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HAGUE INTERNATIONAL TRIBUNALS

Measures Necessary to Ensure: The ICJ's Provisional Measures Order in *Avena and Other Mexican Nationals*

ROBERT D. SLOANE*

Abstract

This article analyzes the provisional measures order of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals*, the first provisional measures order issued by the ICJ after its decision in *LaGrand* holding that such orders have binding effect. After reviewing the background to Mexico's action, the article focuses on *Avena's* place in the Court's provisional measures jurisprudence, its international legal significance, its potential effects, if any, on the ICJ's perceived institutional legitimacy and authority, and its legal and political consequences for the United States. In particular, the article examines the domestic legal implications of the Court's order for the United States in the context of developing international norms on capital punishment and the due process standards governing its implementation in states that continue to practise it.

Key words

death penalty; International Court of Justice; provisional measures; relationship between international and municipal law; Vienna Convention on Consular Relations

On 5 February 2003 the International Court of Justice (ICJ, or the Court) ordered the United States to take 'all measures necessary to ensure' that three Mexican nationals incarcerated under sentences of death in the United States not be executed pending the Court's final judgement in *Avena and Other Mexican Nationals*.¹ This provisional measures order was the culmination of a trilogy rendered by the ICJ in cases brought against the United States for violations of Article 36 of the Vienna Convention on Consular Relations.² In each, states alleged that authorities of the United States failed timely to advise their nationals – inmates convicted of capital crimes and sentenced to death by municipal courts – of their right to consular notification and assistance

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1. *Avena and Other Mexican Nationals (Mexico v. United States)*, [2003] ICJ Rep. (5 Feb.) (hereafter *Avena Order*).
2. Vienna Convention on Consular Relations, 24 April 1963, 21 UST 77, 596 UNTS 261 (hereafter Vienna Convention); see *LaGrand (Germany v. United States)*, [1999] ICJ Rep. 9 (3 Mar.) (hereafter *LaGrand Order*); *Vienna Convention on Consular Relations (Paraguay v. United States)*, [1998] ICJ Rep. 248 (9 April).

under Article 36(1)(b) of the Convention.³ In each, those states invoked the Court's contentious jurisdiction under the Convention's Optional Protocol and sought stays of the executions pending the Court's final judgement.⁴ And in each of the prior cases, the ICJ directed the United States to take 'all measures at its disposal to ensure' that the state's nationals not be executed before its decision.⁵

In *Avena*, however, the Court replaced the qualifier 'at its disposal' with the mandatory 'necessary'.⁶ This deceptively trivial change not only represented a victory for Mexico, it also established a unique and vital international precedent. By omitting the qualifier attached to its two prior provisional measures orders, the Court made unambiguous, as Mexico had asked it to, both the 'obligation to be imposed' and the 'required result' of its order.⁷ At one level, then, *Avena* simply reaffirmed an axiomatic principle of international law: a state may not invoke its municipal law or internal legal structure to excuse or justify violations of international law.⁸ But for a number of reasons – concerns about its institutional legitimacy, uncertainty about the scope and extent of its provisional measures authority, and deference to sovereignty in a matter as quintessentially within a state's municipal jurisdiction as criminal law enforcement – the ICJ had been curiously reluctant to affirm that principle in its earlier orders.⁹ *Avena* is also the first provisional measures order issued by the ICJ after its historic decision in *LaGrand* holding that such orders create binding legal obligations.¹⁰ Its import as an international precedent, finally, is matched by its significance for and potential effects, legal and political, on the United States.

This article explores the substance and ramifications of the *Avena* provisional measures order. Section 1 explains the background to the case initiated by Mexico on 9 January 2003, the relief sought on the merits, and the parties' submissions on the request for provisional measures. Section 2 briefly reviews the Court's resolution of Mexico's request by its Order of 5 February 2003. Sections 3 and 4 appraise

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3. Art. 36(1)(b) provides in pertinent part that 'if [a foreign national of a state party] 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 is arrested or committed to prison or to custody pending trial or is detained in any other manner . . . The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph'.
 4. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, 24 April 1963, Art. I, 21 UST 325, 326, 596 UNTS 487, 488.
 5. *LaGrand* Order, *supra* note 2, para. 29(I)(a); *Vienna Convention on Consular Relations*, *supra* note 2, at 258, para. 41(I).
 6. *Avena* Order, *supra* note 1, para. 59(I)(a).
 7. Request for the Indication of Provisional Measures of the United Mexican States, para. 19, in *Avena*, *supra* note 1, (filed 9 Jan. 2003) (on file with author) (hereafter Request).
 8. Vienna Convention on the Law of Treaties, 23 May 1969, Art. 27, 1155 UNTS 3331; Draft Articles on Responsibility of States for Internationally Wrongful Acts, Arts. 3–4, in Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), annexed to GA Res. 56/83 (12 Dec. 2001); see, e.g., *Reparation for Injuries Suffered in the Service of the United Nations*, [1949] ICJ Rep. 174, 180 (11 April); *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, PCIJ (ser. A/B) No. 44 (1932), at 4; *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, PCIJ (ser. A) No. 24 (1930), at 12.
 9. In *LaGrand*, the Court emphasized that its order had not 'required the United States to exercise powers that it did not have', implying that the legal powers 'at [the] disposal' of the US federal government were relevant to its international responsibility to ensure respect for the Court's order. *LaGrand (Germany v. United States)*, [2001] ICJ Rep. (27 June), para. 115 (hereafter *LaGrand* Judgement).
 10. *LaGrand* Judgement, *supra* note 9, para. 110.

respectively the international and domestic dimensions of *Avena*. I focus on *Avena's* place in the Court's provisional measures jurisprudence, its potential effects, if any, on the ICJ's perceived institutional legitimacy, and its legal and political consequences for the United States. I conclude by asking the extent to which *Avena*, like Paraguay's and Germany's actions before it, can or should in fact be understood, as Judge Oda has asserted, as a manifestation of 'abhorrence – by Mexico and others – of capital punishment'.¹¹

Subsequent to the preparation of this article, the ICJ rendered its decision on the merits in *Avena*.¹² The Court held that the United States had breached its obligations under the Vienna Convention and, reiterating its formulation in *LaGrand*, ordered that the United States provide 'by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals'.¹³ In *Avena*, however, the Court went further. It made it clear that the executive clemency hearings by which the United States had claimed to comply with *LaGrand's* directive were insufficient.¹⁴ Review and reconsideration, the Court held, must take place by means of 'a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration', and 'it is the judicial process that is suited to this task'.¹⁵ Courts must therefore reconsider the conviction and sentence in each case in which competent authorities violated the Convention and ascertain whether the violations 'caused actual prejudice to the defendant in the process of administration of criminal justice'.¹⁶ While many aspects of the ICJ's final judgement in *Avena* invite scholarly consideration, this article limits itself to analysis of the provisional measures order, which merits review in its own right.

I. THE BACKGROUND TO MEXICO'S ACTION AND THE SUBMISSIONS OF THE PARTIES

I.1. The background to Mexico's action

Mexico brought suit against the United States on 9 January 2003 by filing an application and request for the indication of provisional measures.¹⁷ It invoked the Court's jurisdiction under Article I of the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes.¹⁸ To an extent, Mexico's application naturally followed the model established by the actions of Paraguay and Germany. But for two principal reasons it did not simply mimic them.

11. *Avena Order*, *supra* note 1 (Declaration of Judge Oda).

12. *Avena and Other Mexican Nationals*, [2004] ICJ Rep. (31 March).

13. *Ibid.*, para. 153(9).

14. *Ibid.*, para. 143.

15. *Ibid.*, paras. 139, 140.

16. *Ibid.*, para. 121; see also *ibid.*, para. 122.

17. Application and Request for the Indication of Provisional Measures of the United Mexican States, 9 Jan. 2003, in *Avena and Other Mexican Nationals* (on file with author) (hereafter Application).

18. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *supra* note 4.

First, Mexico's geopolitical relationship to the United States made both the nature and gravity of its suit qualitatively distinct. Neither Germany nor Paraguay share a border with the United States. The number of Mexican nationals in the United States dwarfs the number of German or Paraguayan nationals. Mexico's northern border with the United States spans 1,989 miles, adjoining California, New Mexico, Arizona, and Texas.¹⁹ Millions of Mexicans live in the United States, temporarily or permanently, with or without legal immigrant status.²⁰ Mexico emphasized in its application that 'because of their geographic proximity and the frequent interstate travel of their respective citizens', the United States and Mexico had concluded a bilateral consular convention twenty years before the Vienna Convention's adoption.²¹ And since then it 'established forty-five Mexican consulates throughout the United States, primarily in areas with substantial Mexican populations'.²² Germany and Paraguay, by comparison, each maintain nine consulates (and one embassy) in the United States.

Second, in part because of these geopolitical factors and in part because of the precedents established by *LaGrand* and *Vienna Convention on Consular Relations*, the form and substance of Mexico's arguments departed significantly from the Paraguay–Germany model. Mexico's application, for example, reviewed in detail the activities and obligations of Mexican consular officers in the United States, focusing on their historic role in protecting Mexican nationals in conflict with the law.²³ Mexico further explained that its municipal law requires consuls to protect the rights of Mexican nationals,²⁴ including by providing advice, securing interpreters and competent local counsel, locating evidence, communicating with family members and witnesses, and attending legal proceedings – functions that, Mexico asserted, 'literally can make the difference between life and death for Mexican nationals prosecuted for capital crimes'.²⁵ Finally, Mexico's application detailed Mexico's prior efforts to obtain relief for its nationals convicted of capital offences after proceedings that failed to respect Article 36 of the Vienna Convention. These included actions in US courts, federal and state, and diplomatic overtures to the federal and state governments of the United States. Mexico explained, however, the municipal law barriers to relief under US law and the persistent failure of its diplomacy to secure anything more than pro forma apologies issued after the executions of its nationals had been carried out.²⁶

19. Migration Policy Institute, United States–Canada–Mexico Fact Sheet on Trade, Migration, and Border Crossings, available at http://www.migrationpolicy.org/pubs/us_mex_can_facts.htm (last visited 21 March 2003).

20. United States Census Bureau, *The Hispanic Population of the United States* (March 2001) (reporting that Mexican-Americans comprise 66.1 per cent of the 32.8 million Latinos residing in the United States as of March 2000).

21. Application, *supra* note 17, para. 20; see Bilateral Consular Convention of 1943, US–Mexico, 57 Stat. 800, TS 985.

22. Application, *supra* note 17, para. 21.

23. *Ibid.*, paras. 22–26.

24. Mexico therefore appears to adopt the mandatory view of consular functions, whereby consuls do not exercise discretion about whether to assist their nationals, but must provide them with assistance and protection if requested. See L. T. Lee, *Consular Law and Practice* (1991), 124–9.

25. Application, *supra* note 17, para. 23.

26. *Ibid.*, paras. 29–66; see, e.g., *United Mexican States v. Woods*, 126 F.3d 1220 (9th Cir. 1997) (finding Mexico's action seeking relief for violations of the Vienna Convention barred by the Eleventh Amendment to the United States Constitution), cert. denied, 523 US 725 (1998); *Consulate General of Mexico v. Phillips*, 17 F. Supp.

When Mexico filed suit on 9 January 2003, it therefore did not represent an isolated foreign-policy decision. Nor did Mexico simply chance to be the next state after Germany and Paraguay to find one of its nationals facing capital punishment after a conviction in United States courts following proceedings that failed to comply with Article 36 of the Vienna Convention. Mexico's suit rather represented the next step in, and perhaps the culmination of, its ongoing efforts to secure the consular rights of its nationals in the United States – a process that continues at the domestic legal and international political levels.

1.2. The application instituting proceedings

Mexico's application and request for provisional measures reflected these facts. Paraguay's and Germany's applications totalled less than ten pages each and contained few legal citations. Mexico's application ran to more than 70 pages and contained scores of citations, resembling a hybrid complaint and memorandum of law. Paraguay's and Germany's applications concerned individual cases. Their requests for the indication of provisional measures sought the stay of one execution. Mexico's application averred a pattern and practice of systematic violations of the Vienna Convention. Its request sought the stay of the executions of 54 Mexican nationals presently incarcerated under a sentence of death following municipal legal proceedings in which competent authorities of the United States allegedly failed to respect Article 36.²⁷

On the merits, Mexico, like Paraguay and Germany before it, requested *restitutio in integrum*, 'reestablish[ment] of the situation which would, in all probability, have existed if [the violations] had not been committed',²⁸ which, Mexico claimed, required the United States to 'reestablish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States['] international legal obligations'.²⁹ And, again like Paraguay and Germany, Mexico requested a guarantee of non-repetition.³⁰ But unlike the former applications, Mexico requested two additional remedies: the former based on Article 36(2) of the Convention,³¹ the latter, broadly speaking, on *LaGrand*.

2d 1318 (SD Fla. 1998) (disclaiming jurisdiction over suit by Mexico's consul to vindicate Vienna Convention rights because of the Eleventh Amendment and the federal abstention doctrine of *Younger v. Harris*, 401 US 37 (1971)).

27. On 11 January 2003, shortly after Mexico filed its application, Illinois's governor commuted the sentence of all convicts on death row in that state, three of whom had been included in Mexico's application. See Eric Slater, 'Illinois Governor Commutes All Death Row Cases', *Los Angeles Times*, 12 Jan. 2003, at A1. In view of this development, Mexico informed the court that its request for provisional measures no longer applied to these three nationals, although its application for relief on the merits with respect to their convictions and sentences remained. It also noted that Governor Ryan had referred expressly to the concerns about the Vienna Convention violations communicated to him by President Vicente Fox of Mexico and observed that 'If we do not uphold international law here, we cannot expect our citizens to be protected outside the United States.' Letter from Santiago Oñate, Agent of the United Mexican States, to Philippe Couvreur, Registrar of the International Court of Justice (20 Jan. 2003) (on file with author).

28. *Factory at Chorzów (Germany v. Poland)*, PCIJ (ser. A) No. 17 (1928), at 47 (13 Sept.).

29. Application, *supra* note 17, para. 281.

30. *Ibid.*

31. Art. 36(2) provides that Art. 36(1) rights 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 under this Article are intended'.

First, Mexico asked the Court to order the United States to ‘take the steps necessary and sufficient to ensure that its municipal law enable[s] full effect to be given to the purposes for which the rights afforded by article 36 are intended’.³² Second, Mexico asked that the United States be required ‘to establish a meaningful remedy *at law*’ for violations of Article 36.³³

1.3. The request for the indication of provisional measures

Mexico’s provisional measures request likewise resembled those of Paraguay and Germany, but, again, also differed in several crucial respects. Foremost, after *LaGrand*, Mexico could and did emphasize the undoubted nature of the ICJ’s provisional measures authority: that ‘Orders of provisional measures pursuant to article 41 establish binding obligations.’³⁴ After the orders issued in response to Paraguay and Germany’s requests, Mexico also could and did seek support in those precedents, arguing that they ‘unequivocally support Mexico’s right to provisional measures here’.³⁵

Because of the United States’ responses to the ICJ’s prior orders,³⁶ however, Mexico took the unusual step of elaborating at the pleading stage a paramount principle of international law: that neither a state’s internal structure nor its municipal laws may excuse or justify failures to comply with international legal obligations. Hence Mexico emphasized that ‘both the United States and its political subdivisions have an obligation to abide by the international legal obligations of the United States’, and therefore that ‘while Mexico recognizes that the Court may wish to leave to the United States the choice of means, Mexico respectfully requests that the Court leave no doubt as to the required result’.³⁷

Finally, Mexico took the even more unusual step of digressing into a state’s municipal law in an effort to establish that, in any event, the United States clearly *does* have ample means at its disposal to enforce the Court’s order.³⁸ Citing the United States Constitution, federal cases, and academic commentary, Mexico reviewed in some detail the variety of measures available to the United States to ensure that its constituent states obey the Court’s order³⁹ – despite what US authorities had

32. Application, *supra* note 17, para. 281.

33. *Ibid.* (emphasis added).

34. Request, *supra* note 7, para. 8 (citing *LaGrand* Judgement, *supra* note 9, para. 109).

35. *Ibid.*, para. 14.

36. In both Paraguay’s and Germany’s cases, US state authorities of, respectively, Virginia and Arizona executed the foreign nationals notwithstanding the ICJ’s provisional measures orders. In neither case did the federal government take all the measures ‘at its disposal’ to prevent those executions, and, in Paraguay’s case, one branch of the federal government submitted a brief to the US Supreme Court contending that the ICJ’s order did not establish binding obligations. See Brief for the United States as *Amicus Curiae*, at 51, in *Breard v. Greene*, 523 US 371 (1998), 1997 LEXIS US Briefs 1390, at *51 (asserting that the ICJ’s ‘order is precatory rather than mandatory’). On Paraguay’s action, and the failure of the United States to comply, see generally ‘Agora: *Breard*’, (1998) 92 AJIL 666–712; see also *Breard v. Greene*. On Germany’s action, and the failure of the United States to comply, see B. H. Oxman and W. J. Aceves, ‘International Decision: *LaGrand (Germany v. United States)*’, (1998) 96 AJIL 210, 214–15; see also *Federal Republic of Germany v. United States*, 526 US 111 (1999), 112 (declining to grant Germany’s application for leave to file an original bill of complaint to enforce the ICJ’s order because of ‘the tardiness of the pleas and the jurisdictional barriers they implicate’).

37. Request, *supra* note 7, para. 4.

38. *Ibid.*, paras. 22–29.

39. Specifically, Mexico emphasized (1) that Art. 6, Clause 2 of the US Constitution establishes the supremacy of federal law, including treaty law, Request, *supra* note 7, paras. 22–23 (citing *United States v. Pink*, 315 US 203 (1942), 230–1, and *United States v. Belmont*, 301 US 324 (1937), 331–2); (2) that ‘Either the governor or the state clemency board is authorized to grant stays or commute sentences in all of the states on which Mexican

claimed in the past to be obstacles to enforcement imposed by the federal structure and municipal laws of the United States.⁴⁰ In short, Mexico sought to impress on the Court that the qualifier 'at its disposal' would be doubly superfluous: first, because of the irrelevance of municipal law constraints to the international responsibility of the United States; and second, because even a cursory review of that municipal law belied the asserted inability of the federal government to ensure that its constituent states comply with the ICJ's order.⁴¹

1.4. The provisional measures hearing

After the first round of oral submissions at the provisional measures hearing on 21 January 2003,⁴² Mexico pointed out an evident tension in the United States' position on this score: on the one hand, it agreed that its municipal law should play no role in the Court's decision; on the other, it explained 'the complications of federalism and . . . suggest[ed] that in fact those complications were somehow a reason to repeat the formulation' adopted by the Court in *LaGrand* and *Vienna Convention on Consular Relations*.⁴³ In this regard Mexico reminded the Court that 'from the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activity of States, in the same manner as do legal decisions or administrative measures'.⁴⁴

The United States did not directly take issue with the legal principles set forth by Mexico. Nor did it contest jurisdiction, perhaps recognizing that its arguments on this issue would fare no better at the provisional measures stage than in the

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- nationals presently remain on death row,' Request, *supra* note 7, para. 26; (3) that federal courts may enjoin actions by the constituent states in violation of federal law, including treaty obligations, Request, *supra* note 7, para. 27 (citing *Asakura v. Seattle*, 265 US 332 (1924) (enjoining enforcement of municipal ordinance in violation of treaty with Japan)); (4) that the President may issue an executive order requiring compliance with federal law, including international law, Request, *supra* note 7, para. 28 (citing *Dames & Moore v. Regan*, 453 US 654 (1982)); and (5) that the Attorney General of the United States may bring suit against the constituent states to enforce treaty obligations, see Request, *supra* note 7, para. 29 (citing, *inter alia*, *United States v. County of Arlington*, 669 F.2d 925, 928–9 (4th Cir.), cert. denied, 459 US 801 (1982)).
40. See, e.g., Memorial of the United States of America, 27 March 2000, paras. 121–127, in *LaGrand* (describing constraints on the federal government's ability to ensure compliance with the ICJ's order allegedly imposed by its federal constitutional structure); see also *ibid.*, para. 118 (asserting that 'By immediately transmitting the Order to the Governor of Arizona, the United States placed the Order in the hands of the one official who, at that stage, might have had legal authority to stop the execution').
41. Mexico therefore expressly asked the ICJ to impose an 'obligation of result' – the precise kind of order – indeed the precise language – that the Court had disclaimed in reviewing the nature of the obligation that its provisional measures order in *LaGrand* had imposed. See *LaGrand* Judgement, *supra* note 9, para. 115.
42. As an initial matter, Mexico argued that it met the requirements for provisional measures under Art. 41 of the ICJ Statute, which authorizes the Court 'to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party'. Statute of the International Court of Justice, 26 June 1945, Art. 41, UN Charter (annex), 59 Stat. 1055. The ICJ's precedents establish that to qualify for provisional measures a state must show (1) *prima facie* jurisdiction, (2) an urgent need to preserve the rights of the parties, (3) a probability of irreparable harm, and (4) that an order would not anticipate the Court's judgement on the merits. See *Nuclear Tests (Australia v. France)*, [1973] ICJ Rep. 99, 101, para. 13 (22 June) (*prima facie* jurisdiction); *ibid.*, para. 20 (order may not anticipate judgement on the merits); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro)*, [1993] ICJ Rep. 3, 19, para. 34 (8 April) (irreparable prejudice); *Passage Through the Great Belt (Finland v. Denmark)*, [1991] ICJ Rep. 12, 17, para. 23 (July 29) (urgency).
43. Transcript of Oral Argument, 21 Jan. 2003 (hereafter Hearing Transcript), rebuttal at 21, available at http://www.icj-cij.org/icjwww/idocket/imus/imuscr/imus_ocr2003-03_20030121.PDF.
44. *Certain German Interests in Polish Upper Silesia*, PCIJ (ser. A) No. 7 (1926), at 19 (25 May).

cases of Paraguay and Germany.⁴⁵ It instead contended that the order Mexico sought would be an exorbitant exercise of the ICJ's provisional measures authority: Mexico 'ask[s] this Court to intrude deeply into the entire criminal justice system of the United States', to 'begin dictating the outcomes of criminal cases'.⁴⁶ The United States further argued that the order requested by Mexico would be at odds with the remedy for Article 36 violations articulated in *LaGrand*, 'review and reconsideration' of the conviction and sentence taking account of the violation.⁴⁷ Provisional measures, the United States maintained, could not provide interim relief that would exceed the maximum remedy on the merits to which a state might be entitled.⁴⁸ Because, the United States argued, *LaGrand* entitles Mexican nationals only to review and reconsideration,⁴⁹ a stay could not be deemed a measure to preserve Mexico's rights or those of its nationals; for those rights, by hypothesis, do not exist.

By making this argument, however, the United States conflated two issues: the standards for granting provisional relief under Article 41, on the one hand, and the remedy on the merits for the violations alleged by Mexico, on the other. Circumstances may well exist in which the Court's ability to render full relief on the merits to one party requires that it preserve the status quo, even if that necessitates an order that implicates legal rights that may not, strictly speaking, belong to that party (or even exist). Mexico may not, for example, have had a right to vacatur of the convictions and sentences of its nationals, a form of relief that the Court indeed ultimately declined to order in its decision on the merits. But to execute Mexico's nationals before the Court had the opportunity to rule on the merits would plainly have precluded the ICJ from finally awarding them any form of meaningful relief, except, perhaps, for *ex post facto* compensation. Equally, it would have improperly anticipated a judgement on the merits.⁵⁰

To sustain its argument, the United States also put itself in an awkward litigation posture. By contending that neither Mexico nor its nationals possess the rights that Mexico sought, by its request for provisional measures, to preserve, the United States assumed the burden to establish, on the merits, two controversial legal propositions at the provisional measures stage: first, that *LaGrand* entitles Mexican nationals only to 'review and reconsideration', neither more nor less; and second, that the executive clemency hearings by which the United States purported to implement *LaGrand* constitute 'review and reconsideration'.⁵¹ Yet those very propositions tend to invest the Court with rather than divest it of jurisdiction and authority to order

45. Hearing Transcript, *supra* note 43, Argument of the United States of America, para. 2.4 (declining to address jurisdiction but reserving the 'right to contest the Court's jurisdiction at the appropriate stage later in the case').

46. Hearing Transcript, *supra* note 43, para. 1.6; see also *ibid.*, paras. 3.37–3.47.

47. *Ibid.*, para. 3.4; see *LaGrand* Judgement, *supra* note 9, para. 125.

48. Hearing Transcript, *supra* note 43, paras. 3.1–3.6.

49. *LaGrand* Judgement, *supra* note 9, para. 125.

50. *Nuclear Tests (Australia v. France)*, *supra* note 42, 103, para. 20 (22 June).

51. See Hearing Transcript, *supra* note 43, paras. 3.10–3.11. As Mexico noted in rebuttal, this assumes the point in dispute, i.e., the meaning of 'review and reconsideration'. See Hearing Transcript, *supra* note 43, rebuttal at 13 ('Mexico does not believe that the Vienna Convention affords nationals deprived of their rights an opportunity to beg for mercy'); *ibid.*, rebuttal at 12 ('Mexico is confident that under any reasonable interpretation of this Court's judgment in *LaGrand*, that the standardless, secretive and unreviewable process that is called clemency cannot and does not satisfy this Court's mandate in [*LaGrand*]').

provisional measures – for both indicate clear disputes over the interpretation and application of the Convention after *LaGrand*.⁵²

2. THE COURT'S ORDER OF 5 FEBRUARY 2003

In its request, and again at oral argument, Mexico asked the Court to act 'with the utmost dispatch'.⁵³ The ICJ issued its order on 5 February 2003. Early in the text, the Court telegraphed its agreement with Mexico that a genuine dispute existed over the interpretation of the rights set forth in Article 36. It quoted Mexico's assertion that 'the rights conferred by Article 36 . . . are not rights without remedies' and supported that proposition by citing *LaGrand*.⁵⁴ Conversely, the Court noted the United States' contrary argument about the nature of the obligations imposed by *LaGrand* and its representation that it had been complying with those obligations – review and reconsideration – by executive clemency processes.⁵⁵

Having concluded that a genuine dispute exists, and hence that it possessed prima facie jurisdiction under the Optional Protocol,⁵⁶ the Court proceeded to analyze whether an indication of provisional measures would unduly prejudice the United States. The ICJ reiterated that its 'function . . . is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal', but after the *LaGrand* and *Vienna Convention on Consular Relations* orders, it responded confidently, if simply, that it 'may indicate provisional measures without infringing these principles'.⁵⁷ The Court found that the three cases cited in Mexico's request as presenting the most imminent risks of executions satisfied the requirement of urgency. It held, however, that at that juncture it would be needlessly sweeping to stay the executions of all 54 Mexican nationals enumerated in Mexico's application.⁵⁸

In the operative paragraph of its order the Court therefore, unanimously, indicated:

- (a) The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;

52. Mexico's request therefore differed from that of Libya in *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United States)*, [1992] ICJ Rep. 114 (14 April), where the Court denied Libya's request for provisional measures on the ground that 'whatever the situation previous to the adoption of [SC Res. 748 (1992)], the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures'. *Ibid.*, at 126–7, para. 43 (emphasis added). After *LaGrand*, the existence of the rights invoked by Mexico cannot be disputed – only their proper interpretation and application. But that, of course, supplies with rather than divests the ICJ of jurisdiction.

53. Request, *supra* note 7, para. 15.

54. *Avena* Order, *supra* note 1, para. 3 (quoting Application, *supra* note 17, para. 18, and *LaGrand* Judgment, *supra* note 9, para. 125); see O. W. Holmes, Jr., *The Common Law*, ed. M. DeWolfe Howe (1963 [1881]), 169.

55. *Avena* Order, *supra* note 1, paras. 30, 37.

56. See *ibid.*, paras. 38–42.

57. *Ibid.*, para. 48 (citing *LaGrand* Order, *supra* note 2, at 15, para. 25 (3 March)).

58. *Ibid.*, para. 56 (observing that 'the other individuals listed in Mexico's Application, although currently on death row, are not in the same position as the three persons identified in the preceding paragraph of this Order').

- (b) The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.⁵⁹

3. INTERNATIONAL APPRAISAL

3.1. Jurisdiction

Judge Oda joined the *Avena* provisional measures order, but issued a declaration to reiterate ‘doubts concerning the Court’s definition of “disputes arising out of the interpretation and application” of the Vienna Convention on Consular Relations’.⁶⁰ In his view Mexico and the United States did not dispute the interpretation and application of the Vienna Convention; rather, ‘While there may be a question of the appropriate *remedy* for the violation, that is a matter of general international law, *not* of the interpretation or application of the Convention.’⁶¹

On this issue, the Court stands on solid ground. First, of course, at the provisional measures stage, the Court need only satisfy itself that it has *prima facie* jurisdiction.⁶² But in any event, the suggestion that the Court lacks jurisdiction over a dispute about the remedies for conceded violations of a treaty simply because they *have* been conceded is difficult to accept, both as to the Vienna Convention specifically and treaty disputes generally. The United States itself, as counsel for Mexico noted, rejected this view in *United States Diplomatic and Consular Staff in Tehran*.⁶³ Disputes about the remedies international law prescribes for Convention violations constitute disputes about the ‘interpretation and application of the Convention’.⁶⁴

In fact, few treaties specify particular remedies for their violation. States conclude treaties within the context of general principles on remedies under international law, most importantly the well-known principle of *restitutio in integrum* articulated in *Chorzów Factory*.⁶⁵ There, the Permanent Court of International Justice affirmed that ‘reparation is the indispensable complement of a failure to apply a convention, and *there is no necessity for this to be stated in the convention itself*’.⁶⁶ It would be odd, then,

59. *Ibid.*, para. 59.

60. *Avena* Order, *supra* note 1 (Declaration of Judge Oda); cf. *LaGrand* Order, *supra* note 2, (3 March) (Declaration of Judge Oda); *Vienna Convention on Consular Relations*, *supra* note 2, (9 April) (Declaration of Judge Oda).

61. *Ibid.* (emphasis in original). Judge Oda also appeared to agree with the United States that the Court’s order inappropriately ‘interferes in a State’s criminal law system’, by ‘fail[ing] to respect the sovereignty of the State and plac[ing] itself on a par with the supreme court of the State’. In view of these strongly expressed views, why Judge Oda concurred is not entirely clear. In both *LaGrand* and *Vienna Convention on Consular Relations*, he said that he voted to stay the executions on humanitarian grounds notwithstanding his disagreements with the majority, and it is reasonable to speculate that the same considerations motivated his decision to join the *Avena* Order.

62. See, e.g., *Nuclear Tests (Australia v. France)*, *supra* note 42, 101, para. 13 (June 22).

63. See Transcript of Oral Submissions (rebuttal at 5), in *Vienna Convention on Consular Relations*, *supra* note 2, (9 April).

64. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *supra* note 4. Mexico’s application in any event raises questions not only about the remedies for, but also about the precise content and meaning of, the rights conferred by Art. 36. See Application, *supra* note 17, para. 5 (asserting that ‘Mexico and the United States disagree both on the scope and the nature of the rights conferred by article 36, including the meaning of the phrase, “without delay”’).

65. *Factory at Chorzów*, *supra* note 28; see also *Corfu Channel (United Kingdom v. Albania)*, [1949] ICJ Rep. 4, 23 (9 April).

66. *Ibid.* at 29 (emphasis added); cf. *LaGrand* Judgement, *supra* note 9, para. 48 (‘Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required for the Court to consider the remedies a party has requested for the breach of the obligation’). Responding to a similar assertion by

if the absence of an express provision on remedies divested the Court of jurisdiction where a dispute over that dimension of the interpretation and application of a multilateral treaty plainly exists.

3.2. Propriety of the order

Did the ICJ exceed its legitimate provisional measures authority? The *Avena* order largely conforms to the precedents established by *LaGrand* and *Vienna Convention on Consular Relations*. To the extent that those cases persuade, it is difficult to argue that Mexico's request should have been treated differently.⁶⁷ But however accurate the ICJ's repeated disclaimer that it will not act 'as a court of criminal appeal',⁶⁸ to stay criminal sentences will inevitably be perceived by some observers and commentators as an illegitimate or exorbitant exercise of the Court's provisional measures authority – if only because, in effect, it may seem indistinguishable from the relief that a municipal appellate court might order. An international stay of municipal criminal proceedings is unquestionably an unusual exercise of provisional measures authority. It is therefore worth asking whether *Avena*, like its predecessor orders, augurs an inappropriate level of interference by the ICJ in the sovereign affairs of those states from which its jurisdiction and authority derive.

In general, provisional measures affect matters readily understood as traditional concerns of international law: the rights and duties of states vis-à-vis one another. In *Nuclear Tests*,⁶⁹ for example, the ICJ ordered France to refrain from 'nuclear tests causing the deposit of radio-active fall-out on Australian territory'. In *Passage Through the Great Belt*,⁷⁰ it denied Finland's request for an order that Denmark 'refrain from continuing or otherwise proceeding with . . . construction works in connection with the planned bridge project over the East Channel of the Great Belt as would impede the passage of ships . . . to and from Finnish ports and shipyards'. In *Land and Maritime Boundary between Cameroon and Nigeria*,⁷¹ it instructed those states to take no action prejudicial to its adjudication of their dispute over the sovereignty of the Bakassi Peninsula. Each thus involved quintessentially inter-state issues – transboundary environmental harms, the law of the sea, and frontier and maritime boundaries, respectively. The acts sought to be stayed implicated the rights of states qua states.

In *Avena*, by contrast, as in *LaGrand* and *Vienna Convention on Consular Relations*, the Court ordered the United States to stay acts – the imposition of criminal

the United States in the *Vienna Convention on Consular Relations* provisional measures hearing, counsel for Paraguay observed that were the contrary argument accepted, 'it would be necessary to reproduce the Articles on State Responsibility in every treaty, and surely that is not the expectation of treaty drafters. Instead, the fundamental understanding with respect to remedies is part of a legal context in which any treaty must operate.'

67. See Request, *supra* note 7, paras. 15–16 (quoting *LaGrand* Order, *supra* note 2, para. 19 (3 March)). This is not to suggest that either Paraguay or Germany deliberately failed to submit their requests 'in good time'; it is only to point out that Mexico sought to heed *LaGrand*'s directive concerning the timely submission of requests for the indication of provisional measures.
68. *Avena* Order, *supra* note 1, para. 48 (citing *LaGrand* Order, *supra* note 2, para. 25); see also *Vienna Convention on Consular Relations*, *supra* note 2, at 257, para. 38 (9 April).
69. *Nuclear Tests (Australia v. France)*, *supra* note 42, 106, para. 36 (22 June).
70. *Passage through the Great Belt (Finland v. Denmark)*, *supra* note 42, 14, para. 7 (29 July).
71. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, [1996] ICJ Rep. 13, 24, para. 49 (15 March).

sentences – ordinarily regarded as ‘matters . . . essentially within the domestic jurisdiction of [that] state’.⁷² *Avena* does not implicate a matter on which international law arguably provides for concurrent criminal jurisdiction by more than one state.⁷³ Yet *Avena*’s alleged intrusion into municipal law should not be understood as a radical departure from the Court’s conventional practice. The Vienna Convention and its subject matter (consular relations) implicate the international rights of Mexico and the United States qua states. The regulation of consular relations between states has been a vital function of international law since its modern evolution following the Peace of Westphalia.⁷⁴ *Avena* therefore did no more than preserve certain treaty rights in connection with a traditional subject of international concern, pending the Court’s final judgement.⁷⁵ That it incidentally may have impeded the usual progression of criminal proceedings in the United States remains, as a matter of international law, irrelevant.⁷⁶ The ICJ’s order in *Avena*, like those in *LaGrand* and *Vienna Convention on Consular Relations*, may be unusual insofar as it affects a matter – the operation of a state’s criminal laws – ordinarily outside the scope of international concern. That alone, however, does not make it either unprecedented or an abuse of the Court’s authority under its Statute.

3.3. Precedential value

How should the Court’s substitution of ‘necessary’ for the qualifier ‘at its disposal’ be understood? Mexico argued adamantly for that change, and the Court acceded to its request. To understand why, it should first be emphasized that the Court’s decision to insert ‘at its disposal’ in the *LaGrand* and *Vienna Convention on Consular Relations* orders did not arise in a vacuum. In the latter case, Paraguay had asked the ICJ to order ‘that the Government of the United States take the measures *necessary to ensure* that Mr. Breard not be executed pending the disposition of this case’.⁷⁷ But the Court nonetheless chose to limit its order to those measures at the United States’ ‘disposal’. That formulation had appeared, in substance, in prior provisional measures orders in which a state’s ability to comply might reasonably be subject to doubt.⁷⁸ Second, the Court has historically indicated provisional measures hesitantly, emphasizing

72. UN Charter, Art. 2(7).

73. See *SS Lotus (France v. Turkey)*, PCIJ (ser. A) No. 10 (1927) (Sept. 7); cf. *Wildenhuis’s Case*, 120 US 1 (1887).

74. See generally Lee, *supra* note 24, at 3–7 (describing the origins and evolution of consular relations).

75. Provisional measures orders based on treaty obligations enjoy ample support in international precedents, which include orders that arguably interfered far more dramatically with matters intimately related to domestic sovereignty, for example internal revolution. See *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, [1979] ICJ Rep. 7, 12, para. 25 (15 Dec.) (indicating provisional measures in connection with the Iranian hostage crisis, in part on the basis of the Vienna Convention on Consular Relations, notwithstanding the Court’s agreement that ‘it is no doubt true that the Islamic revolution of Iran is a matter “essentially and directly within the national sovereignty of Iran”’); cf. *Bosnia & Herzegovina v. Serbia & Montenegro*, *supra* note 42, (8 April) (ordering Yugoslavia to ‘take all measures within its power to prevent commission of the crime of genocide’ on its territory or by forces within its effective control).

76. Cf. *Arrest Warrant of 11 April 2000 (Congo v. Belgium)*, Judgement of 14 February 2002, para. 78(3), available at http://www.icj-cij.org/icjwww/idocket/imus/imuscr/imus_icr2003-03_20030121.pdf (ordering ‘that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated’).

77. See Request for the Indication of Provisional Measures of the Republic of Paraguay, April 3, 1998, para. 8(a) (emphasis added), in *Vienna Convention on Consular Relations*, *supra* note 2, (9 April).

78. E.g., *Bosnia & Herzegovina v. Serbia & Montenegro*, *supra* note 42, para. 52(a)(1) (8 April) (ordering Yugoslavia to ‘take all measures *within its power* to prevent commission of the crime of genocide’) (emphasis added).

their extraordinary nature.⁷⁹ Their imposition has frequently provoked controversy within the Court, producing numerous separate declarations and dissents.⁸⁰ Much of this hesitation, if not apprehension, about provisional measures can fairly be ascribed to the Court's past inability to arrive at an internal consensus about the extent, scope, and binding effect of its provisional measures orders authority under Article 41 of its Statute.

LaGrand, however, resolved the most fundamental of these issues, changing the legal landscape in which the Court considered Mexico's request. There, the Court held that 'the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court'.⁸¹ Observing that its order 'was not mere exhortation', the Court then reviewed the measures taken by the United States and ruled that it did not take 'all measures at its disposal' to prevent the execution of the German national Walter LaGrand pending the Court's decision on the merits.⁸² The Court qualified its judgement in *LaGrand*, however, with language that presaged Mexico's request. It noted the United States' representation that its ability to comply had been constrained by 'the character of the United States as a federal republic of divided powers', a system in which, the United States asserted, only the Governor of Arizona had the power to stay an execution imposed under Arizona law.⁸³ The Court evidently deferred to this representation, emphasizing that it had 'not require[d] the United States to exercise powers it did not have'.⁸⁴

For that reason, in *Avena* Mexico emphasized the simple but critical distinction between physical and legal obstacles to compliance. There could be no question of the *physical* ability of the United States to comply. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court had ordered Yugoslavia to 'take all measures *within its power* to prevent commission of the crime of genocide', implicitly acknowledging (accurately or not) that Yugoslavia may have lacked effective control over the various military and paramilitary forces engaged in acts of genocide on its territory or under its technical legal control.⁸⁵ But the request in *Avena*, as in *LaGrand* and *Vienna Convention on Consular Relations*, required no onerous state action. Nor did it impose any financial burdens. It simply required authorities of the United States to refrain from certain actions – simply, if graphically,

79. E.g., *Aegean Sea Continental Shelf (Greece v. Turkey)*, [1976] ICJ Rep. 3, 11, para. 32 (11 Sept.); *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, [1951] ICJ Rep. 89, 97 (5 July) (dissenting opinion of Judges Winiarski and Badawi Pasha).

80. E.g., *Cameroon v. Nigeria*, *supra* note 71, (15 March); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, [1984] ICJ Rep. 169, 187 (10 May); *Nuclear Tests (Australia v. France)*, *supra* note 42, (22 June); *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, *supra* note 79, (5 July); *Passage through the Great Belt (Finland v. Denmark)*, *supra* note 42, (29 July).

81. *LaGrand* Judgement, *supra* note 9, para. 102; see also *ibid.*, para. 109 (text, object and purpose, and *travaux préparatoires* of the Statute of the Court support conclusion 'that orders on provisional measures under Art. 41 have binding effect'); see generally Oxman and Aceves, *supra* note 36.

82. *LaGrand* Judgement, *supra* note 9, paras. 110, 115; see also *ibid.*, paras. 111–14 (appraising measures taken by the United States).

83. *Ibid.*, para. 95.

84. *Ibid.*, para. 115.

85. *Bosnia & Herzegovina v. Serbia & Montenegro*, *supra* note 42, 24, para. 52(a)(1) (8 April) (emphasis added).

to forbear from flipping the switches on electric chairs or injecting lethal substances into persons – for the time necessary for the Court to consider and decide Mexico’s application on the merits. The physical capacity of the United States to obey that order could not be doubted. Its *legal* capacity, by contrast, the sole capacity that could be doubted, remained irrelevant as a matter of international law.

By its agreement with that proposition in the *Avena* provisional measures order, the ICJ reaffirmed a vital and indispensable principle governing the relationship between international and municipal law, while at the same time manifesting a new-found confidence in its provisional measures authority in the wake of *LaGrand*. The Court’s accession to Mexico’s request that it replace ‘at its disposal’ with ‘necessary’, finally, may suggest some frustration with the United States’ disregard of the Court’s two prior provisional measures orders in the Vienna Convention trilogy. In both, it will be recalled, the United States pleaded deficiencies in its municipal law and federal structure as justification for the failure of the competent authorities of its political subdivisions to comply with the Court’s orders.

3.4. The implications for the ICJ’s authority and institutional integrity

Avena is the first provisional measures order issued by the ICJ after its historic decision in *LaGrand* holding that provisional measures orders establish binding obligations. How the United States responded to it may therefore have affected the Court’s perceived institutional integrity and authority in a way that responses before *LaGrand* did not. As it happened, no conflict between the Court’s provisional measures order and the insistence of one of the states on carrying out an execution arose during the period of the order’s effect. But it is worth asking, as a matter of international law, what legal consequences defiance of the ICJ’s provisional measures order could have produced. First, in view of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts,⁸⁶ it is conceivable that the Court could have held the United States internationally responsible for the execution of one or more Mexican nationals carried out in disregard of its order even had it later determined, on the merits, that Mexico had no absolute right to the vacatur of their sentences, as indeed was the case.⁸⁷ Article 48(2) suggests that Mexico could invoke the United States’ international legal responsibility in this regard, not only on its own behalf, but also on behalf of ‘the beneficiaries of the obligation breached’, which could include, for example, the family of the deceased Mexican national. At the same time, Article 48(2) ‘does not make clear whom the [beneficiaries of the obligation breached] include and the commentary does not elaborate on this point’, making it difficult to predict how this provision, which one commentator has said ‘expands the domain within which state responsibility

86. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 8, (‘commending’ the Articles ‘to the attention of Governments’).

87. Cf. Oxman and Aceves, *supra* note 36, at 217 (observing that, after *LaGrand*, ‘the Court could conceivably grant a provisional measures order in a case where it subsequently determines that it lacks jurisdiction’, and ‘If violated, a provisional measures order could impose liability on a state even if the Court lacked jurisdiction in the underlying dispute’); accord J. Fitzpatrick, ‘The Unreality of International Law in the United States and the *LaGrand* Case’, (2002) 27 *Yale Journal of International Law* 427, 431.

operates and in this sense represents progressive international legal development', may be applied in the future.⁸⁸

Second, some observers feared that, after *LaGrand*, another failure or refusal by the United States to comply with an ICJ provisional measures order, whether because of an alleged inability or unwillingness to control the acts of its constituent political subdivisions, portended a threat to the ICJ's institutional authority. While this scenario never materialized, the fear appears, in any event, to have been overstated, if not unfounded. The United States undoubtedly possessed the ability to comply with the Court's order.⁸⁹ The sole question raised by the *Avena* provisional measures order, as by the orders in *LaGrand* and *Vienna Convention on Consular Relations*, was of political will. The United States, like most states, abides by most of its international obligations most of the time.⁹⁰ Most international obligations, however, do not bear as heavily on the internal politics of a state as do those that implicate capital punishment in the United States, which remains a highly controversial political issue. The effect of the *Avena* provisional measures order on the right of the United States' constituent states to carry out the death penalty therefore may have raised the internal political costs of compliance to the federal government. Unlike most provisional measures orders, *Avena* mandated action (or forbearance) that affected the internal politics and mores of a state in an area that provokes strong emotional responses from the citizens who comprise the body politic in a democracy. This helps to explain, which is not to say to justify, the dismal record of compliance by the United States in the two prior Vienna Convention actions before the ICJ.

Finally, some expressed the related fear that the *Avena* provisional measures order and its predecessors threatened the institutional integrity of the Court. In this regard the United States has repeatedly raised the spectre that the ICJ would be forced to act as an international court of criminal appeal – that foreign nationals would flock to the Court with Vienna Convention claims in an effort to void valid criminal sentences imposed under municipal laws, sinking the Court in a quagmire threatening its role in the peaceful, consensual resolution of inter-state disputes.⁹¹

88. E. Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century', (2002) 96 AJIL 798, 805–05; see also D. D. Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority', (2002) 96 AJIL 857 (cautioning that the Articles provide a deceptive clarity that may not, in fact, reflect the state of international law and should in any event not be accepted at face value).

89. See generally L. Henkin, 'Provisional Measures, US Treaty Obligations, and the States', (1998) 92 AJIL 679 (canvassing a variety of means by which the federal government could have ensured compliance with the Court's order in *Vienna Convention on Consular Relations*, *supra* note 2); see also C. M. Vazquez, 'Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures', (1998) 92 AJIL 683.

90. See L. Henkin, *How Nations Behave* (1979), 47; see also H. H. Koh, 'Why Do Nations Obey International Law?', (1997) 106 *Yale Law Journal* 2599, 2599 (observing that 'empirical work since [the date of Henkin's assertion] seems largely to have confirmed this hedged but optimistic description').

91. See, e.g., Counter-Memorial Submitted by the United States of America, 27 March 2000, para. 51, in *LaGrand* (contesting the admissibility of Germany's second, third, and fourth submissions on the ground that 'Germany seeks through those claims to have the Court play the role of ultimate court of appeal in national criminal proceedings', a function that 'would improperly transform and expand the Court's role, making it the overseer of national judicial systems in criminal cases'); see also Oral Submissions of the United States of America, 7 April 1998, in *Vienna Convention on Consular Relations*, *supra* note 2, para. 47 (cautioning that 'Once the Court opens itself to this process, it can be expected that a great many defendants will press the States of their nationality to take recourse to it', including 'not only those who received no

But despite the three cases involving Vienna Convention violations to date, the risk that a spate of similar applications will flood the Court appears overstated. The political costs of suing the United States remain high, for most states prohibitively so,⁹² and diplomacy remains the paramount tool for resolving treaty disputes.

4. DOMESTIC APPRAISAL: THE IMPLICATIONS FOR THE UNITED STATES

As it happened, neither Texas nor Oklahoma, the two states directly affected by the Court's provisional measures order in *Avena*, took steps to carry out an execution of one of the Mexican nationals protected by the order. We can therefore do no more than speculate about what the federal government's response would have been. At the time, it said little. The US State Department was reportedly 'studying the order'.⁹³ This muted response suggests that the United States had hoped, above all, to prevent the *Avena* order and its potential fallout from becoming headline news, particularly at a time when both the perceived unilateralism and international exceptionalism of the United States, on the one hand, and increasing scrutiny of the death penalty process within the United States, on the other, remain controversial issues. The state of Texas, by contrast, was less reticent. A spokesman for Governor Richard Perry remarked, 'According to our reading of the law and the treaty, there is no authority for the federal government or the World Court to prohibit Texas from exercising the laws passed by our Legislature.'⁹⁴

The federal government's past responses to provisional measures orders in the Vienna Convention trilogy had not been encouraging. In *Vienna Convention on Consular Relations*, its response can euphemistically be characterized as schizophrenic. On the one hand, Secretary of State Madeleine Albright urged the Governor of Virginia to stay the execution '[i]n light of the [ICJ]'s request, the unique and difficult foreign policy issues, and other problems created by the Court's provisional measures', including that a refusal to comply could cause 'negative consequences for the many US citizens who live and travel abroad' and 'lead some countries to contend incorrectly that the US does not take seriously its obligations under the

consular notification at all, but also those who may wish to claim that the notification received was deficient, incomplete, or tardy').

92. As counsel for Paraguay emphasized in *Vienna Convention on Consular Relations*, 'This Court, I believe, will appreciate the magnitude of a decision by a Government like that of Paraguay to institute proceedings in the International Court of Justice against the United States'. Oral Submissions of Paraguay, April 7, 1998, in *Vienna Convention on Consular Relations*, *supra* note 2 (9 April).
93. C. Hines, 'Opinion, Consular Rights, Station House Wrongs', *Houston Chronicle*, 23 Feb. 2003, available at 2003 WL 3239472.
94. *Ibid.* The United States, like all states, has the 'power – I do not say the right – to violate international law and obligation and to suffer the consequences'. L. Henkin, *Foreign Affairs and the US Constitution* (1996), 235 (emphasis in original). But Texas's position that the federal government does not have the authority to stay an execution authorized by its laws is indefensible. Federal laws based on treaty or other international obligations prevail over state laws to the contrary. See *United States v. Pink*, *supra* note 39, 230–4; *United States v. Belmont*, *supra* note 39, at 327, 331–2; *Asakura v. City of Seattle*, 265 US 332 (1924), 341; *Hauenstein v. Lynham*, 100 US (10 Otto) 483, 488–9 (1879); *Ware v. Hylton*, 3 US (3 Dall.) 199, 236–7 (1796); cf. *Missouri v. Holland*, 252 US 416 (1920) (sustaining congressional power to legislate pre-emptively pursuant to a treaty in a legal domain purportedly otherwise reserved to the states by the Tenth Amendment).

Convention'.⁹⁵ That alone should have sufficed to compel the governor to stay the execution – although the ambiguity of Secretary Albright's letter on the issue of the binding effect of ICJ orders arguably weakened its influence. But as Louis Henkin wrote in the aftermath of Governor Gilmore's decision to ignore the ICJ's order despite Secretary Albright's request, 'states are bound by US foreign policy decisions even if they do not take any formal form'; and under the Constitution treaty obligations of the United States bind state officials, such as Governor Gilmore, no less than federal officials.⁹⁶ Scholars have also noted that the federal government had an ample variety of other means at its disposal to enforce the ICJ's order.⁹⁷

On the other hand, Solicitor General Seth P. Waxman submitted an *amicus curiae* brief to the US Supreme Court urging it to deny *certiorari* and to refuse to stay Breard's execution. Waxman argued that provisional orders do not impose binding obligations and that, in any event, Paraguay lacked a cognizable federal right of action to seek to enforce those obligations.⁹⁸ The Supreme Court, in turn, denied *certiorari* in a brief *per curiam* order that elided a host of complex issues raised by the related actions of Breard and Paraguay.⁹⁹ That it refused to 'delay the execution, grant *certiorari*, and hear plenary briefing and argument', as several scholars have emphasized, seems incredible, 'if only out of simple comity to the ICJ'.¹⁰⁰

At the state level, Governor Gilmore of Virginia said that he believed his first obligation as governor to be 'to ensure that those who reside within [Virginia's] borders . . . may conduct their lives free of crime'.¹⁰¹ In addition, he explained, he

95. Letter from Madeleine K. Albright, US Secretary of State, to James S. Gilmore III, Governor of Virginia (13 April 1998).

96. US Const., Art. VI, cl. 2; see Henkin, *supra* note 89, at 681–2 (citing *Ex parte Peru*, 318 US 578, 589 (1943), and *Republic of Mexico v. Hoffman*, 324 US 30, 38 (1945)).

97. See *ibid.* (canvassing additional measures by which the federal government could have enforced the ICJ's order, including by executive order or an action in federal court by the Attorney General to compel compliance); see also Vazquez, *supra* note 89, at 685 ('It is difficult to understand how the administration could have concluded that the only measure at the federal government's disposal under such circumstances was to beseech a state Governor to comply with the Order'); F. L. Kirgis, 'Zscherhig v. Miller and the Breard Matter', (1998) 92 AJIL 704, 707 (arguing that under the Supreme Court's decision in *Zscherhig v. Miller*, 389 US 429 (1968), which held that an Oregon probate statute interfered with the federal government's exclusive power over foreign relations even in the absence of a formal indication to that effect by the executive branch, Virginia should have stayed Breard's execution inasmuch as '*Zscherhig* applies *a fortiori*, since the state official . . . in this matter not only denigrated the role of the International Court of Justice – a court whose Statute is a treaty binding upon the United States – but also ignored or subordinated foreign policy concerns expressly pointed out to him by the Secretary of State').

98. Brief for the United States as *Amicus Curiae* in *Breard v. Greene*, *supra* note 36, at 49, at *49–*50 (arguing that 'The better reasoned position is that an [ICJ] provisional measures order] is not binding); *ibid.*, at 17, at *17 (arguing that the Vienna Convention only 'set[s] forth substantive rules of conduct' and does 'not create private rights of action' enforceable in United States courts) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 US 428 442 (1989)).

99. *Breard v. Greene*, *supra* note 36; see also *ibid.* at 379 (Stevens, J, dissenting) (observing the absence of any 'compelling reason' not to stay the execution and hear plenary briefing, particularly in view of 'the international aspects of this case'); *ibid.* at 380 (Breyer, J, dissenting) (declining to accept, 'without examining the record more fully', that Breard and Paraguay's 'arguments are *obviously* without merit' or 'to accept without fuller briefing and consideration the positions taken by the majority') (emphasis in original).

100. H. H. Koh, 'Paying "Decent Respect" to World Opinion on the Death Penalty', (2002) 35 *UC Davis Law Review* 1085, 1113; see also A.-M. Slaughter, 'Court to Court', (1998) 92 AJIL 708, at 708 (arguing that elementary principles of comity well established under federal law should have led the Supreme Court to 'honor . . . the ICJ's request', binding or not, 'as a matter of judicial comity').

101. Commonwealth of Virginia, Officer of the Governor, Press Office, Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard (14 April 1998), at 2.

preferred to carry out Breard's execution on schedule because, should the ICJ rule in Paraguay's favour, it would be more difficult for him to carry out the execution at that point.¹⁰² Of course, in one sense, 'It is neither surprising nor particularly objectionable that the Governor of a state believes he owes his primary duty to its citizens.'¹⁰³ At the same time, it is ironic, if not reprehensible, that the federal government did not intervene on behalf of the United States to vindicate national interests in the face of a parochial state decision. The threat of foreign hostilities inherent in a disunited central government incapable of compelling state adherence to international obligations permeates *The Federalist Papers*.¹⁰⁴ For this reason, among others, it became 'one of the main objects of the constitution to make [the United States], so far as regarded our foreign relations, one people, and one nation'.¹⁰⁵

The United States' response to the *LaGrand* order, while perhaps more understandable in view of the time constraints under which it operated, nonetheless seems equally deplorable. As the Court noted in its final judgement, even assuming the truth of the United States' protestations of its limited capacity to enforce the order in the face of recalcitrant state conduct, the federal government did not take 'all measures at its disposal' to stay Walter LaGrand's execution.¹⁰⁶ Again, the Solicitor General expressed the view that the Vienna Convention does not 'furnish a basis . . . to grant a stay of execution' and that 'an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief'.¹⁰⁷ And again, the Supreme Court denied Germany's motion for leave to file an original bill of complaint and refused to stay the execution, giving short shrift to the arguments advanced by Germany.¹⁰⁸ Justice Breyer, joined by Justice Stevens, observed in dissent, first, that comity counselled a stay because 'both the ICJ and a sovereign nation have asked that we stay this case'; and, second, that a stay 'would give us time to consider, after briefing from all interested parties, the jurisdiction and international legal issues involved',¹⁰⁹ noting that the majority's

102. *Ibid.*

103. Vazquez, *supra* note 89, at 684.

104. John Jay wrote that the Constitution would 'secure [the Union] against the hostilities and improper interference of foreign nations' by vesting authority over foreign affairs exclusively in the federal government. 'The Federalist No. 5' (John Jay), in *The Federalist*, ed. J. E. Cooke (1961), 27; see also *ibid.*, 'The Federalist No. 3' (John Jay), 14–15 ('It is of high importance to the peace of America, that she observe the laws of nations towards all these Powers [foreign nations], and to me it appears evident that this will be more perfectly and punctually done by one national Government, than it could be either by thirteen separate States, or by three or four distinct confederacies'); *ibid.*, 'The Federalist No. 4' (John Jay) (cautioning against the inducements to war threatening the nascent Republic and emphasizing that a unified government can better prevent and confront the threat of war); *ibid.*, 'The Federalist No. 80' (Alexander Hamilton), at 536 ('The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it').

105. *Holmes v. Jennison*, 39 US (14 Pet.) 540 (1840), 575 (Taney, CJ); accord *Chae Chan Ping v. United States*, 130 US 581 (1889), 606 ('[F]or national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power'); see also 'The Federalist No. 42' (James Madison), in *The Federalist*, *supra* note 104, at 279 ('If we are to be one nation in any respect, it clearly ought to be in respect to other nations').

106. See *LaGrand* judgement, *supra* note 9, paras. 111–15.

107. *Federal Republic of Germany v. United States*, *supra* note 36, 113.

108. See *ibid.*

109. *Ibid.* at 113 (Breyer, J, dissenting).

terse dismissal of the potentially complex issues raised 'suggest[ed] a need for fuller briefing'.¹¹⁰

In view of this record, what could have been expected had a state elected to proceed with the execution of a Mexican national protected by the *Avena* order? The United States plainly hoped to avoid that scenario, and it did. But had it arisen, the principle difference would have been the change in the order's phraseology. Because of the substitution of 'necessary' for 'at its disposal', no longer could the United States plausibly maintain, as it did in *LaGrand* and *Vienna Convention on Consular Relations*, that by urging a state governor to stay the execution, it had taken all the measures 'at its disposal'. Nor could it have argued that its federal structure and municipal laws disabled it from ensuring compliance with the Court's order. In short, had the United States elected to disregard the Court's provisional measures order in *Avena*, it would not have been able to invoke the fiction of federalism constraints as a veneer for its political decision not to comply.

Informally, however, the United States may have taken steps to avoid being placed in that awkward situation. In May 2003, William Howard Taft IV, Legal Adviser to the US Department of State, addressed the National Association of Attorneys General to emphasize the extent to which 'legal work at every level of government is being influenced by international law and activities' generally, and in particular by the contentious issue of the death penalty.¹¹¹ In his address, he emphasized the need to ensure compliance with the Vienna Convention as the law of the land and to inform state and local officers of their international obligations in this regard. He also explained *Avena* and its predecessor actions. Perhaps tellingly, he remarked that 'those of you who are Attorneys General of [those states in which Mexican nationals enumerated in Mexico's application remain on death row] should have received a letter from me advising you of this case, and of the fact that we will need your help in defending the United States'.¹¹² The State Department may therefore have taken steps to avert the situation it faced in *LaGrand* and *Vienna Convention on Consular Relations*.

The federal judiciary never directly faced a conflict with the *Avena* order. But in *Torres v. Mullin*, the Supreme Court, while not confronted with Torres's imminent execution in violation of the *Avena* provisional measures order, denied his petition for a writ of *certiorari*, again over the strong dissent of Justice Breyer.¹¹³ Justice Breyer, after reviewing the legal arguments made by Torres and Mexico, observed incisively that 'The answer to Lord Ellenborough's famous rhetorical question, "Can the Island of Tobago pass a law to bind the rights of the whole world?" may well be yes, where the world has conferred such binding authority through treaty.'¹¹⁴ In *Loza v. Mitchell*, the United States District Court for the Southern District of Ohio, while denying the

110. *Ibid.* at 114 (Breyer, J, dissenting).

111. Remarks of the Honorable William Howard Taft, IV, Legal Adviser, US Department of State, before the National Association of Attorneys General, 20 March 2003, available at <http://usinfo.state.gov/resional/nea/iraq/text/2003/032120taft.htm> (last visited 5 April 2003).

112. *Ibid.*

113. *Torres v. Mullin*, 124 S. Ct. 562 (2003).

114. *Ibid.*, at 565 (Breyer, J, dissenting from denial of *certiorari*) (citing *Buchanan v. Rucker*, 9 East 192, 103 Eng. Rep. 546 (KB 1808)).

habeas petitioner's motion for suspension of the briefing schedule, said: 'Without expressing any opinion on the merits of the United Mexican States' complaint, or the potential impact of a favorable ruling on petitioner's case, this Court recognizes the benefits of maintaining the status quo in these habeas corpus proceedings pending resolution of the International Court of Justice proceedings.'¹¹⁵ At least one other federal district court has paid serious attention to *LaGrand*,¹¹⁶ and more may follow suit in the aftermath of the *Avena* judgement.¹¹⁷

In the final analysis, compliance with the *Avena* provisional measures order would likely have depended on the federal government's political assessment of the relative consequences of its action vis-à-vis the states and its domestic political constituency, on the one hand, and the states and the international community, on the other. The former tend to support capital punishment, at least in those states affected by *Avena*. The latter oppose capital punishment categorically and with increasing vehemence. As Harold Koh, former Assistant Secretary of State for Democracy, Human Rights, and Labor, recently emphasized, 'Simply put: no other civilized, democratic government that has a commitment to human rights resorts to the death penalty in the way we do.'¹¹⁸ Those states would likely have perceived a decision not to comply with *Avena* as another example of the United States' disregard for international law generally and of the Bush administration's strident unilateralism. At a time when the United States requires the international co-operation of states to combat terrorism and rebuild and establish stability in Afghanistan and Iraq, to have flouted the *Avena* order overtly would have imposed serious political costs on the federal government.

Unqualified cynicism should be avoided, however. The *Avena* order, and now the ICJ's decision on the merits, may well produce positive long-term effects along two dimensions. It may contribute to the growing normative trend in international jurisprudence towards abolition of the death penalty or, at a minimum, the imperative to employ the most exacting standards of due process in states that continue to impose capital punishment. And within the United States, the desire to avoid similar future conflicts with states like Mexico may raise the level of compliance with the Vienna Convention, whatever the United States' future response to its international legal

115. *Loza v. Mitchell*, No. C-1-98-287 (SD Ohio 31 Jan. 2003).

116. *United States ex rel Madej v. Schomig*, 223 F. Supp. 2d 968 (ND Ill. 2002), 977-80; see also S. D. Murphy, 'Contemporary Practice of the United States Relating to International Law: United States Compliance with *LaGrand*', (2003) 37 AJIL 180.

117. On 13 May 2004, the Oklahoma Court of Criminal Appeals, in response to the *Avena* final judgement, issued a remarkable order staying the execution of Torres and remanding the case for an evidentiary hearing to determine, *inter alia*, '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'. *Torres v. Oklahoma*, No. PCD-04-442, Order Granting Stay of Execution and Remanding Case for Evidentiary Hearing, 13 May 2004. The same day, however, Oklahoma's Governor, Brad Henry, mooted the issue by commuting Torres's sentence to life imprisonment. See A. Liptak, 'Execution of Mexican Is Halted', *New York Times*, 14 May 2004, at A23. It remains too early to tell whether other US courts will follow suit. In the only other published decision to consider the issue at the time of this writing, the US Court of Appeals for the Fifth Circuit refused to give *Avena* binding effect, reasoning that while '*Avena* and *LaGrand* were decided after *Breard*, and contradict *Breard*, we may not disregard the Supreme Court's clear holding that ordinary procedural default rules can bar Vienna Convention claims'. *Medellin v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004).

118. Koh, *supra* note 100, at 1104 (emphasis removed).

obligations under the Statute of the ICJ, the Convention, and judgements rendered pursuant to the Court's jurisdiction under the Optional Protocol.

Taft's public address to the National Association of Attorneys General, for example, is unusual. After *Vienna Convention on Consular Relations*, the State Department, as it emphasized to the Court in *LaGrand*,¹¹⁹ initiated a programme to disseminate broadly a manual on consular notification and to distribute pocket cards for use by law enforcement agents.¹²⁰ It seems less likely that the State Department would have taken such steps to increase the level of knowledge and compliance with the Vienna Convention were it not for the trilogy of cases culminating in *Avena*. In 1999, moreover, California enacted a law mandating that state and local police inform foreign nationals of their consular rights under Article 36 within two hours of their arrest or detention.¹²¹ Finally, some courts have begun to acknowledge *LaGrand* and give it persuasive, if not binding, effect.¹²² These developments suggest that *Avena*, too, whatever its reception at the formal political level, may produce positive long-term effects normatively and at the practical level of implementation of Vienna Convention obligations within the United States.

5. CONCLUSION

To conclude, it is worth asking a related question about the relation of *Avena* and the prior Vienna Convention actions to the maintenance of capital punishment by the United States: is Judge Oda right? At bottom, is *Avena* really about 'abhorrence – by Mexico and others – of the death penalty'? A principal reason why the United States retains the death penalty despite the trend towards its worldwide abolition is that it has relegated the decision to local democratic politics. Whereas political elites abolished the death penalty in most states in western Europe and elsewhere – and its abolition has been required as a condition of membership of the European Union, for example – political constituencies in many states of the United States have elected to retain the death penalty when it has been put to popular vote. Until abolition becomes customary international law or the Supreme Court declares capital punishment unconstitutional, that arguably remains a decision, as the United States repeatedly asserts, for its body politic rather than the international community.

But while the United States perhaps presently can, as a matter of international law, preserve the institution of capital punishment, it cannot avoid the consequences – including, increasingly, the international consequences – of that decision. Because most states find it abhorrent, as Judge Oda wrote, Mexico's insistence that its nationals facing capital punishment receive the maximum level of due-process protection to which international law entitles them is understandable. Even if the United States

119. See *LaGrand* judgement, *supra* note 9, para. 121.

120. See Amnesty International, *A Time For Action – Protecting the Consular Rights of Foreign Nationals Facing the Death Penalty* (2001), 6–7.

121. *Ibid.*, at 7.

122. See, e.g., *United States ex rel Madej v. Schomig*, *supra* note 116, at 977–80; see also S. D. Murphy, 'Contemporary Practice of the United States Relating to International Law: United States Compliance with *LaGrand*', (2003) 37 AJIL 180.

can continue to resort to the death penalty, it must now factor into its assessment of that punishment's value the escalating political, diplomatic, and financial costs it will incur in the course of litigating compliance with the Vienna Convention (and perhaps other international instruments) before the ICJ and other international bodies,¹²³ just as it must in defending capital punishment in diplomatic and international human rights fora.¹²⁴

Avena, in the final analysis, therefore manifests the tension both (i) between international and domestic punitive norms; and (ii) between, on the one hand, the demands of international law in an increasingly globalized world that facilitates the cross-fertilization of legal and moral norms and, on the other, those of internal politics in a popular democracy. The ICJ, *Avena* and its predecessors suggest, can play a non-trivial role in resolving those tensions.

123. The Inter-American Court of Human Rights, for example, has held that because a violation of the rights protected by Art. 36(1)(b) of the Vienna Convention would be 'prejudicial to the guarantees of the due process of law, . . . in such circumstances, imposition of the death penalty is a violation of the right not to be 'arbitrarily' deprived of one's life . . . with the juridical consequences inherent in a violation of this nature, i.e., those pertaining to the international responsibility of the State and the duty to make reparations'. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 (ser. A) No. 16, paras. 134-37 (Oct. 1). Of course, the Inter-American Court interpreted consular rights within a distinct treaty-based framework, the very object of which is to codify human rights standards. American Convention on Human Rights, 22 Nov. 1969, 1114 UNTS 123. But a strong argument can be advanced that some robust conception of due process in criminal cases, particularly those that implicate the death penalty, has become customary international law. If that is correct, then just as the Court can and should interpret the Vienna Convention within the context of general principles of customary international law on state responsibility and remedies, equally it can and should consider the Convention within the context of the customary international law of human rights.

124. See Koh, *supra* note 100, at 1104-6 (documenting widespread condemnation of the United States' resort to the death penalty and the severe diplomatic and political costs it imposes in the arena of foreign relations).