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Judicial Notification: A Simple Solution to Ensure Compliance with the Vienna Convention on Consular Relations

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JUDICIAL NOTIFICATION: A SIMPLE SOLUTION TO ENSURE COMPLIANCE WITH THE VIENNA CONVENTION ON CONSULAR RELATIONS

Michael Candela†

I.	Introduction	343
II.	Background	345
III.	Current Remedies	357
	A. Relief Through the Courts	358
	B. Relief Through Executive Clemency	362
IV.	Current Policy	365
V.	Alternate Solution	368
VI.	Conclusion	371

I. INTRODUCTION

The Vienna Convention on Consular Relations is an international treaty which was created on April 24, 1963.¹ The United States became a party to the treaty when the U.S. Senate ratified it on December 24, 1969.² Under Article 36 of the Vienna Convention, if a foreign national is arrested, the authorities must give the foreigner the option to notify his consulate of his detention.³

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¹ See Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR], available at <http://www.un.org/law/ilc/texts/consul.htm>.

² See Amnesty Int'l, *United States of America: A Time for Action – Protecting the Consular Rights of Foreign Nationals Facing the Death Penalty*, AI Index AMR 51/106/2001, Aug. 22, 2001, available at <http://web.amnesty.org/library/index/engamr511062001>.

³ See VCCR, *supra* note 1. Article 36(1)(b) provides:
if [the accused] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State

Although the United States is a signatory of the Vienna Convention, it has repeatedly failed to adhere to the law set forth by the Convention. In both U.S. state and federal criminal courts, foreign nationals have been denied their right to notify their consulate of their detention. Since the death penalty was reinstituted in 1976 by the United States Supreme Court in *Gregg v. Georgia*,⁴ there have been twenty-one executions of foreign nationals as of May 15, 2004.⁵ Of the twenty-one men executed, sixteen of them raised the claim of a violation of their rights under the Vienna Convention.⁶ The failure of the United States to enforce the Vienna Convention led various nations of the world to bring suit against the United States of America at the International Court of Justice ("ICJ").⁷ In lawsuits brought by Germany and Mexico, the ICJ ruled that the United States violated international law by failing to notify detained foreign nationals of their right to consular notification.⁸ After each de-

if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph. *Id.*

As stated, the detainee has the option of accepting aid from his consulate. Further Article 36(1)(c) provides:

consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action. *Id.*

⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976) (addressing capital punishment imposed for murder convictions).

⁵ See *Foreign Nationals Part II*, <http://www.deathpenaltyinfo.org/article.php?scid=31&did=582#executed> (last visited Apr. 1, 2006).

⁶ See *id.*

⁷ Paraguay, Germany and Mexico have all brought suits against the United States. While Germany and Mexico obtained a final judgment from the International Court of Justice, Paraguay withdrew its claim, asking the court to dismiss the case with prejudice. See Concerning the Vienna Convention on Consular Relations—Order—Discontinuance (Para. v. U.S.), 1998 I.C.J. 4 (Nov. 10) (*Paraguay Discontinuance*), available at <http://www.icj-cij.org/icjwww/idocket/ipaus/ipaus-frame.htm>.

⁸ See *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 3 (June 27) (*LaGrand*), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>. See also

cision by the ICJ, the United States repeatedly pledged to remedy its violations.⁹ However, the remedies put into place by the United States attempt to only remedy cases in which violations have already occurred.¹⁰ This Comment proposes that the instituted remedies should also be aimed at preventing future violations of the Vienna Convention from occurring in the courts of the United States.

This Comment searches for a way to prevent violations of the Vienna Convention on Consular Relations from occurring continuously in U.S. courts. In order to find an effective way to eliminate this problem, one must first understand the complex history and cases underlying the problem. Part II will follow the progression of three cases that made their way from the U.S. courts to the ICJ. This section will look at how the U.S. courts barred all of the defendants' claims and also how the countries of Paraguay, Germany and Mexico each brought suit against the United States in the ICJ for violation of the Vienna Convention. Further, this section will set forth the remedies proposed in these ICJ decisions. Next, Part III will explore the remedies that the United States had in place prior to the ICJ decisions, and the remedies that were implemented in response to those decisions. Additionally, this section will show why the remedies implemented by the United States are not sufficient to stop further violations of the Vienna Convention in the U.S. courts. Next, Part IV will introduce the current policy and explain why it is ineffective. Lastly, Part V will propose a solution which will enable full compliance with the Vienna Convention on Consular Relations in the future, thus eliminating this problem from U.S. courts.

II. BACKGROUND

In June of 1993, Angel Breard was convicted for the attempted rape and murder of Ruth Dickie and was sentenced to death.¹¹ On direct appeal, the Supreme Court of Virginia af-

Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31) (*Avena*), available at <http://www.icj-cij.org/icjwww/idocket/imus/imus-frame.htm>.

⁹ See *LaGrand*, 2001 I.C.J. 3; see also *Avena*, 2004 I.C.J. 12.

¹⁰ See *Avena*, 2004 I.C.J. 12 ¶ 110.

¹¹ See *Breard v. Virginia*, 445 S.E.2d 670, 673 (Va. 1994).

firmed the judgment one year later.¹² On August 30, 1996, Breard filed a petition for a writ of habeas corpus to the United States District Court for the Eastern District of Virginia.¹³ In his habeas, Breard argued for the first time that, due to violations of the Vienna Convention on Consular Relations,¹⁴ his conviction should be overturned.¹⁵

Breard argued that as a citizen of Paraguay, he was entitled to notify the Paraguayan Consulate about his arrest in order to obtain their assistance.¹⁶ The judge rejected his claim, holding that because Breard failed to raise the violation of the Vienna Convention anywhere in the state court proceedings, his claim was procedurally barred.¹⁷ In addition, because Breard failed to demonstrate any cause or prejudice for this procedural default, his claim was dismissed.¹⁸

Approximately one month prior to the district court's decision in September of 1996, the Republic of Paraguay, its U.S. Ambassador and Paraguay's Consul General to the United States collectively brought a claim against various Virginia state officials to free Breard based on a U.S. violation of the Vienna Convention.¹⁹ This time, the district court dismissed the suit due to a lack of subject matter jurisdiction.²⁰ In its decision, the court noted that although the Eleventh Amendment generally bars suits by foreign governments against state governments,²¹ there is a narrowly crafted exception under *Ex Parte Young*.²² However, in order to satisfy the exception, the plaintiffs needed to show a "continuing violation of federal law."²³ Since the plaintiffs, once they were notified,²⁴ were al-

¹² See *id.*

¹³ See *Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996).

¹⁴ See *VCCR*, *supra* note 1.

¹⁵ See *Netherland*, 949 F. Supp. at 1260.

¹⁶ See *id.*

¹⁷ See *id.* at 1263.

¹⁸ See *id.*

¹⁹ See *Republic of Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996).

²⁰ See *id.* at 1271.

²¹ See *id.* at 1272 (citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 82 (1996); *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934)).

²² See *Allen*, 949 F. Supp. at 1272 (citing *Ex Parte Young*, 209 U.S. 123 (1908)).

²³ *Id.* (citing *Green v. Mansour*, 474 U.S. 64, 68 (1986)).

²⁴ The Paraguayan Consulate did not learn about Breard's arrest and trial until some time in 1996. See *Application of the Republic of Paraguay (Para. v.*

lowed access to Breard, they could not claim a "continuing violation of federal law."²⁵ Although District Court Judge Richard Williams was "disenchanted by Virginia's failure to embrace and abide by the principles embodied in the Vienna Convention," he nonetheless found the Republic of Paraguay's claim to be barred by the Eleventh Amendment.²⁶ After the Fourth Circuit affirmed the district court's dismissal of Breard's petition for a writ of habeas corpus,²⁷ Breard, along with Paraguay, petitioned the U.S. Supreme Court for a writ of certiorari and a stay of execution.²⁸

Meanwhile, a few days prior to the commencement of *Breard v. Greene* before the U.S. Supreme Court, Paraguay filed suit against the United States in the ICJ.²⁹ In this suit, Paraguay claimed that a violation of the Vienna Convention on Consular relations had taken place.³⁰ Paraguay requested that Breard's execution date of April 14, 1998 be stayed until the conclusion of this proceeding.³¹ Furthermore, Paraguay asked the International Court to order a retrial for Breard, this time with the aid of the Paraguayan consulate.³² On April 9, the International Court issued a unanimous Provisional Measure stating that the "United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings."³³

Back in the United States, the Supreme Court affirmed the decision of the Virginia district court, agreeing with that court's

U.S.), 1998 I.C.J. ¶ 12 (Apr. 3), available at <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm>, (*Paraguay Application*). See also GAYL WESTERMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 105 (2004) [hereinafter WESTERMAN] (using Jonathan I. Charney & W. Michael Reisman, AGORA: BREARD: *The Facts* 92 A.J.I.L. 666 (Oct. 1998)).

²⁵ *Allen*, 949 F. Supp. at 1273.

²⁶ *Id.*

²⁷ See *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998).

²⁸ *Breard v. Greene*, 523 U.S. 371 (1998).

²⁹ *Paraguay Application*, 1998 I.C.J. ¶ 12.

³⁰ Concerning the Vienna Convention on Consular Relations – Order – Request for Provisional Measures (Para. v. U.S.), 1998 I.C.J. 1, ¶ 2 (Apr. 9), (*Paraguay Order*), available at <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm>.

³¹ See *id.* ¶¶ 5, 8(a).

³² See *id.* ¶ 5(2).

³³ *Id.* ¶ 41.

finding that Breard's claim was procedurally defaulted.³⁴ The Supreme Court rejected petitioner's claim that the Vienna Convention, as a treaty, fell under the Supremacy Clause of the United States Constitution,³⁵ thus superceding the state procedural default doctrine.³⁶ First, the Court held that the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"),³⁷ which was enacted in 1996, modified the Vienna Convention because it was created "later in time."³⁸ Second, the Court followed Article 36(2) of the Vienna Convention, which stated that Article 36 obligations "shall be exercised in conformity with the laws and regulations of the receiving State."³⁹ The Court concluded, therefore, that because Breard's claim would be procedurally defaulted under State law, he could not raise this claim in his federal habeas review.⁴⁰

By declining to implement the ICJ's Provisional Measures, and holding that Breard's claim was procedurally barred, the U.S. Supreme Court eliminated all but one remedy for Angel Breard.⁴¹ The Governor of Virginia now had the ability to grant either a stay of execution or remove Breard from death row under the Governor's executive clemency power.⁴² Justice Souter acknowledged that "[i]f the Governor wishes to wait for the

³⁴ See *Greene*, 523 U.S. at 375.

³⁵ U.S. CONST. art. VI, § 2. "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. . . ." *Id.*

³⁶ See *Greene*, 523 U.S. at 375.

³⁷ The Antiterrorism and Effective Death Penalty Act (AEDPA) states that if a petitioner fails to raise a violation of a treaty in the state court proceedings, then the doctrine of procedural default applies. AEDPA, 28 U.S.C.S. § 2254(e)(2) (2005).

³⁸ *Greene*, 523 U.S. at 376 (citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)) (holding that if a treaty and a federal statute conflict, "the one last in date will control the other").

³⁹ *Id.* at 375 (quoting VCCR, *supra* note 1). The full text of Article 36(2) states:

The rights referred to in paragraph 1 of this article 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.

See VCCR, *supra* note 1.

⁴⁰ See *Greene*, 523 U.S. at 376.

⁴¹ See *id.* at 378.

⁴² See *Greene*, 523 U.S. at 378.

decision of the ICJ that is his prerogative. But nothing in our existing case law allows us to make that choice for him.”⁴³ Despite a last effort by the Secretary of State, Madeleine Albright, to stay Breard’s execution,⁴⁴ Governor James Gilmore denied the stay,⁴⁵ as the dissenting justices in *Breard v. Green* had argued for,⁴⁶ and Angel Breard was executed.⁴⁷ After Breard’s execution, the United States formally apologized to Paraguay for an “unquestionabl[e] . . . violation of an obligation owed to the Government of Paraguay.”⁴⁸ Paraguay accepted the apology, praising “the courage of the U.S. government in admitting an error.”⁴⁹ On November 2, 1998, Paraguay discontinued its suit, with prejudice, against the United States and requested that the case be removed from the Court.⁵⁰

While litigation on Angel Breard’s case continued, another case brought the issue of consular notification to the attention of the U.S. courts. In 1982 Karl and Walter LaGrand, two brothers of German nationality, robbed a bank and were arrested in Arizona for “first-degree murder, attempted murder in the first degree, attempted armed robbery and two counts of kidnapping.”⁵¹ The two men were convicted of all charges and sentenced to death.⁵² Karl and Walter’s convictions were af-

⁴³ *Id.*

⁴⁴ On April 13, 1998, Secretary of State Madeleine Albright wrote to Virginia Governor Jim Gilmore asking him to stay the execution of Angel Breard for “the unique and difficult foreign policy issues.” Charney & Reisman, *supra* note 24, at 671-72. (quoting letter from Madeleine Albright to governor of Virginia who stressed her concern for Americans living and traveling abroad).

⁴⁵ On April 14, 1998, Governor Gilmore denied Breard’s request for executive clemency, stating that his duty was to the people of Virginia and that the “International Court of Justice has no authority to intervene in the criminal justice system of the Commonwealth of Virginia or any other state. . . .” *Id.* at 674 (quoting Virginia Governor Jim Gilmore’s Press Release (Apr. 14, 1998)).

⁴⁶ *Greene*, 523 U.S. at 376 (Stevens, J., Breyer, J., dissenting).

⁴⁷ *United States of America: The Execution of Angel Breard: Apologies Are Not Enough*, May 1, 1998, available at <http://web.amnesty.org/library/index/engAMR510271998>.

⁴⁸ *Paraguay and USA Resolve Dispute over Breard Execution*, March 1999, in *Foreign Nationals: Current Issues and News*, <http://www.deathpenaltyinfo.org/article.php?scid=31&did=579>.

⁴⁹ *Id.*

⁵⁰ See *Paraguay Discontinuance*, 1998 I.C.J. 4.

⁵¹ *State v. LaGrand* (Karl), 733 P.2d 1066, 1067 (Ariz. 1987); *State v. LaGrand* (Walter), 734 P.2d 563, 565 (Ariz. 1987).

⁵² See *LaGrand* (Karl), 733 P.2d at 1067; *LaGrand* (Walter), 734 P.2d at 565.

firmed by the Arizona Supreme Court.⁵³ After unsuccessful attempts to seek post-conviction relief in the Arizona State court system, the Supreme Court also denied them relief.⁵⁴ The LaGrand brothers subsequently filed a petition for a writ of habeas corpus to the district court in Arizona.⁵⁵ The district court acknowledged that Arizona failed to notify the LaGrand brothers of their rights under the Vienna Convention, nevertheless, mirroring the Virginia district court in *Breard*, the Arizona district court found the claim to be procedurally defaulted because it was not raised during the state court proceedings.⁵⁶ The court stated further that the only way it could address violations of the Vienna Convention was if the petitioners could show cause or prejudice.⁵⁷ Karl and Walter each attempted to show cause.⁵⁸ Karl argued that his Sixth Amendment right to effective assistance of counsel was violated,⁵⁹ while Walter stated various claims.⁶⁰

Karl argued that his trial attorney was ineffective.⁶¹ However, he had two other lawyers during his state court proceedings (one on appeal and another for his collateral appeal), neither of whom raised his Vienna Convention claim.⁶² The court reasoned that because Karl's two unquestionably competent attorneys could have, but did not raise the violation of the Vienna Convention claim during either the direct or the collateral appeal, this claim was meritless.⁶³ Karl's brother, Walter, could not raise an ineffective assistance of counsel claim be-

⁵³ See *id.*

⁵⁴ See *LaGrand v. Arizona*, 501 U.S. 1259 (1991).

⁵⁵ See *LaGrand v. Lewis*, 883 F. Supp. 451 (D. Ariz. 1995).

⁵⁶ See *id.* at 454.

⁵⁷ See *id.* at 454-55.

⁵⁸ See *id.* at 457, 466.

⁵⁹ See *id.* at 457; see also U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."); see also *LaGrand v. Stewart*, 133 F.3d 1253, 1271 (9th Cir. 1998) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (stating that the Sixth Amendment grants all defendants the right to effective assistance of counsel)).

⁶⁰ See *Lewis*, 883 F. Supp. at 466-69 (Walter had three arguments: the trial court erred when it ruled that Karl's confessions were inadmissible, the Arizona felony murder statute was unconstitutional because it did not have a lesser included offense and that mitigating evidence was not taken into consideration by the sentencing court.).

⁶¹ See *id.* at 457.

⁶² See *LaGrand v. Stewart*, 133 F.3d 1253, 1262 (9th Cir. 1998).

⁶³ See *id.*

cause he had waived his right to do so.⁶⁴ Subsequent attempts by the two brothers failed as the Ninth Circuit and the Supreme Court both affirmed the district court's denial of the habeas corpus.⁶⁵ Karl LaGrand's execution was carried out on February 24, 1999.⁶⁶

After Karl's execution, Jane Dee Hull, the Governor of Arizona, denied Walter LaGrand's bid for executive clemency.⁶⁷ Germany, which had been notified of the situations of Karl and Walter LaGrand in 1992,⁶⁸ finally intervened and attempted to stop the execution of Walter LaGrand. On March 2, 1999, the day before Walter LaGrand's scheduled execution, Germany filed a suit against the United States of America in the ICJ.⁶⁹ The following day, only hours before Walter was to be put to death, the court issued Provisional Measures, similar to those issued in Paraguay's suit one year earlier, ordering that "[t]he United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings."⁷⁰

After the Provisional Measure of the ICJ, Germany then filed suit against the United States and Governor Hull in the U.S. Supreme Court, attempting to place an injunction on Walter LaGrand's execution.⁷¹ Germany sought to enforce the Provisional Measure of the ICJ upon the United States.⁷² The Supreme Court, citing *Breard v. Greene*,⁷³ dismissed the complaint due to a lack of subject matter jurisdiction.⁷⁴ Further-

⁶⁴ See *id.*

⁶⁵ See *id.* at 1269.

⁶⁶ See *Foreign Nationals Part II*, *supra* note 5.

⁶⁷ WESTERMAN, *supra* note 24, at 126 (using the *Statement of Governor Jane Dee Hull on the Case of Walter LaGrand*, Mar. 2, 1999).

⁶⁸ See *LaGrand*, 2001 I.C.J. 3 ¶ 23.

⁶⁹ Application of the Federal Republic of Germany (F.R.G. v. U.S.), 1999 I.C.J. (Mar. 2), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>.

⁷⁰ Concerning the Vienna Convention on Consular Relations – Order – Request for Provisional Measures (F.R.G. v. U.S.), 1999 I.C.J. 1 (Mar. 2), ¶ 8, available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>.

⁷¹ See *Federal Republic of Germany v. United States*, 526 U.S. 111, 111 (1999).

⁷² See *id.* at 111-12.

⁷³ *Breard v. Greene*, 523 U.S. 371 (1998).

⁷⁴ See *Federal Republic of Germany*, 526 U.S. at 112; see also *Allen*, 949 F. Supp. 1269 at 1272. As previously stated, the Eleventh Amendment grants states sovereign immunity and therefore cannot be sued by foreign governments. Be-

more, the Court added that the lateness of Germany's response to the situation was a contributing factor in the Court's decision.⁷⁵ "This action was filed within only two hours of a scheduled execution that was ordered on January 15, 1999, based upon a sentence imposed by Arizona in 1984, about which the Federal Republic of Germany learned in 1992."⁷⁶ With the U.S. Supreme Court's approval, Governor Hull ignored the Provisional Measure of the ICJ and went against the advice of the Arizona Clemency Board,⁷⁷ by putting Walter LaGrange to death by gas chamber on March 3, 1999.⁷⁸

Unlike Paraguay, who removed their claim from the International Court once the United States formally apologized and Angel Breard was put to death,⁷⁹ Germany refused to accept the United States' formal apology⁸⁰ and awaited the decision of the International Court.⁸¹ In June of 2001, the ICJ released its decision.⁸² The Court found the United States in violation of its international legal obligations by failing to notify the LaGrand brothers and Germany of each party's respective rights under the Vienna Convention.⁸³ The Court then added that Article 36(1) created individual rights in foreign nationals and those rights may be invoked by the "national State of the detained person."⁸⁴ In addition, the Court held that the United States

cause Arizona is immune from suit, the court lacks the jurisdiction to hear the case. *Id.*

⁷⁵ See *Federal Republic of Germany*, 526 U.S. at 112.

⁷⁶ *Id.*

⁷⁷ See LaGrand, 2001 I.C.J. 3 ¶ 113 (the Arizona Clemency Board recommended that Walter LaGrand be granted a stay of execution).

⁷⁸ See *Suarez Execution Strains Foreign Relations*, Aug. 2002, in *Foreign Nationals: Current Issues and News* (citing Ginger Thompson, *Texas Executes a Mexican for Murder Despite President Fox's Plea*, N.Y. TIMES, Aug. 15, 2002, at A5), <http://www.deathpenaltyinfo.org/article.php?scid=31&did=579>; see also *Foreign Nationals Part II*, *supra* note 5.

⁷⁹ See *Paraguay Discontinuance*, 1998 I.C.J. 4 (Nov. 10).

⁸⁰ See LaGrand, 2001 I.C.J. 3 ¶ 122 ([v]iolations of Article 36 followed by death sentences and executions cannot be remedied by apologies or the distribution of leaflets. An effective remedy requires certain changes in U.S. law and practice).

⁸¹ See *id.*

⁸² See *id.*

⁸³ *Id.* ¶ 128(3).

⁸⁴ See *id.* ¶ 77. The issue of whether the Vienna Convention on Consular Relations created individual rights was expressly denied in *Allen*. "[T]he term 'self-executing' also denotes a treaty that confers rights of action on private individuals. Defendants correctly note that the Vienna Convention and the Friendship

violated its Order granting the Provisional Measure of staying the execution of Walter LaGrand until the International Court was able to deliver a judgment.⁸⁵ Furthermore, the International Court ruled that state procedural default rules by themselves do not violate the Vienna Convention.⁸⁶ However, in circumstances where the state procedural default rules prevent a court from considering a violation of the Vienna Convention, the state procedural default rules conflict with, and thus violate, the Vienna Convention.⁸⁷ Finally, in terms of future breaches of the Vienna Convention, the ICJ held that if at any time the United States breaches its Article 36(1) obligations, "it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention."⁸⁸ The Court added that the United States could choose whatever method of "review and reconsideration" it wanted.⁸⁹

This judgment by the ICJ, especially its decision that Article 36(1) created individual rights, was met with mixed reviews by the U.S. courts.⁹⁰ Pursuant to the *LaGrand* decision by the International Court, the United States implemented a "review and reconsideration" for all death penalty cases where Article 36 violations occurred.⁹¹ Specifically, the method of "review and reconsideration" that the United States implemented was that of executive clemency, "an institution 'deeply rooted in the

Treaty are not "self-executing" in this sense." *Allen*, 949 F. Supp. at 1274 (citing Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.3d 929, 937 (D.C. Cir. 1988)); but see *Greene*, 523 U.S. at 376 ("arguably confers on an individual the right to consular assistance following arrest").

⁸⁵ See *id.* ¶ 128(5).

⁸⁶ See *LaGrand*, 2001 I.C.J. 3 ¶ 91.

⁸⁷ See *id.*

⁸⁸ *Id.* ¶ 125.

⁸⁹ See *id.* ¶¶ 125, 128(7).

⁹⁰ Compare *Valdez v. Oklahoma*, 46 P.3d 703, 709 (Okla. Crim. App. 2002) ([f]or this court to decide that the ICJ's ruling overrules a binding decision of the United States Supreme Court and affords a judicial remedy to an individual for a violation of the Convention it would interfere with the nation's foreign affairs and run afoul of the U.S. Constitution), with *United States ex rel. Madej v. Schoming*, No. 98-C1866, 2002 U.S. Dist. LEXIS 20170, at *3 (N.D. Ill. Oct. 21, 2002) (after *LaGrand*, however, no court can credibly hold that the Vienna Convention does not create individually enforceable rights).

⁹¹ See *A Case Concerning Avena and Other Mexican Nationals – Order – Request for Provisional Measures (Mex. v. U.S.)*, 2001 I.C.J. 3, ¶ 30 (Feb. 5) (*Avena Order*), available at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>.

Anglo-American system of justice.’”⁹² Although the United States, through efforts by the Department of State, has been working on ways to improve compliance with the Vienna Convention,⁹³ foreign nationals continue to be denied their right to consular notification.⁹⁴

Currently, there are more Mexican nationals on death row than any other nationality.⁹⁵ As of August 15, 2004, fifty-three of the 117 foreign nationals on death row in the United States were Mexican nationals.⁹⁶ Despite the efforts of Mexican officials over the years to enforce the rights of their nationals, more Mexicans have been executed in the United States than any other nationality.⁹⁷ The most recent example is Javier Suarez Medina. Medina, a Mexican national, was executed on August 14, 2002, despite the attempt by Mexican President Vicente Fox to stay the execution.⁹⁸ Medina was the fourth Mexican executed in the United States since the death penalty was reinstated in 1976.⁹⁹ Since the United States “consistently refused to provide relief adequate to put an end to these violations and to ensure Mexico that they will not reoccur in the future,”¹⁰⁰ Mexico filed suit against the United States in the ICJ on Janu-

⁹² *Id.* ¶ 44.

⁹³ See *LaGrand*, 2001 I.C.J. 3 ¶ 121 (according to the United States, it is estimated that until now over 60,000 copies of the brochure as well as over 400,000 copies of the pocket card have been distributed to federal, state and local law enforcement and judicial officials throughout the United States).

⁹⁴ See *Foreign Nationals Part II*, *supra* note 5.

⁹⁵ See *Consular Rights, Foreign Nationals and the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?did=198&scid=31#background>.

⁹⁶ See *id.*

⁹⁷ See William J. Aceves, *The Vienna Convention on Consular Relations: Recent Developments*, (ACLU Int'l Civil Liberties Report 2002), Jan. 31, 2003, at 44, 45, available at http://sdshh.com/ICLR/ICLR_2002/7_Aceves.pdf; see also *Foreign Nationals Part II*, *supra* note 5.

⁹⁸ See *Foreign Nationals Part II*, *supra* note 5; see also *Mexican Officials Claim Execution of Foreign National is Illegal*, *Foreign Nationals: Current Issues and News* (citing *Mexican Government Prepared to Take Death Row Case to U.S. Supreme Court*, ASSOC. PRESS, Aug. 13, 2002), <http://www.deathpenaltyinfo.org/article.php?scid=31&did=579> (in a letter sent to Texas Governor Rick Perry prior to the execution, Mexican President Vicente Fox called on the state to halt the execution, saying the punishment is “illegal” because it violates the 1963 Vienna Convention on Consular Relations).

⁹⁹ See *Foreign Nationals Part II*, *supra* note 5; see also *Gregg v. Georgia*, 428 U.S. 153, 177 (1976).

¹⁰⁰ *Avena Order*, 2001 I.C.J. 3 ¶ 5.

ary 9, 2003.¹⁰¹ The suit was on behalf of the fifty-four Mexican nationals awaiting the death penalty.¹⁰²

In its application, Mexico asked for the “*status quo ante*,”¹⁰³ meaning that Mexico wanted retrials for all of their nationals who were convicted because of the U.S. violations of the Vienna Convention.¹⁰⁴ In addition, Mexico argued that the United States was under an international obligation not to apply the doctrine of procedural default to any Article 36 claims.¹⁰⁵ Moreover, the United States “must take the steps necessary and sufficient to establish a meaningful remedy at law” for violations of Article 36.¹⁰⁶ Mexico also addressed its three nationals who were scheduled to be executed within the next six months and requested that the International Court order their executions stayed.¹⁰⁷

The International Court of Justice reached its decision on the Order to enforce Provisional Measures on February 5, 2003.¹⁰⁸ The Court found in favor of Mexico holding that the United States “shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos

¹⁰¹ See Application of the United Mexican States (Mex. v. U.S.) 2003 I.C.J. 128 (Jan. 9), (*Avena Application*), available at http://www.icj.org/icjwww/idoctet/imus/imusorder/imus_application_20030109.PDF.

¹⁰² Originally, when Mexico brought this action, on January 9, 2003, before the International Court the number of Mexican nationals on death row was fifty-four. However, on January 11, 2003, Governor George Ryan of Illinois, commuted all of the death sentences in Illinois. By doing this, Governor Ryan commuted three of the fifty-four Mexicans on death row: Juan Alonso Caballero Hernandez, Gabriel Solache Romero and Mario Flores Urbano. In response, Mexico informed the ICJ in a letter dated January 20, 2003, that it would withdraw its request for provisional measures on behalf of the three Mexican nationals who had their death sentences commuted. See Maurice Possley & Steve Mills, *Clemency for All; Ryan Commutes Death Sentences to Life in Prison Without Parole: 'There is no Honorable Way to Kill,' He Says*, CHICAGO TRIBUNE, Jan. 12, 2003, at C1; see also *Foreign Nationals Part III*, <http://www.deathpenaltyinfo.org/article.php?scid=31&did=583#innocence>; Press Release, International Court of Justice, Request for Indication of Provisional Measures: Summary of Order, 2003/9bis (Feb. 5, 2003), available at http://www.icj-icj.org/icjwww/ipresscom/ipress2003/ipresscom2003-09bis_mus_20030205.htm.

¹⁰³ *Avena Application*, 2003 I.C.J. 128 ¶ 281(1).

¹⁰⁴ See *Aceves*, *supra* note 97, at 45.

¹⁰⁵ See *Avena Application*, 2003 I.C.J. 128 ¶ 281(3); see also *Avena Order*, 2003 I.C.J. 2 ¶ 8(3).

¹⁰⁶ See *Avena Application*, 2003 I.C.J. 128 ¶ 281(3).

¹⁰⁷ See *Aceves*, *supra* note 97 at 46; see also *Avena Order*, 2003 I.C.J. 2 ¶ 11.

¹⁰⁸ See *Avena Order*, 2003 I.C.J. 2.

and Mr. Osvaldo Torres Aguilera¹⁰⁹ are not executed pending final judgment in these proceedings.”¹¹⁰ Additionally, the Court held that the “Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.”¹¹¹

In the Order to enforce Provisional Measures, Mexico clarified the meaning of its request that the United States establish a “meaningful remedy at law” for violations of Article 36.¹¹² Mexico stated that an apology from the United States was not sufficient;¹¹³ nor was executive clemency, the remedy the United States put in place at the request of Germany and the ICJ during the *LaGrand* decision,¹¹⁴ a sufficient remedy.¹¹⁵ Both of these remedies, Mexico argued, failed to comply with that the “review and reconsideration” standard set forth in the *LaGrand* case.¹¹⁶ Moreover, although Mexico conceded that the United States had the choice of how to comply with the “review and reconsideration” standard set in *LaGrand*, Mexico wanted the International Court to “leave no doubt as to the required result.”¹¹⁷

On March 31, 2004, the ICJ delivered its nonappealable, binding judgment on the matter.¹¹⁸ The Court affirmed that the United States was in violation of the Vienna Convention for its failure to notify the detainees of their rights under Article 36(1).¹¹⁹ The ICJ also affirmed its position from previous cases

¹⁰⁹ Osvaldo Torres Aguilera was eventually granted executive clemency by the governor of Oklahoma on May 13, 2004. See *Foreign Nationals Part III*, *supra* note 102.

¹¹⁰ *Avena Order*, 2003 I.C.J. 2 ¶ 59(a).

¹¹¹ *Avena Order*, 2003 I.C.J. 2 ¶ 59(b).

¹¹² See *Avena Application*, 2003 I.C.J. 128 ¶ 281(3).

¹¹³ See *Avena Order*, 2003 I.C.J. 2 ¶¶ 7, 27; *Our Opinion: Compliance with Hague Ruling Protects Americans Abroad*, MIAMI HERALD, Apr. 4, 2004, reprinted in *Recent Editorials on the March 2004 Decision by the International Court of Justice*, available at <http://deathpenaltyinfo.org/article.php?scid=31&did=955>.

¹¹⁴ See *LaGrand*, 2001 I.C.J. 3.

¹¹⁵ See *Avena Order*, 2003 I.C.J. 2 ¶ 45 (“the standardless, secretive and unreviewable process that is called clemency cannot and does not satisfy this Court’s mandate [in the *LaGrand* case]”).

¹¹⁶ See *LaGrand*, 2001 I.C.J. 3.

¹¹⁷ See *id.* ¶ 15 (this meant that Mexico wanted the ICJ to specify to the United States what methods of review and reconsideration were adequate and which methods were not adequate).

¹¹⁸ See *Avena*, 2004 I.C.J. 12.

¹¹⁹ See *id.* ¶ 153(4).

that the United States shall be the final arbiter in choosing the proper method of review and reconsideration for violations of the Vienna Convention.¹²⁰

In response to the decision made by the ICJ, President Vicente Fox met with U.S. President George W. Bush in April of 2004.¹²¹ At the meeting, the two presidents discussed the next possible steps that the U.S. courts could take to remedy the continual violations of Article 36 of the Vienna Convention.¹²² Despite acknowledgement by President Bush that the United States has indeed continued to violate the Vienna Convention, many states have dismissed the ruling of the ICJ altogether.¹²³

III. CURRENT REMEDIES

Currently, there are two ways in which a party can seek relief for a violation of the Vienna Convention on Consular Relations.¹²⁴ The first way to get relief is through the U.S. courts.¹²⁵ However, obtaining a remedy through the judicial process is difficult because the Vienna Convention is silent on

¹²⁰ See *Avena*, 2004 I.C.J. 12 ¶ 153(9).

¹²¹ See *President Bush Acknowledges Importance of World Court Ruling Regarding Mexican Foreign Nationals*, ASSOC. PRESS, Apr. 13, 2004 reprinted in *Foreign Nationals: Current Issues and News*, available at <http://www.deathpenaltyinfo.org/article.php?scid=31&did=579>.

¹²² See *id.*

¹²³ See, e.g., *No Justice in Rights Denied*, L.A. TIMES, Apr. 3, 2004, reprinted in *Recent Editorials on the March 2004 Decision by the International Court of Justice*, available at <http://deathpenaltyinfo.org/article.php?scid=31&did=955>; but see *Oklahoma Governor Grants Clemency to Mexican National*, THE OKLAHOMAN, May 14, 2004, reprinted in *Foreign Nationals: Current Issues and News*, available at <http://www.deathpenaltyinfo.org/article.php?scid=31&did=579> (Oklahoma Governor Brad Henry commuted the sentence of Osvaldo Torres to life imprisonment without parole. In coming to this decision, the Governor noted the binding effect the ICJ has on U.S. courts and that “[t]he treaty (VCCR) is also important to protecting the rights of American citizens abroad.” Even if Governor Henry had not granted Torres’ plea for clemency, the Oklahoma Court of Criminal Appeals decided earlier that day to stay Torres’ execution and order a new hearing in his case. Appeals court Judge Chapel wrote, “I have concluded that there is a possibility a significant miscarriage of justice occurred, as shown by Torres’ claims, specifically that the violation of his Vienna Convention rights contributed to trial counsel’s ineffectiveness, that the jury did not hear significant evidence, and the results of the trial is unreliable.”).

¹²⁴ See *Avena Order*, 2003 I.C.J. 2 ¶ 37.

¹²⁵ See *id.*

the topic of remedies¹²⁶ and the United States Supreme Court has not ruled on the issue.¹²⁷ Many Article 36 claims are procedurally defaulted, which denies defendants the ability to obtain relief. The second way to obtain relief is through a grant of executive clemency.¹²⁸ This method is inconsistent, thus failing to meet the expectations set by the ICJ in *LaGrand*¹²⁹ and *Avena*.¹³⁰ Therefore, although there are currently remedies available to foreign nationals, they are not “meaningful remed[ies] at law.”¹³¹

A. *Relief Through the Courts*

Prior to the ICJ's *LaGrand* decision,¹³² American courts were unable to come to a definite conclusion on the issue of individual rights. Since its ratification, the Vienna Convention on Consular Relations was considered by the United States to be a self-executing treaty.¹³³ This, however, did not necessarily mean that it automatically granted enforceable individual rights.¹³⁴ The Virginia district court in *Paraguay v. Allen*,¹³⁵ stated that “[t]he term ‘self-executing’ has two distinct meanings in international law.”¹³⁶ The first meaning is that the treaty does not require Congress to implement further legislation in order to make the treaty federal law.¹³⁷ In *Allen*, although both parties agreed that the Vienna Convention met this first interpretation, neither side agreed on the second interpretation of the term “self-executing.” This second meaning

¹²⁶ See VCCR, *supra* note 1, at pmb. (“Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States. . .”).

¹²⁷ See *Breard v. Greene*, 523 U.S. 371 (1998).

¹²⁸ See *Avena Order*, 2003 I.C.J. 2 ¶ 37.

¹²⁹ See *LaGrand*, 2001 I.C.J. 3 ¶¶ 125, 128(7).

¹³⁰ See *Avena Order*, 2003 I.C.J. 2 ¶ 8(3).

¹³¹ See *id.*

¹³² See *LaGrand*, 2001 I.C.J. 3 ¶ 77.

¹³³ See *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring) (“The Vienna Convention is a self executing treaty—it provides rights to individuals rather than merely setting out the obligations of signatories”); see also *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996).

¹³⁴ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. h (1987).

¹³⁵ See *Republic of Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996).

¹³⁶ *Id.* at 1274 (citing *Comm. of United States Citizens in Nicar.*, 859 F.3d at 937).

¹³⁷ See *id.*

conferred individual rights under the treaty to private parties.¹³⁸ The district court in Virginia ruled against Paraguay, holding that the Vienna Convention did not grant such rights.¹³⁹ However, the conclusion in *Allen* appears to be the minority opinion since many of the lower federal courts have been willing to entertain the idea that the Vienna Convention grants rights to the individual.¹⁴⁰ Even the U.S. Supreme Court has favored such a conclusion. In *Breard v. Greene*,¹⁴¹ the Court stated that the Vienna Convention “arguably confers on an individual the right to consular assistance following arrest.”¹⁴²

After the *LaGrand* decision in 2001,¹⁴³ some courts continued to ignore the ICJ’s decision, holding that the Vienna Convention did not provide individuals with rights.¹⁴⁴ Other courts however, felt that this decision by the ICJ mandated them to find that the Convention granted individual rights.¹⁴⁵ Although some courts,¹⁴⁶ including the Supreme Court in *Greene*,¹⁴⁷

¹³⁸ *Allen*, 949 F. Supp. at 1274 (citing Comm. of United States Citizens in Nicaragua., 859 F.3d at 937).

¹³⁹ See *id.*

¹⁴⁰ See, e.g., *United States v. Salas*, No. 98-4374, 1998 WL 911731, at * 3 (4th Cir. Dec. 31, 1998); *Villafuerte v. Stewart*, 142 F.3d 1124, 1125 (9th Cir. 1998) (“So far as relevant here, Article 36 of the Convention requires a detaining state to inform a detained foreign national of his right to consult with consulate officials.”); *Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D. Va. 1996); *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996); *United States v. Hongla-Yamche*, 55 F. Supp. 2d 74, 78 (D. Mass. 1999); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999).

¹⁴¹ *Breard v. Greene*, 523 U.S. 371 (1998).

¹⁴² *Id.* at 376.

¹⁴³ See *LaGrand*, 2001 I.C.J. 3.

¹⁴⁴ See e.g., *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001) (holding that Article 36 does not create individually enforceable rights); *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 907, cmt. a (1987) (“International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts. . .”)); *United States v. Bustos de la Pava*, 268 F.3d 157 (2d Cir. 2001); *United States v. Nai Fook Li*, 206 F.3d 56, 62-63 (1st Cir. 2000); *New Mexico v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001).

¹⁴⁵ See *Schomig*, 2002 U.S. Dist. LEXIS 20170 at *3 (“After *LaGrand*, however, no court can credibly hold that the Vienna Convention does not create individually enforceable rights.”).

¹⁴⁶ See *United States v. Salas*, No. 98-4374, 1998 WL 911731, at * 3 (4th Cir. Dec. 31, 1998); *Villafuerte v. Stewart*, 142 F.3d 1124, 1125 (9th Cir. 1998); *Netherland*, 949 F. Supp. at 1263; *Johnson*, 81 F.3d at 520; *United States v. Hon-*

seemingly agreed with the ICJ's decision that the Vienna Convention creates individual rights, as stated in *LaGrand*,¹⁴⁸ defendants still were unable to obtain relief because they were failing to abide by the procedural default doctrine, as stated in AEDPA,¹⁴⁹ which mandated that their claim originate in state court.¹⁵⁰

The Supreme Court proclaimed in *Breard* that violations of the Vienna Convention would be procedurally barred under AEDPA¹⁵¹ if the claims were not brought during the state court proceedings.¹⁵² The Court further stated that "even [if] Breard's Vienna Convention claim [was] properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial."¹⁵³ Thus, in order to obtain relief from a Vienna Convention violation, the defendants have the burden of establishing not only that their rights under the Vienna Convention were violated, but also that the violation materially prejudiced either the outcome of their trial, or the sentence they received.¹⁵⁴

The courts have placed a high burden on the defendant to establish prejudice, thereby creating a very limited possibility for remedy in the courts.¹⁵⁵ Prejudice requires that the defendant produce evidence that he was not aware of his Vienna Convention rights, that he would have taken advantage of his rights had he known of their existence, and that it was likely that the communication with the consulate would have assisted him.¹⁵⁶ In *United States v. Alvarado-Torres*,¹⁵⁷ the defendant

gla-Yamche, 55 F. Supp. 2d 74, 78 (D. Mass. 1999); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999).

¹⁴⁷ See *Greene*, 523 U.S. at 371.

¹⁴⁸ See *LaGrand*, 2001 I.C.J. 3 ¶ 77.

¹⁴⁹ See Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C.S. § 2254(e)(2) (2005).

¹⁵⁰ See *Greene*, 523 U.S. at 376; *Schoming*, 2002 U.S. Dist. LEXIS 20170, at *3.

¹⁵¹ See AEDPA 28 U.S.C.S. § 2254(e)(2).

¹⁵² See *Greene*, 523 U.S. at 375-76 (citing AEDPA 28 U.S.C.S. 28 § 2254(e)(2)).

¹⁵³ *Id.* at 377.

¹⁵⁴ See *Schoming*, 2002 U.S. Dist. LEXIS 20170 at *5.

¹⁵⁵ See *United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 990 (S.D. Cal. 1999).

¹⁵⁶ See *id.* (citing *United States v. Proa-Tovar*, 975 F.2d 592, 594-95 (9th Cir. 1992)).

¹⁵⁷ *Id.*

sought to suppress incriminating information that she gave to the agents because the information was solicited in violation of the Vienna Convention.¹⁵⁸ The court determined that the agent's failure to inform the defendant of her rights under the Vienna Convention was not prejudicial and therefore refused to suppress the evidence.¹⁵⁹ In addition, the court failed to find prejudice when the agents interrogated the defendant prior to notifying her consulate.¹⁶⁰

The *Alvarado-Torres* court went on to say that even if the defendant could establish prejudice, suppression would not be the appropriate remedy.¹⁶¹ This is because the exclusionary rule¹⁶² is a remedy that is available only for constitutional violations.¹⁶³ The court cited to *Murphy v. Netherland*,¹⁶⁴ in which the Fourth Circuit emphasized that the Vienna Convention does not create fundamental, Constitutional rights.¹⁶⁵ Also, noting the *Chaparro-Alcantara* case, the court stated that suppression could not be a remedy because the Vienna Convention did not expressly provide it as a remedy for violation of its terms.¹⁶⁶ Moreover, the *Alvarado-Torres* court held that a dismissal of the indictment would not be a proper remedy either because "this Court is not aware of any decision in which the Ninth Circuit has suggested that dismissal of the indictment would provide an appropriate remedy for a violation of the Vi-

¹⁵⁸ *See id.*

¹⁵⁹ *See id.*

¹⁶⁰ *See id.* at 991; *cf. Chaparro-Alcantara*, 37 F. Supp. 2d at 1126 (showing that even an affidavit from the Mexican Consul in St. Louis, stating that if the defendants had contacted him, he would have told them not to provide any information to the I.N.S., was insufficient to meet the threshold of prejudice because the defendants failed to show that they would not have waived their Fifth Amendment rights prior to speaking with the Consulate).

¹⁶¹ *See Alvarado-Torres*, 45 F. Supp. 2d at 993-94.

¹⁶² A rule that excludes or suppresses evidence obtained in violation of an accused person's constitutional rights. *See* BLACK'S LAW DICTIONARY (8th ed. 2004).

¹⁶³ *Alvarado-Torres*, 45 F. Supp. 2d at 994 (citing *Massiah v. United States*, 377 U.S. 201 (1964) (dealing with the Sixth Amendment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (dealing with the Fourth Amendment); *Bram v. United States*, 168 U.S. 532 (1897) (dealing with the Fifth Amendment)).

¹⁶⁴ *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997).

¹⁶⁵ *Alvarado-Torres*, 45 F. Supp. 2d at 994 (citing *Netherland*, 116 F.3d at 100 (stating that although the Convention may create individual rights, a state does not violate a constitutional right merely by violating the Vienna Convention)).

¹⁶⁶ *Id.* (citing *Chaparro-Alcantara*, 37 F. Supp. 2d at 1125-26).

enna Convention.”¹⁶⁷ Therefore, the Court denied the defendant’s motion to dismiss.¹⁶⁸ The court voiced its concern over the continuing failure by the United States to abide by the terms of the Vienna Convention.¹⁶⁹ Furthermore, the court stated that although there was a lack of remedies available for violations of the Vienna Convention, the court was powerless to create any such remedy.¹⁷⁰

B. *Relief Through Executive Clemency*

Due to the limited relief granted in the courts, it is fortunate for defendants that the courts are not the only place where a defendant can receive a remedy from a violation of the Vienna Convention. As a result of the International Court’s 2001 decision in *LaGrand*,¹⁷¹ the United States was given the option to choose its own method of “review and reconsideration” of those foreign nationals who were imprisoned despite violations of the Vienna Convention.¹⁷² The remedy the United States deemed to be the best suited to achieve the proper “review and reconsideration,” called for by the ICJ in *LaGrand*, was that of executive clemency.¹⁷³ The United States held that clemency proceedings provided a more flexible review process than that of the courts because the doctrine of procedural default did not apply,¹⁷⁴ thereby avoiding the Supreme Court decision in *Breard*.¹⁷⁵

Clemency is a power that rests solely with the chief executive of the state. Since the power to grant or deny clemency resides in the governor alone, the chief executive can use this power as he or she wishes. This power has been used to com-

¹⁶⁷ *Id.* at 995.

¹⁶⁸ *See id.*

¹⁶⁹ *See id.* at 994 (noting that the United States should abide by the Vienna Convention and that a continued failure to do so may result in other countries not respecting the treaty, and thus would not notify the United States consulate when an American citizen is arrested in a foreign country).

¹⁷⁰ *Id.* (“If the Vienna Convention does not expressly provide for a remedy, however, it is not the proper role of this Court to ‘connect the dots’ and thus create one.”).

¹⁷¹ *See LaGrand*, 2001 I.C.J. 3.

¹⁷² *See id.* at ¶ 128(7).

¹⁷³ *See Avena Order*, 2003 I.C.J. 2 ¶ 44.

¹⁷⁴ *See id.* ¶ 37.

¹⁷⁵ *See Greene*, 523 U.S. 371 (1998) (stating that the doctrine of procedural default applies to claims of violations of the Vienna Convention).

mute the sentence of one inmate¹⁷⁶ as well as to commute the sentence of every inmate on death row.¹⁷⁷ Such a sweeping action was done by Illinois Governor George Ryan, who, on January 11, 2003, granted all 164 prisoners on death row executive clemency, thus commuting their death sentences to life imprisonment.¹⁷⁸ Governor Ryan declared that the state's capital punishment system was not only "haunted by the demon of error," but was "arbitrary and capricious"¹⁷⁹ as well. Although executive clemency has been used to prevent unjust executions, since it is under the control of only one person, the decision to grant or deny clemency is very subjective and can be easily abused. Even the state parole board, which makes recommendations to the governor on whether or not to grant or deny clemency, cannot overrule the governor's final decision.¹⁸⁰ Furthermore, the governor can decide to deny clemency, even after the parole board has recommended granting it.¹⁸¹

Such was the case with Gerardo Valdez, a Mexican national who was sentenced to death in Oklahoma for "First Degree Malice Aforethought Murder."¹⁸² Valdez, like so many others before him, was not notified of his rights under the Vienna Convention.¹⁸³ Moreover, Mexico was not notified of Valdez's status until April of 2001,¹⁸⁴ only a few weeks before his scheduled execution.¹⁸⁵ In response, the Mexican consulate retained experts, gathered evidence and argued at a clemency hearing that Valdez suffered from several conditions that greatly attributed

¹⁷⁶ See *No Justice in Rights Denied*, *supra* note 123 (Oklahoma Governor Brad Henry commuted the sentence of Osvaldo Torres to life imprisonment without parole).

¹⁷⁷ See Possley & Mills, *supra* note 102; see also Press Release 2003/9bis, *supra* note 102 (Illinois Governor George Ryan commuted the sentence of all 164 death row inmates).

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See *Valdez v. Oklahoma*, 2002 OK CR 20, 46 P.3d 703, 706 (Okla. Crim. App. 2002).

¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ See *id.* at 705.

¹⁸⁴ See *id.* (the only reason Mexico learned of Valdez's execution was because one of his relatives contacted the Mexican consulate).

¹⁸⁵ See *id.* at 704 (Valdez was originally scheduled to be executed on June 19, 2001).

to his actions.¹⁸⁶ On June 6, 2001, the Oklahoma Board of Pardons and Paroles voted 3–1 to commute Valdez's sentence to life in prison without the possibility of parole.¹⁸⁷ Consequently, Governor Frank Keating granted a thirty day stay of the execution in order to decide whether or not to grant clemency.¹⁸⁸ However, despite granting the stay, the governor denied granting executive clemency for Valdez on July 20, 2001, notwithstanding a personal appeal from Mexican President Vicente Fox.¹⁸⁹ Although the governor admitted to a violation of the Vienna Convention, he stated that the violation was not prejudicial and would not have affected the sentence Valdez received.¹⁹⁰ Valdez was scheduled to be executed on August 30, 2001.¹⁹¹ Through a series of motions, Valdez was able to stay his execution until the Oklahoma Court of Criminal Appeals could make a final determination on the matter.¹⁹² Valdez attempted to rely on the ICJ decision in *LaGrand*, in which the International Court held that the procedural default cannot prevent review of Article 36 claims.¹⁹³ The court rejected this,¹⁹⁴ stating that the 1998 Supreme Court decision, *Breard v. Greene*, established that the rules of procedural default applied to the Vienna Convention.¹⁹⁵ Despite rejecting Valdez's claim

¹⁸⁶ See *id.* at 706 ("Valdez suffered from organic brain damage, was born into extreme poverty, received limited education and grew up in a household plagued by alcohol abuse and instability.").

¹⁸⁷ See *id.*; see also *Valdez Case Results in Life Sentence*, DAILY OKLAHOMAN, Nov. 16, 2003, reprinted in *Foreign Nationals: Current Issues and News*, available at <http://www.deathpenaltyinfo.org/article.php?scid=31&did=579>.

¹⁸⁸ See *Valdez*, 46 P.3d at 704.

¹⁸⁹ See *id.*; see also *Oklahoma Governor Grants Temporary Reprieve For Mexican National*, N.Y. TIMES, Jul. 21, 2001, reprinted in *Foreign Nationals: Current Issues and News*, available at <http://www.deathpenaltyinfo.org/article.php?scid=31&did=579>.

¹⁹⁰ See *Valdez*, 46 P.3d at 706; see also *United States of America: A Time for Action – Protecting the Consular Rights of Foreign Nationals Facing the Death Penalty*, Aug. 22, 2001, <http://web.amnesty.org/library/index/engamr511062001> (The governor described the consular rights violation as "regrettable and inexcusable" but dismissed it as resulting in "harmless errors." He further stated that granting clemency would be an "inappropriate remedy in this case.").

¹⁹¹ See *Valdez*, 46 P.3d at 704.

¹⁹² See *id.* at 704-05.

¹⁹³ See *LaGrand*, 2001 I.C.J. 3; see also *Valdez*, 46 P.3d at 707-09.

¹⁹⁴ See *Valdez*, 46 P.3d at 707-09 (holding that "[t]he legal basis for the claim is not new and was available at the time of Petitioner's first Application for Post-Conviction Relief regardless of the ICJ's decision in *LaGrand*").

¹⁹⁵ See *id.* at 709 (citing *Breard v. Greene*, 523 U.S. 371, 376 (1998)).

of a violation of the Vienna Convention,¹⁹⁶ the court granted relief in the form of re-sentencing based on the grounds that Valdez was denied his Sixth Amendment right to effective assistance of counsel.¹⁹⁷

Since the governor denied him executive clemency despite the Oklahoma Parole Board recommendation, Gerardo Valdez was fortunate that the court found another avenue for relief. Other foreign nationals, such as Angel Breard and Walter LaGrand were not so fortunate.¹⁹⁸ These two foreign nationals, like Valdez, were procedurally barred from bringing their Vienna Convention claims.¹⁹⁹ Similar to Valdez, they were denied clemency by their respective governors,²⁰⁰ however, for Breard and LaGrand, no alternate remedy was available. The denial of clemency by the governor in the *Valdez* case and the actions taken by Illinois Governor Ryan are illustrations of how subjective the decision to grant clemency can be. Such a subjective and single-handed decision is why the “the standardless, secretive and unreviewable process that is called clemency”²⁰¹ is not “a meaningful remedy at law,”²⁰² for violations of the Vienna convention.

IV. CURRENT POLICY

In addition to requesting that the United States provide remedies for violations of the Vienna Convention, Paraguay, Germany and Mexico have all demanded, in their respective cases before the ICJ, that the United States provide a “garan-

¹⁹⁶ See *id.* (“For this Court to decide the ICJ’s ruling overrules a binding decision of the United States Supreme Court and affords a judicial remedy to an individual for a violation of the Convention would interfere with the nation’s foreign affairs and run afoul of the U.S. Constitution.”).

¹⁹⁷ See *id.* at 710-11; see also U.S. CONST. amend. VI.

¹⁹⁸ Both Governor Jim Gilmore of Virginia and Governor Jane Dee Hull of Arizona declined to exercise the power of executive clemency over Breard and LaGrand. See Charney & Reisman, *supra* note 24; WESTERMAN, *supra* note 67.

¹⁹⁹ See *Greene*, 523 U.S. at 375 (for Angel Breard); *LaGrand v. Lewis*, 883 F. Supp. 451, 454 (D. Ariz. 1995) (for Walter LaGrand).

²⁰⁰ See Charney & Reisman, *supra* note 24; WESTERMAN, *supra* note 67; *LaGrand*, 2001 I.C.J. 3 (in fact, like Valdez, Arizona Governor Jane Dee Hull went against the recommendation of the Arizona Parole Board and denied Walter LaGrand clemency).

²⁰¹ *Avena Application*, 2003 I.C.J. ¶ 45.

²⁰² See *id.* ¶ 281(3).

tee of the non-repetition of the illegal acts.”²⁰³ Through the efforts of its executive agencies the United States has attempted, but has ultimately failed, to comply with these international demands.²⁰⁴

After Angel Breard was convicted of murder in 1993,²⁰⁵ it took three years before the Paraguayan consular authorities learned of Breard’s situation.²⁰⁶ The United States Department of State undertook an investigation to determine why it took so long for Paraguay to receive notification about one of its citizens’ legal plight.²⁰⁷ The investigation revealed one possible explanation as to why Paraguay was not notified of Breard’s arrest or conviction. Angel Breard spoke English fluently and had lived in America for seven years prior to his arrest.²⁰⁸ Breard was familiar with American customs and culture. Therefore, the arresting officers may have assumed that Breard was an American citizen due to his command of the English language. Additionally, the investigation led to other findings which showed why notification of Paraguay may have been irrelevant. One such finding was that even though Breard himself did not contact the consulate, he had continuous contact with his family.²⁰⁹ Therefore, any member of his family could have notified the Paraguayan consulate at his request. Breard also had criminal defense attorneys who were experienced in death penalty cases and could most likely explain to him the American legal system better than a Paraguayan consular officer.²¹⁰ Lastly, notification of the Paraguayan consulate would have been irrelevant because there was overwhelming evidence implicating Angel Breard in the attempted rape and murder of

²⁰³ *LaGrand*, 2001 I.C.J. 3 ¶ 10(4); see *Paraguay Order*, 1998 I.C.J. 1 ¶ 5(3); *Avena Order*, 2003 I.C.J. ¶ 8(4).

²⁰⁴ Since the inception of the Vienna Convention, the United States Department of Justice has had regulations in place to ensure that all foreign nationals arrested by members of the federal government receive their Article 36 rights. These regulations do not apply to state officials. See 28 C.F.R. § 50.5 (2004).

²⁰⁵ See *Breard v. Virginia*, 445 S.E.2d 670, 674 (Va. 1994).

²⁰⁶ See *Paraguay Application*, 1998 I.C.J. ¶ 12.

²⁰⁷ See GAYL WESTERMAN ET AL., *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 105 (Foundation Press 2004) (using Jonathan I. Charney & W. Michael Reisman, *AGORA: BREARD: The Facts*, 92 A.J.I.L. 666 (Oct. 1998)).

²⁰⁸ See *id.*

²⁰⁹ See *id.*

²¹⁰ See *id.* at 105-06.

Ruth Dickie.²¹¹ Despite coming to the conclusion that notification was unnecessary, the State Department did admit that a violation of the Vienna Convention took place and apologized to Paraguay.²¹²

In the *LaGrand* case before the ICJ, the United States notified Germany and the court that it made “‘substantial measures . . . aimed at preventing any recurrence’ of a breach of Article 36. . . .”²¹³ They went on to claim that the U.S. State Department was working on ways to improve compliance with the Vienna Convention throughout the United States, thus attempting to halt future violations.²¹⁴ Such efforts, in January 1998, included the publication of booklets, brochures and pocket parts all instructing law enforcement officials on the issues dealing with consular notification.²¹⁵ This material was to be delivered to the Attorney General of each state for further distribution.²¹⁶ Despite such promises, the United States continued to ignore decisions of the ICJ as well as the Vienna Convention.²¹⁷ Two years later, Mexico’s suit in the ICJ reiter-

²¹¹ See *id.* at 106.

²¹² See *id.*

²¹³ *LaGrand*, 2001 I.C.J. 3 ¶ 121; see also GAYL WESTERMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 118-19 (Foundation Press 2004) (using *Letter from Mark Richards, Deputy Assistant Attorney General, to Charles D. Siegal*, Mar. 24, 1998; *Letter from Department of State David R. Andrews, to Charles D. Siegal*).

²¹⁴ See *LaGrand*, 2001 I.C.J. 3 ¶ 121.

²¹⁵ The booklet is entitled “Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them.” Furthermore, over 60,000 copies of a similar brochure as well as 400,000 pocket parts have been distributed to federal, state and local law enforcement officials. The State Department has continuously conducted training programs as well as created an office and the position of Legal Advisor on Consular Affairs within the State Department to handle issues dealing with the Vienna Convention. See *LaGrand*, 2001 I.C.J. 3 ¶ 121; see also United States Dept. of State, <http://travel.state.gov/law/notify.html>; see also *State Department Changes its Tune*, Apr. 1998, reprinted in *Foreign Nationals: Current Issues and News*, available at <http://www.deathpenaltyinfo.org/article.php?scid=31&did=579>.

²¹⁶ See *State Department Changes its Tune*, Apr. 1998, reprinted in *Foreign Nationals: Current Issues and News*, available at <http://www.deathpenaltyinfo.org/article.php?scid=31&did=579>.

²¹⁷ See *Consular Rights, Foreign Nationals and the Death Penalty*, *supra* note 95; Aceves, *supra* note 97; *Foreign Nationals Part II*, *supra* note 98; *Mexican Officials Claim Execution of Foreign National is Illegal*, *supra* note 98; *Gregg v. Georgia*, 428 U.S. 153 (1976); *Avena Order* 2003 I.C.J. 2; *Avena Application*, 2003 I.C.J. 128.

ated the complaints of Germany and Paraguay, once again asking for America to comply with Article 36.²¹⁸

These repeated claims before the ICJ against the United States are evidence that the policy of giving arresting authorities the responsibility of notifying foreign nationals of their Article 36 rights is an ineffective solution to halting Article 36 violations. This is because the policy is inconsistently enforced. For example, the booklet created by the State Department and given out to federal, state and local law enforcement does not require that law enforcement officials ask every detainee whether they are a U.S. citizen.²¹⁹ It merely suggests that if the official has reason to question the detainee's nationality, they should inquire further.²²⁰ Also, even after the arresting authorities learn of the detainee's foreign citizenship, they sometimes neglect to tell either the detainee or the foreign consulate. This was mentioned by Justice Breyer in his dissent in *Federal Republic of Germany v. United States*.²²¹ Justice Breyer stated that the Arizona officials knew that the LaGrand brothers were of German nationality, yet they chose not to inform either the defendants of their Article 36 rights or Germany of the situation of its two citizens.²²² A more effective way of eliminating violations of the Vienna Convention would be to leave the responsibility of informing the foreign national of his or her rights with the judiciary branch.

V. ALTERNATE SOLUTION

A remedy by the judiciary branch could come in a variety of forms. One would be in the form of a U.S. Supreme Court decision,²²³ holding that the Vienna Convention creates individually enforceable rights, and creates a "meaningful remedy at

²¹⁸ See 28 C.F.R. § 50.5 (2004).

²¹⁹ See *Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*, 18, available at http://travel.state.gov/pdf/CNA_book.pdf.

²²⁰ See *id.*

²²¹ *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) (Breyer, J., dissenting).

²²² See *Federal Republic of Germany*, 526 U.S. at 113.

²²³ See Sarah M. Ray, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, 91 CAL. L. REV. 1729, 1769-71 (2003).

law.”²²⁴ However, a different, and a simple solution in the federal courts would be to amend Rule 5 of the Federal Rules of Criminal Procedure.²²⁵ Under Rule 5, if a defendant is charged with a felony, the judge must inform the defendant of the charge against him,²²⁶ his right to retain counsel,²²⁷ any circumstances under which the defendant may obtain pretrial release,²²⁸ the right to a preliminary hearing²²⁹ and the defendant’s right to remain silent.²³⁰ This paper proposes that this rule should be amended so that the judge must notify the defendant that he or she has the right to obtain consular assistance in accordance with the Vienna Convention. Similar to a Miranda warning,²³¹ judicial notification of a defendant’s right to notify his or her consulate would be a blanket rule, applicable to every prisoner that appeared before a judge.

An amendment to Rule 5 would be relatively simple and it would not involve an overhaul of the entire federal criminal system. Instead, the only modification to the current federal criminal system would be to require federal judges, during the defendant’s initial appearance in court, to educate defendants during their initial court appearance of their right to notify their consulate of his or her detention.

A change from law enforcement notification to judicial notification would also help the United States gain credibility throughout the world as a nation that respects international law. Due to this policy’s universal application, it would significantly reduce, or even eliminate all violations of the Vienna Convention from occurring. Such a policy would be more effective than current enforcement, which leaves the decision to no-

²²⁴ See *Avena Application*, 2003 I.C.J. ¶ 281(3).

²²⁵ FED. R. CRIM. P. 5.

²²⁶ FED. R. CRIM. P. 5(d)(1)(A).

²²⁷ FED. R. CRIM. P. 5(d)(1)(B).

²²⁸ FED. R. CRIM. P. 5(d)(1)(C).

²²⁹ FED. R. CRIM. P. 5(d)(1)(D).

²³⁰ FED. R. CRIM. P. 5(d)(1)(E).

²³¹ The doctrine that a criminal suspect in police custody must be informed of certain constitutional rights before being interrogated. *Miranda v. Arizona*, 384 U.S. 436 (1966). See BLACK’S LAW DICTIONARY (8th ed. 2004); see also *Avena*, 2004 I.C.J. 12 ¶ 64; see also *Miranda Offers Simple Fix to Consular Rights Problem*, AUSTIN AMERICAN-STATESMAN, Apr. 10, 2004, reprinted in *Recent Editorials on the March 2004 Decision by the International Court of Justice*, <http://deathpenaltyinfo.org/article.php?scid=31&did=955>.

tify the detainee of his or her rights under Article 36 up to the subjective determination of a law enforcement agent. Furthermore, as many newspapers have noted, in the wake of the *Avena* decision by the ICJ,²³² if the United States constantly fails to provide foreigners with access to their consulate, it is possible that foreign governments will reciprocate by ignoring the treaty when Americans are arrested abroad.²³³ Therefore, it is important that the United States adhere to international law, so that Americans abroad can be protected.

An amendment to Rule 5 would also prevent situations, such as the one mentioned in the *Avena* case, from re-occurring.²³⁴ In *Avena*, Mexico argued that the United States failed to notify its citizens of their rights under the Vienna Convention.²³⁵ The United States responded that it is difficult to determine who is and who is not a U.S. citizen because America is a multi-ethnic nation with much diversity.²³⁶ Additionally, since citizenship is generously granted in America, unfamiliarity with the English language may not be entirely reliable when determining whether or not a person is an American citizen.²³⁷ Therefore, the arresting officers cannot be sure who they should notify and who need not be notified of their consular rights. This is further evidence of why an amendment to Rule 5 would be a more effective policy than the current policy. If all detainees who were brought before a judge were notified of their possible rights under the Vienna Convention, then the confusion admitted to by the United States in *Avena* would not have occurred.

²³² See *Avena*, 2004 I.C.J. 12.

²³³ See *What Goes Around*, BALT. SUN, Apr. 2, 2004, at A14; *No Justice in Rights Denied*, L.A. TIMES, Apr. 3, 2004, at B20; *Our Opinion: Compliance with Hague Ruling Protects Americans Abroad*, MIAMI HERALD, Apr. 4, 2004, at 4L; *Foreigners on Death Row*, INT'L HERALD TRIB., Apr. 5, 2004; *Keeping Your Word – Texas Can't Afford to Ignore Federal Treaties*, DALLAS MORNING NEWS, Apr. 12, 2004, at A14; *Miranda Offers Simple Fix to Consular Rights Problem*, AUSTIN AMERICAN-STATESMAN, Apr. 16, 2004, all reprinted in *Recent Editorials on the March 2004 Decision by the International Court of Justice*, <http://deathpenaltyinfo.org/article.php?scid=31&did=955>.

²³⁴ See *Avena*, 2004 I.C.J. 12.

²³⁵ See *Avena*, 2004 I.C.J. 12 ¶ 12(1).

²³⁶ See *id.* ¶ 64.

²³⁷ See *id.* at ¶¶ 63-4.

In addition, a universal policy would be beneficial because every country has its own distinct laws on citizenship²³⁸ and the method adopted by the State Department cannot guarantee that violations of the Vienna Convention will not occur. For example, Karl and Walter LaGrand were German nationals even though they moved to the United States when they were very young.²³⁹ Due to moving at a young age, the boys adopted the American culture and language.²⁴⁰ Neither brother spoke German.²⁴¹ Therefore, when arrested, the Arizona law enforcement had no suspicion that the brothers were either German citizens or that the Vienna Convention even applied.²⁴² It is for reasons such as this, that the current policy must be changed so that those who appear to be American citizens, but are not, do not lose their Article 36 rights.

VI. CONCLUSION

As a signatory to the Vienna Convention on Consular Relations, the United States should abide by the international treaty. The United States has attempted to comply with the Convention in various ways. However, each method of compliance has proven ineffective. In the courts, the doctrine of procedural default has limited the review of Article 36 claims. Further, executive clemency has proven to be too arbitrary of a decision to provide full compliance. In addition, the current policy of law enforcement notification is not effective in preventing future violations of the Vienna Convention. Therefore, the United States must create a new policy of judicial notification by amending Federal Rule of Criminal Procedure Rule 5. With such an amendment, the United States could comply with Article 36 and rid itself of any international problems associated with violating the Vienna Convention.

²³⁸ See United States Office of Personnel Management Investigations Service, *Citizenship Laws of the World*, <http://www.opm.gov/extra/investigate/IS-01.pdf>.

²³⁹ See GAYL WESTERMAN ET AL., *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 125-26 (Foundation Press 2004).

²⁴⁰ See *id.*

²⁴¹ See *id.*

²⁴² See *id.*