Compliance with ICJ Provisional Measure and the Meaning of Review and Reconsideration Under the Vienna Convention on Consular Relations: Avena and Other Mexican Nationals (Mex. V. U.S.)

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For the third time in a span of five years, a country has brought suit against the United States in the International Court of Justice (ICJ) for violations of the Vienna Convention on Consular Relations (VCCR) in capital cases. And, for the third time, the ICJ has issued an order of provisional measures. The most recent order indicates that: "[t]he United States shall take all measures necessary to ensure that [three named Mexican defendants] are not executed pending final judgment in these proceedings."

Each case is contributing to the evolution of a new and growing field in criminal cases, especially capital cases, of rights based on international treaties. A decision from the ICJ binds the countries that are parties to the litigation. The United States has agreed to the compulsory jurisdiction of the ICJ for disputes regarding the interpretation or application of international treaties.


2. Avena, 2003 I.C.J. at ¶ 59. In the two earlier cases, the provisional measures order was substantially the same, but indicated that the United States "should" take all measures "at its disposal" to prevent the executions. See Vienna Convention on Consular Relations (F.R.G. v. U.S.), 1999 I.C.J. 9, ¶ 29 (Mar. 3) (stating that "[t]he United States . . . should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings . . .") (emphasis added); see also, Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 99, ¶ 41 (Nov. 10) (same).

application of the VCCR. Thus, the cases brought before the ICJ are highly significant in the development of the requirements imposed on the United States under the VCCR. There are also unresolved issues about the effect of an ICJ judgment in domestic criminal cases. As a result, the most recent case, Avena and Other Mexican Nationals (Mexico v. United States), will likely reverberate in the court systems for some time to come.

Although many aspects of the Avena case could lead to significant developments, there are two that I will address in this essay. The first issue has an immediate impact on the pending executions. What must the United States do to comply with the provisional measures order? What

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5. One of the most complex issues is the effect of an ICJ decision on the merits in subsequent domestic litigation in an individual capital case. There is considerable debate about the effect of an ICJ decision in domestic law. See Torres v. Mullin, 317 F.3d 1145 (10th Cir. 2003), cert. denied, 540 U.S. (forthcoming 2003) (No. 03-5781, 2003 Term), slip op. at 2 (Stevens, J., respecting the denial of certiorari) (referring to the LaGrand decision as an "authoritative" interpretation of the VCCR) and slip op. at 6-7 (Breyer, J., dissenting from the denial of certiorari) (noting the unresolved issues involving the impact of ICJ decisions on domestic cases), available at http://www.supremecourtus.gov/opinions/03relatingtoorders.html (last visited Jan. 15, 2004); see also A. Mark Weisburd, International Courts and American Courts, 21 Mich. J. Int'l L. 877 (2000) (Security Council action is the only enforcement mechanism for ICJ decisions; it is unconstitutional to attempt by treaty to allow review by international tribunals of federal or state judgments); Roger P. Alford, Federal Courts, International Tribunals, and the Continuum of Deference, 43 Va. J. Int'l L. 675 (2003) (describing a continuum of effect of decisions from international tribunals, with the greatest effect under a "full faith and credit" model (international tribunals decision is legal judgment), and decreasing use from: 1) an "arbitration" model (generally enforceable judgments), 2) a "foreign judgment" model (decision of international tribunal treated in same manner as a foreign judgment in a U.S. court), 3) the "Charming Betsy" model (interpreting U.S. law in harmony with international law if possible), 4) "Paquete Habana" model (use of international decision as persuasive authority), 5) "special master" model (international tribunal functioning under control of U.S. court), and 6) the "no deference" model (international decision effectively ignored)); Cara Drinan, Article 36 of the Vienna Convention on Consular Relations: Private Enforcement in American Courts After LaGrand, 54 Stan. L. Rev. 1303 (2002) (taking the position that the ICJ decision is binding on American courts). The few court decisions post-LaGrand that have addressed the effect of the ICJ's decision in that case reflect the debate. Compare U.S. ex rel. Madej v. Schomig, No. 98-C1866, 2002 U.S. Dist. LEXIS 20170 (N.D. Ill. Oct. 21, 2002) (noting that the ICJ decision in LaGrand is binding on the court, but deciding the case on other grounds) with Commonwealth v. Diemer, 785 N.E.2d 1237 (Mass. App. Ct. 2003) (noting that "[t]he effect of the LaGrand decision in the United States is unclear. .").

There are also unresolved arguments regarding the Eleventh Amendment's effect on the ability of a foreign country to sue a state in federal court to enforce the continuing effect of a violation of the VCCR. See, e.g., Note, Too Sovereign But Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations? 116 Harv. L. Rev. 2654 (2003) [hereinafter Too Sovereign?].

6. In this essay, I address what the United States should do to be in compliance with the provisional measures order of the ICJ, including compelling a state to stay an execution. As indicated in note 5, supra, legal redress in American courts for the failure of the United
are "all measures necessary"? The second issue will have an impact in later litigation in the cases of the fifty-two Mexican defendants named in Avena and on other future defendants.\(^7\) What must the United States do to provide "review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in [the VCCR]"?\(^8\) Must there be a "meaningful remedy at law" as Mexico is requesting?\(^9\) Is clemency sufficient to satisfy these requirements for consideration of the consular notification issue, as the United States is arguing?\(^10\)

I. THE TREATY AND THE COURTS

In the mid-1990s, criminal defense attorneys discovered the Vienna Convention on Consular Relations.\(^11\) Through the pioneering efforts of Sandra Babcock in her representation of Canadian Stanley Faulder,\(^12\) the violation of the treaty's consular notification right for detained foreign nationals began to surface in the litigation of criminal cases. The provision of the treaty on notification is quite straightforward. It provides, in pertinent part:

With a view to facilitating the exercise of consular functions relating to nations of the sending state ... if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other

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\(^7\) Although cases before the ICJ directly affect only the parties before the Court, both Mexico and the United States would have difficulty distinguishing a decision in this case from any other case involving different foreign nationals under the same treaty. See LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27) (declaration of President Guillaume) (stating that, though the ICJ Judgment established Article 36 rights between nationals of Germany and the United States, paragraph 128(7) of the Judgment cannot be applied "a contrario" to "the position of nationals of other countries ... ").

\(^8\) Id. \(\S\) 128(7).


\(^12\) Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996), cert. denied, 519 U.S. 995 (1996). Despite extensive efforts by his attorneys and Canadian authorities, Stanley Faulder was ultimately executed in Texas.
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.\(^\text{13}\)

Subsequent to the Faulder case, the violation of the VCCR was raised in a stream of cases.\(^\text{14}\) Although the violations of the notification provision in case after case were clear,\(^\text{15}\) the courts refused to grant relief of any kind. In the initial cases, the issue was typically not discovered until federal habeas corpus proceedings. Because the issue had not been raised in state court, and was now barred under state procedural rules, the federal courts repeatedly found that the VCCR claim was procedurally defaulted and could not be considered in the habeas case.\(^\text{16}\) In later cases, as more defense attorneys became aware of the issue, the VCCR violation was raised at the pretrial and state appellate levels. Despite the more timely consideration, the courts declined to suppress evidence\(^\text{17}\) or to grant a dismissal\(^\text{18}\) as a result of a VCCR violation. The most that courts have done is to make indirect use of the VCCR violation

\(^{13}\) Vienna Convention, supra note 13, art. 36(1)(b) (emphasis added).


\(^{16}\) E.g., Breard v. Greene, 523 U.S. 371 (1998); Faulder, 81 F.3d 515.


\(^{18}\) E.g., De La Pava, 268 F.3d 157; Page, 232 F.3d 536; Cordoba-Mosquera, 212 F.3d 1194; Awadallah, 202 F. Supp. 2d 17.
as support for granting relief for ineffective assistance of counsel\textsuperscript{19} or a Miranda violation.\textsuperscript{20} Thus, for all practical purposes, the consular notification provision remains a right without a remedy in a criminal case.

Concerned about the treatment of their citizens in American courts, foreign governments began to take legal and diplomatic measures in response to the VCCR violations. Although several countries have been active behind the scenes or with supporting affidavits,\textsuperscript{21} the most prominent legal actions have been taken by Paraguay, Germany, and Mexico. Each of the three countries intervened on three levels in at least one capital case involving a citizen of that country. Amicus briefs were filed in the criminal action, civil lawsuits were initiated against the state in which the defendant was being prosecuted, and ultimately, the jurisdiction of the ICJ was invoked under the VCCR in an action brought by the foreign country against the United States.

Seeking the jurisdiction of the ICJ with executions imminent, both Paraguay in 1998 and Germany in 1999 sought provisional measures to prevent the executions until the ICJ could hear the actions on the merits. In each case, the ICJ indicated provisional measures that the United States "should take all measures at its disposal" to prevent the executions.\textsuperscript{22}

With the provisional measures as support, both Paraguay and Germany sought, but failed to gain, relief in the United States Supreme Court. In the consolidated criminal and civil cases involving Paraguayan Angel Breard, the United States Supreme Court found that Breard's VCCR claim was procedurally defaulted under habeas corpus rules; that the VCCR did not provide for a cause of action by a country to challenge a conviction and sentence; that the Eleventh Amendment barred

\textsuperscript{19} For example, in U.S. ex rel. Madej v. Schomig, 2002 WL 31386480 (N.D. Ill. Oct. 22, 2002), in the course of granting federal habeas on Sixth Amendment ineffective assistance of counsel grounds, the court stated: "[w]hat the Consulate almost certainly would have done is provided Petitioner with an attorney who would have assisted in obtaining ... effective assistance at the sentencing hearing." Similarly, in Valdez v. State, 46 P.3d 703 (Okla. Crim. App. 2002), the Oklahoma Criminal Appellate Court granted state habeas corpus relief on ineffective assistance of counsel grounds and stated: "trial counsel did not inform Petitioner he could have obtained financial, legal and investigative assistance from his consulate ... In hindsight ... it is difficult to assess the effect consular assistance, a thorough background investigation and adequate legal representation would have had." \textit{Id}.

\textsuperscript{20} See State v. Ramirez, 732 N.E.2d 1065, 1070 (Ohio Ct. App. 1999). In \textit{Ramirez}, the court held that Miranda was violated and used the VCCR violation in its reasoning: "if the Vienna Convention had been complied with ... , the [Miranda] errors would have been avoided. First, a competent translator would have been present ... Second, the American legal system would have been explained to appellant ... ."


Paraguay's suit against Virginia; and that Paraguay was not a "person" for purposes of bringing a federal civil rights claim under 42 U.S.C.A. § 1983. Similarly, the Supreme Court denied Germany's action based on the original jurisdiction of the Court, in which Germany was seeking, inter alia, an injunction to preclude the execution of Walter LaGrand. Angel Breard was executed in Virginia on April 14, 1998, and Walter LaGrand was executed in Arizona on March 3, 1999.

Although Paraguay abandoned its action before the ICJ after Breard's execution, Germany proceeded with its case to a decision on the merits. The case was based on the violation of the consular notification provisions of the VCCR for two brothers, Karl and Walter LaGrand. Both were executed in Arizona prior to the ICJ's decision on the merits. In June 2001, the ICJ issued a judgment in LaGrand (F.R.G. v. United States) with numerous findings. One of the critical issues was whether or not the provisional measures order had binding effect. The ICJ found that provisional measures are binding upon the parties and that the United States had failed to comply with the order. Other critical issues related to the rights and responsibilities under the VCCR. The violation of the treaty in failing to advise Walter and Karl LaGrand of their notification right was uncontested, but the other submissions by Germany were contested. In its decision, the ICJ found that the VCCR confers rights not only on a country, but also on individuals, an issue that American courts had generally sidestepped. The ICJ further found that

23. Breard v. Greene, 523 U.S. 371 (1998). Paraguay's claims were both a petition for certiorari and an action based on original jurisdiction.
25. See Death Penalty Information Center, Executions, at http://deathpenaltyinfo.org/article.php?did=414&scid=8 (last visited Oct. 17, 2003) (providing a listing by date of those executed in the U.S. since 1976). Although the LaGrand case involved both Walter and Karl LaGrand, Karl had already been executed in Arizona at the time of the provisional measures from the ICJ.
28. Id. ¶¶ 109, 110.
29. Id. ¶¶ 39, 40.
30. Id. ¶ 126.
the United States violated the VCCR by failing to provide consideration of the VCCR issue. Although the treaty provides that the laws of the "receiving State" (the country in which the action takes place; here, the United States) shall apply, those laws "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." In the case of the LaGrand brothers, the ICJ found that the federal habeas "procedural default" rule precluded the "full effect" in violation of the VCCR. In future cases involving German nationals, the ICJ found that the United States must "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in [the VCCR]." In the same sentence, the ICJ stated that the United States can comply with the review and reconsideration "by means of its own choosing."

In the wake of the ICJ decision in Germany's case and repeated unsuccessful efforts at resolving VCCR violations in American courts, Mexico brought an action against the United States before the ICJ in January 2003. Like Germany, Mexico is seeking relief based on violations of the VCCR. Unlike Germany's case involving two German nationals, Mexico's case is based on fifty-two Mexican nationals on death row in nine states in the United States. Building on the precedent of the German case, Mexico seeks a judgment that the United States:

32. Vienna Convention, supra note 13, art. 36(2).
34. See id. ¶ 128(7) (indicating that the ICJ's judgment controls the rights conferred under Article 36 of the VCCR as between German nationals and the United States). But see supra note 5 and accompanying text (indicating that the rights conferred under Article 36 of the VCCR as between Germany and the United States are applicable to other foreign nationals as well).
36. Id.
1) must afford *restitutio in integrum* or the restoration of the situation prior to the convictions and sentences,\(^{39}\) and 2) must provide a "meaningful remedy at law," which includes preventing procedural rules, such as procedural default, from precluding "full effect" being given to the rights under the treaty.\(^{40}\) As a preliminary matter, Mexico sought provisional measures to ensure that the named Mexican individuals would not be executed before the ICJ could decide the merits of the case. On February 5, 2003, the ICJ issued the provisional measures order that is cited at the beginning of this essay. The order provides that the United States "shall take all measures necessary" to prevent the executions of three of the named individuals whose executions in Texas and Oklahoma were the most imminent.\(^ {41}\)

Among the issues raised by the Mexican case are 1) what the United States must do to comply with the provisional measures order and 2) what the United States must do to provide "review and reconsideration" of the convictions and sentences. Each of these issues will be discussed below.

## II. PROVISIONAL MEASURES

Much like an injunction in a domestic case, the ICJ issues "provisional measures" to preserve the status quo until there is a resolution on the merits. Until the *LaGrand* decision, it was unclear if the provisional measures were binding. The United States took the position that provisional measures were not binding. In accord with its position that the provisional measures were not binding, the United States did very little to secure compliance with the measures. In fact, the Solicitor General affirmatively argued in the Supreme Court in the *LaGrand* case that the

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39. *Id.* ¶ 281(2).
40. *Id.* ¶¶ 281(1),(3),(5). Mexico also asked the ICJ to adjudge and declare that the United States has violated the VCCR; that the United States not violate the VCCR in the future; and that the ICJ find "that the right to consular notification under the Vienna Convention is a human right . . . ." *Id.* ¶ 128(5).
41. *Avena and Other Mexican Nationals (Mex. v. U.S.),* Order of Feb. 5, 2003, Provisional Measures, 2003 I.C.J. at ¶ 59 (Feb. 5), available at http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imusiorder_20030205.PDF (last visited Jan. 15, 2004). Although Mexico was trying to avoid the eve-of-execution situation that arose in *LaGrand*, which made compliance with the provisional measures difficult for the United States, the United States argued that Mexico's request for the indication of provisional measures was premature, stating: "Mexico did not satisfy the condition of urgency and did not show that imminent serious harm was likely, because United States proceedings in each of the fifty-one cases were continuing and none of the Mexican nationals covered . . . [were] scheduled to be executed." *Id.* at ¶¶ 31, 53.
measures were non-binding. Not surprisingly, the ICJ found that "by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice in the case, the United States of America breached the obligation incumbent upon it under the Order indicating provisional measures...."

What measures did the United States take? The ICJ lists the actions by the United States that it viewed as responsive to the provisional order. First, as required by the provisional order, the United States transmitted the content of the order to the Governor of Arizona. The ICJ considered this inadequate where the United States merely sent the text of the order, "without any comment, particularly without even so much as a plea for a temporary stay." The ICJ further criticized the position of the Solicitor General before the United States Supreme Court that the provisional measures were non-binding. Second, reacting to the refusal to grant a stay of execution, the ICJ observed that the Governor of Arizona "decided not to give effect to [the provisional measures]." Third, the ICJ identified the refusal of the United States Supreme Court to grant a stay of execution until that Court could hear the issues.

Several points are worth noting about the ICJ's finding that the United States did not comply with the provisional measures order. The ICJ was looking for compliance through authorities on the federal and state levels. Thus, not only were the State Department's actions scrutinized, but also the actions of the state of Arizona. Similarly, the actions of both the executive and judicial branches of the federal government were part of the analysis. The refusal of the United States Supreme Court to grant a stay was a factor, just as the position of the Solicitor General and the actions of the State Department were factors. In addition to criticizing the actions of the United States, the ICJ also suggested that there was some flexibility in what constitutes compliance, depending on the circumstances. The ICJ indicated that if Germany had requested relief,

42. F.R.G. v. United States, 526 U.S. 111, 113 (1999) (Breyer, J., dissenting) (quoting the Solicitor General's position that the provisional measures were not binding); LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 104, ¶ 96, 112 (June 27).
44. Id. ¶ 112. The ICJ added that the transmission also failed to include "an explanation that there is no general agreement on the position of the United States that orders of the International Court of Justice on provisional measures are non-binding...." Id.
45. Id. The ICJ commented that the position taken by the Solicitor General in LaGrand went beyond the position taken by the Solicitor General in Breard that there was "substantial disagreement" whether or not the provisional measures were binding. Id.
46. Id. ¶ 113. The ICJ further commented on the fact that the "Arizona Clemency Board had recommended a stay of execution for Walter LaGrand." Id. Thus, the ICJ very carefully examined the dynamics on the state level as well as on a federal level.
47. Id. ¶ 114.
which it did not, for the failure to comply with the provisional order, the ICJ would have considered the "time pressure" under which the United States was operating on the eve of the execution and the fact that the binding nature of the provisional orders was undecided at that time.  

What then should the United States do to comply with the provisional measures order in Avena? The answer to this question can be divided into two parts. The first is to rectify the inadequacies in the attempt to comply with the LaGrand order. The second is to identify measures that could or should be taken above and beyond those discussed in LaGrand.

In LaGrand, the ICJ criticized the actions of the United States as performed by the federal State Department and Justice Department, the state Governor, and the United States Supreme Court. At a minimum, to respond to the statements of the ICJ in the LaGrand case, the State Department should not only transmit the provisional measures order to Texas and Oklahoma, but should also include a "plea," a request, or a demand for a stay of execution. It would also appear advisable for the State Department to explain the ICJ finding that the order is binding on the United States and, therefore, on each individual state. Presumably, the Solicitor General's Office will also modify its position in briefs to reflect the finding of the ICJ that the provisional measures are binding. The clemency authorities in Texas and Oklahoma should grant stays of execution under their state procedures until there is a final resolution in the ICJ. In the LaGrand case, the ICJ commented that "the various competent United States authorities failed to take all the steps they could have taken to give effect to the Court's Order." Granting a stay of execution is a step that the states can take in response to the order. If the states fail to act, and the cases are brought before the United States Supreme Court, the Supreme Court should grant stays at least pending the briefing of the issues in the Supreme Court. In addition, it is a matter of

48. Id. ¶ 116.
49. In both Texas and Oklahoma, the governor has the authority to grant clemency, but may only do so if the state's pardons and parole board recommends clemency. Thus, on a state level, both the board and the governor would have to act favorably to grant clemency. In both states, however, the governor has the authority to grant a temporary reprieve (thirty-day reprieve in Texas; sixty-day reprieve in Oklahoma). Tex. Const. art. 4 § 11; Okla. Const. art. VI, § 10.
51. In their dissents in Breard, Justices Stevens, Breyer, and Ginsburg would have granted a stay until the issues could have been fully briefed and considered. Breard v. Greene, 523 U.S. 371, 379–81 (1998) (Stevens, J., dissenting; Breyer, J., dissenting; Ginsburg, J., dissentering). Similarly, in the LaGrand litigation, Justices Breyer and Stevens would have granted a stay pending briefing. F.R.G. v. United States, 526 U.S. 111(1999) (Breyer, J., dissenting). More recently, in a case involving one of the Mexican nationals who is also part of the Avena litigation, Justices Stevens and Breyer took stronger positions respecting a denial of
Compliance with ICJ Provisional Measures

judicial comity for the Supreme Court to respect the request of another court, here the ICJ, to preserve the situation until the pending case can be heard.52

What other measures should be taken by the United States to comply with the provisional measures order of the ICJ? The most critical actors for ensuring compliance are at the state level. Because both Texas and Oklahoma have executive clemency, the appropriate authorities should stay the executions. The State Department should enter into discussions with the governors to impress upon them the importance of complying with the ICJ’s order. What if the parole boards or governors refuse to stay the executions? What other “measures” could the United States take? Professor Quigley has suggested that the United States Attorney General should sue to enjoin the state from carrying out the execution.53 Such an action may be rare, but it is not unprecedented,54 and it is a “measure” at the disposal of the United States. Professor Vazquez has
certiorari. Justice Stevens indicated that the use of procedural default to bar a hearing on the VCCR claim violates the treaty and is “manifestly unfair” after the LaGrand decision. Torres v. Mullin, 317 F.3d 1145 (10th Cir. 2003), cert. denied, 540 U.S. (forthcoming 2003) (No. 03-5781, 2003 Term), slip. op. at 2 (Stevens, J., respecting the denial of certiorari). Justice Breyer summarized the arguments of the defense and Mexico that the ICJ decision was controlling and would have deferred consideration of the petition pending the outcome of the Avena litigation. Id. at 6–7 (Breyer, J., dissenting from denial of certiorari), available at http://www.supremecourts.gov/opinions/03relatingtoorders.html (last visited Jan. 15, 2004).

52. For a discussion of judicial comity in the context of the Bredard case, see Anne-Marie Slaughter, Agora: Bredard—Court to Court, 92 AM. J. INT’L L. 708 (1998). See also Too Sovereign?, supra note 5, at 2671–72 (suggesting that either the Supreme Court or the President could stay an execution in response to provisional measures). But see Weisburd, supra note 5, at 924–28 (criticizing the arguments that the Supreme Court could or should issue a stay in response to provisional measures such as those in Bredard on the grounds that comity pertains to a choice of forum issue, not mere respect or deference to another court, and that the Court does not issue stays unless there is a likelihood of reviewing the legal issue).


also suggested that the President could issue an executive order requiring that the execution be postponed.\textsuperscript{55} Moreover, the United States will not be able to rely on the possible "time pressure" safety valve or undecided effect of the provisional measures that the ICJ mentioned in \textit{LaGrand} as a factor that might have mitigated the obligation of the United States. Mexico has requested and obtained the provisional measures before execution dates have even been set for the three defendants. Thus, there is significantly more time for the United States to respond than there was in \textit{LaGrand}. Additionally, there is no undecided issue on the binding nature of the order. The United States must act now on the basis of a binding order from the ICJ.

III. REVIEW AND RECONSIDERATION

In addition to the issue of compliance with the provisional measures, another significant issue in the \textit{Avena} litigation is the meaning of "review and reconsideration." In \textit{LaGrand}, the ICJ found that the United States must allow for review and reconsideration of the conviction and sentence to comply with its obligations under the VCCR.\textsuperscript{56} Moreover, the ICJ found that procedural bars to the consideration of the VCCR issue failed to provide full effect to the purposes of the right under the treaty, which again would put the United States in violation of the treaty.\textsuperscript{57} However, the ICJ indicated that the United States should accomplish the review and reconsideration "by means of its own choosing."\textsuperscript{58} What will satisfy the treaty, as interpreted by the ICJ, for review and reconsideration? In \textit{Avena}, Mexico is asking for a "remedy at law," which would exclude clemency.\textsuperscript{59} The United States has taken the position that the availability of a clemency petition is an adequate "review and reconsideration."\textsuperscript{60}

\begin{itemize}
\item \textsuperscript{55} Carlos Manuel Vazquez, \textit{Agora: Breard—Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures}, 92 AM. J. INT'L. L. 683, 685–86 (1998) (noting that, even if the courts could not enforce the ICJ Order on political question grounds, an executive order would be a viable measure). \textit{But see} WEISBURD, supra note 5 (criticizing applicability of executive orders in this context).
\item \textsuperscript{56} \textit{See supra} note 35, and accompanying text.
\item \textsuperscript{57} \textit{See supra} notes 32–33, and accompanying text.
\item \textsuperscript{58} \textit{See supra} note 36, and accompanying text.
\end{itemize}
Compliance with ICJ Provisional Measures

Clemency is an unusual aspect of the overall criminal justice system. Although each state's process differs somewhat, all have the key characteristic that clemency is vested in the executive, not the judicial branch. Typically, clemency is at the discretion of either a parole board or a governor. Unlike legal proceedings in a court where there are defined rights and procedures, clemency is virtually undefined substantively and procedurally. The parole board or governor may grant or deny clemency for any reason, with or without stating those reasons.

It is viewed as an act of mercy. There is no set of factors to consider that might entitle a defendant to clemency. Nor is there any consistency among states or within a given state. For example, one governor—former Governor Ryan of Illinois—recently commuted the sentences of all 167 death row inmates in that state.

In contrast, there has only been one commutation of a death sentence in Texas, which has a death row

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61. Clemency includes a pardon, a commutation, and a reprieve. A pardon relieves the defendant of the conviction and sentence. A reprieve is a temporary relief from the sentence, such as a thirty-day stay of an execution. A commutation reduces the amount of the punishment. In death penalty cases, the most common form of clemency is a commutation from the death sentence to a sentence of life imprisonment. See James R. Acker & Charles S. Lanier, May God—Or the Governor—Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems, 36 CRIM L. BULL. 200, 204-05 (2000).

62. In some states, the governor has the exclusive authority to grant clemency. In others, a parole board has the exclusive authority. In still other states, including Oklahoma and Texas, the governor has the authority to grant clemency, but only with the recommendation of the parole board. Id. at 217. California has an unusual twist. The governor has the authority to grant clemency, but four justices of the California Supreme Court must concur in order to grant clemency if the defendant is a two-time felon. CALIF. CONST. art. V, § 8(a). See generally, Death Penalty Information Center, State by State Death Penalty Information, at http://www.deathpenaltyinfo.org/article.php?did=121&scid=11 (last visited Oct. 25, 2003) (state-by-state information). For federal convictions, the President has the authority to grant clemency (except for impeachment). U.S. CONST. art. II, § 2, cl. 1.

63. In Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 288–95 (1998), a splintered coalition of five justices found that there was a life interest that was entitled to a minimal level of due process. For discussion, see Alyson Dinsmore, Clemency in Capital Cases: The Need to Ensure Meaningful Review, 49 UCLA L. REV. 1825, 1847-49 (2002).

64. Clemency is described as "an act of grace." See Woodard, 253 U.S. at 285.


population of over 400 inmates, and one commutation of a death sentence in Oklahoma, which has a death row population of over 100 inmates. Another example of the inconsistency and unpredictability of clemency is the treatment of juveniles. For instance, the governor of Kentucky recently commuted the sentence of a death row inmate who was a juvenile at the time of the crime. In contrast, Texas executed three inmates in 2002 who were juveniles at the time of their crimes.

The lack of standards and complete discretion of executive clemency is zealously guarded. This lack of substantive and procedural standards is both the strength and the weakness of clemency. While clemency can be viewed as a last check on injustice in the criminal process, it is also so unpredictable and so seldom invoked that it can hardly be viewed as a reliable part of the overall criminal justice system. There are no standards, no requirements, no regularized procedures, and almost no judicial review of clemency decisions. Although a majority of the Supreme Court has recognized that a death row inmate retains an interest in life, the justices found that only a minimal level of due process is required for a clemency proceeding. This minimal level is satisfied by almost any procedure. In her concurring opinion in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring in part and concurring in the judgment), Justices Souter, Ginsburg, and Breyer joined Justice O'Connor's concurrence. The fifth vote was provided by Justice Stevens, who concurred in part and dissented in part. Four members of the Court found a life interest only to the extent of not being "summarily executed." *Id.* at 281 (Rehnquist, C.J., opinion joined by Justices Scalia, Kennedy, and Thomas).

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68. *Id.* It is possible that there will be another commutation in Oklahoma. On December 17, 2003, the Oklahoma governor granted a 30-day stay of execution in the case of a Vietnamese national after the Pardon and Parole Board recommended clemency on the basis of inadequate presentation of mitigation and failure to provide access to consular assistance. *Oklahoma Grants Stay of Vietnamese Man's Execution*, Reuters, Dec. 17, 2003, at http://www.reuters.com/newsArticle.jhtml?type=domesticNews&storyID=4011753 (last visited Jan. 15, 2003).


74. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring in part and concurring in the judgment). Justices Souter, Ginsburg, and Breyer joined Justice O'Connor's concurrence. The fifth vote was provided by Justice Stevens, who concurred in part and dissented in part. Four members of the Court found a life interest only to the extent of not being "summarily executed." *Id.* at 281 (Rehnquist, C.J., opinion joined by Justices Scalia, Kennedy, and Thomas).
Compliance with ICJ Provisional Measures

Authority v. Woodard, Justice O'Conner suggested that judicial intervention might be justified if the clemency authority "flipped a coin to determine whether to grant clemency" or "arbitrarily denied a prisoner any access to the clemency process." Justice O'Connor's examples demonstrate how unregulated the clemency process is by any judicial oversight. For instance, in the Faulder case cited earlier, involving the Canadian national whose VCCR rights were violated, the defense challenged the clemency process as a proceeding conducted in secret, with no hearing, no reason for the decision, and no record of the action taken. The Fifth Circuit Court of Appeals found no due process problem with this process.

Despite the non-judicial nature of clemency, are clemency proceedings likely to satisfy the review and reconsideration requirement? Although the ICJ in LaGrand stated that the United States could choose its means of providing review and reconsideration, the purpose of such proceedings was clearly to allow for a substantive hearing on a violation of the VCCR rights of the defendant. The procedural default bar in federal habeas completely precluded any hearing on the issue. The ICJ indicated that the use of procedural default prevented full effect being given to the purposes of the right under the treaty. Thus, a hearing on the merits of the VCCR issue is necessary to give full effect to the VCCR notification right.

Is a clemency consideration a hearing on the merits of the VCCR issue? As the United States argues in Avena, it is possible to consider the VCCR issue in clemency proceedings. The State Department has sent letters to governors requesting that they consider the VCCR issue at the clemency stage. The problem with clemency as a "review and reconsideration," however, is twofold. First, unless substantive guarantees and procedures are standardized, there is no way to know if the VCCR issue is adequately considered in a clemency petition. Second, the purpose of the notification right is to allow access and assistance to the detained foreign national in the legal system. Thus, it would be more consistent with the VCCR provisions to require a judicial review and reconsideration.

Clemency proceedings by their very nature do not provide review and reconsideration of legal issues. Although in some instances, a

76. Id. at 289.
77. Faulder v. Tex. Bd. of Pardons & Paroles, 178 F.3d 343, 344 (5th Cir. 1999). The Fifth Circuit viewed Woodard's minimal procedural safeguards as satisfied by Texas' process which allowed Faulder to provide any information he chose to the Board. Id. at 344-45.
governor or parole board might decide to commute a sentence based on a lack of due process in the proceedings, there is no requirement that the executive do so. In other words, a governor or parole board might find that there was a complete denial of the right to counsel in a criminal case and yet choose not to commute a sentence. Similarly, even if the executive authority found an egregious effect from a VCCR violation, there is no standard that requires any relief, nor is there any procedure for a review of that decision. Thus, calling the clemency proceeding a "review and reconsideration" by the governor or parole board is truly form over substance.

Moreover, the point of the "review and reconsideration" is to give full effect to the purpose of the right of consular notification. In its 1999 advisory opinion, the Inter-American Court of Human Rights found that the consular notification right was part of the due process guarantees of the International Covenant on Civil and Political Rights (ICCPR). The purpose, according to the Inter-American Court, was informational. The defendant had a right to information necessary for his or her defense.

Although the Inter-American Court opinion is only advisory as to the United States, the Court is a body charged with the interpretation of relevant treaties. While the decision from the Inter-American Court is not binding on the ICJ, it is possible that the ICJ will consider the position of the Inter-American Court in its own decision on the interpretation of the same treaty. As a significant part of the process due a detained foreign national, the consular notification right can affect the outcome of the criminal proceedings. Thus, the reliability of the conviction and sentence are at stake. Where clemency is completely at the discretion of the governor, there is no bona fide check on the reliability of the conviction and sentence.

In contrast, judicial review is characterized by standards and procedures. The courts must apply the legal standards and provide relief as required under law. A review and reconsideration by a court on the merits of the VCCR issue would not be a whimsical event.

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79. For a critique of clemency, see Palacios, supra note 66 (describing the ineffectiveness of clemency). See generally Breslin & Howley, supra note 71; Dinsmore, supra note 63.
81. Id. § 124.
84. See Palacios, supra note 66, at 370 (summarizing the inability of clemency as presently used to remedy errors in the imposition of the death penalty and commenting on the political liability of governors and parole boards as inhibiting clemency decisions).
Just as procedural default barred consideration of the VCCR claim in *LaGrand*, clemency provides no guarantee of review and consideration in any case. There is only the possibility of a consideration of the VCCR violation at the complete, unreviewable discretion of a governor or parole board.

IV. Conclusion

The *Avena* litigation in the International Court of Justice is charting a new course in the effect of treaties on domestic criminal cases with its adjudication of issues involving the Vienna Convention on Consular Relations. Two important aspects of the *Avena* case are the adequacy of measures to comply with the provisional measures order and the sufficiency of clemency as a review and reconsideration mechanism.

The effect of the provisional measures order on the United States should be significantly different than it was when provisional measures were issued in the *LaGrand* and *Breard* cases. The status of provisional measures was unclear prior to the ICJ’s decision in *LaGrand*, which held that the provisional orders are binding.\(^8\) Thus, there is nothing equivocal about the binding nature of the provisional measures order in *Avena*. A binding provisional measures order from the ICJ calls for a different response than the United States gave in the earlier cases. First, it is incumbent upon the states affected, Oklahoma and Texas, to respond under their state laws to abide by the provisional measures order and stay the executions. On the federal level, there should be increased efforts by the State Department to educate and convince the states to comply. In addition, legal actions in court filed by the federal government against the states to force compliance with the provisional order are “measures at its disposal” and possibly “measures necessary” to ensure that the executions do not occur.

The claim by the United States that executive clemency is an adequate review and reconsideration of a conviction and sentence where there has been a VCCR violation is the ultimate expression of form over substance. Although the ICJ indicated in *LaGrand* that the United States could use “means of its own choosing” to satisfy the review and reconsideration requirement,\(^8\) it seems clear that the intent of the ICJ was that the means would be adequate to allow for a hearing and substantive consideration of the VCCR violation. With its standardless, unreviewable nature, clemency provides no guarantee of either a hearing

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\(^85\). *See supra* note 28, and accompanying text.

\(^86\). *See supra* note 36, and accompanying text.
or a consideration of a VCCR violation. The clemency authority need not take into account any particular claim. Moreover, even if the clemency authority listens to the VCCR claim, it is free to disregard the merits regardless of their strength. There is no control over the content of clemency proceedings and little control over the procedures employed. A "review and reconsideration" of a conviction and sentence because of a VCCR violation where the reviewing authority is free to refuse to listen or to consider the claim would fail any interpretation of the ICJ decision in *LaGrand*. The treaty itself mandates that the receiving State's law must yield if it fails to give full effect to the purposes of the right under the treaty. A right to notification and consular assistance is meaningless if there is no forum in which the reviewing authority is required to give effect to the right under defined standards.

As the *Avena* litigation progresses in the ICJ, the issues of compliance with provisional measures and the adequacy of clemency as a review and reconsideration will be among the most closely watched issues. The reaction of state and federal executive authorities, as well as the decisions in the courts in the United States, should incorporate a better understanding of, and compliance with, international treaties. The resolution of these issues will continue the slow, but ongoing, process of increased recognition of treaty obligations in domestic criminal cases.

87. Vienna Convention, *supra* note 13, art. 36(2) ("The rights ... shall be exercised in conformity with the laws ... of the receiving State, subject to the proviso, however, that the said laws ... must enable full effect to be given to the purposes for which the rights accorded under this Article are intended").