Avena & Other Mexican Nationals (Mex. v. U.S.): The International Court of Justice Deems U.S. Actions in Fifty-Two Death Penalty Cases as Violations of International Law

I. OVERVIEW

Fifty-two incarcerated Mexican nationals were convicted and sentenced to death by the United States in a manner the International Court of Justice (ICJ) deemed a violation of international rights under the Vienna Convention on Consular Relations and Optional Protocols (Vienna Convention).[1] All were tried and convicted of crimes warranting the death penalty, and most remain on death row in the United States.[2] In response to these convictions, the United Mexican States brought suit against the United States of America (United States) in the ICJ.[3] On March 31, 2004, the court found the United States in violation of its international obligations under the Vienna Convention.[4]

Mexico, on its own behalf and on behalf of fifty-four of its nationals, initiated proceedings against the United States in the ICJ on January 9, 2003, claiming that the United States violated its international legal obligations to Mexico under the Vienna Convention.[5] Mexico did not allege that its nationals were innocent of the crimes for which they

1. Avena & Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1, 10, 58-61 (Judgment Mar. 31).

2. *See id.* at 10 (describing accusation by Mexico that "the United States, in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row violated international law").

3. *Id.* at 7, 10.

4. *Id.* at 58-61 (citing Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 596 U.N.T.S. 8638-40 [hereinafter Vienna Convention]).

5. *Id.* at 7.

were convicted.[6] Instead, Mexico contended that the arrests, detentions, convictions, and sentencings of the nationals occurred in violation of the Vienna Convention.[7] Specifically, Mexico alleged that the United States violated article 36, which provides for various rights of foreign nationals and their respective governments upon the arrest of the governments' nationals within a foreign state.[8] It is contended that throughout the criminal proceedings against the Mexican nationals, the United States neither informed the nationals of their rights to communicate with Mexican consular officials—in violation of article 36(1)(a)—nor notified the Mexican authorities of their detention.[9] This prevented Mexico from rendering consular assistance to its detained nationals, a violation of articles 36(1)(b) and (c).[10] Accordingly, Mexico requested that the ICJ (1) award reparation to Mexico for the injuries to Mexico and its citizens, (2) preclude the United States from applying the doctrine of procedural default or other domestic law to prevent the adjudication of Vienna Convention claims in accordance with international law, (3) require that the United States provide "appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with" its international obligations in the future, and (4) require that the United States remedy the current violations.[11] Though Mexico initially alleged violations in fifty-four death penalty cases, at the time of the ICJ's ruling, only fifty-two Mexican nationals were included because two of the claims did not adequately allege Vienna Convention violations.[12]

On the same day that Mexico initiated proceedings against the United States in the ICJ, Mexico also requested that the court issue provisional measures to preclude the United States from executing the Mexican nationals until such time as the court could render a final decision on the matter.[13] On February 5, 2003, the ICJ unanimously issued an order requesting that the United States take appropriate measures to ensure that the three Mexican nationals who risked execution within the immediate future not be executed pending final decision by the court and that the United States inform the court of

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6. *See id.* at 11-15.
7. *Id.* at 12, 14; *see also* Vienna Convention, *supra* note 4, art. 36 ("Communication and Contact with Nationals of the Sending State").
8. *Avena*, 2004 I.C.J. at 12, 14; *see also* Vienna Convention, *supra* note 4, art. 36.
9. *Avena*, 2004 I.C.J. at 14.
10. *Id.*
11. *Id.* at 14-15.
12. *Id.* at 16.
13. *Id.* at 8.

measures taken to comply with the order.[14] The ICJ, sitting in a fifteen-person panel, issued its decision regarding the noted case on March 31, 2004.[15] The court *held* that the United States violated article 36 of the Vienna Convention in its arrests, detentions, convictions, and sentencings of the Mexican nationals and therefore must provide "review and reconsideration" of the convictions and sentencings.[16] *Avena & Other Mexican Nationals (Mex. v. U.S.)* 2004 I.C.J. 1 (Mar. 31).

II. BACKGROUND

A. Vienna Convention on Consular Relations[17]

The United States signed the Vienna Convention on Consular Relations in 1963, and the Senate ratified it without reservation in 1969.[18] The treaty's Optional Protocol, which was also ratified and signed into law in the United States, provided that the ICJ has jurisdiction to determine Vienna Convention claims.[19] Thus, since the treaty and its Optional Protocol were codified into U.S. law in 1969, it follows that the ICJ decisions are binding on the United States under the United States Constitution's Supremacy Clause.[20] However, as of March 2005, the Bush Administration has withdrawn the United States from the Optional Protocol, the effects of which remain to be seen.[21]

The ICJ has recently interpreted the Vienna Convention to provide both individual rights and State rights, although the preamble states that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States."[22] Of most importance to this analysis is article 36, entitled "Communication and Contact with

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14. Request for the Indication of Provisional Measures Order, Avena & Other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. 2, 4-5, 15 (Feb. 5, 2003). César Roberto Fierro Reyna, Roberto Moreno Ramos, and Osvaldo Torres Aguilera were the three Mexican nationals who had exhausted judicial review and, barring clemency, faced execution in the immediate future. *Id.*

15. *Avena*, 2004 I.C.J. at 1, 4.

16. *Id.* at 60-61.

17. Vienna Convention, *supra* note 4.

18. *See* Sarah M. Ray, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, 91 CAL. L. REV. 1729, 1734-35 (2003).

19. Optional Protocols (of the Vienna Convention on Consular Relations), Apr. 24, 1963, 596 U.N.T.S. 8638-40 [hereinafter Optional Protocols].

20. U.S. CONST. art. VI.

21. *See, e.g.*, Adam Liptak, *U.S. Says It Has Withdrawn from World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A16; *see also infra* note 129.

22. Vienna Convention, *supra* note 4, pmbl; *see also* LaGrand Case (F.R.G. v. U.S.), ¶ 30 (June 27, 2001), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment20010625.htm.

Nationals of the Sending State."[23] Article 36(1) sets out both the rights of nationals detained in foreign states and the foreign nation's consular authorities' rights to be informed and have access to their detained nationals.[24] Specifically, article 36(1)(a) provides for communication between consular officers and their nationals.[25] Article 36(1)(b) states that the detainees must be informed of their rights and that, if requested, the detaining authorities should inform the foreign state's consular officials of the detention "without delay."[26] Finally, article 36(1)(c) provides consular officers the right to access their detained nationals and arrange for legal representation.[27] Article 36(2) then delineates the appropriate placement for these rights within domestic systems, stating that the rights of this provision "shall be exercised in conformity with the laws and regulations of the receiving State . . . however, that the said law and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."[28] Thus, article 36 of the Vienna Convention clearly provides rights to both detained foreign nationals and their States, and such rights must be incorporated into the domestic laws of the state in which the detention occurs.[29]

B. Breard v. Greene

The Supreme Court of the United States addressed the domestic implications of Vienna Convention violations in its 1998 decision *Breard v. Greene*.[30] The case is noteworthy as one of the first suits filed in the United States by another government based on Vienna Convention violations.[31] Further, the case involved an international judicial body attempting to intervene in domestic criminal law, a rarity within the United States.[32] The Court's decision, however, did not lead to the implementation of domestic safeguards for preventing and remedying

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23. Vienna Convention, *supra* note 4, art. 36.
24. *Id.* art. 36(1).
25. *Id.* art. 36(1)(a).
26. *Id.* art. 36(1)(b).
27. *Id.* art. 36(1)(c).
28. *Id.* art. 36(2).
29. *Id.* art. 36.
30. Breard v. Greene, 523 U.S. 371, 374 (1998).
31. *Id.*; *see also* William J. Aceves, *Application of the Vienna Convention on Consular Relations*, 92 AM. J. INT'L L. 517, 518 (1998).
32. *Breard*, 523 U.S. at 374-75; *see also* Request for the Indication of Provisional Measures Order, Vienna Convention on Consular Relations (Para. v. U.S.), ¶¶ 5-9 (Apr. 9, 1998), *available at* http://www.icj-cij.org/icjwww/idocket/ipaus/ipausorder/ipaus_iorder_090498.htm.

U.S. violations of international obligations.[33] Instead, it served to preclude many suits claiming Vienna Convention violations from adjudication within the U.S. court system.

Angel Francisco Breard, a Paraguayan citizen, was convicted of attempted rape and capital murder in 1993.[34] After exhausting all appeals in the state court system, Breard filed a motion for habeas corpus relief within the federal courts, at which time he first raised allegations of Vienna Convention violations.[35] Breard then alleged that, from the time of his arrest, he was not notified of his Vienna Convention article 36(1) right to contact his state's consular officials.[36] Both the district court and the United States Court of Appeals for the Fourth Circuit rejected his claim as procedurally defaulted, because he had not raised the Vienna Convention claim in state court and he "could not demonstrate cause and prejudice for this default."[37] The Republic of Paraguay instituted proceedings in the United States in 1996 and at the ICJ on April 3, 1998.[38] Responding to the imminent threat of execution, on April 9, 1998, the ICJ unanimously issued an order requesting that the United States postpone the execution until such time as the court could make a ruling.[39] The mandate by the ICJ, however, fell on deaf ears.

On the date of Breard's execution, the Supreme Court denied certiorari, holding that since Breard had not asserted his Vienna Convention violation claims in the state courts, he was procedurally barred from raising them in later proceedings.[40] Most notably, the Court held that domestic law would determine how the treaty was to be implemented within the country.[41] In support of its finding, the Court noted that the Vienna Convention states in article 36(2) that it "shall be exercised in conformity with the laws and regulations of the receiving

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33. *See Breard*, 523 U.S. at 378-79 ("[N]othing in our existing case law allows us to make that choice for [the Secretary of State].").

34. *Id.* at 372-73.

35. *Id.* at 373.

36. *Id.*

37. *Id.*

38. *Id.* at 374.

39. *Id. See generally* Request for the Indication of Provisional Measures Order, Vienna Convention on Consular Relations (Para. v. U.S.) (Apr. 9, 1998), *available at* http://www.icj-cij.org/icjwww/idocket/ipaus/ipausorder/ipaus_iorder_090498.htm. The ICJ's provisional order stated, "The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order." *Id.* ¶ 41.I.

40. *Breard*, 523 U.S. at 375-76; LaGrand Case (F.R.G. v. U.S.), ¶ 30, (June 27, 2001), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm.

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

State" as long as they correspond with the purposes of the treaty.[42] The Supreme Court provided a second rationale for holding that the procedural default rule superseded the treaty.[43] The opinion stated that "an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."[44] Thus, since the procedural default rule was crafted by a judicial interpretation of the Antiterrorism and Effective Death Penalty Act passed by Congress in 1996, the Court held that the procedural default rule prevents Breard from thereafter raising a Vienna Convention violation that was not previously raised within the state courts.[45]

The Supreme Court thus upheld the federal procedural default rule for allegations of article 36 violations.[46] Notably, the Court stated the following:

> First, while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.[47]

The execution of Breard therefore occurred despite U.S. violations of an international treaty in his detention and subsequent criminal proceedings. In *Breard*, the Supreme Court held that the federal procedural default rule supersedes the Vienna Convention rights that a foreign national held within the domestic criminal system,[48] a ruling that would be called into question by the ICJ soon thereafter.[49]

C. LaGrand Case (F.R.G. v. U.S.)

In its 2001 *LaGrand Case* (*F.R.G. v. U.S.*), the ICJ denounced the United States for its Vienna Convention violations.[50] Additionally, the

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42. *Id.* (quoting Vienna Convention, *supra* note 4, art. 36(2)).
43. *Id.* at 376.
44. *Id.* (quoting Reid v. Covert, 354 U.S. 1, 18 (1957)).
45. *Id.* The procedural default rule is a judicially constructed procedure endorsed by the Supreme Court. Thus, in this case, the Court is interpreting that the Congressional act is in conflict with the rights enumerated in the Vienna Convention. *See, e.g.*, Medellin v. Dretke, 371 F.3d 270, 279 (5th Cir.), *cert. granted*, 125 S. Ct. 686 (2004) (examining the application of the Supreme Court's procedural default rule).
46. *Breard*, 523 U.S. at 378-79.
47. *Id.* at 375.
48. *Id.* at 378-79.
49. *See* LaGrand Case (F.R.G. v. U.S.) (June 27, 2001), *available at* http://www.icj-cij/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm.
50. *Id.* ¶ 128(3)-(5).

court indicated that the U.S. procedural default rule, to the extent that it precludes enforcement of the Vienna Convention, is inadequate.[51] The ICJ specifically held that the United States must revisit Vienna Convention violations to determine if they prejudiced the judicial proceedings.[52]

The *LaGrand Case* arose from the 1984 U.S. conviction of two German half-brothers, Karl and Walter LaGrand, for first-degree murder, attempted armed robbery, and kidnapping.[53] The court sentenced both to the death penalty and affirmed the sentences on appeal.[54] It was not until December 21, 1998, that they were officially notified of their Vienna Convention right to communicate with the German consular officials, at which time they had already exhausted their appeals in the state court system.[55] The brothers raised allegations of Vienna Convention violations in their joint petition for writ of habeas corpus, but the district court found that the "LaGrands had not shown an objective external factor that prevented them from raising the issue of the lack of consular notification earlier."[56] The United States Court of Appeals for the Ninth Circuit subsequently concluded that they were procedurally barred as they had not raised the issue at the state court level—a ruling in accordance with the Supreme Court's *Breard* decision.[57]

In March 1999, after Karl LaGrand's execution and shortly before his brother Walter's scheduled execution, the Federal Republic of Germany (Germany) requested that the ICJ intervene and penalize the United States for its deliberate violations of the Vienna Convention.[58] On March 3, 1999, the day of Walter LaGrand's scheduled execution,[59] the ICJ issued an order requesting that the United States stay the execution pending the outcome of its decision. That same day, in *Germany v.*

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51. *Id.* ¶ 128(4).

52. *Id.* ¶ 128(7).

53. *Id.* ¶¶ 13-14; Amanda E. Burks, *Consular Assistance for Foreign Defendants: Avoiding Default and Fortifying a Defense*, 14 CAP. DEF. J. 29, 30 (2001).

54. *See LaGrand Case*, ¶¶ 14, 19.

55. *See id.* ¶ 24.

56. *Id.* ¶ 23; *see* Burks, *supra* note 53, at 30-32.

57. *See* LaGrand v. Stewart, 133 F.3d 1253, 1261-62 (9th Cir. 1998); Breard v. Greene, 523 U.S. 371, 371 (1998).

58. Request for the Indication of Provisional Measures Order, Vienna Convention on Consular Relations (F.R.G. v. U.S.), ¶¶ 5-6 (Mar. 3, 1999), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusorder/igus_order_19990303.htm.

59. The first brother, Karl LaGrand, was executed on February 24, 1999. *Id.* ¶¶ 8, 29.I(a). The I.C.J. specifically requested, "The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all measures which it has taken in implementation of this Order." *Id.*

United States, the Supreme Court denied Germany's motions and declined to grant original jurisdiction.[60] Not only did the Court refuse to force the state criminal system to uphold the ICJ's order to postpone the execution, but it failed to sufficiently address the alleged Vienna Convention violations.[61]

Despite the execution of both LaGrand brothers, the ICJ issued a decision on the matter in June 2001.[62] First, the court held that the United States violated article 36 of the Vienna Convention in its arrest, detention, trying, conviction, and sentencing of both Karl and Walter LaGrand.[63] Second, the ICJ concluded that, although the procedural default rule does not in itself violate article 36, it does effectively bar a challenge to the conviction and sentencing of foreign nationals based on a Vienna Convention claim by preventing them from attaching meaning to the purpose of the treaty.[64] Thus, the court held that the application of the procedural default rule does violate article 36(2) when it prevents claims of Vienna Convention violations, as was the case with the LaGrand brothers.[65] Finally, the ICJ indicated that the appropriate remedy for the Vienna Convention violations was to mandate that the United States allow the "review and reconsideration" of the convictions and sentencings.[66] It must be noted, however, that the court expressly left the choice of means for this action to the United States.[67]

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60. Federal Republic of Germany v. United States, 526 U.S. 111, 111-12 (1999). As a result, Walter LaGrand was executed on March 3, 1999. *See LaGrand Case*, ¶ 34.

61. *See F.R.G.*, 526 U.S. at 111-12.

62. *See generally LaGrand Case*.

63. *Id.* ¶ 128(3).

64. *Id.* ¶ 125. After noting that the procedural default rule does not necessarily violate article 36 itself, the court elaborated by stating:

> The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information "without delay", thus preventing the person from seeking and obtaining consular assistance from the sending State.

Id. ¶ 90.

65. *Id.* ¶ 125.

66. *Id.* ¶ 128(7). As the LaGrand brothers had already been executed, the court was specifying this remedy for future German nationals held within the United States yet denied their Vienna Convention rights. *See id.*; *F.R.G.*, 526 U.S. at 111.

67. *LaGrand Case* ¶ 128. The court simply stated that "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." *Id.*

D. Valdez v. Oklahoma

The opinion of the Oklahoma Court of Criminal Appeals in *Valdez v. Oklahoma* marks one of the first times that a U.S. state court addressed the implication of a Vienna Convention article 36 violation with reference to the ICJ's *LaGrand* decision.[68] Specifically, the court granted relief to a capital offender even though his Vienna Convention claim was procedurally defaulted.[69] Nevertheless, the court did not rely on the treaty violations to come to its final decision, indicating that courts were beginning to take note of the ICJ but were not prepared to rule based on its findings.[70]

The case arose when Gerardo Valdez, a Mexican national, was convicted of first-degree murder and sentenced to death in 1995.[71] The state failed to notify him of his Vienna Convention right under article 36 to communicate with the Mexican consulate and did not notify the proper Mexican officials of his detention throughout his appeals process.[72] As his execution date approached, Valdez filed for postconviction relief and was granted two stays of execution by the Governor of Oklahoma.[73] It was not until his second application for relief, however, that Valdez raised his claim of Vienna Convention violations.[74] Once the appropriate Mexican authorities were informed of the detention, they began to assist Valdez and discovered that he had a past history which may have mitigated his sentence and precluded him from capital punishment.[75] Thus, they petitioned for relief from the State of Oklahoma.[76]

The Oklahoma Court of Criminal Appeals granted Valdez's application for postconviction relief in May 2002 and ordered resentencing in light of the new evidence.[77] In its opinion, the court noted the ICJ's decision in the *LaGrand Case* and its determination that the procedural default rule may not be appropriate for Vienna Convention violation claims.[78] Nevertheless, the court rejected Valdez's argument and held that since the United States Supreme Court has not overruled

68. 46 P.3d 703, 707-09 (Okla. Crim. App. 2002).
69. *Id.* at 710-11.
70. *Id.* at 709-10.
71. *Id.* at 704.
72. *Id.* at 706.
73. *Id.* at 704.
74. *Id.* at 705-06.
75. *Id.* at 706.
76. *See id.* at 706-07.
77. *Id.* at 710.
78. *See id.* at 707-08.

Breard, the court was bound by its holding.[79] Specifically, the court stated that

> the United States Supreme Court in *Breard* specifically rejected the contention that the doctrine of procedural default was not applicable to provisions of the Vienna Convention and until such time as the supreme arbiter of the law of the United States changes its ruling, its decision in *Breard* controls this issue. . . . For this Court to decide the ICJ's ruling overrules a binding decision of the United States Supreme Court and affords a judicial remedy to an individual for a violation of the Convention would interfere with the nation's foreign affairs and run afoul of the U.S. Constitution.[80]

Thus, Valdez was procedurally barred from claiming Vienna Convention violations in his application for postconviction relief, despite the ICJ's ruling in the *LaGrand Case* that it was not appropriate to deny the foreign national a forum in which to assert a claim of international law violations.[81]

III. THE COURT'S DECISION

In the noted case, the ICJ held that the United States violated the Vienna Convention when it arrested, detained, convicted, and sentenced to capital punishment fifty-two Mexican nationals.[82] The court first found that the United States violated article 36(1)(b) in relation to fifty-one Mexican nationals by not informing them of their rights, as well as failing to notify "without delay" the appropriate Mexican consular post of the detention of forty-nine Mexican nationals.[83] Second, the court concluded that the United States violated article 36(1)(a) and (c) by depriving Mexico of the right to communicate and have access to forty-nine of its nationals in a timely fashion or to arrange for legal representation for thirty-four of its nationals in a timely fashion.[84] Third, the court held that the United States violated article 36(2) by not providing for the "review and reconsideration" of the conviction and sentencing of the three cases involving judicial exhaustion.[85] After finding that the United States violated the Vienna Convention, the court

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79. *See id.* at 709.
80. *Id.*
81. *Id.* The court did, however, grant the application on the basis of ineffective assistance of counsel. *Id.* at 710.
82. Avena & Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1, 10, 58-61 (Judgment Mar. 31).
83. *Id.* at 59.
84. *Id.* at 59-60.
85. *See id.* at 60.

provided for reparations in the form of "review and reconsideration" of all the convictions and sentencings of the Mexican nationals, but it noted that the United States could choose the means by which to carry out the remedy, albeit with qualifications.[86]

Prior to its determination that the United States violated article 36 of the Vienna Convention, the court made two conclusions necessary to a finding that the United States was under a duty to abide by international law in the fifty-two cases at issue.[87] The court first responded to the U.S. contention that article 36 duties apply only to foreign nationals, and that they did not apply to the alleged victims who possess both U.S. and Mexican citizenship.[88] As the court correctly noted, Mexico had the burden of proving that all fifty-two individuals were of Mexican nationality, a task in which Mexico was successful.[89] The United States, however, could not adequately rebut Mexico's nationality claims because it could not establish U.S. nationality for any of them.[90] Accordingly, the court concluded that the United States had an obligation to Mexico under article 36(1) in relation to the Mexican nationals.[91]

Second, the court responded to the contested meaning of "without delay" in article 36.[92] Mexico contended that "without delay" meant "immediately upon detention and prior to any interrogation."[93] The United States, however, understood the term to mean "no deliberate delay."[94] As the exact meaning of the phrase is not noted in the Vienna Convention, the ICJ looked toward the intentions of the drafters and the purpose of article 36.[95] The court concluded that "without delay" does not mean immediately but instead means "as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national."[96]

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86. *Id.* at 60-61.
87. *See id.* at 30.
88. *See id.* at 30-32.
89. *See id.* at 31.
90. *See id.* at 31-32.
91. *See id.* at 32.
92. *See id.*
93. *Id.* at 36-37.
94. *Id.* at 37. The Court references a United States State Department manual that specifically states that there should be "no deliberate delay," and, thus, under most circumstances "notification to consular officials" should occur within twenty-four to seventy-two hours after the initial arrest or detention. *Id.* (quoting U.S. STATE DEP'T, CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM (2003), *available at* http://travel.state.gov/consul_notify.html).
95. *See id.* at 37-39.
96. *Id.* at 39.

After determining the United States had an obligation to abide by article 36 and clarifying the meaning of "without delay," the ICJ focused on U.S. actions with respect to the criminal cases at issue.[97] Mexico contended that

> the United States, in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row described in this Application, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals, as provided by Articles 5 and 36, respectively of the Vienna Convention.[98]

As stated above, the court found that the United States violated article 36(1)(a), (b), and (c) of the Vienna Convention in its actions relating to the Mexican nationals.[99] As all but three of the Mexican nationals still had judicial remedies available as of the date of the ICJ's decision, only in the three cases in which judicial relief was exhausted did the court find that the United States violated article 36(2).[100] This article provides that the rights listed above "shall be exercised in conformity with the laws and regulations of the receiving State" but that these laws "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."[101] According to the U.S. procedural default rule, a defendant who had the opportunity to raise a legal issue at trial but did not do so is generally precluded from raising it in future proceedings, thus requiring the defendant to exhaust his remedies at the state level.[102] Mexico argued that the U.S. procedural default rule bars foreign nationals from any effective opportunity for review of potential article 36 violations.[103] The United States, conversely, argued that its domestic system of judicial review and executive clemency allow for article 36 rights to be realized in their entirety.[104]

The ICJ had previously found in the *LaGrand Case* that the procedural default rule in the United States was often problematic because it "effectively" thwarted foreign detainees from challenging a conviction or sentence on the basis of an allegation of article 36

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97. *See id.* at 39-40.
98. *Id.* at 10.
99. *Id.* at 58-61.
100. *Id.* at 44-46.
101. Vienna Convention, *supra* note 4, art. 36(2).
102. *Avena*, 2004 I.C.J. at 45.
103. *See id.* at 44 ("'By applying provisions of its municipal law to defeat . . . remedies for the violation of rights conferred by Article 36—thus failing to provide meaningful review and reconsideration of severe sentences imposed in proceedings that violated Article 36— . . . has violated, and continues to violate, the Vienna Convention.'").
104. *Id.* at 44-45.

violations.[105] Although the *LaGrand Case* dealt with the rule as applied to U.S. federal cases and its application here is in state courts of criminal appeal, the outcome is nevertheless the same.[106] Despite the *LaGrand Case* ruling, the ICJ found in the noted case that the United States failed to revise the procedural default rule to comply with the purpose of article 36, and thus, the United States continued to prevent review of article 36 violations in those cases where exhaustion of remedies had occurred.[107] The court, therefore, concluded that, in the forty-nine cases in which exhaustion had not occurred and "review and reconsideration" was still a possibility, there had been no article 36(2) violations.[108] Nevertheless, in the case of the three Mexican nationals who had exhausted all judicial remedies, the procedural default rule precluded them from raising a Vienna Convention claim, and thus the United States breached its obligations under article 36(2).[109]

Turning to the remedies available for the U.S. breach, the ICJ rejected Mexico's request for *restitutio in integrum* by way of restoration of *status quo ante* through partial or total annulment of the convictions and sentencings of the fifty-two nationals.[110] Instead, the court followed the established standard of "reparations in an adequate form," as explained by its predecessor court, the Permanent Court of International Justice.[111] The violations in this case were the failure of the United States to inform Mexican nationals of their rights, notify the Mexican consular posts of the detention of their nationals, and to allow for contact and legal representation by the Mexican consular officials.[112] The court did not see automatic reversal as appropriate because the convictions and sentencings were not themselves violations of international laws.[113] In its quest for the appropriate form of reparations, the ICJ followed its holding

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105. *Id.* at 45.
106. *See id.*
107. *Id.* at 45-46.
108. *Id.* at 46.
109. *Id.*
110. *Id.* at 46-50.
111. *Id.* at 47-48 (citing Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction), 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26) ("It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."), *available at* http://www.worldcourts.com/pcij/eng/decisions/1927.07.26_chorzow/). According to the court in *Factory at Chorzów*: "[R]eparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." Case Concerning the Factory at Chorzów (Claim for Indemnity) (The Merits), 1928 P.C.I.J (ser. A) No. 17, at 47 (Sept. 13), *available at* http://www.worldcourts.com/pcij/eng/decisions/1927.07.26_chorzow/.
112. *Avena*, 2004 I.C.J. at 49.
113. *Id.*

in the *LaGrand Case*.[114] Accordingly, it determined that "review and reconsideration" was the appropriate remedy for article 36 violations.[115] In doing so, it allowed the United States to choose its own methods, but not without qualification.[116] The "review and reconsideration" must "take account of the violation of the rights set forth in the Convention."[117] The United States must therefore determine if actual prejudice occurred as a result of the violations that would affect the outcome of the proceedings against the criminal defendants.[118] The court then held that "review and reconsideration" must occur with regard to international law obligations and without regard for U.S. constitutional due process rights.[119] Furthermore, the ICJ held that clemency is not sufficient to satisfy international obligations; however, it found certain clemency procedures could supplement judicial review when the judicial system fails to address the grievances adequately.[120] Thus, the ICJ required more from the United States than it did in the 2001 *LaGrand Case*.

IV. ANALYSIS

At first glance, it appears as though the ICJ's *Avena* decision is simply an extension of the *LaGrand Case* from three years earlier.[121] However, the implications of the *Avena* court are proving to hold more weight than was accorded to the ICJ's decision in 2001, although the full effect of *Avena* remains to be seen. Not only does the noted case involve the rights of fifty-two foreign nationals, as opposed to simply two in the *LaGrand Case*, but the court is strengthening its resolve to force the United States to remedy its Vienna Convention violations in a more substantive manner.[122] In fact, the ICJ now analyzes U.S. *domestic* policy for conformity with this *international* treaty, and expressly mandates how the United States should reconcile the two bodies of law.[123] The U.S. reaction to the decision, along with the evolution of thought regarding the reconciliation of U.S. practices with its treaty obligations under international law, makes the *Avena* ruling a prominent force within the

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114. *Id.* at 53-54.
115. *Id.*
116. *Id.* at 51.
117. *Id.* at 53 (quoting LaGrand Case (F.R.G. v. U.S.) (June 27, 2001), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm).
118. *Avena*, 2004 I.C.J. at 51.
119. *Id.* at 53.
120. *Id.* at 54.
121. *See id.* at 58-61; *cf. LaGrand Case* at 514-17.
122. *See Avena*, 2004 I.C.J. at 58-61; *cf. LaGrand Case* at 514-17.
123. *Avena*, 2004 I.C.J. at 53-54.

ever-evolving U.S. domestic judicial system. In fact, it appears that early signs allude to the prospect that review and reconsideration will be mandated on federal and state courts reviewing alleged Vienna Convention violations.[124] Nevertheless, the United States continues to refuse to give full weight to the ICJ decision beyond the minimal cursory review that the decision expressly mandated.

There has been a significant debate regarding the Vienna Convention's effectiveness as a binding U.S. law in relation to domestic laws. The Supremacy Clause of the United States Constitution clearly states that "all Treaties . . . shall be the supreme Law of the Land."[125] The Vienna Convention was codified in the United States in 1969.[126] At this point, the document was binding between signatories such as the United States, and its incorporation into U.S. federal domestic law served to allow it to preempt conflicting laws of the fifty U.S. states.[127] The Optional Protocol of the Vienna Convention also provides that the ICJ is the tribunal responsible for Vienna Convention claims.[128] Furthermore, article 94 of the United Nations Charter states, "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."[129] Yet, the Convention's enforcement in the courts of the United States is hampered by the necessity that its provisions be applied in a manner that is consistent with domestic federal law, which is also supreme in the U.S. judicial system.[130] Moreover, the United States hesitates to hold the treaty as binding when it appears to conflict with judicially crafted rules such as the doctrine of procedural default. It is this very tension that has caused the greatest international concern over U.S. reluctance to defer to the ICJ's holdings in cases that have dealt with Vienna Convention violations.[131]

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124. *See, e.g.*, *id.* at 49.

125. U.S. CONST. art. VI.

126. *See* Ray, *supra* note 18, at 1735 (citing 115 CONG. REC. S30,953, S30,997 (daily ed. Oct. 22, 1969)).

127. *Id.* the Vienna Convention is a self-executing treaty. As such, it is enforceable as federal law without additional domestic legislative action.

128. Optional Protocols, *supra* note 19.

129. U.N. CHARTER art. 94.

130. U.S. CONST. art. VI.

131. The Bush Administration has recently withdrawn from the Optional Protocol of the Vienna Convention. Associated Press, *Court Examines Rights of Foreigners on Death Row*, N.Y. TIMES, Mar. 28, 2005, at A1. Thus, the United States no longer officially recognizes the ICJ as having the final decision on Vienna Convention violations, Optional Protocols, *supra* note 19, although the United States vows to continue to abide by the treaty itself. Associated Press, *supra*. However, in February 2005, President Bush directed state courts to follow the ICJ's directive to review and reconsider the cases of Medellin and fifty other Mexican nationals. *Id.*

Persistent conflicts between the ICJ decisions and U.S. law generated the controversies that led to the *LaGrand Case* and *Avena* rulings.[132] Prior to the *Avena* decision, the ICJ ruled in two matters involving alleged U.S. violations of article 36 of the Vienna Convention.[133] Both Paraguay and Germany sought provisional measures to prevent executions of their nationals in 1998 and 1999, respectively.[134] Although the ICJ issued orders requesting stays of execution until the Court could rule on the violations, the Supreme Court of the United States ignored both, and it allowed the executions to occur as scheduled.[135] The Supreme Court concluded in both instances that the foreign nationals' claims had procedurally defaulted, as they had not been raised initially in the state court system at the trial level or postconviction adjudication.[136] The application of this domestic rule provides no forum by which foreign nationals can assert a Vienna Convention violation until such time as they are barred from doing so.[137] This discrepancy raised a red flag for the ICJ, which issued a decision in the *LaGrand Case* regardless of the fact that the executions of both of the foreign nationals at issue in the case had already occurred because the ICJ's jurisdiction under the Vienna Convention extends to the two nations in the case, not the two German nationals whose criminal adjudication was examined.[138]

The *LaGrand Case* decision is noteworthy for two reasons. It was the first time that domestic criminal courts were required by an international tribunal to take the Vienna Convention into account. This

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132. *See generally* Avena & Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1, 53-54 (Judgment Mar. 31); LaGrand Case (F.R.G. v. U.S.) (June 27, 2001) at 466, *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm.

133. *See* Request for the Indication of Provisional Measures Order, Vienna Convention on Consular Relations (Para. v. U.S.) (Apr. 9, 1998), ¶ 41, *available at* http://www.icj-cij.org/icjwww/idocket/ipaus/ipausorder/ipaus_iorder_090498.htm; Request for the Indication of Provisional Measures Order, Vienna Convention on Consular Relations (F.R.G. v. U.S.) (Mar. 3, 1999), ¶ 29, *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusorder/igus_order_19990303.htm.

134. *See* Request for the Indication of Provisional Measures Order, Vienna Convention on Consular Relations (Para. v. U.S.), ¶ 3-5 (Apr. 9, 1998), *available at* http://www.icj-cig.org/icjwww/idocket/ipaus/ipausorder/ipaus_iorder_090498.htm; Request for the Indication of Provisional Measures Order, Vienna Convention on Consular Relations (F.R.G. v. U.S.), ¶ 5 (Mar. 3, 1999), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusorder/igus_order_19990303.htm.

135. *See* Breard v. Greene, 523 U.S. 371, 378-79 (1998); Federal Republic of Germany v. United States, 526 U.S. 111, 111-12 (1999). Significantly, in November 1998 Paraguay asked the court to discontinue the proceedings against the United States with prejudice. Request for the Indication of Provisional Measures Order, Vienna convention on Consular Relations (Para. v. U.S.) (Nov. 10, 1998), *available at* http://icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm.

136. *See Breard*, 523 U.S. at 371; *F.R.G.*, 526 U.S. at 111-12.

137. *Avena*, 2004 I.C.J. at 45-46.

138. *LaGrand Case*, 2001 I.C.J. at 472.

decision also served as the ICJ's introduction of the "review and reconsideration" remedy for Vienna Convention violations.[139] Although the ICJ left the means by which the remedy was to be implemented to the United States, the court mandated for the first time that the United States implement the terms of an international treaty in its domestic legal sphere.[140] However, even after the *LaGrand Case*, U.S. courts believed that the clemency process already in place was sufficient to comply with the "review and reconsideration" requirement, an approach which has troubled the rest of the world because it does not guarantee that violations of international obligations will be heard prior to the realization of capital punishment.[141] Thus, although the *LaGrand Case* laid the foundation for a potentially adequate means of remedying Vienna Convention violations within the United States, its mandate has not proven to be effective both because of U.S. reluctance to be bound by an international tribunal's decision and by the ICJ's deferential remedy requirements.[142] In sum, the implications of the *LaGrand Case* ruling were limited as courts within the United States continued to impose the procedural bar for claims alleging Vienna Convention violations.

There is evidence that the courts of the United States are perhaps more willing to comply with the ICJ directives than they were at the time of the *LaGrand Case*. For instance, the United States did not execute the three Mexican nationals who had exhausted all appeals in accordance with the ICJ Order requesting provisional measures during *Avena*.[143] In both *Breard* and the *LaGrand Case*, two U.S. courts did not give deference to the ICJ's requests and refused to postpone executions of foreign nationals.[144] Moreover, in *Avena*, the ICJ clarified the holding in the *LaGrand Case* by stating that the "review and reconsideration" requirement is "not without qualification."[145] As in the *LaGrand Case*, the court indicated that the United States must look at the issue in terms of prejudice to each case.[146] However, the ICJ in *Avena* demanded that the United States permit "review and reconsideration" of Vienna Convention violations in its courts without the use of the procedural

139. *Id.* at 508-14.

140. *Id.* at 495-98.

141. *Avena*, 2004 I.C.J. at 44-45.

142. *See LaGrand Case*, 2001 I.C.J. at 516; *see also* Valdez v. Oklahoma, 46 P.3d 703, 709 (Okla. Crim. App. 2002).

143. Request for the Indication of Provisional Measures Order, Avena & Other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. 2, 15 (Feb. 5, 2003).

144. Breard v. Greene, 523 U.S. 371, 378-79 (1998); LaGrand v. Stewart, 133 F.3d 1253, 1277 (9th Cir. 1998).

145. *Avena*, 2004 I.C.J. at 51.

146. *Id.*

default bar that has been employed until this point.[147] Furthermore, the court held that the executive clemency process alone is not sufficient to satisfy the requirements of the ICJ ruling on the rights afforded to foreign nationals under article 36 of the Vienna Convention.[148] Thus, the ICJ, an international tribunal, has required that the United States provide for the implementation of the ICJ's decision without regard for the federal domestic laws currently in place.[149]

Although the *LaGrand Case* decision initially defined the scope of U.S. obligations under the Vienna Convention,[150] it was the *Avena* decision which has thus far had the most widespread influence in defining the Vienna Convention's place within the U.S. domestic system. This is evidenced by several recent decisions by state courts that appear to be in accordance with the ICJ's directions to review and reconsider, as well as minimal efforts by the United States State Department to inform courts of the ICJ's decision.[151] As can be seen from these rulings, however, U.S. courts remain reluctant to hold the ICJ's directives as binding.[152]

Of most significance to date, Oklahoma stayed the execution of Osbaldo Torres Aguilera, one of the three Mexican nationals who had exhausted judicial remedy and who was closest to execution at the time of the ICJ's *Avena* decision.[153] Torres was arrested, convicted, and sentenced to death for two murders in 1993.[154] He was not informed of his rights under the Vienna Convention.[155] When appeals proved unsuccessful, he filed for postconviction relief with the Oklahoma Court of Criminal Appeals.[156] After the ICJ issued its decision in the *Avena* case, the United States State Department asked the Oklahoma Board of Pardon and Parole to consider clemency for Torres on April 23, 2004, specifically stating the following:

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147. *Id.* at 51-52.

148. *Id.* at 54.

149. *See id.* at 51-54.

150. *LaGrand Case*, 2001 I.C.J. at 466.

151. *See, e.g.*, Sean D. Murphy, *Implementation of* Avena *Decision by Oklahoma Court*, 98 AM. J. INT'L L. 581 (2004); Medellin v. Dretke, 371 F.3d 270, 279-80 (5th Cir. 2004); Plata v. Dretke, 111 Fed. Appx. 213, 216-27, 2004 WL 1814089, at *2-*3 (5th Cir. 2004); Murphy, *supra* at 583-84 (quoting Torres v. Oklahoma, No. PCD-04-442, slip. Op. at 2-5, 8-12 (Okla. Crim. App., May 13, 2004) (Chapel, J., concurring)).

152. *Medellin*, 371 F.3d at 279-80; *Plata*, 2004 WL 1814089, at *2.

153. Press Release, Office of Governor Brad Henry, Gov. Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), *available at* http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1 [hereinafter Clemency Press Release].

154. Torres v. Mullin, 124 S. Ct. 562, 563 (2003).

155. *Id.*

156. *Id.*

> The Department of State requests that in its review of the case the Pardon and Parole Board give careful consideration to the pending clemency request of Mr. Torres, including by considering the failure to provide Mr. Torres with consular information and notification pursuant to Article 36 of the VCCR and whether that failure should be regarded as having ultimately led to his conviction and sentence.[157]

This request is therefore an acknowledgement by the State Department of its desire to see the state criminal courts review and reconsider the convictions and sentencings in accordance with the ICJ's determination.[158] In response, the Pardon and Parole Board recommended clemency, and Governor Brad Henry of Oklahoma commuted the death sentence to life imprisonment without parole.[159]

The commuted death sentence of one of the Mexican nationals under the clemency process is not what makes the Oklahoma judicial system's response to the ICJ important. Instead, it is the response of the state court system to the *Avena* decision which holds the most significance. On the same day that Torres's sentence was commuted, May 13, 2004, the Oklahoma Court of Criminal Appeals adjudicated Torres's application for postconviction relief.[160] The court stayed the execution pending an evidentiary hearing to determine whether Torres was prejudiced by the international violations or by ineffective assistance of counsel.[161] Most notable was Judge Charles S. Chapel's concurrence, which expressly acknowledged the binding nature of the ICJ's decisions.[162] Specifically, Judge Chapel found that "[t]he United States is bound by the terms of the treaty and the State of Oklahoma is obligated by virtue of the Supremacy Clause to give effect to the treaty."[163] The court went on to state that "[a]s the Court is bound by the treaty itself, we are bound to give full faith and credit to the *Avena* decision."[164] Judge Chapel noted that, although normally Torres's claim would be barred because this was the first time it was raised, the ICJ's determination that procedural bars were inappropriate to fulfill review and reconsideration requirements if they prevented Vienna Convention claims must be given

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157. Murphy, *supra* note 151, at 582 (quoting letter from the United States Department of State Legal Advisor).

158. *See id.*

159. *See* Clemency Press Release, *supra* note 153.

160. Murphy, *supra* note 151, at 583-84 (citing Torres v. Oklahoma, No. PCD-04-442, slip. Op. At 2-5, 8-12 (Okla. Crim. App., May 13, 2004) (Chapel, J., concurring)).

161. *Id.*

162. *Id.* at 583-84.

163. *Id.* at 583.

164. *Id.*

full effect in the U.S. judicial system.[165] Thus, the judge held that "[i]n order to give full effect to *Avena*, [the court is] bound by its holding to review Torres's conviction and sentence in light of the Vienna Convention violation, without recourse to procedural bar."[166] Ultimately, the court remanded the case for evidentiary hearing on a basis other than prejudice under Vienna Convention violations.[167] This case is nevertheless noteworthy as it is evidence that at least some state criminal courts are reviewing the Vienna Convention violation cases under the standard articulated by the ICJ in *Avena*.[168]

Other cases for the Mexican nationals included in the *Avena* decision are currently being revisited for a determination of prejudice under the review and reconsideration standard. Although it appeared from the *Torres* case that U.S. courts were taking the ICJ's *Avena* decision seriously, the actions of the United States Court of Appeals for the Fifth Circuit, for one, call this presumption into doubt.[169] Two of the Mexican nationals whose Vienna Convention rights were violated have since had their habeas petitions denied by the Fifth Circuit.[170] Though the Fifth Circuit appeared to be reviewing and reconsidering its cases, it was not giving due weight to the ICJ's purpose for the remedy.[171]

In *Medellin v. Dretke*, the Fifth Circuit held on May 20, 2004, that a Mexican national's Vienna Convention claim was procedurally defaulted.[172] From the time of Jose Medellin's arrest for murder in 1993 until 1997, he was not informed of his rights to have contact with the Mexican consulate.[173] The court reasoned that, although both the *LaGrand Case* and *Avena* held that procedural default could not bar Vienna Convention claims, the Supreme Court's decision in *Breard* held otherwise.[174] Since only a Supreme Court decision can overrule one of its previous holdings, the ICJ's holding could not prevent the procedural bar in this case.[175] Thus, despite its concession that an article 36 violation

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165. *Id.* at 583-84.
166. *Id.* at 583.
167. *Id.* at 584.
168. *See id.* at 582-84.
169. *See, e.g.*, Medellin v. Dretke, 371 F.3d 270, 279-80 (5th Cir. 2004); Plata v. Dretke, 111 Fed. Appx. 213, 216-27, 2004 WL 1814089, at *2-*3 (5th Cir. 2004).
170. *Medellin*, 371 F.3d at 281; *Plata*, 2004 WL 1814089, at *5.
171. *See Medellin*, 371 F.3d at 279-80; *Plata*, 2004 WL 1814089, at *2-*3.
172. *Medellin*, 371 F.3d at 279-90.
173. The Int'l Justice Project, *Foreign Nationals: Jose Medellin*, *available at* http://www.internationaljusticeproject.org/nationalsJMedellin.cfm.
174. *Medellin*, 371 F.3d at 280.
175. *Id.*

occurred, the Fifth Circuit refused to follow *Avena* in light of the Supreme Court's reluctance to expressly overrule *Breard v. Greene*.[176]

The Fifth Circuit has also ruled on another *Avena* case, *Plata v. Dretke*.[177] In this case, however, the court did address the merits of the Vienna Convention claim to determine if it prejudiced the conviction and sentencing.[178] Daniel Plata, a Mexican national, was convicted of murder and sentenced to death.[179] The district court had ruled that his application for writ of habeas corpus on the Vienna Convention claim was procedurally defaulted and that, even if it was not, Plata would have failed to prove that he was prejudiced.[180] On appeal, the Fifth Circuit avoided a determination of whether Plata procedurally defaulted.[181] Instead, the court simply held that Plata did not show prejudice and thus a determination of the application of the procedural bar was irrelevant.[182] As the same court ruled just three months before that a procedural bar still existed, it appears as though its ruling in this case on August 16, 2004, purposefully did not address the procedural bar, as the court believed it could come to the same determination without it.[183]

The post-*Avena* determinations by the Fifth Circuit allude to the court's willingness to technically apply the ICJ's *Avena* directives but to deny the full effect of the ruling by maintaining that the procedural bar exists until such time as the highest court in the United States expressly states otherwise.[184] As of the date of this publication, the Supreme Court of the United States has granted certiorari to the *Medellin* case and has proceeded with oral arguments.[185] This case may be the moment that the Supreme Court determines the full effect that the ICJ's rulings shall have on United States law.

V. CONCLUSION

The ICJ's recent decision in *Avena* is certain to have a lasting effect on U.S. domestic jurisprudence. Yet, despite the ICJ's multiple attempts to convince the United States to remedy Vienna Convention violations,

176. *Id.*; Breard v. Greene, 523 U.S. 371, 378-79 (1998).
177. Plata v. Dretke, 111 Fed. Appx. 213, 2004 WL 1814089 (5th Cir. 2004).
178. *See id.* at *3.
179. *See id.* at *1.
180. *Id.* at *2.
181. *See id.* at *1-*3.
182. *Id.* at *3.
183. *See id.* at *1-*3.
184. *See* Medellin v. Dretke, 371 F.3d 270, 279-80 (5th Cir. 2004); *Plata*, 2004 WL 1814089, at *1-*3.
185. *Medellin*, 125 S. Ct. 686 (2004).

the courts within the United States remain hesitant to give full weight to the ICJ's ruling, even though many courts are now implementing the ICJ's "review and reconsideration" requirement. This symptom is indicative of a larger problem: U.S. reluctance to be governed by international tribunals enforcing international law, regardless of the fact that the United States has codified many of these international laws. The *Avena* decision was a bold step in that the ICJ is now requiring action from the U.S. judiciary to remedy violations of international law. More, however, is necessary than a ruling by the ICJ; action by the U.S. government, in general, and the United States Supreme Court, specifically, is required to enforce the rights of foreign nationals in the courts of the United States under the Vienna Convention.

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