

THE LIMITS OF INTERNATIONAL LAW: EFFORTS TO ENFORCE RULINGS OF THE INTERNATIONAL COURT OF JUSTICE IN U.S. DEATH PENALTY CASES

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INTRODUCTION

Since the Supreme Court reinstated the death penalty in 1976,¹ the United States has executed twenty-eight foreign nationals from fifteen different countries.² Most of those foreign nationals were never informed of their rights to consular notification and access under Article 36 of the Vienna Convention on Consular Relations,³ a treaty the United States ratified in 1969.⁴ Violations of Article 36 in capital cases have caused consternation in foreign capitals and endless litigation in domestic courts and international tribunals. Mexico, which has the largest number of foreign nationals on death row,⁵ established the

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1. *Gregg v. Georgia*, 428 U.S. 153, 187, 207 (1976).

2. *Confirmed Foreign Nationals Executed Since 1976*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/foreign-nationals-part-ii#executed> (last updated Oct. 2, 2011).

3. *Id.*; see generally Vienna Convention on Consular Relations, United Nations, Apr. 24, 1963, 21 U.S.T. 77.

4. Vienna Convention on Consular Relations, *supra* note 3, at 77 (entered into force Dec. 24, 1969).

5. *Reported Foreign Nationals Under Sentence of Death in the U.S.*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty->

Mexican Capital Legal Assistance Program in 2000 to assist its nationals facing the death penalty and to ensure that Vienna Convention claims were aggressively litigated.⁶ Several foreign governments have filed briefs in state and federal courts describing the nature of the assistance they could have provided if their nationals had been promptly notified of their consular rights.⁷ In dozens of cases, appellate lawyers have argued that consular assistance could have made the difference between life and death. Yet, even in the wake of favorable judgments from the Inter-American Commission of Human Rights,⁸ the Inter-American Court on Human Rights,⁹ and the International Court of Justice (ICJ),¹⁰ national courts have persistently refused to grant any measure of relief to condemned foreign nationals, even in cases in which the violation was undisputed. As of September 2011, domestic courts have overturned death sentences on the basis of Article 36 violations in only two cases.¹¹

In light of these statistics, it is tempting to conclude that Article 36 litigation has had negligible effects on the application of the death penalty in the United States. And indeed, under no circumstances could

us#Nationality (last updated Oct. 2, 2011).

6. 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, 393-94 (2003) (describing Mexico's consular assistance in capital cases in Texas and elsewhere over the last several decades).

7. See, e.g., *Paraguay v. Allen*, 949 F. Supp. 1269, 1273 (E.D. Va. 1996); Complaint at ¶¶ 70, 76, *United Mexican States v. Woods* (D. Ariz. 1997) (No. CIV 97-1075-PHX SMM); see generally Brief of the Gov't of the United Kingdom of Great Britain & N. Ireland as Amicus Curiae in Support of Petitioner-Appellant & Reversal, *Carty v. Quarterman*, 345 Fed. Appx. 897 (5th Cir. 2009) (No. 08-70049).

8. See, e.g., *Martínez Villareal v. United States*, Case 11,753, Inter-Am. Comm'n H.R., Report No. 52/02, OEA/Ser.L/V/II.117, doc. 1 rev. ¶ 64 (2003), available at <http://www.cidh.oas.org/annualrep/2002eng/USA.11753.htm>.

9. See *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶¶ 121-22 (Oct. 1, 1999), available at <http://www1.umn.edu/humanrts/iachr/A/OC-16ingles-sinfirmas.html>.

10. See *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12, 71-72 (Mar. 31).

11. See *Torres v. Oklahoma*, 120 P.3d 1184, 1189-90 (Okla. Crim. App. 2005); *Valdez v. Oklahoma*, 46 P.3d 703, 709-11 (Okla. Crim. App. 2002). In *Valdez*, the court's decision to vacate the death sentence of Gerardo Valdez was based on its finding that trial counsel was ineffective for failing to contact the Mexican consulate and make use of the resources consular officers would have provided. *Valdez*, 46 P.3d at 710. Although the court found the petitioner's Vienna Convention claim to be procedurally barred, the court's decision to grant relief was based on its conclusion that the Mexican consulate would have provided extensive assistance if it had been notified of Valdez's detention. *Id.* at 709-10. For that reason, I include it among the cases in which Vienna Convention claims have prevailed—although I recognize that others may quibble with this assessment.

even the most optimistic internationalist claim that Article 36 litigation has been a resounding success. But it would be similarly misguided to say that Article 36 litigation has had no effect on domestic legal culture. As an initial matter, the United States complied with the ICJ's provisional measures order in *Avena and Other Mexican Nationals*,¹² leading to a five-year moratorium on the execution of Mexican nationals in the United States.¹³ In addition, the death sentences of two Mexican nationals were vacated in direct response to the ICJ's final judgment in *Avena*; one of those cases is examined in greater detail below. And finally, litigation over violations of the Vienna Convention in U.S. death penalty cases has attracted substantial public commentary calling on the courts and Congress to comply with their international obligations. Although it is too soon to say whether the United States will ultimately comply with the ICJ's *Avena* judgment in the cases of Mexican nationals who remain on death row, there can be little question that litigation in domestic and international tribunals has led to increased awareness of the United States' obligations under the Vienna Convention, which in turn has led to greater compliance with Article 36 at the trial level.

I. ARTICLE 36 LITIGATION PRIOR TO THE ICJ RULINGS

Twenty years ago, few in the United States had heard of the Vienna Convention on Consular Relations.¹⁴ Ratified by the United States in 1969, the treaty had been all but forgotten by the judges, lawyers, police and court personnel who came into contact with foreign nationals in the criminal justice system. In the first two decades after its ratification, the few courts to consider the rights established in Article 36 limited their analysis to the validity of deportation orders.¹⁵ In the

12. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Provisional Measures, 2003 I.C.J. 6 (Feb. 5).

13. *See Confirmed Foreign Nationals Executed Since 1976*, *supra* note 2. After Mexico filed its application instituting proceedings in the ICJ in January 2003, no Mexican national whose case was addressed in the ICJ proceedings was executed until August 5, 2008, when Texas executed José Medellín Rojas. *Id.*

14. The first law review article on the topic was published in 1994. *See generally* Gregory Dean Gisvold, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 MINN. L. REV. 771 (1994).

15. *See United States v. Calderon-Medina*, 591 F.2d 529, 531 & n.6 (9th Cir. 1979) (holding defendants could challenge indictments for illegal re-entry following deportation on the grounds that they were denied the right to consular notification during earlier deportation proceedings); *see also United States v. Rangel-Gonzales*, 617 F.2d 529, 530 (9th Cir. 1980) (establishing consular notification as a personal right and reversing a conviction of illegal re-entry following deportation on the grounds that the indictment should have been

1990s, litigation over violations of Article 36 became increasingly common.¹⁶ Defense lawyers and prosecutors began to grapple with the consequences of consular rights violations, and state and federal officials began to study and implement means to ensure greater compliance with Article 36. This period of increasing awareness coincided with the executions of more than a dozen foreign nationals. At least eleven of these nationals raised an Article 36 violation prior to being executed,¹⁷ but in most of these cases the courts determined that the issue had been waived by the defendants' failure to raise it in a timely manner.¹⁸

Nonetheless, there were some signs that the domestic and international litigation had some effect. In California, legislators passed a bill in 1999 implementing, at least in part, the notification provisions of Article 36.¹⁹ The bill's legislative history referred specifically to the case of Canadian national Joseph Stanley Faulder,²⁰ which had led to a decision from the Fifth Circuit Court of Appeals implying that individuals had enforceable rights under Article 36 of the Vienna Convention.²¹ In Texas, the Attorney General's Office published a manual on consular notification, which it distributed to law enforcement agencies and courts.²² In federal courts around the country, magistrates began to notify known foreign nationals of their rights under Article 36.²³ The U.S. Department of State undertook a massive educational campaign in response to litigation in *Faulder* and other cases in an attempt to teach local law enforcement officers their obligations under Article 36.²⁴ Through these efforts, compliance with Article 36, at least

dismissed after defendant was denied the right to consular notification in the underlying deportation proceeding).

16. See, e.g., *Faulder v. Johnson*, 81 F.3d 515, 517 (5th Cir. 1996); *Breard v. Pruett*, 134 F.3d 615, 618-19 (4th Cir. 1998).

17. *Confirmed Foreign Nationals Executed Since 1976*, *supra* note 2.

18. See, e.g., *Breard*, 134 F.3d at 619, 620; *LaGrand v. Stewart*, 133 F.3d 1253, 1261-62 (9th Cir. 1998); *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997).

19. CAL. PENAL CODE § 834c (West 2008).

20. *Arrest of Foreign Nationals: Hearing on S.B. 287 Before the S. Comm. on Pub. Safety*, 1999-2000 Reg. Sess. (Cal. 1999), available at http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0251-0300/sb_287_cfa_19990316_125225_sen_comm.html.

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

22. *Magistrate's Guide to the Vienna Convention on Consular Relations*, ATT'Y GEN. OF TEX. (Jan. 2006) available at http://www.oag.state.tx.us/AG_Publications/pdfs/vienna_guidebook.pdf.

23. U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS 16 (3d ed. 2010), available at http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf.

24. Counter-Memorial of the United States of America, Avena and Other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. Pleadings 1, ¶ 2.31 (Nov. 3, 2003), available at <http://www.icj-cij.org/docket/files/128/10837.pdf>.

in some parts of the nation, began to improve.²⁵

II. ARTICLE 36 LITIGATION AFTER THE ICJ'S RULINGS

In 1998, Paraguay was the first state to initiate proceedings in the ICJ over violations of Article 36 in the case of Angel Breard, a Paraguayan national condemned to death in Virginia.²⁶ The following year, Germany initiated proceedings on behalf of nationals Karl and Walter LaGrand, leading to the *LaGrand* judgment in 2001.²⁷ And in 2003, Mexico initiated proceedings on behalf of fifty-four Mexican nationals sentenced to death by the United States in *Avena and Other Mexican Nationals*.²⁸ In both *LaGrand* and *Avena* the ICJ held that foreign nationals whose Article 36 rights were violated and who were subjected to “severe penalties” or prolonged incarceration, were entitled to “review and reconsideration” of their convictions and sentences.²⁹ In *Avena*, the ICJ made clear that the required “review and reconsideration” must be judicial in nature and that the courts must not invoke procedural bars to prevent review of Article 36 claims on the merits.³⁰

A. *The Impact of the ICJ's Provisional Measures in Avena*

Each of the nations that initiated proceedings in the ICJ sought and received provisional measures to prevent the execution of their nationals during the pendency of proceedings before the international court.³¹ Prior to the *LaGrand* judgment, however, there was no uniform consensus regarding the legal effect of the ICJ's provisional measures. In proceedings before the U.S. Supreme Court leading up to Walter LaGrand's execution, the United States argued that such measures were

25. *See id.* ¶ 2.33.

26. Vienna Convention on Consular Relations (Para. v. U.S.), Application of the Republic of Paraguay, ¶¶ 3, 28 (Apr. 3, 1998), available at <http://www.icj-cij.org/docket/files/99/7183.pdf>. Paraguay ultimately withdrew its case from the ICJ after its national, Angel Breard, was executed by the United States. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 426, 427 (Nov. 10).

27. *LaGrand Case* (Ger. v. U.S.), 2001 I.C.J. 466, ¶¶ 1, 10, 128 (June 27).

28. Application Instituting Proceedings (Mex. v. U.S.), 2003 I.C.J. No. 128, ¶ 1 (Jan. 9), available at <http://www.icj-cij.org/docket/files/128/1913.pdf>.

29. *LaGrand*, 2001 I.C.J. at 46 ¶ 125; *Avena and Other Mexican Nationals* (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, ¶¶ 138, 140 (Mar. 31).

30. *Avena*, 2004 I.C.J. ¶¶ 112, 113, 140.

31. *See, e.g.*, Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 I.C.J. 248, ¶¶ 6, 9, 41 (Apr. 9); *LaGrand Case* (Ger. v. U.S.), Provisional Measures, 1999 I.C.J. 9, ¶¶ 6, 9, 29 (Mar. 3); *Avena and Other Mexican Nationals* (Mex. v. U.S.), Provisional Measures, 2003 I.C.J. 14, ¶¶ 9, 13, 59 (Feb. 5).

not directly binding on parties to the litigation.³² In both *Breard* and *LaGrand*, the Supreme Court refused to stay the executions notwithstanding the existence of provisional measures.³³

In its 2001 *LaGrand* judgment, the ICJ determined for the first time that provisional measures were binding on the parties to proceedings before the court.³⁴ The effect of this determination was to be tested two years later when Mexico initiated proceedings in the *Avena* case and sought provisional measures to prevent the executions of its nationals while the court considered the merits of Mexico's claims.³⁵ In February 2003, the ICJ issued provisional measures directing the United States to take "all measures necessary" to ensure that three Mexican nationals—Cesar Roberto Fierro Reyna ("Fierro"), Roberto Moreno Ramos ("Moreno"), and Osbaldo Torres Aguilera ("Torres")—were not executed while the Court considered Mexico's claims.³⁶ At the time, none of the Mexican nationals had been scheduled for execution, but all had exhausted (or had nearly exhausted) their post-conviction appeals and were in imminent danger of receiving execution dates.³⁷

Two of the three nationals facing execution, Fierro and Moreno, were on death row in the state of Texas; the third, Torres, was in Oklahoma. Texas had the nation's busiest execution chamber, and at the time, Oklahoma executed more individuals per capita than any other state.³⁸ The judiciaries in both states were renowned for their conservative bent and hostility toward criminal defendants. And politicians in Texas and Oklahoma at times seemed to revel in their tough-on-crime reputations.

When Mexico initiated proceedings in the ICJ, Moreno appeared to be at greatest risk of execution. Prosecutors had sought to schedule his execution at a court hearing in November 2002, but before the trial court could consider the prosecution's request the Inter-American Commission on Human Rights issued precautionary measures calling

32. See *Germany v. United States*, 526 U.S. 111, 113 (1999) (Breyer, J., dissenting) (noting that the Solicitor General of the United States filed a letter with the Court opposing a stay of execution for Walter LaGrand on the grounds that a provisional measures order from the International Court of Justice is not binding).

33. See *Breard v. Greene*, 523 U.S. 371, 374, 378-79 (1998); see also, *LaGrand v. Arizona*, 526 U.S. 1001, 1001 (1999).

34. *LaGrand*, 2001 I.C.J. ¶ 109.

35. *Avena*, 2003 I.C.J. ¶¶ 9, 13.

36. *Id.* ¶ 59.

37. *Id.* ¶ 11.

38. *State Execution Rates*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/state-execution-rates> (last updated Aug. 2, 2011).

on the United States not to execute Moreno while they considered a complaint filed by his lawyers.³⁹ The prosecution and the trial judge agreed temporarily to defer consideration of when to schedule Moreno's execution. Three months later, the ICJ issued its provisional measures order.⁴⁰

Through counsel, Mexico contacted the prosecutors assigned to the cases of Moreno, Fierro, and Torres. All agreed to defer the setting of execution dates while the ICJ considered Mexico's application. In the case of Torres in Oklahoma, Attorney General Drew Edmondson filed an unprecedented notice with the Oklahoma Court of Criminal Appeals recommending that the court refrain from scheduling his execution while the ICJ considered Mexico's claims.⁴¹ Although Oklahoma law does not provide for any grounds under which the court can defer the setting of execution dates,⁴² the court nonetheless refrained from scheduling Torres' execution for over fourteen months while the ICJ proceedings were pending.

For observers unfamiliar with the politics of capital punishment in Texas and Oklahoma, these actions may seem unremarkable. But for capital litigators, the prosecutors' decisions to comply with the order of an international court were nothing short of extraordinary. Although Texas prosecutors could have sought execution dates for both Fierro and Moreno under state law,⁴³ they did not. From the time Mexico filed its application at the ICJ in January 2003 until the ICJ issued its final judgment in March 2004, none of the Mexican nationals subject to provisional measures were executed.

B. The Impact of LaGrand and Avena in the State of Oklahoma: A Case Study

At the time the ICJ issued its judgment in March 2004, a May 17th execution date had already been scheduled for Torres. Shortly after the ICJ issued its judgment, Torres filed a clemency petition with the Oklahoma Board of Pardons and Paroles and a post-conviction application before the Oklahoma Court of Criminal Appeals arguing that the *Avena* judgment was binding on the United States courts.⁴⁴

39. *Moreno Ramos v. United States*, Case 12.430, Inter-Am. Comm'n H.R., Report No. 1/05, OEA/Ser.L./V/II.124, doc. 5 ¶¶ 1, 76 (2005).

40. *Avena*, 2003 I.C.J. at 6.

41. Adam Liptak, *Mexico Awaits Hague Ruling on Citizens on Death Row*, N.Y. TIMES, Jan. 16, 2004, at A1.

42. See OKLA. STAT. tit. 22, § 1001.1 (2003).

43. See TEX. CODE CRIM. PROC. ANN. art. 43.141 (West 2006).

44. See *Torres v. Oklahoma*, 120 P.3d 1184, 1186 (Okla. Crim. App. 2005).

On May 7, 2004, the clemency board considered Torres' bid for commutation of his death sentence.⁴⁵ The Ambassador of Mexico to the United States, Carlos de Icaza, attended the clemency hearing at the maximum security prison in McAlester, Oklahoma and appealed to the board for clemency based on the *Avena* decision.⁴⁶ Surviving relatives of the victims asked that Torres' sentence be carried out.⁴⁷ The five-member Board listened, then voted, one by one. Two voted in favor of commutation, and two were against.⁴⁸ The deciding vote was cast by Susan Loving, a former Attorney General and the Board's chairperson.⁴⁹ Loving cited the ICJ's decision in *Avena* and stated that she believed Torres "may very well have been prejudiced" by the Article 36 violation.⁵⁰ She then stated:

I worry a great deal about Americans who may be overseas, whose rights are violated under an international treaty, and who, and the country that makes the decision as to what happens because of those rights being violated is the same one who violated those rights. We have many Americans overseas whose lives are in jeopardy as we speak, and that is one very important reason for my vote today.⁵¹

The Board's vote, however, was simply a recommendation to the Oklahoma Governor Brad Henry.⁵² Henry was free to accept or reject the Board's recommendation—and indeed, on the previous three occasions when the Board had recommended clemency during Henry's tenure as Governor, he disagreed with the Board's decision and refused to grant clemency.⁵³ One of those cases involved a consular rights violation in the case of Vietnamese national, Hung Thanh Le, where the Board had voted unanimously in favor of clemency.⁵⁴ Henry had already presided over eighteen executions as Governor by the time the

45. Transcript of Clemency Hearing of Osvaldo Torres at 1, 2 (May 7, 2004) (on file with author).

46. *Id.* at 1, 2-7.

47. *Id.* at 101-04.

48. *Id.* at 116-17.

49. *Id.* at 1, 117.

50. Transcript of Clemency Hearing, *supra* note 45, at 117.

51. *Id.* at 118-19.

52. *Id.* at 119.

53. Ernesto Londoño, *Oklahoma Parole Board Urges Life Term for Mexican*, DALLAS MORNING NEWS, May 8, 2004, at A6; see also *David Jay Brown*, CLARKPROSECUTOR.ORG, <http://www.clarkprosecutor.org/html/death/US/brown901.htm> (last visited Oct. 25, 2011); *Bobby Joe Fields*, CLARKPROSECUTOR.ORG, <http://www.clarkprosecutor.org/html/death/US/fields832.htm> (last visited Oct. 25, 2011); *Hung Thanh Le: Case Overview*, INT'L JUST. PROJECT, <http://www.internationaljusticeproject.org/nationalsTLe.cfm> (last visited Oct. 25, 2011).

54. *Hung*, *supra* note 53.

Board recommended clemency for Torres.⁵⁵ Within an hour of the Board's vote, the Governor issued a press release indicating that he would not stay Torres' execution.

Henry agreed to meet with counsel for Torres and for Mexico only days before the scheduled execution. He told them they had no more than thirty minutes to make their case. The conversation quickly turned to the ICJ's judgment in *Avena*, and Henry removed his jacket and rolled up his sleeves. His assistant entered the room to advise that the thirty minutes were up, but Henry decided he needed more information. He asked whether the United States had a legal obligation to comply with the ICJ's judgment, and whether Oklahoma was bound to comply. The meeting lasted over an hour. At the end, Henry was non-committal.

Meanwhile, Torres' post-conviction application and request for stay of execution was pending in the Oklahoma Court of Criminal Appeals. Four days before his scheduled execution, on May 13, 2004, the Oklahoma court issued a stay of execution in a brief, unpublished order. In his concurrence, Judge Chapel elaborated on the majority's reasoning, and opined that the *Avena* judgment was binding on United States courts:

There is no question that this Court is bound by the Vienna Convention and Optional Protocol At its simplest, this is a matter of contract. A treaty is a contract between sovereigns. The notion that contracts must be enforceable against those who enter into them is fundamental to the Rule of Law.⁵⁶

The court remanded Torres' case for an evidentiary hearing to consider the effect of the Article 36 violation on his capital murder prosecution.⁵⁷ Two hours after the Oklahoma court issued its historic decision, Henry decided to commute Torres' death sentence to life imprisonment without the possibility of parole. The Governor's press release stated that "[u]nder agreements entered into by the United States, the ruling of

55. DEATH PENALTY INFORMATION CENTER, SEARCHABLE EXECUTION DATABASE, http://www.deathpenaltyinfo.org/views-executions?exec_name_1=&exec_year%5B%5D=2003&exec_year%5B%5D=2004&sex=All&state%5B%5D=OK&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All (last visited Oct. 31, 2011).

56. *Torres v. Oklahoma*, No. PCD-04-442, 2004 WL 3711623, slip op. at 2 (Okla. Crim. App. May 13, 2004) (order granting stay of execution and remanding case for evidentiary hearing) (Chapel, J., specially concurring).

57. Torres ultimately received an evidentiary hearing on the Article 36 violation, and the trial court determined that he had been prejudiced by the violation. On appeal, the Oklahoma Court of Criminal Appeals concurred that Torres had demonstrated prejudice at the penalty phase of his capital murder trial, but concluded that the Governor's grant of clemency rendered any determination of prejudice moot. *Torres v. Oklahoma*, 120 P.3d 1184, 1188 (Okla. Crim. App. 2005).

the ICJ is binding on U.S. courts.”⁵⁸

After the Oklahoma court’s historic decision in *Torres*, other courts began to address the implications of the ICJ’s judgment. In the case of Rafael Camargo, a Mexican national sentenced to death in Arkansas, prosecutors agreed to reform his death sentence to life imprisonment after learning of the *Avena* judgment.⁵⁹ In response to media inquiries, they characterized the *Avena* judgment as the “primary motivation” for their decision to stipulate that Camargo was mentally retarded and therefore ineligible for the death penalty.⁶⁰ The federal district court for the Western District of Arkansas subsequently issued a decision finding that the agreement to modify Camargo’s sentence to life imprisonment remedied “any and all potential prejudice caused by the denial of petitioner’s rights under the Vienna Convention.”⁶¹ In *Ex parte Medellín*, however, the Texas Court of Criminal Appeals refused to adhere to the ICJ’s judgment, even after President George W. Bush directed state courts to provide the review and reconsideration mandated by *Avena*.⁶²

The constitutional issues raised by Texas’ defiance of the President’s directive were addressed by the U.S. Supreme Court in *Medellín v. Texas*.⁶³ In *Medellín*, the Supreme Court determined that the ICJ’s *Avena* judgment was not self-executing, and that the decision did not therefore preempt states from applying procedural default rules to bar review of Article 36 claims.⁶⁴ Although all nine justices agreed that the United States had an international legal obligation to comply with the ICJ’s judgment,⁶⁵ the Court held that only Congress could

58. Gov. Henry Grants Clemency to Inmate Torre, OFFICE OF THE GOVERNOR BRAD HENRY (May 13, 2004), available at <http://www.eurunion.org/legislat/deathpenalty/TorresVOklaGovMess.htm>.

59. Jeff Arnold, *Deal Gives Killer Life*, TIMESRECORD, Aug. 13, 2004, http://swtimes.com/news/article_6c2fa457-f4b3-5bfe-9e29-c29ef6a52789.html. The prosecution agreed to this outcome shortly after the defense filed a motion to vacate Camargo’s conviction and death sentence based on the ICJ’s *Avena* ruling. See Petitioner’s Motion to Vacate His Convictions and Death Sentences and for a New Trial, *Camargo v. Norris*, Civ. No. 02-2188 (W.D. Ark. Jul. 19, 2004).

60. *Id.*

61. *Camargo v. Norris*, Civ. No. 02-2188, slip op. at 5 (W.D. Ark. Aug. 12, 2004).

62. Memorandum for the U.S. Attorney General Regarding Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005) 44 I.L.M. 964, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18.html>. The President’s written directive was attached to an *amicus curiae* brief submitted by the Solicitor General of the United States in *Medellín v. Dretke*, 544 U.S. 660 (2005).

63. 552 U.S. 491, 498-99 (2008).

64. *Id.* at 525, 527, 530.

65. *Id.* at 504.

transform this international obligation into binding federal law.⁶⁶ The President, acting unilaterally, could not compel Texas to review Medellín's Article 36 claim.⁶⁷

III. WHAT THE FUTURE MAY HOLD: PROSPECTS FOR COMPLIANCE WITH AVENA IN THE WAKE OF *MEDELLÍN V. TEXAS*

Although *Medellín* left open the possibility that states could choose to enforce *Avena*, and although Justice Stevens exhorted the states to follow Oklahoma's example in his concurring opinion,⁶⁸ no state has done so apart from Oklahoma. Only the California Supreme Court has addressed the issue in the wake of *Medellín*, and the court refused to set aside its procedural default rules to allow for review and reconsideration of the appellant's Article 36 claim.⁶⁹ As of this writing, a second case is pending in the Nevada Supreme Court; a ruling is expected in early 2012.⁷⁰

Congress has been slow to respond to the *Medellín* decision. In July 2008, several members of Congress introduced "The Avena Case Implementation Act."⁷¹ The bill would have implemented the *Avena* judgment and would have provided judicial remedies, both civil and criminal, for foreign nationals whose Article 36 rights had been violated.⁷² Mexican national José Medellín sought to stay his execution on the basis of the pending legislation, arguing that he had a due process right to remain alive until Congress enacted legislation to implement his right to review and reconsideration.⁷³ The Supreme Court denied the stay, noting that the Executive Branch had not indicated its support for the pending legislation.⁷⁴ Medellín was executed on August 4, 2008, without receiving the judicial review mandated by *Avena*.⁷⁵

66. *Id.* at 520.

67. *Id.* at 525.

68. *Medellín*, 552 U.S. at 536-37 (Stevens, J., concurring).

69. *In re Martínez*, 209 P.3d 908, 911 (Cal. 2009).

70. *Gutierrez v. State*, No. 53506 (Nev. Dec. 22, 2010) (order granting oral argument), available at <http://www.nevadajudiciary.us/index.php./oralarguments/1011-gutierrez-carlos-vs-state-death-penalty>.

71. The Avena Case Implementation Act, H.R. 6481, 110th Cong. (2008), available at <http://www.gpo.gov/fdsys/pkg/BILLS-110hr6481ih/pdf/BILLS-110hr6481ih.pdf>.

72. *Id.*

73. Application for Stay of Execution Pending Disposition of Motion to Recall and Stay the Mandate and Petition for Writ of Certiorari or Writ of Habeas Corpus at 2, *Medellín*, 552 U.S. 491 (2008) (No. 06-984).

74. *Medellín v. Texas*, 554 U.S. 759, 760, 761 (2008).

75. The ICJ subsequently held that by executing Medellín, the United States had violated its obligations under the *Avena* Judgment. See Request for Interpretation of the Judgement of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (*Mex. v. U. S.*), Judgment, 2009 I.C.J. 139 (Jan. 19).

In late 2010, legislation intended to implement *Avena* was again introduced in the U.S. Senate as part of an omnibus appropriations bill.⁷⁶ The appropriations bill failed to pass by the end of the congressional term.⁷⁷ In June 2011, Vermont Senator Patrick Leahy introduced the Consular Notification Compliance Act (CNCA),⁷⁸ remarking that “[g]iven the long history of bipartisan support for the VCCR, there should be unanimous support for this legislation to uphold our treaty obligations.”⁷⁹ Secretary of State Hillary Clinton and Attorney General Eric Holder immediately announced their support for the legislation.⁸⁰ In the interim, Texas had set an execution date for Humberto Leal García, another Mexican national who had not yet received the review mandated by the ICJ in *Avena*.⁸¹ Leal, like Medellín, petitioned the U.S. Supreme Court to stay his execution, arguing that Congress was poised to implement his right to review and reconsideration.⁸² The United States filed an amicus curiae brief in support of Leal’s motion for stay, informing the Court that Leal’s case “implicate[d] United States foreign-policy interests of the highest order.”⁸³ Prominent international leaders, including the United Nations High Commissioner for Human Rights, the Special Rapporteurs for Torture and Extrajudicial, Summary and Arbitrary Executions, and the Inter-American Commission on Human Rights, all issued statements calling for a stay in light of the United States’ unfulfilled obligations under the *Avena* judgment.⁸⁴ Leal cited the Obama Administration’s strong support for the Leahy Bill as a critical fact that distinguished his case from Medellín,⁸⁵ but the Court was unpersuaded. On July 7, the Court denied the stay over a strong dissent by Justices Breyer, Ginsburg, Kagan, and Sotomayor.⁸⁶ Leal was executed less than two

76. Department of State, Foreign Operations, and Related Programs Appropriations Act of 2011, S. 3676, 111th Cong. (2010).

77. *Id.*

78. Consular Notification Compliance Act, 112th Cong. (1st Sess. 2011).

79. 157 CONG. REC. S3780 (2011).

80. 157 CONG. REC. S4216 (2011).

81. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12, ¶ 106, 121 (Mar. 31).

82. Motion for Stay of Execution at 10, *García v. Texas*, 131 S. Ct. 2866 (2011).

83. Brief for the United States as Amicus Curiae in Support of Motions for a Stay at 11, *García*, 131 S. Ct. 2866 (2011).

84. *U.S. Urges Supreme Court to Halt Mexican’s Execution*, AGENCE FRANCE-PRESSE (July 1, 2011), available at <http://ph.news.yahoo.com/un-agency-urges-texas-halt-execution-mexican-135001141.html>.

85. Petition for Writ of Certiorari at 20, *García*, 131 S. Ct. 2866 (2011) (No.11-5001), 2011 WL 2743200, at *20.

86. *García*, 131 S. Ct. at 2868-71 (2011).

hours later.⁸⁷

Within the next year, at least two other Mexican nationals whose cases were addressed in the *Avena* judgment are likely to face execution in Texas.⁸⁸ Unless Congress enacts the CNCA by mid-2012, both men may be executed without receiving the review required by the *Avena* judgment, and still others face the possibility of execution within the next year.

Despite the poor prospects for compliance with *Avena* in the short term, the long-term outlook is slightly more encouraging. Most of the Mexican nationals affected by the judgment are incarcerated on California's death row.⁸⁹ The great majority of these nationals will not face execution for at least a dozen years, so they could eventually benefit from state or federal legislation designed to implement *Avena*. In addition, some will have an opportunity to litigate their Article 36 claims in federal court, unencumbered by the procedural default ruling that proved fatal for Medellín. After all, *Medellín* did not bar the federal courts from reviewing Article 36 claims on their merits—it simply held that *Avena* was not binding federal law that preempted the application of state procedural default rules.⁹⁰

CONCLUSION

Six years after the ICJ's *Avena* judgment, we can only begin to assess the effects of the litigation. By one measure, the litigation has been a tremendous success: in the eight years since Mexico initiated proceedings in the ICJ, only two Mexican nationals named in the judgment have been executed, whereas in the eight years preceding the ICJ litigation, four Mexican nationals were executed.⁹¹ This de facto moratorium was initiated by the ICJ's issuance of provisional measures, and continued during the litigation of *Medellín*. Although more executions may be carried out in the near future, the significance of the

87. Chris McGreal, *Humberto Leal García Executed in Texas Despite White House Appeal*, THE GUARDIAN (July 7, 2011), <http://www.guardian.co.uk/world/2011/jul/08/humberto-leal-garcia-executed-texas>.

88. Félix Rocha Díaz and Virgilio Maldonado Rodríguez have both filed petitions for writ of certiorari with the U.S. Supreme Court raising violations of the Vienna Convention. Those petitions were denied by the Court on October 3, 2011. Petition for Writ of Certiorari, Maldonado v. Thaler, 132 S. Ct. 124 (2011), (No. 10-9511), 2011 WL 4530498, at *1; Petition for Writ of Certiorari, Rocha v. Thaler, 132 S. Ct. 397 (2011), (No. 10-9659), 2011 WL 1060963, at *1.

89. See *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12, ¶15 (Mar. 31).

90. *Medellín v. Texas*, 552 U.S. 491, 498-99 (2008).

91. *Confirmed Foreign Nationals Executed Since 1976*, *supra* note 2.

moratorium should not be understated. In a field where victories are rare, capital litigators often measure success by their ability to extend their clients' lives as long as possible. Two Mexican nationals—Torres and Camargo—have been permanently removed from death row as a result of the ICJ's judgment.

All nine justices in *Medellín* recognized that non-compliance with the ICJ's judgment could have serious consequences for the United States' standing in the international community and for its relations with Mexico.⁹² But in the wake of *Leal García*, it is clear that the Supreme Court will not stay the executions of Mexican nationals whose cases were addressed by the *Avena* judgment unless and until Congress enacts implementing legislation.

The prospects for future compliance with *Avena* are closely linked to political and legal perspectives on the value of international law. Some politicians are clearly hostile to the notion that the United States should comply with the decision of an international tribunal such as the ICJ—even where the United States consented to the court's jurisdiction.⁹³ Even politicians who are not overtly hostile to international law may have little to gain by supporting legislation that benefits a group of foreign nationals on death row. Congress is more likely to act, however, if its members recognize the reciprocal nature of the rights to consular notification and access. Accounts of U.S. citizens detained abroad—particularly when they are imprisoned by nations perceived as repressive and undemocratic—arouse a great deal of public sympathy.⁹⁴ In the weeks leading up to the execution of Humberto Leal, multiple commentators called on Congress and the Supreme Court to stay the execution out of concern for the welfare of U.S. citizens who rely on the protections afforded by Article 36 when traveling abroad.⁹⁵

92. *Medellín*, 552 U.S. at 523-24.

93. See, e.g., *Fulfilling Our Treaty Obligations and Protecting Americans Abroad: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (Statement of Senator Chuck Grassley) (webcast), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3d9031b47812de2592c3baeba62c686d>; Ted Cruz, *Scotus Rejects Authority of World Court*, HUMAN EVENTS (Apr. 2, 2008), <http://www.humanevents.com/article.php?id=25783>.

94. See, e.g., Editorial, *Iran's Release of American Hikers is "Wonderful News,"* SEATTLE TIMES, Sept. 22, 2011, at A15; Nicholas Kristoff, *Laura Ling, Euna Lee, and North Korea*, N.Y. TIMES BLOG (June 22, 2009, 12:35 PM), <http://kristof.blogs.nytimes.com/2009/06/22/laura-ling-euna-lee-and-north-korea/>.

95. See, e.g., Editorial, *The World is Watching*, N.Y. TIMES, July 6, 2011, at A22; Editorial, *Another Chance for Justice*, WASH. POST, July 5, 2011, at A12, available at http://www.washingtonpost.com/opinions/another-chance-for-justice/2011/07/05/gHQA7LmkzH_story.html; Editorial, *The Law, Even on Death Row*, L.A. TIMES, July 2, 2011, at 24.

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Politicians may not gain many votes by enacting legislation to benefit foreign nationals on death row, but they are unlikely to lose popular support if their constituents understand the relationship between domestic compliance with Article 36 and consular access abroad, and if they appreciate the limited nature of the remedy mandated by the ICJ. Review and reconsideration is not a “get out of jail free” pass. Even if the courts provided review and reconsideration to every Mexican national named in the judgment, they would need to find evidence of “actual prejudice” before vacating a conviction or sentence—in which case the national would be subject to retrial, not release.⁹⁶

The Oklahoma example demonstrates that international legal arguments founded on reciprocity do resonate, even in the conservative heartland. Even in the wake of *Medellín*, the Oklahoma Court of Criminal Appeals has continued to provide judicial remedies for Article 36 violations.⁹⁷ And in 2011, the Massachusetts Supreme Judicial Court accepted its obligation to provide review and reconsideration under the ICJ’s ruling in the case of a foreign national seeking to vacate a guilty plea based on an Article 36 violation.⁹⁸ It remains to be seen whether these cases are interesting anomalies, or whether they presage an era of increasing concern for the international rule of law.

96. Consular Notification Compliance Act, S. Res. 1194, 112th Cong. § 4(a)(3)(2011). As of the time of this writing, the legislation had not yet passed.

97. *See* Duenas-Flores v. Oklahoma, No. C-2005-1, slip op. at 5 (Okla. Crim. App. June 28, 2007).

98. *Commonwealth v. Gautreaux*, 941 N.E.2d 616, 625 (Mass. 2011).