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Revisiting Miranda After Avena: The Implications of Mexico v. United States of America for the Implementation of the Vienna Convention on Consular Relations in the United States

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Abstract

This Article explores the tension between the limited power of the federal government to implement the ICJ's ruling and the authority of individual U.S. states to effect criminal justice, in consideration of the Vienna Convention and the requirements of the Avena decision. The application of international law within the U.S. federal system will be analyzed, in particular with respect to the Avena, LaGrand, and Breard cases. In view of those cases, the efficacy of remedies in the U.S. federal system for the correction of past violations as well as the prevention of future breaches of the Vienna Convention will be addressed, with a look at possibilities for enforcement by the national government as well as possibilities for state action. Part I generally discusses the challenges that federal States encounter in the international legal community with a focus on attribution of acts to the State and the compliance of State organs. Part II illustrates the functioning of the U.S. federal system and its relationship with the international community, specifically concentrating on the status of treaties in the United States. Part III explains the doctrine of procedural default and provides a selected case analysis to understand the framework in which the Avena case is found. The cases highlight a broad array of Vienna Convention violations at the various levels of government. Part IV provides an in-depth outlining of Breard and LaGrand, the cases preceding Avena, and their relevant issues in order to provide a backdrop for Avena so as to facilitate a better understanding of the circumstances in which the case was decided. Part V presents a detailed look at the Avena case, which includes the facts and the decision and rationale of the ICJ. In addition, this Part reviews the recourse requested by Mexico in Avena. Part VI expounds upon the implementation of the ICJ decision in Avena and discusses whether U.S. states may choose to follow the decision of the ICJ despite a contrary ruling by the U.S. Supreme Court as seen in Breard, and whether Breard is actually valid precedent. In addition, two cases are offered to highlight the differences in approach. Part VII addresses the responsibility of the United States to provide avenues of redress. In addition, the doctrine of good faith will be emphasized as a necessity when taking action that entails international ramifications. Miscellaneous instances are then offered as examples of the exercise of good faith. Part VIII analyzes the various ways in which the U.S. federal government, responsible for its state organs, can secure state compliance with federal treaties, with an emphasis on federal action that can be taken. Part IX advocates the implementation of a Miranda-style

warning as mandatory throughout the United States as a means of avoiding possible future Vienna Convention violations and concludes with a specific recommendation.

REVISITING *MIRANDA* AFTER *AVENA*: THE IMPLICATIONS OF *MEXICO V. UNITED STATES OF AMERICA* FOR THE IMPLEMENTATION OF THE VIENNA CONVENTION ON CONSULAR RELATIONS IN THE UNITED STATES

*Elizabeth Samson**

INTRODUCTION

From its founding, the United States has acknowledged and emphasized the importance of amicable relations with its neighbors and countries around the world.[1] Indeed, as U.S. citizens had been laid victim to one of the most grievous violations of consular and diplomatic rights in the Iranian hostage crisis,[2] the United States has firmly pursued these rights on behalf of itself as a Nation and on behalf of U.S. citizens abroad. Notwithstanding that undertaking, however, the United States has not fully succeeded in effecting the implementation of the terms set forth in the 1963 Vienna Convention on Consular Relations[3] ("Vienna Convention" or "Convention") within its own territory.[4]

In the field of consular relations, *Avena and Other Mexican Nationals*,[5] decided by the International Court of Justice (the "ICJ" or the "Court")[6] on March 31, 2004, is a groundbreaking

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1. *See infra* Part II.A and accompanying notes.

2. *See generally* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran; Iranian Hostage crisis), 1980 I.C.J. 3 (May 24).

3. Vienna Convention on Consular Relations and Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967, entered into force in the U.S. Dec. 24, 1969) [hereinafter Vienna Convention or Convention]. The Vienna Convention is a multilateral treaty.

4. *See* William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 259 (1998).

5. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

6. The ICJ is the principal judicial organ of the United Nations. *See* Press Release,

case in international jurisprudence. The premise of the case is that U.S. law enforcement officials failed to inform detained Mexican nationals of their right to consular access pursuant to Article 36 of the Vienna Convention,[7] which ultimately resulted in the application of the "procedural default" rule. This prevented the detainees from bringing a claim based on their Vienna Convention rights, thus violating the Convention and the rights of those detainees.[8]

In *Avena*, the United States asserted that the procedural default rule of the Antiterrorism and Effective Death Penalty Act ("AEDPA"),[9] as set forth by the Supreme Court in *Breard v. Greene*[10] is a defense to any deficiencies in notification and Vienna Convention implementation.[11] The ICJ in *Avena*, drawing on its previous ruling in the *LaGrand Case*,[12] found the application of the procedural default rule with respect to Vienna Convention claims to be against international law. The ICJ therefore required the United States to establish a method by which the cases could be reviewed and reconsidered so that the intent of the Vienna Convention would be given full effect.[13]

The purpose of the Vienna Convention on Consular Relations is to promote the efficient use of consular offices[14] by generally governing consular issues between a majority of the Nations of the world.[15] The Vienna Convention has been broadly ratified, presently by more than 165 States, thereby making it applicable to nearly all foreign nationals who are arrested on

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International Court of Justice ("ICJ"), The Court Finds That the United States of America has Breached its Obligations to Mr. Avena and 50 Other Mexican Nationals and to Mexico Under the Vienna Convention on Consular Relations, ICJ Press Release 2004/16 (2004).

7. *See* Vienna Convention, *supra* note 3, art. 36.

8. *See infra* Parts IV.A, VI and accompanying notes.

9. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 18 U.S.C.A. 1961(1)) [hereinafter AEDPA].

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

11. *Avena*, 2004 I.C.J. at 63, ¶ 134.

12. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

13. For a full explanation of the facts of the case and the reasoning of the ICJ, see *infra* Part VI and accompanying notes.

14. *See* Heather M. Heath, *Non-Compliance with the Vienna Convention on Consular Relations and Its Effect on Reciprocity for United States Citizens Abroad*, 17 N.Y. INT'L L. REV. 1, 12 (2004).

15. *See* Alan Macina, *Avena and Other Mexican Nationals: The Litmus for* LaGrand *and the Future of Consular Rights in the United States*, 34 CAL. W. INT'L L.J. 115, 120 (2003).

criminal charges.[16] The Vienna Convention was adopted on April 24, 1963 in Vienna, Austria, and entered into force on March 19, 1967.[17] The U.S. Senate ratified both the Vienna Convention and the Optional Protocol Concerning the Compulsory Settlement of Disputes on October 22, 1969.[18] President Nixon formally ratified the Vienna Convention for the United States on November 12, 1969.[19] The ratification was deposited on November 24, 1969, and it entered into force for the United States on December 24, 1969.[20]

The United States signed the Vienna Convention with a view towards affording rights to foreign nationals on U.S. soil and achieving reciprocity with other Nations for U.S. nationals on foreign soil.[21] However, since the adoption of the Vienna Convention by the United States in 1969, there have been many reported violations of Article 36 of the Vienna Convention, and the victims have, for the most part, not received redress. In essence, the Vienna Convention provides rights, but there are no real or broadly implemented remedies[22] in the United States to date.[23]

The ICJ has described Article 36 of the Vienna Convention[24] as "an interrelated régime designed to facilitate the implementation of the system of consular protection."[25] Paragraphs 1(b) and 2 of Article 36 are pivotal to the discussion at hand and

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16. *See* John Quigley, *The Law of State Responsibility and the Right to Consular Access*, 11 WILLAMETTE J. INT'L L. & DISP. RESOL. 39, 41 (2004).

17. *See generally* Vienna Convention, *supra* note 3.

18. *See* Molora Vadnais, *A Diplomatic Morass: An Argument Against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations*, 47 UCLA L. REV. 307, 314 (1999).

19. *See* Valerie Epps, *Violations of the Vienna Convention on Consular Relations: Time for Remedies*, 11 WILLAMETTE J. INT'L L. & DISP. RESOL. 1, 6-7 (2004).

20. *See* Aceves, *supra* note 4, at 268-69.

21. *See id.* at 259.

22. There is one instance in which a court did provide relief in a claim brought on the grounds of a Vienna Convention violation. *See infra* Part VIII.A and accompanying notes.

23. *See* Linda E. Carter, *Compliance with ICJ Provisional Measures and the Meaning of Review and Reconsideration Under the Vienna Convention on Consular Relations*: Avena and Other Mexican Nationals (Mex. v. U.S.), 25 MICH. J. INT'L L. 117, 121 (2003).

24. *See* Vienna Convention, *supra* note 3, art. 36. Article 36 is entitled "Communication and contact with nationals of the sending State." For a full citation of the article and paragraphs, see *infra* note 27 and accompanying text.

25. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 46, ¶ 74 (Mar. 31) (citing *LaGrand Case*, 2001 I.C.J. 466 (June 27)).

to the understanding of the *Avena* case as well as other cases in which Vienna Convention violations are presented.[26] These Articles state as follows:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
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> . . . .
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
>
> . . . .
>
> 2. 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.[27]

As the ramifications of *Avena* presently unfold, many questions have been raised regarding the implications of this case on the obligations of the United States with respect to these paragraphs, which lie at the heart of the controversy of *Avena* and its preceding cases, most important of which are *Breard* and *LaGrand*. These cases bring to light the challenge of complying with the Vienna Convention in the United States in view of its complex

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26. *Id.* ¶ 14.

27. Vienna Convention, *supra* note 3, art. 36. It is relevant to note that Article 36 was nearly omitted from the Vienna Convention, due to intense debate about its inclusion at the plenary meetings of the Vienna Convention. The notification requirement of Article 36, paragraph 1(b), however, was not even included in the debate, because it was only added to the draft of Article 36 just before signing. Interestingly, the U.S. delegation to the Vienna Convention stated that the requirement of notification "ha[d] the virtue of setting out a requirement which [was] not beyond means of practical implementation in the United States, and, at the same time, [was] useful to the consular service of the United States in the protection of [its] citizens abroad." Vadnais, *supra* note 18, at 314 (citing Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963, S. Exec. Doc. E., 91st Cong., at 60 (1969)).

system of federal government.[28]

This Article explores the tension between the limited power of the federal government to implement the ICJ's ruling and the authority of individual U.S. states to effect criminal justice, in consideration of the Vienna Convention and the requirements of the *Avena* decision.[29] The application of international law within the U.S. federal system will be analyzed, in particular with respect to the *Avena*, *LaGrand*, and *Breard* cases. In view of those cases, the efficacy of remedies in the U.S. federal system for the correction of past violations as well as the prevention of future breaches of the Vienna Convention will be addressed, with a look at possibilities for enforcement by the national government as well as possibilities for state action.

Part I generally discusses the challenges that federal States encounter in the international legal community with a focus on attribution of acts to the State and the compliance of State organs.

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Part IV provides an in-depth outlining of *Breard* and *LaGrand*, the cases preceding *Avena*, and their relevant issues in order to provide a backdrop for *Avena* so as to facilitate a better understanding of the circumstances in which the case was decided.

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28. In cases prior to *Avena*, many Nations have discreetly issued supporting affidavits for detainees, but the governments of Paraguay, Germany, and most recently Mexico in *Avena*, have been at the forefront of the struggle to ensure that the Vienna Convention is relevant as applied to their citizens. *See* Carter, *supra* note 23, at 121. Those cases will be highlighted in this Article.

29. It must be noted that throughout this Article, "state" refers to one of the fifty United States, while "State" refers to a country or Nation.

Part VI expounds upon the implementation of the ICJ decision in *Avena* and discusses whether U.S. states may choose to follow the decision of the ICJ despite a contrary ruling by the U.S. Supreme Court as seen in *Breard*, and whether *Breard* is actually valid precedent. In addition, two cases are offered to highlight the differences in approach.

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Part IX advocates the implementation of a *Miranda*-style warning as mandatory throughout the United States as a means of avoiding possible future Vienna Convention violations and concludes with a specific recommendation.

I. *THE PROBLEMS OF FEDERAL STATES IN INTERNATIONAL LAW*

This Part discusses three interrelated ideas. The first section addresses the conflict that federalism can pose due to the division of power between central and local governments, when States attempt to implement international legal rules within a national legal system. The second section addresses the responsibility of a State for any action taken by one of its organs. The third section addresses the obligations of States to enforce treaty compliance by its organs.

A. *Federalism and the Tension Between International and National Law*

In a complex international legal order, there is a constant tension between international and national law,[30] especially in a State with a federal system of government. International law has

30. *See* Jeremy White, *A New Remedy Stresses the Need for International Education: The Impact of the* LaGrand *Case on a Domestic Court's Violation of a Foreign National's Consular Relations Rights Under the Vienna Convention*, 2 WASH. U. GLOBAL STUD. L. REV. 295, 305 (2003).

not generally accepted the rigidity of a federal structure of a national government as a pretext for breach of the Nation's obligations.[31] For instance, in a 1932 Advisory Opinion, the Permanent Court of International Justice ("Permanent Court") declared that "[a] State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."[32] The Permanent Court went even further, stating that "[a] State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken."[33]

Moreover, the Vienna Convention on the Law of Treaties of 1969 ("VCLT")[34] prohibits a Nation from invoking its federal structure as an excuse for breach.[35] Article 27 of the VCLT states that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[36] This Article implies a preexisting rule of customary international law that does not permit exceptions for federal States.[37]

Though the rule put forth in Article 27 seems unambiguous, the challenges that federal governments face in balancing the powers of their central and local governments continue to present themselves. An example of this difficulty is when a national government ratifies a self-executing treaty in a federal State with a general supremacy doctrine, conforming the State's international commitments to domestic law should be an auto-

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31. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT]. Though signed by U.S. President Richard Nixon on April 24, 1970, the United States has yet to ratify the VCLT. *See* United Nations, Status of Multilateral Treaties Deposited with the Secretary General, ch. XXIII § 1, *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp.

32. *Treatment of Polish Nationals in Danzig*, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44, at 24 (Feb. 4).

33. *Exchange of Greek and Turkish Populations*, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 10, at 20 (Feb. 21).

34. *See* VCLT, *supra* note 31.

35. *See* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 450 (2003).

36. VCLT, *supra* note 31, art. 27. Article 27 continues, stating that "[t]his rule is without prejudice to Article 46[,]" which concerns the provisions of internal law regarding the competence to conclude treaties. *Id.*

37. *See* Swaine, *supra* note 35, at 450. A more specific method by which federalism is denied as a pretext for breach is by holding governments responsible for the acts of their organs. *See infra* Part I.B.

matic undertaking.[38] However, the State's constitutional order may cause the provisions of the treaty to not be automatically performed.[39] For instance, in the United States, where the national government ratifies treaties such as the Vienna Convention on Consular Relations, the state and local authorities are left with the responsibility of implementing specific articles such as Article 36, paragraph 1(b) of the Vienna Convention,[40] and oftentimes do not do so. Consequently, despite what may be the best of intentions to fulfill their obligations, federal States, because of their structure, can face challenges when it comes to domestic implementation of their international responsibilities.

B. *State Responsibility and Unity of the State*

The responsibility of a federal State for its member states can often pose conflicts between local law and international law.[41] As early as 1851, there have been instances of federal States being held responsible for the actions of their component states.[42] In that year, in the United States there were riots in New Orleans, Louisiana, in which the Consulate of Spain was raided and Spanish businesses were destroyed.[43] Even though the acts were committed in Louisiana and the state of Louisiana was factually liable for the incident, the government of Spain requested restitution from the U.S. Government,[44] holding it responsible for the act of its component state.

In the past, the ICJ has applied the law of State Responsibility to remedy treaty breaches.[45] The law of State Responsibility is binding on States, even in the absence of any entry into a treaty, as indicated in cases asserting that customary law is law even in the absence of a treaty indication.[46] The International Law Commission Articles on the Responsibility of States for Interna-

38. *See* Swaine, *supra* note 35, at 454.

39. *See id.* at 453-55.

40. *See* U.S. Dep't of State, Consular Notification and Access, Part 5: Legal Material, Vienna Convention on Consular Relations ("VCCR"), http://travel.state.gov/law/consular/consular_744.html#vccr (last visited Feb. 1, 2006).

41. *See* IVAN BERNIER, INTERNATIONAL LEGAL ASPECTS OF FEDERALISM 84 (1973).

42. *See id.* at 87-88 (giving an example of a Spanish request for redress to the United States over an incident in New Orleans, Louisiana).

43. *See* BERNIER, *supra* note 41, at 88.

44. *See id.*

45. *See, e.g.*, LaGrand Case, 2001 I.C.J. 466 (June 27).

46. *See, e.g.*, The Paquete Habana, 175 U.S. 677 (1900).

tionally Wrongful Acts ("ILC Articles")[47] address the issue of a State's responsibility for its obligations in international law.[48] Article 4 of the ILC Articles holds a State responsible under international law for the conduct of any State organ, "whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State . . . ."[49] The Principle of Unity of the State asseverates that, pursuant to Article 4, all acts of all State organs are treated equally.[50] There is no difference between the President and lower officials, between the judicial, legislative, and executive bodies, between a national government and the state governments—all are representative of the State to the same degree.

Pursuant to the laws of State Responsibility, attribution of the acts of State organs to the State itself is to be expected, because under international law, the State and its organs are one unit. Therefore, in a Nation with a federal system of government, the actions taken by one state in the system are attributed to the federal government, and in the same vein, the acts and obligations of the national government are binding upon the states as federal organs.

C. *State Implementation of International Law: Compliance of State Organs*

It has been the practice to include in certain treaties obligations on States to take measures to apply rules of international law. For instance, the General Agreements on Tariffs and Trade ("GATT")[51] includes a clause pertaining to federalism in Article XXIV(12), which states that "[e]very contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and

47. State Responsibility: Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading, U.N. GAOR Int'l L. Comm'n, 53d Sess., U.N. Doc. A/CN.4/L.602/Rev.1 (2001) [hereinafter ILC Articles].

48. *See* Quigley, *supra* note 16, at 50.

49. ILC Articles, *supra* note 47, art. 4. The Article further notes that "[a]n organ includes any person or entity which has that status in accordance with the internal law of the State." *Id.*

50. *See id.*

51. General Agreements on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

local governments and authorities within its territories."[52] The Article shows that the obligations of GATT were placed upon the State to ensure that its organs comply with the agreement and, thereby, making the State liable for any breaches by its organs.[53]

In the Preparatory Committee to GATT, the United States expressed that "[i]t is necessary to distinguish between central or federal governments, which undertake these obligations in a firm way, and local authorities which are not strictly bound, so to speak, by the provisions of the Agreement, depending of course upon the constitutional procedure of the country concerned."[54] In disputes and instruments of the WTO, there continues to be a strong differentiation between the State's central government and its various organs. The WTO holds the State liable for any breach, even in circumstances in which the State does not have the constitutional authority to control the acts of its organs.[55]

As certain treaties such as GATT have taken special pains to clarify that notion to its signatories, in light of the aforementioned, the States are to be held accountable for the acts of their organs. However, some treaties do not make that level of accountability particularly clear. For instance, the lack of specificity in Article 36, paragraph 2, of the Vienna Convention on Consular Relations as to the extent of the responsibility of the national government is evident in that it only requires that the Article "be exercised in conformity with the laws and regulations of the receiving State" and that those laws and regulations "enable full effect to be given" to the Article, without clearly defining "full effect."[56] In that regard, although it seems that the responsibility of the entire State is implied, that there is no mention of the State organs could perhaps raise doubts about their liability.

Regardless of whether there is inclusion of the responsibility of State organs in the terms of a treaty, in light of Article 4 of the ILC Articles as discussed in the previous section, the responsibil-

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52. *Id.* art. XXIV(12).

53. Ward Ferdinandusse, *Out of the Black-Box? The International Obligation of State Organs*, 29 BROOK. J. INT'L L. 45, 99 (2003).

54. *Id.* at 99 (citing GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 772 (6th ed. 1994)).

55. *See* Ferdinandusse, *supra* note 53, at 100-01.

56. Vienna Convention, *supra* note 3, art. 36, ¶ 36(2).

ity of States for the acts of their organs is unequivocal under international law.

II. *U.S. FEDERALISM AND THE INTERNATIONAL ARENA: THE STATUS OF TREATIES IN THE UNITED STATES*

Part II examines the complexity of the U.S. federal system. The historical background explains how the difficulty of treaty compliance due to U.S. federalism is not a twentieth-century problem, but rather that this problem even has roots in the very first years of the establishment of the United States as a Nation. The next section analyzes the division of powers in the U.S. federal system generally, and specifically the clash between the power of the federal government to engage in foreign affairs with the power of the states to administer criminal justice. The final section takes a different turn and introduces the "later-in-time" rule and the *Charming Betsy*[57] doctrine which are instrumental in our understanding of the hierarchy of laws in the United States as well as the perception that exists when national law conflicts with treaty law. The purpose of this Part is to provide a backdrop to understand how the nature of the U.S. federal system poses challenges to Vienna Convention implementation, and will be discussed more in-depth throughout this article.

A. *Historical Background*

The difficulty that the United States encounters in being a federal State on the global stage dates from the earliest days of the establishment of the United States as a Nation. At that time, the founding fathers looked at the role of the United States, not as an isolated entity, but as a participant in world affairs with a particular emphasis placed on the great significance of international alliances. In fact, one of the primary impetuses leading to the Constitutional Convention was that individual states did not observe the treaties made by the Continental Congress.[58]

The Federalist Papers support the proposition that a plausible interpretation of the intent of the Framers of the Constitu-

57. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

58. Note, *Too Sovereign But Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?*, 116 HARV. L. REV. 654, 2665 (2003) [hereinafter *Too Sovereign But Not Sovereign Enough*] (citing LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 156 (2d. 1996)).

tion ("Framers") was to grant the federal government the power and perhaps even the obligation to guarantee that states adhere to U.S. treaty obligations.[59] For instance, in Federalist 80, Alexander Hamilton argued that "the peace of the whole ought not to be left at the disposal of a part . . . ."[60] Indeed, the most important lesson that the Framers learned from the failed Articles of Confederation was that "the federal government had to have sufficient power to ensure that any obligations it undertook to foreign countries would be observed by the states."[61] Otherwise, any Nation of the world could simply establish a federalist system in order to violate treaty obligations by allowing its component states to perpetrate the violations.[62]

The Framers thought it essential that the states be bound to the agreements into which the new national government entered because the potential security of the new Nation would be hanging in the balance. Thus, they included a clause in the Constitution that not only made a treaty signed by the national government the law of the land and, therefore, binding on the states, but also made that treaty on par with the Constitution itself.[63] Article VI, Clause 2, of the Constitution, also termed the 'Supremacy Clause,'[64] states:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[65]

The inclusion of this clause was to ensure that U.S. states would not act independently of the national government with respect to international relations. Despite this attempt at assur-

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59. *See, e.g.*, THE FEDERALIST No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

60. *Id.*

61. *Too Sovereign But Not Sovereign Enough*, *supra* note 58, at 2665 (quoting David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1101 (2000)).

62. *See id.* at 2666.

63. *See infra* Part II.B.2 and accompanying notes.

64. U.S. CONST. art. VI, cl. 2. This clause has come to be termed the "Supremacy Clause."

65. *Id.*

ance, however, the federal system has been unable to prevent conflict, as shown in the next section.

B. *The U.S. Federal System and Treaty Observance*

1. *States Rights v. Federal Rights*

In the U.S. federal system, when an international treaty is to be implemented by state officials, there is a conflict between two fundamental principles of U.S. government: the power of the federal government to conduct foreign relations on the one hand and the federal government's limited ability to compel states to execute national policy on the other.[66] To be sure, balancing the powers and rights of U.S. states with the power of the national or "federal" U.S. government to implement decisions of international law is a rather complicated undertaking. The federal government has the power to enter into treaties and this power must be reconciled with the right of the states to administer justice without intervention from the federal government, while at the same time complying with the treaty as the law of the land.[67]

James Madison wrote in the Federalist Papers that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite."[68] The powers of the federal government, which are outlined in the Constitution of the United States as indicated by Madison, are termed the "enumerated powers."[69] These powers are limited by the Constitution, enabling Congress to legislate only in areas in which it has authority.[70] Within these areas of authority is the power to conduct foreign affairs. All other powers are subject to the authority of the individual states[71] and are termed the "re-

66. *See* Joshua A. Brook, *Federalism and Foreign Affairs: How to Remedy Violations of the Vienna Convention and Obey the U.S. Constitution, Too*, 37 U. MICH. J.L. REFORM 573, 575 (2004).

67. *See* U.S. CONST. art. VI, cl. 2.

68. THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

69. U.S. CONST. art. I, § 8.

70. Ana Maria Merico-Stephens, *Of Federalism, Human Rights, and the Holland Caveat: Congressional Power to Implement Treaties*, 25 MICH. J. INT'L L. 265, 318 (2004).

71. U.S. CONST. AMEND. X. The Tenth Amendment to the U.S. Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

served powers," among which is the administration of criminal justice in the states' territories.

Early U.S. Supreme Court decisions took care to invalidate any state law that conflicted with international treaties entered into by the United States.[72] For instance, in *Ware v. Hylton*[73] in 1796, a Virginia statute that was at odds with the Treaty of Paris[74] was invalidated by the Supreme Court. More recently, in *Crosby v. National Foreign Trade Council*, the Supreme Court affirmed the invalidation of a Massachusetts statute that imposed sanctions on the government of Burma.[75] The Court found that federal legislation authorizing the President to impose sanctions on Burma if certain criteria were met preempted the state law.[76] The Court stated that "the state Act is at odds with the President's intended authority to speak for the United States among the world's nations . . . . [It] compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments."[77] These examples show that steps have been taken to ensure that the powers of the federal government remain separate from the powers of the states, with special attention paid to the preservation of the power of the federal government to conduct foreign affairs and to enter into treaties without state interference.

2. The Federal Foreign Affairs Power to Enter into Treaties

The federal government has the enumerated power and ex-

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72. *See* Brook, *supra* note 66, at 582.

73. Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (striking down a Virginia law that canceled debts owed to British subjects). For an extended exploration of *Ware*, see John Quigley, *Toward More Effective Judicial Implementation of Treaty-Based Rights*, 29 FORDHAM INT'L L.J. 552, 554-56 (2006).

74. Treaty of Paris, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80. In the Treaty of Paris, Great Britain recognized the independence of the United States.

75. *See* Brook, *supra* note 66, at 582, (citing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000)).

76. *Id.*

77. *Crosby*, 530 U.S. at 380-81. Dicta in other Supreme Court cases confirm the primacy of the national government in international relations. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) ("[R]ules of international law should not be left to divergent . . . and parochial state interpretations."); United States v. Pink, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the states; it is vested in the national government exclusively."); United States v. Belmont, 301 U.S. 324, 331 (1937) ("[I]n respect of our foreign relations generally, state lines disappear. As to such purposes, the state . . . does not exist.").

clusive authority to conduct foreign affairs.[78] The Constitution expressly furnishes the federal government with several powers that are necessary to conduct foreign relations[79] and withholds that same authority from the states.[80] Among those powers is the power vested in the President to enter into treaties with foreign Nations "by and with the [a]dvice and [c]onsent of the Senate."[81] Elsewhere in the Constitution, the importance of this enumerated power is confirmed both by granting treaties the preemptive force of federal law as well as expressly denying any authority in that regard to the states.[82] The preemptive strength of treaties flows directly from Article VI, Clause 2 of the Constitution, which maintains that treaties have the same force as any other U.S. law.[83] The Supremacy Clause has the unique function of "transform[ing] instruments that had previously been operative on [nations] as political bodies and enforceable only by military force into instruments operative on individuals and enforceable in courts."[84]

In many Nations, transforming a treaty into local law requires domestic lawmaking institutions to undertake an additional legislative act.[85] In the United States, however, most treaties do not require subsequent legislation to be put into effect and are directly applicable federal law without implementing legislation.[86] As evidenced by the Supreme Court declaration in *Foster v. Neilson* in 1829,[87] the Court stated that "[o]ur Constitution declares a treaty to be the law of the land. It is, conse-

78. Todd Steigman, *Lowering the Bar: Invalidation of State Laws Affecting Foreign Affairs Under the Dormant Foreign Affairs Power After* American Insurance Association v. Garamendi, 19 CONN. J. INT'L L. 465, 465 (2004).

79. U.S. CONST. art. I, § 8, cl. 11-13.

80. U.S. CONST. art. I, § 10, cl. 1-3 ("No State shall enter into any Treaty, Alliance, or Confederation . . . lay any imposts or Duties on Imports or Exports . . . [or] enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War.").

81. U.S. CONST. art. II, § 2, cl. 1-2.

82. *See supra* note 79; *see also* Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 900-01 (2004).

83. U.S. CONST. art. VI, cl. 2.

84. Emily Deck Harrill, *Exorcising the Ghost: Finding a Right and a Remedy in Article 36 of the Vienna Convention on Consular Relations*, 55 S.C. L. REV. 569, 575 (2004) (citing Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1097 (1992)).

85. *See* Van Alstine, *supra* note 82, at 904.

86. U.S. CONST. art. VI, cl. 2.

87. Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

quently, to be regarded in Courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."[88] As the supreme law of the land, the power of such a "self-executing" treaty, in addition to not requiring enacting legislation, is that any treaty trumps any state law in existence at the time the treaty is signed, preempting the state law, with the treaty then becoming the new law of the land. In addition, it can be said that under the Supremacy Clause, federal courts "have not only the right, but also the obligation, to enforce the provisions of self-executing treaties."[89]

3. States and the Administration of Criminal Justice

Traditionally, the responsibility of administering criminal justice has been a reserved power, with Alexander Hamilton stating as much in the Federalist Papers, declaring that "the ordinary administration of criminal justice belongs to the states."[90] Several Supreme Court cases have taken care to affirm the power of the states over criminal justice. For instance, in *Brecht v. Abramson*,[91] the Court stated that "[s]tates possess primary authority for defining and enforcing the criminal law."[92] In *Abbate v. United States*,[93] the Court stated that the "responsibility for defining and prosecuting crimes" resides with the states.[94] In addition, in the plurality opinion of the U.S. Supreme Court in *Screws v. United States*,[95] the Court stated: "Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the [s]tates except as Congress, acting within the scope of those delegated powers, has

88. *Neilson*, 27 U.S. (2 Pet.) at 314.

89. Van Alstine, *supra* note 82, at 905-06. It should be noted that the doctrine of self-execution does not mean that every provision of every treaty automatically creates federal rights or obligations. As in other forms of federal law, treaty lawmakers may expressly provide that a particular treaty is not self-executing. However, when a treaty expresses an intent to create rights or obligations of its own accord, Article III of the Constitution mandates that federal courts apply it as a federal rule of decision, just as they would a statute or other form of enforceable federal law. *Id.* at 906-07.

90. Mark A. Correro, *Get A Divorce—Become A Felon:* United States V. Emerson, *270 F.3d 203 (5th Cir. 2001)*, 45 S. TEX. L. REV. 419, 447 (2004).

91. Brecht v. Abramson, 507 U.S. 619, 635 (1993) (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982)).

92. *Brecht*, 507 U.S. at 635.

93. Abbate v. United States, 359 U.S. 187, 195 (1959).

94. *Abbate*, 359 U.S. at 195.

95. Screws v. United States, 325 U.S. 91, 109 (1945).

created offenses against the United States."[96]

It is the duty of states to "define criminal conduct and assign penalties deemed appropriate in light of the goals of criminal law that the state has accepted."[97] This is due to the fact that most crime is of a local nature, which gives the state an immediate interest in defining criminal conduct and enforcing criminal statutes. The size and experience of local police departments and state investment in penal institutions and supporting agencies strengthen the states' interest in self-administration of criminal justice.

Earlier in U.S. history there had been limited federal participation in the area of criminal law, but more recently, the federal government has increased its participation in the criminal arena.[98] There has been a considerable increase in federal legislation that makes local conduct subject to federal criminal sanction, "[most] notably in areas in which existing state law already criminalizes the same conduct."[99] One study had shown that "forty percent of the federal criminal provisions that have been enacted since the Civil War have been enacted since 1970."[100] Despite this trend, however, criminal law primarily remains the domain of state governments.

C. *The "Later-in-time" Rule and* Charming Betsy

The "later-in-time" rule, which applies only in the context of treaties and federal statutes,[101] holds that, in the domestic law of the United States, treaty provisions can be overridden by directly inconsistent subsequent statutes, which constitute "the latest expression of sovereign will."[102] Consequently, when a statute that

96. *Screws*, 325 U.S. at 109; *see also* Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL'Y 25, 33 n.39 (2004) (citing *Screws*).

97. Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1132 (1997).

98. *See id.* at 1132-33.

99. Hadi S. Al-Shathir, *And Into The Maelstrom Steps The United States Supreme Court: Licenses Are Not "Property" For Purposes Of The Mail Fraud Statute*, 68 MO. L. REV. 179, 187 (2003) (citing James E. Strazella, *The Report of the ABA Task Force on the Federalization of Criminal Law*, 1998 A.B.A. SEC. CRIM. JUST. 5 (1998)).

100. Strazella, *supra* note 99, at 7.

101. *See* Jeffrey L. Green, *International Law:* Valdez v. State of Oklahoma *and the Application of International Law in Oklahoma*, 56 OKLA. L. REV. 499, 520 (2003).

102. Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 313-21 (2001).

is enacted later than a treaty at issue is inconsistent with the treaty, the statute will prevail over the treaty to the extent of the conflict.[103]

The later-in-time rule dates from the mid-nineteenth century. The first time the Supreme Court adopted the later-in-time rule was in the *Cherokee Tobacco Case*.[104] That case involved a treaty of 1866 between the United States and the Cherokee Nation, which released Cherokees from the obligation to pay any U.S. tax on the sale of their farm products.[105] However, an 1868 statute imposed a tax on spirits and tobacco "produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not."[106] The Supreme Court held that the 1868 statute could and did supersede the treaty.[107] This case settled a significant issue—a treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.[108]

There is an acknowledged and authoritative objection to the application of the later-in-time rule with respect to treaties. This long-standing doctrine arises from the landmark case of *Murray v. Schooner Charming Betsy* ("*Charming Betsy*"),[109] which holds that U.S. courts should construe a later statute to be consistent with a prior treaty to the greatest extent possible.[110] *Charming Betsy* requires that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[111] The *Charming Betsy* doctrine requires that a court first examine whether the effect of a statute is to violate international law.[112] If the court determines that the statute contradicts international law, the court should next review the statute for ambiguity.[113] If there is no clear congressional

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103. *See* Howard S. Schiffman, *The* Lagrand *Decision: The Evolving Legal Landscape of the Vienna Convention on Consular Relations in U.S. Death Penalty Cases*, 42 SANTA CLARA L. REV. 1099, 1132-33 (2002).

104. Cherokee Tobacco Case, 78 U.S. (11 Wall.) 616 (1870).

105. *Cherokee*, 78 U.S. at 616.

106. An Act to Facilitate the Settlement of Paymasters' Accounts, 15 Stat. 42, 167 (1868).

107. *Cherokee*, 78 U.S. at 616.

108. *See* Vagts, *supra* note 102, at 315-16.

109. Schooner Charming Betsy, 6 U.S. (2 Cranch) at 64.

110. *Id.*

111. *Id.* at 118.

112. *Id.* at 64.

113. *Id.*

intent to violate international law, the court should exploit any ambiguous text in the statute to avoid violating international law.[114]

The application of the later-in-time rule to bar a Vienna Convention claim from habeas review has been found to be problematic in that the rule can undermine the purposes of the Vienna Convention. That is, the rule prevents detainees from litigating the issue at a crucial point in the case, especially where there is no other established means of addressing Vienna Convention violations.[115] And so, it appears likely that despite Supreme Court decisions which have utilized the later-in-time rule, especially in cases that turn on Vienna Convention claims, the rule was not intended to be employed for the purposes of circumventing international legal obligations. The courts should thus look at the superseding statute in the context of the *Charming Betsy* doctrine, utilizing *Charming Betsy* to assess whether that statute can remain consistent with U.S. obligations under international law.

III. *PROVIDING A FRAMEWORK FOR VIENNA CONVENTION VIOLATIONS*

There have been attempts to challenge U.S. violations of the Vienna Convention at the state, federal, and international levels. For the purpose of demonstrating that the issue of violations of Article 36 of the Vienna Convention were not that of first impression when the *Avena* case was brought before the ICJ, the following cases in Part III highlight a selection of instances in which the violation of Article 36, paragraph 1(b), was raised. The cases are intended to be neither an indication of systematic violations nor a general trend, nor are they considered to be exceptions to a rule of general compliance. In addition, the doctrine of procedural default will first be addressed as it is critical in the later cases and in *Avena*.

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114. *See* Michael F. Williams, Charming Betsy, Chevron, *and the World Trade Organization: Thoughts on the Interpretive Effect of International Trade Law*, 32 LAW & POL'Y INT'L BUS. 677, 694-95 (2001).

115. *See* Schiffman, *supra* note 103, at 1132.

A. *The Doctrine of Procedural Default*

In 1888, the Supreme Court in *Whitney v. Robertson*[116] held that if a treaty and a federal statute conflict, "the one last in date will control the other."[117] This "later-in-time" rule, as seen earlier in Part II.C,[118] remains prominent in U.S. law. In 1957, the Supreme Court held in *Reid v. Covert*[119] that "an Act of Congress . . . is on a full parity with a treaty, and that a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."[120]

The Vienna Convention came into effect in the United States in 1969.[121] In 1996, however, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA").[122] The AEDPA provides that a habeas petition challenging a state conviction is subject to a one-year period of limitation,[123] and that the petitioner must assert his claim in state court proceedings if he is alleging that he is being held in violation of a U.S. treaty.[124] If the petitioner does not follow procedure and raise the claim in the appropriate court within the statute of limitations, the petitioner defaults on that claim and is prohibited from raising it at a later date.[125] Since the AEDPA was enacted after the Vienna Convention, it has been deemed to render the Vienna Convention null to the extent which they conflict.[126]

The doctrine of procedural default has prevented many valid Vienna Convention claims from being heard, simply because those claims were not raised at the appropriate time under law. However, it will become evident that the application of this doctrine with respect to the Article 36 of the Vienna Convention has caused considerable conflict in the international community.

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116. Whitney v. Robertson, 124 U.S. 190 (1888).

117. *Whitney*, 124 U.S. at 194.

118. *See supra* Part II.C and accompanying notes.

119. Reid v. Covert, 354 U.S. 1 (1957).

120. *Reid*, 354 U.S. at 18.

121. *See* Vienna Convention, *supra* note 3, art. 31(3)(b).

122. *See* AEDPA, *supra* note 9.

123. Howard S. Schiffman, Breard *and Beyond: The Status of Consular Notification and Access Under the Vienna Convention*, 8 CARDOZO J. INT'L & COMP. L. 27, 47-48 (2000).

124. *See* 28 U.S.C. § 2254(a), (e)(2) (1994 ed. & Supp. IV).

125. *Id.*

126. *See generally* AEDPA, *supra* note 9.

B. *State Courts*

In the following state court cases, the defendants were denied relief despite clear Vienna Convention violations. Although these were not habeas proceedings, they highlight the courts' reluctance to recognize Vienna Convention rights.

At the state level, in *State v. Ricardo Martinez-Rodriguez*,[127] a New Mexico court held that the defendant did not have a private right of action under the Vienna Convention and so did not allow any arguments based on international treaty violations to be introduced.[128] The defendant further alleged that there was prejudice from the failure of arresting officers to notify him of his right to consular access, pursuant to Article 36, paragraph 1(b).[129] Despite that notification under the Vienna Convention has been found to be similar to *Miranda* warnings,[130] the court in this instance found, in general, that lack of consular notification does not result in prejudice and the court held the same with respect to Martinez-Rodriguez.[131]

Although the district court in *State v. Tuck*[132] did not determine whether the Vienna Convention created individual rights, it affirmed the state court's decision to deny the defendant's motion to suppress on the grounds that his rights under the Vienna Convention were violated.[133] In *State v. Ruvalcaba*,[134] the defendant, a Mexican national, was not notified of his rights under the Vienna Convention by the arresting officers.[135] The defendant argued that because of the failure to notify, any evidence obtained should be suppressed.[136] In addition, he argued that because his attorney did not raise the Vienna Convention violation he received ineffective assistance of counsel.[137] The court denied both claims on the grounds of *res* judicata.[138]

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127. State v. Ricardo Martinez-Rodriguez, 33 P.3d 267 (N.M. 2001).

128. *Martinez-Rodriguez*, 33 P.3d at 267.

129. *Id.*

130. Miranda v. Arizona, 384 U.S. 436 (1966).

131. *See generally Martinez-Rodriguez*, 33 P.3d at 267; Heath, *supra* note 14, at 19-20.

132. State v. Tuck, 766 N.E.2d 1065 (Ohio Ct. App. 2001).

133. *See* Heath, *supra* note 14, at 20.

134. *See* State v. Ruvalcaba, No. 20585, 2001 Ohio App. LEXIS 5371 (Ohio Ct. App. Dec. 5, 2001).

135. *Id.* at *2.

136. *See id.*

137. *See id.* at *2-*3.

138. *See* Heath, *supra* note 14, at 21.

C. *Federal Courts*

At the federal level, there have been several cases in which the Vienna Convention claim was raised and the courts found that no relief could be granted. *United States v. De La Pava*,[139] *United States v. Felix-Felix*,[140] and *United States v. Emuegbunam*,[141] all demonstrate instances in which the defendant was granted no remedy after claiming violations of Article 36, paragraph 1(b).[142]

The most significant of the federal cases was *LaGrand v. Stewart*.[143] It was undisputed that the state of Arizona did not notify Walter and Karl LaGrand, German nationals, of their Vienna Convention rights, but the Court of Appeals dismissed their claim on the grounds of procedural default.[144] The LaGrand brothers brought their case to the ICJ, and for the first time, the doctrine of procedural default was ruled upon by an international court. The full facts and decision in their case will be discussed in further detail in the next Part.

D. *The United States Supreme Court*

The Supreme Court decision in *Breard v. Greene*[145] ("*Breard*") has been used and continues to be used for its precedential value by various state and federal courts. This case presents a validation by the Supreme Court of the doctrine of procedural default with respect to Article 36, paragraph 1 (b) of the Vienna Convention.[146] *Breard* provides the backdrop for the international cases to follow and will be addressed in the next Part.

IV. *THE ROAD TO* AVENA

Two cases paved the way for the ICJ decision in *Avena*. The first, *Breard* in 1998, offers to date the only full decision of the U.S. Supreme Court with respect to a claim of a Vienna Convention violation. The importance of this case lies not only in the fact that it has established precedent for lower court decisions,

139. United States v. De La Pava, 268 F.3d 157 (2d Cir. 2001).
140. United v. Felix-Felix, 275 F.3d 627 (7th Cir. 2001).
141. United v. Emuegbunam, 268 F.3d 377 (6th Cir. 2001).
142. *See* Heath, *supra* note 14, at 22-26.
143. LaGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998).
144. *See id.* at 1261, 1277; *see infra* Part V.A and accompanying notes.
145. Breard v. Greene, 523 U.S. 371, 371 (1998).
146. *See id.* at 375.

but more significantly in that it is the expression of validation of the procedural default rule with respect to the Vienna Convention by the highest court in the land.[147] In validating the procedural default rule, a chain of events was triggered that led to the subsequent decisions of the ICJ which deemed the rule to be in violation of international law when applied to the Vienna Convention, the first being the decision of the ICJ in *LaGrand*, and culminating with *Avena* in 2004.

A. *Breard v. Greene*

1. Facts of the Case

Angel Francisco Breard ("Breard"), a citizen of Paraguay, arrived in the United States in 1986. In 1992, Breard was charged with attempted rape and capital murder and was convicted on both charges and sentenced to death in the Circuit Court of Arlington County, Virginia.[148] The Virginia Supreme Court affirmed the conviction on appeal in 1994.[149] The U.S. Supreme Court denied certiorari.[150] Breard then filed a writ of habeas corpus[151] in 1996 alleging that his convictions and sentences should be overturned because, in violation of the Vienna Convention, the arresting authorities failed to inform him of his right to contact the Paraguayan Consulate.[152] The District Court held that Breard procedurally defaulted on his claim when he did not raise the Vienna Convention issue in state court, pursuant to the AEDPA, and the Fourth Circuit affirmed the decision.[153]

2. The Decision of the Supreme Court

The U.S. Supreme Court rejected the request for habeas relief and denied certiorari with respect to the procedural default issue on two grounds. The first reason that the Supreme Court put forth was that "absent a clear and express statement to the

147. *See id.* at 375-76.

148. *See id.* at 373.

149. *See id.*

150. *See id.*

151. A writ of habeas corpus is "[a] writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal (*habeas corpus ad subjiciendum*)." BLACK'S LAW DICTIONARY 728 (8th ed. 2004).

152. *See generally Breard*, 523 U.S. at 373.

153. *See id.*

contrary, [international law has recognized that] the procedural rules of the forum State govern the implementation of the treaty in that State."[154] The Vienna Convention, in fact, supports this notion by stating that the rights expressed in the Convention "shall be exercised in conformity with the laws and regulations of the receiving State," so long as "said laws and regulations [allow] full effect to be given to the purposes for which the rights accorded under this Article are intended."[155] The law in the United States is that a claim of error in a criminal proceeding must be raised at the state court level in order to allow for a habeas relief at a later time, and if it is not raised then it is defaulted.[156] Since Breard failed to raise his claim in state court, he did not properly exercise his rights under the Vienna Convention, and his claim fell within the parameters of procedural default.[157]

As for the second reason, the Supreme Court maintained that despite the fact that Article VI of the Constitution recognizes treaties as the supreme law of the land, the Constitution itself is also defined as the supreme law of the land, and it is to the Constitution that the rules of procedural default apply.[158] The Court further established the foundation for its argument and referred to cases in which subsequent statutes preempted treaties.[159] The Court found that Breard's habeas claim was preempted by the AEDPA and the doctrine of procedural default.[160] Angel Breard was executed on April 14, 1998.

B. Germany v. United States of America: *The* LaGrand Case

In June 2001, the ICJ delivered its judgment in the *LaGrand*

154. *Id.* at 375 (citing Sun Oil Co. v. Wortman, 486 U.S. 717 (1988); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988); Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 539 (1987)).

155. *See* Vienna Convention, *supra* note 3, art. 36(2).

156. *See Breard*, 523 U.S. at 375.

157. *See id.* at 375-76; *see also supra* Part III.A and accompanying notes.

158. *See Breard*, 523 U.S. at 376.

159. *See id.*

160. *See Breard* at 375-76. It should be noted that the attorneys for Breard submitted his claim to the ICJ, but subsequently withdrew the claim. *See* Jennifer Lynne Weinman, *The Clash Between U.S. Criminal Procedure and the Vienna Convention on Consular Relations: An Analysis of the International Court of Justice Decision in the* LaGrand Case, 17 AM. U. INT'L L. REV. 857, 862-63 (2002) (noting that Paraguay withdrew its claim before the ICJ after the United States issued a formal apology).

case,[161] a complex dispute concerning the death penalty, treaty interpretation, federalism, criminal procedure, and remedies for the unlawful acts of States.[162] The *LaGrand* case is particularly monumental in that it is the first time the ICJ adjudicates the legality of the doctrine of procedural default in the context of Vienna Convention violations.

1. Facts of the Case

In 1984, two brothers, Walter and Karl LaGrand, were tried and convicted in an Arizona Superior Court of first degree murder, attempted first degree murder, attempted armed robbery, and two counts of kidnapping.[163] They were each sentenced to death for the first degree murder charge.[164] The LaGrand brothers were born in Germany and moved with their mother to the United States in 1967. They remained German nationals at all times, never acquiring U.S. citizenship.[165]

From the time of the LaGrands' arrests and through their convictions and appeals, they were never informed of their rights under the Article 36, paragraph 1(b), of the Vienna Convention.[166] In 1992, after learning of their rights from outside sources, and not from Arizona authorities, the LaGrand brothers informed the German consulate of their case.[167] From 1992 through 1999 the German Consulate General in Los Angeles visited the LaGrands in prison and assisted in the investigation of their case.[168] In a third set of legal proceedings, the LaGrands filed applications for writs of habeas corpus[169] in the U.S. District Court for the Southern District of Arizona with the hope that their convictions, or at least their death sentences, would be set aside.[170] Their applications were denied and the Ninth Circuit Court of Appeals affirmed the denial, due to the fact that the doctrine of procedural default prohibited the LaGrands from raising the Vienna Convention violation on habeas corpus

161. LaGrand Case, 2001 I.C.J. 466 (June 27).
162. *See* Brook, *supra* note 66, at 575.
163. *See LaGrand*, 2001 I.C.J. at 475, ¶ 14.
164. *See id.*
165. *See id.* ¶ 13.
166. *See id.* ¶ 15.
167. *See id.* ¶ 22.
168. *See id.*
169. *See id.* ¶ 23.
170. *See id.*

review in federal courts because they had not raised the claim of violation in state proceedings.[171]

On February 24, 1999, Karl LaGrand was executed by lethal injection.[172] Only hours before Walter's scheduled execution, the government of Germany filed a claim before the ICJ.[173] The ICJ then issued a provisional measure, which called upon the United States to "take all measures at its disposal to ensure that Walter LaGrand is not executed."[174] Germany then filed a claim with the U.S. Supreme Court, requesting a stay of execution based on the ICJ provisional order.[175] The United States Supreme Court declined to exercise its original jurisdiction and rejected a request for a stay of execution for Walter LaGrand[176] after which he was summarily executed by asphyxiation in an Arizona gas chamber.[177]

2. The Decision of the ICJ

Although the deaths of the LaGrand brothers would render the issues in this case moot under U.S. domestic law, Germany could still pursue a claim under international law for the harm that it suffered due to the Vienna Convention violation, and so it brought suit against the United States in the ICJ.[178] The ICJ decision in the *LaGrand* case delineated U.S. obligations under the Vienna Convention. The ICJ had two main holdings. The first was that "orders on provisional measures under Article 41 [of the ICJ Statute] have binding effect" in international law.[179] The United States would, therefore, have a legal duty to comply with the provisional measure of the ICJ to use any means within its capabilities to stay the execution of a foreign national.[180]

The second holding was that the United States was obligated, in cases of conviction and death sentences obtained in violation of the Vienna Convention, to "allow review and reconsideration of the conviction and sentence by taking account of

171. *See id.*
172. *See id.* ¶ 29.
173. *See id.* ¶ 30.
174. *See id.* ¶ 32.
175. *See id.* ¶ 33.
176. *See generally* Germany v. United States, 526 U.S. 111, 112 (1999).
177. *See* Brook, *supra* note 66, at 578.
178. *See id.*
179. *See* LaGrand Case, 2001 I.C.J. 466, 506, ¶ 109 (June 27).
180. *See* Brook, *supra* note 48, at 578.

the violation of the rights set forth in the Convention[,]"[181] thereby precluding a situation of procedural default. While leaving the means of compliance to the United States, the U.S. government may not invoke its own governmental structure to skirt international law, and must also manage to balance its international obligations with its own federal system.[182]

IV. *THE* AVENA *JUDGMENT*

The *Avena* case is the latest international judicial decision determining the validity of the procedural default rule with respect to the Vienna Convention.[183] As in the previous cases of *Breard* and *LaGrand*, the facts will first be presented followed by the ICJ's decision and rationale. This Part will conclude with the recommendation of the Court, after it finds other suggested methods to be insufficient and inapplicable.

A. *Facts of the Case*

On January 9, 2003, Mexico brought suit against the United States for alleged breaches of the Vienna Convention with respect to a certain number of Mexican nationals who had been tried, convicted, and sentenced to death in criminal proceedings in the United States.[184] The claim originally included fifty-four persons, but was later adjusted to include just fifty-two, and then limited further to fifty-one.[185] Mexico also requested that the ICJ order the United States to stay all executions pending a final decision of the Court, and the Court issued such order on February 5, 2003.[186]

On March 31, 2004, the ICJ delivered its final, unappealable and binding judgment in *Avena*, finding by fourteen votes to one that the United States breached its obligations under Article 36, paragraph 1(b) of the Vienna Convention.[187]

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181. *See id.* at 578-79.

182. *See id.* at 579.

183. *See generally* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

184. *See* ICJ Press Release, *supra* note 6.

185. *See id.* The ICJ concluded that Mexico failed to prove that the United States violated its obligations under the Article 36, paragraph 1(b) of the Vienna Convention with respect to one claimant, Mr. Ramón Salcido Bojórquez, and elected to comment upon it no further. *See Avena*, 2004 I.C.J. at 44-45, ¶ 66.

186. *See* ICJ Press Release, *supra* note 6.

187. *See id.*

B. *The Decision and Rationale of the ICJ*

To more adequately address the issue of procedural default, the ICJ focused its attentions on a major point at issue between Mexico and the United States.[188] The issue related to the definition of the term "without delay" in paragraph 1(b) so as to determine at what point the obligations of Article 36, paragraph 1(b) arise.[189] The meaning of the expression "without delay" lies at the heart of the discussion of whether the doctrine of procedural default with respect to the Vienna Convention is valid, because if, in fact, there had not been a delay in notification of the detainees, then the doctrine of procedural default would not have applied to them at all. It is, therefore, the delay in notification that resulted in the violation of the detainees rights under the Vienna Convention.

The Court noted that Article 36, paragraph 1(b), contains three separate but interrelated elements with respect to the term "without delay": (1) the right of the individual concerned to be informed without delay of his rights under Article 36, paragraph 1(b); (2) the right of the consular post to be notified without delay of the individual's detention, if he so requests; and (3) the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person.[190]

Mexico and the United States have diverging views about the meaning of "without delay." Mexico contends that it requires "unqualified immediacy" and that "consular notification . . . must occur immediately upon detention and prior to any interrogation of the foreign detainee."[191] The United States, on the other hand, interprets "without delay" to mean that "there should be no deliberate delay" and that the necessary notification should be issued "as soon as reasonably possible under the

188. *Avena*, 2004 I.C.J. at 40, ¶ 52. In fact, there were two major points at issue. The first was the question of the nationality of the Mexicans concerned. The United States claimed that some of the fifty-two Mexican nationals had dual citizenship in Mexico and the United States. The Court found that since the United States did not prove their claim, they were obligated to adhere to the obligations set forth in Article 36, paragraph 1(b), and provide the fifty-two Mexican nationals with consular information. *See* ICJ Press Release, *supra* note 6. For the purposes of this Article, however, the definition of the terms "without delay" will be the focus.

189. *Avena*, 2004 I.C.J. at 40, ¶ 51.

190. *See id.* at 43, ¶ 61.

191. *See id.* at 47, ¶ 78.

circumstances."[192]

In noting that the Vienna Convention does, in fact, define certain terms used in the Convention and that no definition was given of the phrase "without delay,"[193] the Court found that the phrase does not invoke immediacy, but rather, detaining authorities have the duty to inform a detainee of his Vienna Convention rights "once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national."[194]

The ICJ found that by applying the procedural default rule in the manner currently practiced, "the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited in seeking the vindication of his rights under the United States Constitution."[195] In the *Avena* decision the ICJ essentially affirmed its decision in the *LaGrand* case, contending that its previous decision is equally valid in the present case. Citing *LaGrand*, the Court stated:

> In itself, the [procedural default] rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay,' thus preventing the person from seeking and obtaining consular assistance from the sending State.[196]

On these grounds, the ICJ in *Avena* observed that "the procedural default rule prevented counsel for the LaGrands to effectively challenge [the LaGrands'] convictions and sentences

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192. *See id.* at 47, ¶ 81.

193. *See id.* at 48, ¶ 84.

194. *See id.* at 43, 49, ¶¶ 62, 88. It should be noted that the booklet issued by the United States Department of State, entitled *Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*, has been distributed to federal, state and local authorities so as to advance adherence to Article 36 of the Vienna Convention. This booklet notes that "most, but not all, persons born outside the United States are not [citizens]."

195. *Avena*, 2004 I.C.J. at 63, ¶ 134.

196. *Id.* at 57, ¶ 112 (citing *Lagrand Case*, 2001 I.C.J. 466 (June 27)).

other than on United States constitutional grounds."[197] The Court went on to state that this assertion was equally relevant in the *Avena* case, where Mexican nationals were placed in the same situation.[198] The ICJ affirmatively held that the application of the procedural default rule effectively prevents "full effect [from being] given to the purposes for which the rights accorded under [Article 36, paragraph 1(b),] are intended,"[199] pursuant to Article 36, paragraph 2.

In addition to the ICJ's landmark decision on procedural default, the Court's clarification of the term "without delay" is equally significant in that it defines the requirements of States Parties to the Vienna Convention with respect to implementing Article 36, paragraph 1(b). From this decision there is a reference point to which governments can turn to determine if they are acting in accordance with the intent of the treaty. This definition will also prove crucial to the implementation of remedies, as well as to the understanding of the recourse that the ICJ outlined in *Avena*.

C. *Solutions Presented in* Avena

The Government of Mexico submitted to the ICJ that the proper remedy for the violation by the United States of the Vienna Convention rights of the Mexican nationals should be, by way of *restitutio in integrum*, annulment of the convictions and sentences of all the Mexican nationals.[200] The ICJ rejected this assertion.[201] The Court examined other measures and discussed their acceptability.

1. Clemency

Although the ICJ acknowledged the function of clemency in the administration of criminal justice in the United States, and that it is the "historic remedy for preventing miscarriages of justice where judicial process has been exhausted,"[202] the Court found that clemency did not qualify as an appropriate means for

197. *Id.*
198. *See id.*
199. *Id.* at 57, ¶ 113.
200. *See id.* at 58, ¶ 117.
201. *See id.* at 70, ¶ 152.
202. *See* Herrera v. Collins, 506 U.S. 390, 411-12 (1993).

achieving effective review of the cases.[203] The Court did note, however, that clemency could supplement judicial "review and reconsideration," as will be discussed below.[204] This determination is significant in that in the past, the U.S. Government as well as localities have looked to clemency as their method of review and reconsideration to alleviate alleged Vienna Convention violations, and now an alternative technique must be found to supplant their former method.

2. Adequate Assurances

The government of Mexico requested of the Court to rule that the United States provide "appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36(1)," because the measures that the United States has already taken to implement the Vienna Convention have proven ineffective in light of the current case.[205] The Court denied this request, recognizing that there is no evidence to indicate a "regular and continuing" pattern of breach and that the United States has made efforts to implement the Vienna Convention.[206] The ICJ had also addressed the issue of request for assurances in *LaGrand*, stating:

> If a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. The programme in question certainly cannot provide an assurance that there will never again be a failure by the United States to observe the obligations of notification under Article 36 of the Vienna Convention. But no State could give such a guarantee and Germany does not seek it. The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Ar-

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203. *See Avena*, 2004 I.C.J. at 66, ¶¶ 142-43.

204. *See id.* For a more detailed analysis of "review and reconsideration," see *infra* Part IV.C.3.

205. *See Avena*, 2004 I.C.J. at 67, ¶¶ 144-45.

206. *See id.* at 68, ¶ 149. It should be noted that the Court mentions paragraph 64 of its decision, which discusses some the efforts of some jurisdictions to provide Vienna Convention information in parallel with the reading of Miranda rights. This Article discusses in a later section how, though this may be considered a substantial effort on the part of the Court, it is, in fact, insufficient.

> ticle 36, paragraph 1(b), must be regarded as meeting Germany's request for a general assurance of non-repetition.[207]

The Court held that what applied in *LaGrand* also applied in the *Avena* case.[208]

3. Review and Reconsideration

As had already been in addressed in *LaGrand*, in the event that breaches of Article 36, paragraph 1(b) should occur:

> [I]t would be incumbent on the United States to allow review and reconsideration of the conviction and sentence [of the claimants] 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.[209]

The ICJ in *Avena* remained faithful to the review and reconsideration criteria set forth in *LaGrand* insofar as it stated that the process of review and reconsideration, of both the conviction and sentence, should take into account the violation of the rights established by Article 36, paragraph 1(b), as well as ensure that the breach and the possible prejudice caused by the breach be thoroughly examined.[210]

In discussing review and reconsideration, the ICJ also found that the due process rights under U.S. constitutional law were not relevant to Vienna Convention claims, in that Article 36, paragraph 1(b) establishes treaty rights and does not relate to a right to due process.[211] And so, in a case of a Vienna Convention violation, the defendant's claim does not concern any damage to a right necessary to experience a fair trial, but rather simply involves the infringement of treaty rights. The ICJ, therefore, takes note that it is imperative in the process of review and reconsideration for there to exist a procedure "which guarantees that full weight is given to the violation of rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration."[212]

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207. LaGrand Case, 2001 I.C.J. 466, 512-13, ¶ 124 (June 27).

208. *Avena*, 2004 I.C.J. at 69, ¶ 150.

209. *LaGrand*, 2001 I.C.J. at 513, ¶ 125.

210. *Avena*, 2004 I.C.J. at 65, ¶ 138 (citing *LaGrand*, 2001 I.C.J. at 514-17, ¶ 128).

211. *Id.* at 65, ¶ 139.

212. *See id.*; *see also*, Sean D. Murphy, ed., *ICJ Decision Regarding Mexicans on Death Row in United States*, 98 AM. J. INT'L L. 364, 368 (2004).

VI. *IMPLEMENTATION OF THE ICJ DECISION IN* AVENA

The implications of the *Avena* case on any subsequent action to be taken are outlined in this Part, beginning with a brief mention of how it appears the Courts in the *Breard*, *LaGrand*, and *Avena* cases view the obligations of States. This is crucial in that knowledge of States' obligations is necessary for understanding future implementation mechanisms. The next two sections analyze the ability of the states to comply with the ICJ decision in *Avena* in light of the Supreme Court decision in *Breard*. Two state court cases demonstrate how the *Avena* decision will cause courts across the United States to part ways in deciding whether to follow the ICJ or the Supreme Court when rendering decisions.

A. *The Obligations of States:* Breard, LaGrand, *and* Avena

The decision of the U.S. Supreme Court in *Breard* sheds some light on the ways in which the Supreme Court perceives its obligations with respect to the federal government's international agreements. *Breard* is the precursor to the *LaGrand* and *Avena* cases. The fundamental issue and premise of all three—the validity or applicability of the procedural default rule with respect to Article 36, paragraph 1(b)—was subsequently found by the ICJ to be against international law.[213] It is, therefore, imperative that the difficult issues of the *Breard* case are understood, as they lay the foundation for the subsequent two cases.

The Supreme Court in *Breard*, while not discounting its international obligations, asserted that Article 36, paragraph 1(b), of the Vienna Convention will only apply so long as those rights are invoked within the procedural framework of the prosecuting state, pursuant to Article 36, paragraph 2. The Court makes no mention of the prosecuting state's insufficiency in implementing Article 36, and, therefore, does not provide a real solution for foreign Nations, such as Paraguay in that instance, who object to the ill-treatment of their citizens on U.S. soil.[214]

It should be noted that while the Supreme Court did cite Article 36, paragraph 2, which states that the "laws and regulations [of the receiving State] must enable full effect to be given

213. *See* Murphy, *supra* note 212, at 368.

214. *See generally* Breard v. Greene, 523 U.S. 371 (1998).

to the purposes for which the rights accorded under this Article are intended[,]"[215] the Court made no mention of how the Article was, or in this case was not, given full effect in the case of *Breard.* It only focused on how Breard defaulted on his rights. It may be inferred that this decision is asserting the proposition that the international obligations of the United States under the Vienna Convention are only relevant so long as they are conducted within U.S. legal procedure, and that U.S. legal procedure remains paramount above all else, including the specific terms of the treaty the federal government signed.

The *LaGrand* and *Avena* cases offer a more noble mention of the responsibilities of States with respect to their international treaty obligations. These cases stand for the proposition, in finding the doctrine of procedural default to be against international law in instances where the Vienna Convention has not been applied, that it is simply not enough to sign an agreement without putting the mechanisms in place to ensure that the agreement is given proper force. By finding the doctrine of procedural default to be in violation of international law, consequently preventing full effect to be given to the terms of the Vienna Convention, the ICJ decisions serve as an admonition of the Supreme Court in its ruling that the doctrine of procedural default can essentially sever a claim based on the violation of the Vienna Convention's terms.

The ICJ and the Supreme Court part ways in their determination of international obligations. The Supreme Court does not deny its international obligations, in general, but ultimately uses its own laws to place itself outside the scope of international law. The ICJ, however, has concluded that domestic law may indeed be relevant, so long as it does not impede the treaty obligations that the United States has taken upon itself.

B. *Are the States Bound by* Breard?

The case of *Valdez v. State of Oklahoma* in 2002,[216] in which the court relied on *Breard,* is significant in that it was the first state court to address Article 36 issues after the *LaGrand* case. As it is similar to the dilemma facing courts today after *Avena,* the Oklahoma Court of Criminal Appeals ("Oklahoma Court")

215. *See id.*

216. *See generally* Valdez v. Okla., 46 P.3d 703 (Okla. Crim. App. 2002).

presented the issue as whether it must follow the precedent of the ICJ or the U.S. Supreme Court.[217] The Oklahoma Court concluded that the *Breard* decision gave it no option, in light of the fact that following the ICJ decision in *LaGrand* would interfere with the federal government's power in foreign affairs and would violate the Constitution.[218]

Nonetheless, *Breard* should be inapplicable on the following grounds. As mentioned previously,[219] the Supreme Court in *Breard* never actually resolved the issue of whether the federal procedural default laws actually gave effect to Article 36. Citing Article 36, paragraph 2, of the Vienna Convention, which states that the right to consular access and notification "shall be exercised in conformity with the laws and regulations of the receiving State" provided that those laws give "full effect . . . to the purposes for the which the rights accorded . . . are intended[,]"[220] the Supreme Court asserted that, with respect to this paragraph, the forum state's rules of procedure govern the implementation of the Vienna Convention in that state.[221] However, the Supreme Court did not determine whether the federal procedural default rule did actually give "full effect" to Article 36, paragraph 1(b). This determination was crucial in that it lies at the heart of whether the LaGrand brothers were denied their rights, and whether, in fact, the law enforcement agents complied with the Vienna Convention in that case.[222]

It is also essential to note that a decision of the Supreme Court to deny certiorari carries much less weight than if the Supreme Court actually had heard the case. In *Teague v. Lane* in 1989,[223] the Supreme Court held that petitioners cannot "benefit from the rule announced" in a case denying certiorari.[224] In addition, denials of certiorari do not adjudicate the merits of a particular case and do not carry precedential value.[225] The

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217. *See* Green, *supra* note 101, at 525.

218. *See id.* (citing *Valdez*, 46 P.3d at 706). It is interesting to note that the Oklahoma Court reversed itself in that regard with its decision of May 13, 2004.

219. *See supra* Part V.A and accompanying notes.

220. *See* Breard v. Greene, 523 U.S. 371, 375 (1998).

221. *See id.* at 375-76.

222. Green, *supra* note 101, at 525.

223. Teague v. Lane, 489 U.S. 288 (1989).

224. *Teague*, 489 U.S. at 296.

225. *Id.* (citing Maryland v. Baltimore Radio Show, 338 U.S. 912, 917 (1950); United States v. Carver, 260 U.S. 482, 490 (1923)).

Breard decision was a denial of certiorari and should, therefore, not be relied upon by courts faced with a similar question.

In conclusion, despite the fact that courts have already looked to *Breard* as precedent for decisions in their own cases, the use of *Breard* as precedent fails on two important counts. The first is that *Breard* provided neither a resolution of the detainee's claim of denial of rights, nor an indication that the provision of full effect in Article 36, paragraph 2, of the Vienna Convention was, in fact, implemented.[226] The second and most important is that the Supreme Court decision was a denial of certiorari and not a decision on the merits. Pursuant to *Teague*, a court cannot rely upon such a decision in making a determination in a case before it.

C. *The Binding Effect of the ICJ Decision on the United States*

In addition to ratifying the Vienna Convention in 1969, the United States also signed the Optional Protocol Concerning the Compulsory Settlement of Disputes ("Optional Protocol"),[227] thereby rendering the Optional Protocol the "Supreme Law of the Land." The United States was an instrumental participant in drafting the Optional Protocol, which provides that States may bring disputes arising under the Vienna Convention to the ICJ for adjudication and a binding resolution.[228] The United States was the first country to bring a case under the Optional Protocol during the Iranian hostage crisis.[229] Since that time the U.S. government has invariably looked to the ICJ for binding decisions on international treaty disputes.[230]

Additionally, Article 59 of the Statute of the ICJ addresses the binding effect of ICJ decisions, stating that "[t]he decision of

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226. *See supra* notes 213-215 and accompanying text.

227. Optional Protocol Concerning the Compulsory Settlement of Disputes, done Apr. 24, 1968, 21 U.S.T. 325, 596 U.N.T.S. 487. The United States has since withdrawn from the Optional Protocol.

228. Torres v. Okla., No. PCD-04-442, slip op. at 2 (Okla. Crim. App. May 13, 2004) (Chapel, J., concurring).

229. *Id. See also* Curtis Bradley, Lori Fisler Damrosch, and Martin Flaherty, *Medellin v. Dretke: A Debate*, 43 COLUM J. TRANSNAT'L L. 667, 677 (2005).

230. *Torres*, No. PCD-04-442, slip op. at 2 (Chapel, J., concurring); *see* Philip V. Tisne, *The ICJ and Municipal Law: The Precedential Effect of the* Avena *and* Lagrand *Decisions in U.S. Courts*, 29 FORDHAM INT'L L.J. 865, 906-914 (2006) (arguing that ICJ decisions rendered pursuant to Optional Protocol only operate in international law and are not decisions of municipal law that are binding in States' courts).

the Court has no binding force except between the parties and in respect of that particular case."[231] It follows that a judgement of the ICJ is determinative as between the parties in a case. It should be noted here, however, that in March 2005, the United States withdrew from the Optional Protocol by notifying the United Nations, which is the depositary for the Optional Protocol to the Vienna Convention on Consular Relations.[232] At a State Department briefing of March 10, 2005, a spokesman stated that when the United States signed the Optional Protocol "it [was] not anticipated that . . . the optional protocol would be used to review cases of domestic criminal law."[233] Nonetheless, despite the United States' withdrawal in March, the withdrawal is not retroactive to the *Avena* decision since the United States was party to the Optional Protocol at that time. The State Department spokesman further stated that "in recognition of the optional protocol and [United States'] international commitments . . . . the United States will comply with the judgment of the [ICJ in the *Avena* case]."[234] Therefore, pursuant to Article 59 and the Optional Protocol, the decision of the ICJ in *Avena* remains binding on the United States.

D. *Cases*

The following two cases demonstrate the divide in the state judicial decisions across the United States, and the dilemma facing courts after *Avena*. The first case offers a reconciliation of the *Avena* decision with its own state judicial decision. In the second case, the Court of Appeals acknowledges the rights of the defendant under the Vienna Convention, but finds itself bound to the precedent of the Supreme Court in *Breard*. That case is being reviewed, however, and so a determination is currently pending.

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231. Statute of the International Court of Justice, June 26, 1945, art. 59, 59 Stat. 1055, 33 U.N.T.S. 993.

232. *See* Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A01.

233. *Contemporary Practice of the United States Relating to International Law: General International and U.S. Foreign Relations Law: U.S. Strategy for Responding to ICJ's Avena Decision*, 99 AM. J. INT'L L. 489, 490 (John R. Crook ed., 2005).

234. *Id.*

1. *Torres v. Oklahoma*: A Stay of Execution and a First Step

Since *Avena*, the international legal community has looked toward the United States to see what its next step will be. The urgency and importance mounted as the first of the Mexican nationals, Osbaldo Torres, was set to be executed on May 18, 2004, in Oklahoma.[235] Torres received a stay of his execution by the Oklahoma Court of Criminal Appeals ("Oklahoma Court") in a landmark decision that was a case of first impression in the Oklahoma judicial system as well as in any other U.S. court.[236]

In this case, the Oklahoma Court, in following the forthcoming chain of reasoning, found that the individual states were and had been under an obligation to uphold the Vienna Convention, and in not doing so, they, thereby violated the rights of the defendants.[237] The court rendered its decision while departing from any suggestion that the ICJ has jurisdiction over a state court in Oklahoma.[238]

Justice Chapel of the Oklahoma Court looked to the terms of the Vienna Convention and the Optional Protocol, as well as to the U.S. Constitution as the basis for his decision.[239] He found that the United States was bound to uphold the decision of the ICJ based on U.S. acceptance of the terms of the Optional Protocol, which provides that the ICJ is "the forum for resolution of disputes under the Vienna Convention."[240] In addition, the Oklahoma Court found the Vienna Convention to be directly binding on the states in light of the Supremacy Clause and its treaty provision, and asserted that there has been no question as to whether state courts have considered the Vienna Convention binding on them.[241] In simplest terms, the U.S. federal government legally and voluntarily entered into a treaty with other Nations. In so doing, the United States became bound by the terms of the treaty, and by virtue of the Supremacy Clause and the Optional Protocol, Oklahoma must give effect to that treaty.[242]

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235. *Torres*, No. PCD-04-442, slip op. at 1 (order granting stay of execution and remanding case for evidentiary hearing).

236. *Torres*, No. PCD-04-442, slip op. at 1 (Chapel, J., concurring).

237. *See id.* at 12.

238. *See generally Torres*, No. PCD-04-442.

239. *See id.* at 2; *see also supra* note 230 and accompanying text.

240. *Torres*, No. PCD-04-442, slip op. at 5 (Chapel, J., concurring).

241. *Id.* at 3-4.

242. *Id.* at 5.

The Oklahoma Court found that Torres's Vienna Convention claim "was generated by the State of Oklahoma's initial failure to comply with the treaty."[243] The Oklahoma Court also recognized that, although under normal circumstances Torres's claim would be procedurally barred, the *Avena* decision holds that applying the procedural bar violates the Convention if that bar "prevents the Vienna Convention claim from being heard."[244] The Oklahoma Court then acknowledged that it is bound to review Torres's conviction "without recourse to the procedural bar" in order to give full effect to *Avena*.[245]

Thereafter, to reach its decision, the Oklahoma Court applied a three-prong test that other courts have used, to determine prejudice: (1) the defendant did not know that he had a right to contact his consulate for assistance; (2) he would have availed himself of the right had he known of it; and (3) it was likely that the consulate would have assisted the defendant.[246] Finding that Torres's claim satisfied all three prongs, the Oklahoma Court concluded that the violation of Torres's Vienna Convention rights contributed to ineffective assistance of counsel, that the jury did not hear sufficient evidence, and that the result of the original trial was unreliable.[247]

Thus, while not formally submitting itself to the jurisdiction of the ICJ, the Oklahoma Court determined that its decision complied with the requirements of review and reconsideration set forth in *Avena*.[248] The Oklahoma Court permitted the rendering of that decision by disregarding that the claim was procedurally barred so as to give full effect to the Vienna Convention and *Avena*.

2. *Medellin v. Dretke*

Not all cases after *Avena* have resulted in an immediate reconciliation of the ICJ judgment with U.S. law. In the decision of the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit")

243. *Id.* at 8.
244. *Id.* at 7-8.
245. *Id.* at 8.
246. *Id.* at 9.
247. *Id.* at 12.
248. *Id.*

in the case of *Medellin v. Dretke*,[249] the justices of the denied the petitioner-defendant a certificate of appealability from a denial of a petition for writ of habeas corpus.[250] The U.S. District Court for the Southern District of Texas held that José Ernesto Medellin's Vienna Convention claim was barred by procedural default.[251] The Fifth Circuit supported the petitioner's argument that Texas's application of the procedural default rule in this case violated the Vienna Convention, while recognizing the petitioner's reliance on the decision in *LaGrand* as well as noting the subsequent ICJ affirmation of its decision in *Avena*.[252] The Court nonetheless found that it could not ignore the U.S. Supreme Court ruling in *Breard*, and that ordinary procedural default rules can bar Vienna Convention claims in light of the AEDPA.[253]

In addition, the Court found that Article 36 of the Vienna Convention did not create individually enforceable rights.[254] The petitioner, in making his assertion, relied on the *LaGrand* decision in which the ICJ held that Article 36 did, in fact, create individual rights.[255] The Fifth Circuit, however, relied on a prior decision of its own Court and held to the contrary.[256] The Fifth Circuit maintained that, the decision in *LaGrand* notwithstanding, it is bound to apply the precedent-setting decision of its own Court "until either the Court sitting *en banc* or the Supreme Court say otherwise."[257] Since, it has previously been held that only the Supreme Court may overrule its own decision,[258] only a new Supreme Court decision could provide a different outcome.

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249. Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2004), *cert. granted*, 543 U.S. 1302 (2004) (mem.), *and cert. dismissed*, 125 S. Ct. 2088 (2005).

250. *Id.* at 281.

251. *Id.* at 279.

252. *Id.* at 279-80.

253. *Id.* at 280.

254. *Id.* at 279.

255. *Id.*

256. *See id.* at 280 ("'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 foreign national and his consular office. Thus, the presumption against such rights ought to be conclusive.'") (quoting United States v. Jimenez-Nava, 243 F.3d 192, 198 (5th Cir. 2001).

257. *Id.*

258. *See id.* ("'If a precedent of [the Supreme Court] has direct application in a case . . . , the Court of Appeals should follow the case which directly controls, leaving this Court the prerogative of overruling it own decisions.'") (quoting Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989).

On December 10, 2004, the U.S. Supreme Court granted certiorari in the case of *Medellin v. Dretke*.[259] More than two months after certiorari was granted and a month before oral argument in the case, President Bush issued a memorandum that stated the United States would discharge its international obligations under the *Avena* judgment by "having [s]tate courts give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by the fifty-one Mexican nationals addressed in that decision."[260]

Four days before the Supreme Court was to hear the oral arguments in Medellin's case, Medellin, relying on the memorandum of President Bush, thereafter filed a state application for a writ of habeas corpus in the Texas Court of Criminal Appeals.[261] The Supreme Court held that the "state proceeding may provide Medellin with the review and reconsideration of his Vienna Convention claim that the ICJ required," the same review and reconsideration that Medellin was seeking in the Supreme Court proceeding. In addition, for the Supreme Court to hear Medellin's case, Medellin would have to show that he "exhausted all available state court remedies."[262] Furthermore, in order to appeal a denial of habeas relief to a federal court, the petitioner must make a "substantial showing of a denial of a constitutional right."[263] The Court, therefore, dismissed Medellin's writ of certiorari "as improvidently granted."[264]

Since Medellin's claim before the Court turned on a treaty-based right, his only solution was to pursue his claim in the Texas state courts.[265] The oral argument was heard in the Texas Court of Criminal Appeals on September 14, 2005[266] and the outcome of that proceeding is currently pending.[267]

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259. Medellin v. Dretke, 125 S. Ct. 2088, 2088 (2005) (per curiam).

260. Memorandum from President George W. Bush to U.S. Attorney General (Feb. 28, 2005), http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html (last visited Feb. 1, 2006).

261. *Medellin*, 125 S. Ct. at 2089.

262. *Id.* at 2092.

263. *Id.* at 2091 (citing 28 U.S.C. § 2253(c)(2) (1996)); *see also* Bradley et al., *supra* note 229, at 680.

264. *See Medellin*, 125 S. Ct. at 2088.

265. Bradley et al., *supra* note 229, at 680.

266. The International Justice Project, *http://www.internationaljusticeproject.org* (last visited Feb. 1, 2006).

267. *Id.*

VII. *REMEDIES AFTER* AVENA

That detainees can be procedurally barred from asserting rights that they were unaware they had, due to the inaction of law enforcement officers whose obligation it is to inform them of those rights, is unjust and causes the United States to fall terribly short of achieving compliance with the Vienna Convention. If the ICJ is seeking more concerted efforts on the part of the United States to ensure the implementation of the Vienna Convention in the future, practical means must be found in which the states can more actively comply with their treaty obligations in order to prevent future instances of treaty violations.

Part VII opens with establishing the requirement that a remedy be found, despite that the text of the Vienna Convention itself does not provide as such. The section following talks about the concept of reciprocity among Nations as an incentive for compliance and the discounting of that notion as insufficient. This Part continues with a discussion of good faith and concludes with examples of good faith in practice.

A. *The Requirement of Recourse*

Notwithstanding the many scholarly articles and cases that alert the legal community to the Vienna Convention and its implications, Article 36 violations continue to occur.[268] Oftentimes, even judges and lawyers are not aware of the Vienna Convention provisions, and unless there is some avenue through which the treaty is brought to the attention of the law enforcement community, foreign nationals will continue to make the same unsuccessful arguments for years to come with little recourse at their disposal.[269]

In cases of Vienna Convention violations, the United States has frequently found itself in breach of its obligations because the courts have denied relief, while the executive and legislative branches do not have a direct role in the matter, and, therefore, have little or no effect. The only involvement by the executive in granting relief would occur in cases where the President, in federal-level prosecutions, or a governor, in state-level prosecutions, affords a remedy by means of sentence commutation, pardon, or

268. *Id.* at 586.
269. *Id.* at 586-87.

clemency.[270] Although lack of executive and legislative involvement may provide an explanation for the challenges the United States faces in upholding the Vienna Convention, as indicated in the ILC Articles, however, the explanation is not a valid justification. Pursuant to the ILC Articles, all organs of the United States, be they the executive, legislative, or judicial, share equal responsibility for the wrongful acts of the State.[271] All branches are, therefore, responsible for finding an equitable solution for the wronged parties in the *Avena* case.

Since the United States is generally aware of its treaty obligations, at issue in this instance is not whether the United States deems itself to be obligated under the Vienna Convention, but how those obligations can be fulfilled.

As the Vienna Convention creates a right, as indicated by the ICJ, then, to be sure, there must also be a remedy for breach. Chief Justice Marshall of the U.S. Supreme Court asserted that principle in 1803, declaring in *Marbury v. Madison*[272] that "[w]here there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[273] Chief Justice Marshall went further to state that "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for violation of a vested legal right."[274] And so, even if the text of Article 36 does not provide a definitive remedy, "courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice."[275] In establishing that there is a right created under the Vienna Convention, then, in accordance with U.S. tradition, a remedy for the violation must also exist.

B. *The Advancement and Failure of the Argument for Reciprocity*

Thomas Paine once said that "[h]e that would make his own liberty secure must guard even his enemy from oppression; for if

270. Quigley, *supra* note 16, at 50-51 (citing U.S. CONST. art. II, § 2, cl. 1).
271. *See supra* Part I.B and accompanying notes.
272. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
273. Harrill, *supra* note 84, at 587 (citing *Marbury*, 5 U.S. at 163).
274. *Marbury*, 5 U.S. at 163.
275. Monongahela Bridge Co. v. United States, 216 U.S. 177, 195 (1910).

he violates this duty he establishes a precedent that will reach to himself."[276] The idea embodied in those words has formed the foundation for an argument against non-compliance.

The United States has historically conducted diplomatic interactions and entered into treaty-based relationships with other States. U.S. leaders have, therefore, valued the stability of expectations created by the norms of the law of treaties.[277] Treaty enforcement has traditionally been based upon the rule of reciprocity—that a State complies with a treaty to guarantee other States' compliance with the treaty. Reciprocity effectively ensures "the observance of justice and good faith, in [the] intercourse [that] frequently occur[s] between two or more independent [S]tates, and the individuals belonging to each."[278]

The principle of reciprocity has served as the premise for arguments that U.S. non-compliance with Article 36 would be detrimental to U.S. citizens abroad.[279] Several courts have been concerned that there may be negative consequences for U.S. citizens if U.S. courts do not heed the Vienna Convention.[280] The Oklahoma Court in the *Torres* decision averred that treaty violations undermine not only the "Law of the Land," but also international law where reciprocity is critical.[281] The Oklahoma Court argued that officials in foreign countries would be more likely to disregard their treaty obligations when U.S. citizens are in custody if U.S. officials continue to ignore the requirements of Article 36.[282]

As evidenced by the Iranian hostage crisis,[283] the United States is deeply concerned with the safety of U.S. citizens abroad and the protection that Article 36 affords them. However, although this reason has been advanced as an incentive for states

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276. Harrill, *supra* note 84, at 590 (2004) (citing United States v. Alvarez-Machain, 504 U.S. 655, 688 (Stevens, J., dissenting) and quoting THE COMPLETE WRITINGS OF THOMAS PAINE 588 (Philip S. Foner ed., 1945)).

277. *See* John E. Noyes, *American Hegemony, U.S. Political Leaders, and General International Law*, 19 CONN. J. INT'L L. 293, 300 (2004).

278. Michael Fleishman, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of its Foreign Nationals in United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. L. 359, 362 (2003) (citing Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2351-53 (1991)).

279. *See* Green, *supra* note 101, at 534.

280. *Id.*

281. *See Torres*, No. PCD-04-442, slip op. at 4 (Okla. Crim. App. May 13, 2004).

282. *See id.*

283. *See supra* Introduction and accompanying notes.

to properly implement the Vienna Convention and redress violations, this fact alone has not sufficiently motivated the authorities to take action to provide an adequate remedy. The Iranian hostage crisis occurred in 1979, and since that time, Vienna Convention violations have persisted, as evidenced by *Breard*, *LaGrand*, and *Avena*, which commenced a long while after. To find a truly successful remedy, other avenues must be explored.

C. *The Doctrine of Good Faith*

Although international law is binding on the individual states under Article VI of the U.S. Constitution, current practice in states across the country seems to suggest that states find that to be otherwise. And so, the question of federal government intervention in state action raises rather interesting issues.

On the one hand, ICJ decisions cannot cause decisions of domestic U.S. courts to simply be overturned. The only mechanism for enforcement in the system of the ICJ that is provided for in the U.N. Charter is by way of the U.N. Security Council and solely at its discretion.[284] In addition, although the Vienna Convention and its Optional Protocol are binding on the states under the Supremacy Clause, in the absence of new federal legislation, the federal government cannot compel states to apply the ICJ decision.[285] However, this does not mean that states need not comply, but rather that the federal government does not have the power at present to force them to do so without new legislation. On the other hand, even if states wished to comply with the ICJ decision in *Avena*, it has been contended that the decisions of the Supreme Court cannot be ignored by deferring to a court outside of the United States. The solution to this dilemma cannot be found in statute, but rather in the doctrine of good faith,[286] which is especially important in international relations.

When Nations sign treaties, they do so with the good faith belief that the other signatories will uphold their obligations. This notion was considered so important that it was included in the VCLT as a reminder to States. Article 26 of the VCLT states

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284. *See* Bradley, et al., *supra* note 229, at 681.

285. *See supra* Part VI and accompanying notes.

286. *See generally* H.K. Lücke, GOOD FAITH AND CONTRACTUAL PERFORMANCE, *in* ESSAYS ON CONTRACT ch.5 (Paul D. Finn ed., 1987).

that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[287]

In the circumstances of *Avena*, by not informing the Mexican nationals of their Vienna Convention rights and later claiming that those rights have defaulted on procedural grounds was not the best display of good faith by the United States in fulfilling its treaty obligations. Even if it were the case that the AEDPA prevents a claim from being heard again, and that an ICJ decision does not have equal weight to a U.S. Supreme Court decision or that the *Avena* ruling cannot be imposed on the state courts, the Vienna Convention and Optional Protocol remain binding on the states under the Supremacy Clause, and so their terms must be respected.

As an exercise in good faith, it may be plausible for state courts to deem the ICJ decision to be persuasive in making their decisions, looking to the ICJ for guidance in fulfilling their own treaty obligations, while at the same time not necessarily formally deeming the decision to be controlling in their courts, as seen in the case of *Torres v. Oklahoma*,[288] so as not to conflict with the U.S. Supreme Court.[289] Although this may appear contradictory and not within the complete expectations of the international community, by doing so, the courts would be satisfying the terms of the Optional Protocol as well as adhering to their own treaty responsibilities, while staying faithful to the U.S. judicial system. It may not be an ideal solution, but it will constitute good faith action by the states and a good start.

D. *Miscellaneous Instances of Implementation and Compliance*

The following instances demonstrate that across the United States, some courts, states, and localities are attempting to fulfill their good faith obligation to give full effect to the Vienna Convention.

Following the ICJ decision in *Avena*, California Attorney General Bill Lockyer struggled to determine how the decision would affect the twenty-eight Mexican nationals on death row in

287. VCLT, *supra* note 31, art. 26.

288. *See supra* Part VI.E.1 and accompanying notes.

289. As can be seen in the next section, the Oklahoma Court of Criminal Appeals took note of the decision of the ICJ in staying the execution of Torres, while remaining steadfast in its commitment to the U.S. judicial system.

California.[290] Attorney General Lockyer turned to the U.S. Department of State and other states in similar circumstances to determine the best course of action.[291] In addition, he intends to remind District Attorneys to provide consular notification to foreign nationals in present and future cases.[292] Furthermore, various Vienna Convention responsibilities have been codified in the California Penal Code,[293] so as to prevent future violations.

Other states have also moved to codify the requirements of Article 36 of the Vienna Convention. For instance, the state of Texas has produced a sixty-seven page manual outlining requirements, procedures, and forms to be used in compliance with Article 36.[294]

In the state of Oregon, law enforcement officials have taken steps to cooperate with foreign consulates and to incorporate the Vienna Convention's terms into Oregon law enforcement agency procedures.[295] They concluded that a brief detention would not suffice to trigger Article 36, paragraph 1(b) obligations and that the defendant's arrival at a jail is the triggering point for notification.[296] In addition, two major developments illustrate Oregon's efforts towards Vienna Convention compliance.[297] The first is that police recruits receive instructions about the Vienna Convention included in their preparation to become state-certified law enforcement officials.[298] The second development is that a form of notification has been agreed upon

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290. Death Penalty Information Center, Recent Developments from DPIC, http://www.deathpenaltyinfo.org (last visited Feb. 1, 2006). Of the twenty-eight men, two are exempt from the ruling because they dual citizenship or were advised of their Vienna Convention rights. Nine other men were, in fact, notified of their rights, but the ICJ determined that it was not in a timely fashion. *Id.*

291. *See id.*

292. *See id.*

293. Cal. Penal Code § 834(c) (West 2003).

294. *See* Harrill, *supra* note 84, at 584 n.131; *see also* Greg Abbott, *Attorney General of Texas, Magistrate's Guide to Consular Notification Under the Vienna Convention.*

295. *See* Peter Shepherd, *The Vienna Convention on Consular Relations: An Oregon Law Enforcement Perspective*, 11 WILLAMETTE J. INT'L L. & DISP. RESOL. 53, 53-54 (2004).

296. *See id.* at 55-56.

297. *See id.* The Oregon Attorney General convened a group in 2000 to explore ways in which Oregon law enforcement officials could better comply with the Vienna Convention. The Mexican Consul General for Oregon participated in the group, as did the Oregon chapter of the ACLU, the Oregon Criminal Defense Lawyers Association, the Oregon State Sheriffs Association, the Oregon District Attorneys Association, and various academics. *Id.* at 58-59.

298. *Id.*

to be used by all Oregon jail managers to notify aliens of their consular notification rights at the time they are received at any of Oregon's jails following an arrest.[299] In addition, in 2003, the Oregon Legislature codified the provisions of Article 36, amending various sections of Oregon statutes to comply with Vienna Convention requirements.[300]

The codification of provisions of the Vienna Convention by state legislatures is a positive step towards nationwide implementation. Notwithstanding those efforts, codification at the federal level will be sure to secure the implementation of Article 36, paragraph 1(b), by every single state, as the states are bound to federal laws, which serve to supersede their own.

VIII. *THE POWER OF THE FEDERAL GOVERNMENT TO ENFORCE STATE COMPLIANCE WITH TREATIES*

Several methods have been offered by which the federal government can compel state compliance with its international treaty obligations. However, even if the courts do find a right for the defendant within Article 36 or the federal government passes legislation which gives foreign nationals the right to consular notification, the question still remains as to whether states can truly be compelled to enforce that right.[301]

A. *Reasons for State Non-compliance with Article 36, Paragraph 1(b)*

To arrive at a mechanism that will compel state compliance, the reasons why states do not voluntarily comply must first be understood. One reason is that still today, some jurisdictions are unaware that there is a notice requirement.[302] Notwithstanding a booklet issued by the U.S. Department of State entitled *Consular Notification and Access—Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them,* which has been distributed to federal, state, and local authorities in order to advance adherence to Article 36 of the Vienna Convention, total dissemination of information to all law enforcement personnel nationwide remains incomplete.

299. *Id.*
300. *See* Harrill, *supra* note 84, at 584 n.131.
301. *See* Vadnais, *supra* note 18, at 323.
302. *See id.* at 332.

A second reason is that some states arrest and imprison many foreign nationals, which makes the notice requirement a substantial burden on the courts and police, so they may choose not to engage in notification. A third reason is that oftentimes, foreign nationals cannot be readily identified as such or distinguished from U.S. citizens. Therefore, requiring law enforcement officials to question every detainee as to their nationality is a burden that is often avoided.[303]

A final reason why voluntary state compliance has not been a priority is that the requirement had not been taking very seriously before the *Breard* case, including not by the federal government. A periodic State Department notice sent to the states' attorneys general was the federal government's only attempt to urge compliance until *Breard*.[304] After *Breard*, every state governor received information on the Vienna Convention from the State Department as mentioned above, as well as "pocket-sized reference cards for law enforcement officers" from the State Department.[305]

All of the aforementioned reasons indicate that compliance with Article 36 of the Vienna Convention was not considered a national priority from the signing of the treaty by the United States in 1969. This lack of concern from the outset has served to exacerbate the issue of treaty compliance to the present day.

B. *Methods by Which Congress can Ensure Compliance*

As the federal government is responsible for the acts of its organs—its component states—Congress must do what is within its powers to secure state compliance with Article 36, and this can be done in several ways. The following offers a selection of possibilities, but is, by no means, exhaustive. One avenue is by way of state financial appropriation. For instance, due to the financial burden of the cost of incarcerating convicted foreign nationals, Congress could provide financial incentives to states to comply by offering funds to states who notify Congress of the foreign nationals they detain.[306] In addition, Congress could

303. *See id.* at 332-33.

304. *See id.*

305. *See id.* at 333.

306. *See id.* at 336; *see also* Brook, *supra* note 66.

generally condition federal spending on states enacting laws to improve treaty compliance.

Another way is by enacting federal legislation. For example, Congress could expand habeas jurisdiction to allow federal courts to hear procedurally defaulted Vienna Convention claims, or Congress could enact a law requiring states to report statistics of arrested foreign nationals to the federal government, thereby ensuring compliance.[307] A potentially more effective method would be the preemption of state death penalty statutes with a federal statute to forbid the death penalty where the Vienna Convention was violated.[308]

Congress could also move to authorize a cause of action to allow the Justice Department to bring an action to enforce the Vienna Convention against the states. Or, Congress could order federal officers, such as INS agents, to interview new arrivals at local jails to determine nationality.[309]

Enacting federal legislation that gives full effect to Article 36, paragraph 1, in conformity with Article 36, paragraph 2, would, indeed, be the most expedient means of remedying the continuous problem of Vienna Convention interpretation[310] as well as violations in localities that are unaware of the Vienna Convention requirements. Regardless of these measures, Congress cannot enact a law to force a state judiciary to reverse a decision it has already rendered. Due to the separation of powers in the United States, the executive, legislative, and judicial branches of the government remain independent and distinct entities, with the powers of one branch being extremely limited in its ability to intrude upon the powers of another. And so, as a solution to the issues raised in *Avena*, the U.S. Congress does not have the power to compel state courts to adhere to the decision of the ICJ.

C. *Executive Methods of Compliance Enforcement*

Scholars have offered several ways for the executive to remedy violations and to effect state compliance. These methods have included: (1) the use of stays of execution and executive

307. *See* Vadnais, *supra* note 18, at 336.
308. *See* Brook, *supra* note 66, at 594-97.
309. *See* Vadnais, *supra* note 18, at 336.
310. *See* Green, *supra* note 101, at 531.

orders to prevent those sentenced to death from being executed pending review of their cases; (2) federal government lawsuits against offending states in federal court; and (3) the granting of wider powers to foreign Nations to sue states in federal court.[311] The U.S. Attorney General has sued state or local governmental authorities that conducted activities that put the United States in violation of treaty obligations.[312] It is, therefore, still possible for the Attorney General to bring suit against states for Vienna Convention violations.

As mentioned earlier, the methods that the executive can use do not include forcing the courts to overturn their own decisions.[313] And so, as the state and local authorities have been the bodies responsible for the lack of implementation, it is proper for the executive and Congress to take the measures available to them to secure compliance. With respect to the decisions of the courts, however, compliance enforcement is much more complex.

IX. *INCORPORATING* AVENA *INTO* MIRANDA*: A POSITIVE NEXT STEP AND POSSIBLE SOLUTION*

As seen previously in this Article, several methods have been proffered to secure state observance of federal treaty obligations.[314] Although these methods appear plausible, the only way in which they can be practical is if those who are in positions to take action, in fact, do so. Codifying the Vienna Convention rights at the state level into a *Miranda*-type warning would be a more effective preventative method that would ensure that future violations are averted. This *Miranda*-type warning would be effected by informing detained individuals—all detainees and not only foreign nationals—of the right to consular access under Article 36, paragraph 1(b) at the moment they are taken into custody.[315] In doing so, the requirement of "without delay" of

311. *See Too Sovereign But Not Sovereign Enough*, *supra* note 62, at 2671-74.

312. *See* Quigley, *supra* note 16, at 51. For instance, there have been cases where local governments attempted to collect property taxes from the missions of foreign governments, and the United States was obligated by treaty to allow tax-free use of premises by foreign governments for diplomatic purposes. *Id.*

313. *See supra* Part VII.C.

314. *See supra* Part VII and accompanying notes.

315. *See* Vienna Convention, *supra* note 3, art. 36, ¶ 1(b) (describing the rights of foreign nationals upon arrest).

paragraph 1(b) as expounded upon by the ICJ in *Avena*[316] will certainly be fulfilled. By reading those in custody their *Miranda* rights as well as their Vienna Convention rights, the number of Vienna Convention claims are sure to be reduced, if not entirely eliminated, precluding the possibility of judicial decisions being reviewed due to Vienna Convention violations.

A. *Implementing* Miranda v. Arizona

Miranda v. Arizona marked a turning point in U.S. criminal jurisprudence. The *Miranda* decision provides that unless a defendant has received notice of the right to remain silent and the right to assistance of counsel, or unless the defendant has waived those rights, any statements made by criminal defendants to law enforcement officials in a custodial setting may not be introduced into evidence against the defendant.[317] These *Miranda* rights are to be read to a detainee prior to interrogation. The Supreme Court in *Miranda* stated:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. *He must be warned prior to any questioning* that he has the right

316. *See supra* Part V.B and accompanying notes.

317. Pursuant to the Fifth and Sixth Amendments to the U.S. Constitution, a detainee has right not to incriminate himself as well as a right to counsel. The Fifth Amendment to the Constitution states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself,* nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. 5 (emphasis added). The Sixth Amendment to the Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel for his defense.*" U.S. CONST. amend 6 (emphasis added).

> to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial no evidence obtained as a result of interrogation can be used against him.[318]

Prior to the *Miranda* case, difficulties in determining whether a confession was compelled often led to litigation to determine the voluntariness of a defendant's statements. *Miranda* was designed to reduce those litigation problems,[319] because the process of litigation was unable to depict what exactly took place when a defendant was in police custody.[320] The Supreme Court in *Miranda* implied that the *Miranda* warnings would greatly reduce the need for prospective litigation if defendants were provided with the opportunity to exercise their rights.[321]

After *Miranda*, the concern about litigation may have dissipated, but a new fear replaced it—that the conviction rate would drop and dangerous criminals would be set free. There were studies done in Allegheny County, Pennsylvania as well as Washington, D.C. among others, in the wake of *Miranda* to determine what effect, if any, the decision had on law enforcement, confessions and convictions.[322] In Allegheny County, the conviction rates slightly dropped for the first six months after *Miranda*, but in the first half of 1967 the rate came back up and, in fact, was higher than at any time from the period of 1964 to 1966.[323] In the Washington, D.C. study it was determined that despite *Miranda*, defendants gave confessions and asserted their rights at

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318. Miranda v. Arizona, 384 U.S. 436, 478-79 (1966).

319. *See* Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 7 (1986).

320. *See id.* at 8.

321. *See id.* at 9 (citing *Miranda*, 384 U.S. at 457).

322. *See id.* at 17-8.

323. *See id.* at 17-18 (quoting Richard H. Seeburger & R. Stanton Wettick, Jr., *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 19 (1967)).

about the same rate as before the decision.[324] As a result of *Miranda*, notwithstanding reasonable concerns, rights afforded in that decision endowed the detainee with constitutional protections, while at the same time not impairing the interests of law enforcement.[325]

The full nationwide implementation of *Miranda* took time, even years, before the difficulties with compliance were ironed out. Although law enforcement was not impeded, studies also concluded that *Miranda* was not producing the results it was seeking.[326] Detainees routinely waived their rights after been notified and chose not to remain silent and be represented by counsel. Their acts have been attributed to lack of understanding as well as negligence on the part of law enforcement in making the rights clear and comprehensible.[327] As late as 1970, execution of the *Miranda* decision was lagging. As *Miranda* rights became a more familiar concept across the United States in the early 1970's and in later years, the effects of *Miranda* began to appear with more detainees choosing to exercise their rights.[328]

In the years after the *Miranda* decision, the Federal Bureau of Investigation published a training document entitled *Police Interrogation: The Miranda Rule* to guide law enforcement agents in their implementation of the *Miranda* warnings.[329] This document was originally published in 1968 as a guideline and was later updated in 1974 with the purpose of "accept[ing] the [*Miranda*] decision for what it is—the law of the land—and to understand its application."[330] This document was used by law enforcement agents nationwide and provided them with the standards needed to give effect to the Supreme Court's decision.[331]

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324. *See id.* at 18 (citing Paul Alexander, Richard J. Medalie & Leonard Zeitz, *Custodial Interrogation in Our Nation's Capitol: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968)).

325. *See id.* at 21.

326. *See* Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1462-63 (1985).

327. *See* Gerald M. Caplan, *Miranda Revisited*, 93 YALE L.J. 1375, 1380 (1984) (reviewing LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS (1983)).

328. *See id.*

329. DONALD J. MCLAUGHLIN, POLICE INTERROGATION: THE MIRANDA RULE (Quantico, Va., FBI Academy 1974).

330. *Id.* at 1.

331. *See* J. Lewis Cannon, Robert L. Flanders & Otis H. Stephens, *Law Enforcement and the Supreme Court: Police Perception of the Miranda Requirements*, 39 TENN. L. REV. 407, 429 (1972).

B. *Comparing Vienna Convention Rights with* Miranda *Rights*

In the aftermath of *Breard*, scholars and civil libertarians have argued that the legally correct decision in *Breard* would have been the reversal of the defendant's conviction and the conception of a "Miranda-type exclusionary rule for violations of international rights."[332] The reason suggested to support this notion is that, otherwise, it would not be possible to prompt local law enforcement to comply with the Vienna Convention unless courts overturn convictions.[333]

The Vienna Convention right to consular access involves an affirmative corollary duty upon the arresting state to inform the detainee of his consular rights. These rights, which are premised on the arresting authorities' duty to inform, allow the foreign detainee the option to exercise or waive the rights, as in *Miranda*.[334] *Miranda* is, therefore, comparable to the Article 36, paragraph 1(b), duty to inform—under *Miranda*, arresting officers must inform detainees of their rights prior to interrogation. So, too, the Vienna Convention requirement of notification must be executed in a timely fashion in accordance with the paragraph 1(b) obligation to provide the information "without delay."[335] Taking into consideration the apparent similarities, it would, thus, seem logical and fully comprehensible for state and local authorities, who are already accustomed to informing detainees of their *Miranda* rights, to also inform them of their right to consular access.

C. *The ICJ on* Miranda

The ICJ in *Avena* makes mention of the use of the *Miranda* warnings by several states as a method of providing Vienna Convention notification.[336] The Court noted that it is understandable that, due the multiculturalism and ethnic diversity of the U.S. populace, the appearance of a person and the language that person speaks does not necessarily indicate that the person

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332. Erik G. Luna & Douglas J. Sylvester, *Beyond* Breard, 17 BERKELEY J. INT'L. L. 147, 149 (1999).

333. *See id.* at 149.

334. *See id.* at 151.

335. *See id.* at 152; *see also supra* Part VI.B and accompanying notes (discussing "without delay").

336. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 44, ¶ 64 (Mar. 31).

is a foreign national.[337] Considering these facts, the heterogeneity of the population would render it expedient to inquire as to a detained individual's nationality upon detention.[338]

The United States advised the ICJ that, in addition to some law enforcement authorities' routine inquiry of detainees regarding U.S. citizenship, some local jurisdictions have also provided a parallel reading of Vienna Convention rights alongside the traditional *Miranda* warnings.[339] It should be noted, however, that not all jurisdictions offer that parallel reading. Although the ICJ stated that "neither the terms of the Convention as normally understood, nor its object and purpose, suggest that 'without delay' is to be understood as 'immediately upon arrest and before interrogation,'"[340] the ICJ did find that doing so may be beneficial to the implementation of the Vienna Convention. The ICJ noted that providing a parallel reading would be of certain benefit in that "were each individual to be told at [the time of his arrest or detention] that, should he be a foreign national, he is entitled to ask for his consular post to be contacted, compliance with [the notification] requirement under Article 36, paragraph 1(b), would be greatly enhanced."[341]

D. *Equating* Miranda *with* Avena

Just as being informed of the constitutional right to be protected against self-incrimination is necessary to safeguard a detainee from a confession induced by police coercion, a foreign national who has rights on par with any constitutional amendment pursuant to the Supremacy Clause,[342] should be informed of his consular rights so as to be protected against intrusion by an unknown legal system. Equating the *Miranda* rights with the right to receive information about consular notification "without delay" as seen in *Avena*, indicates that a detainee's awareness of both sets of rights would not only bring the United States into compliance with their treaty obligations by giving full effect to

337. *See id.*

338. *See id.*

339. *See id.* Perhaps this has been pursuant to the suggestions of the Department of State guidebook. *See also supra* notes 210-212 and accompanying text.

340. *Avena*, 2004 I.C.J. at 48, ¶ 85.

341. *Id.* at 44, ¶ 64.

342. *See supra* Part II and accompanying notes.

Article 36, paragraph 1(b), as required by *Avena*, but would also ensure the proper administration of justice.

In one case that essentially equates *Miranda* warnings with the Vienna Convention, *Delaware v. Reyes* in 1999, a Delaware court held that despite that a defendant had been given *Miranda* warnings, the violation of the defendant's Vienna Convention rights must result in the suppression of evidence in the case.[343] A broad and nationwide implementation of the principles set forth in this decision could be a positive next step in remedying Vienna Convention violations.

To return to *Torres*, the Oklahoma Court expounded upon why the lack of consular notification resulted in a miscarriage of justice.[344] With respect to the third prong of the test employed by the Oklahoma Court as described in Part VI of this Article, the requirement that it be likely that the consulate would have assisted *Torres* was adequately proven to the court. The government of Mexico generally provides extensive services to its nationals who are detained abroad including having a "systematic procedure to offer very specific consular assistance"[345] in defending the cases. This demonstrates that consular notification is necessary at the outset of a foreign national's detention in order to provide the best possible chances for the detainee to receive a proper defense.

Therefore, just as detainees are generally read their *Miranda* rights upon detention so as to prevent a miscarriage of justice, so, too, it is imperative for law enforcement officials to read detained foreign nationals their Vienna Convention rights from the very moment they are taken into custody. The uniform nationwide implementation of the requirement of notification of consular access is an essential tool that would ensure that detained foreign nationals receive the fairest possible representation their consulates can provide.

E. *A Recommendation*

Some localities do offer a method of compliance with the Vienna Convention, the law enforcement officials there main-

343. Delaware v. Reyes, 740 A.2d 7 (Del. 1999); Epps, *supra* note 19, at 29.

344. *Torres*, No. PCD-04-442, slip op. at 10.

345. *See id.* (discussing further details on the extensive assistance offered by the government of Mexico).

taining that they understand the need to inform consulates when foreign citizens are arrested.[346] Although experts agree that the law is not clearly comprehended in many of the 26,000 nationwide police departments, several police departments have become more conscious of notifying detainees of their Vienna Convention rights.[347] Regardless of the attempts by local authorities, however, there is still no method of nationwide uniform application that would facilitate more effective implementation of the Vienna Convention rights.

Notwithstanding the suggestion of the ICJ of a parallel reading, an *incorporated* reading would be a more expeditious method of facilitating notification. To eliminate the step of inquiring as to the nationality of the detainee, to avoid potential Vienna Convention violations, and to ensure that the rights are read in full, the *Miranda* warnings should be fully modified to include the rights under the Vienna Convention. The rights of Article 36, paragraph 1(b) should be termed the "*Avena* rights" and should be added to the *Miranda* rights as a new clause, included in the reading at the time an individual is taken into custody by law enforcement agents. The inserted clause would read as follows:

> If you are a national of a State or Nation other than the United States of America, you have the right to communicate with the consular post of your nationality, if you so request. Any communication addressed to the consular post by you, in prison, custody or detention shall be forwarded by the authorities without delay.

Just as *Miranda* rights can be waived, so, too, should *Avena* rights be waivable. Article 36, paragraph 1 (b) begins with the clause "if he so requests."[348] The duty to inform refers to the

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346. *See* Siobhan Morrissey, *U.S. Violates Right of 52 Mexican Citizens to Speak to Consular Officials, Ruling Says*, A.B.A. J. E-Report, Apr. 9, 2004, *available at* http://venus.soci.niu.edu/~archives/ABOLISH/oct04/0594.html (citing Florida as an example of a state that informs consulates when foreign citizens are arrested).

347. Chris Kraul, *Mexicans on U.S. Death Row Denied Rights, Court Says*, L.A. TIMES, Apr. 1, 2004, at A1. In Florida for example, police departments stress relevant parts of the Vienna Convention to their officers because cases of foreign nationals arise so often. The law enforcement handbook of the Miami-Dade Police Department highlights the treaty in its first few pages. The handbook includes instructions for officers even for cases where the detainees come from countries not recognized by the United States, such as Cuba. *See* Morrissey, *supra* note 346.

348. *See* Kraul, *supra* note 347. In Florida, for example, police departments stress

obligation of the receiving State to inform the detainee of his or her rights. The obligation to inform the sending State of the detainee's existence is only triggered at the point that the detainee requests assistance after being informed of the *Avena* rights. As the *Avena* rights can be waived by the detainee they would, therefore, be no greater an impediment to the administration of justice than the *Miranda* rights. In actuality, the *Avena* rights would serve to protect against future litigation, while the waiver would serve to open the door for law enforcement to proceed.

Through incorporation of this clause into the *Miranda* warnings as they currently exist, the law enforcement agents will be sure to have notified foreign nationals of their rights, and in so doing will have fulfilled the terms of Article 36, paragraph 1(b), which requires "[t]he authorities [to] inform the person concerned without delay of his rights under this subparagraph[.]"[349] The nationwide reading of the *Miranda* and *Avena* rights together will be a breakthrough in combined international and domestic law enforcement in the United States.

CONCLUSION

As the situation exists at present, the United States cannot afford to continue to ignore the requirements of the Vienna Convention. The U.S. government at every level must proceed to engage in meaningful dialogue to reach a better conclusion, one that affords sufficient respect to the treaty obligations it has taken upon itself in the Vienna Convention, and respect of the international community who are partners to that treaty.

What should be the greatest incentive for compliance by courts is the duty to act in good faith, a duty the United States adopted in signing the VCLT. It has been posited, however, that ICJ decisions are not a controlling authority for United States domestic courts, but rather, have merely persuasive authority.[350]

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349. *See* Vienna Convention, *supra* note 3, art. 36, ¶ 1(b).

350. *See, e.g.*, Arthur Mark Weisburd, *International Judicial Decisions, Domestic Courts, and the Foreign Affairs Power*, 2004-2005 CATO SUP. CT. REV. 287.

As seen in the *Torres* decision, courts are already taking steps of their own accord to implement the ICJ decision, but there is still a long way to go toward a uniform remedy. The February 28, 2005, Memorandum of President Bush only provides a solution for the fifty-one Mexican nationals in the *Avena* case,[351] but makes no reference to future Vienna Convention claims. And so, some courts, such as the Fifth Circuit Court of Appeals in *Medellin*, may choose to disregard the ICJ decision in spite of clear violations and refer only to what they consider to be their highest authority, the U.S. Supreme Court. It appears, therefore, that the only true solution in that regard for future Vienna Convention claims will come by way of the effective and binding precedent of a Supreme Court decision which recognizes the obligations of United States compliance with Article 36, paragraph 1(b), regardless of the doctrine of procedural default, in cases involving foreign nationals detained on U.S. soil. Meanwhile, what remains to be seen is whether courts will follow the path of *Torres* or the path of Fifth Circuit in *Medellin*.

The more significant issue is whether the *Avena* decision will be viewed as relevant enough to warrant a change in the application of Article 36, paragraph 1(b), of the Vienna Convention so as to provide a deterrent to future litigation in the United States. To that effect, an incorporated reading that includes *Avena* rights with *Miranda* rights would be a very positive display of good faith as well as the most effective tool in uniformly applying Article 36, paragraph 1(b), and giving full effect to the Vienna Convention on Consular Relations.

351. Memorandum, *supra* note 260.