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From *LaGrand* and *Avena* to *Medellin*—A Rocky Road Toward Implementation

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I. INTRODUCTION 8
II. COMPARING *LAGRAND* AND *AVENA*: THE ICJ REFINES ITS JURISPRUDENCE ON ARTICLE 36 10
A. *Dual Nationality* 10
B. *Status of Consular Assistance as a Human Right* 11
C. *Diplomatic Protection* 13
D. *Interpretation of the Obligation To Inform "Without Delay"* 18
E. *Interference with the Domestic Judicial System* 19
F. *Remedies* 22
III. IMPLEMENTATION OF *LAGRAND* AND *AVENA* IN U.S. COURTS—REVIEW AND RECONSIDERATION 26
A. *Bars to Review and Reconsideration* 28
1. No Individual Right 28
2. Procedural Default and the Preclusion of Claims in Habeas Corpus Proceedings 32
3. No Remedy/Remedy Asked for Not Available 34

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B. *Conducting Review and Reconsideration—Inquiring into Prejudice* 37
C. *The* Torres *Case—A Welcome First* 44
IV. DEVELOPMENTS SURROUNDING *MEDELLIN* 47
A. *The* Medellin *Dismissal* 49
B. *Strategic Moves of the White House—The Presidential Memorandum and U.S. Withdrawal from the Optional Protocol* 52
C. *The Task of U.S. Courts—An International Law Perspective* 53
D. *A Few Words of Caution and Some Loose Ends* 55
V. CONCLUSION 57

I. INTRODUCTION

In 1982, Arizona State Police arrested two brothers, Karl and Walter LaGrand, after they attempted an armed bank robbery during which they murdered an employee and severely wounded another. Both were German nationals, having been born in Germany and to a German mother. However, the Arizona Superior Court tried and sentenced them to death without the brothers having been informed about their right to consular assistance.[1] This right is laid down in article 36, paragraph 1*(b)*, of the Vienna Convention on Consular Relations of 24 April 1963 (Vienna Convention or Convention) in the following terms:

> If he [the person arrested] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph. . . .[2]

It was not until 1992 that the German authorities became aware of the situation.

Germany subsequently took extensive steps to save the brothers' lives. Nevertheless, the State of Arizona executed Karl LaGrand on February 24, 1999. On March 2, 1999, the day before Walter LaGrand's

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1. *See* State v. LaGrand, No. CR-07426, Minute Entry (Pima County Super. Ct. Mar. 2, 1999).

2. Vienna Convention on Consular Relations, art. 36, Apr. 4, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

execution date, Germany submitted an application and a request for provisional measures to the International Court of Justice (ICJ). Within less than twenty-four hours, the ICJ indicated provisional measures, namely that the "United States should take all measures at its disposal to ensure that Walter LaGrand [was] not executed pending the final decision" of the ICJ.[3] Walter LaGrand was nevertheless executed on March 3, 1999.

Germany continued to pursue the case.[4] In its Judgment of 27 June 2001, the ICJ held that the United States had breached its obligations to Germany and the LaGrand brothers under the Vienna Convention by not informing Karl and Walter LaGrand of their rights under the Convention and by not allowing review and reconsideration of their convictions and sentences.[5] It furthermore held that, where U.S. courts sentence German nationals to severe penalties without respecting their rights under article 36, paragraph 1*(b)* of the Convention, the United States, 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.[6]

While decisions of the ICJ are only binding between the parties to a case,[7] the decision was of obvious significance to other States parties to the Convention which faced similar conduct of the United States to the detriment of their nationals. Mexico, whose nationals represent the largest foreign inmate population in U.S. prisons, found itself confronted with a multitude of cases similar to that of the LaGrand brothers. Hence, on January 9, 2003, Mexico instituted proceedings before the ICJ addressing the situation of some fifty of its nationals who had all been sentenced to death in the United States and whose rights under article 36, paragraph 1*(b)*, had not been respected.[8]

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3. LaGrand Case (Germany v. United States of America), 1999 I.C.J. 9, 16 (Order of 3 March 1999—Request for the Indication of Provisional Measures).

4. In contrast, in a prior ICJ case concerning a Paraguayan national, Angel Breard, Paraguay withdrew the case after Breard was executed. *See* Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), 1998 I.C.J. 248 (Apr. 9).

5. LaGrand Case (Germany v. United States of America), 2001 I.C.J. 466, 475 (June 27).

6. *Id.* at 513.

7. ICJ President Guillaume, however, stressed in his Declaration appended to the *LaGrand* judgment that there could not be an *a contrario* interpretation with respect to nationals of other States. *Id.* at 517. The ICJ then made the substance of this Declaration an integral part of the *Avena* judgment. Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 12, 69-70 (Mar. 31); *see also infra* note 227 and accompanying text.

8. *Avena*, 2004 I.C.J. at 17.

In its Judgment of 31 March 2004, the ICJ held that by not informing the Mexican nationals of their rights and by not notifying the Mexican authorities, the United States had breached its obligations under article 36 of the Convention.[9] With regard to three individuals whose sentences had already become final, the ICJ held that the United States had violated its obligation to provide review and reconsideration of their convictions and sentences as set out in the *LaGrand* judgment.[10] The ICJ furthermore held that where the convictions and sentences had not yet become final, and in future cases, review and reconsideration undertaken by the U.S. judiciary was to be the appropriate remedy for breaches of the Convention.[11]

In many respects, *Avena* seemed to present the ICJ with a sequel to the *LaGrand* case. Obviously, it was in the interest of Mexico to present *Avena* as a mirror image to *LaGrand*—a slam-dunk case building on Germany's success in the preceding case. On the flip side, the United States sought to distinguish the cases wherever possible to avoid exactly that impression.

In Part II of this Article, we will first present an overview of how the ICJ in *Avena* extended and refined its jurisprudence on the Convention first developed in *LaGrand*. Specifically, we will address the issues of dual nationality, the status of consular assistance as a human right, diplomatic protection, the interpretation of the obligation to inform "without delay," interference with the domestic judicial system, and remedies. In Part III, we will address our main concern, the implementation of the *LaGrand* and *Avena* judgments in U.S. courts. In Part IV we will then trace the developments in *Medellin v. Dretke*, which reached the United States Supreme Court and led to certain steps of the U.S. government by which the United States, among other things, left the system of compulsory ICJ jurisdiction of Vienna Convention disputes.

II. COMPARING *LAGRAND* AND *AVENA*: THE ICJ REFINES ITS JURISPRUDENCE ON ARTICLE 36

A. *Dual Nationality*

In some respects, such as the number of individuals concerned and their nationality, the *LaGrand* and *Avena* cases are quite different on the facts. Concentrating on these differences, the United States alleged in its objections to admissibility that, unlike the LaGrand brothers, some of the

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9. *Id.* at 53-54.
10. *Id.* at 57.
11. *Id.* at 70.

Mexican individuals concerned possessed dual nationality at the time of their arrest or detention, and thus were not entitled to any rights under article 36.[12] The United States thus invited the ICJ to rule that Mexico would have to establish first that it had a right to exercise diplomatic protection with respect to these nationals.

The ICJ, however, found that, as Mexico had also brought a claim in its own right based on the alleged violations of article 36, the question would have to be decided on the merits.[13] Thus, addressing the question in the merits stage, the ICJ disagreed with the United States, holding that it was the United States that had the burden of proof on the issue of whether some of the Mexican nationals also held U.S. citizenship, given that it was the party seeking to establish this very fact.[14] Rejecting U.S. arguments that Mexico would nevertheless be under a duty to produce certain documents in the hands of the Mexican authorities, the ICJ found that "[i]t was for the United States to seek such information, with sufficient specificity, and to demonstrate both that this was done and that the Mexican authorities declined or failed to respond to such specific requests."[15] The ICJ went on to state that "[a]t no stage, however, has the United States shown the Court that it made specific enquiries of those authorities about particular cases and that responses were not forthcoming."[16]

The ICJ accordingly concluded that the United States had "not met its burden of proof in its attempt to show that persons of Mexican nationality were also United States nationals."[17]

B. Status of Consular Assistance as a Human Right

The issue of whether the right to consular protection had acquired the status of a human right presented itself both in *LaGrand* and *Avena*. However, in the latter case, much to the chagrin of international human rights advocates, Mexico, by seeking to push the ICJ to pronounce on the issue, was rebuked by the ICJ with a rather stark statement that the Mexican assertion was unfounded, which seems to undermine previous tendencies in doctrine and practice for the foreseeable future.[18] Germany had argued in *LaGrand* that "the right of the individual to be informed

12. *Id.* at 36. Mexico did not dispute the argument that dual nationals would not have a right to be advised. *Id.*
13. *Id.* at 37.
14. *Id.* at 41.
15. *Id.* at 42.
16. *Id.*
17. *Id.*
18. *Id.* at 60-61.

without delay under article 36, paragraph 1, of the Vienna Convention was not only an individual right but has today assumed the character of a human right."[19] The Court avoided pronouncing on the issue at that time. Having found that the United States violated the rights accorded by article 36, paragraph 1 to the LaGrand brothers, the ICJ did not deem it necessary to consider the additional argument developed by Germany in this regard.[20] The critical aspect contributing to this exercise in judicial restraint may have been that the judges sought to avoid having to address this issue at a point where the Inter-American Court of Human Rights had just taken a very progressive stand on the subject.[21] In its advisory opinion of October 1, 1999, the Inter-American Court of Human Rights had stated "[t]hat Article 36 of the Vienna Convention on Consular Relations *concerns* the protection of the rights of a national of the sending State and is part of the body of international human rights law."[22] In an article on the *LaGrand* case, Sir Robert Jennings, a former President of the ICJ, had welcomed the silence of the Hague Court on this matter and opined that, "[f]or this forbearance all international lawyers should give heartfelt thanks."[23] This statement, from one of the most prominent international lawyers from the conservative camp, demonstrates vividly how controversial this issue is to be regarded.

Alas, counsel for Mexico seems to have misread the ICJ in *LaGrand* and pushed the point once more.[24] Thus, Mexico argued

> that the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Vienna Convention; . . . this right, as such, is so fundamental that its infringement will *ipso facto* produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right.[25]

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19. LaGrand Case (Germany v. United States of America), 2001 I.C.J. 466, 494 (June 27).

20. *Id.* at 514.

21. I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999, Series A no. 16, at 65, *available at* http://www.corteidh.or.cr/serieapdf_ing/seriea_16_ing.pdf.

22. *Id.*

23. Sir Robert Jennings, *The* LaGrand *Case*, 1 L. & PRAC. INT'L CT. & TRIBUNALS 13 (2002).

24. Mexico, in its Application of January 9, 2003, asked the Court to adjudge and declare "that the right to consular notification under the Vienna Convention is a human right." Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 12, 20 (Mar. 31).

25. *Id.* at 60-61.

The United States unsuccessfully objected that the ICJ would lack jurisdiction to address this question. The ICJ considered that the question "[was] indeed one of interpretation of the Vienna Convention, for which it [did have] jurisdiction."[26]

However, the ICJ shut the door rather forcefully on the argument characterizing article 36 rights as fundamental human rights by stating that, while it need not decide whether or not the Vienna Convention rights are human rights, "neither the text nor the object and purpose of the Convention, nor any indication in the *travaux préparatoires*," support Mexico's conclusion in that regard.[27] Thus, in the end, the Mexican argument backfired, with the ICJ curtailing the potential reach of a human right to consular notification. From the point of view of progressive evolution of human rights, this story evokes the Latin phrase *si tacuisses*. . . .

In fact, this critique applies to both Mexico and the ICJ; while Mexico clearly should not have pressed the issue against all odds, the ICJ could have easily held back and confined itself again to the position that it need not decide the question. This is all the more true because for the individual concerned, what matters is that one has an individual right that one can assert and which is enforceable in the domestic courts of the receiving State, not whether this right is of an otherwise elevated or universal nature.

C. Diplomatic Protection

In *LaGrand*, the law of diplomatic protection was canvassed from two different angles. First, the ICJ was called upon to rule whether article 36 actually creates individual rights, which, if violated by the receiving State, could then give rise to a claim that the State of nationality has the right to espouse if it so chooses. Second, the ICJ was presented with the question of how the rule of exhaustion of local remedies would operate where the claim in question was based both on the violation of the national's individual right and the violation of the State's own direct right under a treaty.

The question whether article 36 creates individual rights was a central one in *LaGrand*, as it determined whether Germany would have standing to raise a claim based on diplomatic protection. In its memorial, Germany asked the ICJ to rule:

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26. The United States, in its fourth objection to jurisdiction, claimed that the ICJ would lack jurisdiction to adjudicate whether the right to consular notification constituted a human right. *Id.* at 33.

27. *Id.* at 61.

> [T]hat the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36 subparagraph 1*(b)* of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36 paragraph 1 of the said Convention.[28]

The United States, on the other hand, contended "that rights of consular notification and access under the Vienna Convention are rights of States, and not of individuals, even though these rights may benefit individuals by permitting States to offer them consular assistance."[29]

The ICJ followed the German argument and held that article 36 does indeed create individual rights.[30] A violation of such rights thus gives rise to a claim of the affected national, which the state of nationality can then espouse.[31]

The Court's finding in *LaGrand* that article 36 creates individual rights immediately raised the next issue: whether these individual rights are subject to the rule of international law demanding that local remedies be exhausted before a claim of diplomatic protection can be brought by the state of nationality.

In *LaGrand* the United States argued that Germany's espousal of the LaGrands' claims was inadmissible as the LaGrands had not exhausted local remedies. In fact, the United States contended that Karl and Walter LaGrand had been precluded from raising their Vienna Convention claims in federal court because they had not raised it in the preceding state court proceedings. This, however, was due to the fact that they were not informed of their rights under article 36 until after they had exhausted all their appeals.[32] The ICJ acknowledged the fact that counsel for the LaGrands did not raise their rights under the Convention until after they were blocked from doing so by the procedural default rule, but held that "the United States may not now rely . . . on this fact in order to preclude the admissibility of Germany's first submission, as it was the

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28. LaGrand Case (Germany v. United States of America), 2001 I.C.J. 466, 472 (June 27).

29. *Id.* at 493.

30. *Id.* at 494.

31. The ICJ concluded "[b]ased on the text of these provisions . . . that Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person." *Id.*

32. *Id.*

United States itself which had failed to carry our [sic] its obligation under the Convention to inform the LaGrand brothers."[33]

In *Avena*, the ICJ faced a more complex question. While in *LaGrand* it had been possible to decide the issue of exhaustion of local remedies on the simple facts specific to the two brothers, in *Avena* the ICJ was now faced with fifty-two cases at very different stages of their proceedings.[34] The arguments on both sides closely mirrored those brought by Germany and the United States in *LaGrand*. Mexico adopted Germany's formulation that the United States "violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals."[35] The United States argued that, regarding the question of exhaustion of local remedies, the ICJ "should find inadmissible Mexico's claim to exercise its right of diplomatic protection on behalf of any Mexican national who has failed to meet the customary legal requirement of exhaustion of municipal remedies."[36]

The ICJ addressed the question of local remedies in two steps. First, it confirmed the applicability, in principle, of the local remedies rule with respect to article 36 claims.[37] However, in a second step, the ICJ tackled the problem that Mexico could thus have been required in some cases to bring separate claims for injury in its own right and injury to its nationals stemming from the very same set of facts.[38] The threat of such a wasteful duplication of claims arose because Mexico was entitled to bring a claim for injury in its own right at any time after the violation of article 36. However, in cases where a national had not yet exhausted local remedies, Mexico would have had to wait until the national did in fact exhaust remedies to bring a claim based on the very same facts, but not for injury to its national.

The ICJ dealt with this looming threat of wasteful litigation by cutting the Gordian Knot, as it were, holding that the exhaustion of local

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33. *Id.*
34. Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 12, 27 (Mar. 31).
35. *Id.* at 20-21.
36. *Id.* at 34.
37. The ICJ first observed

> that the individual rights of Mexican nationals under paragraph (1)*(b)* of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States. Only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection.

Id. at 35.
38. *Id.* at 35-36.

remedies rule did not apply to "special circumstances" of "interdependent rights" as presented by article 36 claims, where a violation of the State's right to be afforded an opportunity to assist may also constitute a violation of the individual's right to information.[39] This solution strikes us as less than satisfactory. First, while the International Law Commission of the United Nations (ILC), its most important codification body, had just completed the restatement of the customary international law of diplomatic protection, including the traditional approach to the local remedies rule,[40] the ICJ has now created a substantial exception along divergent lines.[41] In fact, this may even be a case where the exception swallows the rule, as it seems that in the majority of "mixed claims" (to adopt the language of the ILC draft articles), the ICJ's "special circumstances" logic would apply. Moreover,

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39. *Id.* at 36. The ICJ further observed that

> violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of the rights which it claims to have suffered both directly and through the violation of the individual rights [of its] nationals under Article 36, paragraph (1)*(b).* The duty to exhaust local remedies does not apply to such a request.

Id.

40. Report of the International Law Commission, Fifty-Sixth Session (3 May-4 June and 5 July-6 August 2004), GAOR 59th Sess., Supp. No. 10, U.N. Doc. A/59/10 (2004), *available at* http://www.un.org/law/ilc/reports/2004/2004report.htm [hereinafter Report of the International Law Commission].

41. Judge Vereshchetin's separate opinion aptly identified the problem:

> In its Commentary to Article 9 [11] of the said Draft the ILC, basing itself on several judgments of this Court dealing with diplomatic protection cases and related issues of the exhaustion of local remedies (Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959; United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980; Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989), stated:
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> > In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant . . . . If a claim is preponderantly based on injury to a national this is evidence of the fact that the claim would not have been brought but for the injury to the national . . . . The principal factors to be considered in making this assessment are the subject of the dispute, the nature of the claim and the remedy claimed.
>
> Article 9[11], to which the above-cited Commentary refers, reads as follows:
>
> > Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in article 7[8]. [Article 7[8] deals with Stateless persons and refugees.]

Avena, 2004 I.C.J. at 80-81 (separate opinion of Judge Vereshchetin) (alterations in original) (citations omitted).

the ICJ, in our opinion, easily could have followed the approach of the ILC articles and still have arrived at the same conclusion, by identifying other characteristics of the claims that would do away with the requirement of exhaustion of local remedies.

Two such characteristics were identified in the separate opinions of Judges Vereshchetin and Tomka in *Avena*. Judge Vereshchetin saw a distinguishing circumstance in the fact that at the time of the filing of the application by Mexico, all the individuals concerned were already on death row.[42] Given the danger that by the time the ICJ would arrive at ruling on the issue, the individuals concerned would already have been executed, Judge Vereshchetin would have dispensed with the exhaustion of local remedies rule.[43]

The reasoning of Judge Tomka, in his separate opinion, appears to offer an even more principled and attractive way to address the problem. At the time of the proceedings, U.S. courts, practically without exception, held that article 36 did not create individual rights, or that no remedy would be available for such claims.[44] Most importantly, most of the *Avena* claimants were barred by the procedural default rule from raising their article 36 claims for the first time after they finally had been informed.[45] This may be exactly the exception to the exhaustion of local remedies rule envisaged in Judge Tanaka's individual opinion in the *Barcelona Traction* case[46] and addressed by the ILC in its draft on the subject: exhaustion is not required where "[t]he local remedies provide no reasonable possibility of effective redress."[47] In sum, while we find the approach by the ICJ workable, as the interdependence between the detained individual's claim and the State's claim may indeed be a closer one than in the case of other mixed claims, we would have hoped for the ICJ to situate this new category more clearly within its own jurisprudence and the work of the ILC.

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42. *Id.* at 83 (separate opinion of Judge Vereshchetin).
43. *Id.* (separate opinion of Judge Vereshchetin).
44. See *infra* Part III for more details. *But see* U.S. *ex rel.* Madej v. Schomig, 223 F. Supp. 2d 968, 978-80 (N.D. Ill. 2002).
45. *Avena*, 2004 I.C.J. at 114 (separate opinion of Judge Tomka).
46. Case Concerning the Barcelona Traction, Light and Power Co. (Belgium v. Spain), 1970 I.C.J. 3, 146 (Feb. 5) (separate opinion of Judge Tanaka).
47. Report of the International Law Commission, *supra* note 40, at 21.

D. Interpretation of the Obligation To Inform "Without Delay"

In *LaGrand*, it was undisputed that the brothers had not been informed without delay of their rights under the convention.[48] In *Avena*, however, the parties disagreed in their interpretation of the term "without delay" in article 36, paragraph 1*(b)*.[49] Mexico argued that the Convention requires that information about consular rights and the opportunity for consular access be given before "any action potentially detrimental to the foreign national's rights" is taken.[50] The ICJ clarified:

> Article 36, paragraph 1*(b)*, contains three separate but interrelated elements: the right of the individual concerned to be informed without delay of his rights under Article 36, paragraph (1)*(b)*; the right of the consular post to be notified without delay of the individual's detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person.[51]

The ICJ proceeded to find that in forty-five of the cases under consideration it had no evidence that the persons were reasonably believed to be U.S. nationals or that inquiries into dual nationality had been made. Seven persons were, however, alleged to have claimed U.S. citizenship at the time of their arrest. The ICJ held that in all but one of these cases Mexico was actually able to prove a violation.[52]

The ICJ then turned to the interpretation of the term "without delay." While the United States conceded in forty-seven cases that notification was never given, in the remaining four cases a dispute as to the interpretation arose. The ICJ rejected the Mexican argument that "without delay" denoted "unqualified immediacy," thus requiring a notification directly upon arrest or before any interrogation (analogous to the Miranda warnings). The ICJ found that there is no clear indication in the *travaux préparatoires* of the Convention as to the level of immediacy implied by the term "undue delay," and that it does not mean directly upon detention or interrogation.[53] Thus, while it did not fix a clear time frame, the ICJ held that "there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to

48. LaGrand Case (Germany v. United States of America), 2001 I.C.J. 466, 481 (June 27).
49. *Avena*, 2004 I.C.J. at 40.
50. *Id.* at 42.
51. *Id.* at 43.
52. *Id.*
53. *Id.* at 48-49.

think that the person is probably a foreign national."[54] The ICJ found that the United States had violated its duty on the facts relating to the four individuals in question.[55] Only Judge Tomka, in his separate opinion, took the view that the obligation to give consular information arises upon the detention of the foreign national.[56]

We can thus summarize the ICJ's findings on the "without delay" question: (1) it is not fatal to an individual's claim if he or she claimed to be a U.S. national at the time of arrest, if at some later point the authorities learn otherwise; (2) the term "without delay" does not mean immediately, but the ICJ has not further clarified the term; (3) the term is not tied to interrogation; and (4) a duty to inform immediately arises when the authorities know or have reason to know that the individual is a foreign national, the simplest example being that he says so.

E. Interference with the Domestic Judicial System

Several arguments advanced by the United States in *LaGrand* and *Avena* focused on what the Respondent perceived as undue interference with its domestic judicial system by the ICJ. In its objections to jurisdiction, the United States expressed concerns that the ICJ would position itself as an "ultimate court of appeal" in its domestic criminal proceedings.[57] Additionally, the United States challenged the ICJ's authority to pronounce on the domestic legal system of the United States in general.[58] As a specific issue, the procedural default rule and its operation vis-à-vis the international obligations of the United States attracted the attention of the ICJ.

In *LaGrand*, the United States argued that Germany's second, third and fourth submissions (application of procedural rules of domestic law, compliance with provisional measures, and assurances of non-repetition and effective review and remedies) would go beyond the powers of the Court in that they would require the Court to "play the role of ultimate court of appeal in national criminal proceedings."[59] The ICJ disagreed with being characterized as an "ultimate court of appeal," holding that Germany's second submission asked the ICJ for an interpretation of the scope of article 36, paragraph (2), the third submission for a finding that

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54. *Id.* at 49.
55. *Id.* at 53-54.
56. *Id.* at 97 (separate opinion of Judge Tomka).
57. LaGrand Case (Germany v. United States of America), 2001 I.C.J. 466, 485 (June 27); *see also Avena*, 2004 I.C.J. at 34.
58. *Avena*, 2004 I.C.J. at 30; *LaGrand*, 2001 I.C.J. at 485.
59. *LaGrand*, 2001 I.C.J. at 485.

the United States violated an Order of the ICJ issued pursuant to article 41 of its Statute, and Germany's fourth submission for the determination of the remedies applicable to the alleged violations of the Convention.[60] The ICJ found that, "[a]lthough Germany deal[t] extensively with the practice of American courts as it bears on the application of the Convention, all three submissions [sought] to require the ICJ to do no more than apply the relevant rules of international law to the issues in dispute between the Parties."[61] Accordingly, the ICJ saw itself doing no more than exercising a function expressly required of it by article 38 of its Statute.[62]

In *Avena*, the United States revived its "ultimate court of appeal" argument in its objection to admissibility.[63] The ICJ treated this argument as a question of remedies, discussed below.[64]

The United States also questioned the ICJ's authority to pronounce on the domestic legal system in its first and second objections to jurisdiction in *Avena*.[65] In those objections, the United States argued that for the ICJ to address the domestic legal system of the United States would be an abuse of its jurisdiction, that the Convention "creates no obligations constraining the rights of the United States to arrest a foreign national,"[66] and that acts of "detaining, trying, convicting and sentencing" could not constitute a breach of the Convention.[67]

Addressing these arguments against its jurisdiction, the ICJ found that the Mexican interpretation of the Convention, that the judicial proceedings to which the Mexican nationals were subject had been rendered fundamentally unfair, would have to be scrutinized on the merits, as such an interpretation "is not excluded from the jurisdiction conferred on the Court by the Optional Protocol to the Vienna Convention."[68] Regarding its alleged interference with the U.S. domestic legal system, the ICJ found:

> If and so far as the Court may find that the obligations accepted by the parties to the Vienna Convention included commitments as to the conduct of their municipal courts in relation to the nationals of other parties, then in

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60. *Id.* at 486.
61. *Id.*
62. *Id.* at 485-86; *see also* Statute of the International Court of Justice, 1945 I.C.J. Acts & Docs, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm.
63. *Avena*, 2004 I.C.J. at 34.
64. *Id.*
65. *Id.* at 30-31.
66. *Id.* at 30.
67. *Id.* at 30-31.
68. *Id.* at 32.

> order to ascertain whether there have been breaches of the Convention, the Court must be able to examine the actions of those courts in the light of international law.[69]

The United States expanded the argument to the question of remedies. In its third objection to admissibility, the United States argued that, if breaches were shown, the ICJ should limit itself to deciding that the United States should provide "review and reconsideration" along the lines of the *LaGrand* judgment.[70] The ICJ rejected this objection by characterizing the nature of remedies to be awarded as a merits issue.[71]

A specific issue of contention regarding the ICJ's ability to interfere with the U.S. domestic legal system was the compatibility of the application of the procedural default rule with article 36, paragraph (2), of the Convention.[72] That section of the Convention reads as follows:

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.[73]

In *LaGrand*, Germany in its second submission contended that

> by applying rules of its domestic law, in particular the doctrine of procedural default, [the United States] violated its international legal obligation to Germany under Article 36 paragraph 2 of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended.[74]

Subsequently, the ICJ rejected the U.S. argument that the rule of procedural default could not violate the Convention, as the Convention does not mandate the creation of individual remedies in criminal proceedings.[75] Having determined that article 36, paragraph (1), does, in fact, create individual rights, the ICJ concluded that the reference in article 36, paragraph (2), to "rights" is also addressed to the detained individual.[76] The ICJ stressed that the procedural default rule as such did not violate the Convention.[77] However, in the case before it, the

69. *Id.* at 30.
70. *Id.* at 34.
71. *Id.* at 34.
72. *Id.* at 55-56.
73. Vienna Convention, *supra* note 2, ¶ 2.
74. LaGrand Case (Germany v. United States of America), 2001 I.C.J. 466, 495 (June 27).
75. *Id.* at 497-99.
76. *Id.* at 497.
77. *Id.*

procedural default rule operated to prevent the United States from giving full effect to the purposes of the Convention as required by article 36, paragraph (2).[78] Accordingly article 36, paragraph (2), had been violated.[79]

In *Avena*, Mexico argued that by applying municipal law doctrines, such as the procedural default rule to article 36 claims, the United States violated its international obligations to Mexico under the Convention.[80] The ICJ recalled its consideration of the procedural default rule in the *LaGrand* case.[81] Analogous to its statements there, the ICJ found that the procedural default rule once again prevented counsel for some of the Mexican nationals from challenging the convictions of the latter by raising the question of a violation of the Vienna Convention.[82] The ICJ also observed:

> [T]he procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial.[83]

Moreover, the ICJ found that in the three cases in which sentences had become final, the United States was in breach of its obligations under article 36, paragraph (2).[84]

F. Remedies

With regard to remedies, the ICJ addressed three important questions in *LaGrand* and *Avena*. First, is the ICJ empowered to award remedies for a violation of the Convention? Second, what is the nature of general guarantees and assurances of non-repetition? And third, how are specific guarantees and assurances in cases involving severe penalties to be dealt with; more specifically, how is the ICJ's language in *LaGrand* regarding effective review and reconsideration to be interpreted?

Regarding its jurisdiction to award remedies, the ICJ clearly enunciated its power to award remedies in disputes arising out of the interpretation of the Convention. In *LaGrand*, the ICJ found that

78. *Id.* at 497-98.
79. *Id.*
80. Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 12, 55 (Mar. 31).
81. *Id.* at 56-57.
82. *Id.* at 57.
83. *Id.*
84. *Id.*

> a dispute regarding the appropriate remedies for the violation of the Convention . . . is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation.[85]

In *Avena*, the ICJ reiterated the position it took in *LaGrand* and held that it would not need a separate basis for awarding a remedy if it has jurisdiction over a matter where the breach of a right is at issue.[86]

In terms of general guarantees and assurances of non-repetition, *LaGrand* and *Avena* are perfectly parallel. In both cases, Germany and Mexico requested such assurances,[87] and, in both cases, the ICJ found that the U.S. statements before the ICJ regarding the substantial activities it was undertaking to alleviate the notification problems under article 36 met the request for guarantees and assurances of non-repetition of this type.[88]

Lastly, we want to address the issue of specific guarantees and assurances. In *LaGrand*, Germany's fourth submission read in pertinent part: "[i]n particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36."[89] The ICJ largely followed that request and held that

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85. LaGrand Case (Germany v. United States of America), 2001 I.C.J. 466, 485 (June 27) (citing Factory at Chorzów, 1928 P.C.I.J. (ser. A) No. 17, at 4).

86. *Avena*, 2004 I.C.J. at 34.

87. The relevant part of Germany's fourth submission in *LaGrand* reads as follows:

> [T]he United States shall provide Germany an assurance that it will not repeat its unlawful acts and that, in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations.

LaGrand, 2001 I.C.J. at 508-09. Mexico's eighth submission in *Avena* was analogous to Germany's request for straightforward assurances: "That the United States . . . shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals and shall provide appropriate guarantees and assurances that it shall take measures . . . to ensure compliance with Article 36 (2)." *Avena*, 2004 I.C.J. at 24.

88. In *LaGrand*, the Court considered "that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1*(b)*, must be regarded as meeting Germany's request for a general assurance of non-repetition." *LaGrand*, 2001 I.C.J. at 513. In *Avena*, the Court "believe[d] that as far as the request of Mexico for guarantees and assurances of non-repetition is concerned, what the Court stated in [the respective] passage of the *LaGrand* Judgment remains applicable, and therefore meets that request." *Avena*, 2004 I.C.J. at 69.

89. *LaGrand*, 2001 I.C.J. at 474.

> if the United States . . . should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. *The choice of means must be left to the United States*.[90]

In *Avena*, Mexico put a lot of weight on the appropriate remedy, which it envisaged as *restitutio in integrum*.[91] It seems, however, that counsel for Mexico got "cold feet" more than halfway through the proceedings, when they added an alternative to what they regarded as the most appropriate form of restitution, namely the annulment of the convictions and sentences.[92] In that regard, it is interesting to track the evolution of Mexico's argument over the course of the proceedings before the ICJ. Mexico's initial request in the Application demanded that "the United States must restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States' international legal obligations."[93]

During the oral arguments, counsel for Mexico elaborated that

> restitution here must take the form of annulment of the convictions and sentences that resulted from the proceedings tainted by the Article 36 violations. It follows from the very nature of *restitutio* that, when a violation of an international [legal] obligation is manifested in a judicial act, that act must be annulled and thereby deprived of any force or effect in the national legal system.[94]

But then a noteworthy change occurred in the second round of oral arguments where, after repeating the request for *restitutio*, counsel for Mexico closed his observations with a heavily qualified argument in the alternative:

> However, what could just possibly be envisaged, on a purely alternative basis, in the event that restitution by annulment of the original convictions and sentences were not to be granted, would be the alternative

90. *Id.* at 513-14 (emphasis added).
91. *See Avena*, 2004 I.C.J. at 21, 23.
92. *See id.* at 58.
93. *Id.* at 20.
94. Public sitting held on Monday 15 December 2003, Case Concerning Avena and Other Nationals (Mexico v. United States of America), 2003 I.C.J. Pleadings CR 2003/25, ¶ 351, *available at* http://www.icj-cij.org/icjwww/idocket/imus/imuscr/imus_icr2003-25_20031215.PDF.

> establishment of a genuinely judicial procedure of review and reconsideration, in every respect distinct from the current clemency proceedings. This could be envisaged so as to allow the individuals concerned at least some chance of asserting their rights.[95]

This more cautious course was subsequently reflected in Mexico's final submissions.[96]

As to the ICJ, it reiterated its conclusions in *LaGrand*, namely that

> the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of [the respective] nationals' cases by the United States courts . . . with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.[97]

The ICJ stressed that, "[i]t is not to be presumed . . . that partial or total annulment of conviction or sentence provides the necessary and sole remedy."[98]

Considering Mexico's arguments, which were geared at limiting the discretion of the United States in choosing how to provide review and reconsideration, and addressing arguments advanced by Mexico that sought to more rigidly define the appropriate remedies to be awarded, the ICJ held that the determination whether confessions or statements obtained prior to the time when the national is informed of his right to consular assistance were to be excluded, would have to be made on a case-by-case basis by U.S. courts during the process of review and reconsideration.[99] Additionally, Mexico sought for the ICJ to declare that clemency procedures, which it described as "standardless, secretive, and immune from judicial oversight," would not meet the review and reconsideration called for in *LaGrand*.[100] On this point, recalling its decision in *LaGrand*, the ICJ found that

> in cases where the breach of the individual rights of Mexican Nationals under Article 36, paragraph (1)*(b)* . . . resulted . . . in the individuals

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95. Public sitting held on Thursday 18 December 2003, Case Concerning Avena and Other Nationals (Mexico v. United States of America), 2003 I.C.J. Pleadings CR 2003/28, ¶ 173, *available at* http://www.icj-cij.org/icjwww/idocket/imus/imuscr/imus_icr2003-28_20031218_translation.PDF.

96. The final submission read: "[T]o the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the 52 nationals. . . ." *Id.* ¶ 181(7).

97. *Avena*, 2004 I.C.J. at 60.

98. *Id.*

99. *Id.* at 61.

100. *Id.* at 64.

> concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration.[101]

The ICJ emphasized "that it is the judicial process that is suited to this task"[102] and proceeded to note that the clemency process as currently practiced in the U.S. criminal justice system does not appear to meet these requirements, and therefore, does not meet the standard of "review and reconsideration" stated by the ICJ in *LaGrand*.[103]

III. IMPLEMENTATION OF *LAGRAND* AND *AVENA* IN U.S. COURTS—REVIEW AND RECONSIDERATION

We already mentioned in the Introduction to this Article that by the time the ICJ handed down its final judgment in *LaGrand*, the State of Arizona had already executed both brothers. Germany did not request material reparation, but rather sought assurances that the United States would ensure the effective exercise of article 36 of the Convention.[104] As we have seen above, the ICJ took up Germany's demand, and held that in future cases the United States was to allow review and reconsideration.[105]

While the United States has a clear duty to allow such review and reconsideration, the *LaGrand* judgment did not provide any guidance as to implementation.[106] In its decision in *Avena*, however, the ICJ clarified that "it is not to be presumed . . . that partial or total annulment of conviction or sentence provides the necessary and sole remedy."[107] Rather, the United States was under a duty to permit review and reconsideration, "with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice."[108]

Part III of this Article seeks to assess to what degree the United States has lived up to these obligations. Let us begin our observations on this issue by clarifying why the United States, including its courts, is bound to implement a judgment of the ICJ. Surely, no State can ever be

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101. *Id.* at 65-66.
102. *Id.*
103. *Id.* at 66.
104. LaGrand Case (Germany v. United States of America), 2001 I.C.J. 466, 513-14 (June 27).
105. *See supra* text accompanying note 90.
106. *LaGrand*, 2001 I.C.J. at 513-14.
107. *Avena*, 2004 I.C.J. at 60.
108. *Id.*

brought before the ICJ against its will, as the jurisdiction of the ICJ is strictly consensual. The consent thus necessary to establish the ICJ's jurisdiction can be expressed in different ways. In *LaGrand* and *Avena*, the United States did so not only by becoming a party to the Vienna Convention but also by ratifying the Optional Protocol, thus accepting the compulsory jurisdiction of the ICJ in questions of interpretation of the Convention.[109] Moreover, U.S. courts have held that the Convention is self-executing, in the sense that its provisions automatically become part of the law of the United States without additional congressional legislation.[110] To the argument put forward by the U.S. government that the ICJ does not exercise any judicial power over the United States, Justice Breyer replied pointedly in his dissenting opinion in the Supreme Court's *Torres v. Mullin* certiorari decision:

> While this is undeniably correct as a general matter, it fails to address the question whether the ICJ has been granted the authority, by means of treaties to which the United States is a party, to interpret the rights conferred by the Vienna Convention. The answer to Lord Ellenborough's famous rhetorical question, "Can the Island of Tobago pass a law to bind the rights of the whole world?" may well be yes, where the world has conferred such binding authority through treaty.[111]

In the following Part, we will discuss the key positions taken by courts around the country.[112] We will show that the emerging jurisprudence on article 36 claims falls short of implementing *LaGrand* and *Avena*. In a great number of cases, implementation fails because review and reconsideration is simply denied. But even where U.S. courts proceed with such review and reconsideration, they tend to set the bar very high by putting the burden of proof on the claimant, and applying tests that are difficult to meet.

In Part III.A, we will address judicial mechanisms that prevent the individuals concerned from obtaining any form of review and

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109. *Id.* at 28-29; *LaGrand*, 2001 I.C.J. at 481-82.

110. *See* Torres v. Mullin, 540 U.S. 1035, 1039 (2003) (Breyer, J., dissenting).

111. *Id.* at 1041 (Breyer, J. dissenting).

112. Conventional research methods disclose about 150 cases (as of December 2005) decided after *LaGrand* in which a criminal defendant brought up article 36 of the Convention in his defense. About two-thirds of those are state court decisions, fifty-three of which were decided before *Avena*. Of the federal cases on the subject, twenty-one were decided before *Avena*.

In the vast majority of cases the violation of the Convention was either expressly conceded or uncontested; in fact, only in eight cases can one find a dispute as to whether a violation of the article 36 rights had indeed occurred.

Some of these decisions carry considerable precedential value, such as the fifteen State Supreme Court decisions stemming from eleven different states. On the federal side, we find twenty-one court of appeals decisions representing the position of ten different circuits.

reconsideration based on the violation of their article 36 rights. In Part III.B, we will turn to the way courts have dealt with the question of "actual prejudice" introduced in *Avena*.

A. Bars to Review and Reconsideration

A review of the case law dealing with article 36 claims quickly reveals that most courts are not willing to entertain such claims. Specifically, three arguments are routinely advanced to deny defendants review and reconsideration. First, many courts still reject that article 36 creates individually enforceable rights. Second, many courts still apply procedural default rules or bar a claimant from habeas corpus review of an article 36 claim where such a claim was not raised in the original proceedings. Lastly, courts short-circuit the process and deny review and reconsideration. They hold either that there is no remedy at all for violations of the Vienna Convention, or that the remedy the claimant asked for is not available, and thus no inquiry into prejudice will be necessary. We will take up these three positions in turn.

1. No Individual Right

Both *LaGrand* and *Avena* call for an evaluation of the individual's situation as a matter of right. The ICJ decided this issue already in *LaGrand*, holding that article 36 does indeed give rise to individual rights.[113] Specifically, the ICJ concluded "[b]ased on the text of these provisions . . . Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person."[114] However, many state and federal courts still hold that the Convention does not create any judicially enforceable individual rights that a defendant could raise in a domestic court.[115] Hence, some courts do not inquire any further into defendant's claims under article 36 of the Convention. Others, while holding that the defendant does not have individually enforceable rights, proceed to analyze the claim further, assuming *arguendo* that the defendant had enforceable article 36 rights.

The great majority of decisions do not provide much support for their holding that the Convention does not create individual rights, and

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113. *LaGrand*, 2001 I.C.J. 466, 494 (June 27).

114. *Id.*

115. *See supra* text accompanying note 44.

cite neither *LaGrand* nor *Avena*.[116] A recent decision by the Oregon Supreme Court went to great lengths to interpret the Convention and arrived at the conclusion that there is a general presumption that international treaties speak only to the rights and obligations of signatory states and do not confer individual rights that are enforceable in judicial proceedings.[117] The court also noted that, "although Article 36 of the VCCR loosely refers to a foreign detainee's 'rights' to consular access and notification, it contains no explicit statement or clear implication of an intent to depart from that general rule."[118] Throughout its analysis, the court did not make a single reference to *LaGrand* or *Avena*.[119] This is especially unfortunate as the decision recognizes that there are circumstances in which individual rights can be created in a treaty.[120]

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116. Mendez v. Roe, 88 Fed. App'x 165, 167 (9th Cir. 2004) ("Because no clearly established federal law directs that Article 36's consular access provision institutes a judicially enforceable right, relief for a violation of the article may not be granted in a federal habeas corpus petition."); United States v. De La Pava, 268 F.3d 157, 164-65 (2d Cir. 2001) (citing the preamble to the Convention and the Senate Report concerning the Convention, S. Exec. Rep. No. 91-9 at 2 (1969)); United States v. Nambo-Barajas, No. CRIM 02-195(2), 2004 WL 812974, at *3 (D. Minn. Apr. 13, 2004) ("The Eighth Circuit has not recognized an individually-enforceable right under article 36(b) of the Vienna Convention."); People v. Bernal, No. G027793, 2003 WL 550402, at *7 (Cal. Ct. App. Feb. 27, 2003) ("[N]o case has held that the Vienna Convention 'creates a personally enforceable right'" (citing People v. Corona, 89 Cal. App. 4th 1429)); Gordon v. State, 863 So. 2d 1215, 1221 (Fla. 2003) ("Gordon has failed to establish that he has standing to assert such a claim, as we have held that such treaties constitute agreements between countries, not citizens."); Rodriguez v. State, 837 So. 2d 478, 481 (Fla. Dist. Ct. App. 2002) ("[I]t is clear that treaties are between countries, and individual citizens have no standing to challenge violations of such treaties in the absence of the protest of the sovereign involved."); Gomez v. Commonwealth, 152 S.W.3d 238, 242 (Ky. Ct. App. 2004) (adopting State v. Navarro, 659 N.W.2d 487, 491 (Wis. Ct. App. 2003); State v. King, 858 A.2d 4, 13 (N.J. Super. Ct. App. Div. 2004) ("We have repeatedly declined to find a private enforceable right under the Convention"); State v. Martinez-Rodriguez, 33 P.3d 267, 274 (N.M. 2001) ("[We] determine that the provisions of the VCCR do not create legally enforceable individual rights. The presumption against implying rights in international agreements, weighs against Defendant's position. We conclude that this Court should not depart from the general principles of international law and the expressed position of the State Department to find that Defendant has a private right of action to enforce the VCCR in our courts. The VCCR, after all, is an agreement negotiated among sovereign states, including the United States and Mexico, not New Mexico and Mexico. Accordingly, we hold that Defendant does not have standing to enforce the provisions of the VCCR." (citations omitted)).

117. State v. Sanchez-Llamas, 108 P.3d 573, 577 (Or. 2005).

118. *Id.* The Supreme Court granted certiorari in this case on November 7, 2005. Sanchez-Llamas v. Oregon, 126 S. Ct. 620 (2005); *see infra* note 229 and accompanying text.

119. *Sanchez-Llamas*, 108 P.3d at 575-78.

120. The court stated: "Certainly, the noted presumption can be overcome by explicit wording and even by provisions that necessarily imply a private right of judicial enforcement." *Id.* at 576. The authors would respectfully submit that the interpretation by the ICJ, to which the United States ceded the interpretative authority over the Convention by becoming a party to the Optional Protocol, would accordingly overcome the said presumption.

Of the four decisions that do cite *LaGrand* or *Avena* and hold that no individual rights exist, two fundamentally misinterpret the decision. In *Bell v. Virginia*, the Supreme Court of Virginia concluded "that the ICJ, contrary to Bell's assertion, did not hold that Article 36 of the Vienna Convention creates legally enforceable individual rights that a defendant may assert in a state criminal proceeding to reverse a conviction."[121] Moreover, the court reasoned, "the ICJ stated that 'Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, *may be invoked in [the ICJ] by the national State* of the detained person.'"[122] In *Wisconsin v. Navarro*, the Court of Appeals of Wisconsin cited exactly the same passage to arrive at the same conclusion as *Bell*.[123] Additionally, that court found that the preamble of the Convention and the practice of the United States State Department bolstered its conclusion that the treaty does not confer individual rights.[124]

The third decision, *Medellin v. Dretke*, may actually represent a beacon of hope.[125] On May 20, 2004, the United States Court of Appeals for the Fifth Circuit held that the Convention did not create any individual rights that would be enforceable in U.S. courts.[126] The decision, however, acknowledged the conflict with the ICJ's holding in *LaGrand*, but felt compelled to follow precedent.[127] The Fifth Circuit

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121. Bell v. Commonwealth, 563 S.E.2d 695, 706 (Va. 2002).

122. *Id.* (citing LaGrand Case (Germany v. United States of America), 2001 I.C.J. 466, 494 (June 27)).

123. State v. Navarro, 659 N.W.2d 487, 493 (Wisc. Ct. App. 2003).

124. The court stated, *inter alia*, that "[t]he Preamble unambiguously renounces the creation of any individual rights." *Id.* at 491. Additionally, the Court pointed out:

> With regard to the Vienna Convention, the State Department has consistently taken the position that although implementation of the treaty may benefit foreign nationals, it does not create judicially enforceable individual rights that can be remedied in the criminal justice systems of the member states. According to the State Department, "[t]he [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political or exist between states under international law."

Id. at 492 (alterations in original) (citations omitted). The ICJ had specifically rejected this position in *LaGrand*. 2001 I.C.J. at 494.

125. Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2004).

126. *Id.* at 280. For a discussion of the subsequent proceedings before the Supreme Court, see *infra* Part IV.

127. *Medellin*, 373 F.3d at 280. The court pointed out:

> The International Court of Justice held in *LaGrand* that Article 36 did create personal rights. Again, we note that the International Court of Justice adhered to this position in *Avena*.
>
> A prior panel of this Court, however, held that Article 36 of the Vienna Convention does not create an individually enforceable right. *Jiminez-Nava*, 243 F.3d at 198 ("The sum of [petitioner's] arguments fails to lead to an ineluctable conclusion that Article 36 creates judicially enforceable rights of consultation between a detained

recently reaffirmed its position on the Convention in *Cardenas v. Dretke*.[128] Relying on *Breard v. Greene*,[129] and employing similar arguments as the *Medellin* and *Cardenas* court, the Court of Appeals of Wisconsin in *State v. Markovic* acknowledged *Avena*, but held that "until such time as the United States Supreme Court or the Wisconsin Supreme Court overrule *Navarro*, [an individual raising an Article 36 claim] does not have the requisite standing."[130]

From this survey of jurisprudence two important points become apparent. First, there seems to be a lack of judicial dialogue between the ICJ, which is empowered to interpret the Convention, and U.S. courts that face claims under it. Second, where there are actually signs that such dialogue takes place, we frequently encounter misunderstandings leading to erroneous conclusions. Furthermore, as expressed by the Fifth Circuit in *Medellin* and *Cardenas*, there is great need for guidance from the Supreme Court of the United States because lower courts perceive that the Supreme Court's precedent conflicts with ICJ decisions.

The denial of claims under the Vienna Convention based on the argument that article 36 does not create individually enforceable rights has potentially disastrous consequences for the individuals whose claims are rejected. However, on a conceptual level, it would be easy to align the position of U.S. courts with *LaGrand* and *Avena*. If the respective decisions are not corrected on appeal, it is in the hands of the federal courts to address misinterpretations of *LaGrand* or *Avena* when such misinterpretations come up in habeas corpus petitions. Accordingly, where a judgment withholds review and reconsideration arguing that article 36 of the Convention creates no individually enforceable rights before U.S. courts, the federal court can still afford the required review. However, where a judgment was handed down, as in *Medellin*, by a federal court and with the express reference to Supreme Court precedent

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> foreign national and his consular office. Thus, the presumption against such rights ought to be conclusive.") . . . We are bound to apply this holding, the subsequent decision in *LaGrand* notwithstanding, until either the Court sitting *en banc* or the Supreme Court say otherwise.

Id. (citations omitted).

128. Cardenas v. Dretke, 405 F.3d 244, 253 (5th Cir. 2005). In this case, the court addressed the appeal of another one of the Mexican nationals whose rights had been adjudged in *Avena*. *Id.* at 252. Mr. Cardenas is listed as number "41" in the *Avena* Judgment of 31 March 2004. Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 12, 25, 53 (Mar. 31).

129. Breard v. Greene, 523 U.S. 371 (1998).

130. State v. Markovic, No. 2004AP1560, 2005 WL 1283112, at *4 (Wis. Ct. App. June 1, 2005).

perceived as binding, the only institution that could rectify such misperception is the Supreme Court itself.

2. Procedural Default and the Preclusion of Claims in Habeas Corpus Proceedings

The ICJ already addressed the procedural default rule in *LaGrand*.[131] The ICJ specifically held that the rule as such did not violate international law; however, as applied to the brothers, it violated U.S. obligations under international law by barring individuals from obtaining review and reconsideration of their conviction and sentencing where a violation of article 36 of the Convention had occurred.[132] Nevertheless, procedural default, as defined in the respective state statutes, is still routinely a basis for state courts to deny review and reconsideration where an article 36 violation occurred. In federal courts, habeas corpus review is denied when an appellant raises a claim based on article 36 that had not been raised during the proceedings at the state level. This exclusion is based on Supreme Court jurisprudence and the Antiterrorism and Effective Death Penalty Act (AEDPA).[133] Such decisions are clearly at odds with the ICJ judgments in *LaGrand* and *Avena*, "where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial."[134]

In *Medellin*, the Fifth Circuit also held, relying on *Breard*, that "Vienna Convention claims, like Constitutional claims, can be procedurally defaulted, even in a death penalty case."[135] In doing so, the court once more acknowledged that "[t]hough *Avena* and *LaGrand* were decided after *Breard*, and contradict *Breard*, we may not disregard the Supreme Court's clear holding that ordinary procedural default rules can bar Vienna Convention claims . . . . That is, only the Supreme Court may overrule a Supreme Court decision."[136] As it did regarding the question

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131. LaGrand Case (Germany v. United States of America), 2001 I.C.J. 466, 495-98 (June 27).

132. *Id.* at 497-98.

133. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1223.

134. Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 12, 57 (Mar. 31).

135. Medellin v. Dretke, 371 F.3d 270, 280 (5th Cir. 2004) (citing Breard v. Greene, 523 U.S. 371, 375 (1998)).

136. *Id.*

of individual rights created by article 36, the court affirmed this position in its ruling in *Cardenas*.[137] Other cases follow the same logic.[138]

It is important here to identify an unfortunate similarity of judicial terminology between the holding of the ICJ in *Avena* and the U.S. legislation regarding habeas corpus review. The ICJ held in *Avena* that the review and reconsideration shall take into account the "prejudice caused."[139] This language is however not to be confused with the "cause and prejudice" standard which federal courts employ to ascertain whether a claimant who did not exhaust state remedies, and is thus bringing a claim for the first time at the federal level, can overcome the rule that federal courts are barred to review such a claim.[140] The two inquiries cannot be conflated into one. Admittedly, a claimant who has been prejudiced (in the ICJ sense) by a violation of his article 36 rights would thus likely be able to also show cause and prejudice to meet the habeas standard. However, two fundamental problems remain. First, the ICJ made it very clear that the duty on the United States to afford review and reconsideration is unconditional where a violation of article 36 occurred.[141] So the claimant is decidedly not required to prove anything to get the review, but rather such review is a matter of right arising out of the U.S. breach of the Convention. Second, while intuitively similar, the habeas standard is arguably different from review and reconsideration under *LaGrand* and *Avena*, as it puts the burden of proof solely on the defendant, a circumstance that we will discuss in more detail in Part III.B below.

All these cases paint a grim picture of the implementation of the *LaGrand* and *Avena* judgments with respect to the procedural default rule. The findings by the ICJ on the issue were very clear in both *LaGrand* and *Avena*. In its decision in *Avena*, the ICJ recalled its

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137. Cardenas v. Dretke, 405 F.3d 244, 253 (5th Cir. 2005).

138. *See, e.g.*, United States v. Sanchez, 39 Fed. App'x 10, 11 (4th Cir. 2002); United States v. Dixon, 30 Fed. App'x 53, 54 (4th Cir. 2002) (rejecting claims by defendants that they should be allowed to withdraw their guilty pleas where they had not been timely informed of their rights under the Convention—both their claims were disposed of as having been raised for the first time on appeal, and thus being precluded by the procedural default rule); United States v. Nambo-Barajas, No. CRIM 02-195(2), 2004 WL 812974, at *3 (D. Minn. Apr. 13, 2004) (holding that the defendant had procedurally defaulted his Convention claim and that he did not muster the cause and prejudice test to overcome this default); Sanchez v. State, No. 09-04-101 CR, 2005 WL 913445, at *1 (Tex. App. Apr. 20, 2005); Esparza v. State, No. 10-03-00044-CR, 2004 WL 2005549, at *2 (Tex. App. Sept. 8, 2004) (holding that the court needed not consider defendant's claim under the Convention as he did not preserve it for appeal); State v. Moreno, No. 54073-4-I, 2005 WL 1009836, at *4 (Wash. Ct. App. May 2, 2005).

139. *Avena*, 2004 I.C.J. at 65.

140. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977).

141. *Avena*, 2004 I.C.J. at 70.

consideration of the procedural default rule in the *LaGrand* case.[142] As it had found there, it concluded that the procedural default rule here once again prevented counsel for some of the Mexican nationals from challenging their convictions by raising the question of a violation of the Vienna Convention.[143] The ICJ also observed, following its decision in *LaGrand*, that the procedural default rule remained unchanged and nothing prevented its application to cases where the United States' failure to inform prohibited counsel from raising a Vienna Convention violation at trial.[144] Hence, the ICJ now found that in the three cases where sentences had become final, the United States was in breach of its obligations under article 36, paragraph (2).

Unfortunately, the situation has not ameliorated since then. Neither *LaGrand* nor *Avena* seem to have been able to overcome the reluctance of U.S. courts to apply international law over domestic procedure. However, it is commendable that the court in *Medellin* and *Cardenas* pinpointed its problem with the implementation of *LaGrand* and *Avena* to a perceived conflict of international law, as manifested in the ICJ's decisions, and U.S. federal law as reflected in Supreme Court precedent.[145] It is now up to the Supreme Court to ensure a consistent approach to the procedural default rule at the state level, and habeas corpus review at the federal level, that allows defendants whose article 36 rights have been violated to challenge their convictions with an article 36 claim even after the direct appeal. This they must be enabled to do in at least two scenarios: first, where defendants were not informed of their rights until after such appeal; and second, where the violation of their article 36 rights may have prejudiced their defense in a way that hindered them to raise the claim in time.

3. No Remedy/Remedy Asked for Not Available

A great number of courts have disposed of appeals under the Convention by holding that the remedy asked for by the defendant would not be available for such claims,[146] some going as far as denying the

142. *Id.* at 56-57.
143. *Id.* at 57.
144. *Id.*
145. Medellin v. Dretke, 371 F.3d 270, 280 (5th Cir. 2004); Cardenas v. Dretke, 405 F.3d 244, 253 (5th Cir. 2005).
146. *See, e.g.*, United States v. Rodriguez-Preciado, 399 F.3d 1118, 1130 (9th Cir. 2004) (relying on United States v. Lombera-Camorlinga, 206 F.3d 882, 885 (9th Cir. 2000)); United States v. Ortiz, 315 F.3d 873, 887 (8th Cir. 2002); United States v. Chanthadara, 230 F.3d 1237, 1255-56 (10th Cir. 2000); United States v. Lawal, 231 F.3d 1045, 1048 (7th Cir. 2000); United States v. Cordoba-Mosquera, 212 F.3d 1194, 1196 (11th Cir. 2000); United States v. Li, 206 F.3d

possibility of awarding any remedy for a violation of the Convention. Sometimes, this reasoning has also been used to deny claims of ineffective assistance of counsel in federal habeas corpus proceedings.[147] Similarly, federal courts have denied habeas relief where state courts had held that suppression of statements was an inappropriate remedy for a violation of the Convention.[148] Moreover, state courts have held that state exclusionary rules do not apply to violations of article 36.[149]

In criminal appeals, federal courts have also held that suppression of statements is not an appropriate remedy for a violation of the Convention.[150]

56, 60, 62 (1st Cir. 2000); United States v. Ruiz Gutierrez, No. CRIM.A. 04-470(ESH), 2005 WL 1115952, at *1 (D.C.C. May 11, 2005) (holding that "dismissal of an indictment would not be an appropriate remedy for an Article 36 violation, as held by every circuit that has considered the question"); United States v. Brodie, 326 F. Supp. 2d 83, 90-91 (D.D.C. 2004) (citing *Lombera-Camorlinga*, 206 F.3d at 885-86); State v. Quintero, No. M2003-023110-CCA-R3-CD, 2005 WL 941004, at *10 (Tenn. Crim. App. Apr. 22, 2005) (holding that suppression of evidence would be unavailable as a remedy).

147. In *United States v. Valdez*, the Ninth Circuit stated:

> In short, *Lombera-Camorlinga* precludes the precise relief that Valdez argues his counsel should have sought for the alleged violation and, therefore, Valdez has necessarily failed to demonstrate that: (1) his counsel's decision not to pursue this claim constitutes "deficient performance," *Strickland*, 466 U.S. at 690, 104 S. Ct. 2052; and (2) there is a "reasonable probability that, but for counsel's [failure to raise the claim], the result of the proceeding would have been different."

104 Fed. App'x 624, 627 (9th Cir. 2004) (citing Mayfield v. Woodford, 270 F.3d 915, 934 (9th Cir. 2001) (quoting Strickland v. Washington, 466 U.S. 668, 690 (1984))).

148. *See, e.g.*, United States v. Hurtado, No. 03 C 7436, 2004 WL 1462441, at *4 (N.D. Ill. June 28, 2004). This court also ruled that

> suppression was an inappropriate remedy under the [sic] Article 36. That ruling is not contrary to, or an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court. The Supreme Court has never held that suppression is mandated by violations of Article 36. Moreover, nearly every circuit court has held otherwise, concluding that suppression of evidence is an inappropriate remedy for violations of Article 36.

Id. (citing, *inter alia*, United States v. Jimenez-Nava, 243 F.3d 192, 198-99 (5th Cir. 2001); United States v. Page, 232 F.3d 536, 540-41 (6th Cir. 2000)); *see also* Jiminez v. Dretke, No. 3:02-CV-1716-M, 2004 WL 789809, at *4 (N.D. Tex. Apr. 13, 2004) ("[T]he United States Supreme Court has not clearly established that suppression of the detainee's statements is a proper remedy for a Vienna Convention violation."); Villagomez v. Sternes, 88 Fed. App'x 100, 101-102 (7th Cir. 2004) (holding that defendant could not show "cause and prejudice" required to overcome procedural default, as suppression of a statement would not be an appropriate remedy under the Convention).

149. *See, e.g.*, *Sierra v. Texas*, 157 S.W.3d 52, 59-60 (7th Cir. 2004) ("Absent contrary directions from the United States Supreme Court, the court of criminal appeals stated that it would not enforce Vienna Convention violations claimed under the federal exclusionary rule. This court is bound by the precedent of the Texas Court of Criminal Appeals and has no authority to disregard or overrule the precedent in *Rocha*.") (citations omitted).

150. United States. v. Gamez, 301 F.3d 1138, 1143-44 (9th Cir. 2002) (citing *Lombera-Camorlinga*, 206 F.3d at 883-84); United States v. Felix-Felix, 275 F.3d 627, 635 (7th Cir. 2001)

This raises two important issues. First, it is evident that courts should not be able to escape their duty to afford review and reconsideration by directly jumping to the question of remedies. Thus, courts cannot circumvent the process of review and reconsideration by stating that, as one or the other remedy is not available, claimant will not even be afforded review and reconsideration.

Second, it seems important to address the relationship between review and reconsideration on the one hand, and remedies on the other. While the ICJ held in *LaGrand* that the choice of means of implementing review and reconsideration is to be left to the United States,[151] and while it clarified in *Avena* that "[i]t is not to be presumed . . . that partial or total annulment of conviction or sentence provides the necessary and sole remedy" that a violation of the Vienna Convention will require,[152] it seems clear that a review and reconsideration that cannot award *any* remedy will not comply with the ICJ's holding in *Avena*. In fact, to interpret review and reconsideration to that effect seems to disregard the general principle of law *ubi jus ibi remedium*.[153] This is to say that while a violation of an individual's rights under article 36 of the Convention does not necessarily or automatically give rise to any specific remedy, it does in every case oblige the United States to conduct review and reconsideration. Such review and reconsideration has two purposes: first, to assess whether the defendant suffered actual prejudice from the violation; and second, if so, to determine which remedy is appropriate in the specific case. To put it differently, review and reconsideration with a view to whether an individual suffered actual prejudice from the violation can only be meaningful if the court has the possibility to find,

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(citing *Lawal*, 231 F.3d at 1045); United States v. Cowo, 22 Fed. App'x 25, 26 (lst Cir. 2001) (citing *Li*, 206 F.3d at 60); United States v. Carillo, 269 F.3d 761, 771 (7th Cir. 2001) (citing *Lawal*, 231 F.3d at 1048); United States v. Emuegbunam, 268 F.3d 377, 390 (6th Cir. 2001) (citing *Page*, 232 F.3d at 540) ("[A]lthough some judicial remedies may exist, there is no right in a criminal prosecution to have evidence excluded or an indictment dismissed due to a violation of Article 36."); United States v. Chaparro-Alcantara, 226 F.3d 616, 624-25 (7th Cir. 2000); United States v. Agboola, No. CR. 01-162 JRTFLN, 2003 WL 292082, at *4-5 (D. Minn. Jan. 21, 2003) (relying on United States v. Rumbo Rosendiz & Manzanares-Valle, Crim. No. 01-186 JRT/FLN, Order (D. Minn. Nov. 26, 2001)).

151. LaGrand Case (Germany v. United States of America), 2001 I.C.J. 466, 514 (June 27).

152. Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) , 2004 I.C.J. 12, 60 (Mar. 31).

153. A most apt explanation of the principle was provided by Chief Justice Holt in *Ashby v. White*, a case before the Court of King's Bench in 1703: "It is a vain thing to imagine, there should be right without a remedy; for want of right and want of remedy are convertibles: if a statute gives a right, the common law will give remedy to maintain it . . . ." 90 Eng. Rep. 1188, 1189 (1702-03).

where appropriate, that actual prejudice resulted. If it does find so, it has to award an appropriate remedy. Accordingly, in terms of the general principle, review and reconsideration constitute the means to vindicate a plaintiff's right, and if it is found that the plaintiff was injured (beyond the legal injury by failure of notification), he should be awarded the appropriate remedy. To properly address the situation, a court, faced with a claim for a certain remedy, should conduct the required review and reconsideration, inquire whether the remedy prayed for is proper and, if not, inquire *sua sponte* if another remedy would be more appropriate, and then proceed to award such remedy or to dismiss the claim.

B. Conducting Review and Reconsideration—Inquiring into Prejudice

As we have shown above, a great number of courts dismiss claims based on a violation of article 36 before they arrive at the question of prejudice. However, some courts still address claims based on article 36 of the Convention by way of dictum, having decided the issues on other grounds as outlined above. While it is the review and reconsideration itself that the ICJ ordered in *LaGrand* and *Avena*, such review and reconsideration must be effective.[154] As we already argued above, effectiveness will, among other factors, require that the individual whose rights have been violated can obtain a remedy for such violation if he was in fact prejudiced. The main issue here is how to allocate the burden of proof regarding prejudice, and which test to employ to determine it.

In practice, U.S. courts have overwhelmingly put the burden of proof solely on the defendant, when they looked to defendant's claim for a remedy under the Convention. Accordingly, so the logic goes, the individual bringing a claim under the Convention has to demonstrate that he has been disadvantaged in the proceedings by the violation of the Convention. This is questionable for at least two reasons. On the one hand, such an inquiry is always going to be a counterfactual one, posing the question, "what would have been the outcome of the trial, had defendant been properly informed?" This is a particularly heavy burden on the claimant; in fact it seems unreasonably high, given that in a majority of the cases it is not disputed that the individual's rights have been violated.[155] Furthermore, it strikes us as problematic that someone who may have suffered considerable disadvantages in his representation, and is thus likely in a poor position to properly bring sufficient proof of

154. *Avena*, 2004 I.C.J. at 66; *LaGrand*, 2001 I.C.J. at 508-09.

155. In fact, the issue whether the individuals' rights under article 36 of the Convention had actually been violated arose in only 8 of about 150 cases examined for this Article.

such a counterfactual scenario, is allocated the burden of proof. It seems that, at least where the violation of the Convention is conceded, the burden of proof cannot reasonably be put on the defendant alone to establish prejudice. Rather, it should be a shared obligation, between the claimant and the court, to ensure that where the claimant may be in a weak position to prove prejudice, the court will still inquire whether such violation did actually prejudice the defendant, and if so, what remedies to award.

Having stated our concerns regarding the allocation of the burden of proof, let us now take a look at how this burden is conceptualized in practice. Some courts put the defendant's burden in general terms, and require him to adduce proof that he was in fact prejudiced by the violation of his rights under article 36.[156] A recent example is the *Cardenas* case.[157] Here, the Fifth Circuit Court of Appeals held that "the Mexican consular authorities learned of Cardenas' detention in time to provide him assistance, but decided not to assist him with his legal representation. Cardenas thus fails to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest."[158] It seems surprising to us that a decision by the Mexican authorities not to make arrangements for his representation when they were notified after Cardenas had already confessed can be taken as a strong indication that they would not have done so had they been informed prior to his confession. In fact, Cardenas apparently alleged at trial that he would likely not have confessed at all.[159] Unfortunately, only Judge Dennis, in a special concurrence, found it reasonably debatable that Cardenas was indeed prejudiced by the State's failure to inform him in time.[160]

Other courts have employed a three-prong test to assess whether the claimant is entitled to relief for the violation of his article 36 rights.[161] For example, in *State v. Hernandez*, the Court of Appeals of Minnesota relied

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156. *See, e.g.*, Hernandez v. United States, 280 Fed. Supp. 2d 118, 125 (S.D.N.Y. 2003); State v. Gegia, 809 N.E.2d 673, 681 (Ohio Ct. App. 2004); Calderon v. State, 840 So. 2d 427, 430 (Fla. Dist. Ct. App. 2003); Lopez v. State, 558 S.E.2d 698, 700 (Ga. 2002) ("In addition, Lopez cannot show that any alleged violation of the Vienna Convention had a prejudicial effect on his trial.").

157. Cardenas v. Dretke, 405 F.3d 244 (5th Cir. 2005).

158. *Id.* at 253-54.

159. *Id.* at 252.

160. *Id.* at 254 (Dennis, J., specially concurring).

161. State v. Hernandez, No. C1-01-720, 2001 WL 1530886, at *4-5 (Minn. App. Dec. 4, 2001); *see also* State v. Jang, 819 A.2d 9, 14-15 (N.J. Super. Ct. App. Div. 2003) (citing State v. Cevallos-Bermeo, 754 A.2d 1224 (N.J. Super. Ct. App. Div. 2000) (adopting three-prong test set forth in U.S. v. Villa-Fabela, 882 F.2d 434, 440 (9th Cir. 1989)).

on the Ninth Circuit decision in *United States v. Rangel-Gonzales*.[162] The court held:

> To obtain relief under the Vienna Convention, the arrestee must establish prejudice by showing "that he did not know of his right to consult with consular officials, that he would have availed himself of that right had he known of it, and that there was a likelihood that the contact would have resulted in assistance to him."[163]

Given the growing importance of the test in practice, below we will take the opportunity to discuss its working in more detail. The first prong of the test, regarding claimant's ignorance of his rights, may seem fairly uncontroversial at first sight. However, at closer sight, it appears that what should be demanded is that the prosecution prove that the defendant knew of his rights and voluntarily chose not to exercise them.[164] It is simply counterintuitive, if not impossible, to prove one's ignorance of a fact. The second prong demands a counterfactual inquiry, that is, "what would the defendant have done, had he known of his rights?" In practical terms, it has to rely on the assumption that the claimant's conduct before or, more importantly, after the violation occurred can serve as a proxy for what he would have done, had he been properly informed. Following this logic, courts have found that a defendant who did not contact his consulate right away when he was ultimately informed of his right had thus failed to demonstrate prejudice.[165]

The last prong, however, has proved even more problematic in practice. Here, courts have also taken conduct by consulate officials after the violation occurred, for example after a confession had already been made by defendant, as indicative for the counterfactual of what consular support would have or could have done for the defendant.[166]

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162. *Hernandez*, 2001 WL 1530886, at *4-5 (citing United States v. Rangel-Gonzales, 617 F.2d 529, 533 (9th Cir. 1980)).

163. *Id.* at *4-5 (quoting *Rangel-Gonzales*, 617 F.2d at 533).

164. In that sense, the requirement that an individual be informed of his rights may not only fulfill an informative function as such, but also a signaling function, i.e., that the authorities respect the right of the individual to contact his consulate. It is one thing to know of a right, and quite another to be informed about it and afforded an opportunity to exercise it. Not surprisingly, the so-called *Miranda* rights are dealt with in exactly this way.

165. *See* United States v. Cazares, 60 Fed. App'x 223, 226 (10th Cir. 2003); *Hernandez*, 2001 WL 1530886, at *5 (holding that where the defendant, when he was finally advised of his rights three days later, had waited another three days to contact his consulate, and where assistance would have been unlikely on the first day he could have contacted his consulate, defendant did not meet the *Rangel-Gonzales* test, and that he could thus not withdraw his guilty plea due to the Convention violation).

166. In *State v. Rodriguez-Martinez*:

This is unconvincing, as the factual situation after a statement has already been given may be fundamentally different. The individual consular officer might well have advised a suspect to remain silent had he been contacted before the defendant made a statement to the authorities, but may not give the same advice once the same suspect already confessed to a crime. Similarly, courts have speculated as to whether a defendant would have been able to reach someone at the consulate at the time the information should have been given. Courts have gone so far as to hold that prejudice could not be established, as nobody could have been reached at the consulate in any event because the individual was arrested on a Sunday.[167]

This tendency is dangerous as it gives authorities the wrong incentives. According to this logic, foreign nationals arrested on the weekend and after hours would have far less protection than those arrested during working hours. Moreover, courts applying this test venture into dangerous speculation. It is preferable here to adopt an approach that assumes that every individual would have gotten the support that a reasonable consular officer would have afforded him. Otherwise, U.S. courts would face the difficult task of assessing the quality of consular support of different nations, which then translates into

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> [W]hen appellant talked with a consul, he was not instructed to remain silent. The consul merely informed appellant that his rights would be respected. Therefore, there is no evidence that the consul would have advised appellant not to talk to the police. As the district court noted, appellant failed to demonstrate "that assistance from the Mexican consul would have resulted in a different, more beneficial outcome."

No. C9-02-1009, 2003 WL 21058537, at *6 (Minn. Ct. App. May 13, 2003).

167. *United States v. Ortiz* provides a good illustration of such an approach. 315 F.3d 873 (8th Cir. 2002). In that case, three defendants had been convicted of murder and traveling in interstate commerce with intent to commit murder for hire. *Id.* at 878. To determine whether defendants had been prejudiced, the court ventured into a hypothetical inquiry, applying a "clearly erroneous" standard to the district court's factual finding that the defendants would have made their statements anyway, irrespective of a notification of their rights under the Convention:

> There is no evidence that receiving this information from the consul would have changed their conduct. In other words, there is no evidence that defendants, if they had been given proper consular access, would have chosen not to waive their *Miranda* rights. So far as we can tell, the course of the trial would not have been changed at all. Furthermore, the Vienna Convention does not require that interrogation cease until consular contact is made. The interrogation in this case occurred on a Sunday. If defendants had been allowed to telephone the consul, they could not have reached him. The most that could have been done was to leave a message on the consulate's voice mail, and the consul would have returned the call the next day. By that time, defendants, fully informed of their rights under *Miranda*, had already confessed. In other words, defendants have shown no prejudice, and therefore the violation of the Vienna Convention is of no avail to them, even if the violation is assertable by an individual detained person.

Id. at 886-87.

different levels of protection for these countries' nationals, should their rights be violated. This clearly does not conform to the object and purpose of the Convention.

As we have shown, there are significant dangers inherent in the application of the three-prong test. These dangers are exacerbated when courts employ the test to determine whether the claimant met a burden of proof, as the court did in *Hernandez*.[168] However, the original test from *Rangel-Gonzalez* addressed claimant's burden of *evidence* rather than his burden of *proof*.

Let us close with two additional observations: first we will take a look at the version of the test which the Oklahoma Court of Criminal Appeals adopted in its decision in *Torres* on September 6, 2005;[169] second, we will propose our own reformulated version of the three prong test. As regards the three-prong test as applied in *Torres*, at first glance it appears to be the first instance of a fair inquiry into prejudice, with *Torres* as the first defendant who could muster such an inquiry. However, in our view, the test as applied in Torres only happens to prove innocuous because Judge Chapel basically pulled all its teeth. Luckily for Torres, the first prong (lack of knowledge of his right under the Convention) was uncontested.[170] Given our review of the jurisprudence, there is no reason to believe that this will always be the case. Hence, our concerns outlined above remain. Turning to the second prong (defendant would have availed himself of the help), Judge Chapel set the burden very low, taking an affidavit by the defendant as sufficient to prove his intent to contact the consulate at the relevant time.[171] Unfortunately, Judge Chapel fell into the same trap as many other judges before him by stating that "[t]his assertion is bolstered by the fact that Torres did request help from the Mexican government when he became aware of his right to do so."[172] While the use of a defendant's subsequent conduct in his favor does not concern us as such, as a matter of principle the reasoning still appears dangerous. Too many courts, as shown above, have, under similar circumstances, used such evidence against defendants in a questionable manner. Regarding the third prong (likelihood that the consulate would have assisted the defendant), we also regard Judge

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168. The court concluded that "Hernandez did not *establish* that he was prejudiced." *Hernandez*, 2001 WL 1530886, at *5 (emphasis added).

169. *See* Torres v. State, No. PCD-04-442, slip op. at 2-5, 8-12 (Okla. Crim. App. May 13, 2004), *reprinted in* 43 I.L.M. 1227, 1228-31 (2004) (Chapel, J., specially concurring). For a discussion of the case as such, see *infra* note 182 and accompanying text.

170. *Torres*, 43 I.L.M. at 1230 (Chapel, J., specially concurring).

171. *Id.* (Chapel, J., specially concurring).

172. *Id.* (Chapel, J., specially concurring).

Chapel's findings as to the overall quality of consular assistance traditionally provided by Mexico, as well-intentioned as they may have been, to be counterproductive as a matter of principle. It appears dangerous to us to draw conclusions from the conduct of sovereign states in the past and apply them toward how these states would have reacted in the given case.

This concern is not alleviated by the fact that the Oklahoma Court of Criminal Appeals, in its decision of September 6, 2005, clarified the third prong. There, the court held that a defendant is not required to show that the consular assistance would, or could, have made a difference in the outcome of the criminal trial, but that it suffices that the defendant show that the consulate would have taken specific actions to assist in his criminal case.[173]

Let us now offer a straightforward reformulation of the three-prong test for prejudice:

> Prejudice from a violation of an individual's Article 36 rights shall be presumed if:
>
> (1) such individual can demonstrate that his state of nationality would have aided him. An affidavit of an appropriate official of the state of nationality to that effect shall constitute conclusive proof of this presumption, unless;
>
> (2) the receiving state's authorities demonstrate that the individual knew of his right under this provision, or was informed of it within the relevant timeframe by a third party, and voluntarily chose not to exercise it; or
>
> (3) the receiving state's authorities demonstrate that the consulate of the individual's state of nationality gained knowledge of the individual's arrest or detention within the relevant timeframe but chose not to act.

We believe that our version of the test comes in fact very close to the three prong test in that it relies on essentially the same logic. However, our reformulation would have some key advantages.

Regarding the new first prong (showing that aid was probable), it incorporates the spirit of the original third prong, but is much cleaner to apply. We should keep in mind that requiring the defendant to show that the help could have made a difference in the outcome of the trial has already been abandoned in the *Torres* version of the test. However, the *Torres* court demands that the individual show specific acts which his consulate would have undertaken, without a clear standard attached. This still invites courts to draw, from ways in which sovereign states handled their article 36 right of consular assistance in the past,

173. Torres v. State, 120 P.3d 1184 (Okla. Crim. App. 2005).

conclusions as to whether and how these states would have chosen to exercise this right in the case now before them. However, as a matter of principle, even a consistent refusal to exercise a right under the Convention can in no way affect the continued existence of the right itself. By way of demonstration, let us imagine a change of leadership, and hence of policy, in Ruritania, a fictitious signatory of the Convention. If Ruritania is now ready, even if it were for the first time in its history, to come to the assistance of one of its nationals whose article 36 rights were violated, it has no less a right to do so than a state which did so continuously for decades. Where does this leave us with regard to the former third prong? The only apparent way to uphold the prong and avoid the problems outlined above is to accept some showing by the state of nationality to the effect that it would have helped, as conclusive to meet the third prong. We suggest that an affidavit by an appropriate official would be a practical way for a court to have such showing documented.

This leads us to a new second prong, which in fact incorporates all we can expect in practice from the first and second prong of the original three-prong test. As we demonstrated above, reading an individual's mind *ex post* in order to determine if that person would have exercised his right, will give a court undue discretion, ranging from accepting defendant's self-serving affidavit (rendering the prong basically meaningless) to dubious inferences drawn from the individual's prior or subsequent conduct that seem plainly unprincipled. Hence, we propose that it should be for the authorities of the receiving state to overcome the presumption that the individual was prejudiced, by showing that the individual knew of his right to contact the consulate, or was informed of it within the relevant timeframe by a third party, and voluntarily chose not to exercise it. Thus, putting the inquiry in positive terms avoids the problems we outlined above, while still accomplishing our task of not allowing someone a second bite at the apple who rejected it the first time around.

Regarding the third prong, the authorities of the receiving state would still be able to counter the presumption by showing that the state of nationality had in fact gained knowledge of the national's detention but chose not to act. This requirement addresses a concern that was not properly identified in the original test. Of course, if the state of nationality refused to exercise its right to come to the assistance of its national, *provided it had learned of the arrest or detention in time*, the individual in question is to be regarded as not having been prejudiced, even though his article 36 rights were violated.

With this attempt at a much needed clarification of the analysis necessary to assess prejudice in cases of violations of article 36, let us return once again to the *Torres* case in order to evaluate its impact more broadly.

C. The Torres *Case—A Welcome First*

Osbaldo Torres, one of the individuals whose rights were adjudicated in *Avena*, was convicted of murder in Oklahoma.[174] He subsequently exhausted all his appeals, all the way to the Supreme Court, which denied certiorari shortly before oral arguments in *Avena* were held.[175] The court's dismissal of Torres' application for a writ of *certiorari* is notable for the two dissents by Justices Breyer and Stevens, which display great willingness to take U.S. obligations under international law seriously.[176]

Then, following the rendering of the *Avena* judgment, the Oklahoma Court of Criminal Appeals, the highest court for criminal cases in Oklahoma, conducted a hearing on post-conviction relief for Torres, referring, *inter alia*, to the Vienna Convention.[177]

Simultaneously, Torres had filed an application for clemency with the Oklahoma Pardon and Parole Board.[178] The Board recommended commuting his death sentence.[179] Governor Brad Henry followed this recommendation and commuted Torres' sentence to life in prison without the possibility of parole.[180] The Department of State requested that the Board and the Governor 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."[181] On the same day Torres' sentence was commuted, the Oklahoma Court of Criminal Appeals announced its decision to stay Torres' execution indefinitely and

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174. Torres v. Mullin, 540 U.S. 1035, 1037 (2003) (Breyer, J., dissenting).
175. *Id.* at 1035, 1038.
176. *Id.* at 1035-41.
177. *Torres*, 120 P.3d at 1186.
178. *Id.*
179. *Id.* at 1190 n.18.
180. *Id.* at 1186.
181. Letter from William H. Taft IV, U.S. State Dep't Legal Adviser, to Susan B. Loving, Chairperson, Okla. Pardon & Parole Bd. (Apr. 23, 2004), *reprinted in* Sean D. Murphy, *Implementation of* Avena *Decision by Oklahoma Court*, 98 AM. J. INT'L L. 581, 582 (2004).

order an evidentiary hearing on, among other things, Torres' Vienna Convention claim.[182]

The specially concurring opinion by Judge Chapel has been widely cited because of its use of very clear language in support of the view that *Avena* is binding on U.S. courts.[183] Judge Chapel and the Oklahoma court apparently viewed their judgment not as ordering review and reconsideration, but rather as conducting it itself, the remedy being the evidentiary hearing ordered.[184] Viewed from a slightly cynical perspective, the urgent requests by the State Department to the Pardon and Parole Board and to Governor Henry may not have been based exclusively on the conviction that the United States has strong obligations under *Avena*. They may also have sought to contain the

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182. *Torres*, 120 P.3d at 1186. The Court remanded the case to the Oklahoma County District Court for an evidentiary hearing on the issues of "(a) whether Torres was prejudiced by the State's violation of his Vienna Convention rights in failing to inform Torres, after he was detained, that he had the right to contact the Mexican consulate; and (b) ineffective assistance of counsel." *Id.*

183. Judge Chapel stated: "There is no question that this Court is bound by the Vienna Convention and Optional Protocol." Torres v. State, No. PCD-04-442, slip op. at 2-5, 8-12 (Ct. Crim. App. May 13, 2004), *reprinted in* 43 I.L.M. 1227, 1229 (2004) (Chapel, J., specially concurring).

> At its simplest, this is a matter of contract. A treaty is a contract between sovereigns. The notion that contracts must be enforceable against those who enter into them is fundamental to the Rule of Law. This case is resolved by that very basic idea. The United States voluntarily and legally entered into a treaty, a contract with over 100 other countries. The 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.

Id. (citations omitted).

> As this Court is bound by the treaty itself, we are bound to give full faith and credit to the *Avena* decision. I am not suggesting that the International Court of Justice has jurisdiction over this Court—far from it. However, in these unusual circumstances the issue of whether this Court must abide by that court's opinion in Torres's case is not ours to determine. The United States Senate and the President have made that decision for us. The Optional Protocol, an integral part of the treaty, provides that the International Court of Justice is the forum for resolution of disputes under the Vienna Convention.

Id. (citations omitted).

184. Judge Chapel stated:

> In accordance with the *Avena* decision, I have thoroughly reviewed and reconsidered Torres's conviction and sentence in light of the consequences of the violation of his rights under the Vienna Convention. I have concluded that there is a possibility a significant miscarriage of justice occurred, as shown by Torres's claims, specifically: that the violation of his Vienna Convention rights contributed to trial counsel's ineffectiveness, that the jury did not hear significant evidence, and that the result of the trial is unreliable. This Court has decided to remand the case for an evidentiary hearing on the Vienna Convention and ineffective assistance of counsel issues. This decisions [sic] comports with the *Avena* requirement of review and reconsideration.

Id. at 1231.

possible impact of an evidentiary hearing in the lower court in Oklahoma.[185]

Speculation aside, even if this had been the federal government's strategy, the Oklahoma Court of Criminal Appeals did not close the case. The evidentiary hearing was held before the trial court on November 29, 2004. In this hearing, the trial court found that Torres had in fact been prejudiced by the violation of his article 36 rights. The Oklahoma Court of Criminal Appeals subsequently affirmed this holding.[186] In so doing, the court formally adopted the three-prong test that we discussed and criticized above.

As to Torres himself, he could not benefit any further from the decision that he was prejudiced because the court found that no remedy had to be granted. According to the court, this was because Mexico would have concentrated its efforts—as it in fact had done once it had gained knowledge of Torres' situation—on the sentencing phase of his

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185. Such a strategy may arguably have worked in the earlier case of Gerardo Valdez, a Mexican citizen convicted of murder and sentenced to death for the shooting and stabbing of Juan Barron. Valdez v. State, 900 P.2d 363 (Okla. Crim. App. 1995), *cert. denied*, 516 U.S. 967 (1995); Valdez v. State, 933 P.2d 931 (Okla. Crim. App. 1997) (denying application for postconviction relief); Valdez v. Ward, 219 F.3d 1222 (10th Cir. 2000), *cert. denied*, Valdez v. Gibson, 121 S. Ct. 1618 (2001) (denying and affirming federal habeas relief). After this long series of litigation Valdez ultimately sought postconviction relief a second time in the aftermath of the *LaGrand* judgment. Valdez v. State, 46 P.3d 703 (Okla. Crim. App. 2002).

Valdez's article 36 rights had not been respected, as the Government of Mexico did not learn of Valdez's arrest, conviction, and sentence until April of 2001, when one of Valdez's relatives contacted the Mexican consulate in El Paso, Texas, and informed consular officials of Valdez's upcoming execution in Oklahoma. *Id.* at 705.

Valdez's case received a lot of attention by international law scholars due to the correspondence between the Legal Adviser for the United States State Department, William H. Taft, and Governor Keating of Oklahoma and the Oklahoma State Pardon and Parole Board in 2001. In a first set of letters Taft asked the Governor and the Parole Board respectively to give careful consideration to the pending clemency request. The Parole board at that point recommended to commute Valdez's sentence to life in prison without the possibility of parole, and Governor Keating issued a thirty-day stay of Valdez's execution. *Id.* at 704. About a week later, when the ICJ had rendered its judgment in *LaGrand*, Taft once again sent a letter to Governor Keating, this time asking him to specifically consider the question whether Valdez had been prejudiced by the violation of his article 36 rights. On July 20, 2001, Governor Keating denied the clemency petition, concluding that the violation of article 36 had had no prejudicial effect on Valdez's conviction or sentence. *Id.* On August 17, however, the Governor granted another stay of execution to allow Valdez to pursue once more a claim for postconviction relief before the Oklahoma Court of Criminal Appeals. *Id.* Valdez's claim succeeded, and his sentence was indeed finally converted into one of life in prison without the possibility of parole. *Id.* at 706. In this (second) hearing on postconviction relief, the Oklahoma Court of Criminal Appeals, however, explicitly refused to discuss Valdez's claim in terms of the Vienna Convention. The court based its decision exclusively on the fact that counsel for Valdez was ineffective, namely that Valdez's attorneys would have had to look into exculpatory evidence located in Mexico regarding his mental capacity. *Id.* at 710.

186. *Torres*, 120 P.3d at 1184.

trial, in order to avoid the death penalty. The death penalty no longer at issue after Governor Henry had commuted Torres' death sentence, the court concluded that no further remedy was required.[187]

With all the complicated iterations thus described, the *Torres* case is symptomatic for the evolution of article 36 claims, and hence the implementation of *LaGrand* and *Avena* in U.S. courts. It is all the more a sign of hope that, with this last one in a series of courageous decisions, we are now for the first time in presence of a case in which an inquiry into prejudice—albeit not free of problems—was conducted that can be seen as complying with the requirements set out by the ICJ. We take this as the beginning of a fruitful judicial dialogue between U.S. judges and the Hague Court.

Let us now turn to another case that has crucially influenced the implementation of *LaGrand* and *Avena* in U.S. courts.

IV. DEVELOPMENTS SURROUNDING *MEDELLIN*

Jose Ernesto Medellin is one of the individuals whose rights have been specifically adjudicated by the ICJ.[188] He was convicted of capital murder in a Texas court and sentenced to death for raping and killing two teenage girls.[189] He subsequently filed a petition for writ of habeas corpus, on the basis, *inter alia*, that his Convention rights had been violated.[190] The District Court denied his petition, and the Fifth Circuit Court of Appeals subsequently denied his application for a certificate of appealability.[191] On December 10, 2004, the Supreme Court of the United States granted certiorari in *Medellin v. Dretke*.[192]

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187. *Id.*

188. Medellin is listed as "38" on the list of individuals in the *Avena* judgment. Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 12, 25 (Mar. 31).

189. Medellin v. Dretke, 125 S. Ct. 2088, 2089 (2005).

190. *Id.*

191. *Id.* at 2089-90.

192. Medellin v. Dretke, 125 S. Ct. 686 (2004). The two questions presented to the Supreme Court read as follows:

> 1. In a case brought by a Mexican national whose rights were adjudicated in the *Avena* Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the *Avena* holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?
> 2. In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the *LaGrand* and *Avena* Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?

Shortly before the day for which oral argument before the Supreme Court was scheduled (March 28, 2005), a series of events unraveled that proved important for the further course of the proceeding. First, on February 28, 2005, President Bush issued a document entitled "Memorandum for the Attorney General," declaring that state courts should give effect to the *Avena* decision.[193] A few days later, by way of a letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations, the United States withdrew from the Optional Protocol.[194] Moreover, relying on the memorandum and the *Avena* judgment as separate bases for relief that were not available at the time of his first state habeas corpus action, Medellin filed a state application for a writ of habeas corpus just four days before oral argument at the Supreme Court.[195] Simultaneously, he filed a motion to stay proceedings at the Supreme Court while the action would be pending in Texas.[196]

The Supreme Court, however, proceeded to hear oral arguments, and on May 23, 2005 dismissed the application for certiorari as improvidently granted.[197] In the following Part, we analyze the Supreme Court's decision, comment on the effect of the withdrawal of the United States from the Optional Protocol, and offer some thoughts on how

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Petition for Writ of Certiorari, Medellin v. Dretke, No. 04-5928, 2004 WL 2851246, at *i (5th Cir. Aug. 18, 2004).

193. The full text reads as follows:

> The United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the "interpretation and application" of the Convention.
>
> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligation under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)*, 2004 ICJ 128 [sic] (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Brief for the United States as Amicus Curiae Supporting Respondent, Medellin v. Dretke, 125 S. Ct. 2088 (2005) (No. 04-5928), 2005 WL 504490, app. 2.

194. The text of this letter can be found at Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, n.1, *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty33.asp#N1 (last visited Jan. 14, 2006).

195. *Medellin*, 125 S. Ct. at 2090.

196. *Id.* at 2093.

197. *Id.* at 2092.

future article 36 cases in general, and *Medellin* in particular, could evolve based on these events.

A. The Medellin *Dismissal*

About two months after it had heard oral argument in the case, the Supreme Court, in a five to four decision, dismissed the writ of certiorari as improvidently granted.[198] From our perspective, the decision is worthy of closer attention for several reasons: First, the three dissents appended to the decision (one by Justice Souter, one by Justices Breyer and Stevens, and another by Justices O'Connor, Stevens, Souter, and Breyer) show the importance that four of the Justices attributed to the questions raised in *Medellin* and how close the Court came to deciding those questions in May 2005. Also, the dissents show a considerable degree of support for the position that U.S. courts should give effect to article 36 in accordance with the ICJ's interpretation laid out in *LaGrand* and *Avena*. Yet, not only the dissents but also the majority opinion contain some reason for hope that, either in a future stage of the *Medellin* case or in a different case arising under article 36, the Supreme Court would grant certiorari. The Supreme Court can then design a regime that will finally provide clarity and legal certainty not only for individuals whose article 36 rights have been violated, but also for lower court judges, and will ensure that the United States lives up to its obligations under international law.

The majority opinion, joined by Chief Justice Rehnquist, Justices Scalia, Kennedy, Thomas, and Ginsburg, cites two principal reasons for the dismissal as improvidently granted.[199] The first is the overarching concern that the Court's decision may be rendered advisory due to the circumstance that the state court in Texas could grant Medellin's habeas corpus application.[200] Should that court award the review and reconsideration Medellin is asking for, the whole subject of the case would be rendered moot.

Second, the majority mentions a set of questions that remain unresolved and "could independently preclude federal habeas relief for Medellin, and thus render advisory or academic [the Court's] consideration of the questions presented."[201] These questions are:

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198. *Id.*
199. *Id.* at 2090, 2092.
200. *Id.* at 2092.
201. *Id.* at 2090.

(a) Is Medellin's claim barred by *Reed v. Farley*, where the Supreme Court held that a violation of federal statutory rights would only be cognizable in a postconviction proceeding if it meets the "fundamental defect" test announced in *Hill v. United States*?[202]

(b) Would Medellin have to establish that the state habeas court's determinations[203] (issued before *Avena*) "[were] contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court"?[204]

(c) How would Medellin's Article 36 claim interact with *Teague v. Lane*, which pronounced the rule that ordinarily a petitioner cannot enforce a "new rule" of law?[205]

(d) Would Medellin have to demonstrate that a treaty violation could satisfy the standard according to which a certificate of appealability may be granted, only in presence of the "substantial showing of the denial of a *constitutional* right" standard?[206]

(e) Can Medellin show that he exhausted all his claims in state court before he sought federal habeas relief?[207]

Most interestingly from our perspective however, the majority appears to indicate implicitly that the Court would be willing to review *Medellin* at a later stage, that is, in case the Texas state court decided Medellin's new claim without affording the review and reconsideration he asked for.[208] It seems fair to assume that such attitude would apply even if *Medellin* should actually be afforded the review and reconsideration, but a different individual whose rights were adjudicated in *Avena* would properly petition the Supreme Court for a writ of

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202. *Id.* at 2090-91 (citing Reed v. Farley, 512 U.S. 339 (1994) (citing Hill v. United States, 368 U.S. 424, 428 (1962))).

203. As discussed *supra* Part III, the state habeas court had determined that the Vienna Convention did not create individual rights, that state procedural rights could bar Medellin's article 36 claim, and that Medellin had failed to show that he was harmed by any lack of notification of the Mexican consulate. Medellin v. Dretke, 371 F.3d 270, 280 (5th Cir. 2004).

204. *Medellin*, 125 S. Ct. at 2091 (citing Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1) (2000)); *see also* Woodford v. Viscotti, 537 U.S. 19, 22-27 (2002) (discussing the unreasonable application of clearly established Federal law).

205. *Medellin*, 125 S. Ct. at 2091 (citing Teague v. Lane, 489 U.S. 288, 290 (1989)).

206. *Id.* (citing 28 U.S.C. § 2253(c)(2) (1996)).

207. *Id.* at 2091-92.

208. In fact, this is a point all justices seem to agree on. *See id.* at 2092 ("In light of the possibility that the Texas courts will provide Medellin with the review he seeks pursuant to the *Avena* judgment and the President's memorandum, and the potential for review in this Court once the Texas courts have heard and decided Medellin's pending action."); *id.* at 2093 (Ginsburg, J., concurring) ("[The majority's course of action] would enable this Court ultimately to resolve, clearly and cleanly, the controlling effect of the ICJ's *Avena* judgment, shorn of procedural hindrances that pervade the instant action."); *id.* at 2108 (Breyer, J., dissenting) ("[A] loss in state court would likely be followed by review in this Court.").

certiorari.[209] Another hopeful sign can be found in footnote 3 of the majority opinion, where the Justices specifically acknowledge, with respect to the question of whether article 36 created individual rights, that "[a]t the time of [the Court's] *Breard* decision, . . . [it] confronted no final ICJ adjudication."[210] This appears to indicate a willingness to revisit the issue and to realign ICJ and Supreme Court jurisprudence.

The dissenters, however, provide even more hopeful perspectives for the future compliance of the United States with its obligations under the Convention. Justice Souter, in his dissenting opinion, advocates deciding the case, and then remanding it to the Court of Appeals.[211] He remarks, with respect to the Fifth Circuit's reliance on *Breard v. Greene*:

> The Court of Appeals understandably thought itself constrained by our decision in *Breard v. Greene*, which [it regarded] as binding until this Court said otherwise. It is of course correct to face the possibility of saying otherwise today, since Medellin's case now presents a Vienna Convention claim in the shadow of a final ICJ judgment that may be entitled to considerable weight, if not preclusive effect. This case is therefore not *Breard*, and the Court of Appeals should be free to take a fresh look.[212]

Justice Breyer goes a step further when he declares that,

> [f]or one thing, Medellin's legal argument that "American courts are now bound to follow the ICJ's decision in *Avena*" is substantial, and the Fifth Circuit erred in holding the contrary. By vacating its judgment and remanding the case, we would remove from the books an erroneous legal determination that we granted certiorari to review.[213]

The main dissent, written by Justice O'Connor and joined by Justices Stevens, Souter, and Breyer, encompasses ten pages, as compared to the mere three pages of the majority opinion.[214] Its length and structure

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209. This impression is confirmed by footnote 1 of the majority opinion:

> Of course Medellin, or the State of Texas, can seek certiorari in this Court from the Texas courts' disposition of the state habeas corpus application. In that instance, this Court would in all likelihood have an opportunity to review the Texas courts' treatment of the President's memorandum and *Case Concerning Avena and other Mexican Nationals*, unencumbered by the issues that arise from the procedural posture of this action.

Id. at 2090 n.1 (citations omitted). In fact, at the time of printing of the present Article, the Supreme Court granted certiorari in another article 36 case: *Sanchez-Llamas v. Oregon*, 126 S. Ct. 620 (2005). *See infra* note 229 and accompanying text.

210. *Medellin*, 125 S. Ct. at 2091 n.3.

211. *Id.* at 2106.

212. *Id.* at 2106 (Souter, J., dissenting) (citation omitted) (discussing Breard v. Greene, 523 U.S. 371 (1997)).

213. *Id.* at 2107 (Breyer, J., dissenting) (citations omitted).

214. *Compare id.* at 2090-92, *with id.* at 2095-2105 (O'Connor, J., dissenting).

suggest to us that the majority may not have been clear until fairly late, or that some dissenters hoped that it might still change at the last moment and that it was therefore written as a potential majority opinion rather than a mere listing of points of disagreement. Speculation aside, Justice O'Connor would have vacated the Court of Appeals' decision to deny Medellin a certificate of appealability and remanded to the Fifth Circuit for further proceedings.[215] The Fifth Circuit could then have decided to schedule the case so as to allow the Texas proceedings to take place first.[216] In particular, the analysis of the article 36 language with respect to the creation of individual rights is worth highlighting. Having completed a longer analysis of article 36, paragraph (2), Justice O'Connor underscores that

> the treaty . . . impos[es] an obligation to inform the individual of his rights in the treaty. And if a statute were to provide, for example, that arresting authorities "shall inform a detained person without delay of his right to counsel," I question whether more would be required before a defendant could invoke that statute to complain in court if he had not been so informed.[217]

In conclusion, we have to keep in mind that the Justices only had a relatively narrow issue before them, namely whether the Court of Appeals erred in not granting Medellin a certificate of appealability. Faced on the one hand with the possibility that the problem may, at least with respect to Medellin's case, become moot, and on the other hand with the knowledge that the case may well once again come before the Court, and then likely in a better procedural posture, a majority of the Justices preferred to "dig" the case.[218]

B. Strategic Moves of the White House—The Presidential Memorandum and U.S. Withdrawal from the Optional Protocol

President Bush's "Memorandum for the Attorney General" of February 28, 2005, declaring that State courts should give effect to the *Avena* decision, and the U.S. withdrawal from the Optional Protocol should be viewed together, as two parts of one and the same strategy.[219] Indeed, in the week that separated the two events, there was considerable debate among academics familiar with the subject as to what effect the

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215. *Id.* at 2105 (O'Connor, J., dissenting).
216. *Id.* (O'Connor, J., dissenting).
217. *Id.* at 2104 (O'Connor, J., dissenting).
218. To "dig" a case is Supreme Court shorthand for "dismiss as improvidently granted."
219. Brief for the United States as Amicus Curiae Supporting Respondent, Medellin v. Dretke, 125 S. Ct. 2085 (2005) (No. 04-5928), 2005 WL 504490, app. 2.

presidential declaration would have in future cases of article 36 violations, beyond the individuals on whose rights the ICJ had decided in *Avena*. After some speculation as to the constitutionality of such presidential action, it quickly became clear that, given that the memorandum only addressed the fifty-one Mexican nationals whose rights had been addressed by the *Avena* judgment, it would not solve the problem if the President in the future had to decide on a case-by-case basis whether individual victims of article 36 violations were to be afforded review and reconsideration. This concern was answered when part two of the strategy was implemented, that is, when the United States withdrew from the Optional Protocol. Viewed from the Federal government's angle the U.S. withdrawal from the Optional Protocol "seals off" the troubling matter of article 36 claims for the future, as the United States will no longer be obligated to defer to ICJ jurisdiction in Consular Convention cases. However, two points should be kept in mind here. First, it is not clear whether Texas courts will accept the commandeering by the President's Memorandum. Thus, it might well be that the Supreme Court will soon find a case on its docket, confronting the President and the authorities in Texas, which would give the Court the opportunity to delineate more clearly the limits of the President's foreign relations power. Second, and more importantly, withdrawal from the Optional Protocol does not free the United States from its treaty obligations under the Convention itself. The United States will thus still be bound to comply with article 36 of the Convention, the binding interpretation of which the ICJ laid out in *LaGrand* and *Avena*. Hence, it is not possible for the United States to develop its own interpretation of the Convention after it has left the Optional Protocol. Moreover, the United States cannot limit compliance with the Convention to the fifty-one individuals whose rights were decided upon in the ICJ's *Avena* judgment. Once a violation of article 36 is found or even conceded, the United States will have to conduct review and reconsideration in accordance with *LaGrand* and *Avena* to live up to its obligations under international law.

C. The Task of U.S. Courts—An International Law Perspective

While we regard *Medellin* as an important case, we do not perceive it a hard case as far as its international legal aspects are concerned. In fact, the rules of international law on the matter are quite clear. As we have stated above, there is no doubt that the United States, including its courts, is bound to implement judgments of the ICJ, *a fortiori* in the present case. The United States consented to the compulsory jurisdiction

of the Court in questions of interpretation of the Convention when it chose to become a party to the Optional Protocol. Moreover, as we have shown above, not a single one of the violations of Convention rights of the individuals mentioned in *Avena* was disputed—a feature which these cases share with the vast majority of all the instances in which violations of the Convention were brought before U.S. courts. Also, the United States could, at any point in time, have denounced the Optional Protocol, or both the Optional Protocol and the Convention, but chose not to do so before *Avena* was brought. In fact, even if the United States decided to withdraw from the Convention, it would still have to abide by the *LaGrand* and *Avena* decisions in case of violations that occurred while it was still a party. Further, it is to be observed that none of the obligations that the ICJ specified in its *Avena* decision could have come as a surprise to U.S. authorities, given that *Avena* is in fact the third case, after *Breard* and *LaGrand*, in which the matter of consular information was raised.

International law may be inherently less rigid than domestic legal systems. However, unlike other international legal debates in which the United States is currently involved, the questions before us in the present instance can be answered fully and exhaustively by reference to two written sources: the Convention as interpreted by the ICJ and the Optional Protocol. In that sense, international law could not be clearer; everything turns on the consent that the United States expressed in two treaties.

In our view, it should be quite easy for a U.S. court, or the Supreme Court, at a future stage to develop its jurisprudence so as to ensure compliance with *LaGrand* and *Avena*. First, the Supreme Court already held in *Breard* that the Convention *arguably* does create individual rights.[220] Given that we are now in the presence of an authoritative interpretation on the matter, there is no need for the Supreme Court to overrule *Breard*, but merely to clarify it in that regard. Similarly, procedural default is an issue the handling of which U.S. courts could and should be able to rectify easily, applying the same logic, with a view to ensuring that every individual whose rights under article 36 have been violated gets, at some point, the chance of review and reconsideration ordered by *LaGrand* and *Avena*. Along the same lines, it has to be stressed that the duty to afford review and reconsideration cannot be short-circuited by jumping to the question of the remedy asked for and pointing out that such a remedy would not be available. This leads us to

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220. "The Vienna Convention—which arguably confers on an individual the right to consular assistance following arrest—has continuously been in effect since 1969." Breard v. Greene, 523 U.S. 371, 376 (1998).

the point where we perceive the need for guidance to be the greatest and most urgent: the burden and standard of proof for prejudice and the remedies available. We have shown that U.S. courts have been quite creative in the development of tests for assessing whether defendants have been prejudiced by article 36 violations. However, as we have also shown, the tests presently in use are counterintuitive, bordering on the unworkable, and such tests arguably put a very high burden on a claimant who, due to the very fact of his rights under article 36 having been violated, may find himself in a very bad position to meet that burden. It is for that reason that we advocate a burden-sharing between the claimant and the courts in order to ensure that review and reconsideration are capable of assessing effectively actual prejudice to the claimant. In that sense, if the claimant can make a showing that his rights have been violated, there must follow an inquiry into prejudice in which the burden of proof is not solely on the claimant. Ultimately, it may be for the Supreme Court to indicate which remedies are actually available for violations of article 36 rights. In that regard, it seems safe to say, as we did above, that effective review and reconsideration implies that some remedies must be available. The question of which remedies, and of the circumstances under which they are to be granted, should, however, in the words of the ICJ, be left to the United States.

D. A Few Words of Caution and Some Loose Ends

We also take this opportunity to express some caveats by way of pointing out some common misunderstandings about article 36 cases. First, neither *LaGrand*, nor *Avena*, or even *Medellin*, are essentially about the death penalty. In fact, while Germany, in *LaGrand*, sought, among other claims, to vindicate the rights of two of its nationals who happened to have been on death row, it was only due to strategic lawyering that all of the *Avena* individuals similarly were facing the death penalty. It is clear from the ICJ's decisions in both cases that all foreign nationals sentenced to severe penalties in neglect of their rights under the Convention must be afforded review and reconsideration. It was just to make the strongest case possible that Mexico decided to avoid the interpretation of "severe" by only presenting cases of individuals who were facing the most severe punishment known to modern legal systems, namely capital punishment. The judgments of the ICJ that interpret the Convention in no way call for such a limited reading. We suggest that, in keeping with the object and purpose of the Convention, any prison term, and certainly any prison term greater than one year, should qualify as severe. In that regard, it is important to keep in mind that the United

States will very likely be in favor of a low threshold, given its strong interest in the safety of its own citizens abroad.

Another misperception, in part created by the way the certiorari questions in *Medellin* were phrased,[221] is related to the question of what implications the ICJ's holdings in *LaGrand* and *Avena* have for nationals of parties to the Vienna Convention other than the ones who were individually addressed in *Avena*. The second certiorari question suggests that U.S. courts should apply the "review and reconsideration" holdings "as a matter of international judicial comity and in the interest of uniform treaty interpretation."[222] Here one has to keep in mind several distinctions. Of the Mexican nationals addressed in *Avena*, only three had already exhausted all their possibilities of appeal.[223] With respect to those, the ICJ found that the United States was in breach of its secondary Convention obligations, as it did not afford them the required review and reconsideration.[224] With regard to the second group, namely all other individuals specifically addressed in *Avena*, the ICJ found that the United States had not yet breached its secondary obligations because the individuals had not yet exhausted all their appeals.[225] A third group consisted of all Mexican or German nationals whose rights may be violated in the future and who may be sentenced to severe penalties, as their situations have been specifically addressed in *LaGrand* and *Avena*, respectively. With regard to these individuals, the ICJ held that the United States is under an obligation to afford them review and reconsideration of their convictions and sentences at some point in their judicial proceedings.[226] However, the ICJ has made it very clear in *Avena* that it interpreted the Convention in a principled way, and that no *a contrario* interpretation could be made with regard to nationals of countries other than Germany and Mexico who may find themselves in a similar situation in the United States.[227] Hence, in our view, U.S. courts

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221. Petition for Writ of Certiorari, Medellin v. Dretke, No. 04-5928, 2004 WL 2851246, at *i (5th Cir. Aug. 18, 2004).

222. *Id.*

223. Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 12, 27 (Mar. 31).

224. *Id.* at 57.

225. *Id.*

226. LaGrand Case (Germany v. United States of America) 2001 I.C.J. 466, 513-14 (June 27); *Avena*, 2004 I.C.J. at 60.

227. Paragraph 151 of the judgment is very clear on the subject:

> The Court would now re-emphasize a point of importance. In the present case, it has had occasion to examine the obligations of the United States under Article 36 of the Vienna Convention in relation to Mexican nationals sentenced to death in the United States. Its findings as to the duty of review and reconsideration of convictions

should not, as the second certiorari question in *Medellin* suggests, give effect to the ICJ's interpretation of the Convention as a matter of comity. The ICJ has issued an authoritative interpretation of the Convention and U.S. courts should give effect to the *LaGrand* and *Avena* judgments as a matter of law, irrespective of the nationality of the individual whose rights have been violated.

Lastly, we find it important to once again remind the reader that in the vast majority of the reported U.S. cases in which Convention breaches were at issue, the violation of the individual's right under the Convention remained uncontested. Here, one ought not to forget that the easiest way for States to avoid having judgments and sentences of their courts reviewed and reconsidered is to ensure that foreign nationals be advised of their rights, preferably directly at the time of their arrest. This is not a question of affording foreigners a right beyond those guaranteed in the U.S. Constitution. Rather, what is at issue here is the specific vulnerability of a foreign national.

V. CONCLUSION

We have demonstrated above that courts throughout the United States, almost without exception, have up to now not complied with the ICJ judgments in *LaGrand* and *Avena*. However, at this point we consider it important to put our observations into a wider context: The *Medellin* case came before the Supreme Court at a time when U.S. foreign policy, including the Administration's readings of international legal obligations of the United States, met growing criticism at home, and even more criticism abroad. Recently, the U.S. Administration has pushed the limits of international law on several occasions, such as in its interpretation of fundamental obligations under international law like those contained in the Geneva Conventions, or the prohibition of the use of force embodied in the Charter of the United Nations. Much has been

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> and sentences have been directed to the circumstance of severe penalties being imposed on foreign nationals who happen to be of Mexican nationality. To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the *issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention*, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

Avena, 2004 I.C.J. at 69-70 (emphasis added).

written about the current Administration's position towards international law, and the complexities of these questions exceed the scope of the present Article.[228] However, we find it important to divorce such debates—in which the United States stands, rightly or not, accused of hubris in the face of international law—from the issues raised in *Medellin* and other article 36 cases bound to come before the Supreme Court. While it is regrettable that most U.S. courts have so far not found a way to comply with the terms of *LaGrand* and *Avena*, we do not take a cynical perspective on the matter. Rather, we are confident that the U.S. system of justice is functioning properly, albeit slowly. The questions of how to implement *LaGrand* and *Avena* have crystallized further and further as they came before various courts, until they reached the Supreme Court, and likely not for the last time. In fact, the Supreme Court on November 7, 2005, granted certiorari in another article 36 case, *Sanchez-Llamas v. Oregon*.[229] Moreover, as we discussed above, while the *Medellin* certiorari case was dismissed as improvidently granted, not only the dissents by several Justices, but also the majority opinion, contained glimmers of hope that implementation of the Convention in the United States may greatly improve in the future.[230] Also, one should

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228. *See, e.g.*, Andreas L. Paulus, *From Neglect to Defiance? The United States and International Adjudication*, 15 EUR. J. INT'L L. 783 (2004).

229. Sanchez-Llamas v. Oregon, 126 S. Ct. 620 (2005). The certiorari questions presented for the consolidated cases follow:

> 1. Does the Vienna Convention convey individual rights of consular notification and access to a foreign detainee enforceable in the Courts of the United States?
> 2. Does the state's failure to notify a foreign detainee of his rights under the Vienna Convention result in the suppression of his statements to police?

See also Bustillo v. Johnson, 126 S. Ct. 621 (2005):

> 1. Whether, contrary to the International Court of Justice's interpretation of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100-101, state courts may refuse to consider violations of Article 36 of that treaty because of a procedural bar or because the treaty does not create individually enforceable rights.

Sanchez-Llamas v. Oregon, No. 04-10566 (U.S. Nov. 7, 2005); Bustillo v. Johnson, No. 05-51 (U.S. Nov. 7, 2005), *available at* http://www.supremecourtus.gov/qp/05-00051qp.pdf (noting the issues to be considered from *Sanchez-Llamas* and *Bustillo*, respectively, in the consolidated case).

These cases have already attracted substantial attention by international law experts, as evidenced by the Brief of International Court of Justice Experts as Amici Curiae in Support of Petitioners, submitted to the United States Supreme Court. 126 S. Ct. 823 (2005) (No. 04-10566, 05-51), 2005 WL 3597806.

230. Another avenue for implementation of *LaGrand* and *Avena* has recently been explored in *Jogi v. Voges*, 425 F.3d 367 (7th Cir. 2005). There, the claimant brought suit for the violation of his article 36 right under the Alien Torts Claims Act. *Id.* at 370. While the decision contains some very promising statements regarding the judicial dialogue between U.S. courts and the ICJ, this new avenue for implementation of *LaGrand* and Avena lies outside the scope of the present Article and will have to be taken up in further research on the subject.

note that, so far, none of the individuals whose rights were specifically adjudicated in *Avena* have been executed. We thus remain confident that U.S. courts will look beyond politics to the subject matter of the case, which, as we argued above, is actually quite straightforward from the perspective of international law.

In conclusion, we observe no confrontation between the ICJ and the Supreme Court or other U.S. courts, be they state or federal. Rather, in our view, the ICJ in *LaGrand* and *Avena* sought to spark a judicial dialogue by setting a few minimum requirements and leaving the bulk of the task of implementation to the complete discretion of the United States. It is now up to U.S. courts to exercise this discretion.