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THE VIENNA CONVENTION ON CONSULAR RELATIONS: PERSUASIVE FORCE OR BINDING LAW?

Sandra J. Weiland*

I. INTRODUCTION

The Vienna Convention on Consular Relations (“Vienna Convention”) sets forth signatory nations’ obligations to detained foreign nationals.¹ The United States adopted the Vienna Convention and Optional Protocol in 1963 and ratified in 1969.² Article 36 requires that detained foreign nationals be informed—“without delay”—of their right to confer, communicate, and seek representation by their consulate throughout their detention.³

Although the United States considers treaties as part of the “law of the land,”⁴ its record in enforcing and complying with obligations set forth in the Vienna Convention is inconsistent. The United States demands enforcement of diplomatic and consular rights abroad, yet the International Court of Justice (ICJ) recently found the United States in breach (for the third time) of the Vienna Convention.⁵ Because of enhanced threats to U.S. citizens both abroad and at home, it is more important than ever to have a consistent policy of enforcement and reciprocity among nations.

After the ICJ’s 2004 decision in *Avena and Other Mexican Nationals*,⁶ President Bush ordered state courts to give “meaningful review” to convicted Mexican inmates who were not notified of their Vienna Convention rights.⁷ In a

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1. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

2. *Id.*; Michael Fleishman, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Penalty Cases*, 20 ARIZ. J. INT’L & COMP. L. 359, 363 (2003).

3. Vienna Convention on Consular Relations, *supra* note 1, at arts. 36(a)-(b) (stating that, upon detainee request: “[T]he 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 manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.”).

4. *See, e.g.*, *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of rights depending upon it are duly presented for their determination”).

5. Roberto Iraola, *Federal Criminal Prosecutions and the Right to Consular Notification Under Article 36 of the Vienna Convention*, 105 W. VA. L. REV. 179, 180 (2002); Kelly Trainer, *The Vienna Convention on Consular Relations in the United States Courts*, 13 TRANSNAT’L LAW 227, 230 (2000).

6. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

7. *See* Death Penalty Information, *President Bush Orders Courts to Give Foreign Nationals on Death Row Further Review*, (Mar. 4, 2005), at

recent brief submitted to the Supreme Court, the U.S. Solicitor General stated, "Compliance serves to protect the interests of United States citizens abroad, promotes the effective conduct of foreign relations, and underscores the United States' commitment in the international community to the rule of law."⁸ Shortly afterward, however, President Bush withdrew from the Optional Protocol that gives the ICJ jurisdiction to hear cases, like *Avena*, arising under the Vienna Convention.⁹

The Vienna Convention expresses the international law rule of *pacta sunt servanda* (once you enter an agreement in good faith you must abide by it), and the United States' lack of enforcement of the rights and obligations under the Vienna Convention has generated ill will in the international community.¹⁰ In this time of increasing threats to United States citizens abroad and at home, the United States should synthesize the Vienna Convention into its domestic law and demand compliance from state and federal agencies. The United States' systematic Vienna Convention violations undermine the integrity and accountability of the United States internationally and demand redress within our court systems domestically.

Part II of this paper examines the issue of foreigners awaiting the death penalty in the United States. Part III examines the rights and obligations created under the Vienna Convention for foreigners. Part IV studies the evolution of the legitimacy and enforcement of the Vienna Convention by examining the *Breard*¹¹ and *LaGrand*¹² cases. Part V examines the *Torres*¹³ case and the ICJ's *Avena and Other Mexican Nationals (Mexico v. United States of America)* decision. Part VI examines the current status of conflicting jurisprudence in the Fifth Circuit's recent *Medellin*¹⁴ decision in which the United States Supreme Court recently granted certiorari. Part VII concludes the paper.

II. FOREIGN NATIONALS & CAPITAL PUNISHMENT IN THE UNITED STATES

The United States reinstated capital punishment of foreign nationals in 1976.¹⁵ As of February 15, 2005, 119 foreign nationals await the death penalty.¹⁶ Most foreign nationals on death row were not notified of their rights to confer with their

<http://www.deathpenaltyinfo.org/article.php?did=1345&scid=64>.

8. See Amnesty International, *USA: Another "Double Standard" on Consular Rights*, (Mar. 10, 2005), at <http://web.amnesty.org/library/Index/ENGAMR510502005?open&of=ENG-392>.

9. See Death Penalty Information, *U.S. Abandons Optional Protocol to the Vienna Convention on Consular Relations*, (Mar. 10, 2005), at <http://www.deathpenaltyinfo.org/article.php?did=1375&scid=64>.

10. See Lou Ann Bohn, *Understanding the Imposition of Capital Punishment on Foreign Nationals in the United States as a Human Rights Violation*, 21 WIS. INT'L L.J. 435 (2003).

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

12. *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998).

13. *Torres v. Mullin*, 317 F.3d 1145 (10th Cir. 2003).

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

15. Death Penalty Forum, *Foreign Nationals, Part II*, (May 15, 2004), at <http://www.deathpenaltyinfo.org/article.php?sdid=31&did=582#executed>.

16. Death Penalty Forum, *Foreign Nationals and the Death Penalty in the United States*, (Feb. 15, 2005), at <http://www.deathpenaltyinfo.org/article.php?did=198&scid=31>.

consuls and did not learn of their rights until after years of detainment and long after exhausting most of their appeals.¹⁷

Currently, 118 countries have abolished the death penalty and 15 more retain it only for crimes against humanity and war-time crimes.¹⁸ Four nations—the United States, China, Iran, and Viet Nam—carry out 84 percent of all executions.¹⁹ For purposes of the following list, dual- citizenship cases are not listed because, according to the United States State Department, individuals who hold both United States citizenship as well as another nationality are not entitled to rights under the Vienna Convention.²⁰

Foreign Nationals under Sentence of Death in the United States: By Foreign Nationality²¹

Mexico: 54	Spain: 1
Jamaica: 6	Tonga: 1
Cuba: 6	Trinidad: 1
Germany: 2	Philippines: 1
Columbia: 4	Nicaragua: 1
El Salvador: 5	Laos: 1
Thailand: 1	Honduras: 2
Estonia: 2	Egypt: 1
Cambodia: 3	Bangladesh: 1
Viet Nam: 3	Haiti: 1
Croatia: 1	Jordan: 1
Lebanon: 1	Iran: 1
Peru: 1	Unknown nationality: 7
Canada: 1	Guatemala: 1
St. Kitts and Nevis: 1	France: 1
Bahamas: 1	
OTHER DEATH SENTENCES	
Germany: 1 (awaiting resentencing)	
Argentina: 1 (awaiting resentencing)	
Viet Nam: 1 (awaiting retrial)	
Thailand: 1 (awaiting resentencing)	
United Kingdom: (reversed on appeal)	

17. *Id.*

18. Amnesty International, *The Death Penalty*, at http://web.amnestyusa.org/abolish/foreign_nationals.html (last visited Mar. 12, 2005).

19. *Id.*

20. Death Penalty Forum, *supra* note 16.

21. *Id.*

Further, foreign nationals face capital punishment in the following states (number of nationals in each state in parenthesis): California (43), Texas (27), Florida (21), Arizona (5), Ohio (4), Oklahoma (1), Nevada (4), Pennsylvania (2), Louisiana (3), Virginia (1), Oregon (1), Montana (1), Georgia (1), Mississippi (1), Alabama (1), Nebraska (1), and Federal (2).²²

III. THE VIENNA CONVENTION: RIGHTS AND OBLIGATIONS

The United States must notify detained foreign nationals “without delay” of their rights to confer with their consular officials.²³ Article 36(1)(b) of the Vienna Convention is two-fold: (1) to notify “without delay” the detained foreigner of his right to confer with his consulate; and (2) to allow communication between the detained foreign national and his consulate.²⁴ This requirement gives people traveling and living abroad the right to contact their consulates and seek assistance when accused of a crime.

The Vienna Convention codified international customary law on consular “relations, privileges and immunities.”²⁵ The United States ratified the Vienna Convention treaty without reservations in 1969 and agreed to the jurisdiction of the ICJ, which hears disputes between nations.²⁶ In March 2005, however, President Bush withdrew the United States from the Optional Protocol that gives the ICJ jurisdiction to hear disputes arising under the Vienna Convention.²⁷

Ironically, the United States has been a leader in advancing the legitimacy and binding effect of ICJ judgments.²⁸ In 1979, when Iran held American hostages at the United States Embassy in Iran, the United States immediately went to the ICJ and demanded a judgment that Iran had violated international law.²⁹

Under the Supremacy Clause of the United States Constitution, the Vienna Convention binds all states.³⁰ Scholars debate whether the United States has obligated itself to international treaties as binding on state’s judicial and criminal procedures.³¹ And, even officials aware of the Vienna Convention do not always adhere to it. Gene Acuna, spokesmen for Texas Governor Rick Perry, stated:

22. *Id.*

23. Vienna Convention, *supra* note 1, art. 36(a)(b).

24. *Id.*

25. Vienna Convention, *supra* note 1, pmbl.

26. *Id.*

27. See Death Penalty Information, *supra* note 9.

28. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877, 270-72 (2000) (noting requests by the United States to allow consular access to Americans detained in Germany, Syria, and Iran).

29. United States Diplomatic and Consular Staff in Iran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

30. U.S. CONST. art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treatise 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.”).

31. See Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 553 (1999).

“According to our reading of the law and the treaty, there is no authority for the federal government or this World Court to prohibit Texas from exercising the laws passed by our legislature.”³²

IV. CASE STUDIES

*A. Breard v. Greene*³³

In 1992, the Commonwealth of Virginia arrested Angel Francisco Breard, a dual citizen of Paraguay and Argentina, for rape and murder.³⁴ At trial, the State presented “overwhelming evidence of guilt, including semen found on the victim’s body matching Breard’s DNA profile and hairs on the victim’s body identical in all microscopic characteristics to hair samples taken from Breard.”³⁵ Breard refused counsel and confessed to killing the victim, but explained that he did so only because his father-in-law placed a satanic curse on him.³⁶ A jury convicted Breard and then sentenced him to death.³⁷ The Virginia Supreme Court affirmed.³⁸ The United States Supreme Court denied certiorari.³⁹

Only after Breard exhausted all of his state court proceedings did he learn that Virginia officials violated his rights under the Vienna Convention, and he then brought a *habeas corpus* petition in federal district court.⁴⁰ The court denied his petition, however, because of the “procedural default” rule: Breard had not raised the issue in previous state court proceedings.⁴¹ The court also found that Breard did not show he suffered prejudice as a result of this procedural default.⁴² The Fourth Circuit affirmed.⁴³ Notably, in a concurring opinion, a Fourth Circuit judge stated: “United States citizens are scattered about the world.... Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example.”⁴⁴

After Breard’s conviction became final, Paraguay sued in the ICJ, stating that the United States had violated the Vienna Convention.⁴⁵ Because of Breard’s pending execution date, the ICJ issued an order before its judgment.⁴⁶ The court

32. Reuters, *Texas Snubs World Court on Execution Stays*, (Feb. 11, 2003), available at <http://www.rense.com/general34/exce.htm>.

33. *Breard*, 523 U.S. 371 (U.S. 1998).

34. *Id.* at 373.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* (citing *Breard v. Commonwealth*, 445 S.E.2d 670, 682 (Va. 1994)).

39. *Id.* (citing *Breard v. Virginia*, 513 U.S. 971 (1994)).

40. *Id.*

41. *Id.* (citing *Breard v. Netherland*, 949 F. Supp. 1255, 1266 (E.D. Va. 1996)).

42. *Id.*

43. *Id.* (citing *Breard v. Pruett*, 134 F.3d 615, 621 (1998)).

44. *Breard v. Pruett*, 134 F.3d 615, 622 (4th. Cir. 1998) (Butzner, J., concurring).

45. *Breard*, 523 U.S. at 374.

46. *Id.*

demanded that the United States “take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings.”⁴⁷

Although the U.S. Supreme Court held that the Vienna Convention “arguably confers on an individual the right to consular assistance following arrest,”⁴⁸ the Court voted (6-3) on the eve of Breard’s execution and decided that under state procedural rules “claims not so raised are considered defaulted.”⁴⁹ The Court stated that rights created under the Vienna Convention “shall be exercised in conformity with the laws and regulations of the receiving State.”⁵⁰ Thus, Breard could not then raise a claim of violation of his rights under the Vienna Convention on federal *habeas corpus* review.⁵¹ Further, the Court held that Breard did not present any evidence that he was prejudiced by this procedural bar.⁵² Even if Breard had properly raised his Vienna Convention claims, the Court noted that it would be unlikely that violations would reverse his conviction.⁵³ Notably, the Court “did not see itself as constrained by the [ICJ’s provisional] order.”⁵⁴

The *Breard* case illustrates the turmoil in the U.S. justice system. Three justices dissented, stating that they would grant a stay of execution.⁵⁵ Justice Breyer wanted more time to weigh the “potential relevance of proceedings in an international forum.”⁵⁶ While the Justice Department argued the Court should deny Breard’s stay of execution, Secretary of State Madeline Albright sent a letter to the Governor of Virginia pleading Virginia to comply with the ICJ’s order and grant the stay. The letter stated her concern for “the possible negative consequences for the many U.S. citizens who live and travel abroad.”⁵⁷ Within an hour after the release of the Supreme Court’s opinion, Angel Breard was executed.⁵⁸

47. *Id.*

48. *Breard*, 523 U.S. at 376-77 (stating further that “neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United State’s courts to set aside a criminal conviction and sentence for violation of consular notification provisions”).

49. *Id.* at 375.

50. Patrick Dervishi, Comment, *No Remedies for Violation of the Foreign Nationals’ Right to Consular Notification*, 15 FLA. J. INT’L L. 645, 649 (2003) (quoting *Breard*, 523 U.S. at 375).

51. *Breard*, 523 U.S. at 376.

52. *Id.* at 377.

53. Jonathan I. Charney & W. Michael Reisman, *Breard: The Facts*, 92 AM. J. INT’L L. 666, 673 (1988) (citing *Breard*, 523 U.S. at 377).

54. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT’L L. 877, 882 (2000).

55. *Breard*, 523 U.S. at 379.

56. *Id.* at 381 (Breyer, J., dissenting).

57. Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 553 (1999).

58. See Sarah M. Ray, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, 91 CAL. L. REV. 1729, 1744 (2003).

*B. Karl and Walter LaGrand*⁵⁹

Arizona accused the LaGrand brothers, who were German citizens, of murdering a bank employee in a robbery attempt.⁶⁰ After 17 years of confinement and only weeks before their scheduled executions, Arizona officials notified the brothers of their Vienna Convention rights.⁶¹ Shortly after becoming aware of their citizens' plight, Germany sued the United States in the ICJ asserting that the United States had violated the brothers' Vienna Convention rights by failing to notify them of their rights to consular access.⁶²

The ICJ unanimously ordered a stay of execution because the brothers were not informed of their rights to confer with the German consulate under the Vienna Convention.⁶³ The ICJ stated that the United States should take "all measures in its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of that Order."⁶⁴

However, time was running out for the LaGrand brothers. The U.S. Supreme Court held that it was too late to raise the issue of their Vienna Convention rights due to the "tardiness of the pleas."⁶⁵ Despite the ICJ's injunction, the Court permitted the execution to proceed and dismissed Germany's appeal.⁶⁶ Arizona executed Walter LaGrand.⁶⁷

Although both LaGrand brothers had been executed, Germany continued to pursue its ICJ suit.⁶⁸ The United States admitted to violating the Vienna Convention and formally apologized to Germany.⁶⁹ The United States argued, however, that the Vienna Convention had no authority to meddle within domestic criminal procedural rules.⁷⁰ Germany argued that the Vienna Convention does confer individual rights on states and that the U.S. "procedural default" rule violated the Vienna Convention.⁷¹

59. *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998).

60. *Id.* at 1257.

61. Amnesty International, *United States of America: A Time for action-Protecting the Consular Rights of Foreign Nationals Facing the Death Penalty*, (Aug. 22, 2001), at <http://web.amnesty.org/library/index/ENGAMR511062001>.

62. Sarah M. Ray, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, 91 CAL. L. REV. 1729, 1744 (2003); Michael Fleishman, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Penalty Cases*, 20 ARIZ. J. INT'L & COMP. L. 359, 389-90 (2003).

63. Sarah M. Ray, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, 91 CAL. L. REV. 1729, 1742-45 (2003).

64. *La Grand Case (Germany v. United States of America)*, 2001 I.C.J. 104 (June 27), available at <http://www.icj.cij.org/icjwww/idocket/igus/igusframe.htm>.

65. *See Federal Republic of Germany v. United States*, 526 U.S. 111, 112 (1999).

66. *Id.*

67. *See La Grand Case*, *supra* note 64.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

On June 27, 2001 the ICJ held for the first time that the provisional measures of the Vienna Convention on Consular Relations are legally binding.⁷² The ICJ found that the United States had breached its obligations to the LaGrand brothers and to Germany under Article 36, paragraph 1, of the Convention and failed to provide a remedy for these violations.⁷³ The ICJ held that pursuant to the Vienna Convention: (1) an individual has the right to be notified of the right to communicate with consul; (2) domestic “procedural default” rules cannot bar judicial review of violations; and (3) violations demand judicial “review and reconsideration.”⁷⁴ The ICJ stated:

“[A]n apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.”⁷⁵

Although the ICJ ordered the remedy of “review and reconsideration,” U.S. courts hold that defendants must prove they were prejudiced by not being informed of their right to consular access to get a remedy.⁷⁶

V. THE FACE OF LITIGATION TODAY: TORRES AND THE MEXICAN GOVERNMENT

In a case similar to *LaGrand*, Oklahoma convicted Osbaldo Torres for killing a couple during a burglary in Oklahoma City and sentenced him to death without notifying him about his rights under the Vienna Convention.⁷⁷ The Oklahoma Court of Criminal Appeals affirmed the conviction and sentence and denied other claims for post-conviction relief.⁷⁸ Torres subsequently filed a writ for *habeas corpus* which was denied by the federal district court and affirmed in the Tenth Circuit.⁷⁹ Torres then sought *certiorari* in the U.S. Supreme Court, alleging (among other things) conflicts between the Tenth Circuit’s ruling and the ICJ’s holding in *LaGrand*.⁸⁰

A. The U.S. Supreme Court

The U.S. Supreme Court declined *certiorari*.⁸¹ This denial of *certiorari* again stalled judicial determination of what an appropriate “remedy” may be for

72. International Court of Justice Press Release, *La Grand Case*, (Germany v. United States of America), 2001 I.C.J. 104 (June 27, 2001), at <http://www.icj.org/icjwww/idocket/igus/igusframe.htm>.

73. Ashley Wright Baker, *Forcible Transborder Abduction: Defensive Versus Offensive Remedies for Alvarez-Machain*, 48 ST. LOUIS U. L.J. 1373, 1392 (2004).

74. Lou Ann Bohn, *Understanding the Imposition of Capital Punishment of Foreign Nationals in the United States as a Human Rights Violation*, 21 WIS. INT’L L.J. 435, 453 (2003).

75. See *La Grand Case*, *supra* note 64.

76. See *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996).

77. See *Torres v. State*, 962 P.2d 3 (Okla. Crim. App. 1998).

78. *Id.*

79. *Torres v. Mullin*, 317 F.3d 1145 (10th Cir. 2003).

80. *Torres v. Mullin*, 540 U.S.1035 (2003) (denying *certiorari*).

81. *Id.*

Oklahoma's failure to notify Torres of his Vienna Convention rights. Notably, in a concurring opinion, Justice Stevens raised concerns that:

Applying the procedural default rule to Article 36 claims is not only in direct violation of the Vienna Convention, but it is also manifestly unfair. The ICJ's decision in *LaGrand* underscores that a foreign national who is presumptively ignorant of his right to notification should not be deemed to have waived the Article 36 protections simply because he failed to assert that right in a state criminal proceeding.⁸²

Justice Stevens concluded by saying that the procedural default doctrine, which provides that States do not have to provide a remedy for violating a detained foreign national's rights, is not in accord with the law of nations and thus the law of the United States: "The Court is equally unfaithful to that command when it permits state courts to disregard the Nation's treaty obligations."⁸³ Similarly, in dissent, Justice Breyer wrote that Torres' and Mexico's arguments seemed "substantial."⁸⁴

B. International Court of Justice

In an unprecedented action, Mexico sued the United States alleging numerous violations of the Vienna Convention in *Avena and Other Mexican Nationals (Mexico v. United States of America)*.⁸⁵ *Avena* concerns 52 Mexican nationals awaiting capital punishment in the United States,⁸⁶ and Torres is one of the 52 Mexican nationals in the suit.⁸⁷ Mexico alleged that the United States consistently ignored its obligations under the Vienna Convention and that detainees generally learn of their rights years later, after their appeals have been exhausted.⁸⁸ Although Torres was arrested and convicted in 1993, the Mexican government was unaware of his detainment until 1996 when members of Torres' family notified it.⁸⁹ By this time, Torres had already been through one mistrial and a second trial which placed him on death row.⁹⁰

The United States contended that it followed the ICJ's orders handed down in *LaGrand*, which requires "review and reconsideration" of Article 36 violations cases through the clemency hearing process. Further, the United States insisted that it is beyond the scope and authority of the ICJ to further interfere with its criminal justice system.⁹¹

82. *Torres*, 540 U.S. at 1036 (Stevens, J., concurring)

83. *Id.* at 1037.

84. *Torres*, 540 U.S. at 1041 (Breyer, J., dissenting).

85. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

86. *Id.*

87. International Herald Tribune, *Lifeline for Death-Row Inmates*, (Jan. 17, 2004), available at <http://www.iht.com/articles/125430.html>.

88. *Id.*

89. *Id.*

90. *Id.*

91. Associated Press, U.S., Mexico in Death Penalty Feud, (Dec. 16, 2003), available at <http://www.cbsnews.com/stories/2003/11/24/world/main585236.shtml>.

Mexico argued that these 52 cases offer clear evidence of the United States denial of Article 36 rights. The Mexican government asked the ICJ to: (1) define the United States' obligations under the Vienna Convention; (2) define the scope of "review and reconsideration;" (3) provide a remedy for its violations; and (4) declare that the clemency process used by the United States to satisfy the "review and reconsideration" requirement for violations inadequate.⁹²

Mexico, which strongly opposes the death penalty, asked the ICJ to order a provisional measure to ensure that the named Mexican nationals in the suit were not executed prior to the judgment being passed down.⁹³ The ICJ unanimously ordered the United States to take all measures necessary to avoid the execution of the named Mexicans.⁹⁴ The United States complied with this order.

C. Judgment Handed Down

On March 31, 2004, the ICJ handed down the judgment in *Avena and Other Mexican Nationals* and ordered the United States to "review and [reconsider]" the 52 Mexican nationals' death sentences.⁹⁵ The ICJ based its order on the numerous violations of the United States' obligations to these detained foreign nationals under the Vienna Convention.⁹⁶ The ICJ held that the requisite advisement of consular rights "without delay" is a "duty upon the arresting authorities to give the Article 36, paragraph 1 (b), information to the individual... 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."⁹⁷ Unfortunately, the decision said little about what "review and reconsideration" necessarily entails or demands.

The ICJ held the following points in a vote of fourteen-to-one:

(1)The United States breached its obligations to 51 of the Mexican nationals by not informing them "without delay" of their rights under Article 36 of the Vienna Convention;

(2)The United States breached its obligations, under Article 36 of the Vienna Convention, by not notifying the Mexican consulate "without delay" of the detention of 49 of the Mexican nationals;

(3)The United States breached its obligations, under Article 36 of the Vienna Convention, to 49 Mexican nationals by depriving them of their right to have communication with, and access to, the Mexican consulate;

92. *Avena and Other Mexican Nationals* (Mex. V. U.S.), 2004 I.C.J. 128 (Mar. 31).

93. *Id.*

94. *Id.*

95. *Id.*

96. International Court of Justice Press Release, *Avena and Other Mexican Nationals*, (Mar. 31, 2004), available at http://www.icj-cij.org/icjwww/ipresscom/ipress2004/ipresscom2004-16_mus_20040331.htm.

97. *Avena*, 2004 I.C.J. 128.

(4)The United States its obligations, under Article 36 of the Vienna Convention, to 34 Mexican nationals by not allowing their consulate to arrange for their legal representation in previous hearings;

(5)The United States breached its obligations, under Article 36 of the Vienna Convention, to three of the Mexican nationals, including Torres, by not permitting the review and reconsideration of their cases; and

(6)Reparation for the above violations is “review and reconsideration” by the United States.⁹⁸

Further, the court unanimously held the following:

(1)The United States has evidenced a commitment to ensuring performance of Vienna Convention rights, which satisfies Mexico’s request for assurance of future compliance; and

(2) “[R]eview and reconsideration” must be left up to the United States to determine the “means of its own choosing.”⁹⁹

The court failed to state what the scope of “review and reconsideration” entails, but it did specify that the current executive clemency process alone was insufficient.¹⁰⁰ Thus, the ICJ flatly held that the United States had violated the Vienna Convention and “did not shy away from what the United States had characterized as interference in the U.S. judicial process.”¹⁰¹ Although treaties ratified by the United States are supposed to be the “law of the land,” not all states honor these treaties. Texas and Oklahoma, where many Mexican nationals are on death row, have already indicated an “unwillingness to comply” with the ICJ’s judgment.¹⁰² This result indicates that federalism tensions arise when balancing the United States’ compliance and commitment to international law with the autonomy of the state’s separate criminal justice systems.¹⁰³ Texas Governor Rick Perry stated that the International Court of Justice “does not have jurisdiction in Texas.”¹⁰⁴ However, Governor Perry commuted Torres’ death sentence shortly after the ICJ’s decision.¹⁰⁵ Subsequently, President Bush ordered state courts to

98. International Court of Justice Press Release, *supra* note 96.

99. *Id.*

100. *Id.*

101. Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U.L. REV. 2029, 2149 (2004).

102. Death Penalty Forum, *California Considers Impact of International Court Ruling Regarding Mexican Foreign Nationals*, [http://www.deathpenaltyinfo.org/article.php?did=950 &scid=64](http://www.deathpenaltyinfo.org/article.php?did=950&scid=64) (last visited March 13, 2005).

103. See Jehanne E. Henry, *Overcoming Federalism in Internationalized Death Penalty Cases*, 25 TEX. INT’L L.J. 459, 461 (2000).

104. Death Penalty Forum, *No Justice in Rights Denied*, (Apr. 3, 2004), available at <http://www.deathpenaltyinfo.org/article.php?scidz31&did=955>.

105. Boston Herald, *Governor Commutes Mexican National’s Death Sentence*, (May 14, 2004), available at <http://news.bostonherald.com/national/view.bg?articleid=27877&format=>>.

give Mexican foreign nationals who were not notified of their Vienna Convention rights “meaningful review.”¹⁰⁶

VI. *Medellin v. Dretke*¹⁰⁷

Medellin, a Mexican citizen, was convicted of capital murder and sentenced to death.¹⁰⁸ Medellin subsequently filed a writ for *habeas corpus*, which was denied by the federal district court and affirmed in the Fifth Circuit.¹⁰⁹ The Fifth Circuit applied *Breard's* procedural default rule and held that the “[p]etitioner’s claim fails for two reasons: (1) it is procedurally defaulted, and (2) even if it were not procedurally defaulted, the Vienna Convention, as interpreted by this Court in the past, does not confer an individually enforceable right.”¹¹⁰ Mexican consular officials were first notified of Medellin’s incarceration when he wrote them from death row.¹¹¹

The Fifth Circuit noted Medellin’s claims that the ICJ’s recent decisions in *LaGrand* and *Avena and Other Mexican Nationals*, which held that a procedural default cannot bar review.¹¹² Nonetheless, the court stated that under the Supreme Court’s *Breard* decision, claims can be procedurally defaulted in death penalty cases and “only the Supreme Court may overrule a Supreme Court decision.”¹¹³ Absent being “taught otherwise,” the Fifth Circuit is bound to follow the *Breard* precedent.¹¹⁴ Likewise, the Fifth Circuit held that without indication from the Supreme Court, it was bound by precedent that the Vienna Convention does not create an individually enforceable right despite the ICJ’s decisions in *LaGrand* and *Avena*.¹¹⁵

The Court granted *certiorari* in December 2004 and may resolve these lingering issues.¹¹⁶

VII. CONCLUSION

The U.S. Supreme Court in *Paquette Habana* stated: “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”¹¹⁷ Although the Supreme Court refers to customary international law as “part of our law” and part of the “law of the land,” it has so far resisted enforcement of the Vienna Convention.¹¹⁸

106. See Death Penalty Forum, *supra* note 7.

107. 371 F.3d 270 (5th Cir. 2004).

108. *Id.* at 273-74.

109. *Id.* at 274.

110. *Id.* at 279.

111. Death Penalty Forum, *News from the U.S. Supreme Court*, at <http://www.deathpenaltyinfo.org/article.php?did=248&scid=38> (last visited March 14, 2005).

112. *Medellin*, 371 F.3d at 279-80.

113. *Id.* at 280.

114. *Id.*

115. *Id.*

116. *Medellin v. Dretke*, 125 S. Ct. 686 (2004).

117. *The Paquette Habana*, 175 U.S. 677, 700 (1900).

118. *Id.*

Additionally, President Bush recently ordered state courts to give “meaningful review” to Mexican nationals who were not informed of their Vienna Convention rights but then ordered the withdrawal of the United States from the Optional Protocol. This double-standard fails to encourage reciprocity among nations: “This backward step cannot be reconciled with the United States’ own declaration that compliance with the ICJ serves to protect American interests abroad and promotes the global rule of law.”¹¹⁹

U.S. federal and state governments should work cohesively to illustrate their commitment to international law. We must reciprocate and uphold the rights and obligations under the Vienna Convention to other nations. The Supreme Court’s voice must be heard regarding these lingering issues: (1) whether a petitioner’s failure to raise Vienna Convention violations in previous appeals results in a procedural default; (2) whether an individually enforceable right is created by such violations; and (3) what is the scope “review and reconsideration” for such violations.

119. See Amnesty International, *US Withdraws from VCCR Protocol is Step Backwards*, (Mar. 10, 2005), at <http://www.amnestyusa.org/new/document.do?id=C8544612FF018A4685256FC0006301>.

