LAGRAND AND AVENA ESTABLISH A RIGHT, BUT IS THERE A REMEDY? BRIEF COMMENTS ON THE LEGAL EFFECT OF LAGRAND AND AVENA IN THE U.S.

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The United States is obligated under international law to review and reconsider the conviction and sentence of persons who were not informed of their right to request that their Consul be notified of their arrest and to meet with him, as provided for by Article 36 of the Vienna Convention on Consular Relations.[1]

The International Court of Justice (ICJ) so ruled in *Avena*[2] and *LaGrand*[3]. The ICJ had jurisdiction under the Optional Protocol to the Vienna Convention.[4] Unlike the ICJ decision in the Nicaragua case[5] and the recent ICJ advisory opinion on the Israeli security fence,[6] both of which raise serious questions

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1. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, para. 1(b), (c), 596 U.N.T.S. 261, 292 [hereinafter Vienna Convention] (entered into force Mar. 19, 1967).

2. Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1 (March 31).

3. LaGrand Case (Germany v. U.S.), 2001 I.C.J. 466 (June 27).

4. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1964, art. 1, 21 U.S.T. 326, 500 U.N.T.S. 241, 242 [hereinafter Optional Protocol]. ("Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any Party to the dispute being a Party to the present Protocol.").

5. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1984 I.C.J. 392 (Nov. 26).

6. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. – 43 I.L.M. 1009 (July 9) [hereinafter *Legal Consequences*].

about the propriety of the Court's assertion of jurisdiction,[7] there was no serious question of the Court's jurisdiction in this case.

The United States conceded, with respect to most of the defendants, that Article 36 of the Vienna Convention had not been complied with.[8] The remedy determined by the Court is not unreasonable. It does not require reversal and retrial. It only requires "the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences."[9]

The ICJ ruling is binding on U.S. courts, state and federal. Article VI of the U.S. Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; *and the judges in every state shall be bound thereby*, any thing in the constitution or laws of any state to the contrary notwithstanding.[10]

The Vienna Convention on Consular Relations, establishing the right of an arrested foreign national to be informed, and the Optional Protocol, giving the

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7. Although it was undisputed that Nicaragua had never accepted the compulsory jurisdiction of the ICJ, the Court ruled that it had jurisdiction under article 36(5) of the ICJ Statute, which provides:

> Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169, 200, 204(May 10).

The problem was that there was no record of Nicaragua ever having accepted the jurisdiction of the PCIJ either. *Id.* at 201. Nicaragua had indicated in 1939 that it would send its "instrument of ratification" accepting jurisdiction of the PCIJ. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 400 (Nov. 26). The ICJ acknowledged in its opinion that the "files of the League of Nations however contain no record of an instrument of ratification ever having been received. No evidence has been adduced before the Court to show that such an instrument of ratification was ever dispatched to Geneva."

In the case involving the wall, the Court improperly used its *advisory* jurisdiction to rule on a *contentious* matter without the consent of one of the parties. A number of states, including the United States and the European Union, urged the Court not to exercise jurisdiction. *Id.* For an excellent discussion of the ICJ's exercise of the advisory function in this case, *see* Michla Pomerance, *The Advisory Function and the Crumbling Wall Between the Political and the Judicial*, 99 AM. J. INT'L L. 26 (2005).

8. See *supra* note 2. In *Avena* the U.S. challenged Mexico's suit on jurisdictional and procedural grounds, but did not contest Mexico's claim that it had failed to inform the defendants of their rights under article 36 of the Vienna Convention in most of the 52 cases.

9. *Id.* at 55.

10. U.S. CONST. art. VI (emphasis added).

ICJ jurisdiction to interpret that right, are treaties of the United States.[11] There is no dispute about the self-executing nature of these treaties. While I and a number of other commentators have argued that non-self-executing declarations violate article VI, [12] that question does not arise here. The United States acknowledged at the time of ratification that the treaty is "entirely self-executing."[13]

It has been argued that "the ICJ does not exercise any judicial power in the United States, which is vested exclusively by the Constitution in the United States federal courts."[14] That is indisputable. But, as Justice Breyer points out in his dissent from the denial of certiorari in *Torres*, "it fails to address the question whether the ICJ has been granted the authority, by means of treaties to which the U.S. is a party, to interpret the rights conferred by the Vienna Convention."[15] The answer is yes; the Optional Protocol gives the ICJ that authority.[16] The ICJ judgment is binding in the United States not because the ICJ has judicial authority in the United States, but because the Vienna Convention as interpreted by the ICJ is binding on the United States under article VI of the U.S. Constitution.

The problem is implementing the ICJ ruling. If the state has a procedure under which it provides review, there is, of course, no problem. Oklahoma did so in the *Torres* case.[17] If the state does not have a procedure that can be invoked by the defendant, it has an obligation to create one. That is so, because article VI of the Constitution requires state judges to implement the treaty obligations of the United States, and the Vienna Convention, as authoritatively interpreted by the ICJ, requires the United States to provide review. Ideally, states whose laws bar judicial review in these cases will change their laws.

Nevertheless, if a state fails to establish a procedure for review, considerations of federalism would probably preclude the federal government

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11. Vienna Convention, *supra* note 1, at 292; Optional Protocol, *supra* note 4, at 326. The Vienna Convention on Consular Relations and Optional Protocol entered into force for the United States on April 24, 1963. *Id.*

12. Malvina Halberstam, Alvarez-Machain II: The Supreme Court's Reliance on the Non-Self-Executing Declaration in the Senate Resolution Giving Advice and Consent to the International Covenant on Civil & Political Rights, 1 Journal of National Security Law & Policy 89 (2005);*United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women,* 31 GEO. WASH. J. INT'L L. & ECON. 49, 64-69 (1997) (quoting a number of commentators).

13. Torres v. Mullin, 540 U.S. 1035, 1039 (2003) (Breyer, J., dissenting) (quoting J. Edward Lyerly, State Dep't Deputy Legal Advisor, Testimony at Senate Hearing on the Ratification of the Vienna Convention (Mar. 19, 1967)).

14. *Torres*, 540 U.S. at 1041.

15. *Id.*

16. *See* Optional Protocol, *supra* note 4.

17. Torres v. Oklahoma, 58 P.3d 214 (Okla. Crim. App. 2004).

from compelling states to provide a remedy.[18] The alternative is for the federal government to provide review. The difficulty, of course, is that in recent years Congress and the Supreme Court have greatly narrowed the scope of federal *habeas corpus*.[19] Nevertheless, some federal courts have held that federal courts may review such cases under §2254,[20] notwithstanding the failure to raise the claim as required by state law. For example, in the *Madej* case the federal district court took the position that a state's procedural default rules would not bar federal review.[21] It distinguished the Supreme Court's decision in *Breard*,[22] saying,

> The Supreme Court's declaration in *Breard* that the procedural default rules apply equally to Vienna Convention violations operated on the explicit assumption that "those rules enable full effect to be given to the purposes for which the rights accorded under this Article are intended." The I.C.J. has now declared that those rules do interfere with giving full effect to the purposes of the treaty, undermining a major premise of the holding.[23]

But other federal courts have held that such an action would be foreclosed. The Fifth Circuit has so held in the *Medellin* case, which involves one of the petitioners in the *Avena* case.[24] A petition for certiorari has been filed in that case.[25] If the Supreme Court interprets §2254 to permit judicial review in all the

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18. *See, e.g.* Alden v. Maine, 527 U.S. 706, 748 (1999); Printz v. United States, 521 U.S. 898 (1997). *But see* Torres v. Mullin, 124 S.Ct. 919, 920 (2003) (Stevens, J., concurring) (emphasis added)

> Article VI, cl. 2, of our Constitution provides that the "Laws of the United States," expressly including "all Treaties made ... under the Authority of the United States, shall be the supreme Law of the Land." The Court was unfaithful to that command when it held that Congress may not require county employees to check the background of prospective handgun purchasers, Printz v. United States, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), that Congress may not exercise its Article I powers to abrogate a State's common-law immunity from suit, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), and that a State may not be required to provide its citizens with a remedy for its violation of their federal rights, Alden v. Maine, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). The Court is equally unfaithful to that command when it permits state courts to disregard the Nation's treaty obligations.

19. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C.S. § 2244 (2004)); Teague v. Lane, 489 U.S. 288 (1989).

20. 28 U.S.C. § 2254 (1996).

21. United States *ex rel.* Madej v. Schomig, 223 F. Supp. 2d 968 (N.D.Ill. 2002).

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

23. *Madej*, 223 F. Supp. 2d at 979.

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

25. A petition for certiorari was filed on Aug. 18, 2004. Petition for Certiorari at i, 2004 WL 2851246, Medellin v. Dretke, 371 F.3d 270 (5th Cir. (Tex.) May 20,2004) (No. 04-5928). The questions presented in the petition are the following:

> 1. In a case brought by a Mexican national whose rights were adjudicated in the [International Court of Justice's] Avena Judgment, must a court in the United

cases required by the Vienna Convention as interpreted by the ICJ, that will resolve the remedy problem. But, if the Supreme Court interprets §2254 more narrowly, there will still be cases for which the United States is required to provide review under the Vienna Convention but cannot do so under existing U.S. law.

IV. CONCLUSION

A state's domestic law is, of course, not a defense to non-compliance with its international obligations.[26] The solution, in my view, would be an amendment to §2254, giving federal district courts jurisdiction in those cases where the United States is obligated to provide review under a treaty and no state forum is available. Such an amendment would not impose a great burden on the federal courts, as the number of cases is not very large (and hopefully will be fewer as state officials become more knowledgeable about the Vienna Convention requirements). Such an amendment would probably also be good for the United States politically. At a time when the United States is being criticized for not adhering to various treaties—which under international law it, of course, has every right not to ratify—it would demonstrate that the United States takes its international obligations seriously and respects those treaties that it has ratified.

States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the Avena holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?

2. In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the [International Court of Justice's] LaGrand and Avena judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?

Id. The Supreme Court granted certiorari on December 10, 2004. Medellin v. Dretke, 125 S. Ct. 686 (2004). It dismissed the petition as improvidently granted on May 23, 2005 in a *per curiam* opinion, 544 U.S. – (2005).

26. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 27 1155 U.N.T.S. 331, (entered into force Jan. 27, 1980) ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"). The U.S. has not ratified the Convention, but accepts it as generally reflecting customary international law.