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From the World Court to Oklahoma Court: The Significance of Torres v. State for International Court of Justice Authority, Individual Rights, and the Availability of Remedy in Vienna Convention Disputes

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NOTES

From the World Court to Oklahoma Court: The Significance of *Torres v. State* for International Court of Justice Authority, Individual Rights, and the Availability of Remedy in Vienna Convention Disputes*

I. Introduction

In May 2004, the Oklahoma Court of Criminal Appeals issued an unprecedented ruling with significant implications for the incorporation of international law into Oklahoma law.[1] In response to a decision of the International Court of Justice (ICJ),[2] the court stayed the execution of Osbaldo Torres, a Mexican national on Oklahoma's death row.[3] The court remanded Torres's case for an evidentiary hearing because Torres, a Mexican national, was denied his right to consular notification as required by Article 36 of the Vienna Convention on Consular Relations (Vienna Convention).[4] As a result, Torres appears to have become the first prisoner on death row in the United States to avoid the death penalty on the basis of an ICJ decision.

The Vienna Convention mandates that U.S. officials do two things "without delay" when foreign nationals are detained: (1) notify foreign nationals of their right to notify their consulate and (2) if requested by foreign nationals, notify the consulate of the detention.[5] *Torres v. State*[6] presented an issue of first impression in Oklahoma,[7] and indeed all U.S. state and federal courts, after the ICJ's decision in *Avena and Other Mexican Nationals*.[8] In *Avena*, the ICJ held that the United States had breached its Vienna Convention obligations to

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1. Torres v. State, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (order granting stay of execution and remanding case for evidentiary hearing).

2. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31), *available at* http://www.icj-cij.org.

3. *Torres*, No. PCD-04-442.

4. *Id*. at 2.

5. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, art. 36, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

6. *Torres*, No. PCD-04-442.

7. *Id*. at 1 (Chapel, J., specially concurring).

8. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), *available at* http://www.icj-cij.org.

Mexico and fifty-one Mexican nationals who had been sentenced to death.[9] As a result of the breach, the ICJ ordered U.S. courts to provide judicial "review and reconsideration" of the convictions and sentences of these Mexican nationals on the merits of their Vienna Convention claims, without resort to procedural bar.[10]

The Oklahoma Court of Criminal Appeals's order to stay Torres's execution because his Vienna Convention rights were violated was unprecedented in both Oklahoma and other U.S. state and federal courts.[11] The ICJ had previously addressed a Vienna Convention dispute between Germany and the United States in *LaGrand Case*.[12] There, the ICJ held, in almost identical fashion to *Avena*, that where the United States was in breach of its Article 36 obligations, it must provide "review and reconsideration" of Vienna Convention claims.[13] U.S. state and federal courts, however, have "generally ignored" this earlier mandate.[14] One obstacle to "review and reconsideration" of Vienna Convention claims is that U.S. courts have held that such claims raised on appeal are procedurally barred if they were not previously raised at trial court.[15] Commentators and jurists have noted the inherent unfairness of barring a claim based on a right not known to a defendant.[16] In effect, this procedural rule presents a "catch-22"[17] by requiring a defendant to raise a claim of which he is unaware when it is the state's responsibility to inform him of the right of consular notification.

Although the U.S. Department of State has increased its efforts to promote awareness of Vienna Convention rights and obligations among state officials,[18]

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9. *Id*. at 42-43, ¶ 106.

10. *Id*. at 53-54, ¶¶ 138-143.

11. Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 446 (2004) (noting that only one federal decision has provided "review and reconsideration" as intended by the ICJ in *LaGrand Case* (F.G.R. v. U.S.), 2001 I.C.J. 104 (June 27), *available at* http://www.icj-cij.org (referring to United States *ex rel.* Madej v. Schomig, 223 F. Supp. 2d 968 (N.D. Ill. 2002)).

12. LaGrand Case (F.G.R. v. U.S.), 2001 I.C.J. 104 (June 27), *available at* http://www.icj-cij.org.

13. *Id*. at 40, ¶ 2; Paulson, *supra* note 11, at 445.

14. Paulson, *supra* note 11, at 445.

15. *Id*. at 444-46; Sarah M. Ray, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, 91 CAL. L. REV. 1729, 1753 (2003).

16. Torres v. Mullin, 540 U.S. 1035, 1036 (2003) (Stevens, J., op. respecting denial of pet. for writ of cert.).

17. Jeffrey L. Green, Comment, *International Law:* Valdez v. State of Oklahoma *and the Application of International Law in Oklahoma*, 56 OKLA. L. REV. 499, 500 (2003).

18. The Department of State has, for example, issued pocket cards and handbooks and mailed periodic notices advising governors and attorneys general of Vienna Convention

rights under the Vienna Convention are not well-known.[19] Both the difficulty of educating the large number of U.S. law enforcement officers[20] and a perception by state officials that notification of Vienna Convention rights is not mandatory contribute to this lack of knowledge.[21] As a result, officials rarely provide notice of Vienna Convention rights to foreign detainees.[22] This lack of notice, combined with the U.S. practice of procedurally barring Vienna Convention claims, has led to a "systematic failure" of the United States to comply with Vienna Convention obligations.[23]

The *Torres* case gained national attention as it emerged due to the serious conflicts it presented between international and domestic law.[24] Critics of the incorporation of international law into domestic proceedings questioned the authority of the ICJ over U.S. domestic proceedings and discounted the merits of Torres's case.[25] Oklahoma's unprecedented decision in *Torres* garnered national attention because of its legal basis and its dramatic conclusion.[26] First, the decision signified compliance with an order from the ICJ — placing the ICJ and international treaty rights over domestic procedural practice.[27] This was an unexpected result, given that just six weeks earlier the Oklahoma Court of Criminal Appeals had set an execution date for Torres without regard to an ICJ provisional measure instructing the United States to stay Torres's execution pending the outcome of *Avena*.[28] Second, the decision gained further notoriety because, after years of appeals by Torres on various grounds,

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obligations. William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 274-75 (1998); Paulson, *supra* note 11, at 444.

19. *See* John Quigley, LaGrand*: A Challenge to the U.S. Judiciary*, 27 YALE J. INT'L L. 435, 435 (2002).

20. Catherine Brown, *Remarks: Consular Rights and the Death Penalty After* LaGrand, 96 AM. SOC'Y INT'L L. PROC. 309, 313 (2003).

21. Aceves, *supra* note 18, at 275.

22. *Id*.

23. Note, *Too Sovereign but Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?*, 116 HARV. L. REV. 2654, 2654 (2003) [hereinafter *Too Sovereign but Not Sovereign Enough*].

24. Jess Bravin, *U.S. Is Found to Violate Treaty in Handling Mexican Prisoners*, WALL ST. J., Apr. 1, 2004; Adam Liptak, *Mexico Awaits Hague Ruling on Citizens on Death Row*, N. Y. TIMES, Jan. 16, 2004, at A1.

25. Eric Posner & John C. Yoo, *International Court of Hubris*, WALL ST. J., Apr. 7, 2004, at A18; William F. Buckley, Jr., *Enter the Hague*, NAT'L REV., Mar. 8, 2004, at 58.

26. Adam Liptak, *Execution of Mexican Is Halted*, N.Y. TIMES, May 14, 2004, at A23; James H. Carter, Avena *in an Oklahoma Court, Notes from ASIL President James H. Carter*, American Society of International Law, *at* http://www.asil.org/inthenews/avena.html (last visited Apr. 11, 2005).

27. Carter, *supra* note 26.

28. Jess Bravin, *State to Execute Mexican Prisoner*, WALL ST. J., Mar. 2, 2004, at A12.

the judicial order was announced just five days before Torres's scheduled execution.[29] Finally, the order coincided with the Oklahoma Pardon and Parole Board's recommendation to stay Torres's execution and Oklahoma Governor Brad Henry's grant of clemency, signaling a united approach from governmental officials and the state judiciary to a Vienna Convention claim.[30]

The *Torres* case presents complex and controversial issues involving the incorporation of U.S. international treaty obligations into domestic law by U.S. state and federal courts. This note explores the significance of *Torres* in the context of competing judicial approaches to Vienna Convention claims. The note concludes that the Oklahoma Court of Criminal Appeals's decision rested on findings that: (1) the ICJ's authority extends to Oklahoma proceedings; (2) the Vienna Convention grants individually enforceable rights; and (3) a remedy is available for Vienna Convention violations. While already significant when the *Torres* decision was announced, these conclusions may take on greater relevance to other state court proceedings as a result of President George W. Bush's February 28, 2005 memorandum indicating that all U.S. states will "give effect" to the ICJ's directive in *Avena* in state court proceedings involving the fifty-one Mexican nationals named in *Avena*.[31] President Bush's memorandum notwithstanding, this note further considers other unsettled issues of Vienna Convention jurisprudence that may lead U.S. federal and state courts to reach a result contrary to *Torres*.

Part II introduces the rights and obligations established by the Vienna Convention and the role of the ICJ in interpreting and resolving disputes arising under the Vienna Convention. Part II also traces the recent history of Vienna Convention claims in the United States, reviewing those that lead directly to the *Torres* decision and highlighting the contentious interplay between decisions of the ICJ and U.S. federal and state courts since 1998. Part III describes the factual background of Torres's Vienna Convention claim, the issues presented before the Oklahoma Court of Criminal Appeals, and the decision rendered in *Torres*. Part III also discusses the *Torres* order and the fundamental disagreement between the special concurring opinion and the dissenting opinion regarding the authority of the ICJ's decision in *Avena*. Part IV analyzes the complex issues raised by the *Torres* decision and examines the

29. Torres v. State, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (order granting stay of execution and remanding case for evidentiary hearing).

30. Press Release, Office of Governor Brad Henry, State of Oklahoma, Gov. Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), *at* http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1 [hereinafter Gov. Henry Press Release].

31. George W. Bush, U.S. President, Memorandum for the Attorney General (Feb. 28, 2005), *available at* http://www.asil.org/inthenews/avenamemo050308.html [hereinafter Memorandum for the Attorney General].

implicit legal conclusions upon which the *Torres* decision relies, signifying the incorporation of international law into Oklahoma law. Part V discusses the future of Vienna Convention claims in the United States and explores the doctrinal barriers to *Torres*'s precedential value in Oklahoma and other state and federal courts. Part V also addresses developments in the treatment of the Vienna Convention in the United States since *Torres* was decided[32] and the unsettled legal issues that will likely determine whether relief is granted in future Vienna Convention claims.

II. Development of the Law Before Torres

A. The Vienna Convention on Consular Relations

A leading scholar has described the Vienna Convention as "undoubtedly the single most important event in the entire history of the consular institution."[33] The Vienna Convention is a multinational treaty codifying consular rights and obligations between state parties.[34] According to the Vienna Convention, sending states may establish consular posts in a receiving state with that state's consent.[35] The Vienna Convention defines a variety of political, economic, and sociocultural functions of consular posts, including: (1) protecting the interests of the sending state and its nationals; (2) promoting relations between the sending and receiving states; and (3) assisting nationals of the sending state, including representing nationals before tribunals.[36] Over ninety countries, including the United States, participated in the drafting of the Vienna Convention.[37] The United States signed the Vienna Convention in

32. Three significant events occurred after *Torres* was decided. First, President George W. Bush issued a memorandum to the U.S. Attorney General on February 28, 2005 indicating that the United States will comply with its Vienna Convention obligations by having state courts "give effect" to the ICJ's decision in *Avena*. Memorandum for the Attorney General, *supra* note 31. Only a week later, on March 7, 2005, U.S. Secretary of State Condoleeza Rice notified the U.N. Secretary-General that the United States was withdrawing from the Optional Protocol granting jurisdiction to the ICJ in matters concerning the Vienna Convention. Frederic L. Kirgis, *Addendum to ASIL Insight, President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights* (Mar. 2005), *at* http://www.asil.org/insights/2005/03/insights050309a.html [hereinafter Kirgis, *Addendum*]. Finally, the U.S. Supreme Court dismissed as improvidently granted a writ granted to provide habeas review of a case involving a Mexican national named in *Avena* in order to allow state court proceedings consistent with President Bush's memorandum. Medellín v. Dretke, 125 S. Ct. 2088 (2005) (per curiam).

33. LUKE T. LEE, CONSULAR LAW AND PRACTICE 27 (2d ed. 1991).

34. Vienna Convention, *supra* note 5.

35. *Id*. art. 4.

36. *Id*. art. 5.

37. Aceves, *supra* note 18, at 263 (citing LEE, *supra* note 33, at 27).

1963 and ratified it in 1969.[38] The U.S. Secretary of State, William P. Rogers, urged ratification of the Vienna Convention in a letter to President Nixon, writing that "it constitutes an important contribution to the development and codification of international law and should contribute to the orderly and effective conduct of consular relations between States."[39]

Article 36 of the Vienna Convention describes the obligations of state parties that detain foreign nationals, as well as the rights of detained foreign nationals and their home states.[40] In particular, paragraph 1 of Article 36 notes that state parties have the obligation to inform detained foreign nationals "without delay" of their right to notify their consulate.[41] Then, if requested by foreign nationals, the state must notify the foreign consulate of their detention.[42] Paragraph 1 also provides that consular officials have the right to communicate with, visit, and arrange for the legal representation of a detained national.[43] Paragraph 2 explains how the rights in paragraph 1 are to be carried out, and provides that the rights of communication between detainees and their consulate "shall be exercised in conformity with the laws and regulations of the receiving State."[44] Despite this deference to state mechanisms for implementation, paragraph 2 further provides that this deference is "*subject to the proviso*" that such laws and regulations "must enable full effect to be given to the purposes for which the rights accorded . . . are intended."[45]

Article 36 serves two purposes. First, it protects the interests of both foreign nationals and state parties.[46] Second, it gives each the right of free access and communication with the other.[47] Article 36 enables foreign countries to monitor and protect their nationals when detained abroad,[48] and as a practical matter allows consular officials to provide important assistance to detainees who face obstacles such as language difficulties and unfamiliar

38. *Id*. at 268-69.

39. Letter from William P. Rogers, U.S. Secretary of State, to Richard Nixon, U.S. President, 63 AM. J. INT'L L. 803, 806 (1969).

40. Vienna Convention, *supra* note 5, art. 36.

41. *Id*.

42. *Id*. art. 36, ¶ 1b states:

> If [the foreign national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner . . . [t]he said authorities shall inform the person concerned without delay of his rights . . . .

43. *Id*. art. 36, ¶ 1c.

44. *Id*. art. 36, ¶ 2.

45. *Id*. (emphasis added).

46. Aceves, *supra* note 18, at 259.

47. *Id*.

48. LEE, *supra* note 33, at 15.

legal procedures within a foreign criminal justice system.[49] Consular officials may provide or acquire legal assistance, explain criminal proceedings, and provide witnesses or evidence from a foreign national's home state.[50] Such assistance may be particularly important in the penalty phase of capital proceedings, where information about the defendant's background may serve as a mitigating factor to prevent a death sentence.[51] Consular officials may also research and provide information about the social, mental, and health background of a defendant from the home state that court-appointed defense attorneys may not have the time or budget to acquire.[52]

B. Resolving Disputes Arising Under the Vienna Convention: The International Court of Justice

The ICJ is the judicial forum for resolving Vienna Convention disputes.[53] The Vienna Convention itself is silent on how to resolve disputes arising under the treaty. A separate Optional Protocol, however, accompanies the Vienna Convention and allocates jurisdiction to the ICJ to resolve Vienna Convention issues and enforce treaty provisions.[54] The ICJ[55] was created by the United Nations Charter to serve as "the principal judicial organ of the United Nations."[56] The ICJ Statute delineates the court's jurisdiction.[57] The court can only hear cases where the parties before it are states[58] that are party to the ICJ Statute.[59] All U.N. members are automatically party to the ICJ Statute.[60] Furthermore, ICJ jurisdiction only extends to cases as provided for in the U.N. Charter or treaties in force, or where a party has declared its consent to prospective compulsory jurisdiction.[61] Accordingly, the jurisdiction of the ICJ is only by state consent, which may be granted by the

49. Ray, *supra* note 15, at 1736.

50. Quigley, *supra* note 19, at 435.

51. *Id*.

52. *Id*.

53. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, art. I, 596 U.N.T.S. 487 [hereinafter Optional Protocol].

54. *Id*.

55. The ICJ is sometimes referred to as the "World Court." *See* SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS (4th ed. 1989) [hereinafter ROSENNE, THE WORLD COURT].

56. U.N. CHARTER art. 92 [hereinafter U.N. CHARTER].

57. Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993 (June 26, 1945) [hereinafter ICJ Statute].

58. *Id*. art. 34.

59. *Id*. art. 35.

60. U.N. CHARTER, *supra* note 56, art. 93.1.

61. ICJ Statute, *supra* note 57, art. 36.

state on (1) an ad hoc basis, (2) through operation of a jurisdictional grant in a treaty to which a state is party, or (3) by a state's voluntary consent to prospective compulsory jurisdiction.[62] The principle of consent to jurisdiction is significant because states that consent to jurisdiction are more likely to comply with ICJ decisions.[63] The United States ratified the Vienna Convention together with its Optional Protocol in 1969.[64] In 2005, the United States withdrew from the Optional Protocol granting jurisdiction to the ICJ.[65] Because the United States had consented to ICJ jurisdiction over Vienna Convention disputes, however, it is bound by ICJ decisions in cases where it was a party between 1969 and 2005.

The ICJ Statute further provides that judgments of the ICJ are final and are only binding between the parties and with respect to the case before the court.[66] The U.N. Charter reinforces the binding nature of ICJ opinions by requiring that all U.N. members "undertake[] to comply with the decision of the International Court of Justice in any case to which it is a party."[67] The ICJ also has the power to issue "any provisional measures which ought to be taken to preserve the respective rights of either party."[68] Under the powers provided by the ICJ Statute, the ICJ has issued both provisional measures and final judgments regarding obligations under Article 36 of the Vienna Convention.[69]

C. Litigation on the Issue of Consular Notification Before Torres

The extent of the United States's obligations under the Vienna Convention has been a hotly litigated topic in U.S. and international courts since 1998, with conflicting results. The 1998 U.S. Supreme Court decision of *Breard v. Greene*[70] limited the force of ICJ provisional measures within the United States and the legal recourse available to foreign nationals who claim that detaining officials have violated their Vienna Convention rights.[71] On an international level, since 1998, the ICJ has considered three cases involving

62. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 903, cmt. a (1987).

63. ROSENNE, THE WORLD COURT, *supra* note 55, at 44.

64. LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 204 (1966).

65. Kirgis, *Addendum*, *supra* note 32. Professor Kirgis notes that the United States issued its withdrawal on March 7, 2005, but that the effective date of the withdrawal is uncertain. *Id*. If challenged, the withdrawal may not be effective immediately, but after "reasonable notice." *Id*.

66. ICJ Statute, *supra* note 57, arts. 59-60.

67. U.N. CHARTER, *supra* note 56, art 94.1.

68. *Id*. art. 41.1.

69. *See infra* Part II.C.

70. 523 U.S. 371 (1998) (per curiam).

71. *Id*. at 372-73.

U.S. obligations under the Vienna Convention;[72] of those cases, the ICJ has issued two decisions on the merits of a Vienna Convention claim.[73] In the first decision, *LaGrand Case*,[74] the ICJ challenged the *Breard* decision and affirmed a wider set of obligations under the Vienna Convention than those recognized by the U.S. Supreme Court.[75] In *Valdez v. State*,[76] however, the Oklahoma Court of Criminal Appeals considered and rejected the ICJ's holding in *LaGrand* and ruled according to *Breard*.[77] The ICJ revisited U.S. obligations under the Vienna Convention for the second time in *Avena* and clarified its holding in *LaGrand* that the United States must give judicial effect to the treaty and account for Vienna Convention violations.[78] The *Torres* case emerged on the heels of *Avena* and in the context of these conflicting viewpoints.

1. Breard v. Greene

Angel Breard, a citizen of Paraguay, was convicted of attempted rape and murder and was sentenced to death by a Virginia trial court.[79] Both state and federal courts confirmed his conviction.[80] Subsequently, Breard filed a motion for habeas relief in federal court, seeking to overturn his conviction and death penalty sentence. In his motion, Breard argued for the first time that Virginia officials had not informed him during his arrest of his right under the Vienna Convention to notify his consulate.[81] After Breard filed his motion, Paraguay brought suit against Virginia officials in federal district court on the ground that its own rights had been violated by Virginia's failure to notify Breard of his rights under the Vienna Convention.[82] Both the district court and the U.S. Court of Appeals for the Fourth Circuit barred Paraguay's claim on Eleventh Amendment grounds. Subsequently, Paraguay simultaneously appealed to the U.S. Supreme Court and filed suit against the United States in the ICJ, asserting that, by failing to notify Breard of his consular rights, the United

72. *See* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), *available at* http://www.icj-cij.org; LaGrand Case (F.G.R. v. U.S.), 2001 I.C.J. 104 (June 27), *available at* http://www.icj-cij.org; Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. No. 99 (Apr. 9), *available at* http://www.icj-cij.org.

73. *See Avena*, 2004 I.C.J. 128; *LaGrand Case*, 2001 I.C.J. 104.

74. 2001 I.C.J. 104 (June 27), *available at* http://www.icj-cij.org.

75. *Id*.

76. 2002 OK CR 20, 46 P.3d 703.

77. *Id*. ¶ 6, 46 P.3d at 705.

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

79. Breard v. Greene, 523 U.S. 371, 372-73 (1998) (per curiam).

80. *Id*.

81. *Id*.

82. Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1272-73 (E.D. Va. 1996).

States was in breach of the Vienna Convention.[83] Before hearing the case, the ICJ issued a provisional measure requesting that the United States stay Breard's execution pending the ICJ's final decision on the matter.[84] Armed with the ICJ's measure, Paraguay then filed a motion with the U.S. Supreme Court to halt Breard's execution.[85]

The U.S. Supreme Court addressed the three separate claims of Breard and Paraguay in one decision, released just hours before Breard's scheduled execution.[86] The Court affirmed the dismissal of Paraguay's case against Virginia on the grounds that: (1) the Vienna Convention does not "clearly provide" a foreign state with a private right of action in U.S. courts to set aside criminal convictions and sentences, and (2) the Eleventh Amendment prohibits suits by foreign states against a domestic state of the United States.[87]

Regarding the enforcement of the ICJ's provisional measure, the U.S. Supreme Court wrote that "it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."[88] The Court also noted that the Vienna Convention itself adopts this proposition in paragraph 2 of Article 36.[89] On this basis, the Court held that, because Breard had not raised his Vienna Convention claim in state court proceedings, he had not preserved the claim for federal habeas review and U.S. procedural rules barred him from asserting a Vienna Convention claim.[90]

The Court also invoked the "later-in-time" rule to support its assertion that Breard was procedurally precluded from raising his Vienna Convention claim. The Court noted that, while treaties are the "supreme Law of the Land" under the U.S. Constitution,[91] an act of Congress is equal in status to a treaty. Thus, where a statute conflicts with a treaty, under the "later-in-time" doctrine, that which is enacted "subsequent in time" controls.[92] The Court cited the Antiterrorism and Effective Death Penalty Act,[93] enacted in 1996, as

83. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 99 (Apr. 9), *available at* http://www.icj-cij.org.

84. *Id*. ¶ 41 ("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.").

85. *Breard*, 523 U.S. at 374-75.

86. *Id*. at 372-73.

87. *Id*. at 377-78.

88. *Id*. at 375.

89. *Id*.; *see supra* Part II.A.

90. *Breard*, 523 U.S. at 375-76.

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

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

93. 28 U.S.C. §§ 2254(a), (e)(2) (2000).

superceding the Vienna Convention.[94] The Act provides that the factual basis for violations of the Constitution, laws, or treaties of the United States must be asserted in state court proceedings to be heard on habeas review.[95] Accordingly, because Breard had not asserted the violation of his Vienna Convention rights in state court proceedings, the subsequently enacted procedural rule superseded any rights granted by the Vienna Convention and prevented him from asserting those rights before the Court.[96] After Virginia executed Breard, Paraguay withdrew its claim against the United States from the ICJ.[97]

2. LaGrand Case

Three years later, the ICJ heard *LaGrand*,[98] a Vienna Convention claim filed by Germany against the United States. Karl and Walter LaGrand, German nationals, were convicted of first-degree murder and sentenced to death in Arizona.[99] Arizona officials did not inform either of the brothers of his right to consular notification until after conviction, sentencing, and several appeals. Likewise, officials failed to notify Germany of the arrest of the LaGrand brothers.[100] Accordingly, the LaGrands did not raise their Vienna Convention claim at trial or in state court postconviction proceedings.[101] As in *Breard*, when the brothers raised their Vienna Convention claims in federal habeas review, the court found that their claims were procedurally barred because those claims had not been raised previously in state proceedings.[102] Germany pursued diplomatic channels to halt the executions of the LaGrand brothers, but Karl LaGrand was executed nonetheless.[103] The day before Walter LaGrand was scheduled to be executed, Germany filed a claim against the United States in the ICJ alleging a violation of the Vienna Convention and requesting a provisional measure against the United States to stay the execution.[104] The ICJ issued a provisional measure requesting that the United

94. *Breard*, 523 U.S. at 376.
95. *Id*.
96. *Id*.
97. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 99 (Apr. 9), *available at* http://www.icj-cij.org.
98. LaGrand Case (F.G.R. v. U.S.), 2001 I.C.J. 104 (June 27), *available at* http://www.icj-cij.org.
99. *Id*. ¶ 14.
100. *Id*. ¶¶ 15, 19-21.
101. *See id*. ¶¶ 19-21.
102. LaGrand v. Stewart, 170 F.3d 1158, 1161 (9th Cir. 1999).
103. *LaGrand Case*, 2001 I.C.J. at 12, ¶ 26.
104. *Id*. at 12-13, ¶ 30.

States suspend the execution pending the final judgment of the ICJ,[105] but Arizona carried out the execution that same day.[106]

Unlike Paraguay in its case before the ICJ concerning Angel Breard, Germany did not withdraw its claim from the ICJ after Arizona executed the LaGrands.[107] Therefore, *LaGrand* was the first opportunity for the ICJ to rule on the merits of a Vienna Convention claim against the United States. The court issued significant holdings in favor of Vienna Convention claimants. First, in response to the execution of Walter LaGrand despite the ICJ provisional measure, the ICJ announced for the first time that its provisional measures are binding and that the United States had violated the measure.[108] Second, the ICJ found that, by failing to inform the LaGrand brothers of their right to notify their consulate and Germany of the brothers' arrest, the United States had violated Article 36, paragraph 1 of the Vienna Convention.[109]

Germany also challenged the procedural default rule used to prevent the LaGrands from having their claims heard in U.S. federal and state courts.[110] The ICJ held that barring a Vienna Convention claim by invoking the procedural default rule frustrated the purpose of the Vienna Convention and thereby violated paragraph 2 of Article 36.[111] Paragraph 2 indicates that the rights of communication between detainees and their consulate "shall be exercised in conformity with the laws and regulations of the receiving State, *subject to the proviso*, however, that the said laws and regulations *must enable full effect* to be given to the purposes for which the rights accorded . . . are intended."[112] Because Arizona had already executed the LaGrand brothers, the ICJ ordered a future remedy for instances where U.S. officials failed to afford German nationals their Vienna Convention rights and subsequently sentenced them to severe penalties.[113] The ICJ indicated that the United States, "by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth" in the Vienna Convention.[114]

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105. *Id*. at 13, ¶ 32.

106. *Id*. at 13, ¶ 34.

107. *See* Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 99 (Apr. 9), *available at* http://www.icj-cij.org.

108. *LaGrand Case*, 2001 I.C.J. at 28-30, ¶¶ 98-104.

109. *Id*. at 21-22, ¶ 73.

110. *Id*. at 25-26, ¶¶ 79-83.

111. *Id*. ¶ 91 ("[T]he procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended.'" (quoting Vienna Convention, *supra* note 5, art. 36, ¶ 2)).

112. Vienna Convention, *supra* note 5, art. 36, ¶ 2 (emphasis added).

113. *LaGrand Case*, 2001 I.C.J. at 40, ¶ 128(7).

114. *Id*.

3. Valdez v. State

After the ICJ's decision in *LaGrand*, *Valdez v. State*[115] was one of the first cases to come before a state court seeking relief for a Vienna Convention violation.[116] *Valdez* presented the Oklahoma Court of Criminal Appeals with the question of whether the court was required to follow *LaGrand* in its own proceedings.[117] Gerardo Valdez Maltos, a Mexican national, was convicted and sentenced to death in Oklahoma for murder.[118] Oklahoma officials did not inform Valdez of his right to notify his consulate or Mexico of Valdez's detention until after he had exhausted his appeals and was scheduled to be executed.[119] Mexican consular officials assisted Valdez in his clemency hearing before Oklahoma's Pardon and Parole Board, obtaining new evidence from sources in Mexico about his background and medical history, including evidence of severe organic brain damage.[120] Oklahoma's Pardon and Parole Board subsequently recommended that Oklahoma Governor Frank Keating commute Valdez's sentence to life in prison.[121] Governor Keating, however, denied clemency on the ground that the violation of the Vienna Convention did not cause prejudice.[122] Valdez then appealed his death penalty sentence to the Oklahoma Court of Criminal Appeals, arguing that Oklahoma must follow the ICJ's remedy of "review and reconsideration" as articulated in *LaGrand*.[123] Valdez further argued that, even if the court applied Oklahoma's statutory procedural default rule,[124] the court could hear his claim under an exception to that rule because *LaGrand* provided a legal basis for relief that was previously unavailable.[125]

The Oklahoma Court of Criminal Appeals held that, under the strict requirements of Oklahoma's Capital Post-Conviction Procedure Act,[126] Valdez must show that the new legal basis for his claim was previously unavailable.[127] The court found that, because Valdez's legal claim was available at the time of his trial by virtue of the existence of the treaty, he could have advanced his

115. 2002 OK CR 20, 46 P.3d 703.
116. Green, *supra* note 17, at 499.
117. *Valdez*, ¶ 16, 46 P.3d at 707.
118. *Id*. ¶ 1, 46 P.3d at 704.
119. *Id*. ¶ 6, 46 P.3d at 705.
120. *Id*. ¶ 7, 46 P.3d at 706.
121. *Id*. ¶ 9, 46 P.3d at 706.
122. *Id*.
123. *Id*. ¶ 10, 46 P.3d at 706.
124. *See* 22 OKLA. STAT. § 1089 (2001).
125. *Valdez*, ¶ 10, 46 P.3d at 706.
126. 22 OKLA. STAT. § 1089.
127. *Valdez*, ¶ 19, 46 P.3d at 708-09.

claim before the ICJ's *LaGrand* decision.[128] Therefore, the Act barred his Vienna Convention claim.[129] The court also held that, notwithstanding the ICJ's decision, the Supreme Court's *Breard* decision remained controlling over the issue, writing that "[f]or this Court to decide the ICJ's ruling overrules a binding decision of the United States Supreme Court and affords a judicial remedy to an individual for a violation of the Convention would interfere with the nation's foreign affairs and run afoul of the U.S. Constitution."[130] While the court rejected Valdez's Vienna Convention claim, it did provide relief on other grounds. The court waived Oklahoma's procedural default rule based on new factual evidence of Valdez's medical history and remanded the case for resentencing because of ineffective assistance of counsel in obtaining the evidence of Valdez's social, mental, and medical history from Mexico.[131]

4. Avena and Other Mexican Nationals

Just two years after *LaGrand*, the ICJ again addressed the obligations of the United States under the Vienna Convention in *Avena*.[132] In *Avena*, Mexico filed proceedings against the United States in the ICJ on behalf of fifty-four Mexican nationals sentenced to death in nine states, claiming breach of the Vienna Convention's obligation of notification.[133] Mexico also argued that the United States' use of the procedural default rule deferred "review and reconsideration" to clemency hearings,[134] and as a result, denied rights guaranteed under the Vienna Convention by precluding "meaningful and effective review and reconsideration" of Vienna Convention violations as required by *LaGrand*.[135] The ICJ held that the United States was in breach of the Vienna Convention because it had violated its obligation to notify fifty-one[136] of the detained Mexican nationals of their right to consular notification and to inform Mexico of the detentions.[137] Furthermore, by virtue of those breaches, the ICJ held that the United States had violated its obligation to

128. *Id*. ¶ 21, 46 P.3d at 709.

129. *Id*.

130. *Id*. ¶ 23, 46 P.3d at 709.

131. *Id*. ¶¶ 24-28, 46 P.3d at 709-10.

132. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), *available at* http://www.icj-cij.org.

133. *Id*. at 7, ¶ 15.

134. *Id*. at 52, ¶ 135 (arguing that "clemency review is standardless, secretive, and immune from judicial oversight").

135. *Id*. at 14, ¶ 14.

136. Although Mexico named fifty-four Mexican nationals in its suit, the ICJ's decision reached only fifty-one of those nationals. *Id*. at 42-43, ¶ 106.

137. *Id*. at 43, ¶ 106.

allow Mexico to access, communicate with, and provide for the legal representation of its citizens.[138]

As remedy for the breach, the ICJ reaffirmed its directive in *LaGrand* that sentences and convictions be reviewed and reconsidered to account for Vienna Convention violations. The ICJ qualified the *LaGrand* holding, however, that such review and reconsideration by the United States could be done "by means of its own choosing."[139] The ICJ held in *Avena* that the use of the procedural default rule "effectively bar[s]" defendants from having their Article 36 claims heard,[140] and that "it is the judicial process that is suited to this task."[141] The court concluded that clemency review did not provide sufficient review and reconsideration of Vienna Convention claims; therefore, the procedural default rule could not be used to prevent the hearing of Vienna Convention claims in court.[142] Because three of the Mexican nationals named in the suit had exhausted their judicial opportunities for appeal and were procedurally barred from raising their Vienna Convention claims, the court found the United States in breach of the Article 36, paragraph 2 requirement that the laws and regulations of the forum state must give full effect to the rights given in Article 36.[143] Finally, the court extended these holdings beyond the parties before it to "other foreign nationals finding themselves in similar situations in the United States."[144]

III. Torres v. State

A. Procedural History

Osbaldo Torres, a Mexican national, was convicted in Oklahoma of two counts of first-degree murder committed in 1993, for which he received death sentences.[145] Torres's convictions were affirmed in state appeals and federal habeas review.[146] In 1999, Torres raised a claim for breach of his Vienna Convention rights for the first time in federal habeas review.[147] The district

138. *Id*.
139. *See id*. at 53-54, ¶¶ 140-143, 153.
140. *Id*. at 52, ¶ 134.
141. *Id*. at 54, ¶ 140.
142. *Id*. at 54, ¶¶ 141-143.
143. *Id*. at 58, ¶ 152. Cesar Roberto Fierro Reyna, Roberto Moreno Ramos, and Osbaldo Torres Aguilera were the three Mexican nationals who had exhausted their appeals. *Id*.
144. *Id*. at 57, ¶ 151.
145. Torres v. State, 2002 OK CR 35, ¶ 1, 58 P.3d 214, 215.
146. *Id*.
147. Torres v. Mullin, 540 U.S. 1035, 1038 (2003) (Breyer, J., dissenting) (referring to Torres v. Gibson, No. CIV-99-155-R, at 73 (W.D. Okla. Aug. 23, 2000) (unpublished mem. op. and order)).

court rejected Torres's claim based on the procedural default rule articulated in *Breard* because Torres had not previously raised his claim in state proceedings, and the U.S. Court of Appeals for the Tenth Circuit affirmed.[148] The U.S. Supreme Court denied certiorari on November 17, 2003.[149] In his dissent, Justice Breyer stated that he would "defer consideration" of the petition, given the substantiality of Torres's arguments, the lack of briefs from the United States and international experts, the pending *Avena* case before the ICJ, and the international implications of the issues involved.[150] Justice Stevens also issued an opinion regarding the denial of certiorari.[151] He characterized *Breard*'s application of the procedural default rule to Article 36 claims as "not only in direct violation of the Vienna Convention, but . . . manifestly unfair" in that "a foreign national who is presumptively ignorant of his right to notification should not be deemed to have waived his Article 36 protections."[152] Noting the obligations of states under the Supremacy Clause of the U.S. Constitution, Justice Stevens concluded that "[t]he Court is . . . unfaithful to that command when it permits state courts to disregard the Nation's treaty obligations."[153]

Torres was one of the Mexican nationals specifically named by Mexico in the *Avena* case filed at the ICJ. Torres was also named in an ICJ provisional measure released before *Avena* that requested that the United States "take all measures necessary to ensure that [the three Mexican nationals] are not executed pending final judgment on these proceedings."[154] The ICJ noted that this provisional measure was necessary, given that Torres and two other Mexican nationals were at risk of execution within the following weeks or months.[155] Despite the provisional measure, the Oklahoma Court of Criminal Appeals scheduled Torres's execution date for May 18, 2004.[156]

After the ICJ announced its decision in *Avena*, and just six weeks before his scheduled execution, Torres filed a Subsequent Application for Post-Conviction Relief with the Oklahoma Court of Criminal Appeals.[157] In *Avena*, in addition to finding that the United States had violated Torres's Vienna

148. *Id*.

149. *Id*. at 1035.

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

151. *Id*. at 1035 (Stevens, J., op. respecting denial of pet. for writ of cert.).

152. *Id*. at 1036 (Stevens, J., op. respecting denial of pet. for writ of cert.).

153. *Id*. at 1037 (Stevens, J., op. respecting denial of pet. for writ of cert.).

154. Avena and Other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. 128, ¶ 59 (Provisional Measures Order Feb. 5), *available at* http://www.icj-cij/org.

155. *Id*. at 14, ¶ 55.

156. Bravin, *supra* note 28.

157. Torres v. State, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (order granting stay of execution and remanding case for evidentiary hearing).

Convention rights, the ICJ also noted that the United States was in breach of the "review and reconsideration" requirement of Article 36, paragraph 2 with regard to Torres. Therefore, the ICJ ordered the United States "to find an appropriate remedy having the nature of review and reconsideration according to the criteria indicated."[158] These criteria precluded resort to the clemency process alone and required judicial review to guarantee "that full weight is given to the violation of the rights set forth in the Vienna Convention."[159]

In the context of the conflicting directives from *Breard*, *LaGrand*, *Valdez*, and *Avena* regarding the application of the procedural default rule to Article 36 claims, the Oklahoma Court of Criminal Appeals faced several significant issues. First, the court had to determine whether, in light of *Avena*, the substantive rights granted by the Vienna Convention trumped domestic procedural rules or whether procedure superseded Vienna Convention rights as the court had previously held in *Valdez*.[160] The court also had to determine whether the ICJ's decisions were binding on Oklahoma courts, whether the Vienna Convention granted an individual right to enforce Vienna Convention obligations, and whether any remedy was available for Vienna Convention violations.

B. The Torres *Order*

The Oklahoma Court of Criminal Appeals responded to Torres's request for relief just five days before his scheduled execution.[161] The court issued an order that stayed Torres's execution indefinitely and remanded his case for an evidentiary hearing to determine whether Torres was prejudiced by the State's violation of his Vienna Convention rights and ineffective assistance of counsel.[162] On the same day, Oklahoma Governor Brad Henry also granted clemency to Torres and commuted his sentence to life in prison without the possibility of parole, noting the violation of Torres's Vienna Convention rights and the binding nature of the ICJ's *Avena* decision.[163] Governor Henry further cited the role that the U.S. State Department had played in urging him to give "careful consideration" to the treaty.[164] He added that, despite the decision by the Oklahoma Court of Criminal Appeals, he "felt it important to announce the decision that [he] had made upon a careful and thorough review

158. *Avena*, 2004 I.C.J. 128 at 58, ¶ 152.
159. *Id*. at 53, ¶ 139.
160. Valdez v. State, 2002 OK CR 20, ¶ 21, 46 P.3d 703, 709.
161. *Torres*, No. PCD-04-442.
162. *Id*. at 2.
163. Gov. Henry Press Release, *supra* note 30.
164. *Id*.

of the entire case."[165] Governor Henry's decision followed a three-to-two recommendation of clemency by the Oklahoma Pardon and Parole Board, which had also considered the Vienna Convention breach in its deliberations.[166]

C. Discussion of the Torres *Order*

The order from the Oklahoma Court of Criminal Appeals to stay Torres's execution and remand his case for a hearing is a sparse one. The only reference to Torres's Vienna Convention claim is in the directive that the case be remanded for an evidentiary hearing on "(a) whether Torres was prejudiced by the State's violation of his Vienna Convention rights in failing to inform Torres, after he was detained, that he had the right to contact the Mexican consulate; and (b) ineffective assistance of counsel."[167]

Judge Chapel's special concurrence to the order addresses some of the issues involving the application of international law in Oklahoma that the order did not address.[168] First, Judge Chapel distinguished the situation presented in *Torres* from that presented two years earlier in *Valdez*, where the court barred the Vienna Convention claim on procedural grounds.[169] Judge Chapel noted that Valdez, a Mexican national, based his Vienna Convention claim on the ICJ's *LaGrand* decision, which involved Germany and German nationals rather than Mexico or Mexican nationals.[170] Consequently, Valdez could not invoke *LaGrand* as legal authority for his case. In contrast, because *Avena* specifically named Torres and his government was party to the ICJ claim, Torres could invoke *Avena*.[171] This result is arguably consistent with Article 59 of the ICJ Statute, which indicates that decisions of the ICJ are binding only between those parties and the case before it.[172]

Judge Chapel found that "[t]here is no question that this Court is bound by the Vienna Convention and Optional Protocol."[173] Judge Chapel traced the

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165. *Id*.

166. *Id*.; Julie E. Bisbie, *Okla. Panel Backs Clemency for Mexican Inmate – State Feels Heat of Court Ruling*, COM. APPEAL, May 8, 2004.

167. *Torres*, No. PCD-04-442, at 2.

168. *Id*. at 1 (Chapel, J., specially concurring).

169. *Id*. at 1 n.1 (Chapel, J., specially concurring).

170. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27), *available at* http://www.icj-cij.org.

171. *Torres*, No. PCD-04-442, at 1 n.1 (Chapel, J., specially concurring) ("In *Valdez*, the petitioner attempted to rely on an International Court of Justice case to which neither he nor his complaining government were party, and which did not specifically discuss his Vienna Convention claims.").

172. ICJ Statute, *supra* note 57, art. 59.

173. *Torres,* No. PCD-04-442, at 3 (Chapel, J., specially concurring).

ICJ's authority in U.S. domestic law through the Supremacy Clause of the U.S. Constitution.[174] He reasoned that the Vienna Convention applied to Oklahoma because, as the federal government has the authority to make a treaty, "[e]very state or federal court . . . has agreed that it is binding on all jurisdictions within the United States."[175] Accordingly, the issue of whether the Oklahoma Court of Criminal Appeals was obliged to follow the ICJ's decision in *Avena* was "not [the court's] to determine."[176] Judge Chapel concluded that, because the court was bound by the Vienna Convention and Optional Protocol, the court must give full faith and credit to the ICJ's decision in *Avena* and provide review and reconsideration.[177]

Judge Lumpkin's dissent, in which Judge Lile joined, is in stark contrast to Judge Chapel's concurrence. Judge Lumpkin found that *Avena* was not binding on the Oklahoma Court of Criminal Appeals.[178] Consequently, as in *Valdez*, Judge Lumpkin would have required Torres's claims to meet the requirements of Oklahoma's Post-Conviction Procedure Act, which specifies that to be heard on appeal, claims must be grounded in facts or legal claims that could not have been previously presented because they were unavailable.[179] Presumably, because Judge Lumpkin considered the ICJ opinion not binding on the Oklahoma Court of Criminal Appeals, the *Avena* decision did not operate as a new legal basis for remedy according to Oklahoma's Post-Conviction Procedure Act.[180] Accordingly, Judge Lumpkin found Torres's Vienna Convention claim waived because the legal basis for the claim was available since 1993 and Torres had never previously raised the claim.[181] He would have also barred the appeal on the basis of ineffective assistance of counsel because the claim was raised and adjudicated in an earlier direct appeal and in federal court habeas review.[182]

Lastly, Judge Lumpkin reasoned that consular notification assures that defendants receive the benefit of due process. He concluded that, at most,

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

175. *Torres*, No. PCD-04-442, at 3-4 (Chapel, J., specially concurring).

176. *Id*. at 5 (Chapel, J., specially concurring).

177. *Id*. Judge Chapel notes that while Oklahoma must give full faith and credit to the *Avena* decision, the ICJ does not have jurisdiction over the Oklahoma Court of Criminal Appeals. *Id*.

178. *Id*. at 2 (Lumpkin, J., dissenting).

179. *Id*. at 5 (Lumpkin, J., dissenting) (referring to 22 OKLA. STAT. § 1089(D)(8)-(9) (2001)).

180. 22 OKLA. STAT. § 1089(D)(9). The Act indicates that decisions from the following sources will be considered as authority to create a newly available legal claim: the U.S. Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of Oklahoma. *Id*.

181. *Torres*, No. PCD-04-442, at 3 (Lumpkin, J., dissenting).

182. *Id*. at 1 (Lumpkin, J., dissenting).

Avena asked the court to review Torres's case to ensure that he received the benefit of being advised of consular rights, which he concluded was the benefit of legal representation.[183] Judge Lumpkin found no violation of due process where competent counsel represented Torres and he was therefore afforded all the rights that are guaranteed to U.S. citizens.[184]

IV. Analysis of Issues Raised by Torres[185]

Despite the lack of explanation within the actual order to stay Torres's execution, the court's decision to follow *Avena* in providing "review and reconsideration," rather than its own declaration in *Valdez* that it was obliged to follow *Breard's* procedural default rule, implicitly resolved three major and unsettled issues in Vienna Convention litigation in Torres's favor. First, the court's decision indicates that the ICJ's mandate of "review and reconsideration" in *Avena*, without recourse to the procedural default rule, was authoritative. Second, the court's decision rests on the presumption that the Vienna Convention is a self-executing treaty and — of great significance because the U.S. Supreme Court has not yet articulated it — that it grants individually enforceable rights. Third, in remanding the case for an evidentiary hearing, the court concluded that a remedy is available for Vienna Convention violations. These conclusions are significant and distinguish the Oklahoma Court of Criminal Appeals from other U.S. courts concerning the incorporation of international law — specifically the Vienna Convention — into the domestic setting.

A. The Authority of ICJ Decisions Within U.S. State Courts

In *Torres*, the court remanded the case for an evidentiary hearing on whether Torres was prejudiced by Oklahoma's violation of his Vienna Convention rights. In doing so, the court did not resort to the procedural default rule as it had in *Valdez*. Under Oklahoma's postconviction procedural rules, all grounds for relief that are available to a defendant and not raised in previous applications are deemed waived, except in certain limited

183. *Id*. at 3-4 (Lumpkin, J., dissenting).

184. *Id*. at 4 (Lumpkin, J., dissenting).

185. The analysis in Part IV examines the legal significance of the *Torres* decision in the context of the legal environment at the time the decision was announced, without regard to developments in the United States' treatment of the Vienna Convention occurring in and after February 2005. Given these developments, however, the analysis also indicates where and how the legal issues present in *Torres* will have continued relevance to future Vienna Convention disputes. *See infra* Part V for a detailed discussion of developments in the Vienna Convention legal environment occurring after *Torres*.

circumstances.[186] The procedural default rule is waivable only in instances where, for example, the legal basis for the claim was previously unavailable because it was not yet "recognized by or could not have been reasonably formulated from" a decision of the U.S. Supreme Court, a U.S. court of appeals, or an Oklahoma court of appeals.[187] In remanding the case, the court therefore implicitly concluded that the ICJ's *Avena* decision rose to the level of a newly available "legal basis" that was authoritative to the degree of a decision announced by the U.S. Supreme Court, a U.S. court of appeals, or an Oklahoma court of appeals.[188] Alternatively, the court may have determined, according to *Avena*, that Oklahoma's procedural rules could not be applied. In either case, the *Torres* result suggests that the Oklahoma Court of Criminal Appeals found the ICJ's opinion to be authoritative in Oklahoma.

The *Torres* result emerged in a legal context where the authority of the ICJ over judicial proceedings was controversial and unsettled, particularly in state courts, given the U.S. federalist system.[189] The conflict between the concurring and dissenting opinions in *Torres* about the authority of ICJ opinions in U.S. domestic courts reflects this larger debate within the legal community. One element of the debate is whether state courts should immediately follow ICJ Vienna Convention decisions that appear to conflict with the earlier U.S. Supreme Court *Breard* decision or wait until the Supreme Court changes its ruling.[190] The Oklahoma Court of Criminal Appeals had previously considered this question in the 2002 *Valdez* case,[191] where it held that the ICJ's ruling in *LaGrand* against use of the procedural default rule did not overrule the U.S. Supreme Court's *Breard* ruling "until such time as the supreme arbiter of the law of the United States changes its ruling."[192] In light of the result in *Torres*, the Oklahoma Court of Criminal Appeals now apparently considers itself able to waive the procedural default rule without a change in U.S. Supreme Court jurisprudence.

The conflict over whether states are bound by ICJ measures and decisions involves two other elements: (1) whether state officials have discretion in applying ICJ decisions and (2) whether the federal government has the authority to compel states to follow international treaty obligations in state

186. 22 OKLA. STAT. § 1089(D)(2) (2001).
187. *Id*. § 1089(D)(9)(a).
188. *Id*. § 1089(D)(9).
189. *See* Curtis A. Bradley, Breard*, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999).
190. Brown, *supra* note 20, at 315.
191. Valdez v. State, 2002 OK CR 20, ¶ 18, 46 P.3d 703, 708.
192. *Id*. ¶ 22, 46 P.3d at 709.

criminal proceedings.[193] In *Torres*, the Oklahoma judiciary, governor, and pardon and parole board all appear to have taken the ICJ's decision into account and followed it as though it were authoritative. This contrasts with other state officials' responses in Vienna Convention disputes. For example, Texas officials have explicitly denied any ICJ authority over Texas's judicial process.[194] In response to the ICJ's February 2003 provisional measure ordering stays of execution for two Texas prisoners of Mexican nationality, the governor's office issued a statement that "[a]ccording to [the office of the governor's] reading of the law and the treaty, there is no authority for the federal government or this World Court to prohibit Texas from exercising the laws passed by our legislature."[195]

Before *Torres*, the United States also argued that the federal government cannot dictate what effect states must give to ICJ mandates in Vienna Convention litigation.[196] For example, in briefs for the *Breard* litigation before the U.S. Supreme Court and the ICJ, the United States asserted that, "in attempting to compel state compliance with international obligations, '[t]he measures at [the United States's] disposal' under our Constitution may in some instances include only persuasion."[197] Under this position, the United States left the decision to follow the ICJ's provisional measure in *Breard* to the discretion of the Virginia governor, who declined to do so.[198]

The assertion that states may exercise discretion in following ICJ orders has been both criticized and defended by legal scholars. The result in *Breard* prompted much scholarly analysis. One commentator opines that the domestic framework arising out of the *Breard* and *LaGrand* litigation "inexorably leads to the untenable proposition that U.S. states are free to violate federal treaty obligations with impunity."[199] Pointing to the deference given to the state of

193. *See* Carlos Manuel Vázquez, Breard *and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683 (1998). This latter question takes on new significance since President Bush's memorandum to the U.S. Attorney General indicating that states will carry out *Avena*'s mandate in future proceedings involving the fifty-one Mexican nationals named in *Avena*. *See* Memorandum for the Attorney General, *supra* note 31.

194. C. Bryson Hull, *Defiant Texas Will Ignore World Court's Death-Penalty Ruling*, SAN DIEGO UNION-TRIB., Feb. 7, 2003, at A18.

195. *Id*. (quoting Gene Acuna, spokesman for Texas Governor Rick Perry).

196. *Too Sovereign but Not Sovereign Enough*, *supra* note 23, at 2655.

197. *Id*. (quoting Brief of the United States as Amicus Curiae, Republic of Paraguay v. Gilmore and Breard v. Green, 523 U.S. 371 (1998) (Nos. 97-1390, 97-8214), at 51 (internally quoting Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 258, ¶ 41 (Provisional Measures Order of Apr. 9, 1998))).

198. Vázquez, *supra* note 193, at 684.

199. *Too Sovereign but Not Sovereign Enough*, *supra* note 23, at 2655.

Virginia in *Breard*,[200] this commentator characterizes the legal landscape concerning Vienna Convention violations as one where domestic states are "too sovereign" to be held accountable by the federal government for Vienna Convention violations, but "not sovereign enough" to be held accountable in the international context.[201]

Other scholars are also critical of U.S. federal and state positions regarding the ICJ's provisional measure staying Angel Breard's execution. For example, Professor Henkin argues that under Article 41 of the ICJ Statute and the U.S. Constitution, the order had the same status as a self-executing U.S. treaty obligation and is therefore "law for all who exercise authority in, or on behalf of, the United States."[202] Similarly, Professor Vázquez argues that, even if the ICJ provisional measure concerning Angel Breard was not binding, as was not clear until the ICJ declared so in *LaGrand*, the Constitution does not leave the decision of whether to comply with ICJ orders to state governors.[203] At a minimum, in the absence of a federal court ruling compelling state compliance, Professor Vázquez argues that the President can issue an executive order of compliance by virtue of the authority delegated to him by treaties and the foreign affairs power.[204] Professor Quigley also argues that principles of federalism do not require the U.S. federal government to defer to state governors in execution matters; to the contrary, he suggests that the U.S. attorney general may sue state governments to enforce compliance with U.S. treaty obligations.[205]

In contrast, Professor Bradley writes that these arguments depart from the traditional "dualist" approach to international law in the United States[206] and reflect a presumption on the part of international legal scholars that international law and ICJ decisions should be automatically incorporated into, and take precedence over, domestic law.[207] Furthermore, Professor Bradley notes that these arguments elevate foreign affairs above countervailing

200. In that case, the U.S. State Department asserted that it only had the power of persuasion over the state governor and the U.S. Supreme Court found the state immune from suit by Paraguay. *Id*.

201. *Id*. at 2664.

202. Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT'L L. 679, 680 (1998).

203. Vázquez, *supra* note 193, at 690-91.

204. *Id*. at 691.

205. Quigley, *supra* note 19, at 440.

206. Bradley, *supra* note 189, at 530-31. "[T]he dualist view is that international and domestic law are distinct, each nation determines for itself when and to what extent international law is incorporated into its legal system, and the status of international law in the domestic system is determined by domestic law." *Id*. at 530.

207. *Id*. at 561.

domestic considerations such as a U.S. state's interest in controlling its criminal justice system, the court system's interest in the timely presentation of claims, and the danger of ceding judicial authority over domestic matters to a judiciary that does not necessarily represent U.S. interests.[208] Professor Bradley suggests that, in light of the sharp divergence of opinion generated by the *Breard* litigation between scholars and federal and state officials, scholars have "unrealistic expectations" in assuming that U.S. courts should treat an ICJ order as self-executing federal law.[209]

Given the Court of Criminal Appeals's decision in *Torres*, the court appears to have concluded that the ICJ's decision in *Avena* has authority in state court proceedings. Although President Bush's memorandum indicating that the states will "give effect" to *Avena* may decrease the level of judicial discussion on this front, a new set of federalism issues seem likely to arise in future Vienna Convention proceedings. The clash in Professors Henkin, Quigley, Vázquez, and Bradley's views will likely be explored by legal scholars and played out in state and federal courts considering the validity of President Bush's memorandum indicating that states will comply with the ICJ's *Avena* decision.[210]

B. Self-Execution and Individual Rights Under the Vienna Convention

A second issue that the Oklahoma Court of Criminal Appeals confronted in considering Torres's claim was the extent to which the Vienna Convention, as an international treaty, operates on a domestic level to give domestic officials duties and foreign detainees the right to enforce those duties in U.S. courts. In granting Torres relief under his Vienna Convention claim, the court found that the Vienna Convention operated domestically both to give Oklahoma state officials a duty to carry out Vienna Convention obligations and to provide Torres with an individual right to enforce those duties through a legally recognized claim.

International treaties to which the United States is party are incorporated into domestic law as "the supreme Law of the Land" and supersede conflicting state law under the Supremacy Clause of the U.S. Constitution.[211] International treaties the United States enters into may even supersede state

208. *Id*.

209. *Id*. at 565-66.

210. Frederic L. Kirgis, *ASIL Insight: President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights* (Mar. 2005) *at* http://www.asil.org/insights/2005/03/insights050309.html [hereinafter Kirgis, *ASIL Insight*] (noting that there may be a separation-of-powers issue regarding whether the President has the authority to determine the legal effect of ICJ judgments on domestic proceedings).

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

authority and allow Congress to legislate over matters traditionally reserved to the states under the Tenth Amendment.[212] Under the U.S. "dualist" approach to international law, however, while the United States is bound on an international level to other party states by treaty obligations, the binding nature of a treaty on a domestic level is determined by *domestic* law.[213] Domestic courts analyze the domestic effect of treaties under the principle of self-execution.[214] Unless a treaty is self-executing, requiring no implementing legislation by Congress, or unless Congress enacts implementing legislation, an international treaty does not create binding obligations on a domestic level and is not enforceable in U.S. domestic courts.[215] Accordingly, if no implementing legislation exists, treaties become the "supreme Law of the Land" only when they are self-executing. The United States has enacted no implementing legislation directly incorporating the Vienna Convention. Therefore, whether the Vienna Convention creates duties that are enforceable in U.S. courts turns on whether it is a self-executing treaty.

The U.S. Court of Appeals for the Fifth Circuit described the issue of self-execution as "one of the most confounding in treaty law."[216] Courts have struggled to determine whether a treaty is self-executing or requires implementing legislation in order to have domestic effect.[217] Amplifying this confusion, the principle of self-execution has two component parts that courts often conflate, leading to the erroneous conclusion that all treaties deemed non-self-executing have no domestic application whatsoever.[218] In analyzing the question of self-execution, it is important to separate whether a treaty (1) operates domestically as law, thus giving individuals a duty to perform or abstain from certain conduct, and (2) gives an individual a right, or standing, to judicially enforce those duties if they are breached.[219] Professor Sloss has conveniently distinguished these two concepts as "primary law" and "remedial law," respectively.[220] Judicial decisions refer to the latter concept as

212. Missouri v. Holland, 252 U.S. 416 (1920).

213. Bradley, *supra* note 189, at 530; *see supra* note 206 for a definition of the dualist view.

214. Foster v. Neilson, 27 U.S. 253 (1829).

215. Aceves, *supra* note 18, at 291; Bradley, *supra* note 189, at 539-40.

216. United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979).

217. *Id*.; *see, e.g.*, Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995) (discussing four distinct doctrines used by courts to determine self-execution, and noting that confusion results from a tendency to view those separate doctrines as only one).

218. David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 10-11 (2002).

219. *Id*.

220. *Id*. In European Union law these two distinct concepts are phrased, respectively, as "direct applicability" and "direct effect." J.A. Winter, *Direct Applicability and Direct Effect:*

"individual rights" or "individually enforceable rights."[221] Because the term "self-executing" as used in U.S. jurisprudence is vague, sometimes referring to either proposition, self-execution has been entirely negated on the basis of either factor. While the conclusion that a treaty does not grant an individual right of enforcement if it does not create a legal duty is logical, the reverse conclusion is erroneous.[222] For example, where a court finds that no remedy exists for a treaty violation, the court may declare the treaty non-self-executing and thus negate the principle that the treaty imposes duties.[223] Those legal duties, however, may still exist regardless of whether they carry a judicial remedy.[224] Consequently, these two concepts must be "unpacked" in analyzing the Vienna Convention.

Domestic judicial interpretation resolves the question of self-execution under an intent analysis.[225] Because U.S. courts consider international treaties to be contracts between nations, intent is determined under a process akin to that used in contract interpretation.[226] To determine intent, U.S. courts analyze the express language of the treaty and other factors, such as "the way in which the treaty obligations are phrased, the purposes and subject matter of the treaty, and the treaty's drafting history."[227] Additionally, courts may consider statements made by the President, the Senate, and Congress when considering the treaty for ratification.[228] Under an intent analysis, legal scholars generally conclude that the Vienna convention is a self-executing treaty.[229] One key piece of evidence supporting such a conclusion is that, in hearings before the Senate Committee on Foreign Relations, J. Edward Lyerly, State Department Deputy Legal Adviser for the Nixon Administration, said that the treaty was "'entirely self-executive . . . and does not require any implementing or

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Two Distinct and Different Concepts in Community Law, 9 COMMON MKT. L. REV. 425, 425-26 (1972).

221. *See infra* Part IV.B.

222. Sloss, *supra* note 218, at 11.

223. *Id*.

224. *Id*. at 10.

225. Aceves, *supra* note 18, at 292; Bradley, *supra* note 189, at 540-41. Bradley notes that according to section 111, comment h of the *Restatement (Third) of the Foreign Relations Law of the United States*, it is only the intent of the United States, rather than that of all parties, that is considered, but that courts usually phrase this one-party analysis in terms of the parties' intent. Bradley, *supra* note 189, at 540 n.57. For a critique of the use of intent analysis in the domestic determination of whether treaties are self-executing, see Sloss, *supra* note 218, at 6.

226. Bradley, *supra* note 189, at 540.

227. *Id*. at 541. *But see* Sloss, *supra* note 218, at 6; Vázquez, *supra* note 217, at 695 (describing four distinct intent doctrines under which such factors may be analyzed).

228. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987).

229. Aceves, *supra* note 18, at 268.

complementing legislation.'"[230] Lyerly further stated that the Vienna Convention would govern "'[t]o the extent there are conflicts in Federal legislation or State laws.'"[231] These statements, however, while supporting the general proposition that the Vienna Convention creates a domestic legal duty, do not indicate whether the Vienna Convention also grants an individual right to enforce those obligations.

To date, the U.S. judiciary has given no definitive answer on whether the Vienna Convention grants individual rights. The U.S. Supreme Court, in deciding *Breard*, wrote that the Vienna Convention "arguably confers on an individual the right to consular assistance,"[232] but avoided deciding the case on this issue and instead dismissed the case as procedurally barred under the "later-in-time" doctrine.[233] Even the Supreme Court's most recent discussion of the Vienna Convention in *Medellín v. Dretke*,[234] where it dismissed as improvidently granted a writ granted to a Mexican national named in *Avena*, did not resolve the question of whether the Vienna Convention grants individual rights; the Court simply noted it as one of many hurdles that the claimant would have to overcome to obtain state or federal habeas relief.[235] Furthermore, President Bush's memorandum ordering states to comply with *Avena* does not render the individual rights question moot. While states must now presumably provide "review and reconsideration" as mandated by *Avena*, the memorandum does not conclusively determine that the Vienna Convention grants individual rights, and state courts could still potentially deny relief on this ground.[236]

Without clarification from the U.S. Supreme Court, lower courts diverge on whether the Vienna Convention grants individual rights. Some courts dismiss claims on these grounds, claiming there is no private right of action,[237] while others expressly affirm the right.[238] Still others, following the U.S.

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230. *Id*. (quoting S. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. 2 & 5 (appendix) (statement by State Department Deputy Legal Adviser J. Edward Lyerly) (1969)).

231. *Id*.; *see, e.g.*, Aceves, *supra* note 18, at 267-69 (outlining the history of U.S. Vienna Convention ratification proceedings).

232. Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam).

233. *Id*. at 376-77.

234. 125 S. Ct. 2088 (2005).

235. *Id*. at 2091.

236. *See* Kirgis, *ASIL Insight*, *supra* note 210.

237. *See* United States v. De La Pava, 268, F.3d 157, 164 (2d Cir. 2001); United States v. Li, 206 F.3d 56, 62-63 (1st Cir. 2000); Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1274 (E.D. Va. 1996); State v. Navarro, 659 N.W.2d 487, 491 (Wis. Ct. App. 2003); Kasi v. Commonwealth, 508 S.E.2d 57, 64 (Va. 1998).

238. *See* Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring); United States *ex rel*. Madej v. Schomig, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002); Standt v. City of

Supreme Court's lead in *Breard*, presume standing and hear the claim, but dispose of it on other grounds, such as lack of prejudice or lack of remedy, without articulating whether the Vienna Convention grants individual rights.[239]

Under an intent analysis, U.S. State Department opinions and actions provide the basis to either support or reject the proposition that the Vienna Convention grants individual rights. When adopting a defensive posture before the ICJ, the Inter-American Court of Human Rights, and U.S. courts, the U.S. State Department has repeatedly claimed that the Vienna Convention does not create an individual right of action.[240] This statement has been influential for some courts considering the issue.[241] The State Department's defensive stance, however, clearly contradicts its nonlitigation position, where the State Department has worked with local officials to promote awareness of Vienna Convention obligations and to ensure compliance.[242] The State Department issues periodic notices advising state officials of obligations under the Vienna Convention and, since the *Breard* decision, has begun to conduct briefings with state officials and has produced pocket-sized reference cards for police officers.[243] The apparent conflict between the State Department's defensive position and these pro-active efforts may simply be attributed to the fact that the State Department considers the Vienna Convention to create obligations, but not to create an individual right to enforce those obligations.

Beyond these efforts to achieve prospective compliance on the part of state officials, however, the State Department has contacted state governors to request "review and reconsideration" of death penalty sentences in light of Vienna Convention breaches.[244] Furthermore, when the United States invoked

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New York, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001); United States v. Chaparro-Alcantara, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999).

239. *See* United States v. Minjares-Alvarez, 264 F.3d 980, 986 (10th Cir. 2001); United States v. Page, 232 F.3d 536, 540 (6th Cir. 2000); United States v. Chaparro-Alcantara, 226 F.3d 616, 621 (7th Cir. 2000); Valdez v. State, 2002 OK CR 20, ¶¶ 23-24, 46 P.3d 703, 709-10.

240. United States v. Li, 206 F.3d 56, 64 (1st Cir. 2000) (noting that the U.S. State Department denied an individual right of action in response to certified questions from that court, in testimony before the ICJ in *Paraguay v. United States*, and in a written advisory opinion to the Inter-American Court of Human Rights).

241. *Id*. at 63; State v. Navarro, 659 N.W.2d 487, 492 (Wis. Ct. App. 2003).

242. Ray, *supra* note 15, at 1738.

243. Aceves, *supra* note 18, at 323-24.

244. *See* Gov. Henry Press Release, *supra* note 30 (indicating that the U.S. State Department had asked the Oklahoma governor to give "careful consideration" to the fact that the U.S. is party to the Vienna Convention when considering Torres's request for clemency); Sean D. Murphy, ed., *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 461, 462 (2002) (reprinting letter to Oklahoma Governor Frank Keating from William H. Taft IV, Legal Adviser for the U.S. Department of State, requesting Governor Keating to "specially consider" whether the violation of Gerardo Valdez's Vienna Convention

the Vienna Convention to vindicate its own rights before the ICJ against Iran during the Tehran Hostage Crisis, the United States argued that the Vienna Convention provided individual rights.[245] These State Department efforts to redress Vienna Convention violations directly support the notion that the Vienna Convention grants individual rights.

On a global level, international courts have held that the Vienna Convention grants individual rights. In *LaGrand*, the ICJ held that Article 36, paragraph 1 creates individual rights.[246] One U.S. federal court found this interpretation to be binding because the United States had voluntarily consented to ICJ jurisdiction over the interpretation of the Vienna Convention.[247] The Inter-American Court of Human Rights issued a nonbinding advisory opinion that Article 36 confers individual legal rights and furthermore, that denial of those rights was a denial of due process guarantees.[248] That court discerned an individual right from the plain text of the Vienna Convention, as well as from the U.S. position on the Vienna Convention before the ICJ in its case against Iran.[249]

Because U.S. cases before *Torres* have generally not provided relief for breaches of the Vienna Convention, U.S. courts have easily avoided resolving the question of individual standing. Given that the court in *Torres* provided relief by staying Torres's execution, however, the court must have considered the Vienna Convention to both create legal obligations and grant an individual right to enforce those obligations. Because the reasoning for this conclusion is not articulated within the order, the court's conclusion raises interesting questions about what sources — domestic or international — the court found

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rights caused prejudice); *see also* Brown, *supra* note 20, at 313-14 (noting that the U.S. State Department routinely asks state officials to consider Vienna Convention violations during clemency proceedings).

245. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 64 (May 24), *available at* http://www.icj-cij.org.

246. LaGrand Case (F.G.R. v. U.S.), 2001 I.C.J. 104, ¶ 77 (June 27), *available at* http://www.icj-cij.org.

247. United States *ex rel*. Madej v. Schomig, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002) (writing "the I.C.J. ruling conclusively determines that Article 36 of the Vienna Convention creates individually enforceable rights, resolving the question most American courts (including the Seventh Circuit) have left open").

248. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion No. OC-16/99, Inter-Am. C. H. R., Ser. A. No. 16 (1999), *available at* http://www.oas.org; *see also* Michael Fleishman, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. L. 359, 391-93 (2003) (providing an overview of the Advisory Opinion and noting its nonbinding nature over the United States).

249. Fleishman, *supra* note 248, at 391.

to be authoritative concerning the principle that the Vienna Convention provides individual rights.

C. Remedy Within U.S. Judicial Proceedings for Vienna Convention Violations

The availability of a remedy for Vienna Convention violations clearly relates to the principle of individual rights under the Vienna Convention. Another way of phrasing the individual rights question is whether a judicial remedy exists for the breach of a legal duty. Analyzing the ideas of individual rights and availability of remedy separately is useful, however, because at least one court has held that even if the Vienna Convention grants individual rights, it provides no remedy.[250] Furthermore, because the procedural default rule and court rulings that the Vienna Convention provides no individual rights have precluded many Vienna Convention claims, the appropriate remedy for a Vienna Convention violation is a question largely unexplored by the courts. In light of President Bush's recent memorandum that state courts will give effect to *Avena*'s mandate,[251] more courts may have reason to consider whether a remedy is available for Vienna Convention violations and, if so, what that remedy might be.

In *Torres*, the Oklahoma Court of Criminal Appeals identified a remedy for a Vienna Convention violation. On a general level, the court found that the appropriate remedy was to stay Torres's execution and remand the case to determine whether the violation prejudiced his trial court proceedings.[252] On a more specific level, however, what remedy would be available if prejudice was determined remains uncertain. Because Oklahoma Governor Brad Henry granted clemency to Torres on the issue of execution and commuted Torres's sentence to life in prison, this hearing is now presumably unnecessary and a judicial remedy in Oklahoma for Vienna Convention violations remains unknown.[253] Nevertheless, the court's order indicating a general remedy, which contemplates that a specific remedy would also be available, is significant within the landscape of domestic Vienna Convention disputes.

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250. United States v. Ortiz, 315 F.3d 873, 887 (8th Cir. 2002).

251. Memorandum for the Attorney General, *supra* note 31.

252. Torres v. State, No. PCD-04-442, at 2 (Okla. Crim. App. May 13, 2004) (order granting stay of execution and remanding case for evidentiary hearing).

253. Beyond challenging the execution sentence, it is possible that Torres could pursue a hearing on the prejudice caused by the violation of his Vienna Convention rights for the purpose of questioning his conviction or the commutation of his sentence to life in prison. Interview with Randall T. Coyne, Professor, University of Oklahoma College of Law, in Norman, Okla. (Nov. 2004).

The conclusion in *Torres* is arguably consistent with *Breard*, where the Supreme Court suggested in dictum that a determination of prejudice was a necessary predicate to providing a remedy for a Vienna Convention violation.[254] In *Breard*, the Court noted that, "[e]ven were Breard's Vienna Convention claim properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial."[255] The result in *Torres* is also consistent with *Avena*, where the ICJ required U.S. courts to provide "review and reconsideration" that gives "full weight" to the violation.[256] While barring the use of the procedural default rule, *Avena* deferred to U.S. courts the choice of "an appropriate remedy having the nature of review and reconsideration."[257] The ICJ further explained the obligation of review and reconsideration as "ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused *actual prejudice* to the defendant in the process of administration of criminal justice."[258]

Even where a court follows the *Breard* dictum and *Avena's* mandate of "review and reconsideration" and makes a determination of prejudice, the appropriate remedy in the United States for a Vienna Convention violation remains unclear.[259] Some scholars argue that customary international law provides the appropriate remedy for a Vienna Convention violation and that under customary international law, the appropriate remedy for a treaty violation is to restore the *status quo ante*.[260] Under this approach, the appropriate remedy for a Vienna Convention violation in criminal cases would be to suppress evidence or grant a new trial.[261] In *Avena*, Mexico requested the ICJ to restore the *status quo ante* by annulling the convictions and sentences of the Mexican nationals named in the suit and declaring any evidence obtained in violation of the Vienna Convention excluded from any future criminal proceedings.[262] The ICJ expressly refused both proposals[263] and instead opted for the modified "review and reconsideration"

254. Breard v. Greene, 523 U.S. 371, 377 (1998) (per curiam).

255. *Id*.

256. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128, ¶ 139 (Mar. 31), *available at* http://www.icj-cij.org.

257. *Id*. ¶ 152.

258. *Id*. ¶ 121 (emphasis added).

259. *Id*. ¶ 152.

260. Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 610 (1997).

261. *Id*.

262. *Avena*, 2004 I.C.J. 128, ¶ 121.

263. *Id*. ¶¶ 123-130.

requirement.[264] While the ICJ's directive contemplates that a remedy would be provided,[265] Professor Aceves notes that this is essentially a remedy of process rather than outcome.[266] To meet the ICJ's requirement, a U.S. court must consider the Vienna Convention violation but need not come to any particular conclusion as to the effect of the violation.[267] In this way, the ICJ's requirement in *Avena* continues the practice of deference originally given to the United States in *LaGrand*.[268] Given that the ICJ did not dictate an actual remedy for Vienna Convention violations, but rather dictated the process of "review and reconsideration," it is significant that the Oklahoma Court of Criminal Appeals went as far as granting Torres a stay of execution and that the Oklahoma Governor reached even farther by granting clemency.

In the United States, other courts have declined to grant a remedy for Vienna Convention violations, reasoning that the Vienna Convention itself does not require a remedy.[269] Even where a court provides "review and reconsideration," an alternative reason for denying an additional remedy could be that, "[b]ecause the individual right is to notification and access, not to consular assistance, it is difficult to determine exactly what harm the treaty violation has caused in any particular case."[270] This commentator concludes that "[t]his has led many U.S. courts to deny such relief as suppression of confessions, dismissal of indictments, and reversal of convictions."[271]

In contrast, another commentator noted that the prejudice test as applied in Vienna Convention cases "establishes a nearly insurmountable hurdle for defendants."[272] This may be because courts tend to undermine the value of consular assistance, conflating it with the assistance of competent counsel.[273]

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264. *Id*. ¶ 131.

265. *Id*. ("[S]uch review and reconsideration has to be carried out 'by taking account of the violation of the rights set forth in the Convention' . . . including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation.") (quoting LaGrand Case (F.G.R. v. U.S.), 2000 I.C.J. 104, ¶ 125 (June 27).

266. Bernard H. Oxman & William J. Aceves, *International Decisions:* LaGrand *(Germany v. United States) Judgment*, 96 AM. J. INT'L L. 210, 217 (2002).

267. *Id*.

268. *See* William J. Aceves, *International Decisions:* Avena and Other Mexican Nationals *(Mexico v. United States) Provisional Measures Order*, 97 AM. J. INT'L L. 923, 928 (2003) (discussing the "margin of appreciation" given to the United States in mandating "review and reconsideration" but deferring to the United States' choice of means).

269. United States v. Ortiz, 315 F.3d 873, 887 (8th Cir. 2002); Ray, *supra* note 15, at 1741.

270. Joan Fitzpatrick, *Consular Rights and the Death Penalty After* LaGrand, 96 AM. SOC'Y INT'L L. PROC. 309, 309 (2002).

271. *Id*.

272. Ray, *supra* note 15, at 1740.

273. John Quigley, *Consular Rights and the Death Penalty after* LaGrand, 96 AM. SOC'Y INT'L L. PROC. 315, 316 (2002).

Accordingly, under this approach, where a foreign national has had access to legal counsel, courts find no prejudice because they presume that counsel provided any information or assistance that the consulate would have provided to the detainee.[274] Furthermore, prejudice may be difficult to prove if the foreign national cannot show if or how the consul would have assisted him.[275]

Although prejudice may be difficult to establish under these requirements, Mexican nationals may have the greatest success in establishing prejudice. The Mexican government has been increasingly active in assisting its nationals in U.S. capital proceedings, providing legal assistance and mitigating evidence from Mexico.[276] Thus, Mexican detainees may have better success in establishing that their consulate would indeed intervene in their case, as well as the sort of assistance Mexico would provide in their defense.

Even if a court finds prejudice, another issue in applying a remedy is the status of the rights granted by the Vienna Convention. Some courts have held that there is no remedy for a Vienna Convention violation because a treaty violation does not rise to the level of a constitutional violation and therefore does not require the remedies appropriate for constitutional violations, such as suppression of evidence.[277] Although it did not reach the issue of remedy in *Medellín*, the U.S. Supreme Court commented in its "advisory" and "academic" considerations that a prisoner seeking federal relief on the basis of a Vienna Convention claim must meet a number of constitutional threshold issues for a federal court to hear an appeal.[278] Until the U.S. Supreme Court issues a binding decision on the status of Vienna Convention rights vis-à-vis the Due Process clause, the availability of constitutional remedies remains unknown. Alternatively, a state court could examine the Vienna Convention under the state constitution's due process clause and provide a more liberal interpretation that would grant greater access to remedy.

V. The Future of Vienna Convention Claims in U.S. Courts

Since the Oklahoma Court of Criminal Appeals issued the *Torres* order in May 2004, the legal landscape concerning Vienna Convention disputes has changed dramatically. First, President George W. Bush issued a memorandum to the U.S. Attorney General on February 28, 2005 indicating that the United States will comply with its Vienna Convention obligations by having state

274. Ray, *supra* note 15, at 1740.
275. *See* Murphy v. Netherland, 116 F.3d 97, 100-01 (4th Cir. 1997).
276. *See* Fleishman, *supra* note 248, at 359.
277. Ray, *supra* note 15, at 1741.
278. Medellín v. Dretke, 125 S. Ct. 2088, 2090-92 (2005).

courts "give effect" to the ICJ's decision in *Avena*.[279] As a result, unless the President's authority to issue such a directive is challenged,[280] it seems likely that state courts will hear Vienna Convention claims from Mexican nationals named in *Avena* without recourse to the procedural default rule.[281] Although President Bush's memorandum initially signaled a level of U.S. deference to international obligations,[282] just a week later, the United States withdrew from the Optional Protocol granting jurisdiction to the ICJ in disputes involving the Vienna Convention.[283] As a result, the *Avena* decision is apparently the last international interpretation of U.S. obligations under the Vienna Convention and henceforth, domestic courts alone will determine the effect of the treaty.[284] Finally, the U.S. Supreme Court dismissed as improvidently granted a writ allowing an *Avena*-based Vienna Convention claim in order that the claimant could pursue reconsideration of his sentence in state court pursuant to President Bush's memorandum.[285] In doing so, the Court identified five threshold issues that may preclude federal habeas relief for Vienna Convention claimants, but indicated that the discussion of the issues was "advisory or academic" and "not free from doubt."[286]

While claimants in future Vienna Convention disputes in U.S. courts are likely to rely on *Torres*, its strength in future legal claims remains to be seen. Although *Torres* signifies that Oklahoma has directly incorporated international law — specifically an ICJ decision and Vienna Convention obligations — the *Torres* result likely faces serious obstacles in other jurisdictions. President Bush's memorandum indicates that state courts will give effect to *Avena's* mandate of "review and reconsideration." The memorandum does not, however, require anything beyond such reconsideration.[287] Also, the same unresolved issues facing the *Torres* court of self-execution, individual rights, and the availability of remedy for Vienna Convention violations may produce divergent results across jurisdictions.[288]

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279. Memorandum for the Attorney General, *supra* note 31.

280. *See* Kirgis, *ASIL Insight*, *supra* note 210.

281. *Id*.

282. *See* Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A1.

283. Kirgis, *Addendum*, *supra* note 32.

284. *But see id*. (noting that the validity of withdrawal is uncertain because the Protocol is silent on whether a state party may withdraw and questioning whether the President may unilaterally withdraw from a Senate-ratified treaty without consent of the Senate).

285. Medellín v. Dretke, 125 S. Ct. 2088, 2088 (2005) (per curiam).

286. *Id*. at 2090. The issues raised by the Court are beyond the scope of this article and will not be discussed here.

287. Kirgis, *ASIL Insight*, *supra* note 210.

288. *See supra* Part IV.

Unless the U.S. Supreme Court issues binding, definitive answers to those questions, state courts will continue to resolve those issues independently.

Additional issues not present in *Torres* are also likely to emerge in future Vienna Convention claims and may serve as barriers to relief. First, state courts may defy President Bush's memorandum and continue to apply the "later-in-time" doctrine, thereby precluding hearings on the merits of Vienna Convention violations. Second, even where a court follows President Bush's directive and provides "review and reconsideration" of a Vienna Convention claim, the degree to which U.S. courts will apply *Avena* to non-Mexican nationals or Mexican nationals who are not named in *Avena* is unknown. Future courts considering Vienna Convention claims may find that the ICJ's judgment in *Avena* is not relevant on the basis of either of these grounds.

A. President Bush's Memorandum and the "Later-in-Time" Doctrine in State Court Proceedings

The effect of President Bush's memorandum ordering state courts to follow *Avena's* mandate and provide review and reconsideration is uncertain. Although scholars argue that the President may enforce compliance with Vienna Convention obligations under the foreign policy powers granted by the Constitution,[289] this Constitutional authority will likely be tested. For example, a spokesman for the Texas Attorney General's office commented on whether Texas would reopen state court proceedings for one of the Mexican nationals named in *Avena* pursuant to the President's memorandum, stating "[w]e respectfully believe the executive determination exceeds the constitutional bounds for federal authority."[290] Further, the spokesman indicated that "[t]he State of Texas believes no international court supersedes the laws of Texas or the laws of the United States."[291]

Comments such as these indicate that, notwithstanding President Bush's memorandum, future claimants in state court may continue to confront the "later-in-time" doctrine.[292] In past Vienna Convention disputes, state courts have deferred to *Breard*'s analysis of the "later-in-time" doctrine and have

289. Vázquez, *supra* note 193, at 690-91; *but see* Kirgis, *ASIL Insight*, *supra* note 210 (noting presidential authority under the foreign policy powers but also noting a separation-of-powers issue in whether the president has the authority to determine the legal effect of ICJ decisions within domestic proceedings).

290. Adam Liptak, *U.S. Says It Has Withdrawn from World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A16 (quoting Jerry Strickland, spokesman for Texas Attorney General Greg Abbot).

291. *Id*.

292. *See supra* notes 91-96 and accompanying text for a discussion of the "later-in-time" doctrine.

consequently ruled that their own procedural default rules supercede the Vienna Convention.[293] The resulting application of the procedural default rule, however, is flawed when the "later-in-time" doctrine is applied in state court proceedings. *Breard* held that a federal procedural rule enacted after the Vienna Convention superseded the Vienna Convention under the "later-in-time" doctrine.[294] Under this reasoning, however, a state court should not be able to invoke the "later-in-time" doctrine. Under the Supremacy Clause, a treaty, which has the legal status of a *federal* statute, should supersede a *state's* own procedural rule. Therefore, a state should not be able to supersede the Vienna Convention with its own procedural rules.

B. Future Claimants Entitled to Invoke Avena

Even where a state court follows President Bush's directive and hears a Vienna Convention claim, several issues may limit the application of *Avena* to future claimants. First, President Bush's memorandum appears to limit the class of individuals to whom "review and reconsideration" applies. The memorandum indicates that states will give effect to *Avena* "in cases filed by the 51 Mexican nationals addressed in that decision."[295] As a result, whether claimants of other nationalities, or Mexican nationals not named in *Avena*, can use the memorandum as an authority for waiving the procedural default rule is uncertain.

Second, even under a more liberal application of President Bush's memorandum to claimants not named in *Avena*, the binding nature of *Avena* itself is limited. Under Article 59 of the ICJ Statute, decisions of the ICJ are only binding on the actual parties and the particular case before the court.[296] Article 59 rejects the concept of *stare decisis*.[297] Accordingly, the holding in *Avena* clearly speaks to U.S. criminal proceedings involving the fifty-one Mexican nationals named in the decision. In contrast, the binding nature of *Avena* on any future claims made by non-Mexican foreign nationals, or even other Mexican nationals, is questionable.

An interesting complication is that, in announcing its decision in *Avena*, the ICJ held that its decision concerned the general application of the Vienna Convention and was not limited to the named Mexican nationals. The court wrote that "the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by

293. *See* Valdez v. State, 2002 OK CR 20, ¶ 22, 46 P.3d 703, 709.

294. Breard v. Greene, 523 U.S. 371 (1998) (per curiam).

295. Memorandum for the Attorney General, *supra* note 31.

296. ICJ Statute, *supra* note 57, art. 59.

297. SHABTAI ROSENNE, PROCEDURE IN THE INTERNATIONAL COURT 193 (1983) [hereinafter ROSENNE, PROCEDURE IN THE INTERNATIONAL COURT].

it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations."[298] The ICJ's intent by this statement is unclear, allowing several possible interpretations. The court's statement may simply indicate that the court intended to decide future cases in a fashion similar to *Avena*. Thus, the statement may have been made to avoid future litigation over the same issues by the same or different parties. Alternatively, the court may have considered its interpretation of a treaty to have continuing effect where the treaty remains in force.[299] Finally, the court may have intended the judgment to apply to all states that are party to the Vienna Convention.

If the latter proposition is true, the court's attempt to modify the authority of its own decisions is likely to face criticism. When the ICJ earlier declared its own provisional measures binding, commentators found the decision surprising and controversial.[300] In that instance, however, the article in the ICJ Statute concerning provisional measures was ambiguous.[301] The court interpreted the ambiguous language in the ICJ Statute's article granting the court the authority to issue provisional measures in light of the purpose of the ICJ and concluded that its provisional measures were binding.[302] In contrast, the article in the ICJ Statute concerning the binding nature of the court's decisions is explicit. Where the ICJ Statute is explicit, "the Court has no discretionary power to disregard the specific provisions of the Statute, even where this might be desirable from the point of view of the abstract administration of justice."[303]

Thus, U.S. courts considering future claims made by foreign nationals not named in *Avena* are probably not legally bound to the ICJ's mandate of "review and reconsideration" without resort to procedural bar. With the ICJ's statement regarding the general applicability of *Avena* in mind, however, U.S.

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298. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128, ¶ 151 (Mar. 31), *available at* http://www.icj-cij.org.

299. *See* SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 620-21 (2d ed. 1985) [hereinafter ROSENNE, LAW AND PRACTICE].

300. Bruno Simma, *Consular Rights and the Death Penalty After* LaGrand, 96 AM. SOC'Y INT'L L. PROC. 310, 310 (2002); Oxman & Aceves, *supra* note 266, at 217.

301. Oxman & Aceves, *supra* note 266, at 217.

302. Quigley, *supra* note 19, at 438-39. In making its decision, the ICJ compared the English and French versions of Article 41 in the ICJ Statute. The English version indicates that states "ought" to follow provisional measures, whereas the French version uses the word "devoir," which conveys a sense of duty. The court resolved the discrepancy by looking at the object and purpose of the ICJ Statute, which is to issue final and binding judgments. The court concluded that only binding provisional measures would enable the court to meet its primary purpose. *Id*.

303. ROSENNE, PROCEDURE IN THE INTERNATIONAL COURT, *supra* note 297, at 50.

courts may be persuaded to apply *Avena*'s holding to all foreign nationals with Vienna Convention claims to promote uniformity of results and reduce further international conflict on the topic. Because the United States has now withdrawn from the Optional Protocol, such conflict will likely be confined to the diplomatic arena. Lastly, U.S. courts may be reluctant to treat foreign detainees differently, solely on the basis of nationality.[304]

VI. Conclusion

Since 1998, the U.S. Supreme Court and the ICJ have issued conflicting rulings regarding the obligations of U.S. domestic courts when considering Vienna Convention claims. In *Torres*, the Oklahoma Court of Criminal Appeals declined to follow its own decision in *Valdez* and the Supreme Court's holding in *Breard*, and instead issued an unprecedented order that incorporated Vienna Convention obligations and ICJ authority into Oklahoma law. In doing so, the court resolved three major issues that often preclude the incorporation of international law into the domestic setting. In staying Torres's execution, the court implicitly found that: (1) despite issues of federalism, the ICJ's authority extends to criminal proceedings in Oklahoma; (2) the Vienna Convention creates domestic duties and grants an individual right to enforce those duties; and (3) a remedy is available for Vienna Convention violations.

The impact of *Torres* on future court decisions remains to be seen, but other state and federal courts will confront these and other complex issues in considering Vienna Convention claims. President Bush's memorandum ordering states to give effect to *Avena* likely guarantees that courts will begin addressing these issues sooner rather than later. In state courts, a key issue will be whether those courts are required to follow President Bush's memorandum and, by extension, *Avena*'s command of "review and reconsideration." A state court that holds that President Bush's memorandum exceeds his constitutional authority could then decline to give effect to *Avena* on the basis that, under principles of federalism, states are not bound by ICJ decisions. This issue remains discretionary until the Supreme Court revisits *Breard* and comments on the binding force of ICJ decisions. Scholars have noted that the U.S. Supreme Court's recent jurisprudence preserving Tenth Amendment rights of the states may influence a decision in favor of state sovereignty.[305] On the other hand, the Court wrote in *Breard* that "we should

304. *See* Quigley, *supra* note 19, at 438.

305. Vázquez, *supra* note 193, at 687-88; *Too Sovereign but Not Sovereign Enough*, *supra* note 23, at 2658-59; *see* Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1279 (1999) (considering the possible

give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such."[306] If the Court were to affirm state sovereignty regarding Vienna Convention obligations and ICJ decisions, then individual states could choose for themselves what effect to give to ICJ decisions. In this event, while the result in *Torres* may be persuasive in some jurisdictions, divergence across jurisdictions will most likely continue.[307]

If the "later-in-time" and federalism hurdles are overcome and a claim is heard on its merits, state and federal courts will then grapple with the issue of whether the Vienna Convention grants an individual right to enforce Vienna Convention obligations. Finally, if a foreign national is found to have standing to enforce a claim, courts will then need to determine the appropriate remedy, if any, for a Vienna Convention violation. Courts may look to *Torres* for guidance, but until the U.S. Supreme Court issues a binding decision resolving these issues, the results of Vienna Convention claims will likely continue to vary by jurisdiction.

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application of the Supreme Court's rule against federal "commandeering" of state officials in the context of foreign affairs).

306. Breard v. Greene, 523 U.S. 371, 375 (1998) (per curiam).

307. *See supra* Part IV.A.