

BRIEFLY RESUSCITATING THE GREAT WRIT: THE
INTERNATIONAL COURT OF JUSTICE AND THE U.S.
DEATH PENALTY

*Susan L. Karamanian**

I. INTRODUCTION

A single judgment of a non-U.S. court, the International Court of Justice (ICJ) in The Hague, tackled troubling aspects of the post-conviction death penalty process in the United States. The ICJ decision, *Avena*,¹ had altered U.S. death penalty jurisprudence beyond what even the U.S. Supreme Court seemed willing to do.² The ICJ, the principal judicial organ of the United Nations that sits thousands of miles from the U.S. coast, took direct aim at procedural hurdles in the U.S. system that have denied meaningful review of arguably meritorious claims. In addition to exposing flaws, the ICJ's judgment in *Avena* required the United States to take corrective measures. The reach of *Avena* ran from state trial courts to the U.S. Supreme Court, from the office of state governors to the office of the U.S. President.

Avena had the potential for making an impact greater than *Atkins v. Virginia*³ and *Roper v. Simmons*,⁴ recent U.S. Supreme Court cases involving the death penalty which have captured considerable attention for their citation to foreign precedent. My remarks address this observation. They also raise concerns about whether the promise of *Avena* can be fully realized given fairly entrenched principles of U.S. habeas jurisprudence. In fact, on the eve of the

* Associate Dean for International and Comparative Legal Studies, George Washington University Law School. Thanks to Herb Somers, the Law School's foreign and international law librarian, and Margub Kabir, a candidate for the LL.M. degree, for their invaluable help. A special thanks to James Leary, Symposium Editor, for his hard work in organizing the symposium and his patience and care in dealing with this submission.

¹ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

² See *infra* notes 83–95 and accompanying text (discussing the effect of *Avena* on the case of Osbaldo Torres, an inmate in Oklahoma who had been denied relief in U.S. courts on the very claim that ultimately saved his life).

³ 536 U.S. 304 (2002).

⁴ 543 U.S. 551 (2005).

publication of these remarks, the U.S. Supreme Court issued its ruling about domestic implementation of *Avena*. The effect of the ruling is briefly addressed in a postscript to this paper.

II. THE FOREIGN PRECEDENT DEBATE AND THE ICJ

As this symposium focuses on the citation to foreign precedent in U.S. jurisprudence, at the outset, I would like to provide some thoughts on the topic in general and then briefly address how the ICJ fits into the discussion. Judges, government officials, and academics seem preoccupied, nearly obsessed, with the role of international law or foreign law in the U.S. system. The debate *de jour* is whether U.S. courts are authorized to cite to foreign court decisions or foreign opinion to give meaning to the U.S. Constitution. A well-demarcated line has been drawn. On the one hand are those who believe U.S. courts should not consider foreign law in interpreting the Constitution.⁵ On the other hand are those who recognize that foreign decisions may provide useful insight into certain aspects of the Constitution.⁶

With the line drawn, the sides seem to be talking past each other. The dialogue is reminiscent of the endless discussion on whether, in interpreting the Constitution, the Court can look beyond the

⁵ See, e.g., Charles Lane, *The High Court Looks Abroad; As Congress Backs Bush Foreign Policy, Justices Voice Qualms*, WASH. POST, Nov. 12, 2005, at A5 (quoting U.S. Attorney General Alberto Gonzales that “[r]eliance on foreign law threatens to unmoor the court from the proper source of its authority for judicial review and place in jeopardy the reverence Americans have for the laws and for the institution of the Supreme Court”); U.S. Association of Constitutional Law Discussion: Constitutional Relevance of Foreign Court Decisions, Fed News Serv., Jan. 13, 2005 [hereinafter *Discussion*] (statement of Justice Antonin Scalia) (stating that “I do not use foreign law in the interpretation of the United States Constitution”); *Roper*, 543 U.S. at 624 (Scalia, J., dissenting) (rejecting “out of hand” the premise “that American law should conform to the laws of the rest of the world”); John Yoo, *Peeking Abroad?: The Supreme Court’s Use of Foreign Precedents in Constitutional Cases*, 26 U. HAW. L. REV. 385, 394 (2004) (arguing that use of foreign precedent is contrary to the Constitution’s delegation of judicial review).

⁶ See, e.g., *Discussion*, *supra* note 5 (statement of Justice Stephen Breyer) (stating that “in a finite number of instances,” foreign court decisions could be relevant to understanding the Constitution); Ruth Bader Ginsburg, “A decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication (Apr. 1, 2005), available at <http://www.asil.org/events/AM05/ginsburg050401.html> (last visited Mar. 7, 2006) [hereinafter *Ginsburg*] (observing that “[j]udges in the United States are free to consult all manner of commentary—Restatements, Treatises, what law professors or even law students write copiously in law reviews . . . why not the analysis of a question similar to the one we confront contained in [a foreign court opinion]”); *Roper*, 543 U.S. at 578 (noting that “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation” that executing juvenile offenders is cruel and unusual punishment).

founders' original intention.⁷ The "foreign" aspect has added a touch of xenophobia as U.S. judges who look beyond U.S. borders are accused of "impos[ing] foreign moods, fads, or fashions on Americans."⁸

Even participants in the fury have suggested that the matter has the makings of a tempest in the teapot. Justice Stephen Breyer reasonably asks about the harm in "opening your eyes to things that are going on elsewhere" and using that information "for what it's worth."⁹ Further, while looking at foreign precedent may be "dramatic . . . it isn't really the important issue."¹⁰ Indeed, amid the big fuss, and perhaps lost in the sea of over-reaction and hype, is that foreign law and international law are finding their way into U.S. jurisprudence in a meaningful manner because they are central to resolution of specific disputes before U.S. courts.

The decision of one non-U.S. tribunal in particular, the ICJ in The Hague, has affected a controversial area of U.S. law with substantial constitutional implications, the death penalty. Invoking the ICJ into the debate on foreign precedent may seem odd. First, the ICJ is not a "foreign" court that applies foreign law; it is the principal judicial organ of the United Nations that, among other responsibilities, resolves disputes between states consistent with the ICJ Statute.¹¹ Some of those who have raised questions about the use of foreign law to interpret the Constitution, however, also object to the "[e]levated [u]se of [i]nternational [s]ources."¹² Second, at least the United States has some say as to who sits on the ICJ. As a member of the UN General Assembly and as a member of the UN Security Council, the United States votes on the fifteen ICJ members.¹³ But, the ICJ is not a U.S. court. Driving some of the objection to using foreign precedent is that the law emanates from a tribunal that is not American.¹⁴

⁷ See *Ginsburg*, *supra* note 6 (observing that "[t]he notion that it is improper to look beyond the borders of the United States in grappling with hard questions has a close kinship to the view of the U.S. Constitution as a document essentially frozen in time as of the date of its ratification").

⁸ *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring).

⁹ *Discussion*, *supra* note 5.

¹⁰ *Id.*

¹¹ SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 31 (5th ed. 1995).

¹² See, e.g., Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 61–64 (2004).

¹³ ROSENNE, *supra* note 11, at 53.

¹⁴ See, e.g., *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring) (requiring that a "decision by an American court" be cited to support a challenge to the death penalty based on the undue length of the condemned's time in prison); *Discussion*, *supra* note

Perhaps the most penetrating reason for questioning the ICJ's relevance in the foreign precedent debate stems from the role of treaties under the U.S. Constitution. Under the Constitution, a treaty is the supreme law of the land.¹⁵ The U.S. President has the authority to enter into a treaty with the advice and consent of two-thirds of the U.S. Senate.¹⁶ U.S. courts typically cite to ICJ decisions when the dispute at issue involves a treaty to which the United States is bound and the ICJ has resolved matters relating to the treaty.¹⁷ The U.S. Supreme Court has also looked at a decision of the ICJ for guidance in resolving maritime boundary matters between states and the United States.¹⁸ A court's citation to the decision of a foreign court, the Supreme Court of Canada for example, to give meaning to the Constitution is arguably different because some see it as an attempt to inject a foreign legal standard that otherwise would be irrelevant.

No doubt, the distinction as to how the decision of a foreign court comes into the U.S. system is critical. Indeed, under the UN Charter, the United States has agreed to comply with an ICJ decision to which it is a party, and if it fails to do so, the other party may seek relief in the UN Security Council.¹⁹ As Justice Scalia has observed, as to a treaty, U.S. courts should "give considerable

5 (statement of Justice Scalia) (arguing against reliance on foreign judges to determine the meaning of due process under the Constitution). Cf. *infra* note 20 and accompanying text (recognizing that foreign court decisions could be relevant in interpreting treaties).

¹⁵ U.S. CONST. art. VI, cl. 2 ("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").

¹⁶ U.S. CONST. art. II, § 2, cl. 2.

¹⁷ See, e.g., *Medellin v. Dretke*, 125 S. Ct. 2088, 2091 (2005) (per curiam) (addressing *Avena*); *Fed. Republic of Germany v. United States*, 526 U.S. 111, 112–13 (1999) (Breyer, J., dissenting) (urging compliance with the ICJ's order of provisional measures in Germany's case against the United States under the Vienna Convention on Consular Relations); *Breard v. Greene*, 523 U.S. 371, 374 (1998) (per curiam) (addressing the ICJ's order of provisional measures in Paraguay's case against the United States under the Vienna Convention on Consular Relations); *Comm. of United States Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 931 (D.C. Cir. 1988) (addressing the ICJ's decision in *Nicaragua v. U.S.*, 1986 I.C.J. 14 (June 27)). Cf. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628 n.20 (1983) (citing the ICJ's decision in *Barcelona Traction v. Light & Power Co. (Belg. v. Spain)* 1970 I.C.J. 3 (Feb. 5) to support the "lifting [of] the corporate veil" for a corporation that was an agency of the Cuban government); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (citing the ICJ's decision in *Barcelona Traction* to establish that certain human rights are "obligations *erga omnes*").

¹⁸ See, e.g., *United States v. Maine*, 475 U.S. 89, 99 (1986) (citing *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116 (Dec. 18)); see also *United States v. Louisiana*, 470 U.S. 93, 107 n.10 (1985) (citing *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116 (Dec. 18)).

¹⁹ U.N. Charter art. 94.

respect to the interpretation of the same treaty by the courts of other signatories” as the treaty is designed “to establish a single, agreed-upon regime” for the signatories.²⁰

The issue of how law comes into the U.S. legal system is undoubtedly important, but it may not have the final say about the effect of that law once it starts appearing and re-appearing in U.S. courts. It is this development to which I now turn.

III. THE ICJ MEETS THE U.S. DEATH PENALTY, OR IS IT THE OTHER WAY AROUND?

A. *The Vienna Convention on Consular Relations*

The United States is a State party to the Vienna Convention on Consular Relations (Vienna Convention) along with more than 160 other nations.²¹ Article 36 of the Vienna Convention establishes a regime under which a national from a State party to the treaty (sending State) who is present in another State party (the receiving State) is entitled to access the sending State’s consular post and receive certain assistance from it upon arrest or detention.²² In particular, Article 36(1)(b) requires authorities of the receiving State, without delay, to inform the foreign national of “his rights” under Article 36(1)(b), including the right to have the consular post informed of the foreign national’s arrest or detention and to forward any communication from the foreign national to the consular post.²³ Under Article 36(1)(a), consular officers are authorized to communicate freely with and have access to the foreign national, and the foreign national has the “same freedom . . . to communicate with and [have] access to consular officers.”²⁴ Under Article 36(1)(c),

²⁰ Justice Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 AM. SOC’Y INT’L L. PROC. 305, 305 (2004). Also, when interpreting a statute designed to implement a treaty, U.S. courts could consider a foreign decision interpreting the treaty when the treaty is subject to more than one plausible meaning and the foreign court recognizes that the treaty requires a certain interpretation. *Id.* According to Justice Scalia, “Congress presumably wants to live up to the treaty, and what the treaty demands should be determined (as I have said) with appropriate deference to the reasonable views of other signatories.” *Id.* Under this reasoning, surely the decision of a court that the United States entrusted to resolve disputes under the treaty should be entitled to utmost deference.

²¹ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter *Vienna Convention*]; United Nations, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 2004 105 (2005).

²² *Vienna Convention*, *supra* note 21, art. 36(1), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

²³ *Id.* art. 36(1)(b), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

²⁴ *Id.* art. 36(1)(a), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

consular officials have the right of access to the foreign national for purposes of arranging legal representation.²⁵

The Vienna Convention goes beyond imposing a duty on the receiving State to provide the requisite notice and consular access. Of significance is that the State's "laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article [36] are intended."²⁶

The Article 36 regime of consular assistance and access protects the foreign national who is in a foreign country and faces the prospect of criminal sanctions under a foreign legal system and, perhaps, in a foreign language. As the United States earlier acknowledged before the ICJ, Article 36 "establishes rights not only for the consular office but, perhaps more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others."²⁷

Obviously, when death is a possible sanction, the need for assistance and guidance is critical. In the United States, capital murder trials and appeals, which are usually conducted under state law, are complex. The trial itself is actually two trials, the guilt-innocence phase and the sentencing phase.²⁸ The lawyer handling the case must have substantial legal expertise in both aspects of the trial. Although indigent defendants are entitled to court-appointed counsel, in many instances the quality of representation is marginal. In addition, the post-conviction review process, which involves the submission of habeas petitions in state courts and federal courts under strict procedural rules, is a minefield waiting to trip up those lacking the expertise to maneuver through statutes and other relevant legal principles, some of which have their roots in the unique U.S. federal system.²⁹ The combination of these factors and others makes it nearly imperative for the foreign national to have consular access and support when faced with the charge of capital murder.

Until March 9, 2005, the United States was a party to the Optional Protocol Concerning the Compulsory Settlement of

²⁵ *Id.* art. 36(1)(c), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

²⁶ *Id.* art. 36(2), 21 U.S.T. at 101, 596 U.N.T.S. at 292-94.

²⁷ Memorial of the United States, United States Diplomatic and Consular Staff in Tehran (U. S. v. Iran), 1982 I.C.J. Pleadings 121, 174.

²⁸ RANDALL KENNEDY, RACE, CRIME, AND THE LAW 327 (1997).

²⁹ Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 342-44 (1998).

Disputes.³⁰ Under the Optional Protocol, the United States consented to the ICJ's compulsory jurisdiction to resolve "[d]isputes arising out of the interpretation or application of [the Vienna Convention]" filed by a party to the Vienna Convention and the Optional Protocol.³¹

B. The ICJ Reviews U.S. Practice under the Vienna Convention

The ICJ has been pulled into the U.S. execution process on three distinct occasions, each of which has prompted considerable activity in the ICJ itself and in courts in the United States.

1. *Breard*

The first instance that awakened the ICJ to problems with U.S. compliance under the Vienna Convention occurred in the spring of 1998. The Commonwealth of Virginia was scheduled to execute Angel Francisco Breard, a Paraguayan national. A few weeks before the scheduled execution, the Republic of Paraguay instituted proceedings against the United States in the ICJ alleging that the United States failed to comply with Article 36 of the Vienna Convention as to Breard.³² Shortly after the case was filed, the ICJ ordered that the United States "should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings."³³

With the provisional measures order in hand, Breard and Paraguay rushed to the U.S. Supreme Court. The Supreme Court denied Breard's request for a writ of habeas corpus and stay of execution, holding that Breard had procedurally defaulted his alleged claim under the Vienna Convention by not raising it in the state court.³⁴ The procedural default rule prevents a federal court from reviewing a claim raised in habeas corpus that was not presented in the state courts in accordance with a state procedural

³⁰ Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 [hereinafter *Optional Protocol*]. On March 9, 2005, the United States withdrew from the *Optional Protocol*. See Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A16.

³¹ *Optional Protocol*, *supra* note 30, art. 1, 21 U.S.T. at 326, 596 U.N.T.S. at 488.

³² Vienna Convention on Consular Relations (Para. v. U.S.), *Provisional Measures Order*, 1998 I.C.J. 248, 250 (Apr. 9, 1998) [hereinafter *Provisional Measures*].

³³ *Id.* at 258.

³⁴ *Breard v. Greene*, 523 U.S. 371, 375, 378–79 (1998). Breard had previously raised a claim under the Vienna Convention in a federal habeas petition but that claim was held procedurally defaulted due to his failure to raise it in state court. See *Breard v. Pruett*, 134 F.3d 615, 620 (4th Cir. 1998), *cert. denied*, 523 U.S. 371 (1998).

rule.³⁵ The Supreme Court rejected Breard's argument that the Vienna Convention, the supreme law of the land, trumps the procedural default rule.³⁶ In particular, the ICJ's interpretation of the Vienna Convention is subject to the procedural rules of the forum state, and in the United States "assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas. Claims not so raised are considered defaulted."³⁷

Arguably the procedural default occurred through no fault of Breard. Breard was apparently tried, convicted, and given the death sentence without the competent authorities of Virginia advising him of his consular access rights under Article 36(1)(b).³⁸ The Virginia authorities also allegedly failed to notify the Paraguayan consular post that Breard was in custody.³⁹ The Supreme Court did not seem too concerned about the inequity of Breard's situation. The Court observed that the procedural default bar applies to claims under the U.S. Constitution so it should also apply to a claim arising under a treaty.⁴⁰ In explaining this result, the Supreme Court shed light on the substantial hurdles an inmate faces asserting a federal habeas claim. These hurdles are not unique to inmates asserting a claim under the Vienna Convention. For example, even though the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest," it is subject to a later in time federal statute, the Antiterrorism and Effective Death Penalty Act (AEDPA), which came into effect in 1996.⁴¹ Under AEDPA, a petitioner who files a habeas petition in federal court is not entitled to an evidentiary hearing if he has not developed the factual basis of the claim in state court.⁴² Without an evidentiary hearing, Breard could not establish that the alleged breach of the Vienna Convention had any effect on him or the trial.⁴³ Also, if the claim under the Vienna Convention is based on a new

³⁵ 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.1 (4th ed. 2001); see *infra* notes 136–48 and accompanying text (discussing the procedural bar in more detail).

³⁶ *Breard*, 523 U.S. at 375–76.

³⁷ *Id.* at 375 (citation omitted) (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)).

³⁸ *Provisional Measures*, *supra* note 32, at 249.

³⁹ *Id.*

⁴⁰ *Breard*, 523 U.S. at 376.

⁴¹ *Id.* (citing Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214).

⁴² *Id.* (citing 28 U.S.C. §§ 2254(a), (e)(2) (1994)).

⁴³ *Id.* at 376–77.

rule announced after an inmate's sentence and conviction are final, a court is barred under *Teague v. Lane*⁴⁴ from granting post-conviction relief.⁴⁵

2. *LaGrand*

Breard was executed and it appeared that the Vienna Convention issue had been put to rest as Paraguay discontinued its case in the ICJ. But in 1999, Germany initiated proceedings against the United States alleging a violation of the Vienna Convention as to two German brothers. The State of Arizona had executed one of the brothers by the time the case was filed in the ICJ while the other brother, Walter LaGrand, faced imminent execution. The brothers had raised their Vienna Convention claim for the first time in federal court through the post-conviction process, and the Ninth Circuit held that the claim was procedurally defaulted.⁴⁶ Shortly after receiving Germany's application, the ICJ entered an order of provisional measures as to Walter LaGrand similar to the order entered in *Breard*.⁴⁷ The subsequent efforts of Germany and Walter LaGrand to stay the execution failed⁴⁸ and Walter LaGrand was executed.

Unlike Paraguay, Germany persisted with its claim on the merits before the ICJ even though its nationals had been executed. The United States conceded that at the time of the LaGrand brothers' conviction and death sentences in 1984, the United States had not provided the brothers with the information required under Article 36(1)(b) and it had not advised the German consular post of the arrest of the LaGrands.⁴⁹ In fact, the requisite notice was not given until nearly ten years after their arrest, and during this time the LaGrands had pursued their direct appeals and had pursued habeas relief in the State courts.⁵⁰ Accordingly, the ICJ held that the United States had violated Article 36(1) by not informing the

⁴⁴ 489 U.S. 288, 295–96 (1989) (denying habeas relief as the petitioner's claim was based on a new rule, *Batson v. Kentucky*, 476 U.S. 79 (1986), that was decided after his conviction was final).

⁴⁵ *Breard*, 523 U.S. at 376–77.

⁴⁶ *LaGrand v. Stewart*, 133 F.3d 1253, 1259, 1261 (9th Cir. 1998), *cert. denied*, 525 U.S. 971 (1998).

⁴⁷ *LaGrand (F.R.G. v. U.S.)*, 1999 I.C.J. 9, 16 (Mar. 3).

⁴⁸ *LaGrand v. Arizona*, 526 U.S. 1001 (1999); *Fed. Republic of Germany v. United States*, 526 U.S. 111, 112 (1999).

⁴⁹ *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 475–76 (June 27).

⁵⁰ *Id.* at 476–77.

LaGrand brothers of their rights under Article 36(1)(b) and thus preventing Germany from providing consular assistance under Article 36(1).⁵¹ In a critical statement the ICJ also noted:

It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these [consular access] rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen.⁵²

Of further note, the breach of Article 36 pertains to a violation of the LaGrands' individual rights under subsection (1).⁵³ As to the issue of individual rights, the ICJ examined the specific language of Article 36(1)(b) which speaks of obligations owing to the detained person and describes them as "his rights."⁵⁴ It also noted that Article 36(1)(c) gives the detained person the right not to have consular officers act on his behalf.⁵⁵

In another critical aspect of the *LaGrand* judgment, the ICJ held the United States breached Article 36(2) by not allowing "review and reconsideration" of the convictions and sentences which were impaired by the Article 36(1) breach.⁵⁶ The procedural default rule, as applied to the LaGrands, gave rise to the breach under Article 36(2).⁵⁷ Specifically, the procedural default rule prevented the LaGrands from challenging their sentence and convictions under Article 36(1)(b), and that rule came into play because the American authorities had not notified the LaGrands of their right to consular access under Article 36(1)(b).⁵⁸ Justice John Paul Stevens would later note that this aspect of *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

⁵¹ *Id.* at 492, 515.

⁵² *Id.* at 492.

⁵³ *Id.* at 494.

⁵⁴ *Id.* (quoting Vienna Convention art. 36(1)(b), 21 U.S.T. 77, 101, 596 U.N.T.S. 261, 292).

⁵⁵ *Id.* (quoting Vienna Convention art. 36(1)(c), 21 U.S.T. 77, 101, 596 U.N.T.S. at 292). Article 1 of the Optional Protocol authorizes the Sending State to invoke the detain person's rights in the ICJ. *Id.*

⁵⁶ *Id.* at 497-98, 513-14, 515-16.

⁵⁷ *Id.* at 497-98.

⁵⁸ *Id.*

proceeding.”⁵⁹

Finally, even though the LaGrands had been executed, Germany sought a remedy for the United States’ breach of Article 36. The ICJ indicated that an apology for the breach was not sufficient.⁶⁰ Instead, if the United States failed to provide consular notification to the detriment of German nationals “subject[] to prolonged detention or convicted and sentenced to severe penalties” it would be obligated to review and reconsider the individual’s conviction and sentence “by taking account of the violation of the rights set forth in the Convention.”⁶¹ Review and reconsideration could be accomplished through various means and the United States was free to choose the means.⁶²

3. *Avena*

Breard and *LaGrand* involved similar claims of breach of Article 36 of the Vienna Convention as to foreign nationals on state death row, yet in those cases the ICJ did not reach the merits of the claim before the inmates were executed. With *Avena*, however, the ICJ had the opportunity to tackle head-on the issue of a remedy for breach of the Vienna Convention and to do so when the remedy could be meaningful as the inmates subject to the case were still alive.⁶³ Also, with *Avena*, the ICJ was presented a substantial and detailed record of violations of the Vienna Convention as to multiple foreign nationals and a record setting forth the consular support the sending State, Mexico, was prepared to provide if it had been advised about the situation involving its nationals.⁶⁴

In *Avena*, decided in 2004, the ICJ held that the United States breached the Vienna Convention as to fifty-one Mexican nationals on various state death rows.⁶⁵ The breach occurred principally due to the failure of the United States to timely inform the Mexican nationals of their right to have access to the Mexican consular posts

⁵⁹ *Torres v. Mullin*, 540 U.S. 1035, 1036 (2003) (Stevens, J., respecting the denial of the petition for certiorari).

⁶⁰ *LaGrand*, 2001 I.C.J. at 513–14.

⁶¹ *Id.* at 513–14, 516.

⁶² *Id.* The ICJ also held that the United States did not “take all the steps [it] could have taken to give effect to the” provisional order and thus had not complied with the order. *Id.* at 508.

⁶³ *See Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 27–28 (Mar. 31).

⁶⁴ *See generally id.* at 39–57.

⁶⁵ *Id.* at 53–54, 71.

under Article 36(1)(b) of the treaty.⁶⁶ As to three Mexican nationals whose convictions and sentences were final because all appeals, including post-conviction relief, were exhausted, the United States was also held to have violated Article 36(2) by not having laws that gave effect to the rights accorded under Article 36.⁶⁷ Indeed, as to these three individuals, the ICJ had issued an order of provisional measures that the U.S. “shall take all measures necessary to ensure that [the three individuals] are not executed pending final judgment in these proceedings”⁶⁸ and the United States had respected the order of provisional measures.

Mexico had sought restitution as the remedy for a violation of an international wrong, the breach of the Vienna Convention, and it requested that all of the Mexican nationals’ convictions and sentences be vacated.⁶⁹ By taking this aggressive stance, Mexico invited the ICJ to examine hurdles any inmate in the United States faces in attempting to rectify a wrong once a criminal conviction and sentence have become final. Even in a case involving a U.S. citizen who claims his conviction or sentence violates the U.S. Constitution, the likelihood of success post-conviction is remote. As previously noted, the procedural default rule and the non-retroactivity rule of *Teague v. Lane* make it very difficult for errors to be addressed on the merits.⁷⁰

Aware of at least some of the procedural hurdles, the ICJ in *Avena* crafted a remedy that takes direct aim at some of the formidable barriers that have prevented a meaningful review of a conviction and sentence. Specifically, the ICJ held that the appropriate reparation is for the United States “to provide, by means of its own choosing, review and reconsideration of the convictions and sentences” of the referenced Mexican nationals “by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment.”⁷¹

⁶⁶ *Id.* at 71.

⁶⁷ *Id.* at 57, 72.

⁶⁸ *Id.* at 17.

⁶⁹ Memorial of Mexico, Case Concerning *Avena* and other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. Pleadings 128 (June 20, 2003) ¶ 20, available at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm> (last visited Mar. 9, 2006) (noting that “annulment of judicial decisions is a well-recognized form of restitution, and is especially compelling where, as here, criminal proceedings have been tainted by violations of fundamental due process”).

⁷⁰ See *supra* Part III.B.1.

⁷¹ *Avena*, 2004 I.C.J. at 72.

The “review and reconsideration” approach in *Avena* was not novel as it was first suggested in *LaGrand*.⁷² The process of review and reconsideration that *Avena* ordered, however, requires that the United States consider paragraphs 138 to 141 of the *Avena* judgment. This additional requirement prevents the United States from giving short-shrift to the review and reconsideration process. According to the ICJ, *LaGrand* actually required effective “review and reconsideration” which fully examines and takes into account “the [treaty] violation and the possible prejudice caused by that violation.”⁷³ The procedure must guarantee that “full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.”⁷⁴ The legal consequences of the breach must be examined and considered. Accordingly, the “procedure” must be judicial; the clemency process alone, as practiced in the United States, is not “an appropriate means of ‘review and reconsideration.’”⁷⁵

In an earlier portion of the *Avena* judgment, the ICJ gave some insight into the type of review and reconsideration the United States is required to provide, particularly as to the issue of the “legal consequences of [the] breach.”⁷⁶ It reiterated that the international wrong the United States committed was the “failure of its competent authorities to inform the Mexican nationals concerned, to notify Mexican consular posts and to enable Mexico to provide consular assistance.”⁷⁷ Accordingly, the courts in the United States should determine whether the “violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.”⁷⁸

In addition, the judgment in *Avena* observed that the procedural default rule would bar a defendant from raising a claim that his Article 36 rights had been violated if the defendant did not raise the objection at trial.⁷⁹ As it had observed in *LaGrand*, the ICJ noted in *Avena* that the procedural default rule alone does not give rise to a treaty violation.⁸⁰ But the procedural default rule still has the

⁷² See *supra* Part III.B.2.

⁷³ *Avena*, 2004 I.C.J. at 65.

⁷⁴ *Id.*

⁷⁵ *Id.* at 66.

⁷⁶ *Id.* at 65.

⁷⁷ *Id.* at 59–60.

⁷⁸ *Id.* at 60.

⁷⁹ *Id.* at 63.

⁸⁰ *Id.* at 56.

potential for problems in cases involving foreign nationals:

[T]he procedural default rule may continue to prevent courts from attaching legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence. In such cases, application of the procedural default rule would have the effect of preventing “full effect [from being] given to the purposes for which the rights accorded under this article are intended”, and thus violate paragraph 2 of Article 36.⁸¹

The ICJ’s concern was indeed a valid one as courts in the United States had applied the procedural default rule to certain of the Mexican nationals’ claims under the Vienna Convention.⁸²

C. *Avena in the United States*

Avena had a noticeable effect in the United States. As a result of the *Avena* judgment, Osbaldo Torres, a Mexican national who twice had been denied post-conviction relief in state and federal courts, including the U.S. Supreme Court where he had already raised a claim of breach of the Vienna Convention as to his conviction and sentence,⁸³ was spared Oklahoma’s death penalty.⁸⁴ Torres is one of the fifty-one Mexican nationals in *Avena* who had not been informed, without delay, of his rights under Article 36(1)(b).⁸⁵ He is also one of the three Mexican nationals in *Avena* whose conviction and sentence the ICJ found violated Article 36(2) as the United States had “not permit[ed] the review and reconsideration” of his conviction and sentence after violations of Article 36(1)(b) had been established.⁸⁶ The ICJ expressed “great concern” about Torres as his execution was imminent when the *Avena* judgment was

⁸¹ *Id.* at 57.

⁸² *Id.* (after observing that “the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences,” the ICJ stated in *Avena* that “[t]his statement of the Court seems equally valid in relation to the present case, where a number of Mexican nationals have been placed exactly in such a situation”).

⁸³ See *Torres v. Mullin*, 540 U.S. 1035, 1037–38 (2003) (Breyer, J., dissenting).

⁸⁴ See *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004), 43 I.L.M. 1227, 1227 (2004) (granting a stay of execution and ordering an evidentiary hearing on Torres’s third application for post-conviction relief).

⁸⁵ *Avena*, 2004 I.C.J. at 53–54, 71; Susan L. Karamanian, *Introductory Note to the Decision of the Oklahoma Court of Criminal Appeals: Osbaldo Torres v. The State of Oklahoma*, 43 I.L.M. 1225, 1225 (2004).

⁸⁶ *Avena*, 2004 I.C.J. at 72.

entered.⁸⁷ After issuance of the *Avena* judgment, Torres filed a new request for post-conviction relief in the Oklahoma Court of Criminal Appeals (CCA), and sought a stay of execution and an evidentiary hearing on whether Oklahoma's violation of his Vienna Convention rights prejudiced him.⁸⁸ The CCA granted the stay and remanded the case to the trial court for an evidentiary hearing on the Vienna Convention issue.⁸⁹ On the day the CCA issued its order, the Governor of Oklahoma, Brad Henry, "commuted Torres's death sentence to life without parole."⁹⁰

Without *Avena*, Torres would have had considerable difficulty returning to any court and he probably would have been executed. Upon returning to state court, Torres drew the attention of Judge Charles S. Chapel, who wrote a reasoned and detailed opinion "specially concurring" with the CCA's order.⁹¹ Judge Chapel's special concurrence is notable for its strict adherence to *Avena*;⁹² its recognition that *Avena* and basic notions of fairness require a full consideration of the effect of Torres's Vienna Convention claims;⁹³ his pronouncement of a test for actual prejudice;⁹⁴ and his application of that test to establish that Torres possibly experienced "a significant miscarriage of justice."⁹⁵

Due to *Avena*, U.S. President George W. Bush issued a memorandum on February 28, 2005 to the U.S. Attorney General declaring "the United States will discharge its international obligations under" the ICJ's *Avena* decision.⁹⁶ He further declared that state courts were to "give effect to the [*Avena*] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."⁹⁷ Before *Avena* was

⁸⁷ *Id.* at 27–28.

⁸⁸ *Torres*, 43 I.L.M. at 1227; Karamanian, *supra* note 85, at 1226.

⁸⁹ *Torres*, 43 I.L.M. at 1227.

⁹⁰ Karamanian, *supra* note 85, at 1226; Adam Liptak, *Execution of Mexican is Halted*, N.Y. TIMES, May 14, 2004, at A23 (noting that "[t]he court and the governor cited the decision six weeks ago of the International Court of Justice in The Hague and noted that Mr. Torres's right to contact Mexican officials under the Vienna Convention on Consular Relations had been violated").

⁹¹ *Torres*, 43 I.L.M. at 1228 (Chapel, J., specially concurring).

⁹² *Id.* at 1228–29.

⁹³ *Id.* at 1229.

⁹⁴ *Id.* at 1230.

⁹⁵ *Id.* at 1231.

⁹⁶ U.S. President George W. Bush: Memorandum for the U.S. Attorney-General Regarding Compliance with the Decision of the International Court of Justice in *Avena*, 44 I.L.M. 964 (2005), available at http://brownwelsh.com/Archive/2005-03-10_Avena_compliance.pdf (last visited Mar. 9, 2006).

⁹⁷ *Id.*

issued, the U.S. Supreme Court had already denied post-conviction relief for some of the Mexican nationals, which effectively meant these individuals were out of court.⁹⁸ The Presidential Memorandum, at a minimum, re-opened the state court doors for these inmates.

Due to the Presidential Memorandum, the U.S. Supreme Court dismissed a writ of certiorari, as improvidently granted, as to the habeas claim of a Mexican national on Texas's death row subject to *Avena*, Jose Ernesto Medellin, so that the Texas courts could provide the review and reconsideration that *Avena* contemplated.⁹⁹ Instead of perfunctorily dismissing Medellin's new petition based on abuse of the writ, which is frequently done in cases involving a successive writ filed in the Texas courts, the Texas Court of Criminal Appeals held an extensive and lively oral argument on Medellin's successive petition for writ of habeas corpus. According to one observer, the courtroom was overflowing with "lawyers, law professors and journalists" which gave "the sense that the whole world was watching."¹⁰⁰ Likewise, the Fifth Circuit recently abated a post-conviction case to enable Ignacio Gomez to return to state court so that court could "reconsider Gomez's [Vienna Convention and *Avena*] claim in light of the President's directive and the Supreme Court's pronouncements."¹⁰¹

Avena even made in-roads at the trial level in capital murder cases involving non-Mexican nationals. In *Virginia v. Pham*,¹⁰² the Circuit Court of Fairfax County, Virginia, in an unprecedented decision, granted a pre-trial motion to prohibit the death penalty due to the Commonwealth of Virginia's failure to notify the accused of his Article 36 rights before eliciting a confession from him.¹⁰³ In fact, the Commonwealth had still not notified the accused of his Vienna Convention rights as of the date the court granted the motion.¹⁰⁴ After noting *Avena* and the Presidential Memorandum, the court recognized that it should give full faith and credit to the

⁹⁸ See *Medellin v. Dretke*, 125 S. Ct. 2089–90, 2105 (2005).

⁹⁹ *Id.*

¹⁰⁰ Mark Donald, *Medellin Returns; CCA Considers Bush's Memo to Override Its Own Procedural Rules*, TEX. LAW., Sept. 19, 2005, at 1, available at <http://www3.sympatico.ca/aiwarren/news.html> (last visited Mar. 9, 2006).

¹⁰¹ *Gomez v. Dretke*, 422 F.3d 264, 269 (5th Cir. 2005).

¹⁰² *Virginia v. Pham*, Criminal No. K105537, slip op. (Va. Cir. Ct. Fairfax County Jan. 3, 2006) available at http://sentencing.typepad.com/sentencing_law_and_policy/files/phan_order_striking_dp.pdf (last visited Mar. 10, 2006).

¹⁰³ *Id.* at 2, 12.

¹⁰⁴ *Id.* at 2.

Avena judgment.¹⁰⁵ The Virginia court also acknowledged that the Vienna Convention established individual rights¹⁰⁶ and that it was critical that these rights be enforced in the state court, as the failure to do so could give rise to a bar to their later enforcement.¹⁰⁷ On the issue of the preclusion of the death penalty as the appropriate remedy, the Virginia court took comfort in the holding of *Avena* that the United States should have flexibility in fashioning a remedy for the breach.¹⁰⁸ Taking a nod from *Torres*, the court noted that the remedy of preclusion of the death penalty was proportionate in terms of the violation and “it directly addresses the defendant’s alleged prejudice: his inability to promptly consult advisors and consider assistance in responding to the case against him.”¹⁰⁹

Shortly after the ruling in *Pham*, petitions for writ of mandamus and writ of prohibition were filed against the state district judge on the grounds that she lacked authority at the pre-trial stage to preclude the death penalty. The Virginia Supreme Court granted the writ of mandamus.¹¹⁰ In so holding, the court did not address the merits of the inmate’s claim that his Vienna Convention rights were violated.¹¹¹ Instead, it merely held that the district court could not affect the statutorily-imposed sentencing scheme for capital murder at the pre-trial stage and that the prosecutor, not the district court, has the authority to decide whether to seek the death penalty for a capital offense.¹¹² As of the publication of this article, the accused has now pled guilty to capital murder and other offenses and the judge will resolve whether he gets the death penalty or life in prison.¹¹³

These developments aside, *Breard v. Greene*¹¹⁴ was the U.S. Supreme Court’s most recent word on whether the procedural default rule applies to claims under the Vienna Convention.¹¹⁵ The

¹⁰⁵ *Id.* at 5.

¹⁰⁶ *Id.* at 5–7.

¹⁰⁷ *Id.* at 8.

¹⁰⁸ *Id.* at 10.

¹⁰⁹ *Id.* at 11. Since *Avena*, another one of the fifty-one Mexican nationals, Rafael Camargo under sentence of death in Arkansas, has had his sentence changed to life. See Press Release, Embassy of Mexico In the United States, Capital Punishment to Mexican is Exchanged (Aug. 13, 2004), available at http://www.embassyofmexico.org/index.php%3Foption%3Dcom_content%26task%3Dview%26id%3D92%26Itemid%3D123 (last visited Apr. 15, 2006).

¹¹⁰ *In re Horan*, No. 060023, No. 060024, 2006 WL 156994, at *6 (Va. Jan. 19, 2006).

¹¹¹ *Id.* at *1–6.

¹¹² *Id.* at *5.

¹¹³ Tom Jackman, *Man Admits Killing N. Va. Mother, Child*, WASH. POST, Mar. 18, 2006, at B05.

¹¹⁴ 523 U.S. 371 (1998).

¹¹⁵ *Id.* at 375–77.

holding of *Breard*, which enforced the procedural bar,¹¹⁶ is at odds with *Avena*, and thus arguably contrary to the Presidential Memorandum to the extent it would preclude a state court from revisiting the Vienna Convention issue in a meaningful manner. The U.S. Supreme Court has granted certiorari in two cases, *Bustillo v. Johnson*¹¹⁷ and *Sanchez-Llamas v. Oregon*,¹¹⁸ which concern domestic implementation of *Avena*. In *Bustillo*, involving the Commonwealth of Virginia's failure to advise a Honduran national of his Article 36 rights before trying and convicting him of first degree murder, the Court faces two issues that *Avena* has resolved: whether the Vienna Convention provides individual enforceable rights and whether state courts may apply the procedural bar to preclude meaningful review of a claim under Article 36 of the treaty.¹¹⁹ It will be interesting to see the extent to which the Supreme Court revisits its observation in *Breard* that courts "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such."¹²⁰ In *Sanchez-Llamas*, the Court is asked to address the issue of individual rights under the Vienna Convention in addition to the issue of whether a breach of Article 36 warrants the suppression of statements made to the police.¹²¹

IV. BEYOND THE FACTS OF AVENA AND THE PROCEDURAL DEFAULT RULE

As *Pham* and *Bustillo* illustrate, *Avena* could reach foreign nationals whose sentences and convictions were not under review in *Avena*. *Bustillo* establishes the possible applicability of *Avena* in cases involving serious, yet non-capital murder offenses. Reaching beyond the Mexican nationals and other serious non-death penalty cases is consistent with *Avena*. The ICJ recognized that the *Avena* judgment could "apply to other foreign nationals finding themselves

¹¹⁶ *Id.* at 375.

¹¹⁷ 126 S. Ct. 621 (2005).

¹¹⁸ 126 S. Ct. 620 (2005).

¹¹⁹ See Brief of Petitioner Mario A. Bustillo in *Bustillo v. Johnson*, No. 05-51 (U.S. Dec. 22, 2005) 2005 U.S. S. Ct. Briefs LEXIS 952, at 1.

¹²⁰ *Breard v. Greene*, 523 U.S. 371, 375 (1998).

¹²¹ *Oregon v. Sanchez-Llamas*, 108 P.3d 573, 574 (Or. 2005). *Avena* has prompted the Seventh Circuit to recognize that Article 36 affords individual rights which can also be enforced in a civil action under the Alien Tort Statute. See *Jogi v. Voges*, 425 F.3d 367, 370 (7th Cir. 2005).

in similar situations in the United States.”¹²² Justice O’Connor has observed that in 2003, more than 56,000 foreign nationals were held in prisons in the United States.¹²³

Avena addressed the procedural default issue yet it is remarkably silent on other common defenses frequently asserted to prevent either state or federal courts from reviewing the merits of claims raised in habeas. Habeas jurisprudence is complex, frightfully so, and thus a little background on the law itself and defenses could explain the possible shortcomings of *Avena*.

The English legal scholar William Blackstone has acknowledged that the Great Writ, *habeas corpus ad subjiciendum*, is “the most celebrated writ in the English law.”¹²⁴ Although of English derivation, the Great Writ is referenced in the Suspension Clause of Article I of the U.S. Constitution: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹²⁵ State constitutions also establish the Great Writ.¹²⁶

The Suspension Clause itself is “peculiar” as Horace Binney wrote in 1862.¹²⁷ It does not expressly establish but assumes the existence of the Writ of Habeas Corpus. The Writ is not a right but a privilege, or as Binney has written the right is the natural right to be freed from “arbitrary imprisonment,” which “is predicable by the Common Law of every freeman,” with the privilege being the remedy or the Writ.¹²⁸ The clause is silent as to the branch of government authorized to suspend the privilege.¹²⁹

To give effect to the Constitution’s recognition of the Great Writ, Section 14 of the First Judiciary Act of 1789 empowered the federal courts to issue writs of habeas corpus.¹³⁰ The Act included a proviso that limited issuance of writs to prisoners in U.S. custody.¹³¹ The

¹²² *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 70 (Mar. 31).

¹²³ *Medellin v. Dretke*, 125 S. Ct. 2088, 2096 (2005) (O’Connor, J., dissenting).

¹²⁴ *Fay v. Noia*, 372 U.S. 391, 399–400 (1963) (citing 3 BLACKSTONE COMMENTARIES 129).

¹²⁵ U.S. CONST. art. I, § 9, cl. 2.

¹²⁶ *See, e.g.*, TEX. CONST. art. I, § 12 (“The writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual.”).

¹²⁷ HORACE BINNEY, *THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION* 7 (2d ed. 1862).

¹²⁸ *Id.* at 10–11.

¹²⁹ *Id.* at 11.

¹³⁰ First Judiciary Act, ch. 20, § 14, 1 Stat. 73, 81–82 (1789).

¹³¹ *Id.* Cf. ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 30–35 (2001) (arguing that the proviso did not apply to federal courts but only to federal judges).

judicial power was established under the Act even though neither the Constitution nor the Act itself had defined the writ.¹³² At this time, however, “there was respectable common-law authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to fundamental law.”¹³³

With the Judiciary Act of 1867, the Congress authorized federal courts to issue writs of habeas corpus as to inmates in State custody whose detention is “in violation of the constitution, or of any treaty or law of the United States.”¹³⁴ The authorization, which occurred after the end of the Civil War, was in response to concerns that Southern states would hold slaves in custody in violation of the Constitution.¹³⁵

Empowering federal courts to hear habeas claims of prisoners in State custody opened the door to “difficult problems concerning the relationship of the state and federal courts in the area of criminal administration.”¹³⁶ In particular, inmates in State custody are subject to charge under state law. They are tried in state courts and any appeals of a conviction and sentence are filed in state courts. The U.S. Supreme Court lacks jurisdiction to review the state judgment unless resolution of a federal question affects the judgment.¹³⁷ A decision of the state court that “rests on a state law ground that is independent of the federal question and adequate to support the judgment” is not reviewable.¹³⁸ Likewise, an inmate in State custody, subject to a state judgment, who pursues habeas corpus relief in federal court cannot rely on a claim that a state court refused to hear the claim when a state procedural requirement was not met. As stated in *Coleman*:

In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose

¹³² *Fay v. Noia*, 372 U.S. 391, 405–06 (1963).

¹³³ *Id.*; see also *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973) (recognizing that when “the American Colonies achieved independence, the use of habeas corpus to secure release from unlawful physical confinement, whether judicially imposed or not, was thus an integral part of our common-law heritage”).

¹³⁴ Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (1867).

¹³⁵ Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 752–53 (1987).

¹³⁶ *Fay*, 372 U.S. at 417.

¹³⁷ 28 U.S.C. § 1257 (2000).

¹³⁸ *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.¹³⁹

While *Coleman* focuses on the federalism or prudential aspects of the procedural bar rule, Professors Hertz and Liebman have observed that the rule also has a jurisdictional basis.¹⁴⁰ Under the federal habeas statute, a federal court can hear a writ of habeas corpus from an inmate in state custody "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."¹⁴¹ An independent and adequate state ground deprives the federal court from resolving the lawfulness of the inmate's custody.¹⁴²

The procedural bar is a defense which the State must raise and only comes into effect if certain other requirements are satisfied.¹⁴³ The bar is not absolute, and it is of interest that *Avena* never clearly focused on this fact. To get over the procedural bar, an inmate must allege and prove cause for the default and actual prejudice, a relatively onerous challenge.¹⁴⁴ As one author has noted, the domestic cause and prejudice test could give guidance as to the review and reconsideration contemplated in *LaGrand* so that the ICJ's holding may not intrude into the well-established domestic habeas practice.¹⁴⁵ *Avena* arguably took a more aggressive approach by observing that the procedural bar, as applied, could bar review of meritorious claims.¹⁴⁶

The procedural bar is only one of many hurdles an inmate faces in asserting claims in habeas. The federal habeas statute substantially restricts access of inmates in State custody to the

¹³⁹ *Id.* at 730–31.

¹⁴⁰ See HERTZ & LIEBMAN, *supra* note 35, at 1133–35.

¹⁴¹ 28 U.S.C. § 2254(a) (2000).

¹⁴² See HERTZ & LIEBMAN, *supra* note 35, at 1137 (observing that the Independent and Adequate State Grounds Doctrine limits the court's jurisdiction to a state court's judgment on direct review under 28 U.S.C. §1257).

¹⁴³ For example, there must be a clearly applicable state procedural rule that the state court relied on in denying relief. The state procedural rule must be independent of federal law and adequate to support the state court judgment. In other words, the state court judgment must not depend upon federal law. The last state court must have relied on the procedural ground in denying the relief. See HERTZ & LIEBMAN, *supra* note 35, at 1133–35.

¹⁴⁴ *Id.* at 1192.

¹⁴⁵ See Jennifer Lynne Weinman, Note, *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, 891, 904 (2002).

¹⁴⁶ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 57, 60 (Mar. 31).

federal courts. For example, unless the state lacks a corrective process or if circumstances render that process ineffective to protect the inmate's rights, the habeas petitioner in federal court must have exhausted remedies in state court.¹⁴⁷ If the inmate has "the right under the law of the State to raise, by any available procedure, the question presented," his claim is deemed not to have been exhausted.¹⁴⁸ Federal courts routinely rely on the exhaustion defense to dismiss habeas petitions.

Even if the inmate overcomes the exhaustion hurdle and has his claims "adjudicated on the merits" in state court, the federal court can only grant the writ in two very limited circumstances: the state court adjudication must have "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States";¹⁴⁹ or, the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."¹⁵⁰ All factual determinations of the state court are presumed correct, and the petitioner bears "the burden of rebutting the presumption by clear and convincing evidence."¹⁵¹ As the Supreme Court noted in *Breard*, evidentiary hearings are difficult to obtain if the petitioner did not develop the facts in state court.¹⁵²

All of these restrictions, along with *Teague v. Lane* and limitations on appeal rights in federal habeas, could limit the impact of *Avena*. In dismissing the writ as improvidently granted, the Supreme Court in *Medellín* went through a daunting laundry list of hurdles that *Medellín* must overcome if he seeks habeas relief in federal court.¹⁵³

Under Article 36(2) of the Vienna Convention, however, the laws of the United States are to give "full effect . . . to the purposes for which the rights accorded under . . . Article [36] are intended."¹⁵⁴ To the extent other hurdles prevent a federal court from reviewing the breach of the Vienna Convention on the merits, and thereby prevent finding any legal effect due to the breach of Article 36(1), they

¹⁴⁷ 28 U.S.C. § 2254(b)(1) (2000).

¹⁴⁸ 28 U.S.C. § 2254(c) (2000).

¹⁴⁹ 28 U.S.C. § 2254(d)(1) (2000).

¹⁵⁰ 28 U.S.C. § 2254(d)(2) (2000).

¹⁵¹ 28 U.S.C. § 2254(e)(1) (2000).

¹⁵² *Breard v. Greene*, 523 U.S. 371, 376 (1998); 28 U.S.C. § 2254(e)(2) (2000).

¹⁵³ *Medellín v. Dretke*, 125 S. Ct. 2088, 2090–92 (2005) (per curiam).

¹⁵⁴ See Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 78, 101, 596 U.N.T.S. 261, 294.

should be disallowed, just like the procedural bar was disallowed if the circumstances warrant.¹⁵⁵ The logical consequence of *Avena* is that the myriad of rules and procedures established to prevent courts from addressing the merits of specific issues raised in habeas should be considered in light of the treaty breach and the effect of that breach.

V. CONCLUSION

Avena was far from an end in itself. The abundance of *Avena*-related activity in American courts evidences this fact. *Avena* has saved a life, prompted the U.S. President to issue a memorandum that the United States is obligated to follow the decision of a non-U.S. court, but then purported to put the burden of that obligation on the states, and caused state courts, federal courts and certain state governors to focus on undisputed violations of a major multilateral treaty.

The legal consequences of *Avena* are substantial. The United States was held to have breached a treaty. It was ordered to provide a remedy that recognized that the treaty affords individual rights. The remedy addressed a nagging problem in habeas jurisprudence, the procedural default rule, which *Avena* held inapplicable if it prevents full effect from being given to the foreign national's rights under the treaty. Arguably, *Avena* prohibited any domestic law or practice that prevents a domestic court from giving "full weight" to the treaty.

The long-term impact of *Avena*, however, goes beyond these important legal consequences. *Beard*, *LaGrand*, and *Avena* are part of a phenomenon that started in the 1990s, the opening of the U.S. death penalty process to the rest of the world. For example, for many years, executions in Texas occurred at midnight with little fanfare. When we executed in the small East Texas town of Huntsville, we executed in relative silence, as if the event did not occur and thus no one would be held accountable. The media paid scant attention to the specific cases and the executions.

By the mid to late 1990s, however, matters changed. Executions were on the increase. The U.S. legal profession and others started to focus on the plight of death row inmates, particularly those who

¹⁵⁵ Likewise, state courts should not be allowed to side-step a meaningful review of post-conviction claims under the Vienna Convention on the grounds of a procedural bar or for other reasons (e.g., a bar on successive writs).

lacked a lawyer to handle their habeas petitions. As qualified lawyers started handling the cases, substantial and compelling legal arguments were raised. The media started to take notice. The problems with the system became public. Lawyers trained in international law began to focus on U.S. treaty obligations and they looked to the appropriate forum to enforce these obligations. Lawyers from outside of the United States, as well, became attuned to the situation inside the United States. Although the United States has now withdrawn from the Optional Protocol to the Vienna Convention, it cannot shy away from the fact of *Avena*, and in a broader sense it cannot realistically hide the U.S. legal system from the rest of the world.

Avena examined U.S. practice as to foreign nationals. The wrongs at issue were not the convictions and death sentences as to these nationals but the “breaches of treaty obligations which preceded them.”¹⁵⁶ Yet, the detailed focus in *Avena* on the U.S. death penalty and the identification of problems that plague the process cannot go unnoticed. When we execute in the United States, we must now be aware that nearly all aspects of the process are subject to the world’s scrutiny. In short, we are not alone when we execute, and the responsibility for the system of justice that leads to the taking of life is one we now share, in part, with others from outside of the United States.

POSTSCRIPT

On June 28, 2006, the U.S. Supreme Court issued a consolidated decision in *Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson*¹⁵⁷ and held that Article 36 of the Vienna Convention does not trump the procedural default rule.¹⁵⁸ Writing for the majority, Chief Justice Roberts assumed without holding the Vienna Convention provides individual rights that are judicially enforceable.¹⁵⁹ The Court recognized that the ICJ’s interpretation of the Vienna Convention as set forth in *LaGrand* and *Avena* should be given “respectful consideration.”¹⁶⁰ Nevertheless, the Court emphasized the U.S. Constitution gives U.S. courts the judicial power as to

¹⁵⁶ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 60 (Mar. 31).

¹⁵⁷ 74 U.S.L.W. 4493 (U.S. June 28, 2006).

¹⁵⁸ *Id.* at 4495; *see also id.* at 4502 (holding as “in *Breard*, that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims”).

¹⁵⁹ *Id.* at 4495, 4496–97.

¹⁶⁰ *Id.* at 4500.

treaties and that power means that U.S. courts interpret treaties into which the United States has entered.¹⁶¹ Further, while the ICJ is authorized to resolve disputes between nations, its decisions “are not binding precedent even as to the ICJ itself” and the U.N. Charter’s enforcement scheme “contemplates quintessentially *international* remedies.”¹⁶² As the United States has not expressly recognized that the ICJ *Avena* decision is binding on U.S. courts, and had withdrawn its consent under the Optional Protocol to have the ICJ resolve disputes under the treaty, the Court purportedly gave *LaGrand* and *Avena* the “respectful consideration’ due an interpretation of an international agreement by an international court.”¹⁶³ Observing that Article 36(2) of the Vienna Convention provides that rights under the treaty “shall be exercised in conformity with the laws and regulations of the receiving State,” the Court further noted the importance and primacy of the procedural default rule in the U.S. adversary system.¹⁶⁴

The reasoning of the majority opinion in *Sanchez-Llamas* disabled the Vienna Convention’s requirement under Article 36(2) that U.S. laws “enable full effect to be given to the purposes for which” the rights under Article 36 are intended.¹⁶⁵ The Court did not clearly reconcile the procedural default rule with this aspect of Article 36(2), other than to claim that the procedural default rule is the product of the U.S. adversary system and routinely bars claims not timely raised.¹⁶⁶

Second, the Court gave little weight to the ICJ’s balanced approach of giving effect to Article 36(2) by requiring that the United States through means of its own choosing determine whether the treaty violation by the United States caused a possible prejudice to the inmate.¹⁶⁷ In a similar vein, Justice Breyer noted in his dissenting opinion in *Sanchez-Llamas*, the ICJ was cautious in urging its remedy by at least stating there should be proof that the United States failed to inform and that the failure may have prevented counsel for the national from raising the issue of the violation of the Vienna Convention.¹⁶⁸

¹⁶¹ *Id.* (citing U.S. CONST. art. III, §§ 1, 2 and *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

¹⁶² *Id.* (emphasis in original).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 4501.

¹⁶⁵ *Vienna Convention*, *supra* note 21, art. 36(2), 21 U.S.T. at 101, 596 U.N.T.S. at 292–94.

¹⁶⁶ 74 U.S.L.W. at 4501.

¹⁶⁷ *See supra* notes 71–74 and accompanying text.

¹⁶⁸ 74 U.S.L.W. at 4509 (Breyer, J., dissenting).

Instead of giving “respectful consideration” to the ICJ’s decisions in *LaGrand* and *Avena*, which involve matters of treaty interpretation by the very court the United States authorized to resolve disputes under the treaty, the U.S. Supreme Court in *Sanchez-Llamas* effectively gave no meaningful respect and consideration to the ICJ’s judgments.