur).

94. *Id.* at 1103.

95. *See infra* note 96 (explaining precisely what this means for U.S. courts).

96. *See id.* (ordering U.S. courts to review the conviction and sentence of a foreign national whose claim has been dismissed in this fashion so as to ensure against a violation of due process).

II. ANALYSIS OF THE ICJ'S JUDGMENT: THE TENSION BETWEEN INTERNATIONAL LEGAL OBLIGATIONS AND DOMESTIC CRIMINAL PROCEDURE

The ICJ's *LaGrand* decision contains several significant determinations.⁹⁷ One of the most significant is the finding that the procedural default rule within U.S. domestic criminal procedure prevents foreign nationals from exercising their rights under the Vienna Convention.⁹⁸ The ICJ recognized the tension between domestic and international law and acknowledged that this tension could pose more problems for foreign nationals in the future.⁹⁹ Thus, the ICJ ordered that when a foreign national discovers a violation of his rights under Article 36 of the Vienna Convention, U.S. courts should consider the claim on the merits, regardless of the stage in the litigation.¹⁰⁰ This order conflicts with the doctrine of procedural default, as well as the requirement of exhaustion of state remedies in the United States.¹⁰¹

97. See *LaGrand Case*, 40 I.L.M. at 1101-03 (describing the seven official holdings of this case). While this case demonstrates the tension between the procedural default rule and the Vienna Convention, its future significance extends beyond these issues. See generally *supra* note 72 and accompanying text (noting that this case represented the first time ICJ held that an order for provisional measures to prevent an execution was legally binding). The execution of Walter LaGrand, despite these provisional measures, constituted an additional violation by the United States for failing to prevent the execution. *Id.*

98. See *LaGrand Case*, 40 I.L.M. at 1102 (holding that by not addressing the Vienna Convention claim, the subsequent convictions and sentences of the LaGrand brothers violated Article 36, paragraph 2).

99. See ICJ Press Release: Summary of the Judgment, *supra* note 87 (summarizing the rationale for the ICJ's decision that an apology is no longer sufficient, and ordering that a review of the merits of the claims is necessary to prevent violation of these rights in the future).

100. See *LaGrand Case*, 40 I.L.M. at 1103 (dismissing the notion that the failure of a foreign defendant to raise a claim at the trial court can prevent the court from addressing the merits at a later stage in the litigation).

101. See discussion Part II.B. (explaining the tension that is created between domestic procedural rules and the ICJ Order).

The ICJ did not specify how the United States should fulfill the order without significantly altering its domestic laws.¹⁰² A careful analysis of the court's reasoning, along with an examination of the international obligations and domestic laws that the ICJ considered, highlights the tension this judgment caused.¹⁰³

A. INTERNATIONAL LEGAL OBLIGATIONS

The Vienna Convention is designed to protect the roles and functions of consulates in foreign countries, as well as the rights of foreign nationals to be in communication with those consulates.¹⁰⁴ The *LaGrand Case* deals specifically with Article 36 of the Vienna Convention.¹⁰⁵ This Article provides in paragraph 1(b) that appropriate authorities of a state in custody of a foreign national shall inform the national of his rights under the Vienna Convention, including the right to contact his consulate.¹⁰⁶ Additionally, paragraph 2 of Article 36 provides that although the aforementioned rights "shall be exercised in conformity with the laws and regulations of the receiving State . . . [they] must enable full effect to be given to the purposes for which the rights accorded under the Article are intended."¹⁰⁷

Finding the United States in violation of Article 36, paragraph 1 posed no significant problem for the ICJ.¹⁰⁸ The United States admitted that the local authorities failed to inform the LaGrands of

102. See *LaGrand Case*, 40 I.L.M. at 1103 (noting the ICJ left the means by which the United States should accomplish this review and reconsideration to its own choosing).

103. See discussion Part II (explaining that the tension runs deep into the justifications and rationales for the procedural default rule on the one hand, and the foreign policy need for the United States to respect the rights of foreign nationals and the ICJ on the other).

104. See *supra* note 13 and accompanying text (discussing the preamble to the Vienna Convention, which states that the goal of the treaty is to maintain friendly and efficient relations among states).

105. Vienna Convention, *supra* note 3, art. 36.

106. *Id.* art. 36, para. 1(b).

107. *Id.* art. 36, para. 2.

108. See *infra* text accompanying note 109 (explaining that the United States did not contest a violation of Article 36).

their right to contact the German consulate.¹⁰⁹ There was no question that at this most basic level, the United States was not respecting the rights created by the Vienna Convention.¹¹⁰

The ICJ's finding that the United States violated Article 36, paragraph 2 sparked debate among the parties and presiding justices. Germany argued that the procedural default rule made it impossible for the LaGrands to claim that the United States breached their rights under the Vienna Convention.¹¹¹ The United States responded that the Vienna Convention provided no specific remedy in case of a violation, and therefore the treaty required nothing from the United States to prevent a recurrence of this situation.¹¹² In essence, the United States argued that no right exists without a remedy.¹¹³ The United States further contended that the LaGrands should have sought redress for a violation of the Vienna Convention at the trial court level, as in any other criminal case.¹¹⁴

The ICJ rejected the argument made by the United States.¹¹⁵ According to the ICJ, the procedural default rule violated the Vienna

109. See *LaGrand Case*, 40 I.L.M. at 1076 (noting the United States did not dispute that the arresting officers and other competent authorities notified the LaGrands of their rights under the Vienna Convention).

110. See *supra* notes 108-09 and accompanying text (demonstrating that the United States recognized that the rights existed under the Vienna Convention, and that they had been violated).

111. See *LaGrand Case*, 40 I.L.M. at 1088 (noting Germany's argument that the U.S. procedural default rule makes it impossible to invoke a breach of the notification requirement). The ICJ clarified Germany's argument that the procedural default rule operated to deprive the LaGrands of their rights in this situation, not that the rule in general was in conflict with the Vienna Convention. *Id.*

112. See *id.* at 1089 (referencing the U.S. argument that because the Vienna Convention does not require a domestic law that allows persons to assert Convention claims, such claims, when presented cannot violate the Convention).

113. See *infra* text accompanying note 114 (emphasizing the U.S. argument that if one does not assert his right in the first instance, he may not assert it later); see generally David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1199-201 (1992) (discussing the origins of the modern theory that a court must provide a remedy for all legally recognized wrongs).

114. See *LaGrand Case*, 40 I.L.M. at 1089 (acknowledging the U.S. position that states could legally require that Vienna Convention claims be asserted early in litigation).

115. *Id.* at 1089-90.

Convention because it prevented the LaGrands from challenging the violation of their right to consular access.¹¹⁶ The significance of this holding, therefore, is that the procedural default rule can no longer be applied to foreign nationals in this manner without constituting a clear violation of the Vienna Convention.¹¹⁷

Despite this holding, the ICJ failed to propose a way to reconcile international legal obligations under the Vienna Convention with U.S. domestic laws.¹¹⁸ Some commentators believe the ICJ's lack of specific direction leaves the United States with two choices; the United States can either change its domestic laws by submitting to an international body, or it can ignore the ICJ's holding.¹¹⁹ Such extreme and politically charged measures, however, may not be effective or necessary. Rather, a further examination of the procedural default rule may provide a better solution.¹²⁰

B. DOMESTIC CRIMINAL PROCEDURE

The procedural default rule originates in the state laws of criminal procedure and the federal laws governing post-conviction relief.¹²¹

116. See *id.* (explaining that the procedural default rule on its face did not violate the Vienna Convention, but the specific facts of the *LaGrand Case* guided the court's analysis). The violation prevented the German consulate from hiring private counsel, which adds strength to the LaGrands' argument of ineffective assistance of counsel. *Id.* One way to demonstrate cause and overcome procedural default is through a finding of ineffective assistance of counsel. See *infra* discussion Part III.A. (explaining what claims may serve as sufficient cause).

117. See *LaGrand Case*, 40 I.L.M. at 1190 (explaining that the procedural default rule itself does not violate international law). Rather, the problem is how it worked to prevent foreign nationals from raising their claim of a violation of the Vienna Convention where the factual basis of the violation resulted in the default itself. *Id.*

118. See *id.* at 1103 (holding that the United States must review and reconsider its procedure by means of its own choosing).

119. Compare Finn, *supra* note 2 (noting the view of an expert researcher that the United States is bound to mold its domestic criminal procedure to comply with all international treaties), with Editorial, *Review & Outlook: America on Trial*, WALL ST. J. EUR., July 2, 2001, at 8 [hereinafter *America on Trial*] (opining that the ICJ should not rule on fairness in the *LaGrand Case* since the U.S. Supreme Court held it unnecessary to take action), available at 2000 WL-WSJE.

120. See discussion *infra* Part III.A. (elucidating the available doctrines that can be applied to foreign nationals' claims to overcome the procedural default rule).

121. See *infra* text accompanying notes 130-132 (examining the Arizona state

This rule is both old and well-respected and has numerous important justifications.¹²² An analysis of the interplay among various domestic rules will demonstrate how the rule can also become a trap.¹²³

1. State Criminal Procedure

Arizona Rule of Criminal Procedure 32 laid the trap for the LaGrand brothers at the state level.¹²⁴ This rule governs post-conviction relief in any criminal case within Arizona.¹²⁵ If a defendant attempts to challenge his conviction, he must raise any and all claims either at the trial court level or in his first direct appeal.¹²⁶ If the defendant fails to raise all claims, he risks procedural default pursuant to Arizona Rule of Criminal Procedure 32.2(a).¹²⁷ This statute prevents a defendant from raising any claim in post-conviction that was not raised on direct appeal, any claim that the court adjudicated on the merits during direct appeal, or any claim waived at trial.¹²⁸

law that impacted the LaGrand litigation); *see also* Part II.B.2. (highlighting relevant federal law).

122. *See, e.g.*, *Reed v. Ross*, 468 U.S. 1, 10-11 (1984) (weighing the procedural default rule against the need for integrity of state rules and proceedings and the desire for finality of a proceeding). The duty to determine criminal liability and punishment is vested with the states, and each state devises rules to effectively serve this purpose. *Id.* The states' interests are nevertheless limited by the federal government's duty to protect U.S. citizens from unconstitutional custody. *Id.*

123. *See* discussion Part II.B.1-2. (discussing various domestic laws that lay the foundation for the procedural default rule).

124. *See generally* ARIZ. R. CRIM. P. 32.1(a) (West 2001) (listing various grounds for appeal and other post-conviction relief, including when the conviction or sentence is in violation of the United States Constitution).

125. *See id.* (limiting the scope of other post-conviction relief to the confines of Arizona Rule of Criminal Procedure 32.2).

126. *See* ARIZ. R. CRIM. P. 32.2(a) (West 2001) (requiring the defendant to raise all claims at the first instance, or risk preclusion from relief).

127. *See id.* (listing instances when a claim may be precluded). Only claims that could not have been raised at any other point or claims that were not waived at trial may be brought. *Id.*

128. *See id.* (articulating three bases that will preclude a claim). All three grounds precluding a claim ensure that the trial or appellate court is able to create a factual record. *Id.*

When Karl LaGrand discovered the violation of the Vienna Convention, he attempted to challenge his conviction at the state court level.¹²⁹ Arizona Rule of Criminal Procedure 32.2(a)(3) states that unless an individual preserves his claim at trial or during the first set of appeals, the court will automatically deem the claim waived.¹³⁰ Since Karl LaGrand did not preserve his claim at trial or during the first set of appeals, the state court held that he had effectively waived his claim.¹³¹ Although the LaGrands were unaware that they even had a claim of violation of the Vienna Convention during their first round of appeals, the court still found that they involuntarily waived their claim.¹³² The LaGrands were then left with no choice but to attempt to raise their claim under federal post-conviction relief.

2. Federal Statutes

Two bodies of federal law impact the handling of a foreign national's claim of a violation of the Vienna Convention in circumstances like that of the LaGrands.¹³³ First, a writ of habeas corpus applies when a defendant seeks post-conviction relief on the ground that he is unconstitutionally in custody.¹³⁴ Second, recent federal legislation entitled the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is concerned with the status of

129. See *LaGrand*, 170 F.3d at 1161 (explaining the dismissal of Karl LaGrand's claim from state court).

130. ARIZ. R. CRIM. P. 32.2(a)(3). Note an implication is that the waiver can be involuntary. *Id.*

131. See *LaGrand*, 170 F.3d at 1161 (barring LaGrand's claim on procedural grounds, in particular the waiver provision).

132. See generally *LaGrand Case*, 40 I.L.M. at 1077-78 (chronicling the procedural history of the LaGrand litigation). The first set of appeal proceedings through state courts concluded in October 1987 and the second set of appeal proceedings concerning other forms of post-conviction relief ended in 1991. *Id.* Unaware of any violation, the LaGrands began a third set of appeal proceedings by filing an application for a writ of habeas corpus, after which they sought assistance from the German consulate in June 1992. *Id.*

133. See *infra* notes 134-35 and accompanying text (explaining what two areas of U.S. law are applicable to the LaGrands' situation).

134. See generally 28 U.S.C. §§ 2254 et seq. (2001) (codifying rules and regulations for judicial proceedings in habeas corpus review).

death penalty appeals and affects the process of post-conviction relief.¹³⁵

a. Habeas Corpus

Often referred to as the “Great Writ,” habeas corpus examines the constitutionality of a prisoner’s conviction and detention.¹³⁶ According to federal law, courts may only grant a writ of habeas corpus when the applicant has exhausted all state remedies, unless there is no state remedy or the circumstances do not permit protection of the applicant’s rights.¹³⁷ Significantly, the first clause of the habeas corpus statute limits examination to those claims based “only on the ground that [the prisoner] is in custody *in violation of the Constitution or laws or treaties of the United States*.”¹³⁸ Thus, this provision directly applies to the Vienna Convention to which the United States is a party.¹³⁹

Due to a procedural default at the state level, the courts did not address the violation of the Vienna Convention, as Karl LaGrand did

135. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §101, 110 Stat. 1214 (Apr. 24, 1996) (codified in scattered sections) [hereinafter AEDPA] (amending various sections of 28 U.S.C. that relate to habeas corpus review, including the addition of Chapter 154 entitled “Special Habeas Corpus Procedures in Capital Cases”). The Arizona district court rejected the LaGrand’s first habeas corpus petition in 1995, which occurred before passage of the AEDPA. See *LaGrand v. Lewis*, 883 F. Supp. 451 (D. Ariz. 1995), *aff’d*, *LaGrand v. Stewart*, 133 F.3d 1253, 1257 (9th Cir. 1998), *cert. denied*, 525 U.S. 971 (1998); see also *infra* note 147 and accompanying text (discussing how the AEDPA affected the *Breard* litigation). In other cases involving foreign nationals, the AEDPA has been and will be relevant. See *infra* notes 132-34 and accompanying text.

136. See Maria L. Marcus, *Federal Habeas Corpus After State Court Default: A Definition of Cause and Prejudice*, 53 FORDHAM L. REV. 663, 672 (1985) (explaining that the writ of habeas corpus establishes two historic commitments to criminal defendants: (1) it provides a means for the federal court system to evaluate the constitutionality of a defendant’s conviction, and (2) it cannot be used until the defendant exhausts all state remedies).

137. See 28 U.S.C. § 2254(b)(1) (delineating specific situations for which a court can grant a writ of habeas corpus).

138. 28 U.S.C. § 2254(a) (emphasis added).

139. See *id.* (guiding the contention that the LaGrands’ claim fell under controlling federal habeas corpus statutes, and demonstrating that the LaGrands were entitled, at minimum, to file an application).

not technically exhaust all avenues for state relief.¹⁴⁰ Karl LaGrand nonetheless returned to the state court in an attempt to argue around the procedural default and have the court address the claim.¹⁴¹ The state court still held that the claim had a procedural default by waiver at the trial court level and refused to hear the merits of the claim.¹⁴²

b. Antiterrorism and Effective Death Penalty Act of 1996

The AEDPA further tightened the restrictions as to when and under what circumstances a defendant may seek habeas corpus relief.¹⁴³ The statute arose as a legislative response to the 1996 bombing in Oklahoma City with the aim of strengthening U.S. policies and procedures for combating terrorism.¹⁴⁴ The AEDPA serves as a mandate on how the justice system should handle appeals that are part of any capital punishment case.¹⁴⁵ While not specifically

140. *See LaGrand*, 170 F.3d at 1161 (discussing denial of the consular notification claim and stating that the claim was dismissed in the LaGrand's first habeas corpus petition for a failure to exhaust all avenues). The failure to exhaust was based on the court's decision that the LaGrands failed to demonstrate sufficient cause and prejudice for their procedural default). *See id.*

141. *See id.* (noting that after the denial of the first petition for habeas corpus relief, Karl LaGrand took his claim back to the state courts to argue cause and prejudice for this procedural default).

142. *See id.*; *see also supra* note 130 and accompanying text (explaining that if a defendant does not raise all claims at the trial or direct appellate court levels, the claim will be deemed to have been waived).

143. *See ADEPA*, Pub. L. No. 104-132, §101, 110 Stat. 1214 (Apr. 24, 1996) (explaining that the AEDPA has had a wide impact on several sections of title 28 of the U.S. Code).

144. *See Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996*, 32 WEEKLY COMP. PRES. DOC. 719 (Apr. 29, 1996) [hereinafter *Statement on Signing*] (noting that the bill was passed after debate surrounding the events in Oklahoma City and was designed to provide law enforcement agencies with the various tools necessary to help them combat international and domestic terrorism). Former President Clinton commented on three other sections of the bill, including the section aimed at reforming the capital punishment process. *Id.*

145. *See id.* (explaining that the legislation was also intended to streamline federal appeals for defendants challenging their death sentences); *see also* H.R. CONF. REP. NO. 104-518, at 944 (1996) (noting that Title I of the bill deals with reforms to the writ of habeas corpus). The House Conference Report notes that this legislation was designed to "address the acute problems of unnecessary delay and abuse in capital cases." *Id.* One change to the habeas corpus system of relief in capital cases that this bill was designed to effect was to provide for the exhaustion

mentioned in the ICJ decision in the *LaGrand Case*, this legislation played a role in past litigation over alleged violations of the Vienna Convention.¹⁴⁶ The statute requires the exhaustion of state remedies in order for federal courts to hear a claim.¹⁴⁷

Taking into account all the remedies available at the state court level, as well as the appeals available at the federal court level, capital cases can remain on the docket for decades before their final resolution.¹⁴⁸ A key component of AEDPA's effort to speed up, or purportedly to make more effective, the death penalty appeal process, is the addition of Chapter 154 to Title 28 of the U.S. Code, entitled "Special Habeas Corpus Procedures in Capital Cases."¹⁴⁹ Specifically, this chapter was added to define the scope of federal review.¹⁵⁰ This section expressly states that federal courts will only consider claims that have been raised and decided on their merits by the state courts.¹⁵¹ Thus, this provision definitively recognizes the procedural bar at the state court level and mandates that the federal

of state remedies in order for the federal courts to hear a claim. *Id.*

146. See *infra* note 147 and accompanying text (discussing how AEDPA was used in the *Breard* litigation).

147. See *Breard v. Greene*, 523 U.S. 371, 376 (1998) (noting that under the AEDPA, persons challenging their convictions on the ground that their convictions violate a U.S. treaty will not receive an evidentiary hearing if the claim was not raised and addressed on the merits in state court proceedings). The AEDPA barred *Breard* from arguing the merits of his claim of a violation of the Vienna Convention at the federal level. *Id.* See also *Murray*, *supra* note 91 (explaining that the Court in *Breard* held that the AEDPA trumps any claim of a violation of the Vienna Convention when the violation is discovered too late).

148. See Statement on Signing, *supra* note 144 (arguing that endless appeals stand in the way of justice being served). Former President Clinton did not believe that the reforms associated with the AEDPA limited the quality of federal habeas corpus review because the judiciary would interpret these amendments to provide judicial review to true constitutional claims. *Id.*

149. Special Habeas Corpus Procedures in Capital Cases, 28 U.S.C. § 2261-66 (2001).

150. See 28 U.S.C. § 2264 (2001) (mandating that the district court shall only consider claims that have been raised and decided on the merits at the state level).

151. *Id.* See also Benjamin Robert Ogletree, Comment, *The Antiterrorism and Effective Death Penalty Act of 1996, Chapter 154: The Key to the Courthouse Door or Slaughterhouse Justice?*, 47 CATH. U. L. REV. 603, 644 (1998) (summarizing that because an appellate court can only consider the factual findings of the lower court, a federal court in a habeas corpus case cannot consider any claim on the merits that was not addressed at the state level).

courts continue to deny defendants an opportunity to argue a claim on its merits that was not raised in state court.¹⁵²

The U.S. Supreme Court has consistently dismissed claims of violations of the Vienna Convention without examining the constitutionality of the conviction or sentence.¹⁵³ In light of the ICJ decision in the *LaGrand Case*, the question remains whether federal courts can find a way to overcome these procedural barriers and how they will accomplish this in the future.¹⁵⁴

III. RECOMMENDATIONS

After examining the tension between the ICJ holding and domestic law and jurisprudence, it is clear that harmonization of the two is necessary.¹⁵⁵ Demonstrating cause and prejudice as a justification for a procedurally defaulted claim may provide such an avenue.¹⁵⁶ Additionally, alternative ways of interpreting the ICJ ruling, and forms of non-legal action, may further assist the United States in fulfilling its international commitments.¹⁵⁷

152. See *supra* notes 148-151 and accompanying text (providing federal statutory support for the state procedural default system).

153. See generally *Breard v. Gilmore*, 523 U.S. 372, 375-78 (1998) (holding that the claim of a violation of the Vienna Convention was procedurally defaulted and all habeas corpus relief denied); see also *LaGrand v. Stewart*, 133 F.3d 1253, 1261, 1277 (reasoning that because the LaGrands failed to show cause and prejudice for their procedural default, all habeas corpus relief based on that claim was denied).

154. Cf. *America on Trial*, *supra* note 119 (editorializing that since the ICJ's jurisdiction is limited to interpreting signatory states' obligations under a particular treaty, the ICJ is not "competent to rule on the fairness of the LaGrands' criminal prosecution."). The author argues that since the United States Supreme Court ruled in 1998 that sentences can be carried out when there is no doubt as to guilt, even absent a treaty violation, there is nothing wrong with the outcome of the *LaGrand* situation. *Id.*

155. See *supra* notes 118-20 and accompanying text (arguing that the United States should search for a way to harmonize the two competing obligations instead of making the tough political choice of ignoring international law or acknowledging that the ICJ can "overrule" the U.S. Supreme Court).

156. See discussion *infra* Part III.A. (discussing what is required of a defendant in order to make a sufficient showing of cause and prejudice in order to overcome the procedural bar).

157. See discussion *infra* Part III.B-C. (explaining that two other means can be employed to give true meaning to the ICJ decision: avoid reading the opinion too narrowly and institute a training program for legal officials).

A. USE OF CAUSE AND PREJUDICE TO OVERCOME PROCEDURAL DEFAULT

One accepted way to overcome the procedural default rule is for a criminal defendant to show cause for his default and actual prejudice resulting from that default.¹⁵⁸ If a defendant can convince the court of cause and prejudice, then a claim which otherwise would have been procedurally barred can be addressed on its merits.¹⁵⁹ While the LaGrands were unable to show cause and prejudice in the course of their litigation,¹⁶⁰ the ICJ decision provides an opportunity to re-examine the cause and prejudice exception as a strategy for current and future foreign nationals in the same situation.¹⁶¹

Cause and prejudice is a heavy burden for defendants to demonstrate.¹⁶² Federal courts are unwilling to intrude upon a state

158. See *LaGrand*, 133 F.3d at 1253 (explaining that the court may hear a procedurally defaulted claim if the petitioner can show cause and prejudice resulting from alleged violation of federal law). The United States asserted that to show cause a defendant must show that a facially obvious external impediment prevented him from raising the claim in state court. See *LaGrand Case*, 40 I.L.M. at 1078-79. The purpose behind rule is to ensure that state courts be given an opportunity to address issues going to the validity of state convictions before the federal courts intervene. *Id.*

159. See *supra* note 158 and accompanying text (explaining why a demonstration of cause and prejudice would prevent abuse of federal court review, and explaining generally how a defendant can successfully make such a demonstration).

160. See *LaGrand*, 133 F.3d at 1257 (holding that neither Karl nor Walter LaGrand presented sufficient cause for his claim to be heard); see also *LaGrand v. Stewart*, 170 F.3d 1158, 1159 (1999) (finding that Karl LaGrand, after attempting to present his claim to the state courts, again was procedurally barred from raising it at the state level).

161. See *LaGrand Case*, 40 I.L.M. at 1102-03 (explaining that it was too late for the ICJ to remedy the LaGrand situation, however, the ICJ provided a remedy intended for future foreign nationals).

162. See Marcus, *supra* note 136, at 672 (noting that defendants must meet the cause and prejudice standard because procedural default runs contrary to the established doctrines of comity and federalism). As Justice Stewart had stated: "[t]he National Government, anxious though it may be to vindicate and protect federal rights . . . should do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* at 672-73. The standard for meeting cause and prejudice should therefore be high so as to protect the decision of the state, while still recognizing that in some cases it may be necessary for a court to address federal constitutional issues. *Id.*

court conviction without a substantial showing that the conviction violated constitutional rights.¹⁶³ Federal courts want to preserve the finality of state court judgments,¹⁶⁴ but when the fundamental fairness of a trial is implicated, federal courts will intervene and address the merits of a claim.¹⁶⁵ Federal courts also want to ensure that the defendant's reason for failing to raise the alleged violation was not deliberate.¹⁶⁶

The U.S. Supreme Court has not provided a precise definition for either "cause" or "prejudice," and has not delineated the requirements for an individual to rightfully argue the cause and prejudice exception.¹⁶⁷ Instead the Supreme Court decided that allowing the terms to remain amorphous is appropriate because it allows courts to deal with a myriad of situations.¹⁶⁸

163. See *id.* at 700 (noting that the prejudice prong of the cause and prejudice standard requires that "errors of constitutional dimension substantially disadvantaged" the defendant). The test for those errors is one of "actuality," not mere "possibility". *Id.*

164. See Marcus, *supra* note 136, at 674-75 (elaborating on the holding in *Fay v. Noia*, 372 U.S. 391 (1963), which requires a balancing test between a defendant's rights in having the issue addressed and the state's interests in finality of its decisions). The state has an interest in its decisions being respected and final, as well as an interest in orderly adjudication and procedure in a criminal case. *Id.* at 680. In his opinion, Justice Rehnquist emphasized that an overarching theme in the analysis of cause and prejudice is respect to states and their functions, of which criminal law and criminal prosecutions is one). *Id.*

165. See *id.* (noting that the state's interests are weighed against the gravity of the issue that was procedurally defaulted and the reasons for which it was defaulted).

166. See *infra* note 172 (discussing the courts' concern with abuse of cause and prejudice, where defendants could save their claims for federal court, where they think their claims might be better received).

167. See *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977) (noting that no precise definition of "cause" and "prejudice" exists, but despite this the Court was fully confident in finding that neither cause nor prejudice existed). The Court did narrow the vague definitions enunciated in *Fay v. Noia*, however. See *id.*

168. See *Reed v. Ross*, 468 U.S. 1, 13 (1984) ("Because of the broad range of potential reasons for an attorney's failure to comply with a procedural rule, and the virtually limitless array of contexts in which a procedural default can occur, this Court has not given the term 'cause' precise content."); see also *United States v. Frady*, 456 U.S. 152, 168 (1982) (noting that the Court opted to not give the term "prejudice" an exact definition in order to leave room for further discussion and "elaboration of the significance of that term").

I. Cause and Prejudice Explained

As stated, there is no precise definition of cause or what may be used to illustrate it. Courts have generally held, however, that in order to demonstrate cause, defendants must show evidence of “some objective factor external to the defense [that] impeded counsel’s efforts to comply with the State’s procedural rules.”¹⁶⁹ Thus, the failure to raise a claim cannot merely be the result of choice or omission.¹⁷⁰ Instead, there must be some external element that is responsible for failure to raise a claim.¹⁷¹

While the U.S. Supreme Court has not clearly defined cause, it has articulated clear examples of what does and does not satisfy cause. A deliberate tactical choice by counsel not to pursue a claim in state courts will never be sufficient to demonstrate cause.¹⁷² If counsel fails to present a claim, however, because no reasonable legal basis for the claim existed at the time of the default, this will be enough to demonstrate cause.¹⁷³ For example, *Reed v. Ross*¹⁷⁴ holds that a person can demonstrate cause when the failure to raise a claim

169. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The Court explained in *Murray* that a sufficient demonstration of cause did not revolve around attorney error, rather, the proper question was whether there was something external to the attorney-client relationship that prevented the claim from being raised. *Id.*

170. See *infra* text accompanying note 171 (discussing the purpose of cause as ensuring the fairness of the appellate process).

171. See Tung Yin, *A Better Mousetrap: Procedural Default As A Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 231 (2001) (explaining that some commentators view the purpose of cause as to “ensure that the default is not the result of sandbagging and that the defendant had a fair opportunity to raise the claim in state court.”).

172. See *Reed*, 468 U.S. at 13-14 (noting that for the preservation of the criminal system, a defendant is bound by the strategic decisions of his counsel). This rationale prevents counsel from simply ignoring certain state procedures and then later trying to gain the benefit of federal review). *Id.*

173. See *id.* at 13-15 (holding that the novelty of a claim will provide sufficient cause for the procedural default if there was no reasonable basis for the claim in existing law). But see Marcus, *supra* note 136, at 696 (explaining that mere unawareness of a particular claim is insufficient for cause); see also *Engle v. Issac*, 456 U.S. 107, 134 (1981) (asserting that if the defense counsel simply did not recognize that such a claim could be made with respect to the defendant, this is not enough to meet the exception for a novel claim and provide sufficient cause).

174. 468 U.S. 1 (1984).

resulted from the lack of a reasonable basis in the law to support such a claim.¹⁷⁵ In this situation the claim would not be barred because it is considered a novel claim.¹⁷⁶ An argument that counsel provided ineffective assistance may also be sufficient for cause.¹⁷⁷

The concept of prejudice is even more amorphous. Most courts do not reach the question of prejudice because they often make the preliminary determination that the defendant failed to demonstrate cause.¹⁷⁸ In considering whether or not prejudice exists, a court examines the total context of the events and circumstances of the trial.¹⁷⁹ The defendant bears the burden of showing that the court's failure to address an issue did more than present the possibility of prejudice; he must show that he actually failed to receive a fair trial as required by the Due Process Clause of the Constitution.¹⁸⁰

175. *Id.* at 14 (explaining that when the procedural default was not caused by any tactical or intentional decision by counsel, and the constitutional issue was one that was reasonably unknown at the time, a novel claim could demonstrate cause). *Reed* answered the question left open in *Engle* as to whether a novel claim could ever be sufficient for cause. *Id.* at 13.

176. *See id.*

177. *See Edwards v. Carpenter*, 529 U.S. 446, 450-52 (2000) (holding that "a procedurally defaulted ineffective-assistance-of-counsel claim can serve as cause to excuse the procedural default of another habeas corpus claim."). In order for the ineffective assistance of counsel claim to be sufficient cause for another claim, the defendant must be able to prove cause and prejudice for the ineffective assistance of counsel claim itself. *Id.*

178. *See generally LaGrand*, 133 F.3d at 1262 (analyzing the LaGrands' argument for cause). When the cause argument failed, the court did not consider the argument for prejudice. *Id.* *See also Engle*, 456 U.S. at 134 n.43 (1981) (documenting that the Court's analysis ceased when it determined the defendant had not demonstrated cause).

179. *See Frady*, 465 U.S. at 169 (analyzing all the events in a trial to determine the degree of prejudice where defendant failed to object to jury instructions at trial). The Court noted that a trial is composed of many elements, including testimony of witnesses, arguments of counsel, exhibits, and jury instructions; thus jury instructions are only one of many elements that could affect the final judgment. *Id.*

180. *See id.* at 170 (stating that the defendant must show that the allegedly erroneous jury instruction "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."). The Court in *Frady* held that the defendant did not present sufficient evidence to show a substantial possibility that the jury would have found him guilty of manslaughter instead of first-degree murder under different jury instructions. *Id.* at 172.

Within the context of a violation of the Vienna Convention, the question of prejudice turns upon whether consular access and communication would have affected the outcome.¹⁸¹ It is not enough to show that this issue might have affected the trial in some way.¹⁸² Rather, the defendant must show that there was a strong likelihood that the issue deprived him of a fair trial.¹⁸³

2. Cause and Prejudice Applied to the LaGrand Case

There are two possible arguments that the LaGrands could have made as cause for their procedural default. First, the LaGrands could have asserted that denial of consular notification constituted a novel claim because no reasonable legal basis for the claim existed at the time of default, thus it should not be barred by the procedural default rule.¹⁸⁴ Second, the LaGrands may have argued that failure of the LaGrands' counsel to recognize the violation of the Vienna Convention equates to ineffective assistance of counsel, thus demonstrating cause.¹⁸⁵ As to prejudice, the LaGrands' argument that lack of consular access resulted in an inability to collect exculpatory and mitigation evidence should be sufficient.¹⁸⁶

181. See Henry, *supra* note 28, at 474 (suggesting that while the *Breard* Court did not reach the question of prejudice, such a question would be framed as whether consular access would have resulted in a different plea or sentence).

182. See *supra* note 180 and accompanying text (discussing what is needed for a sufficient demonstration of prejudice).

183. See *Frady*, 465 U.S. at 172 (explaining that in this case the allegedly erroneous jury instructions alone were insufficient to lead to the conclusion that the jury would have reached a different conviction or sentence). The prosecution had also put forward a number of undisputed and damaging facts that contributed to the conviction. *Id.*

184. See *infra* notes 187-201 and accompanying text (discussing the strategy of how to use the novel claim exception).

185. See *infra* notes 203-20 and accompanying text (explaining how the claim of ineffective assistance of counsel, if successful, could also be used to demonstrate cause).

186. See *infra* notes 221-30 and accompanying text (discussing the prejudice arguments available to the LaGrands).

a. Cause Demonstrated by the Novel Claim Exception

It is not strategically wise for an attorney to challenge laws by raising claims that have failed continuously.¹⁸⁷ An attorney who asks the courts to address frivolous claims not only wastes judicial resources,¹⁸⁸ but also fails to represent the best interests of his client.¹⁸⁹ However, while tactical decisions of a defendant's attorney are binding,¹⁹⁰ there is no reason to punish a defendant by precluding his claim if the law was unclear or changed.¹⁹¹ The Supreme Court recognized the fundamental unfairness in relying on a strict interpretation of the procedural default rule in all cases in *Reed*, where a defendant attempted to challenge certain jury instructions before changes occurred in the legal environment.¹⁹² Prior to *Reed*, courts continually upheld such jury instructions as lawful, thus leaving no reasonable basis for counsel to raise a challenge.¹⁹³ The *Reed* Court found the existence of merely a "hint" that the defendant had a valid, and possibly successful, argument regarding the jury instructions.¹⁹⁴ The Court concluded, "[j]ust as it is reasonable to assume that a competent lawyer will fail to perceive the possibility of raising such a claim, it is also reasonable to assume that a court will

187. See Yin, *supra* note 171, at 291-93 (explaining that often attorneys are forced to make decisions in the best interests of their client, and therefore will not raise every possible claim because they need to focus their attention and resources on stronger arguments).

188. See *Reed*, 468 U.S. at 16 (indicating that lawyers should be encouraged to limit their contentions on appeal since appellate courts are overburdened with meritless cases and contentions).

189. See *id.* (discussing the implications, for both the court and the defendant, of arguing frivolous claims as a method of avoiding procedural default).

190. See *Murray*, 477 U.S. at 485-86 (noting that the Supreme Court rejected arguments for cause where the defense made a strategic choice to avoid state courts in hopes that the claim would be more favorably received by the federal courts).

191. See *Reed*, 468 U.S. at 9, 13-15 (explaining that when a constitutional issue was not reasonably apparent at the time of the original trial a defendant should not be punished for later attempting to raise the claim).

192. *Id.*

193. See *id.* at 13 (noting that many states had used jury instructions at issue for over a century).

194. See *id.* at 12-13 (quoting the Court of Appeals' judgment, which held that cause existed based on the novel claim).

similarly fail to appreciate the claim.”¹⁹⁵ Thus, the Court allowed the novel claim exception to satisfy the cause requirement in light of changes in the law that made the claim potentially meritorious.¹⁹⁶

In light of the ICJ decision in the *LaGrand Case*, the likelihood of success in arguing a Vienna Convention violation in circumstances such as those in the *LaGrand Case* has substantially increased.¹⁹⁷ What was before perhaps just a “hint” of a successful claim is now considered international precedent that the United States can no longer ignore,¹⁹⁸ unless the United States wants to find itself subject to repeated legal challenges by the international community.¹⁹⁹ While this novel claim exception did not, and could not, help the LaGrands, other foreign nationals currently challenging their convictions could possibly use it to their advantage.²⁰⁰ Application of the novel claim exception provides United States courts with a way to incorporate the holding of the ICJ without significantly altering domestic law.²⁰¹

195. *Id.* at 15.

196. *See id.* at 19 (holding that the defendant’s success in raising a novel claim would excuse his attorney’s failure to raise a claim in an earlier proceeding).

197. *See generally LaGrand Case*, 430 I.L.M. at 1103 (establishing that despite the absence of strict precedent in ICJ cases, a strong likelihood exists that future cases addressing similar violations will be likewise resolved).

198. *See id.* at 1101-03 (noting that the ICJ found the United States in violation of an international treaty). *But see Reed*, 468 U.S. at 17 (explaining three situations in which a new rule or case would be sufficient to qualify as a novel claim: (1) where the Court’s decision expressly overrules precedent; (2) where nearly all lower courts have overruled a longstanding and widespread practice and the Court itself has not expressly ruled on that practice; or (3) where a decision disapproves of a particular practice that the Court had previously sanctioned). A decision of the ICJ does not directly fall into any one of these categories. Arguably, it could fall under the second situation, which recognizes that the decisions of other courts can sometimes be sufficient to make a substantial change in the practice of law. *Id.*

199. *See* U.N. CHARTER art. 94, para. 1-2 (providing that all United Nations members must conform to ICJ decisions to which they are a party, otherwise the other party can challenge). The other party can petition the Security Council, which can recommend measures necessary to give effect to the judgment. *Id.* However, since the United States is a permanent member of the Security Council it could veto any such measures. *Id.* para. 23, 27.

200. *See supra* text accompanying notes 197-199 (explaining that the *LaGrand Case* laid the foundation for future foreign nationals to raise such a claim).

201. *See* Finn, *supra* note 2, at A20 (discussing the U.S. options after the ICJ holding).

b. Cause Demonstrated by Ineffective Counsel

The argument of ineffective assistance of counsel, while much more difficult to make, is nonetheless useful to demonstrate cause.²⁰² To demonstrate cause, the defendant cannot merely state that he had ineffective assistance and blame the procedural default on the lack of competence of his attorney.²⁰³ Rather, to successfully demonstrate cause, the defendant must argue and prove an independent, constitutional claim of ineffective assistance of counsel.²⁰⁴

*Strickland v. Washington*²⁰⁵ explains the standard for judging the effectiveness of counsel. In *Strickland*, the U.S. Supreme Court established a two-part test, which requires a defendant to prove that counsel's performance was deficient, and the deficient performance was prejudicial to the defense.²⁰⁶ The Court uses several factors to determine whether an attorney's performance was deficient, including a consideration of the totality of circumstances,²⁰⁷ even

202. See generally *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (noting that when assessing the effectiveness of counsel, a strong presumption exists that the attorney's performance fell within the wide array of acceptable defense performances). The ineffective assistance of counsel argument for cause is especially important for cases where a defendant's arrest was made after the ICJ decision. In these situations, the novel claim exception would not be fruitful at the time of the defendant's first trial. At this point, the decision has become part of the law, so a reasonable basis for claiming a violation of the Vienna Convention during the trial exists. See generally *supra* text accompanying notes 161, 172-73. The failure to raise the Vienna Convention claim at this time would constitute a tactical choice by the attorney, and the novel claim exception would not be available. *Id.*

203. See *infra* note 204 and accompanying text (discussing how the claim must be successful on its merits).

204. See *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000) (explaining that the argument of ineffective assistance of counsel is its own unique constitutional claim).

205. 466 U.S. 668 (1984).

206. See *id.* at 687 (noting that the test is based on the expected performance of counsel founded in the Sixth Amendment, and the defendant must show prejudice before the Court questions the fairness of the trial).

207. See *id.* at 680 (explaining that counsel does not have to meet the standard of excellent representation; rather, the defendant is only entitled to "reasonably effective assistance given the totality of the circumstances.").

though significant deference is given to counsel in this area.²⁰⁸ One important factor in this determination is the duty of counsel to investigate.²⁰⁹ Specifically, the Sixth Amendment imposes a duty upon an attorney to investigate the facts, circumstances, pleadings, and laws in a particular defendant's case.²¹⁰ There is no exact baseline for assessing this duty, but it requires at least a minimal amount of competent and professional investigation.²¹¹

Future defendants may argue that the failure of counsel to recognize that the client is a foreign national with certain rights does not meet the minimal standard for investigation set forth in *Strickland*.²¹² For instance, an attorney need only ask whether the defendant is a U.S. citizen; a question that appears on numerous forms regularly required of residents.²¹³ While every attorney may

208. See *id.* at 689 (asserting that deference to counsel is based on a strong presumption that the attorney took steps that fall under the wide umbrella of reasonable effective assistance).

209. See *id.* at 680 (basing the duty to investigate on the Sixth Amendment and holding that effective assistance means that counsel's actions should result from "professional decisions and informed legal choices," which can only be rendered after some minimal amount of investigation into the facts and circumstances of the defendant's case).

210. See *id.* at 680-81 (noting that counsel's investigation does not have to be exhaustive, and that factors relating to the duty to investigate include the overall strength of the government's case and the likelihood that investigation into the defendant's case would prove helpful, not harmful).

211. See *Strickland*, 466 U.S. at 680-81 (explaining that there is no precise measurement for the minimum amount of effort an attorney must provide his client). While counsel need not pursue all possible defenses, several factors clarify whether counsel effectively chose the best defenses based on his investigation: counsel's experience, inconsistency between the defenses chosen and those foregone, and the potential prejudice from the defenses that were dismissed. *Id.* at 681.

212. See *infra* text accompanying notes 213-215 (explaining that discovery of a violation of the Vienna Convention does not require much on the part of defendant's counsel, but at a minimum includes awareness that the client is a foreign national).

213. See, e.g., Consular Notification and Access: Instructions for Federal, State, and Other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Offices to Assist Them (U.S. Dep't. of State Jan. 1998) [hereinafter Consular Notification and Access] (listing ways for counsel to discover a person's nationality, including looking at informational cards a person carries on him, a passport or travel documents, and simply asking the person directly), available at

not know about the Vienna Convention, a reasonable question for counsel to ask in situations involving foreign citizens in criminal proceedings is whether special circumstances exist.²¹⁴ Nonetheless, the success of arguing deficiency depends on other factors and circumstances specific to the case, therefore making it difficult to guarantee the success of this argument.²¹⁵

With respect to the prejudice prong of the test for ineffective assistance of counsel, the Supreme Court has held that a defendant must demonstrate that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.”²¹⁶ The probability of error must be such that not only would the result be different, but also the error forced the court to call into question the outcome of the trial.²¹⁷ While the LaGrands unsuccessfully attempted to argue ineffective assistance of counsel in their proceedings,²¹⁸ the next foreign national to face a similar situation should make this argument with the weight of the ICJ decision behind him.²¹⁹ The ICJ has effectively stated it will have diminished confidence in verdicts that ignore the effects of a Vienna Convention violation.²²⁰

<http://www.travel.state.gov/notification3.html> (last visited Feb. 17, 2002) (on file with author).

214. See generally Springrose, *supra* note 14, at 185-86 (noting that criminal law attorneys are increasingly becoming aware of the rights of foreign nationals on account of the national attention surrounding *Breard*).

215. See generally *Strickland*, 466 U.S. at 680 (holding that the determination of effectiveness of counsel is based on the totality of the circumstances).

216. *Id.* at 694.

217. Cf. *id.* (noting that the *Strickland* test relates to the standard for judging materiality of exculpatory evidence that the prosecution withheld from the defense).

218. See *LaGrand*, 133 F.3d at 1257 (explaining that the LaGrands argued ineffective assistance of counsel as cause for their procedural default, but the court rejected this argument on the ground that no “external factor” prevented the LaGrands’ post-conviction relief counsel from arguing ineffective assistance of trial counsel). The court did not perform the analysis prescribed in *Strickland*; instead, the court based its decision on the absence of external factors that would have prevented the post-conviction counsel from making this claim. *Id.*

219. See Imre Karacs, *US Found Guilty of Flouting Law on Death Penalty Laws*, INDEP., June 28, 2001, at 16 (relating Germany’s argument that the LaGrand trial might have had a different outcome had competent counsel represented the LaGrands, which Germany could have provided).

220. See Springrose, *supra* note 14, at 200 (arguing that Article 36 of the Vienna

c. Prejudice Demonstrated by the Inability to Collect Exculpatory and Mitigation Evidence

In cases of procedural default, in addition to proving cause, the defendant must demonstrate prejudice arising from the failure of the court to address his claim.²²¹ Specifically, the defendant must show that he suffered a distinct and substantial disadvantage arising from the failure of the court to address the procedurally defaulted claim.²²² In a situation like the LaGrands', a defendant may prevail if he can show that he suffered a substantial disadvantage because he was not informed of his rights to consular access, and his trial was so unfair as to violate due process.²²³

Where consular support is the only way to obtain evidence, the lack of access to the consulate should suffice to demonstrate prejudice.²²⁴ Because the Ninth Circuit Court of Appeals reached a preliminary determination that the LaGrands did not demonstrate

Convention gives rise to Fifth and Sixth Amendment rights under the U.S. Constitution, which rights are necessary to any fair trial). Article 36 is analogous to the Sixth Amendment right to counsel, as it refers to the role that counsel plays for a foreign national. *Id.* The right to counsel under Article 36 demands many of the same guarantees as the Sixth Amendment, including the ability to gather evidence, obtain witnesses, and explain to the foreign national the nature of legal actions taken against him. *Id.*

221. See generally *LaGrand*, 133 F.3d at 1261 (stating that a court will address the merits of a procedurally defaulted claim if the petitioner can show that the violation resulted in prejudice).

222. See Marcus, *supra* note 136, at 700 (discussing the prejudice standard, which requires the court to recognize that the defendant suffered a disadvantage so severe that it implicated constitutional guarantees, such as due process); see also *supra* notes 216-217 (noting that when making the ineffective assistance of counsel claim, a defendant must demonstrate that counsel's deficient performance was so severe that a reasonable probability existed that the trial would have had a different outcome, a standard similar to the prejudice prong of an ineffective assistance of counsel claim).

223. See *supra* note 220 and accompanying text (discussing how the rights in the Vienna Convention give rise to Fifth and Sixth Amendment rights).

224. See generally *Germany Takes U.S. to Court Over Death Penalty*, HANDELSBLATT (English version) (Nov. 15, 2000) (on file with the author) [hereinafter *Germany Takes U.S. to Court*] (explaining that but for the lack of consulate access and aide, the LaGrands would have been able to collect hospital records and psychological evidence that would have played an important part in the sentencing phase of the trial).

cause, it did not specifically address the prejudice argument.²²⁵ The LaGrands did point out, however, that lack of consular access prevented them from gathering exculpatory or mitigation evidence that could have been useful for the sentencing portion of their trial.²²⁶ Arguably, the inability to collect such evidence could rise to the level of prejudice.²²⁷

It is important to note that the comment to Arizona Rule of Criminal Procedure 32 supports such an interpretation of both cause and prejudice.²²⁸ In *State v. Krum*,²²⁹ the Arizona Supreme Court discussed how the failure of counsel to raise a claim at trial can constitute ineffective assistance of counsel if the mistake is "so egregious as to result in prejudice."²³⁰ With the support found in *Krum*, the argument of ineffective assistance of counsel could help to overcome the procedural bar by waiver at the state level.²³¹

225. See *LaGrand*, 133 F.3d at 1261-62 (holding that the LaGrands' claim of ineffective assistance of counsel failed and was therefore insufficient to show cause).

226. See *id.* at 1262 (noting that the LaGrands also argued that their case met the fundamental miscarriage of justice standard, and the procedural default should be excused, as the denial of consular access prevented them from gathering mitigation and exculpatory evidence). The Ninth Circuit rejected the fundamental miscarriage of justice argument as well. *Id.*

227. See *supra* notes 207-09 and accompanying text (explaining the standard for prejudice).

228. See *infra* text accompanying notes 230-232 (discussing that the egregiousness of the failure to raise a certain claim contributes to overcoming the procedural default).

229. 903 P.2d 596 (Ariz. 1995).

230. *Id.* at 600; see also ARIZ. R. CRIM. P. 32.2(a)(3) cmt. (permitting the defense to argue ineffective assistance of counsel where the defense counsel's failure to raise an issue at trial or on appeal was so egregious that it was prejudicial). Ineffective assistance of counsel and the failure to raise the claim may therefore suffice to show cause as well as prejudice. See *Arizona v. Krum*, 903 P.2d 596, 600 (1995).

231. See *Krum*, 903 P.2d at 600 (explaining that the Court of Appeals agreed that ineffective assistance of counsel could overcome the procedural bar argument as stated in the comment to with the comment to Arizona Rule of Criminal Procedure 32). The Arizona Supreme Court failed to address whether an argument of ineffective assistance of counsel could overcome a procedural bar because no procedural bar argument was raised at this level, thus the potential argument for overcoming it was dicta. *Id.*

The federal courts of the United States should support this interpretation and use of cause and prejudice for both constitutional and political reasons.²³² The idea of reciprocity alone suggests the United States has more to gain from refraining from violations, or at least from acknowledging and examining violations when they occur, than it does from ignoring them.²³³ If the United States continues to ignore its obligations to foreign nationals, other states might do the same to United States nationals abroad.²³⁴

Notably, the ICJ did not hold that a claim for a Vienna Convention violation must be resolved successfully in favor of the defendant.²³⁵ The ICJ merely held that the claim should be reviewed and addressed on its merits.²³⁶ In the LaGrands' situation, the brothers were long time residents of the United States and, for all accounts, appeared to

232. See generally *Time to End Double Standards and Respect the Consular Rights of Foreign Nationals Facing the Death Penalty*, M2 PRESSWIRE, Aug. 22, 2001, [hereinafter *Time to End*] (pointing out that rather than isolate itself from the international community, the United States should abide by its international obligations and uphold universally recognized human rights), available at 2001 WL 26351943. This article cites a U.N. resolution emphasizing the need for all states to protect the human rights of migrants and noting that the United States was the only nation to vote against this resolution. *Id.*

233. See Finn, *supra* note 2, at A20 (quoting Phillip Recker, Deputy State Department Spokesman as saying that "consular notification is very important for Americans abroad and we certainly recognize that we have to provide consular notification for foreign nationals in the United States."); see also Murray, *supra* note 91 (opining that the U.S. State Department is concerned about possible retaliation against an estimated two thousand five hundred Americans in police custody abroad at any given time).

234. See Springrose, *supra* note 14, at 197-98 (encouraging the United States to support the principle of reciprocity in addressing violations).

235. See, e.g., *2 German Brothers*, *supra* note 14, at 4 (crediting John Forde, an attorney who works for the State Department in the area of consular affairs, as stating that no cases exist involving a treaty violation where a conviction was set aside for a defendant). The ICJ was merely ordering that U.S. courts evaluate the circumstances surrounding the treaty violation to determine if the violation would mandate that the conviction be set aside. See *LaGrand Case*, 40 I.L.M. at 1103. A lesser blow to the criminal justice system than setting aside a conviction would be to merely commute death sentences into life sentences. See generally, Finn, *supra* note 2, at A20 (explaining that Germany is but one of many countries around the world opposed to the use of the death penalty).

236. See *LaGrand Case*, 40 I.L.M. at 1103 (holding that the United States is only required to review and reconsider the conviction and sentence of foreign nationals who experienced violations of Vienna Convention rights).

be U.S. citizens.²³⁷ Thus, it is possible to argue that they incurred little, if any, prejudice from the violation.²³⁸ Although the effect of the violation of the Vienna Convention in the *LaGrand Case* may not have been prejudicial, it is easy to envision a case where a foreign national is new to the United States, is not familiar with its language or laws, and suffers significant prejudice by not receiving the aid of his or her consulate.²³⁹ The ICJ decision provides a remedy for the benefit of such foreign nationals.²⁴⁰

B. AVOID NARROW READING OF THE ICJ DECISION

One potential problem for future cases is narrow construction of the ICJ decision.²⁴¹ That is, U.S. courts could choose to ignore the critical question of whether international law and domestic criminal

237. See *supra* notes 42-44 and accompanying text (describing the history of the LaGrand brothers).

238. See generally *Take Me to the American Consul!*, *supra* note 32, at 12 (pointing out that after many post-conviction proceedings, there was never any real doubt about the LaGrands' guilt, or that they in any way misunderstood the consequences of their actions). But see *Germany Takes U.S. to Court*, *supra* note 224 (arguing that counsel provided by the German consulate could have uncovered mitigating evidence related to the LaGrands' "traumatic childhood, hospitalizations and racial isolation in Germany."). In addition, Germany contended that the LaGrands' court-appointed attorneys were unprepared for this type of case because they had never tried a capital case. *Id.* This assertion supported Germany's argument that the death penalty disproportionately applied to indigent defendants who are more likely to have ineffective counsel. *Id.*

239. See, e.g., *A Time for Action*, *supra* note 24 (discussing the circumstances surrounding the arrest and trial of Gerardo Valdez, a foreign national who confessed to the crime he was accused of because he misunderstood his legal rights). Speaking in broken English, Valdez told police he signed the waiver of his Miranda rights because, "I understand it something about a lawyer and he want to ask me questions and that's what I'm looking for, a lawyer." *Id.*

240. See *id.* (providing a true example of the situation that the Vienna Convention was designed to protect); see also Paul Hofheinz, *Foreigners Awaiting Execution in U.S. Pursue New Trial*, WALL ST. J., Aug. 30, 2001, at B1 (discussing what the ICJ might have effectively done in the arrest and trial of Valdez to extend Miranda rights with respect to the right to counsel), available at 2001 WL-WSJ 2874247. Hofheinz argues that not only do arrested individuals have a right to counsel, but foreign nationals who have been arrested have a right to consular assistance and must be promptly notified of that right upon arrest. *Id.*

241. See Finn, *supra* note 2, at A20 (noting that the ICJ ruling in the *LaGrand Case*, if read literally is limited to the consular rights of German nationals charged with serious crimes in the United States).

procedure relate to one another and whether the U.S. criminal justice system must acknowledge international obligations.²⁴² Specifically, two phrases in the wording of the decision may limit its applicability. In its holding, the ICJ addresses whether “nationals of the Federal Republic of Germany” should be sentenced to “severe” penalties.²⁴³

If the opinion is read as only applying to a situation involving German nationals in the United States, the broad remedial purposes of the ICJ’s order will not be met.²⁴⁴ The finding of the violation of rights under the Vienna Convention is significant.²⁴⁵ The Vienna Convention is a multilateral treaty with over one hundred sixty-four ratifying states.²⁴⁶ Generally, all parties are entitled to the same rights under the Convention.²⁴⁷ If Germany can bring the United States before the ICJ and produce a finding that the United States violated its rights and the individual rights of German nationals, then any

242. See, e.g. *id.* (explaining that legal and political critics feel this decision could have a much broader effect because “an established U.S. legal principle limiting appeals violated the country’s responsibilities under the international treaty.”).

243. *LaGrand Case*, 40 I.L.M. at 1103; see also Finn, *supra* note 2, at A20 (recognizing the two technically limiting phrases and acknowledging that German scholars believe the effect of the decision will be much broader). German scholars believe that this decision will have a broader impact because the ICJ directly called into question a domestic legal principal for violating international legal obligations. *Id.*

244. See Finn, *supra* note 2, at A20 (demonstrating that the ICJ decision did not just concern the rights of the LaGrands, but also future disputes over rights under the Vienna Convention). But see *World Court Rules*, *supra* note 30, at 10 (quoting an ICJ spokeswoman who stated that while the ruling definitely applied to German nationals, it was unclear what impact the ruling would have on other states’ foreign nationals).

245. See generally *infra* text accompanying notes 266-267 (discussing implications of the ICJ holding for the United States within the international community).

246. See Vienna Convention, *supra* note 3 (documenting that the treaty entered into force on March 19, 1967, and as of 2002, one hundred sixty-four states have ratified the Convention).

247. See generally Springrose, *supra* note 14, at 187 (noting that the United States ratified the Vienna Convention without reservations). Absent a reservation limiting the applicability of the Vienna Convention, any foreign consulate or national within the territory of the United States is entitled to rights contained in the Vienna Convention so long as his state is a party to the Vienna Convention. *Id.*

other member state may do the same.²⁴⁸ Yet, to bring another claim on the same grounds, the United States must accept the ICJ's jurisdiction.²⁴⁹ For numerous reasons, the United States is unlikely to ever consent again to jurisdiction or participate in an action with another state over this particular clause of the Vienna Convention.²⁵⁰

If the true objective of the Vienna Convention is to be fulfilled and the rights of all ratifying nations and their nationals are to be effectively protected, the ICJ opinion should apply equally to all member countries.²⁵¹ As one commentator pointed out, a majority of states whose nationals suffer from a violation of the Vienna Convention are too weak to stand up to the United States.²⁵² Nevertheless, the rights of the Convention should be applied equally to all signatories, regardless of their economic or political condition.

A second problem relates to the limitation of the ICJ holding to convictions and sentences that are "severe."²⁵³ The ICJ does not explain in its opinion what level of crime and sentence would rise to

248. See generally Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, art. 36 (defining the ICJ's jurisdiction).

249. See *id.* (stating that jurisdiction depends on consent).

250. Cf. Finn, *supra* note 2, at A20 (acknowledging that United States' officials erred in not informing the LaGrands of their rights). Finn's critique of the United States demonstrates that well-respected newspapers, such as *The Washington Post*, will publicize situations in which the United States fails to uphold its international obligations. *Id.* This kind of publicity does not help the domestic or international reputation of the United States. *Id.* The fact that Finn entitled this article "World Court Rebukes U.S. Over Execution of Germans" is noteworthy. *Id.*

251. See generally *supra* note 233 and accompanying text (discussing the importance of reciprocity in order for the rights of U.S. citizens to be respected abroad); see also *infra* note 252 and accompanying text (explaining that not all states have the resources to bring cases before the ICJ, but this should not affect the rights of their citizens in the United States).

252. See Byers, *supra* note 19, at A19 (commenting that most foreigners on death row are from countries that are too weak, both politically and economically, to stand up to the United States), available at 2001 WL 3471675. Smaller countries do not want to threaten their diplomatic and economic relations with a country like the United States, which is so important in the global economy. *Id.* According to Byers, fear of damaging relations with the United States was one reason that Paraguay withdrew the *Breard* case from the ICJ. *Id.*

253. See *supra* text accompanying note 243 (stating the plain language of the ICJ decision that appears to limit the holding).

severe status.²⁵⁴ If a foreign national is subject to execution, the factual situation is the same as the *LaGrand Case* and there is no question that the ICJ decision is applicable.²⁵⁵ It is unclear, however, whether a life sentence would be considered severe, or whether the nature of the crime would affect the severity.²⁵⁶ These questions presently remain unanswered.

C. INSTITUTE TRAINING OF LEGAL OFFICIALS IN ADDITION TO CURRENT TRAINING OF LAW ENFORCEMENT

Even before the ICJ ruling in the *LaGrand Case*, it was clear that the United States would have to do something about the recurring violations of the Vienna Convention.²⁵⁷ In response, the State Department developed a training program for law enforcement officials.²⁵⁸ Through this program the State Department attempts to explain the major rights and provisions of the Vienna Convention.²⁵⁹

254. See *infra* text accompanying notes 255-256 (pointing out the vagueness that the unclear language of the ICJ created).

255. See *LaGrand Case*, 40 I.L.M. 1069, 1103 (affirming that because this was a capital punishment case, it qualifies as a severe penalty).

256. See generally *World Court Rules*, *supra* note 30, at 10 (quoting an ICJ spokeswoman, the ICJ holding would apply to any German national who is on death row or subject to a life sentence). Where the line is drawn after the *LaGrand* decision is unclear. *Id.*

257. See *Germany Takes U.S. to Court*, *supra* note 224 (noting that despite recent U.S. assurances that compliance with the Vienna Convention would improve, Germany alone has documented twenty-four instances within the last two years where the United States has denied rights to German nationals under the Vienna Convention).

258. See generally *Consular Notification and Access*, *supra* note 213 (outlining the Vienna Convention and explaining the rights of foreign nationals under it); see also *Foreigners Shortchanged*, *supra* note 17 (explaining that in the past three and one half years, "the State Department has overseen training programs in 34 cities and mailed more than 93,000 brochures and 400,000 pocket cards to educate police forces about the treaty and help avoid future violations.").

259. See *Consular Notification and Access*, *supra* note 213 (describing the rights created under the Vienna Convention). This program includes six parts explaining to law enforcement agencies their duties under the Vienna Convention, including informing foreign nationals and consulates of criminal or custody actions taken against foreign nationals. *Id.* Part One of the State Department manual includes basic instructions about what to do, and what to check, when a foreign national is arrested or in custody. *Id.* Part Two includes more detailed instructions of the duties and rights a foreign consulate and foreign national have under the Vienna

The ICJ took notice of this program in its decision, but believed the United States still needed to do more.²⁶⁰

As recurring violations of the Vienna Convention within the United States has shown, training of law enforcement officials alone is not enough.²⁶¹ The problem in most cases is not only that the United States fails to notify foreign nationals of their rights without delay, but also that foreign nationals cannot object to violations of those rights and protections when not provided with timely notice of their rights.²⁶² By the time the defendant discovers a violation of his rights under the Vienna Convention, the claim is deemed procedurally defaulted and the defendant cannot thereafter raise the claim in court.²⁶³

Providing training for lawyers would be a positive step towards preventing further violations of the Vienna Convention. In the *LaGrand Case*, the court-appointed counsel did not recognize the rights that foreign states and nationals are entitled to under the Vienna Convention.²⁶⁴ Recognizing and raising a violation of rights

Convention. *Id.* Frequently asked questions are addressed in Part Three, and translations of suggested statements are included in Part Four. *Id.* The legal materials are described and identified in Part Five. *Id.* Part Six includes a list of foreign embassies and consulates in the United States. *Id.*

260. See *LaGrand Case*, 40 I.L.M. at 1102 (noting that the United States had committed to preventing repetition of similar violations of the Vienna Convention).

261. See Murray, *supra* note 91, at A2 (asserting that even though United States assured the ICJ that it was doing more to educate the police after both the *LaGrand* and *Breard* cases, the ICJ still found that the State Department training program was insufficient).

262. See Dorf, *supra* note 16 (stating that “the reason the LaGrands didn’t raise their rights under the Vienna Convention in a timely fashion was because they did not know of those rights”). This article attributes fault for violations of the LaGrands’ rights to the law enforcement agencies who did not inform the LaGrands of their rights upon arrest. *Id.* Lawyers must protect individuals’ rights and make them aware of the legal actions available when their rights are violated, and informing foreign nationals of their rights under the Vienna Convention is equally the responsibility of lawyers as it is of law enforcement officials. *Id.*

263. See *supra* text accompanying notes 140-42 (explaining that the fundamental nature of the violation itself leads to the procedural default problem).

264. See *LaGrand Case*, 40 I.L.M. at 1076-77 (noting that the state court handed down the LaGrands’ first conviction on February 17, 1984, and it was not until June 1992 that the German consulate was even aware of the case).

at the onset of a case would reduce the possibility of an unfair trial.²⁶⁵ Furthermore, if court-appointed counsel received relevant training, this could avoid, or at least diminish, a challenge to a conviction on the basis of ineffective assistance of counsel.

CONCLUSION

The ICJ reached a significant holding in the *LaGrand Case*, one that should have a direct impact on the United States.²⁶⁶ Though only time can tell whether U.S. courts will respect the ICJ judgment, an opportunity exists for the United States to show that it is ready to accept the responsibilities, along with the benefits, that come with membership in the global legal system.²⁶⁷

After the *LaGrand Case*, the debate over the extent to which international law affects domestic U.S. law remains unresolved.²⁶⁸

265. See *supra* text accompanying notes 112-15 (explaining the U.S. argument that nothing in the Vienna Convention prevents U.S. courts from requiring defendants to raise violations of the Vienna Convention at the trial court level). While the ICJ rejected this argument as an incorrect interpretation of the Vienna Convention, the training of legal officials could make this a reality. *Id.* If legal officials knew that such rights existed, they should question their clients immediately about their nationality and whether they were told they could communicate with their consulate. *Id.* Then any violations could be argued at the trial, avoiding any procedural default problems. *Id.*

266. See generally Murray, *supra* note 91, at A20 (highlighting that, at any given moment, over two thousand five-hundred Americans face legal trouble in other countries, and the United States ought to be concerned about how its nationals are treated abroad in light of its own difficulties in adhering to the Vienna Convention).

267. See *Time to End*, *supra* note 232 (noting that the case of Gerardo Valdez in Oklahoma was strikingly similar to the *LaGrand Case*, yet even two months after the decision the United States did nothing to remedy the situation). The Valdez case provided the United States with an opportunity to honor its international obligations. *Id.* See also Ron Jenkins, *Court Delays Mexican's Execution*, AP ONLINE, Sept. 10, 2001 (reporting that the state court indefinitely halted the execution of Gerardo Valdez, and the court permitted Mexican attorneys sixty days to present argument), available at 2001 WL 27335820. Circumstances surrounding the Valdez case suggest that the states are listening to international criticism and recognizing that the ICJ decision applies to foreign defendants in their courts. *Id.*

268. See *supra* text accompanying notes 27-28 (explaining that the debate over what impact international law should have within the United States' domestic legal system is long and complex); see also *supra* note 119 (noting that the United States faces a choice as to how it will react to the ICJ decision; the United States can

Nevertheless, the case raises a possibility for harmonization with respect to the issues raised in the *LaGrand Case*. Through the application of the cause and prejudice standards, U.S. courts can consider violations of the Vienna Convention despite the procedural default rule. Consequently, a viable option exists to incorporate the ICJ's holding into domestic decisions without excessive debate over how it alters domestic law.

either incorporate the ruling or ignore the ruling and continue to use domestic law as an excuse for violations of international commitments).