The Lagrand Decision: The Evolving Legal Landscape of the Vienna Convention on Consular Relations in U.S. Death Penalty Cases

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I. INTRODUCTION

On June 27, 2001, the International Court of Justice ("ICJ") issued its long-awaited decision in the *LaGrand* case between Germany and the United States.1 *LaGrand* was a United States death penalty case that became a dispute of international magnitude. As such, its legacy will affect future death penalty cases in both domestic and international law where the rights of the Vienna Convention on Consular Relations ("VCCR") are applicable.2 The death penalty is a matter of increasing concern in international law and policy, and the application of the VCCR is a significant point of contention in that general debate.

The *LaGrand* brothers were German nationals who were tried, convicted and executed in the United States without being advised of their right to contact German consular authori-

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2. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR]. The VCCR is a multilateral treaty providing principally for the rights and responsibilities of consular personnel in the discharge of their official duties. The key right provided for by the VCCR, and the one most salient to *LaGrand*, is Article 36 entitled, "Communication and Contact with Nationals of the Sending State." Id. art. 36. For the full text of Article 36, see infra text accompanying note 6.
The ICJ's clear endorsement of the important rights of consular notification and access for detained foreign nationals embodied in the VCCR, and its equally clear rebuke of the United States for its disregard of those rights in a death penalty case, has changed the legal landscape of the application of the VCCR in the United States.

Most significantly, U.S. disregard of the Order of Provisional Measures not to execute Walter LaGrand pending the ICJ's determination of the international law issues will necessarily bring about changes in the way VCCR issues will be addressed in the United States. This article examines some of the key features of the LaGrand decision and its potential impact on U.S. law and policy, both at the national and international levels.

3. Final Judgment, supra note 1, ¶ 13. The facts of LaGrand are relatively straightforward. Walter and Karl LaGrand were brothers of German nationality. See id. In 1982, they were both arrested in Arizona and charged with bank robbery, murder, and kidnapping in an Arizona state court. See id. ¶ 14. In 1984, they were convicted for those crimes and sentenced to death. See id. It is not disputed that at the time the LaGrands were convicted and sentenced, the U.S. authorities had not informed them of their right to seek assistance from the German consular authorities or informed the relevant German consular post of the LaGrands' arrest. See id. ¶ 15. This omission, admitted by the United States, was in violation of the Vienna Convention on Consular Relations. See VCCR, infra note 2. The matter of the VCCR violation was not raised by the LaGrands during their trial or subsequent appeals. Final Judgment, supra note 1, ¶¶ 17-21. Germany first learned of the LaGrands' detention in 1992. See id. ¶ 15. In 1995, upon federal habeas corpus review, the LaGrands raised the matter of the VCCR violation for the first time. See id. ¶ 23. This claim was rejected on the basis of the "procedural default" rule. See id. On February 24, 1999, Karl LaGrand was executed. See id. ¶ 29. On March 2, 1999, the day before the scheduled execution date of Walter LaGrand, Germany brought an application against the United States in the ICJ requesting an order of provisional measures suspending Walter LaGrand's execution pending a ruling by the ICJ on the matter of the breach of the VCCR. See id. ¶ 30. On March 3, 1999, the ICJ issued that provisional order against the U.S. See id. ¶ 32. Despite the ICJ's order of provisional measures, Walter LaGrand was executed that same day. See id. ¶ 34. For the procedural history of the LaGrands' trial, appeals and habeas corpus review in U.S. courts, see Stewart v. LaGrand, 526 U.S. 115 (1999). In a parallel proceeding to Walter LaGrand's habeas corpus petition, the German government sought to enforce the ICJ's order of provisional measures to delay Walter LaGrand's execution. See Federal Republic of Germany v. United States, 526 U.S. 111 (1999).

4. See LaGrand Case (F.R.G. v. U.S.), 1999 I.C.J. 9 (Mar. 3) (Request for the Indication of Provisional Measures) [hereinafter LaGrand Order]; Final Judgment, supra note 1, ¶¶ 32-34 (stating that the U.S. proceedings leading to the execution of Walter LaGrand continued despite the ICJ request).
II. INVOKING ARTICLE 36 OF THE VCCR

A. Article 36 of the VCCR

An understanding of the applicable provision of the VCCR is the appropriate point of departure to appreciate the significance of *LaGrand* and other cases that raise the same issue of international law—that is, the right of detained foreign nationals to have access to their consular personnel in the country where they are detained. This right is provided for in Article 36 of the VCCR.\(^5\) Article 36 provides as follows:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

   (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending state shall have the same freedom with respect to communication with and access to consular officers of the sending State;

   (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. 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;*

   (c) 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 pursuant 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.

\(^5\) VCCR, *supra* note 3, art. 36.
2. 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.  

The text of Article 36 itself presents important questions of interpretation for U.S. courts. For example, does it create rights directly available to a criminal defendant or does it only concern the powers of consular personnel and thus the rights of governments? This question, often posed in terms of whether the VCCR is a "self-executing treaty," is the subject of considerable scholarly and juristic debate. Although relevant to LaGrand, neither the VCCR's status as a source of law in the United States nor the general importance of consular notification and access will be considered in great detail in this article. Instead, this article will focus upon the contours of the LaGrand decision and its potential to influence law and policy in the future, particularly in relation to other death penalty cases.

B. Other U.S. Death Penalty Cases Invoking Article 36 of the VCCR

Because LaGrand resulted in a final judgment on the merits by the ICJ, it is perhaps the most visible dispute generated by Article 36. However, it was by no means the only one. The road to LaGrand is paved with other similar cases.


where other foreign governments protested the violation of Article 36 in regard to their nationals. Despite the emphasis on death penalty cases, Article 36 applies to any detained foreign national where both the detaining state and the state of nationality of the detainee are parties to the VCCR. Most of the debate about the application of the VCCR, however, has occurred in cases factually similar to LaGrand, specifically, where the foreign governments protested impending death sentences imposed against their nationals following violations of Article 36.

In the 1998 Vienna Convention on Consular Relations (Paraguay v. U.S.) ("Breard") case, Paraguay brought an application before the ICJ against the United States alleging a similar violation of the VCCR. Angel Francisco Breard was tried, convicted and sentenced to death in the Commonwealth of Virginia. As in LaGrand, the ICJ issued a provisional order to the United States to take all measures at its disposal to see that Breard was not executed pending the final outcome of the ICJ proceedings. Breard was executed while the order was outstanding. Unlike LaGrand, however, Paraguay, the complaining state, requested withdrawal of its case from the docket of the ICJ after Breard’s execution. In the case of Joseph Stanley Faulder, the State of Texas executed Mr. Faulder, a Canadian national, despite the fact that he was not advised of his right to confer with Canadian consular authorities. In another significant death penalty case, which is

9. See Breard Application, supra note 8, ¶¶ 5-11. Breard was convicted in Virginia state court of attempted rape and murder. See Breard v. Greene, 523 U.S. 371, 373 (1998). He raised the matter of the VCCR violation for the first time at federal habeas corpus review. Id. at 375-76. The U.S. Supreme Court rejected the claim as having been "procedurally defaulted" (not raised in state court), and because it was not likely to have affected the outcome of the case. Id. at 375, 377.
13. See Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996). Faulder was tried
still pending at the time of this writing, the Oklahoma Court of Criminal Appeals is reviewing the sentence of Gerardo Valdez, a Mexican national convicted following a VCCR violation.\footnote{14}{See Valdez v. State, No. PCD-2001-1011 (Okla. Crim. App. filed Aug. 22, 2001). Valdez was convicted in Oklahoma state court of first-degree murder and sentenced to death in 1990; his conviction was upheld upon appeal to the Oklahoma Court of Criminal Appeals. See Valdez v. State, 1995 OK CR 18, 900 P.2d 363, \textit{cert. denied}, 516 U.S. 967 (1995). The Oklahoma court denied his first petition for post-conviction relief. See Valdez v. State, 1997 OK CR 12, 933 P.2d 931. The Tenth Circuit upheld the denial of his federal petition for habeas corpus. See Valdez v. Ward, 219 F.3d 1222 (10th Cir. 2000), \textit{cert. denied sub nom.}, Valdez v. Gibson, 532 U.S. 979 (2001). The latest petition for post-conviction relief in the Valdez case was filed on August 22, 2001. This subsequent petition was motivated, in part, by the ICJ's \textit{LaGrand} decision and the intervention of the Mexican government on behalf of Mr. Valdez. See Second Application for Post-Conviction Relief, Valdez v. State, Valdez (No. PCD-2001-1011). Even before the Mexican government intervened in Valdez's case, Mexico's great concern for VCCR rights, particularly in the context of the death penalty, motivated it to seek an advisory opinion before the Inter-American Court of Human Rights declaring the importance of Article 36 rights. See The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Oct. 1, 1999, Inter-Am. Ct. H.R. (Ser. A) No. 16 [hereinafter Advisory Opinion OC-16/99]. In the advisory opinion the Inter-American Court stated "that the individual right under analysis must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial." \textit{Id.} \S 122.}

Although these are the most often discussed cases, U.S. courts have addressed similar violations of Article 36 of the VCCR in both capital and non-capital cases.\footnote{15}{For examples of other notable U.S. cases where violations of the VCCR were litigated in federal courts, see United States v. Li, 206 F.3d 56 (1st Cir. 2000); Flores v. Johnson, 210 F.3d 456 (5th Cir. 2000) (capital case); United States v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000); United States v. Ademaj, 170 F.3d 58 (1st Cir. 1999); United States v. Cordoba-Mosquera, 212 F.3d 1194 (11th Cir. 1998). For two key state supreme court cases where the VCCR issue was litigated, see People v. Madej, 739 N.E.2d. 423 (Ill. 2000) (capital case); Ledezma v. State, 626 N.W.2d 134 (Iowa 2001). For a Web site that tracks Article 36 violations in the U.S criminal justice system with an emphasis on capital cases, see Death Penalty Information Center at http://www.deathpenaltyinfo.org/foreignnatl.html (last visited Apr. 14, 2002).} At a minimum, these cases all highlight the tension between U.S. law and
practice with regard to the VCCR on the one hand, and U.S. obligations under the treaty and international law on the other. The LaGrand case is unique in that it gave rise to a decisive litigation over U.S. actions with respect to the VCCR on the international plane.

III. LAW AND FACTS OF THE LAGRAND CASE IN U.S. COURTS

The facts of the LaGrands’ alleged crimes, trial, conviction and sentence are unremarkable from the standpoint of U.S. law. From the perspective of international law, however, the odyssey of the LaGrand brothers is problematic and controversial. The hallmark of the LaGrands’ case, like so many other VCCR cases, is that at no time during their detention were the LaGrand brothers ever advised of their right to contact German consular officials for assistance, nor were German authorities notified of their detention. This fact is not in dispute as the United States admitted to the VCCR violation. Nevertheless, LaGrand raises important issues of international law that need to be understood. In particular, LaGrand will long be remembered for its contribution to the status of provisional measures in the jurisprudence of the ICJ.

Although there was no dispute that the United States had failed to comply with the VCCR, there was a question as to when U.S. authorities became aware of the fact that the LaGrands were German nationals. Germany contended that U.S. authorities knew very early in their case. The United States, on the other hand, asserted that they did not know of their German nationality until one to two years after their arrest. The German government did not become aware of

16. Final Judgment, supra note 1, ¶ 15.
17. See id. For a review of the U.S. positions in the ICJ in LaGrand, see Contemporary Practice of the United States Relating to International Law, 95 AM. J. INT’L L. 650-55 (Sean D. Murphy ed., 2001) [hereinafter Contemporary Practice]. The fact that the LaGrands were not advised of their rights under the VCCR was not contested in the U.S. courts either. See infra note 25.
18. See Final Judgment, supra note 1, ¶ 16.
19. See id.
20. See id. The United States argued that at the time of their arrest neither Karl nor Walter LaGrand identified themselves as German nationals. See id. The United States also suggested that at the time of their arrest, the LaGrands themselves may not have known that they were not U.S. nationals. See id. Walter and Karl were born in Germany in 1962 and 1963 respectively. Id. ¶ 13. They moved to the United States in 1967 with their mother when they were still
their case until the LaGrands notified them in 1992.21

A. Procedural Default Bars VCCR Issue from Habeas Corpus Review

One of the most salient facts in the case was that neither LaGrand brother ever raised the matter of the VCCR issue at trial or on appeal to the Arizona Supreme Court in 1989.22 Similarly, the VCCR issue was not raised when the U.S. Supreme Court denied certiorari to review the cases in 1987 and 1991.23 The LaGrands raised the VCCR issue for the first time in unsuccessful federal habeas corpus petitions to set aside their death sentences.24 The habeas petitions with regard to the VCCR issue were denied because they were "procedurally defaulted"—that is, they were not raised at the state court level.25 In barring the VCCR claim by application of the procedural default rule, the Ninth Circuit held that the LaGrands had not shown an objective external factor that prevented them from raising the issue of the lack of consular notification at an earlier time in their cases.26

See id. Apparently neither spoke German, and "they appeared in all respects to be native citizens of the United States." See id.

21. See id. ¶ 22.
25. See Final Judgment, supra note 1, ¶ 23. See also LaGrand v. Stewart, 133 F.3d at 1261. "It is undisputed that the State of Arizona did not notify the LaGrands of their rights under the [VCCR]. It is also undisputed that this claim was not raised in any state proceeding. The claim is thus procedurally defaulted." Id.
26. See Final Judgment, supra note 1, ¶ 23. See also LaGrand v. Stewart,
The procedural default rule has long been applied in federal court to deny habeas corpus petitions and derives from both statutory and case law. Procedural default has been used to bar consideration of the VCCR issue in other federal habeas cases. The U.S. Supreme Court upheld the application of procedural default in *Breard v. Greene*. In *Breard*, the Supreme Court held,

It is clear that Breard procedurally defaulted his claim, if any, under the Vienna Convention by failing to raise that claim in state courts.

It is the rule in this country that assertions of error in criminal proceedings must first be raised in state courts in order to form the basis for relief in habeas. Claims not so raised are considered defaulted.

The use of the procedural default rule to bar review of new matters in death penalty cases is by no means limited to the VCCR issue. The application of the U.S. law of procedural default in the LaGrands’ cases, however, would prove highly significant in the judgment of the ICJ.

**B. An Application to the International Court of Justice**

Following the failure of the federal habeas petitions, Germany attempted various unsuccessful political interventions seeking to prevent the LaGrands’ executions. On Feb-

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30. *Breard*, 523 U.S. at 375 (citation omitted).
32. *See* Final Judgment, *supra* note 1, ¶ 26. In particular, the German Foreign Minister and German Minister of Justice wrote to their respective United States counterparts on January 27, 1999. *See id.* On that same day the German Foreign Minister wrote to the Governor of Arizona. *See id.* On February 2, 1999, the German Chancellor wrote to the President of the United States and the Governor of Arizona. *See id.* On February 5, 1999, the President of Germany wrote to the President of the United States. *See id.* These letters referred
ruary 24, 1999, when last-minute federal court proceedings on behalf of Karl LaGrand proved to be fruitless, Karl LaGrand was executed. On March 2, 1999, the day before Walter LaGrand was scheduled to be executed, Germany filed an application in the ICJ regarding the U.S. violation of the VCCR. Germany simultaneously requested an order of provisional measures against the United States to delay Walter’s execution pending a final determination by the ICJ of the international law issues. On the same day the matter was filed in the ICJ, the Arizona Board of Executive Clemency granted a sixty-day reprieve in light of Germany’s case before the ICJ; however, the Governor of Arizona, Jane Dee Hull, decided to allow Walter LaGrand’s execution to go forward as scheduled.

C. The ICJ Order of Provisional Measures to Delay Walter LaGrand’s Execution

The power to grant provisional measures while a case is pending before the ICJ is granted to the court in Article 41 of
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the ICJ Statute. Article 41 provides as follows:

1. The Court shall have the power to indicate, if it considers that the circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

An order of provisional measures is an interim order directed to a party in litigation before the ICJ to preserve the rights of the parties while the litigation is pending. As such, it is functionally similar to the equitable power of injunction in common law courts.

On March 3, 1999, the ICJ, finding the impending execution of Walter LaGrand a matter of the greatest urgency, granted Germany's application for provisional measures and issued the following order ("Order"): (a) The 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, and should inform the Court of all the measures which it has taken in implementation of this Order;

(b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.


38. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 41.

39. See J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 129 (3d ed. 1998); COLLIER & LOWE, supra note 34, at 168-74. For additional scholarly analysis of the ICJ's power and use of provisional measures, see Bernard H. Oxman, Jurisdiction and the Power to Indicate Provisional Measures, THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 323 (Lori F. Damrosch ed., 1987); Peter J. Goldsworthy, Interim Measures of Protection in the International Court of Justice, 68 AM. J. INT'L L. 258 (1974). For an article that specifically examines the ICJ's order of provisional measures in Breard, see Louis Henkin, AGORA: Breard, Provisional Measures, U.S. Treaty Obligations and the States, 92 AM. J. INT'L L. 679 (1998). It is extremely important to note, however, that these sources were written before the ICJ decided LaGrand.

40. LaGrand Order, supra note 4. The ICJ's Order was unanimous with President Schwebel appending a separate opinion and Judge Oda appending a declaration. See id. It is noteworthy that the Order was issued ex parte. The U.S. Supreme Court noted this factor when it decided not to enforce the ICJ's
Obtaining this Order of provisional measures in the ICJ against the United States and the State of Arizona to delay the execution may have seemed like a momentary victory for Walter LaGrand. The U.S. Supreme Court, however, was not persuaded.

D. The U.S. Supreme Court Hears Germany's Plea Based Upon the ICJ's Order

On the same day the ICJ issued the interim Order against the United States, Germany brought an action in the U.S. Supreme Court against both the United States and the State of Arizona seeking to enforce it. Germany sought a preliminary injunction ordering the U.S. Government and Governor Hull to prevent Walter LaGrand's execution pursuant to the ICJ Order. In a per curiam opinion in Federal Republic of Germany v. United States ("F.R.G. v. U.S.")", the Supreme Court declined to do so for two reasons. First, the United States had not waived its sovereign immunity. Second, Article III, Section 2 of the U.S. Constitution did not provide an anchor for an action to prevent an execution of a foreign national who is not an ambassador or consul. With respect to the action against Arizona, the Court found, as it did in Breard, that there is no support in the VCCR for the ability of a foreign government to assert a claim against a U.S. state, and that such an action is probably a violation of

Order. See infra text accompanying note 48.

41. Federal Republic of Germany v. United States, 526 U.S. 111 (1999) (per curiam). To bring this case in the U.S. Supreme Court, Germany relied upon the Court's original jurisdiction established by Article III, Section 2 of the U.S. Constitution. Id. Article III, Section 2 provides, "In all Cases affecting Ambassadors, other public ministers and Consuls, and those in which a State shall be a party, the supreme Court shall have original Jurisdiction..." U.S. CONST. art. III, § 2, cl. 2.

42. See Federal Republic of Germany v. United States, 526 U.S. at 111.

43. See id. at 112. For a key case discussing the doctrine of sovereign immunity in U.S. law, see Principality of Monaco v. Miss., 292 U.S. 313 (1934). For a discussion of sovereign immunity as it applies to VCCR litigation in U.S. courts, see Schiffman, supra note 7, at 49-50.

44. See Federal Republic of Germany v. United States, 526 U.S. at 112. For the relevant text of Article III, § 2, see supra note 41.


46. See Federal Republic of Germany v. United States, 526 U.S. at 112.
the Eleventh Amendment. Finally, the Court noted unfavorably that Germany brought its action to the attention of the ICJ ex parte and within only two hours of the scheduled execution. Accordingly, the Supreme Court declined to exercise its original jurisdiction. On that same day, March 3, 1999, Walter LaGrand was executed.

At the time the Supreme Court decided F.R.G. v. U.S., it was far from settled whether or not an order of provisional measures by the ICJ established binding obligations for the state against which it was issued. The concurring and dissenting opinions in F.R.G. v. U.S. reflect this uncertainty and the rather clear position of the U.S. government on the matter. In F.R.G. v. U.S., the Solicitor General of the United States forcefully argued the U.S. position that provisional orders of the ICJ do not establish binding obligations.

47. See id. The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

48. See Federal Republic of Germany v. United States, 526 U.S. at 112. In addition to being an issue before the Supreme Court, the United States raised the issue of the ex parte nature of the ICJ Order during the merits phase of the ICJ proceedings. See Final Judgment, supra note 1, ¶ 55. Specifically, the United States argued that Germany's late filing of its request for provisional measures compelled the ICJ to respond without full information. See id. The U.S. judge on the ICJ, Thomas Buergenthal, specifically noted Germany's late application to the ICJ in his dissenting opinion. See id. (Buergenthal, J., dissenting as to the admissibility of Germany's third submission—the question of disregard by the United States of its legal obligation to comply with an order indicating provisional measures). For the relevant text of Germany's third submission, see infra note 57.

49. See Federal Republic of Germany v. United States, 526 U.S. at 112. Although unrelated to the VCCR issue, in a parallel decision, the Supreme Court ruled Walter LaGrand could not contest the constitutionality of death by lethal injection. See Stewart v. LaGrand, 526 U.S. 115 (1998).

50. See Final Judgment, supra note 1, ¶ 34.

51. See Contemporary Practice, supra note 17, at 652-55. For a review of literature discussing the power of provisional measures pre-dating LaGrand, see sources cited supra note 39.

52. See Federal Republic of Germany v. United States, 526 U.S. at 112. (Souter, J., concurring) (Justice Ginsburg joined Justice Souter in concurrence).

53. See Federal Republic of Germany v. United States, 526 U.S. at 112 (Breyer, J., dissenting) (Justice Stevens joined Justice Breyer in dissent).

54. See id. The Solicitor General has filed a letter in which he opposes any stay. In his view, the "Vienna Convention does not furnish a basis for this Court to grant a stay of execution," and "an order of the [ICJ] indicating provisional measures is not binding and does not furnish a basis for
The ultimate holding of the ICJ on this matter notwithstanding, it is fairly clear that at the time the U.S. Supreme Court decided *F.R.G. v. U.S.*, the unilateral interpretation of the U.S. government concerning the effect of provisional measures by the ICJ weighed heavily in the Court's decision. The way in which the executive branch of the U.S. government, and a U.S. court might view a similar order in the future will be discussed in Section V(B). In the meantime, however, it is first necessary to fully understand the ICJ's final judgment in *LaGrand*.

IV. THE ICJ DECISION IN THE *LAGRAND* CASE

On June 27, 2001, the ICJ issued its decision in *LaGrand*. In what can only be described as a thorough rebuke of United States practice under the VCCR, the ICJ's decision on the merits addressed a number of key issues. First, the court addressed the disregard by the United States of various obligations under the VCCR, most notably Articles 36(1) and 36(2). Next, the ICJ addressed the United States violation of its order of provisional measures and whether such orders create binding obligations in international law. Finally, the
ICJ addressed what action the United States should take to prevent future violations of the VCCR and to provide redress for existing violations—especially with regard to death penalty cases.  

A. The Violation of Article 36

As noted previously, there was no genuine question of fact as to whether the United States actually violated Article 36. Despite this, the ICJ considered whether it was necessary to find that the outcome of the LaGrands' criminal cases was actually impacted by the United States noncompliance in order to find a treaty violation, and whether the violation applied to the LaGrands as individuals and not just Germany as a nation-state. The ICJ determined that the United States violated its obligations under Article 36 regardless of whether the LaGrands were actually prejudiced, or otherwise affected, by the breach. The court held,

It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have ren-

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58. See supra note 17 and accompanying text.
60. See Final Judgment, supra note 1, ¶¶ 74, 77.
61. See id. ¶ 74. By fourteen votes to one (Judge Oda voting against), the ICJ held that
by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, paragraph 1(b), of the [VCCR], and by thereby depriving the Federal Republic of Germany of the possibility, in a timely fashion, to render the assistance provided for by the [VCCR] to the individuals concerned, the United States of America breached its obligations to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 1(1).
dered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen. 62

In addition, the ICJ concluded that Article 36, paragraph 1 of the VCCR creates rights for individuals, not simply rights for state parties to the treaty. 63 "[T]he Court concludes that Article 36, paragraph 1, creates individual rights, which . . . may be invoked in this Court by the national State of the detained person. These rights were violated in the present case." 64

B. The Effect of the "Procedural Default" Rule

The ICJ next considered the extent to which the application of the U.S. doctrine of procedural default contributed to the violation of the VCCR in the LaGrands' cases. The court emphasized the distinction between the rule itself and its specific application in the LaGrands' cases. 65 The court found that the rule itself does not violate the VCCR. 66 The court held that the problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, para-

62. Id. ¶ 74. This holding stands in stark contrast to numerous cases decided by U.S. courts that held prejudice to the defendant resulting from the treaty breach was necessary before any application for relief would be entertained. See, e.g., Breard v. Greene, 523 U.S. 371, 377 (citing Arizona v. Fulminante, 499 U.S. 279 (1991)); United States v. Ademaj, 170 F.3d 58 (1st Cir. 1999). For a more detailed discussion of the requirement of prejudice in U.S. law, see Schiffman, supra note 7, at 42-44; Kadish, supra note 7, at 602-09.

63. See Final Judgment, supra note 1, ¶ 77. The ICJ's holding that Article 36 creates individual rights is consistent with the Inter-American Court of Human Rights advisory opinion on this question. See Advisory Opinion OC-16/99, supra note 14.

64. Final Judgment, supra note 1, ¶ 77. The spirit of this finding contrasts with holdings by U.S. courts that expressed doubt as to whether Article 36 creates rights that flow directly to individual criminal defendants and are therefore directly enforceable by U.S. courts (i.e., whether or not the VCCR is a "self-executing treaty"). See supra note 7 and accompanying text. It is important to note, however, that although related, the question of whether a treaty is self-executing for the purpose of domestic law is a very different question from whether rights of individuals created by treaty are justiciable in international law before an international tribunal.

65. See Final Judgment, supra note 1, ¶ 90.

66. See id.
graph 1, of the [VCCR], that the competent national authorities failed to comply with their obligation to provide the requisite consular information "without delay," thus preventing the person from seeking and obtaining consular assistance from the sending State.67

The ICJ found that Germany had a right at the request of the LaGrands "to arrange for [their] legal representation."68 Furthermore, because the American authorities failed to comply with their obligation under Article 36(1)(b), the procedural default rule prevented counsel for the LaGrands from effectively challenging their convictions under anything except U.S. Constitutional standards.69 Accordingly, the ICJ held that, "[u]nder these circumstances, the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violated paragraph 2 of Article 36."70

67. Id. By fourteen votes to one (Judge Oda voting against) the ICJ held that by not permitting the review and reconsideration, in the light of the rights set forth in the [VCCR], of the convictions and sentences of the LaGrand brothers after the violations referred to in paragraph [128](3) above had been established, the United States of America breached its obligation to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 2, of the [VCCR][.]

68. Id. ¶ 91. Germany ultimately provided them some assistance to that effect.

69. See id. As a result, although United States courts could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards, the procedural default rule prevented them from attaching any legal significance to the fact, inter alia, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the [VCCR].

70. Final Judgment, supra note 1, ¶ 91.
The one aspect of LaGrand that reaches far beyond the VCCR and international aspects of the death penalty is its contribution to the status of provisional measures as an instrument of the ICJ. The ICJ's clear pronouncement on this point in LaGrand will reverberate throughout the ICJ's future jurisprudence and surely will impact the use of provisional measures in other international tribunals as well.

Germany asked the ICJ to adjudge the United States' failure to follow the provisional Order to take all measures at its disposal to ensure Walter LaGrand was not executed pending the final decision by the ICJ, as a violation of international law in its own right. To support its argument, Germany referred to key provisions of the U.N. Charter and the ICJ Statute. In response, the United States claimed the specific language of the Order was by its own terms non-binding, but that it had, in any event, complied with the Order by immediately transmitting it to the Governor of Arizona. In addition, the United States argued that it was constrained from fulfilling the Order because of the extraordinarily short time between the issuance of the Order and Walter LaGrand's execution and "the character of the [U.S.] as a federal republic of divided powers." Most significantly, the United States maintained that orders of provi-

71. See id. ¶ 92. For the full text of Germany's submission pertaining to the status of a violation of the Order of provisional measures (third submission), see supra note 57.

72. See id. ¶ 93. Among the provisions that Germany invoked was Article 41(1) of the ICJ Statute. See id. For the full text of Article 41 of the ICJ Statute, see supra text accompanying note 38. In addition, Germany invoked Article 94(1) of the U.N. Charter. See id. Article 94(1) of the Charter provides that "[e]ach member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." U.N. CHARTER art. 94, para. 1. It is noteworthy to recall that the ICJ Statute is an integral part of the U.N. Charter. See id. art. 92.

73. See Final Judgment, supra note 1, ¶ 96. For a more detailed discussion of the U.S. position that the ICJ Order was by its own terms non-binding, see Contemporary Practice, supra note 17, at 652-54.

74. See Final Judgment, supra note 1, ¶ 95.

75. See id.

76. Id. In other words, the U.S. federal government is limited in its ability to halt an execution of a state prisoner, convicted and sentenced in a state court under state law. For a more detailed discussion of this point, see infra text accompanying notes 112-21.
sional measures by the ICJ do not, as a matter of international law, create binding obligations for the states against which they are issued.\footnote{77}{See Final Judgment, supra note 1, ¶ 96. For a more detailed discussion of the U.S. position that ICJ orders of provisional measures do not create binding obligations in international law, see Contemporary Practice, supra note 17, at 652-54.}

In what is already being referred to as a milestone decision by the ICJ, the court held that orders of provisional measures by the ICJ pursuant to Article 41 of its Statute do in fact create binding obligations in international law.\footnote{78}{See Final Judgment, supra note 1, ¶ 109. "[T]he Court has reached the conclusion that orders on provisional measures under Article 41 have binding effect." Id. To reach this seminal conclusion, the ICJ meticulously examined several factors including the text of the Statute, a comparison of the French and English versions, and the travaux préparatoires—the preparatory documents of the treaty. See id. ¶¶ 98-109. By thirteen votes to two (Judges Oda and Parra-Aranguren voting against), the ICJ held that by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice in the case, the United States of America breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999[.]

Id. ¶ 128(5).

79. See id. ¶¶ 98-116.
80. See id. ¶ 115.
81. See id. ¶ 113. "It is... noteworthy that the Governor of Arizona, to whom the Court's Order had been transmitted, decided not to give effect to it, even though the Arizona Clemency Board had recommended a stay of execution for Walter LaGrand." Id.

82. See id. ¶ 114.

[T]he United States Supreme Court rejected a separate application by Germany for a stay of execution, "[g]iven the tardiness of the pleas and the jurisdictional barriers they implicate." Yet it would have been open to the Supreme Court, as one of its members urged, to grant a preliminary stay, which would have given it "time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved... ."

Id. (second alteration in original) (quoting Federal Republic of Germany v.
held,

The review of the above steps taken by the authorities of the United States with regard to the Order of the International Court of Justice of 3 March 1999 indicates that the various competent United States authorities failed to take all the steps they could have taken to give effect to the Court's Order. The Order did not require the United States to exercise powers it did not have; but it did impose the obligation to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings . . ." The Court finds that the United States did not discharge this obligation. 83

Having adjudged the United States in violation of both the VCCR and the ICJ's Order to delay Walter LaGrand's execution, the ICJ turned to the question of what assurances the United States must provide to ensure that such violations do not recur in the future.

D. "Review and Reconsideration" of Convictions and Sentences

In response to Germany's request that the United States provide certain assurances to prevent further VCCR violations, the ICJ noted that throughout the proceedings, the United States made assurances that it was working intensively to improve understanding of and compliance with consular notification and access requirements in the United States to guard against future violations. 84 The United States repeated in all phases of the proceedings that it is carrying out a "vast and detailed programme" to ensure future compliance at the federal, state and local levels. 85 The ICJ credited the U.S. statements and found them to satisfy a general assurance of non-repetition. 86

United States, 526 U.S. 111, 112 (per curiam), 113 (Breyer, J., dissenting)). 83. Id. ¶ 115.
85. Final Judgment, supra note 1, ¶ 123.
86. Id. ¶ 124. By unanimous vote the ICJ took note of
Above and beyond the repeated assurances, the United States also offered an apology to Germany for the breach of Article 36. Germany did not seek "material reparation" for the injury resulting to either the LaGrand brothers or Germany itself as a state. Germany did seek; however, assurances that in future cases involving German nationals that the United States would ensure in law and practice the effective exercise of the VCCR. Emphasizing cases involving the death penalty in particular, Germany requested an "effective review of and remedies for criminal convictions impaired by the violation of the rights under Article 36."

Upon consideration of this final submission by Germany, the ICJ ruled,

The Court considers in this respect that if the United States, notwithstanding its commitment [to improve compliance with the VCCR], should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, 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 [VCCR]. This obligation can be carried out in various ways. The choice of means must be left to the United States.

the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1(b), of the Convention; and finds that this commitment must be regarded as meeting the Federal Republic of Germany's request for a general assurance of non-repetition.

Id. ¶ 128(6).
87. See id. ¶ 125.
88. See id.
89. See id.
90. See id.
91. Id. (emphasis added). By fourteen votes to one (Judge Oda voting against), the ICJ held that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1(b), of the [VCCR] having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in [the VCCR].

Id. ¶ 128(7).
This holding requiring possible "review and reconsideration" by the United States of convictions and sentences, yet leaving the means to accomplish this in the hands of U.S. authorities, no doubt will give rise to considerably more litigation and controversy in the event of future VCCR violations. The next section discusses the potential impact of LaGrand and possible future scenarios in U.S. courts.

V. FUTURE IMPACT OF THE LAGRAND DECISION

Despite U.S. assurances of improvement in its compliance with the VCCR, the letter and spirit of Article 36 surely will be tested in the future. This is particularly probable if large numbers of foreign defendants are charged in U.S. courts pursuant to anti-terrorist legislation and executive orders enacted in response to the terrorist attacks upon the United States on September 11, 2001. Some foreign governments already have raised the issue of VCCR compliance in this context. This, of course, is in addition to the usual number of cases involving criminal and immigration matters where foreign nationals are detained.

This section will address potential scenarios where LaGrand may be directly applicable. It will not address the more ordinary (and far more numerous) situations where violations of Article 36 should be raised and litigated by criminal defense and immigration counsel in a timely and appropriate way. Accordingly, this section will concentrate on two key questions. First, how might a state prisoner under sentence of death benefit from the ICJ's requirement of "review and reconsideration" of a conviction and sentence obtained following a violation of the VCCR? Second, how may a state prisoner under sentence of death benefit from an order of provisional measures to delay an execution in light of the ICJ's holding.

92. See Barbara Crossette, Diplomats Protest Lack of Information, N.Y. TIMES, Dec. 20, 2001, at B5 (detailing complaints by foreign diplomats, including non-access to detained nationals); David E. Sanger, President Defends Military Tribunals in Terrorist Cases, N.Y. TIMES, Nov. 30, 2001, at A1 (specifying a protest by the Egyptian Foreign Minister to U.S. Secretary of State Colin L. Powell that Egyptian diplomats had not been given the names of several dozen Egyptian citizens detained by the United States); William Glaberson, A Frustrated A.C.L.U. Tries to Guide Consulates Through a Thicket, N.Y. TIMES, Jan. 2, 2001, at A11 (discussing an offer by the A.C.L.U. to advise foreign consulates on the legal landscape they face when attempting to assist nationals detained in the United States).
that they create binding obligations in international law?

What follows are some informed observations about novel and complex issues involving the relationship between international law and U.S. law. Under no circumstances should one consider this analysis exhaustive or decisive.

A. How May a Death Penalty Inmate Obtain “Review and Reconsideration” Following LaGrand?

After LaGrand, it is natural for inmates convicted by U.S. courts following VCCR violations to seek to challenge their convictions and sentences in light of the ICJ’s decision and its clear emphasis on the importance of VCCR rights. This is especially so in capital cases. Exactly how such challenges may be implemented, however, remains to be seen. The Valdez case in Oklahoma surely will serve as a test case for similarly situated death row inmates in American prisons. In Valdez v. State, the Oklahoma Court of Criminal Appeals clearly has signaled the seriousness of the VCCR issue and the significance of LaGrand as an important new factor in the legal landscape. While other courts may also appreciate the significance of the ICJ’s decision, the ability of death row inmates to successfully utilize LaGrand likely will prove difficult.

First, as a matter of international law, ICJ judgments have no binding effect except as between the parties and only as to that particular case. Thus, only Germany is in a position to claim any direct benefit from the decision. LaGrand only contemplates a possible review and reconsideration of convictions and sentences of German nationals. In addition, the particular language of the holding, “if the United States should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice” by its own terms would arguably apply prospectively. That is, the holding would apply only after the United States has had

94. See Order Staying Execution at 2, Valdez v. State (No. PCD-2001-1011) ("The court has before it a unique and serious matter involving novel legal issues and international law.").
95. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 59.
96. See Final Judgment, supra note 1, ¶ 125.
97. Id. (emphasis added).
a full and fair opportunity to improve its compliance with Article 36. Therefore, any inmate, of German nationality or otherwise, whose conviction and sentence occurred pre-
LaGrand, would not likely be entitled to any reconsideration.

Even in cases where "review and reconsideration" would be appropriate, the ICJ accorded broad discretion to the United States to accomplish this task. Whether "review and reconsideration" in any case spawned by LaGrand will occur at the judicial, executive or legislative levels remains to be seen. In theory, however, there is no reason that all branches of government cannot help fulfill this role. This might take the form of closer scrutiny in applications for executive clemency, petitions before parole boards, applications (or re-applications) for habeas corpus, motions for resentencing, and state and federal legislation recognizing the significance of VCCR rights in post-conviction relief procedures.

There is no question that LaGrand contemplates a significant change in practice by U.S. officials to improve United States compliance with the VCCR. This is certainly true with regard to death penalty cases where the ICJ singled out those individuals who "have been subjected to prolonged detention or convicted and sentenced to severe penalties." In Valdez, although Mr. Valdez is Mexican, not German, the importance of LaGrand has permitted further consideration of Valdez's case.

1. Successive Petitions for Habeas Corpus

The potential for a successive petition for habeas corpus where the VCCR had been determined to be procedurally de-

98. See id. For the full text of the ICJ holding granting broad discretion to U.S. officials to accomplish "review and reconsideration," see supra text accompanying note 91.

99. Final Judgment, supra note 1, ¶ 125. Admittedly, it is somewhat curious that the ICJ designated those inmates "subjected to prolonged detention or convicted and sentenced to severe penalties" without specific reference to the death penalty. On the other hand, it appears beyond doubt that the ICJ was referring to the death penalty in addition to a class of other less defined "severe penalties." The inclusion of those subjected to "prolonged detention" with those "convicted and sentenced to severe penalties" most logically highlights the importance of VCCR rights for immigration detainees and criminal suspects held for long periods of time, as well as sentenced prisoners.

100. Following the ICJ's decision in LaGrand, Valdez filed an application for a stay of execution based upon, among other factors, the important issue of international law. For a procedural history of Valdez, see supra note 18.
faulted is, at least in the short term, the most likely scenario where *LaGrand* will be raised in U.S. courts in death penalty cases. A successive habeas petition, however, presents substantial obstacles that must be overcome and is therefore worthy of discussion.

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") severely limits successive petitions for habeas corpus in federal court. Where a habeas petition has been filed previously, AEDPA requires all subsequent petitions be dismissed if the claim was presented previously. There may be considerable debate as to whether a VCCR claim, procedurally defaulted or otherwise, can be considered as actually raised in a previous habeas application where the inmate seeks review and reconsideration based upon *LaGrand*. Should a court consider a post-*LaGrand* petition to be old wine in a new bottle, that is, indistinguishable from a garden-variety VCCR claim, it would likely be constrained to dismiss the petition. On the other hand, if a new petition is considered to be a brand new application flowing from the ICJ’s authoritative interpretation of international law in *LaGrand*, it would still need to satisfy the requirements of a claim based on new law.

The prospect of raising the VCCR post-*LaGrand* in a successive habeas petition, as a claim based on new law, is also quite problematic. AEDPA limits successive petitions based on new law to "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that


103. *See* 28 U.S.C. § 2244(b)(1). Section 2244 is entitled, "Finality of Determination." Section 2244(b)(1) states simply that "[a] claim presented in a second or successive habeas corpus under 2254 that was presented in a prior application shall be dismissed." *Id.*
was previously unavailable[.].104 Therefore, if a successive petition were to be available in federal court, it would require a validation by the U.S. Supreme Court that the VCCR issue is a matter of constitutional magnitude, and specifically held to be retroactive.

Although treaties traditionally are regarded as having the normative rank of a federal statute, and are therefore inferior to the Constitution,105 a finding of constitutional proportion would not be inappropriate based upon the Supremacy Clause of the Constitution which renders treaties “the supreme Law of the Land[.]” While it may be well settled that treaties in their own right are subordinate to the Constitution, one cannot conclude that an issue of treaty law can never attain constitutional proportion. On the contrary, a genuine question as to the status and applicability of a treaty in U.S. law can be predicated on the Supremacy Clause itself, not simply the treaty.

Under any circumstances, however, before a successive

104. 28 U.S.C. § 2244(b)(2)(A). For a discussion of claims based on new law, see Jeffrey, supra note 102, at 126-27. AEDPA severely limited the ability to bring habeas petitions based on new law and embraced the requirement of Teague v. Lane, 489 U.S. 288 (1989), that the new law the petition relies upon be of constitutional magnitude. This superseded the less restrictive standard that permitted a new application if the inmate could show cause for the default. See Wainwright v. Sykes, 433 U.S. 72, 87-91 (1977); Francis v. Henderson, 425 U.S. 536 (1975). Indicating the extraordinarily high standard for relief under the “new law” exception, the U.S Supreme Court recently construed it in most rigid terms. See Tyler v. Cain, 533 U.S. 656 (2001) (denying a state prisoner’s habeas corpus petition predicated upon a new interpretation of due process adopted by the Supreme Court but not specifically held to be retroactive).


106. U.S. CONST. art. VI, § 1, cl. 2. The Supremacy Clause provides as follows:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. (emphasis added). The U.S. Supreme Court noted the status of the VCCR, and treaties in general, in the hierarchy of U.S. law in Breard v. Greene, 523 U.S. 371, 376 (1998). See also Reid v. Covert, 354 U.S. 1, 18 (1957); Whitney v. Robertson, 124 U.S. 190, 194 (1888).
habeas petition can be brought in federal court, it will still need to satisfy the exhaustion of state remedies requirement.\(^\text{107}\) This requires a review of the applicable state procedural laws with regard to successive petitions of post-conviction relief to determine if any remaining remedies exist in state court.\(^\text{108}\) If further state review is available, the matter is barred from federal court until it has been exhausted. Consistent with this observation, the post-\textit{LaGrand} application in \textit{Valdez} is in the Oklahoma Court of Criminal Appeals, not federal court.

Unquestionably, great difficulties exist to obtaining meaningful “review and reconsideration” following \textit{LaGrand}. The sheer novelty of the issue will require creative lawyering to secure effective implementation of this aspect of the ICJ’s holding. The mechanisms to achieve “review and reconsideration” of convictions and sentences will probably not be established with any consistency for some time, and even then, remedies probably will differ from case to case. Despite substantial barriers in U.S. law, \textit{LaGrand} is ultimately an authoritative interpretation of international law with significant implications for the U.S. domestically and internationally. This reality should weigh heavily in the judgment of U.S. courts and relevant agencies of the executive branch as to whether or not they will grant some form of “review and reconsideration” in the wake of \textit{LaGrand}.

\textit{LaGrand} raises the potential for a scenario even more daunting than obtaining effective “review and reconsideration.” That is, how will the U.S. respond in the future if the ICJ issues an order of provisional measures to stay an execution pending consideration of international legal issues?

\textbf{B. Will the United States Comply with Future ICJ Orders of Provisional Measures?}

As mentioned previously, the most enduring legacy of

\(^{107}\) \textit{See} 28 U.S.C. § 2254(c). “An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.” \textit{Id.}

\(^{108}\) \textit{See} Barnett v. Hargett, 174 F.3d 1128, 1134-35 (10th Cir. 1999); Rogers v. Gibson, 173 F.3d 1278, 1289-90 (10th Cir. 1999) (applying subsequent amendments to state post-conviction procedures to determine that a claim was not procedurally defaulted).
LaGrand is likely to be its clear statement that ICJ orders of provisional measures constitute binding obligations in international law. With this unequivocal revelation based on a meticulous interpretation of its own statute, the ICJ signaled the importance of its provisional powers not just to the death penalty, but also to the many challenging cases expected to grace its docket in the 21st century. This no doubt will include various issues such as human rights, use of military force and the global environment.

It is certainly foreseeable that other countries whose nationals are facing the death penalty in the United States under similar circumstances will seek assistance from the ICJ. Should cases similar to Breard and LaGrand come before the ICJ, and should the ICJ issue a provisional order to delay an execution, U.S. authorities at all levels can no longer rely upon the unilateral interpretation of the U.S. Government that provisional measures of the ICJ are not binding.

On the contrary, considering the United States' obligations under the U.N. Charter, the United States would be required to comply with such orders in the future as a matter of international law. At a minimum, this should entail the executive branch of the federal government supporting a stay of execution, and communicating this forcefully to state executive and judicial authorities, in any case where the ICJ would issue a similar order. Since the executive branch's ultimately incorrect interpretation of the status of provisional measures was decisive in the case of Walter LaGrand,

109. See supra notes 82-84 and accompanying texts.
110. In both Breard and LaGrand, the United States as well as Paraguay and Germany respectively, were members of the Optional Protocol of the VCCR, which conferred jurisdiction upon the ICJ regarding disputes arising from the treaty. See Optional Protocol, supra note 34. The ICJ also may obtain jurisdiction over states by other means set forth in Article 36 of the ICJ Statute. See supra note 34.
111. For the interpretation of the executive branch with regard to the status of provisional measures and the great deference accorded it by the U.S. Supreme Court, see supra text accompanying notes 51-54.
112. See Final Judgment, supra note 1, ¶¶ 109-110; U.N. CHARTER art. 94, para. 1.
113. See supra text accompanying notes 51-54. In Breard, the Supreme Court displayed a similar skepticism of the status of provisional measures. "If the Governor [of Virginia] wishes to wait for the [final] decision of the ICJ, that is his prerogative. But nothing in our existing law allows us to make that choice for him." Breard v. Greene, 523 U.S. 371, 378 (1998). For a discussion of the availability of federal power to compel compliance with ICJ orders of provi-
surely a U.S. court could credit a more authoritative and definitive position by the executive to the contrary in a future case.

By virtue of the Supremacy Clause, individual U.S. states are bound by treaty obligations and, at least in theory, should abide by ICJ provisional measures ordering a stay of execution. Where this does not occur, however, and where an individual U.S. state signals its unwillingness to delay an execution in the face of an order by the ICJ to the contrary, the executive branch of the U.S. federal government may be required to pursue legal remedies against that state. Even if such actions are ultimately unsuccessful, they may be necessary to fulfill the United States' obligation to "take all measures at its disposal" to ensure that the execution is delayed. At a minimum, it would demonstrate a good faith attempt by the executive branch to comply with an ICJ order in a complex domestic legal framework that needs to balance federal supremacy with states' rights.

1. Writs of Mandamus and Prohibition

There is no decisive or clearly defined legal mechanism available to federal authorities to challenge a state's refusal to abide by an ICJ order of provisional measures. One possibility would be for the Justice Department to apply for a writ of mandamus or prohibition in federal court. The writ would be directed against a state official, such as a governor or commissioner of correction, who has custody of the inmate. Such writs are ancient common law remedies and are


114. See infra notes 120-27 and accompanying text.

115. The ICJ orders in both Breard and LaGrand contained this language. See supra notes 10, 42 and accompanying text. Therefore, it is foreseeable that a future order also would include this phrase.

116. As every first-year law student is aware, the landmark case of Marbury v. Madison involved the mandamus power of the federal courts. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). A writ of mandamus is "issued from a court to an official compelling performance of a ministerial act that the law recognizes as an absolute duty. . . ." GIFIS' LAW DICTIONARY 282 (2d ed. 1984). For a historical review of the writ of mandamus in U.S. law, see Jerry J. Phillips, Marbury v. Madison and Section 13 of the 1789 Judiciary Act, 60 Tenn. L. Rev. 51 (1992). A writ of prohibition is "a prerogative writ issued by a superior court to a lower court that prevents an inferior court or tribunal from exceeding its jurisdiction or usurping jurisdiction which it has not been given by law. . . .
authorized by Congress to be issued in the federal courts.\textsuperscript{117} Because of the extraordinary nature of these writs and the prevailing sensitivity to states' rights, it is foreseeable that the federal courts would grant them with great reluctance. The possibility of pursuing writs of mandamus and prohibition in state court, under applicable state law, also should be investigated.

In the past, the federal courts have expressed reservations when asked to exercise their mandamus power to interfere with state governmental functions.\textsuperscript{118} Nevertheless, an application for prohibition or mandamus to delay an execution may provide a direct, albeit imperfect, mechanism to force the issue of an ICJ order before a state official. This is especially so where the operation of a state criminal justice system is in violation of the United States' obligations under international law and where the executive branch of the federal government is the entity bringing the application. Traditionally, the federal courts have shown great deference to the executive branch on matters of international affairs.\textsuperscript{119} As such, the matter of an ICJ order certainly would qualify.

Of course, the executive branch of the federal government is not the only interested party. The state of nationality of the inmate and the inmate himself may seek to enforce the order in their own right. Petitions for mandamus and prohibition by these parties probably present even greater obstacles. In the case of foreign governments, they are constrained

\textsuperscript{117} See 28 U.S.C. § 1651(a). "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." \textit{Id.}


by the Eleventh Amendment. As discussed earlier, in the case of Walter LaGrand, the application by Germany to enforce the ICJ's Order to delay the execution was restricted not only by the executive branch's interpretation of the Order, but also by the constitutional limitation on foreign governments to bring such actions.

An application brought directly by an inmate to enforce an ICJ order surely would face a strong objection to standing. As judgments of the ICJ only create obligations between nation-states, the federal courts have rejected the ability of individual litigants to claim rights from them. Unless a court is prepared to draw a distinction between a final judgment of the ICJ and an interim order, which necessarily rests on an even weaker jurisdictional basis, it is highly unlikely that a death row inmate can directly avail himself of an ICJ provisional order issued on his behalf. The irony of such exclusion notwithstanding, it is consistent with U.S. case law to date.

Despite the great procedural obstacles to raising the VCCR with renewed vigor after LaGrand, it remains that this country now has a forceful and authoritative interpretation on important rights provided by a treaty to which the United States is a party. LaGrand not only highlights the importance of VCCR rights but also points out the admittedly poor record of U.S. compliance. Most importantly, the VCCR is a treaty that provides rights to Americans traveling abroad as surely as it provides rights to foreign nationals detained in the United States. All of these factors should weigh heavily in decisions to grant effective "review and reconsideration" as well as respect for future orders of provisional measures by the ICJ.

120. See supra note 54 and accompanying text.
121. See supra notes 43-44, 47 and accompanying text.
122. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 59.
C. Other Influences of LaGrand and Suggestions for Implementation

The real impact of the LaGrand case probably will be felt in the practices and policies of law enforcement in its application of the VCCR, as well as in judicial review of VCCR issues. The United States has yet to feel the effects of the large-scale program to improve its compliance with the VCCR that was promised to the ICJ in LaGrand. One factor that would improve compliance and give the VCCR more visible status in U.S. law would be to enact state and federal legislation requiring law enforcement to administer Article 36 rights to foreign detainees as part of Miranda warnings. The State of California took an important step in this direction when it enacted a statute requiring peace officers to notify foreign nationals of their VCCR rights if they are detained for more than two hours. Florida has enacted similar legislation. If other states, and perhaps the U.S. Congress, take their lead, Article 36 rights could well be on their way to becoming part of the regular Miranda warnings routinely administered to criminal suspects.

All else aside, the rights set forth in Article 36 are straightforward, easy to administer, and create minimal burdens on law enforcement personnel. State and federal legislation mandating these rights would be a substantial step toward improved compliance. It also would remove any further argument about the VCCR’s status as a self-executing or non-self-executing treaty. Concerning the debate over the VCCR’s status as a self-executing treaty, the ICJ’s clear pronouncement that the treaty creates individual rights should be given great weight by any U.S. court considering the question of self-execution.

In addition, after LaGrand, it is likely that some courts at the trial level will start to look more closely at the imposition of certain remedies for violation of VCCR rights. Although a thorough discussion of potential judicial remedies for VCCR violations is beyond the scope of this article, it has been suggested that such remedies should include the dis-

124. See supra text accompanying notes 85-86.
126. See FLA. STAT. CH. 901.26(3) and 288.816(2)(f) (2001).
127. See Final Judgment, supra note 1, ¶¶ 77, 89
missal of criminal cases and suppression of evidence; in other words, to restore the *status quo ante*.128 Admittedly, there is nothing in U.S. law to suggest such remedies are viable. At the same time, the ICJ's clear endorsement of the rights provided for by the VCCR should be persuasive to U.S. courts on the question of self-execution. Similarly, *LaGrand* should animate criminal defense motions for some form of appropriate and reasonable remedy with the objective of nullifying the effect of the treaty breach where in fact the defendant is prejudiced by it.

On the other hand, in the context of post-conviction relief in capital cases, the fact of the VCCR violation and its possible impact on the trial and sentence should be considered in deciding whether to commute a death sentence in an application for clemency. This would be entirely consistent with the ICJ's mandate of "review and reconsideration" where such review is applicable. The weight given to the treaty breach as a factor in a decision to commute logically should flow from, among other things, the possibility that consular officials could have provided evidence of mitigation that would have been available during the sentencing phase had they been notified in a timely fashion. As all death penalty attorneys are aware, the issue of mitigation during the sentencing phase of the trial is often the most critical aspect of a capital case.129

Furthermore, during habeas corpus review, courts should consider more seriously whether the application of the procedural default rule to bar a VCCR claim works to prevent full effect from being given to the treaty in a given case.130 This is


130. In *LaGrand*, the ICJ noted that the application of the procedural default rule to preclude judicial consideration of the VCCR during post-conviction review had the effect of preventing full effect of the VCCR. Final Judgment, * supra* note 1, ¶ 91. See * supra* text accompanying note 70.
especially true where the violation of Article 36(1)(b) is itself an assault upon the object and purpose of the treaty in the first instance.

In determining whether a VCCR claim has been procedurally defaulted, U.S. courts may need to reconsider the application of the "later-in-time" rule. This rule states that when a statute, which is subsequent to a treaty at issue, is inconsistent with the treaty, the statute will prevail over the treaty to the extent of the conflict. In Breard, the U.S. Supreme Court relied upon the "later-in-time" rule to find that Breard procedurally defaulted his VCCR claim. Specifically, the Court so held because AEDPA was enacted after the VCCR. The difficulty with the application of "later-in-time" in this almost mechanical fashion to bar a VCCR claim from habeas review, is that it can, and in fact has, lead to detrimental effects for the United States on the international plane. Moreover, as in LaGrand and Breard, the application of the rule by itself can undermine the purposes of the VCCR. That is, it deprives detained individuals of a forum to litigate the issue at a critical stage in the case, especially where there is no other pre-determined or established mechanism to address VCCR violations.

Some scholars have raised strong objections to the application of the "later-in-time" rule to prevent a petitioner from raising an Article 36 violation at federal habeas corpus proceedings. In particular, there is a long-standing doctrine that U.S. courts should construe a later statute to be consistent with a prior treaty to the greatest extent possible. This

131. See Breard, 523 U.S. 371, 376 (1998); Reid v. Covert, 354 U.S. 1, 18 (1957); Whitney v. Robertson, 124 U.S. 190, 194 (1888). For an excellent historical overview of the application of the "later-in-time" rule, see Vagts, supra note 105, at 313-21.

132. Breard, 523 U.S. at 376.

133. See id.

134. The key cases addressed herein including LaGrand, Breard, Valdez and Faulder all created friction between the U.S. and friendly governments concerned with the treatment of their nationals in the U.S. criminal justice system. See supra notes 11-18 and accompanying text. The international litigation generated by LaGrand and Breard are the most striking examples.


136. See Murray v. The Charming Betsy, 6 U. S. 64, 118 (1804); Chew Heong v. U.S., 112 U.S. 536 (1884). For a review of recent applications of these cases, see Vagts, supra note 105, at 322-23.
doctrine, arising from the landmark case *Murray v. The Charming Betsy*, is entirely harmonious with the normative rank of treaties; that is, that they enjoy full parity with federal statutes.

In addition, to find a subsequent statute inconsistent with a prior treaty logically should require an indication of congressional intent to supersede the prior treaty. No such intention is apparent from the AEDPA. The need for clear congressional intention to override the treaty is made even more acute by the terms of the VCCR itself, which require its successful integration into the domestic law of member countries. Specifically, Article 36(2) states that even as the rights provided for under Article 36(1) are to be exercised in conformity with the laws of the state applying it, those same laws must enable the full effect of the purposes of the treaty. Therefore, the terms of the treaty itself set the bar quite high to demonstrate the necessary congressional intent to supersede those terms by a subsequent statute. This is especially so where the consequence is to deprive the applicant of a forum to raise the violation of the treaty.

Finally, when faced with an ICJ order of provisional measures in the future, state and federal officials will need to respond more respectfully than they have in the past. The rather dismissive treatment the ICJ's provisional orders received in *Breard* and *LaGrand* would be wholly inconsistent with the new legal landscape. In the case of the federal government, a more proactive approach to help ensure compliance with an order by the ICJ surely will be necessary. Otherwise, the United States risks further exposure before the ICJ and a loss of credibility in its relations with other countries. At a minimum, the executive branch of the federal government no longer can sway a court's ruling with a unilateral interpretation that minimizes orders of provisional measures as non-binding in international law.

The need for a more sensitive approach to the effects of a treaty breach is most evident in cases like *Breard, LaGrand*

137. Murray v. The Charming Betsy, 6 U.S. 64 (1804).
138. See supra notes 105-08.
139. See Paust, supra note 135, at 692-93.
140. Id. at 692.
141. VCCR, supra note 5, at art. 36(2).
142. Id. For the full text of Article 36, see supra text accompanying note 6.
and Valdez. These cases strain U.S. relations with normally friendly countries. The issue of compliance with the VCCR is quite distinct from the debate over the application of the death penalty in the United States. At the same time, it unnecessarily contributes to the United States’ isolation over the issue of the death penalty and underscores an inability or unwillingness to follow through on important obligations of international law. This is especially apparent considering that U.S. citizens benefit substantially from the rights provided by the VCCR.

VI. CONCLUSIONS

The LaGrand case, brought by Germany against the United States, highlights an aspect of international law that directly affects individuals, not just nation-states. United States compliance with the consular access and notification requirements of the VCCR historically has been quite poor. Notable violations of the treaty, especially in the context of death penalty cases, have created friction for the United States on the international plane. In LaGrand, the ICJ thoroughly rebuked the United States for failure to abide by the treaty and ruled that the application of the “procedural default” rule during post-conviction habeas corpus review in federal court interfered with the purposes of the treaty.143

Additionally, the ICJ concluded that the United States’ failure to abide by an order of provisional measures to delay the execution was an independent violation of international law.144 In reaching this conclusion, the ICJ ruled decisively that its orders of provisional measures constitute binding obligations in international law.145 This holding has strong implications for the future jurisprudence of the ICJ.

The United States has undertaken to improve its compliance with the VCCR. The ICJ has mandated that “review and reconsideration” occur in certain cases where an inmate is convicted and sentenced following a VCCR violation.146 While the United States enjoys broad latitude in how this may be implemented, it would be reasonable to commute a

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143. Final Judgment, supra note 1, ¶¶ 90-91.
144. Id. ¶ 115.
145. Id. ¶ 109.
146. Id. ¶ 125.
death sentence pursuant to this requirement.

The mechanisms to achieve effective “review and reconsideration” of convictions and sentences are limited by very substantial legal obstacles in federal law. Similarly, there are no direct and efficient legal mechanisms in U.S. law to ensure compliance with ICJ orders of provisional measures. Nevertheless, the *LaGrand* case offers a legal platform to advance these objectives.

Poor U.S. compliance with the VCCR remains one of the most contentious issues in the death penalty debate. In the post-September 11, 2001 world, more foreign nationals than ever will face the death penalty in the U.S. criminal justice system. Whether the *LaGrand* case will have a substantial effect on U.S. law and policy remains to be seen. If the United States cannot find a way to effectively implement *LaGrand* and generally improve its compliance with the VCCR, it will expose itself to further censure on this issue in the realm of international affairs. In a time when coalitions and allies are essential, this would be a heavy and unnecessary price to pay. The ICJ’s *LaGrand* opinion is an important new element in the evolving legal landscape of consular notification and access. United States’ law and policy must also evolve to meet the challenges and responsibilities of that new landscape.
