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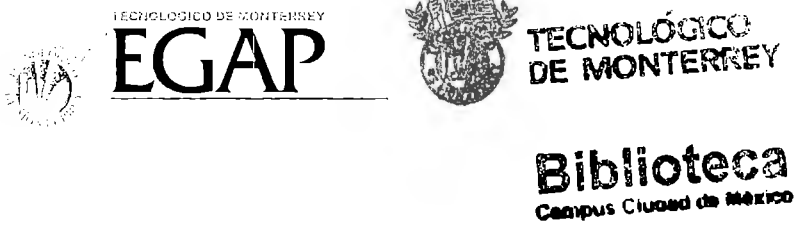
The *Avena* Case: Prospective and Proposals on the International Justice System and the United States' Practice of International Obligation derived from International Tribunals



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SUMMARY

This work refers to the 2004 Judgment of the International Court of Justice on the case pertaining *Avena and other Mexican Nationals* (Mexico v. United States of America). It deals mainly with the throughout aftermath and carefully studied prospective of the controversy on the application and interpretation of the 1963 Vienna Convention on Consular Relations and the current issues to assure the protection of consular rights of foreigners detained abroad.

It is divided in six chapters. Through a descriptive methodology in its first three chapters, this work intends to provide the unfamiliar reader with the basic tools to understand the questions surrounding *Avena* and its transcendence in the topic of consular protection not only for Mexico and the United States, but for all countries party to the same Convention.

Given the considerable number of misleading articles on this issue on the press as a source of a biased perception on it, the author of this work considered important the extent given to such analysis. This case is, in the own interpretation of the International Court of Justice, the culmination of a trilogy of cases on consular rights presented before it. Thus, the chapters yielded by this work to the full and clear understanding of the preceding path leading to it.

The first chapter will introduce the reader to a general background on international tribunals, the International Court of Justice, and the jurisprudence related to *Avena*. Chapters two and three will develop the most important procedures of the *Avena* case and the erratic aftermath of the judgment delivered by the International Court of Justice.

With the analysis and comparison in chapter four of the ten year evolution of a fairly young international law doctrine on the matter, this work proposes a most comprehensive approach on the weight, importance and consequences of judicial decisions taken in the international stage and the poor link of their application in the national level, both practically and hypothetically. It is intended to show that the problems of uncertainty, lack of enforcement and sovereignty in all three spheres of international, national and local law play a key role on further developments.

Finally, this work will deductively develop on possible scenarios and proposals for further work and evolution on the matter, which are of the interest of policy makers, legislators and judges in both sides of the frontier, which are, apart from the student seeking to get in-depth knowledge and reference about *Avena*, the intended readers for this research document.

GLOSSARY, ACRONYMS AND LATIN & FRENCH VOICES

ad hoc For a particular end or objective.

amicus curiae A friend of the tribunal, who presents before it in order to call its attention upon a point on law or fact, yet not representing the interests of any party to the proceedings.

Avena Case (2003) The case presented before the International Court of Justice by Mexico against the United States, named after the first of the 54 Mexican nationals listed in Mexico's claim.

Avena Judgment (2004) The final judgment delivered by the International Court of Justice on the Avena Case.

Avena Order (2005) The memorandum issued by the President of the United States requesting local courts to comply with the Avena Judgment.

Avena Act (2008) An effort by democrat representatives in the House of Representatives to approve legislation allowing the Avena Judgment to have effect within the United States.

Avena Interpretation (2008-2009) The request from Mexico that the International Court of Justice interpret its own final judgment on the Avena Case.

causa sine qua non A necessary cause of the event.

Comity Legal reciprocity. A principle that indicates a nation or jurisdiction will extend certain courtesies to other nations or jurisdictions by recognizing the validity and effect of their legislative, executive and judicial acts.

compromis A special agreement between parties to submit a particular issue either to an arbitral tribunal or to the ICJ in this case.

ex aequo et bono According to fairness and goodness, in the absence of law. Equity in the most general sense.

forum prorogatum The modern practice of a State accepting the jurisdiction of the ICJ after an application instituting proceedings is filed against it. This gives the ICJ jurisdiction to entertain the case as of the date of the acceptance of the jurisdiction.

habeas corpus A legal action that protects the individual from harming himself or being harmed by the judicial system in the event of unlawful detention.

ICHR Inter-American Court of Human Rights

ICJ International Court of Justice

inter alia Among others.

obiter dictum Occasionally. Any opinion mentioned in trial not essential to its decision. Lesser propositions of law stated by tribunals or individual members of tribunals, not directed to the principal matter in issue.

pacta sunt servanda The principle that agreements are binding and are to be implemented in good faith.

prima facie At first sight, apparently, in principle, presumptively.

restitutio ad integrum Restitution to its original state (A benefit in which virtue a person that has received damage or been injured in his property or person may request that things be returned to the state or judicial situation in which they were before such injury took place).

PCIJ Permanent Court of International Justice

Peace Palace The former siege of the Permanent Court of International Justice and current siege of the Permanent Court of Arbitration and of the International Court of Justice, in The Hague, the Netherlands.

per curiam By the court. A judicial opinion or decision rendered by a court acting as a whole, anonymously, but not necessarily unanimously.

SC Supreme Court of the United States of America

stare decisis The principle that a tribunal should follow its own previous decisions and those of other tribunals or equal or greater authority.

sui generis Atypical, not falling within the normal legal categories.

travaux préparatoires Preparatory work; preliminary drafts, minutes of conferences and the like, relating to the conclusion of a treaty.

UNGA United Nations General Assembly

UNSC United Nations Security Council

VCCR Vienna Convention on Consular Relations (1963)

VCDR Vienna Convention on Diplomatic Relations (1961)

VCLT Vienna Convention on the Law of Treaties (1969)

Definitions are mainly from

- IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2003).
- CHAS. W. FREEMAN JR., THE DIPLOMAT'S DICTIONARY (2005).
- MAX SORENSEN, MANUAL DE DERECHO INTERNACIONAL PÚBLICO [INTERNATIONAL PUBLIC LAW HANDBOOK] (Fondo de Cultura Económica, 2004) (1973).

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I. Background

A. Introduction

From the beginning of the last century, the ever-growing numbers of Mexican population living in the United States of America has provided a constant challenge to the Mexican government in order to ensure the protection of their rights abroad. To day, of all countries in the world, Mexico maintains the most comprehensive consular machinery in the United States. With a network of over forty-seven consulates and hundreds of consular officers specially trained to assist its nationals abroad, it ensures connections with the largest national group within the largest minority in the United States.

With such dimensions, a particularly active and challenged area is that of the defence of detained individuals. Addressing the inherent disadvantages faced by foreign nationals in unfamiliar criminal proceedings has made consular protection the core of Mexico's action to safeguard the guarantee of due process abroad.

Given the large quantity of cases presented, ensuring the fairness of criminal proceedings against Mexican nationals goes from serving as a cultural bridge to United States criminal procedures and the arranging of legal representation, as far as hiring defence experts when needed and collecting crucial evidence. Nevertheless, sometimes consular authorities are notified of cases of detained nationals when all legal recourses have been exhausted and a sentence to death is most likely irreversible.

In 1999, the Mexican government weighed heavily the political consequences of requesting the Inter-American Court of Human Rights (ICHR) an Advisory Opinion about the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Nevertheless, the favourable opinion of this court and the moral imperative of the obligation of the Mexican State of protecting its citizens abroad led it to institute proceedings before the International Court of Justice (ICJ) against the United States of America, a case we now know as the *Avena* Case.

The cases of fifty-four Mexican nationals on death row in the United States, all of which singled out procedural faults according to the Vienna Convention on Consular Relations (VCCR), were taken before the ICJ in The Hague, on 9 January, 2003. The case

was accepted, provisional measures were dictated and the ICJ stated its Decision on 31 March, 2004. It found that the United States had breached its international obligation. The Court requested that the country provide review and reconsideration of fifty-two of the sentences.

On 25 February, 2005, George W. Bush issued a presidential memorandum, ordering state courts to take the international ruling into effect. This order, the *Avena* Order, will confront two important doctrines in United States legal tradition: those of Federal Foreign Affairs action and the primacy of individual States in criminal matters.

José Ernesto Medellin, a Mexican national condemned to death in Texas and listed in the *Avena* ICJ Judgment, obtained certiorari from the Supreme Court of the United States in a case against Texas, which ruled presidential memoranda out of order face to state pre-eminence in criminal matters. The holding of the Supreme Court further developed on the notion that both the *Avena* Order and the ICJ judgment lacked enough authority to make State Courts provide review.

Medellin was executed in Texas in early August 2008, in the midst of a Mexican request to the ICJ for an interpretation of its own 2004 *Avena* Judgment, notwithstanding the fact that the ICJ had issued provisional measures against Medellin's execution just twenty days earlier. In a new Judgment in early 2009, the ICJ both reaffirms the binding character of its original decision on *Avena*, and denies Mexico's petition for interpretation.

The unresolved outcome of this issue poses the problematic of the irreparable threat to the life of foreigners, perhaps unjustly detained abroad, sentenced to severe punishments -such as the death penalty- and pending on a conflictive point between national and international law. Moreover, it poses big dilemmas to the evolution of both the international justice system and US conflicting internal law, foreign policy and their overlapping with judicial doctrine.

B. The International Justice System

A Justice in the International Court of Justice in The Hague, H.E. Bernardo Sepúlveda, once stated that the new International Justice System "works, and works quite

well".[1] In the last century, the traditional settlement of disputes among countries has evolved towards the establishment of international tribunals.

Beginning with the creation of the Permanent Court of International Arbitration during The Hague Conference in the 1900s, there has been an exponential growth of judicial organs and arbitration tribunals, which has strengthened the system of alternative methods to the peaceful solution of international controversies. The Permanent Court of International Justice (PCIJ), a part of the League of Nations created in 1922, later led to the creation of one of the most recognized global judicial bodies: the International Court of Justice (ICJ), born along with the United Nations Organization in the San Francisco Conference.

Various other courts coexist in the international system, such as the International Tribunal on the Law of the Sea, as a specifically directed organ to decide on this matter. *Ad hoc* tribunals will also manage the judgment of individuals for crimes against humanity, such as the International Criminal Tribunals for the former Yugoslavia, Ruanda, or most recently, the Special Tribunal for Lebanon, labelled by the Canadian Daniel Bellemare, United Nations chief prosecutor, 'the world's first anti-terrorist court'.[2] Another recent and more universal example of the advancement of the System towards new concepts in international law is the creation of the International Criminal Court (ICC), an initiative to which most countries have adhered to and which is close to its 10th anniversary.

Other specialized tribunals within international organizations, such as the World Trade Organization's Dispute Settlement Body[3] and Standing Appellate Body, and private

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[1] "Sin duda hay un Nuevo sistema de justicia internacional, este sistema de justicia internacional funciona y funciona muy bien." BERNARDO SEPÚLVEDA AMOR, Perspectivas del sistema de justicia internacional [Perspectives on the International Justice System]. In FERNANDO GONZÁLEZ SAIFFE et al., LAS NACIONES UNIDAS RUMBO A SUS 60 AÑOS DE FUNDACIÓN: DESAFÍOS Y PERSPECTIVAS PARA EL SIGLO XXI [THE UNITED NATIONS TOWARDS ITS 60TH ANNIVERSARY: CHALLENGES AND PERSPECTIVES FOR THE XXIST CENTURY] 44 (2005).

[2] *Lebanon's Hariri tribunal opens in The Hague: Prosecutor tells Al Arabiya investigations will continue*, AL ARABIYA NEWS CHANNEL. Sunday, March 1st, 2009.

[3] Under the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, an Annex on dispute settlement in the 1994 Agreement Establishing the WTO, which provides for previous consultations and further measures for appeal. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M 1226 (1994).

initiatives for the settlement of disputes through arbitration, cover the growing demand of judicial fora for the settlement of commercial disagreements among states and among other entities and states.

Regional courts have also been important examples in the growth and credibility of this system in the last decades.[4] The Inter-American Court of Human Rights,[5] the African Court on Human and People's Rights,[6] the European Court of Human Rights,[7] the European Court of Justice, the Central American Court of Justice, the African Court of Justice[8] and the Community Tribunal of the Economic Community of West African States[9] are all regional initiatives that complement and enhance the International Justice System.

Contrary to domestic courts, where an executive branch is entitled to carry out its judgments, the international system still has some important limitations on the impact of the decisions of its courts. One of the most important is their limit to jurisdiction. Another one is that all of them have little ability of enforcing their own decisions. This International Justice System relies heavily on the will of the actors to comply voluntarily, since there is no actual power to enforce what has been decided. In the best of cases, compliance is well seen both by local public opinion and the international opinion. Compliance to the rules set

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[4] This is clearly shown in the proliferation of international tribunals and courts in Africa, which currently leads the way in innovations applying both national and international law and even the first hybrid national-international court. The African continent counts two regional courts, ten sub-regional courts, and holds pending cases before two international criminal courts and five other international courts, including most of the above mentioned.

[5] Established in 1979 in the framework of the Organization of American States (OAS) for the interpretation and enforcement of the American Convention on Human Rights, it delivers adjudicatory and advisory opinions, the latter of legal interpretation on matters brought to its attention by other OAS bodies or member states. Seats in San José, Costa Rica.

[6] Under the African Union and its Charter on Human and Peoples' Rights, the Court came into being on 25 January, 2004, after the ratification of fifteen member states of its Protocol. Currently in a stalled process of being merged with the African Court of Justice and until February 2009 it has not heard a single case. Seats in Arusha, Tanzania.

[7] Established in 1950 under the European Convention on Human Rights, adopted by the Council of Europe, it remains as one of the oldest and most active tribunals, having delivered its 10,000th judgment in 2008. Seats in Strasbourg, France.

[8] Not currently operational, since its protocol is not in force, even though it is the sole judicial organ in the Constitutive Act of the African Union (1999). Seat to be determined.

[9] Originally conceived under the 1975 Treaty of ECOWAS, emerging as a Community Court in 1991 when its Protocol was adopted. The first judges were appointed in 2001. In 2005 a supplementary Protocol expanded the competence of the Court in order for it to receive cases from individuals against any member state on the basis of human rights violations.

by all prevents a State from becoming a pariah in the midst of growing regional communities and the establishment of universal agreements.

1. The International Court of Justice

Even though in the United Nations Legal System there is a structure similar in its functions to those of an executive branch of government in states, the Secretariat, it has no power whatsoever in order to oblige involved states to comply with agreements made by the international community or treaties signed by those same states.[10] This does not mean, nonetheless, that the limits on compliance of the decisions of the ICJ[11] render its action insignificant, since it contributes in proposing ways to settle disputes once diplomacy has failed and in doing so helps define and advance international law. In fact, because of its broad jurisdiction over some of the most important international differences, in comparison to regional membership or theme limited tribunals, the International Court of Justice is commonly known to the general public as the World Court.

The International Court of Justice remains a landmark in the International Justice System because it is one of the main organs of the United Nations.[12] As stated before, it is a clear successor of the Permanent Court of International Justice, as it follows The Hague Conventions of 1899 and 1907, its jurisprudence, and its core place in the League of Nations, succeeded by the United Nations.

Despite the fact that the Permanent Court of International Justice was not judicially a part of the League of Nations,[13] but rather another organization created under the Protocol

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[10] Even though the Secretariat carries most administrative and executive functions, political and strategic decisions for such activities are taken by the main organs such as the Security Council or the General Assembly, and quantitatively more important, by the Economic and Social Council. Compliance to the judgments of the Court will be further discussed when dealing with prospective of the Avena Case in chapter IV of this work: Article 94.2° of the United Nations Charter contemplates that, face to a failure of compliance towards a judgment of the Court, "the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." However, this is a most unlikely case.

[11] Besides the compliance issue, article 59° of the Statute states that "The decision of the Court has no binding force except between the parties and in respect of that particular case."

[12] "[The Court] is not merely an 'organ of the United Nations', it is essentially the 'principal judicial organ' of the Organization." *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion*, I.C.J. Reports 1950, p. 71

[13] BROWNLIE, Ian. (2003) PRINCIPLES OF PUBLIC INTERNATIONAL LAW. New York: Oxford University Press p. 678.

of December 16th, 1920 –originally foreseen by Article 14 of the League of Nations Covenant-, it ceased to exist as soon as the Council and the Assembly that elected its judges became extinct. The prime jurisdictional instance on international law, its duties never went far from those of interpreter of the Treaty of Versailles.

The example set by the Permanent Court of International Justice will be strictly followed by the International Court of Justice.[14] Sentence and opinions by the former are compulsory jurisprudence to the latter. With the passage of time, the reference to jurisprudence from the Permanent Court of International Justice has not diminished, as well as the number of justices, rules of procedure, formats, numbering and even type have remained the same.

However, the role of the International Court of Justice has been more diverse.[15] Called to decide on different issues such as the continental shelf, diplomatic immunity, nuclear weapons and even commercial quarrels, during the 70s the Court was subject to significant criticism. Nevertheless, it is the Court, one of the organizations within the United Nations System, which has had a larger development and professionalization[16] due to its most technical labour.[17]

The International Court of Justice was created through Chapter XIV of the United Nations Charter, which establishes that the Court shall be the principal judicial organ of the United Nations.[18] The Statute of the International Court of Justice is an integral part of the Charter of the United Nations which organizes the composition and functioning of the

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[14] In fact, Article 92 of the United Nations Charter expressly shows that continuance, since it states that "It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter." U.N. CHARTER art. 92.

[15] From 1922 to 1946, the PCIJ dealt with thirty-three contentious cases and twenty-eight requests for advisory opinions, whereas from 1946 to the early spring of 2009 the ICJ has dealt with 119 contentious cases and twenty-five request for advisory opinions. BROWNLIE, *supra* note 13, at 693.

[16] For a full and detailed work on such evolution, please review KENNEDY, Paul. (2006). THE PARLIAMENT OF MAN: THE PAST, PRESENT, AND FUTURE OF THE UNITED NATIONS. New York: Random House. at 34.

[17] The Statute of the International Court of Justice so recognizes this specialization that article 26° provides for the Court to function in one or more specialized chambers for dealing with particular categories of cases. Judgments delivered under such a procedure are considered rendered by the court, under article 27°. U.N. CHARTER AND STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 26 and 27 [hereinafter ICJ Statute].

[18] Article 92° of the United Nations Charter and Article 1° of the Statute of the International Court of Justice. U.N. CHARTER art. 92; ICJ Statute, *supra* note 17, art. 1°.

Court. In fact, United Nations members are *ipso facto*[19] parties to this Statute, and a non member country may become a party to the Statute as well.[20] Only States may be parties in contentious cases before the Court.[21] International Organizations[22] may not be as such, entitled to institute proceedings before the Court. However, an advisory procedure[23] is available to such organizations and to them alone. Therefore, the Court is not entitled to resolve issues among private persons or other collective bodies, nor does it have a prosecuting authority and carries out its functions through a body of judges,[24] a President and a Registrar.

The Court is composed of fifteen[25] independent individuals, promoted by their own country, further nominated by national groups[26] and elected by all member states in the General Assembly and the Security Council[27] on the basis of their individual curriculum. Election is held for staggered periods of 9 years, after which they may be re-elected and there may not be two justices of the same nationality.[28] Even though a principle of equity and distribution has prevailed and the fact the Statute signals that judges are elected on a personal basis,[29] regardless of their nationality, historically all five permanent members of the Security Council have permanently held a seat in the Court. [30] On another aspect of the

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[19] This must not be confused with the *ipso facto* compulsory acceptance of the jurisdiction of the Court, which according to Article 36.1° of the Statute of the Court, and which shall be further discussed in the sub chapter dealing with the Jurisdiction of the Court. ICJ Statute, *supra* note 17 art. 36, para. 1.

[20] The Security Council shall recommend to the General Assembly the particular conditions under which a non-Member of the United Nations shall be enabled to become a party to the Statute. U.N. CHARTER art. 93. Switzerland (28 July 1948), Liechtenstein (29 March 1950), San Marino (18 February 1954), Japan (2 April 1954) and Nauru (29 January 1988) were all parties to the Statute before becoming member states of the United Nations in 2002, 1990, 1992, 1956 and 1999 respectively.

[21] ICJ Statute, *supra* note 17 art. 34, para. 1..

[22] This is, Public Governmental International Organizations.

[23] Further discussed in the sub-chapter dealing with the Jurisdiction of the Court.

[24] Which may or may not function divided in Chambers or as Open Court.

[25] Brownlie recalls a common suggestion on the maximum allowing for viability and successful collective functioning to be 17. BROWNLIE, *supra* note 13, at 679. Quorum of the Court is nine. Article 25.1 of the Statute.

[26] National groups of the Permanent Court of Arbitration

[27] Interestingly enough, Article 10.2° of the Statute provides that voting on the members of the International Court of Justice shall be taken "without any distinction between permanent and non-permanent members of the Security Council. ICJ Statute, *supra* note 17 art. 10, para. 2.

[28] *Id.* art. 3, para. 1.

[29] *Id.* art. 2.

[30] China as an exception, not having a Justice from 1967 to 1985. This absence is related to the General Assembly's recognition of the People's Republic of China government instead of that of Taipei as the legitimate representative of China to the United Nations, according to the One China Doctrine. Nor insular

election, the Statute recommends that the electing countries should keep in mind that representation in the Court of the "main forms of civilization and principal legal systems" shall be assured.[31]

The Independence of the members of the Court is the most important issue. Each member, before taking up his duties, makes a solemn declaration that he "will exercise his powers impartially and conscientiously."[32] Independence is further assured through the prohibition of their engagement on political or administrative functions[33] and the prohibition on them acting as agent, counsel or advocate in any case, or deciding on cases in which they may have previously participated even as members of national courts.[34] Justices may be dismissed through the unanimous opinion of their fellows on their failure to fulfil the required conditions.[35] In addition, each and every member of the Court enjoys diplomatic privileges and immunities.[36]

Consequently, decisions of the Court –advisory opinions included, even if they have no binding effect- carry great legal weight and moral authority. Such decisions contribute to the advancement of international law through the elucidation carried out in its rulings and opinions. As a result, the strengthening of peaceful relations through preventive diplomacy and peace-keeping based on legal grounds are strongly related to verdicts reached in this international judicial organ.

2. *Jurisdiction of the Court*

Jurisdiction of the International Court of Justice is fully described in Chapter II of its Statute. The Court holds both Contentious and Advisory Jurisdiction. In its contentious

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China or continental China put forth a candidate during this period. The privilege of a permanent place in the Court was not discussed in Yalta, nor established in the Charter –neither is the veto power-, but has become common practice since the first election of the court in 1946.

[31] *Id.* art. 9. Essentially: common law, civil law and current post-communist law systems.

[32] *Id.* art. 20. This declaration shall be made in open court.

[33] "Any doubt on this point [engagement on any other occupation of a professional nature] shall be settled by the decision of the Court. *Id.* art. 16, para. 2. Historically, the Court has deemed it correct for Judges to develop other activities, and remain vigilant when conflict of interest arises. Sometimes Judges themselves will declare their own conflict of interests and will not participate in some decisions, as provided in Article 24.1°. *Id.* art. 24, para. 1.

[34] *Id.* art. 17.

[35] *Id.* art. 18.

[36] *Id.* art. 19.

jurisdiction, the Court has to decide disputes[37] of a legal nature submitted to it by States, in accordance with international law. As mentioned before, only States are entitled to institute proceedings before the Court. Article 36.1° of the Statute provides that:

> "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force."

As seen before, the Court is open to the States parties to its Statute.[38] This, however, does not mean its jurisdiction is to be automatic upon them, not even over United Nations Members, but rather that it is "open to them".[39] A dispute is dealt with only when the States to which the Court is open have recognized its jurisdiction.[40] Therefore, any State being a party to proceeding must have in some manner consented thereto. Jurisdiction of the Court is therefore based upon consent, expressed via a special agreement,[41] a treaty or convention, or through the acceptance of compulsory jurisdiction by the parties.

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[37] Which may be defined as a conflict; a clash of legal views or of interests; a disagreement on a question of law or fact.

[38] According to Article 35.2 of the Statute, the Security Council is to establish the rules under which the Court may be open to States not Parties to the Statute. *Id.* art. 35, para. 2. Resolution 9 (1946) of the Security Council established that these States may submit a particular (specific for a case) or general Declaration before the Court, accepting its jurisdiction. S.C. Res. 9, U.N. SCOR, 2nd Sess., 76th mtg, at 1 U.N. Doc S/RES/9 (1946). Particular declarations have been filed by Albania (1947) and Italy (1953). General declarations have been filed by Cambodia (1952), Ceylon (1952), the Federal Republic of Germany (1955, 1956, 1961, 1965 and 1971), Finland (1953 and 1954), Italy (1955), Japan (1951), Laos (1952) and the Republic of Viet Nam (1952).

[39] In the report of 10 February 1944 of the 1943 Inter-Allied Committee presided by Sir William Malkin (United Kingdom) on the analysis of the future of the PCIJ, recommended that, if a new international court should be erected, the acceptance of its jurisdiction should not be compulsory.

[40] Only in 8 cases has the Court found that it could take no further action on Applications in which the opposing party did not accept its jurisdiction. Most of them were presented in the 1950's against Hungary, the Union of Soviet Socialist Republics, Czechoslovakia, Argentina and Chile by the United States and the United Kingdom. After 1978, the Court provided in its present Rules of Court, Article 38.5, that when there is a consent yet to be given or manifested, the applicant shall transmit the application directly to the State against which it is made, and therefore the Court will not take any action in the proceedings until the Court's jurisdiction is consented upon for the purposes of the case. Rules of the International Court of Justice [hereinafter Rules of the Court]. art. 38 para. 5.

[41] A Special agreement is basically an agreement concluded by the parties specifically for the purpose of taking the dispute before the Court. ICJ Statute, *supra* note 17. art. 40. para. 1; Rules of the Court *supra* note 40. art. 40 para. 1. Only 16 of all of the Cases brought before the Court have been submitted by means of the notification of a special agreement between the parties. All others have been established through an application instituting proceedings, without distinction on whether the Court's jurisdiction was founded on the declarations recognizing the Court's jurisdiction, a provision in a convention or any other form of consent.

As established in Article 36.2° of the Statute, States may declare their acceptance of compulsory jurisdiction of the Court:

> "2. The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
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> a. the interpretation of a treaty;
> b. any question of international law;
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
> d. the nature or extent of the reparation to be made for the breach of an international obligation."[42]

Until March of 2009, only sixty-six States maintained such declarations effective before the Secretary General of the United Nations.[43] Six of these Declarations[44] date back to the existence of the PCIJ. Declarations, which may be established by States for a certain time only and commonly conditioned to strict reciprocity, are considered unilateral acts of States. If a State against which an application instituting proceedings has been filed has not yet recognized the jurisdiction of the Court, it may do so in order for the Court to entertain the case, in virtue of the rule of *forum prorogatum*.

Therefore, because of the number of countries accepting the compulsory jurisdiction of the Court, [45] Declarations are not the most common source of jurisdiction of the Court, as

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[42] ICJ Statute, *supra* note 17. art. 36 para. 2.

[43] Australia, Austria, Barbados, Belgium, Botswana, Bulgaria, Cambodia, Cameroon, Canada, Costa Rica, Côte d'Ivoire, Cyprus, Democratic Republico f the Congo, Denmark, Djibouti, Commonwealth of Dominica, Dominican Republic, Egypt, Estonia, Finland, Gambia, Georgia, Germany, Greece, Republic of Guinea, Guinea-Bissau, Haiti, Honduras, Hungary, India, Japan, Kenya, Lesotho, Liberia, Liechtenstein, Luxembourg, Madagascar, Malawi, Malta, Mauritius, Mexico, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Senegal, Slovakia, Somalia, Spain, Sudan, Suriname, Swaziland, Sweden, Switzerland, Togo, Uganda, United Kingdom of Great Britain and Northern Ireland and Uruguay.

[44] Those of the Dominican Republic (1924), Haiti (1921), Luxembourg (1930), Nicaragua (1929), Panama (1921) and Uruguay (1921), all of them also original members of the United Nations.

[45] From the five permanent members of the Security Council, only the United Kingdom maintains effective their Declaration since 2004. Other countries with previous or continuous cases before the Court or that are likely to incur in international responsibility because of the scope of their international activity that maintain their Declaration effective are Australia (2002), Austria (1971), Belgium (1958), Canada (1994), Egypt (1957), Finland (1958), Germany (2008), India (1974), Japan (2007), Netherlands (1956), Pakistan (1960), Spain (1990), and Switzerland (1948).

are Treaties. Over 240[46] bilateral and multilateral treaties refer their resolution of disputes to the ICJ, including the Convention on the prevention and punishment of the crime of genocide (Art. 10), the Convention for suppression of traffic in persons and of exploitation of prostitution of others (Art. 22), Convention relating to the status of refugees (Art.38), the Treaty of Peace with Japan (Art. 22), the Universal Copyright Convention (Art. XV), the Optional protocol to the Vienna convention on consular relations concerning the compulsory settlement of disputes, and various bilateral trade, consular and friendship agreements.

Through any of these bases of jurisdiction, disputes over jurisdiction of the Court may still be raised by States summoned before it, in the form of preliminary objections[47] or questions of jurisdiction or admissibility.[48] In such cases, the Court itself shall decide any questions as to its jurisdiction.

It is important to clarify that Article 95° of the UN Charter provides that "Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future." Therefore, both member States and parties to the Statute of the Court may freely[49] opt from a wide option of international judicial fora for the resolution of disputes. Only Cuba and Guinea Bissau have historically declared their rejection against any of the basis of jurisdiction of the Court. However, in 1989 Guinea Bissau presented to the Secretary General with its Declaration on compulsory jurisdiction.

The Advisory Jurisdiction of the Court is built according to the provisions laid down for contentious cases; to the extent the Court recognizes them to be applicable.[50] Advisory opinions may be delivered upon request of authorized bodies[51] in the United Nations.[52]

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[46] Updated until 2003. Currently, six of the treaties that recognize the jurisdiction of the Court refer to the League of Nations and the Permanent Court of International Justice. Article 37° of the Statute provides that all cases arising from such treaties shall be referred to the ICJ. ICJ Statute, *supra* note 17. art. 37.

[47] Preliminary objections were raised in thirty-six cases.

[48] Questions of jurisdiction or admissibility have been raised in eighteen cases.

[49] Excepting cases in which a Treaty specifically designs the ICJ to be the forum in which the dispute shall be resolved.

[50] ICJ Statute, *supra* note 17. art. 60.

[51] Authorized Bodies include: United Nations Organs such as the General Assembly (15), the Security Council (1), the Economic and Social Council (1), the Trusteeship Council, the Interim Committees of the General Assembly; Specialized Agencies such as the International Labour Organization, the Food and

Such a request shall be laid by means of a written request in which the exact statement of a legal question may be established, together with all documents related to the question.[53] Different from judgments, advisory opinions of the Court have no binding effect unless it was stipulated beforehand, and the organ that requested it remains free to decide the effect to give to these opinions.

It is important to mention that the 1944 report, prepared by jurists of 12 countries, on the future of the PCIJ, recommended that the ICJ should have no jurisdiction to deal with essentially political matters. Even though this is not to be found in its Statute, the ICJ has made clear through their practice of rejection, for example, of advisory opinions when the question, as made, cannot be answered based on international law, attributing this failure to mistakes or legal gaps in the design of the texts to be interpreted.

On competence, one important difference of the ICJ from its predecessor is on its procedure on the application of international law. Article 38° of the Statute rules:

> "1. The Court, whose function is to decide in accordance to international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59[54], judicial decisions and the teachings of the most highly qualified publicist of the various nations, as subsidiary means for the determination of rules of law.

Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization (1), the World Health Organization (2), the International Bank for Reconstruction and Development, the International Finance Corporation, the International Monetary Fund, the International Civil Aviation Organization, the International Telecommunication Union, the International Fund for Agricultural Development, the World Meteorological Organization, the International Maritime Organization (1), the World Intellectual Property Organization, and the United Nations Industrial Development Organization; and finally, Related Organizations such as the International Atomic Energy Agency.

[52] ICJ Statute, *supra* note 17. art. 65 para. 1.

[53] *Id.* art. 65 para. 2.

[54] "The decision of the Court has no binding force except between the parties and in respect of that particular case." *Id.* art. 59.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

Even though there is an important notion on the particular precedence of the sources of International Law the first over the latter, many scholars coincide in them not having to be taken into account in the particular order in which they are written in the Statute. During the discussion of the articles of the Statute, recommendations were presented in the direction of striking down a phrase that suggested these sources had a particular order and precedence in their application. The recommendations were successful and the current text, contrary to that of the establishment of the PCIJ, does not constraint the judges in such a sense.

C. Mexico's participation in the International Court of Justice

The will to actively participate in the pacific settlement of international disputes has consolidated into a strong tradition in Mexican foreign relations.[55] Not only has Mexico publicly declared on the importance of international law and its compliance, but it has complied with international judicial decisions for over a century. In fact, the first *compromis* ever signed to take a case before the earliest permanent international organization created for the settlement of international disputes was –ironically- between the United States of America and the United Mexican States in 1902. This *compromis* had the objective of taking the issue of the Pious Fund of the Californias[56] to an arbitral tribunal of the Permanent Court of Arbitration.[57] Therefore, Mexico was the first country that had to

[55] However, most scholars recognize the absence of an elaborate development Framework that serves as a guideline for Mexican foreign policy –as the United States has built since 1877- and criticize the evident disconnection between the observance of International Law on the international stage and its failure to incorporate it locally. CANCHOLA GUTIÉRREZ, "Práctica de México respecto al derecho internacional: Consideraciones sobre la elaboración de un repertorio." [Mexican Practice of International Law: Considerations on Building a Review]. (2006)

[56] Cour Permanente d'Arbitrage de La Haye. (1902) Fonds Pieux des Californies (Les Etats-Unis d'Amérique c. Les Etats-Unis Mexicains), La Haye, le 14 octobre 1902. (Sentence Arbitrale)

[57] The Permanent Court of Arbitration was established in 1899 during the Hague Peace Conference and through the 1899 Hague Convention for the Pacific Settlement of International Disputes (further revised in 1907). One hundred and seven countries are parties to its arbitral forum. It seats at the Peace Palace in The Hague, home as well to the PCIJ and the ICJ.

observe an award issued in the Peace Palace. This was the closest Mexico ever got to the Peace Palace before 1946.

Participation of Mexicans in the ICJ has not been plentiful. Nonetheless, four distinguished Mexicans have served as justices, having never been appointed as presidents or vice-presidents of the Court. These are Isidro Fabela (1946-1952),[58] Roberto Córdova (1955-1964), Luis Padilla Nervo (1964.1973)[59] and currently Bernardo Sepúlveda Amor (2006-2015).[60] Mexicans have had two participations as *ad hoc* judges in the Court. These are Jorge Castañeda (1983-1984) and Bernardo Sepúlveda (2003-2004).[61]

Signed by Jaime Torres Bodet, former Secretary of State for Foreign Relations, Mexico's Declaration Recognizing the Jurisdiction of the Court as Compulsory[62] was deposited with the Secretary General on October 23, 1947 and has never been retired ever since. Additionally, Mexico has signed various multilateral treaties which submit the

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[58] Isidro Fabela was in fact the Mexican Representative to the League of Nations when in 1938 Nazi Germany took over Austria (*Anschluss*) and was the only one of all the delegates present instructed to protest in the Assembly against such action (which, moreover, signified the violation of the sentence of the Permanent Court of International Justice of 5 September 1931), stating that: *"The Mexican government (...) declares to the face of the world that, to its judgment, the only way of achieving peace and avoiding new international assails such as those perpetrated against Ethiopia, Spain, China and Austria, is to abide by the obligations imposed in the Pact, the signed treatises and the principles of international law; otherwise, the world will dejectedly fall in a conflict much more worse than the one now being tried to contempt outside the League of Nations System."* Isidro Fabela, *Nota de Protesta de México contra la anexión de Austria a la Alemania Nazi.* [Mexican Protest Against the Anexion of Austria to Nazi Germany] (1938).

[59] Luis Padilla Nervo was in fact the first Representative of Mexico to the United Nations.

[60] Justice Sepúlveda actually served as *Judge ad hoc* during the hearings of the Avena Case, according to Article 31° of the Statute, and was later elected through the normal procedure to fill vacancy in 2005. ICJ Statute, *supra* note 17. art. 31.

[61] On the occasion of consideration of an application by Italy for permission to intervene in the case concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta), Mr. Jorge Castañeda sat as judge *ad hoc* on behalf of Malta, voting against this intervention (designated on 26 April 1983 and notified on the non objection to his appointment on 30 May 1983). *Continental Shelf (Libyan Arab Jamahiriya / Malta), Application to Intervene, Judgment, I.C.J. Reports 1984, p. 3.* This, however, produced no significant experience to Mexico before the Court, shown in the rare references ever made to this individual participation not actually representing his own state.

[62] It reads: "*In regard to any legal dispute that may in future arise between the United States of Mexico and any other State out of events subsequent to the date of this Declaration, the Mexican Government recognizes as compulsory ipso facto, and without any special agreement being required therefore, the jurisdiction of the International Court of Justice in accordance with Article 36, paragraph 2, of the Statute of the said Court, in relation to any other State accepting the same obligation, that is, on condition of strict reciprocity. This Declaration, which does not apply to disputes arising from matters that, in the opinion of the Mexican Government, are within the domestic jurisdiction of the United States of Mexico, shall be binding for a period of five years as from 1° March 1947 and after that date shall continue in force until six months after the Mexican Government gives notice of denunciation. Mexico, D.F., 23 October 1947 [Signed] Jaime TORRES BODET, Secretary of State for External Relations.*" [Translated from Spanish].

solution of disagreements to the Court, and three bilateral commercial agreements that have chosen the same system of resolution.

Despite the above, Mexico's experience participating in cases before the Court was nonexistent until very recently. Even though Mexico has an extensive history on the settlement of international disputes via mediation and arbitration: such as the Chamizal dispute with the United States, the Clipperton Island quarrel with France, various bi-national arbitration tribunals that absorbed claims following the Guadalupe Hidalgo and the Bucareli treatises, and current dispute settlement under its free trade agreements' network; it had never recurred to the International Court of Justice or its predecessor, nor had it been summoned by them.

Therefore, the importance of the political decision of taking the United States of America before the International Court of Justice must be understood. It was only after having exhausted every diplomatic resource and all political recourses that the decision was seriously taken into account. This was done during a year in which Mexico would also oppose the United States, as non-permanent member to the Security Council, on its vote on Iraq. Many Mexican diplomats qualify the decision to take the issue to the attention of the Court a success, even if it was the only one that the Fox administration had on foreign policy.

1. Advisory Opinion Requests supported by Mexico

The principle of the peaceful settlement of disputes is enshrined in the Mexican Constitution.[63] Certain coherence can be observed in Mexico's performance over the years in the international arena on this subject. Following our approach on the relation between Mexico and the International Court of Justice, one may observe the evidence left in consistent voting and speeches in both the General Assembly and the Security Council, that further supports Mexico's reliance on international law and multilateral institutions. From the twenty-five Advisory Opinions ever submitted to the Court, Mexico has continuously

[63] CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Constitution; hereinafter MEX. CONST.] art. 89 § 10 (MEX.). In it, the executive power is to follow certain principles while designing foreign policy, such as: the self-determination of peoples, non-intervention, pacific settlement of disputes, the ban of the threat or use of force in international relations, juridical equality of States, international cooperation for development and the strengthening of international peace and security.

expressed itself before the Court via public hearings or written submissions, particularly in four of them: "Effects of Judgments handed out by the United Nations Administrative Tribunal", "United Nations Expenditure", the "Legality of the Use of Nuclear Weapons" and most recently on Israel's Security Barrier in the West Bank.

During the 10th Emergency Special Session of the General Assembly on 20 July, 2004, Mexico strongly supported the vote of a resolution demanding Israel heed to an advisory opinion[64] of the International Court of Justice on the security barrier in the West Bank. Request for this Advisory Opinion was made by the General Assembly in December of 2003[65]. Before the voting, Mexico was one of the few states that stated its intention to vote in favour of the resolution, for the question of the wall to be decided in adherence to international law and not merely politically. According to Mexico, its vote would demonstrate not only its 'deep appreciation for the International Court of Justice', but also its confidence that the Court's Opinion would contribute to finding a lasting solution to the problem. The Mexican representative stated that "The wisdom [of the Court] strengthened the foundation on which the relations among States should be structured".[66] The Assembly adopted the draft resolution making the request, on an overwhelming vote of 150 in favour to 6 against, with 10 abstentions.

Thus, Mexico is most interested in the peaceful settlement of disputes according to international law. Even if it has not participated much in the mechanisms and cases within the International Court of Justice, its compromise is recognized for closely following the evolution of the International Justice System in the framework of the United Nations.

2. Related cases promoted by Mexico

Prior to beginning procedures before the ICJ, Mexico, a member country to the Inter-American System for the Defence and Protection of Human Rights, searched for the affirmation of its position in the regional forum for this matter. On December 9th, 1997, Mexico filed a Request for an Advisory Opinion before the Inter-American Court of

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[64] U.N. GAOR, *General Assembly Emergency Session Overwhelmingly Demands Israel's Compliance with International Court of Justice Advisory Opinion.* Press Release, 20 July 2004. GA10248

[65] *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem,* A-ES-10\L.18/Rev.1

[66] *Id.* at *65*

Human Rights (ICHR), requesting the response of twelve different questions concerning the failure of the agents of a state to give prompt consular notification when the national of another state is detained, and its relation with due process under the Viena Convention on Consular Relations (VCCR), the International Covenant on Civil and Political Rights, the Organization of American States Charter and the American Declaration.

The Advisory Opinion of the ICHR, which Mexico shall take as an important argument during its pleadings on *Avena*, dealt particularly with the consular rights of foreign detainees under the VCCR. Delivered on October 1st, 1999, the ICHR Opinion states:

> [...] THE COURT IS OF THE OPINION:
> Unanimously,
> 1. That article 36 of the Vienna Convention on Consular Relations confers rights upon detained foreign nationals, among them the right to information on consular assistance, and that said rights carry with them correlative obligations for the host State.
> [...]
> By six votes to one,
> 7. That failure to observe a detained foreign national's right to information, recognized in Article 3(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the due process of law and, in such circumstances, imposition of the death penalty is a violation of the right not to be deprived of life "arbitrarily", as stipulated in the relevant provisions of the human rights treaties (*v.g.* American Convention on Human Rights, Article 4; International Covenant on Civil and Political Rights, Article 6), with the juridical consequences that a violation of this nature carries, in other words, those pertaining to the State's international responsibility and the duty to make reparation.
> [...]
> Unanimously,
> That the international provisions that concern the protection of human rights in the American States, including the right recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, must be respected by the American States Party to the respective conventions, regardless of whether theirs is a federal or unitary structure. [...]

Even though it could be argued, *prima facie*, that the ICHR has no jurisdiction to interpret the VCCR, the opposite tends to be the truth, since it is stated that the ICHR has

jurisdiction to interpret, in addition to the American Convention, "other treaties concerning the protection of human rights in the American States". On the other hand, a very important detraction from this opinion is that of Judge Jackman, who filed a partially dissenting opinion. In his opinion, Judge Jackman states that the rights derived from the Convention do not create an obligation by the receiving state over people not adscript to Consular missions or activities, or to those not acting as agents of the sending state. Judge Jackman's reasoning, however, did not prevail, nor in the ICHR opinion, nor in the analysis further developed by the ICJ for an actual case, therefore producing coherent judgments in two different international tribunals around the same dates.

The view that did prevail was on the violation of the right of information as a prejudicial factor to the due process of law; further evolving into a violation of the right not to be deprived of life arbitrarily, in the cases where death penalty was the conclusion of such a process.

Finally, the reference made in point 8 of the Opinion is particularly interesting, since it foresees, as asked in the Mexican requests, the non-relief of a State's responsibility to comply with its international obligation due to its structure of government. Whether with a federal or unitary structures, a State must comply with them. In its reasoning, the ICHR recalls further decisions[67] sustaining that "a State cannot plead its federal structure to avoid complying with an international obligation." Furthermore, Article 29 of the *Vienna Convention on the Law of Treaties* is cited, recalling that "a treaty is binding upon each party in respect of its entire territory".[68]

D. United States of America role in the International Court of Justice

The United States is the most active participant in judicial fora throughout the world. It was the first country to bring a case before the first permanent judicial organ for the settlement of disputes, an arbitral award won against Mexico in 1902. In both the PCIJ

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[67] *Garrido and Baigorria Case, Reparations (Art. 63(1) American Convention on Human Rights)*, Judgment of August 27, 1998. Series C No. 39. para. 46; *Cf.* Arbitral Award of July 26, 1875 in the Montijo Case, LA PRADELLE-POLITIS, *Recueil des arbitrages internationaux*, Paris, 1954, t. III, p. 675; decision of the France-Mexico Mixed Claims Commission of 7.VI.1929 in the Hyacinthe Pellat case, U.N., *Report of International Arbitral Awards*, vol. V, p. 536.

[68] Vienna Convention on the Law of Treaties, [hereinafter VCLT] art. 29.

and the ICJ, the United States has assured its uninterrupted presence since their creation in 1922 and 1946, respectively.

Four American judges sat at the PCIJ: John B. Moore (1922-1928), Charles E. Hughes (1928-1930), Frank B. Kellog (1930-1935) and Manley O. Hudson (1936-1942). None of them were ever elected to hold the presidency or vice-presidency of the PCIJ, nor did the United States bring any case before this tribunal or was summoned by it.

Continuous participation in the ICJ has been assured through the election of six most illustrious jurists such as Green H. Hackworth (1946-1961),[69] Philip C. Jessup (1961-1970), Hardy C. Dillard (1970-1979), Richard R. Baxter (1979-1980), Stephen M. Schwebe (1981-2000)[70] and currently Thomas Buergenthal (2000).[71] Judges *ad hoc* in the Court include Thomas Franck, on behalf of Indonesia and Bernard H. Oxman, on behalf of Ukraine.

Currently, as much as 32 bilateral treaties or commercial agreements, as well as various multilateral treaties bind the United States to the dispute resolution jurisdiction of the ICJ. To date the United States has presented itself as Agency in 22 cases before the Court.

The United States has submitted a total of nine cases to the Court, against the Union of Soviet Socialist Republics (in four occasions),[72] Hungary,[73] Czechoslovaquia,[74] Bulgaria,[75] Iran,[76] and Italy.[77] On six of such cases, the Court declared it could not take any steps further on the US Application on the basis of the non acceptance of its jurisdiction by the opposing parties.[78]

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[69] Elected President of the Court from 1955 to 1958.
[70] Elected Vice President of the Court from 1994 to 1997 and President of the Court from 1997 to 2000.
[71] Buergenthal also served as a Judge of the ICHR from 1979 to 1991, holding its Presidency once, and as member to the United States Supreme Court. In 2008 he was awarded the Gruber Prize for Justice on the basis of his contributions to the promotion and protection of human rights, particularly in Latin America.
[72] 1954, Treatment in Hungary of Aircraft and Crew of United States of America; 1955, Aerial Incident of 7 October 1952; 1958, Aerial Incident of 4 September 1954; and 1959, Aerial Incident of 7 November 1954.
[73] 1954, Treatment in Hungary of Aircraft and Crew of United States of America.
[74] 1955, Aerial Incident of 10 March 1953.
[75] 1957, Aerial Incident of 27 July 1955.
[76] 1979, United States Diplomatic and Consular Staff in Tehran.
[77] 1987, Elettronica Sicula S.p.A. (ELSI).
[78] All four cases against the USSR, the case against Czechoslovaquia and the case against Hungary.

On the other hand, the United States has been summoned before the Court on twelve different occasions, by Iran (twice),[79] Mexico (twice),[80] France,[81] Italy,[82] Switzerland,[83] Nicaragua,[84] Libya,[85] Paraguay,[86] Germany,[87] and Yugoslavia.[88] In nine of these cases, the US presented Preliminary Objections and Questions of Jurisdiction or Admissibility.

The only case in which the United States has accepted the jurisdiction of the Court through a special agreement is the delimitation of the maritime boundary in the Gulf of Maine Area with Canada (1981).

1. Contentious cases related to the VCCR promoted before the Court by the United States

Following the armed attack on the United States Embassy in Tehran and Consulates at Tabriz and Shiraz, on 4 November 1979, the Unites States instituted proceedings[89] against Iran along with a request for provisional measures to ensure the lives of diplomatic and consular staff, as well as two more of its citizens seized during the attack by Muslim Student Followers of the Imam's Policy. Even though the attackers were not agents from the receiving state and Iran was not liable for the attacks themselves, it did not intervene to protect or liberate the hostages.

Since Iran did not appear before the Court to put forward its arguments, nor did it evoke any denial on the documents and proof presented by the United States Agent, the Court was obligated by its rules of procedure to satisfy itself on the veracity of the only

[79] 1989, Aerial Incident of 3 July 1988; and 1992, Oil Platforms.
[80] Taking into account both Applications related to Avena: 2003, Avena and Other Mexican Nationals; and the 2008 request for Interpretation on the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals.
[81] 1950, Rights of Nationals of the United States of America in Morocco.
[82] 1953, Monetary Gold Removed from Rome in 1943 (case brought also against the United Kingdom and France)
[83] 1957, Interhandel.
[84] 1984, Military and Paramilitary Activities in and against Nicaragua.
[85] 1992, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie.
[86] 1998, Vienna Convention on Consular Relations.
[87] 1999, Legrand.
[88] 1999, Legality of the Use of Force.
[89] I.C.J., United States Diplomatic and Consular Staff in Tehran, Pleadings

proof presented before it. The Court issued the requested order[90] for provisional measures requesting the immediate liberation of the premises and delivered its judgment[91] against Iran on 24 May 1980.

When an order on provisional measures by the ICJ and various mediation efforts failed to motivate any change in Iran's governmental inaction, the United States proposed comprehensive non-military sanctions on Iran through the United Nations Security Council. The proposal did not only receive abstentions from Bangladesh and Mexico, but was not voted upon by China, vetoed by the Soviet Union and voted against by the German Democratic Republic.[92]

Two important ideas emerge from this case. First, the negative of the UNSC to agree on any measures upon a Member state, notwithstanding an order against it issued by the ICJ, shows how ineffective the actual practice of Article 94.2 of the UN Charter may prove, which provides for recourse to the UNSC in the event of non compliance with ICJ Judgments. Second and most importantly, the United States submitted this claim under the VCCR and presumed the acquisition of rights by the nationals of the sending state under the mentioned convention to be contrary to the doctrine of consular protection as a right to be exercised only by the sending state.

The United States promoted the Jurisdiction of the Court based on the Optional Protocol concerning the Compulsory Settlement of Disputes of the VCCR, among other treaties, and pursued against Iran the violation of article 36 of the said Convention.

In its *Memoire* to the Court, the United States expressed that:

> [...] a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations. Article

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[90] *United States Diplomatic and Consular Staff in Tehran. Provisional Meassures. Order of 15 December 1979, I.C.J. Reports 1979, p.7*

[91] *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p.3*

[92] LUCK, Edward C. "Tackling Terrorism". in MALONE, David M. THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY. (2004) at 89.

> 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others. [93]

This statement reveals the importance the United States conferred upon the Consular *liaison* towards the adequate protection of the rights of its own citizens abroad, therefore, recognizing twenty years before cases were brought against it on the same grounds, the granting of rights for nationals of the sending State under article 36 of the VCCR.

2. Related contentious cases in the Court against the United States

Around the same time Mexico made its request for an Advisory Opinion from the ICHR, two cases involving alleged violations of the Vienna Convention on Consular Relations were presented against the United States before the ICJ. These cases will be known as the *Breard*[94] case and the *LaGrand*[95] case, presented by Paraguay and Germany, respectively.

On 3 April 1998, Paraguay filed an Application and requested the ICJ provisional measures to stay the execution of Angel Francisco Breard, a Paraguayan citizen detained and sentenced to death in 1992 in the Commonwealth of Virginia. Mr. Breard was not advised of his right to consular assistance at the moment of his detention, nor were the Paraguayan consular officers notified of it, as required by Article 36 of the Vienna Convention, and this situation continued during his trial, conviction of murder and sentence to death. The Application stated that the United States' actions violated its obligations owed to Paraguay under the Vienna Convention, and sought *restitution in integrum,* or the restoration of the situation to the point before the failure to provide notification took place, therefore allowing Paraguay to provide the consular assistance required by the Convention.

Six days after, on 9 April 1998, the Court unanimously decided on the request for provisional measures. It indicated that the United States "should take all measures at its

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[93] *United States Diplomatic and Consular Staff in Tehran. United States of America Memorial, I.C.J. Pleadings, p. 174*

[94] *Vienna Convention on Consular Relations (Paraguay v. United States of America), Order of 10 November 1998, I.C.J. Reports 1998,* p. 426

[95] *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001,* p. 466

disposal" to grant the stay of the execution until the Court produced its final judgment. Nonetheless the acceptance of the provisional measures by Madeleine Albright, then Secretary of State, the order was ignored by the Governor of Virginia, and Mr. Breard was executed six days later, on 14 April 1998, as scheduled.

Notwithstanding the strong worded *Memoir* presented before the Court against the United States on 9 October, on 2 November the Agent of Paraguay requested in the name of his Government, that the proceedings be discontinued with prejudice and removed from the List of cases pending trial before the Court. This procedure was agreed upon by the United States and the case was removed from the List, it being clear for Paraguay that it made no sense to pursue the action even before the presentation of the Unites States' Memorial.

Nevertheless, important development of judicial thought on the matter took place, for the granting of provisional measures was quite divisive among the Members of the Court. Declarations by President Schwebel, Judge Oda and Judge Koroma in the Order of 9 April, leave clear the intention of the unanimous ruling of the Court on the provisional measures not to have been enacted as emerged from a "universal supreme court" of criminal appeal, nor as from a petitioner forum for writs of *habeas corpus*, but rather issued coherently with the jurisprudence of the Court in order to preserve the respective rights of either party which may be exposed to imminent and irreparable breach.[96] Furthermore, Judge Oda develops on the dubious existence of the mentioned individual rights under the Vienna Convention, but reflects on the consequences of not issuing the Order, rendering the main Application meaningless and keeping an important and controversial topic away from profound discussion by the Court. The imminent execution of Mr. Breard shall bring to reality such regret and force the Court to wait until the next similar matter was presented to it in order to be able to judge on the merits.

On 2 March 1999, after the exhaustion of every diplomatic means at the disposal of the Government of the Federal Republic of Germany, its Ambassador to the Netherlands

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[96] *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999,* at 260 and p. 36 of the order.

submitted to the Court an Application[97] and an extremely urgent request for provisional measures against the United States for violations of the Vienna Convention on Consular Relations. In 1992, the German consular officers were made aware of the detention, trial, conviction and sentence to death, ten years before, of two German nationals, Karl and Walter LaGrand. Their situation came to the knowledge of the consular officers by the detainees themselves, long time after all legal resources at the State of Arizona, where they had been detained, had been exhausted.

Having accepted the case, the Court issued an order[98] indicating provisional measures, requesting the United States grant the stay of the imminent execution of one of the brothers, taking "all measures at its disposal". Even though the order was requested two days before the settled execution date and the execution did take place -fact which was heavily criticized by both the Court and the United States Agent, arguing such urgent requests did not give enough time for the Court's proper deliberation and the US federal authority to take any action- Germany did not retire its case and the Court delivered its verdict on 27 June 2001, with important precedents and widely agreeing majorities. First, it held[99] that the United States had violated its obligations to Germany under the VCCR by failing to inform German consular officers and the LaGrand brothers of their rights under article 36(2) following their arrest, thereby depriving Germany of the possibility of rendering the immediate assistance that it is entitled to provide, and, more importantly, that their nationals are entitled to receive. Furthermore, the Court stated[100] that the United States had breached the obligations imposed by the provisional measures order, which was ruled to be, for the first time in the history of the Court, legally binding.

Finally, the Court decided[101] that review and reconsideration of convictions in light of these violations would be an appropriate remedy, thus setting a precedent. Therefore, should any other German national be sentenced to severe penalties without their VCCR

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[97] *Germany v. the United States of America. Application Instituting Proceedings Submitted by the Federal Republic of Germany. 2 March 1999.*

[98] *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999,* p. 9

[99] By fourteen votes to one.

[100] By thirteen votes to two.

[101] By fourteen votes to one.

right having been respected, the United States should voluntarily allow the review and reconsideration of the sentence.

A step farther from provisional measures in *Breard*, *LaGrand* constitutes the starting point for nearly all of the arguments that would be presented under the *Avena* case, which dealt as well with violations under article 36 of the VCCR against the United States, this time presented by Mexico. Nevertheless, *Avena* presents new questions in several important aspects of this judgment. In fact, since in *LaGrand* Germany was unable to preserve the life of its citizens but maintained the case until the final judgment was pronounced, it could be said now that the *Avena* case is "essentially, a fight for the soul of *LaGrand*".[102]

[102] AMIRFAR, Catherine M. (2004). "AALS Panel – Mexico v. U:S.A. (Avena) – Arguments of Mexico". GERMAN LAW JOURNAL. Vol. 05 No. 04 2004. p. 378

II. The *Avena* Case

This chapter will deal with the main arguments delivered before the International Court of Justice and its decision on the case between Mexico and the United States in 2003-2004, as an essential preamble to understanding further developments after 2004.

A. The facts before the presentation of the case to the Court

At the turn of the century, the Mexican government accounts that the competent authorities of the United States have detained, tried and sentenced to death more than thirty Mexican nationals at the conclusion of judicial procedures in which such authorities have allegedly violated international obligations incumbent upon the United States under article 36 of the VCCR. These violations, continuous and repetitive, have barred Mexico from performing its own consular activities abroad, protected under the VCCR, and therefore, creating prejudice against Mexico's rights, as well as the rights of its nationals.

As of 1999 and supported by the advisory opinion of the ICHR, Mexico presented a considerable number of diplomatic notes to the government of the United States, pertaining to the cases of twenty Mexican nationals on death row, in which violations to article 36 of the VCCR were documented. In such notes, Mexico requested the federal government to urge the local authorities about the need to take the necessary measures to preserve the fundamental rights of those condemned. Thus, whenever getting noticed of an article 36 violation having occurred, Mexican consular officers routinely assisted defence counsel at trial, appellate and clemency proceeding levels. Nonetheless, judicial resources presented to the different local courts claiming these violations were not heard.

After June 2001, when the ICJ made public its decision on *LaGrand*, Mexico tried to convince the United States through all diplomatic means available about the need to provide review and reconsideration, via the US legal system, on the cases of Mexicans condemned to death in which a violation of their consular information and notification rights was demonstrated.

However, the courts of the United States refused to consider violations under the VCCR, on the basis of procedural default doctrine.[103] Procedural default, it was held by courts once and again, applies to prevent the consideration of the VCCR violations on the merits, there being no judicial remedy available –nor prejudice possible, since their rights under the US Constitution and laws had been protected- even when there was a VCCR violation. Given the liberty to choose the means for judicial review, provided for by the ICJ in *LaGrand*, the United States limited itself to a review mechanism supplied through executive clemency. Future experience proved that the federal government of the United States was hesitant to intervene further from mere suggestions during executive clemency procedures and hearings in order to obtain the revision of cases in which the mentioned violation was acknowledged.

On 16 December 2002, M. Juan Manuel Gómez Robledo, legal advisor to the Mexican chancery, met in Washington D.C. with the legal advisor of the Department of State, M. William Taft IV.[104] After a long meeting during which most topics were related to compliance by the United States with its obligations pertaining consular information and notification, the M. Gómez Robledo, as agent of the Mexican government, urged M. Taft to intervene in the judicial procedures and to inform local pardon and parole boards that commuting death row for life sentence constitutes adequate reparation to this kind of violations, rather than just exhorting the committees and governors to merely 'consider' violations under article 36, as the federal government had done so far.

It was during this same meeting, in which the Department of State made clear that its duty under *LaGrand* went no further than requesting local authorities to carefully review and consider such violations -not granting that the pardon board or the governor would follow the Department of State's advise-, that it became clear for the Mexican authorities

[103] Which shall be further discussed when dealing with the particular outcome of cases in section III.A.I. of this work, but which may be seen in cases such as *State v. Reyes Camarena*, 7 P. 3d 522, 524-526 (Or. 2000)
[104] GÓMEZ ROBLEDO V., Juan Manuel. (2005). "El Caso Avena y otros nacionales mexicanos (México c. Estados Unidos de América) ante la Corte Internacional de Justicia". [The Case Concerning Avena and other Mexican Nationals] ANUARIO MEXICANO DE DERECHO INTERNACIONAL [MEXICAN JOURNAL OF INTERNATIONAL LAW], vol. V, 2005 p. 179.

they should not put any more hope on negotiating and should make use of judicial procedures available.[105]

Twenty four days later, when Mexico presented its case to the registrar of the Court against the United States, there were fifty four Mexican nationals on death row and four others[106] had been executed since 1997, having their rights to consular protection been violated. The registrar of the Court, Mr. Philippe Couvreur, decided to file the case under the name *Avena and other Mexican nationals* (Mexico v. United States of America) following the first of the fifty four names in the list that Mexico delivered the Court, that of Carlos Avena Guillén.

B. Procedures and Main Arguments

At the same time Mexico filed its Application, it requested provisional measures for the protection of the fifty four Mexican nationals in danger, so that their execution would not take place pending a judgment on the merits by the ICJ. When this was requested, in January 2003, three of them were pending execution in the next six months. [107]

Departing from the *acquis* of *LaGrand*, further important requests were made to the Court to decide upon. Mexico argued that, by failing to inform its nationals of their rights to consular assistance *without delay* and by failing to provide *meaningful review and reconsideration* as required in *LaGrand*, the United States had violated not only its rights, but those of its nationals, and should, as reparation, restore the *status quo ante*. Therefore, the Court would be forced to clarify its interpretation on *LaGrand* on details pertaining the extent of violations and reparation under article 36 of the VCCR.

The United States presented itself to the Court with a different strategy than the one it had followed during *LaGrand*. Whilst in *LaGrand* it had recognized the existence of a violation and tried to limit an interpretation by the Court on the real effect of consular assistance, concluding that its obligations could be fulfilled with a formal apology to

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[105] *Id.* 103 p. 181.

[106] Irineo Tristán Montoya (18 June 1997) executed in Texas, Mario Benjamin Murphy (18 September 1997) executed in Virginia, Miguel Ángel Flores (9 November 2000) executed in Texas and Javier Suárez Medina (14 August 2002) executed also in Texas.

[107] César Fierro (February 2003), Roberto Moreno Ramos (March 2003) and Osbaldo Torres (July 2003). GÓMEZ ROBLEDO, *supra* note 104. at 186.

Germany; in *Avena*, it chose to deny proof of any violation having taken place, according to Mexico. The arguments of the United States centred mostly on convincing the Court that a similar judgment had already been delivered and due reparation had already been decided upon. In both cases, the United States argued that Germany and Mexico were abusing the jurisdiction of the Court and that both cases were meant to defy the sovereign application of the death penalty in the United States.[108]

1. Jurisdiction and admissibility

The United States agent presented four elements against the jurisdiction of the Court on this matter, as well as five motives for which the court should find Mexico's requests inadmissible. Mexico tried to bar such procedural resources arguing they had been presented after due time, following the Rules of the Court. However, the Court decided to examine the arguments presented by the United States.

Most of the exceptions presented by the United States against the jurisdiction of the Court were related to the fact that Mexico was requesting the Court decide on subject matters independent from the application or interpretation of the VCCR, and was thus requesting the Court to intervene in the functioning of the United States' criminal justice administration system.

It must be noted at this point that all throughout the case, Mexico did not question the legality of the death penalty in the United States *per se*, nor does it justify the criminal actions for which its nationals are presumptively responsible. It does take, however, a precise positioning on the argument that such a penalty should only be imposed with due regard for the strictest adherence to guarantees related to the legality of the proceedings whether they emerge from national or international law.

On the other hand, exceptions presented on the inadmissibility of Mexico's requests were mostly related to an argument in which Mexico was trying to build the Court into a *habeas corpus* tribunal. It was argued that Mexico could not pretend to justify its recourse to the Court since its nationals have not exhausted all local remedies available, including

[108] COGAN, Jacob Katz. (2004). "AALS Panel – Mexico v. U.S.A. (Avena) – Argument of the United States". In GERMAN LAW JOURNAL. Vol. 05 No. 04, 2004. p. 385

executive clemency procedures. Mexico sustained that the dispute could be brought before the Court because the local courts in the United States have never accepted any judicial resource promoted by foreigners on the violations to article 36 of the VCCR, the pursuit of procedures under US tribunals until their exhaustion being, thus, pointless.[109] Furthermore, Mexico argued that executive clemency cannot be taken into account when dealing with the exhaustion of local procedures, nor when dealing with reparation,[110] because essentially it is not a judicial resource.

Exceptions presented by the United States also sustained the fact that Mexico does not comply with the obligations marked in the VCCR and thus was not in a position to demand the Court decide on the violations the United States may have incurred. Finally, the United States argued that the individuals listed were also citizens of the United States, and were therefore unable to request diplomatic protection under article 36 of the VCCR. In response, Mexico presented the birth certificates of each and every one of the accused.

2. Without delay

On the matter of the interpretation of the phrase 'without delay' in Article 36(1)(b) of the VCCR,[111] the US stated that it is satisfied as long as the arresting authorities notify the arrested national of his rights under the VCCR in the ordinary course of business without engaging in any deliberate delay or procrastination. Mexico was of the opinion that such an interpretation is subjective and that, for the purpose of consular protection being effective, 'without delay' must mean immediately, before any step of criminal prosecution compromising the rights of the detainee takes place.

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[109] For such an argument, Mexico cites the jurisprudence of the Court in *Barcelona Traction* "[in order to consider the exhaustion of local judicial resources] *does not require from those concerned a clearly futile and pointless activity, or a repetition of what has been done in vain*", and in *Eletronica Sicula* : "*for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success*". CR 2003/25, paragraphs 305-306

[110] A point which will be further developed in sections 3 and 4 of this subchapter.

[111] Such article provides: "*if* [the detained] *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 of is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.*" VCCR, art. 36 para. 1(b)

This is a fundamental difference, since the acceptance of Mexico's interpretation in the context of the United States means that such notification would have to be ensured even before interrogation takes place. Even though only a handful of countries follow Mexico's interpretation,[112] the Advisory Opinion delivered in 1999 by the ICHR supports the conclusion that such delay could in fact prejudice the detainee's rights.[113]

3. Meaningful review and reconsideration

After *LaGrand*, in which the Court gave the United States the liberty to choose how it would comply with its obligation to provide review and reconsideration, the United States decided it would focus on executive clemency proceedings as the means to fully satisfy the required review and reconsideration, notwithstanding if local courts did not attach any legal significance to violations under the VCCR.

Mexico argued that executive clemency proceedings could not be considered a resource satisfying the requisites in *LaGrand*, nor a kind of reparation in international law from violations under the VCCR. For Mexico, executive clemency stands not as a judicial remedy, but as a discretionary granting of grace; an unreviewable process, because of its lack of standards or hearing procedures, its secretiveness and its political nature. In sum, under Mexico's arguments, review and reconsideration adopted by the government of the United States to comply in *LaGrand* is not 'meaningful' towards the purposes of granting remedy to consular rights violations, but rather an arbitrary and uncertain mechanism.[114]

Additionally, the rule of procedural default precludes detainees from raising Article 36 violations in cases before higher courts, thus leaving no other option to the defence other than the request of executive clemency at the end of the judicial process. After *LaGrand*, appeals in the United States that were related to Article 36 violations when these had not been originally presented were unsuccessful. Therefore, meaningful review and reconsideration, under this perspective, is not viable.

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[112] Brazil, Denmark, Iceland, Ireland, Kenya, Korea, Spain and Turkey. *Avena*, CR 2003/24 para. 215.
[113] *The Right to Information on Consular Assistance in the framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, October 1, 1999, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999)* para. 106.
[114] GÓMEZ ROBLEDO, *supra* note 104 at 199.

4. Due reparation

Mexico requested the Court declare that due reparation to violations under article 36 consists of restoring the *status quo ante* through the annulment or some other action that deprives from their effect or value the verdict and sentence dictated against those Mexican nationals enlisted, including the obligation to take all necessary measures to ensure the effects of violations to article 36 have no incidence on further local procedures.

Following this line of thought, where the verdicts and sentences were not annulled, the United States should assure a meaningful review and reconsideration as argued before. Furthermore, Mexico requested that the Court declare such obligation couldn't be fulfilled by executive clemency procedures, nor barred by any rule or doctrine of law previously mentioned.

C. Judgments delivered by the Court

1. Provisional Measures

On 5 February 2003 the Court decided on Mexico's request for provisional measures. Unanimously, the Court considered the execution of the Mexican nationals would irreparably prejudice any right that may belong to Mexico, and in order to preserve those rights, it would indicate provisional measures, notwithstanding the argument by the United States that such a decision would prejudice its rights as well. The operative clauses of the Court's judgment are most interesting:

> "Unanimously,
> I. Indicates the following provisional measures:
> (a) The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these prodeedings;
> (b) The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.
> II. Decides that, until the Court has rendered its final judgment, it shall remain seized of the matters which form the subject of this Order."[115]

[115] I.C.J. Reports 2003, pp. 91-92, para. 59

Whereas the Court only protects the rights of three of the Mexican nationals which were under the greatest danger of execution during the next months, it declares itself ready to extend further provisional measures should any other be in such situation. Furthermore, and notwithstanding the declaration by Judge Oda on his doubts on Mexico's motives and on the Court's inability to be petitioned for writs of *habeas corpus*, the unanimous vote of the Court shall be most important, since it will also decide to change the conservative and unsuccessful wording present in both provisional measures judgments in *Breard* and *LaGrand*, from an indicative "should take all measures at its disposal" to an authoritative "shall take all measures necessary".

The sudden turn against the United States on the strong wording used by the Court in its provisional measures, added to the declaration of the Court in *LaGrand* in the sense that the provisional measures it produces are mandatory, appeared to have left no room for any doubt or a different interpretation. The fact is that, until the judgment of the Court on the merits was delivered, no condemned Mexican under *Avena* was executed.

2. The merits

The final judgment of the Court was rendered on 31 March 2004, a little over a year since it was registered, which was considerably faster than the average. The judgment reads:

> "The Court,
>
> (1) By thirteen votes to two,
>
> Rejects the objection by the United Mexican States to the admissibility of the objections presented by the United States of America to the jurisdiction of the Court and the admissibility of the Mexican claims;
>
> (2) Unanimously,
>
> Rejects the four objections by the United States of America to the jurisdiction of the Court;
>
> (3) Unanimously,
>
> Rejects the five objections by the United States of America to the admissibility of the claims of the United Mexican States;
>
> (4) By fourteen votes to one;
>
> Finds that, by not informing, without delay upon their detention, the 51 Mexican nationals referred to in paragraph 106 (1) above of their

right under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations of 24 April 1963, the United States of America breached the obligations incumbent upon it under that subparagraph;

(...)[116]

(9) By fourteen votes to one,

Finds that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the right set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment;

(10) Unanimously,

Takes note of the commitment undertaken by the United States of America to ensure implementations of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b) , of the Vienna Convention; and finds that this commitment must be regarded as meeting the request by the United Mexican States for guarantees and assurances of non-repetition;

(11) Unanimously,

Finds that, should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment."[117]

The judgment of the Court gives a final answer to many of the claims made by Mexico and the exceptions presented by the United States of America. In its reasoning on the objections of the United States, the Court concludes that Mexico's request is under the jurisdiction of the Court, since both the Vienna Convention on the Law of Treaties in its

[116] It must be noted at this point that subparagraphs (5), (6), (7) and (8) are not considered essential for the objective of the analysis in this work and thus are not cited. They correspond to distinctions made by the Court based on the different violations to subparagraphs (a), (b) and (c) of article 36 of the VCCR in each of the 51 individual cases in the list. Such distinctions do not affect the overall obligation to due reparation through review and reconsideration stated in subparagraphs (9) and (11), which is the main theme of this work.

[117] *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004,* p. 70 para. 153.

articles 26 and 27[118] on the observance of treaties, and article 36 (2)[119] of the VCCR leave clear that the objection of an intervention upon the US legal system is out of order. As well, since Mexico presented proof on the nationality of all the detainees in the case, all other objections were overruled.

On the controversy pertaining the definition of "without delay", the Court finds that the United States breached its obligations to inform the Mexican Consulate, since it considers that the violation of rights under article 36 could prejudice the process all the way from the interrogation. In fact, in its reasoning, the Court recommends that for the compliance of this obligation in the future, the United States might consider informing of the right to consular contact in addition to the reading of the Miranda rights.[120]

Due reparation and meaningful review and reconsideration shall be linked concepts under the judgment of the Court. First, the Court reasoned that the procedural default rule had barred the lawyers of the LaGrand brothers to effectively oppose the verdict and their sentencing to death in the courts of the United States. Therefore, review and reconsideration ordered by the Court had not been provided. The same conclusion was extended to the case of the Mexican detainees.

However, the Court does not conclude that review and reconsideration have been denied in all cases, for the simple reason that not all cases have come to an exhaustion of legal resources and thus sentences are not final. It concludes so only in the cases where the verdicts and sentences are final, thus giving the United States the opportunity to repair things to their *status quo ante* in all other cases, through the procedures the same Court will outline when reasoning due reparation.

On due reparation, the Court did not consider appropriate the petition by Mexico that all sentences be annulled as a *status quo ante* reparation. Instead, the Court decided

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[118] "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*" VCLT, *supra* note 68 art. 26. "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 26.*" *Id.* art. 27.

[119] "*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.*" VCCR, art. 36 para. 2.

[120] *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004,* at 44 and 69 para. 64 and 149. It must be noted that the ICJ did take into account the United State's observation that such practice already takes place in some jurisdictions.

that, not to infringe upon the legal system of the United States, review and reconsideration shall take place "by means of its own choosing". It does note additionally in subparagraph (9), however, that such review and reconsideration chosen by the United States must "allow full weight to be given to the violation of the rights set forth in the Convention". In such thought, the Court implicitly rejects that the mere suggestion of these violations in a clemency process may count as proper review as a mean for due reparation. To put it more precisely, in paragraph 143 of its reasoning, the Court considers that clemency processes may 'complement' judicial review and reconsideration, thus allowing the opportunity for those condemned to obtain review and reconsideration, not being under the pressure and limitation of a certain death, but cannot substitute it.

Before continuing, it is important for this work to recall that the nuanced approach of the Court to this case must be fully appreciated: while the rule of procedural default, as well as verdicts and sentences like the death penalty delivered by the United States are not, as such, being considered illegal under international law; the non compliance to conventional obligations that may have led to such verdicts and sentences and impede their review is unlawful under it.

III. The aftermath and perspectives of the *Avena* Case

This chapter will describe and analyze the aftermath and perspectives of the local application of the *Avena* Case in different authority circles of the United States. It will carry special emphasis on the decision by the Supreme Court of the United States, as the most important set of arguments towards the current state of the *Avena* case.

A. The State Courts and the *Avena* Judgment

The immediate response to the *Avena* Judgment in procedure followed by the different State Courts has been erratic and varied. Following is the example on four cases and the decisions taken in different states in the legal sphere.

1. Moisés Sánchez-Llamas (Oregon)[121]

Mr. Sánchez Llamas was detained in 1999. On 4 January 2004 (three months before the issuing of the judgment by the ICJ), the Oregon Court of Appeals denied Mr. Sánchez-Llamas a petition of review he had requested in light of the violation to Article 36 of the VCCR during his interrogation, after which he was charged with attempted murder, attempted aggravated murder, and various other crimes. The decision of the Oregon Court of Appeals[122] confirmed that of the circuit court in which he had been condemned and would be later confirmed by the Supreme Court of the State of Oregon on 4 November, 2004 (seven months after the issuing of the judgment by the ICJ). Mr. Sánchez-Llamas asserted that his post-arrest statements during the interrogation should have been suppressed as a vindication of the violation of his rights under the VCCR. The decision upheld by all three courts in this case is that Article 36 of the VCCR does not create rights for individuals in a criminal proceeding. Neither *LaGrand* nor *Avena* are referenced at all in the Oregon Supreme Court reasoning, which made a great effort to interpret the Convention on its own. Even though Mr. Sánchez Llamas is neither under the list in the ICJ *Avena*

[121] State v. Sanchez-Llamas, 191 Or App 399, 84 P3d 1133 (2004)
[122] *Id.* 120 p. 2

Judgment, nor was he sentenced to death,[123] its case constitutes a paradigmatic example of the application of the VCCR, since it reached the Supreme Court of the United States.[124]

2. *Osbaldo Torres Aguilera (Oklahoma)*[125]

On 1° March 2004 (four weeks before the judgment of the ICJ was rendered), the Oklahoma Court of Criminal Appeals set the date of the execution of Mr. Torres to 18 May. On 13 May, five days before the date of the execution, responding to a *habeas corpus* request from its defense and having had the intervention of Mexico as *amicus curiae*, the Court of Criminal Appeals decided to indefinitely suspend the execution and grant Mr. Torres a hearing in a District Court. This decision was followed in the same day by the Governor's decision to commute his death penalty to life sentence, having expressly considered the violations to the VCCR in his decision. In a concurrent opinion to that of the majority of the Court of Criminal Appeals, judge Chapel observed the importance of article 6 of the Constitution of the United States of America, which grants the federal government foreign affairs authority which is binding over the States.

3. *Rafael Camargo Ojeda (Arkansas)*[126]

On 12 August 2004, the Federal District Court for the Western District of Arkansas, mentioning the violation of his rights under Article 36 of the VCCR, announced that it would commute the death penalty of Mr. Camargo to life sentence. It was indicated that, due to the absence of consular assistance, mental limitations of the accused were not signaled during the procedure.

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[123] It must be noted that, whilst all the individuals listed under Avena had been sentenced to capital punishment (a strategic move, as we have analyzed in this work); the original judgment of the ICJ refers to the review and reconsideration of violations resulting in "severe penalties", thus signaling not only death penalty cases.

[124] The case of Sánchez-Llamas before the Supreme Court of the United States shall be overviewed in subchapter C of this work.

[125] Torres v. Oklahoma, 120 P3d 1184 (Okla. Crim App. 2005)

[126] CR 2008 / 14, p. 20, paras. 2 and 3.

4. José Ernesto Medellin (Texas)[127]

On November 2006, the request of review made by the defense of José Ernesto Medellin, convicted of murder and sentenced to death in a State Court in Texas, was declined by the Texas Court of Criminal Appeals. In its decision, the Texas Court of Criminal Appeals held that "the ICJ *Avena* decision and the President's memorandum[128] do not constitute binding federal law". The United States Court of Appeals for the Fifth Circuit had held the same position on its decision from 20 May 2004 (two months after the ICJ decision), but did acknowledge the conflict with the ICJ *LaGrand* decision. A petition would be then submitted to the United States Supreme Court for a writ of certiorari.[129]

5. Other cases

In other similar cases in State Courts in which *Avena* is mentioned,[130] the idea that the VCCR does not create individual rights is held.[131] Two of such cases are considered by ICJ Justice Bruno Simma as misinterpretations of the ICJ *Avena* decision, since they justify the enforceability of such rights only under the ICJ jurisdiction and not locally, based on Article 1 of the Optional Protocol, the preamble of the Convention and the practice of the State Department.[132]

B. The *Avena* Order and the presidential strategy

The federal executive of the United States, as the maximum authority in international relations, decided that several actions would be undertaken as a comprehensive strategy to fulfil the international obligations of the United States described in the ICJ Judgment. Through a presidential memorandum and actions carried out by the

[127] *Ex parte Medellin*, 206 S.W.3d 584 (Tex. Crim. App. 2005)
[128] Further described in subchapter B of this work.
[129] The case of Medellin before the Supreme Court of the United States shall be overviewed in subchapter C of this work.
[130] Bell v. Virginia, Wisconsin v. Navarro.
[131] Mostly following the Supreme Court's 1998 *per curiam* opinion on Breard v. Greene (523 U.S. 371), in which the Supreme Court concluded both that such action was barred by procedural default and that the VCCR did not provide for a clear individual right of a foreign national in U.S. Courts. Justices Breyer, Ginsburg and Stevens dissented.
[132] SIMMA, Bruno, & HOPPE, Carsten. "From LaGrand and Avena to Medellin: A rocky road toward implementation". In TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW. (2005) p. 30

Department of Justice, the main scope of the strategy was to maintain the issue of review and reconsideration in local courts.

1. The Avena Order

On 28 February, 2005, President George W. Bush issued a Memorandum to the Attorney General of the United States, in which he addresses the issue of compliance with the Decision of the International Court of Justice in *Avena*:

> "I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena), 2004 ICJ 128 (Mar.31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."[133]

Thereafter, the Attorney General wrote to all fifty state attorney generals informing them of the president's decision and explaining the implications of such a determination. Being migration a difficult topic as it is, there's no need to explain how this decision by President Bush caused considerable media turmoil.

In the following three years, the Department of Justice, acting on behalf of the United States, briefed in cases before different criminal appeal state courts as *amicus curiae*. In such briefings, the Department of Justice affirmed that (a) each court "must permit review and reconsideration" of the applicant's VCCR claims, (b) that such review would be unfeasible without the Presidents' Order, and (c) that as a matter of federal law, the courts are required to give effect to the president's determination. Such claims were made, respectively, with arguments built upon the United States' international obligation for compliance under the United Nations Charter;[134] the holding that neither Article 36 of the VCCR or the *Avena* decision authorize private judicial enforcement; and the holding of

[133] President's determination (Feb. 28, 2005) regarding U.S. response to the Avena decision in the ICJ. <<http://www.state.gov/s/l/2005/87181.htm>> [last consulted on 28 June 2009]
[134] U.N. CHARTER art. 94 para. 1.

the authority of the President as the Nation's Chief Foreign Policy Officer under several Supreme Court judgments and the US Constitution.

Lastly, it must be noted that, in the case that the presidential order resulted effective for review and reconsideration in local courts, the fact that it only concerned those named nationals in *Avena* would make it useless for any other case not on the list. Alas, under this strategy, should any other foreign national request review and reconsideration for the violation of its rights under the VCCR, he or she could successfully raise such a claim only under the same circumstances of the 51 named nationals as in *Avena*. This is, theoretically, under an ICJ Judgment and a presidential order.

2. *Withdrawal from the Optional Protocol*

However, the possibility of obtaining a new judgment from the ICJ with a new list of detained nationals from any other country was immediately barred. A week after the issuing of the presidential memorandum, on 7 March 2005, Condoleeza Rice, then Secretary of State, sent a letter to Kofi A. Annan, then Secretary General of the United Nations. In it she notified, under the rules of procedure of the VCCR, the withdrawal of the United States from the Optional Protocol to the VCCR concerning the Compulsory Settlement of Disputes. The letter reads as follows:

> "This letter constitutes notification by the United States of America that it hereby withdraws from the aforesaid Protocol. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol."[135]

Even though this does not mean that the United States does not have to comply with its current obligations under *Avena*, nor does it mean the rejection of the VCCR per se, it does complicate the resolution of disputes that may arise in the future out of the

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[135] The text of this letter can be found at Chapter III Privileges and Immunities, diplomatic and consular relations, etc. 8. Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes. Vienna, 24 April 1963, available at << http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-8&chapter=3(=en>> [last consulted on 30 June 2009]

interpretation of this convention, both for the protection of foreign nationals in the United States and of nationals of the United States in foreign countries.[136]

3. Recommendation for not granting certiorari

As the last part of the presidential strategy for granting review and reconsideration for the foreign nationals under the *Avena* judgment, the Department of State recommended that the Supreme Court not grant certiorari on any cases concerning the VCCR, so as to assure the implementation of the strategy as it had been designed. This recommendation had two scopes. First, in order to avoid the eventual acceptance by the Supreme Court of automatic execution of the ICJ judgments in local courts, thus ensuring a controlled compliance. Second, to avoid the Supreme Court from pre-emptively barring review in local courts, so that compliance to the *Avena* judgment would follow the path originally schemed by the executive.

Ironically, it was the state of Texas that would put a juridical end to the presidential strategy. Whilst in 1998 Virginia's rejection of Secretary of State Madeleine Albright's petition for a stay in Breard's execution was supported by then governor of Texas George W. Bush, it was now Texas' Court of Criminal Appeals the one that refused to follow the presidential order on *Avena*. This case will be seen in the following subchapter.

C. The Supreme Court of the United States and U.S. Obligations

In this subchapter the holdings by the U.S. Supreme Court on relation to the VCCR shall be analyzed. Whereas *Sanchez-Llamas* and *Medellin* were the first related cases to obtain a decision from the Supreme Court, they were not, however, the first to request a writ of certiorari from it. In late 2003, Osbaldo Torres, before submitting his case to the Oklahoma Court of Criminal Appeals and the Oklahoma Pardon and Parole Board in the light of the rendering of the ICJ *Avena* judgment, as seen above, had requested certiorari from the Supreme Court. Even though it was dismissed, it is most interesting to note the

[136] Such question shall be further adressed in chapter IV of this work.

dissenting opinions to such dismissal by Justices Stevens and Breyer, eager to discuss the issue of U.S. obligations under international law.[137]

1. Sanchez-Llamas v. Oregon[138]

On 28 June, 2006, the Supreme Court of the United States decided the case that Mr. Sánchez-Llamas[139] presented against the Oregon Supreme Court. As seen before, Mr. Sánchez-Llamas' defence requested that incriminating evidence obtained during interrogation be dismissed, on the basis that the accused had no knowledge of his rights under the VCCR. In a six to three opinion, with Justices Breyer, Stevens, Souter and Ginsburg (in part) dissenting, the Supreme Court held not only that claims of violations under Article 36 of the VCCR not presented in due time could be barred by procedural default,[140] but that, notwithstanding a violation to the VCCR for the acquiring of information, such information could be admitted as evidence against defendants.[141] Also, the Supreme Court held, as it did in Breard v. Greene, that ICJ rulings are only entitled to "respectful consideration" but not directly enforceable in United States Courts.[142]

2. Medellin v. Texas

After the Texas Court of Criminal Appeals upheld the decision that both *Avena* and the president's memorandum were not binding federal law and refused to provide the review ordered in both of them, Mr. Medellin's defence petitioned for a writ of certiorari from the Supreme Court and obtained it on 30 April, 2007.[143]

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[137] Torres v. Mullin, 540 U.S. 1035-41 (2003)

[138] Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006)

[139] As mentioned above, Mr. Sanchez-Llamas is not a named national in the Avena case, and shall thus serve as an example for the legal consequences of Avena on non-listed nationals with severe penalties.

[140] Coherently with its 1998 opinion on Breard v. Greene, already mentioned in foot note 120.

[141] Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006)

[142] Sanchez-Llamas, 126 S. Ct. at 2685, 2687.

[143] This was the second time a writ of certiorari would be granted from the Supreme Court to Medellin. The first one was granted in late 2004 for Medellin v. Dretke, before the president's memorandum was issued. In Medellin v. Dretke, the questions presented to the Supreme Court were "(...) must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the Avena holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?" and "(...) should a court in the United States give effect to the LaGrand and Avena Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?". However, after the memorandum was issued, in March 2005, Mr. Medellin's defense applied for a writ of habeas corpus at the state level, relying on the newly available resources, and requested the

While we have seen the response towards the VCCR in Sánchez-Llamas, the reasoning of the Supreme Court in *Medellin* is a most interesting case. The questions this time were on the obligation to recognize and enforce the ICJ judgment, whether per se or through the president's memorandum.[144] Therefore, the decision of the Supreme Court will not deal with the interpretation of the VCCR rights entitlement anymore, but rather with the application of other treaties in the United States, such as the United Nations Charter and the Statute of the International Court of Justice, from whose texts the obligation to comply with ICJ rulings derives.[145]

Prima facie, the application of obligations derived from an international treaty within the United States would suppose no obstacles, for the Constitution of the United States provides, in Article VI:

> "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."[146]

A more factual analysis tells otherwise: Notwithstanding the notion set forth in the Constitution, practice indicates that not all Treaties entered into by the United States get to constitute 'the supreme law of the land', or at least, not automatically. With a very

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Supreme Court stay its proceedings pending the Texas decision. Nevertheless, the Supreme Court proceeded to hear oral arguments on March 28, 2005, and decided (five to four) to dismiss the application for certiorari as improvidently granted two months later. Medellin v. Dretke, 125 S. Ct. at 2092 (2005). (Per curiam). Justices Souter, Breyer, Stevens and O'Connor dissenting, relying on the importance of the questions raised in Medellin since the last related case presented before them was Breard v. Greene, which was not supported by an ICJ final judgment. Justice Souter goes as far as stating in his dissenting opinion that "This case is therefore not Breard, and the Court of Appeals should be free to take a fresh look." Id. At 2106 (Souter, J., dissenting). While Medellin was pending decision in Texas, Sanchez Llamas v. Oregon was accepted and decided upon by the Supreme Court, setting another not very optimistic precedent with a minimal majority.

[144] Questions presented to the Supreme Court in Medellin v. Texas were: "Is the ICJ's judgment in Avena directly enforceable as domestic law in a state court in the United States?" and "Does the President's Memorandum independently require the States to provide review and reconsideration of the claims of the 51 Mexican nationals named in Avena without regard to state procedural default rules?".

[145] Thus the importance of the extensive explanation of such documents in Chapter I. It is recommended such initial comments are reviewed.

[146] U.S. CONST. art. VI cl. 2.

controversial reasoning, the Supreme Court stated in its decision on *Medellin* that, since Article 94 (1) of the UN Charter merely suggests that Member States "undertake to comply" the decisions of the ICJ, they are not bound to comply with them, as the use of a more authoritative language by the Charter drafters may have indicated.

According to the Supreme Court's interpretation, the writing in the Charter also connotes that compliance with ICJ decisions is not a self-executing provision, since the parties' 'undertaking to comply' means they would implement -*voir* legislate- the necessary measures within their own jurisdiction so as to delineate how each country would give local effect to ICJ judgments. Moreover, the fact that Article 94 (2) of the Charter references the UNSC as the only enforcer of ICJ decisions when facing non compliance, led the Supreme Court to interpret that domestic courts are not supposed to be the ones that carry with the last resource compliance burden to an ICJ ruling without an order from the UNSC. The Supreme Court based this thesis on the reliance of the Charter drafters on the UNSC as the sole enforcement mechanism,

Given that the UN Charter and the Statute are not enforceable as domestic law, or, as it was specified, none are "self-executing treaties" in the United States,[147] they are not enforceable in domestic courts. Following such a line of thought, only the recognition of a particular judgment by the competent United States Authorities would make it enforceable within the United States.[148]

Such recognition would be embodied, at least in theory, by the President's Memorandum, which the Supreme Court will discuss in the second question surrounding *Medellin*. However, a similar negative response was given to the question on the validity of the President's memorandum trumping state law.

In order for the unfamiliar reader to understand such reasoning fully, the author sees it useful to remind him or her that, since the constitution of the United States, the notion of a system of checks and balances prevails in relations amongst the executive, legislative and

[147] Notwithstanding the fact that the treaty was signed by the executive and ratified by a two-thirds majority in the Senate.

[148] Then again, this leaves our question un-answered. What to do when compliance is not followed locally since international responsibility has not been fulfilled?

judicial branches of government, and between federal and local authorities. Such overall sense of equity amongst powers is an important notion still observable in the United States.

Thus, the Supreme Court found itself in the middle of a doctrinal confrontation: traditional pre-eminence of state authority over criminal proceedings against presidential foreign affairs authority. In most cases, the authority of the federation will overrule state proceedings. However, in this case the contrary will be held, for, in the Supreme Court's statement, the federal executive can only exercise such supremacy when at its highest dominance –in a checks and balances logic. In other words, the authority of the United States gathers its greatest strength when backed by all three branches of government, and thus is undermined the most when they oppose each other.

Even though the president's memorandum did not find open congressional opposition that would weaken it, the Supreme Court was of the opinion that neither did it generate expressions supporting it that would imply the will of the legislative branch to back the federal action against a state. Therefore, according to the reasoning of the Supreme Court, the president's memorandum was not a measure powerful enough to override state procedures. Furthermore, the Supreme Court considered that such a measure was unavailable under the U.S. Constitution as binding federal law.

The Supreme Court concluded on 25 March 2008, with a six Justices majority, a concurrent opinion by Justice Stevens and dissenting opinions by Justices Breyer, Sourter and Ginsberg, that:

> "(...) neither Avena nor the President's Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions. (...) The judgment of the Texas Court of Criminal Appeals is affirmed. It is so ordered."

After the judgment was issued by the Supreme Court, Texas scheduled the execution of Mr. Medellin on 5 August 2008. Nearing the date of the execution, Mr. Medellin requested the Supreme Court a stay on his execution and a petition for a writ of habeas corpus, based on new developments in both the national and international

spheres.[149] The Supreme Court denied such requests on 5 August 2008[150] and some hours after Mr. Medellin was executed, notwithstanding the calls made to Texas Governor Rick Perry by both the Mexican Government and the State Department of the United States, requesting that he stay the execution.

D. Mexico's Request for Interpretation

After the Supreme Court's decision on the questions pertaining *Medellin v. Texas*, it became increasingly difficult for advocates to defend the VCCR rights of the Mexicans named in the *Avena* judgment in local courts. Whereas initially the State Department would file as *amicus curiae* in favour of those Mexican nationals whose rights had been stepped on or barred from being invoked, after the pronunciation of the Supreme Court on this case it did not only retreat its support, but it filed as *amicus curiae* in favour of the respondent.

1. A new case before the ICJ

As Medellin's execution neared, the Mexican government ran out of options to oblige the United States to comply with the ICJ ruling on *Avena*. In a desperate dead end, Mexico decided to rely on Article 60 of the Statute of the Court, which provides that in the event of a dispute as to the meaning or scope of the judgment, any of the parties may request the Court to construe upon it. Being so, in June 2008 Mexico filed before the registrar of the ICJ a Request for Interpretation on its own *Avena* judgment, accompanied with a Request for provisional measures.

The Court, while critic in its response,[151] did grant a month later a provisional measures order[152] to ensure Medellin and other five Mexicans named in *Avena* would be

[149] Both developments will be further presented and discussed in this work in subchapter D and chapter IV.

[150] Justices Breyer, Ginsburg, Souter and Stevens dissented of this rejection, taking note that the execution would place the United States in direct violation of its international responsibilities.

[151] Justices Buergenthal, Owada, Tomka, Keith and Skotnikov presented dissenting opinions with the order. However, while most of them had to do with the pertinence of the Mexican request for interpretation and the jurisdiction of the Court to pursue it, all of them underlined the United States had not discharged its international obligation, and that the execution of Medellin without due review and reconsideration would irreparably breach such obligations. They all agreed such matters had already been solved by the Court in the Avena Judgment and saw no point in reviewing the condition of result the United States agents had agreed to pursue when the judgment was delivered.

kept alive pending and ICJ judgment on the request for interpretation. Nevertheless, while the tone in the ICJ's Order was as authoritative as it had been in 2003, and while the Order was presented in Medellin's last request for a writ of habeas corpus to the Supreme Court and by the State Department to the government of Texas, it did not succeed in deterring the Texan Authorities from proceeding with Medellin's execution.

2. An unexpected response

Finally, on 19 January 2009, the ICJ issued its final judgment on Mexico's request for interpretation on *Avena*, whose operative clauses read as follows:

> THE COURT,
>
> (1) By eleven votes to one,
>
> *Finds* that the matters claimed by the United Mexican States to be an issue between the Parties, requiring an interpretation under Article 60 of the Statute, are not matters which have been decided by the Court in its Judgment of 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*, including paragraph 153 (9), and thus cannot give rise to the interpretation requested by the United Mexican States;
>
> (2) Unanimously,
>
> *Finds* that the United States of America has breached the obligation incumbent upon it under the Order indicating provisional measures of 16 July 2008, in the case of Mr. José Ernesto Medellín Rojas;
>
> (3) By eleven votes to one,
>
> *Reaffirms* the continuing binding character of the obligations of the United States of America under paragraph 153 (9) of the *Avena* Judgment and *takes note* of the undertakings given by the United States of America in these proceedings;
>
> (4) By eleven votes to one,
>
> *Declines*, in these circumstances, the request of the United Mexican States for the Court to order the United States of America to provide guarantees of non-repetition;
>
> (5) By eleven votes to one,

[152] Request for interpretation of the judgment of 31 March 2004 in the case concerning *Avena and other Mexican Nationals (Mexico v. United States of America)* (Mexico v. United States of America) – Order indicating Provisional Measures

Rejects all further submissions of the United Mexican States.[153]

For the ICJ, the criteria taken in its *Avena* Judgment is clear and must be followed by the United States. In a bold action, decides unanimously to mention the United States breach by executing Mr. Medellin. At the same time, it takes note of the good will shown towards compliance by the United States agents, notwithstanding the fact that no conclusive result had been delivered following the order for review and reconsideration given in the *Avena* Judgment.

Unexpectedly, this Judgment puts an end to any further procedures under the jurisdiction of the ICJ on the matter and leaves no other course of action for proposals than those that fall under the sovereignty of the United States.

[153] Request for interpretation of the judgment of 31 March 2004 in the case concerning *Avena and other Mexican Nationals (Mexico v. United States of America)* (Mexico v. United States of America) – Judgment of 19 January 2009, p. 18-19

IV. Prospective

After the 2009 Judgment on Mexico's request for interpretation, it is clear that the ICJ will not entertain any more judicial elements from Mexico seeking to delay an execution. While it is clear that any further execution would be a flagrant violation to the United States international obligations and most of the justices ICJ see no point in re-stating the binding character of its 2004 *Avena* Judgment in a new case, most Mexican nationals condemned to death are still in high risk of being executed in the United States without the violation to their VCCR rights properly repaired. Alternative scenarios and solutions are analyzed in this chapter.

A. Impact on United States Foreign Action

Foreign action of the United States during George W. Bush's presidency was heavily criticized. Most actions taken within the United Nations framework worked in the direction of a growing isolationism, and matters related to international law were no exception to that hard line, shown in its anti-terrorism policies and military tribunals.

1. The result of years of isolationism

As previously discussed in section III.B. of this work, the presidential strategy regarding the *Avena* Judgment did not only result to be badly planned in its implementation within the United States, but now seems to carry additional future burdens against United States citizens.

Apart from harshening the solution of consular issues with the countries it confronted before the ICJ and with other countries whose nationals have been detained and sentenced to severe penalties in the United States, the presidential strategy to retire the United States from the Optional Protocol for the Resolution of Disputes of the VCCR may actually end harming its own citizens.

2. The retirement of the Optional Protocol: against the best interest of United States citizens

It is true that by retiring itself from the Optional Protocol, the United States government prevented other countries from initiating a fourth case against it before the ICJ, but at the same time, it prevents the United States from further claiming the jurisdiction of the ICJ on dispute resolution on questions pertaining the VCCR. Thus, such retirement reduces the options for the peaceful resolution of disputes over American citizens detained abroad.

Eleven years ago -and seven years before the United States retreated from the Optional Protocol-, H. E. Stephen M. Scwebel, United States' ICJ Justice for two decades and at the time President of the ICJ dealing with the provisional measures Order in favour of Mr. Breard, noted:

> "The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States)."[154]

When questioned by the United States Senate Committee on Foreign Relations on the consequences of withdrawing from the Optional Protocol, State Department officials stated that it would not affect United States citizens given the training provided for US Consular Officers abroad. Nevertheless, reciprocity on the respect of VCCR rights and obligations may prove of importance for such bold affirmation to work, for the United States has deprived itself of a powerful dispute resolution tool on this matter. Farther from the VCCR particular implications, such unilateral dismissal of international judicial orders and treaty provisions may put the United States in a difficult position when it decides to get involved in other international agreements.

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[154] *Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)* Declaration of Judge Schwebel appended to the unanimous Order of 9 April 1998, I.C.J. Reports 1998, p. 259

B. Solutions provided in the United Nations Charter

As already stated in sections I.B.1, I.D.2 and III.D.2 of this work, there are several alternatives for the peaceful settlement of disputes within the United Nations framework. Such options escalate through mediation efforts all the way to cohesive action against a Member State that does not comply with previous efforts and agreements on dispute resolution. Since the pyramid of available procedures shortens after an ICJ Judgment has been issued on a specific matter, this subchapter will deal with the availability of such procedures.

1. Rules considering non compliance

Article 94 (2) of the UN Charter contemplates the actions on the eventual case of a party failing to perform its obligations under an ICJ judgment. In such a case, the affected party "may have recourse to the Security Council", and as this body deems it necessary, it may issue recommendations or take measures. This article specifies that such actions are "to be taken to give effect to the judgment", allegedly, towards the same sense of the reasoning of the ICJ.

2. Previous cases and requests

Three examples of UNSC actions backed by ICJ Judgments will be shown. Two of them, the US Embassy hostages in Iran case and the Advisory Opinion on the Construction of a Wall in the Palestinian Territory, have already been reviewed in this work. The third case used will be the Advisory Opinion on the Western Sahara.[155]

In the case of the US hostages in Iran, in which VCCR violations were considered by the ICJ, the intent of passing a UNSC resolution against Iran, in order to enforce the ICJ Judgment, proved unsuccessful because of political reasons, receiving a veto by the Soviet Union. Even though six years later, through its resolution 579, in which the Security Council condemns kidnapping and hostage retaining practices supporting itself in various international conventions, the Security Council refrains from even referring or supporting its resolution on ICJ Judgments, not even as valuable judicial developments on the matter.

[155] Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12

In the case of the Advisory Opinion of the ICJ regarding the Western Sahara, the un-willingness of Morocco to take into account the opinion of the Court, which qualifies its claims to the western Saharan territory as unfounded, has driven negotiations as early as 1988 to practically ignore or avoid mentioning the Opinion of the ICJ as a valid background to settle the issue. For twenty years since, the UNSC annual resolutions on the Western Sahara have not mentioned the Opinion of the Court, as it has proven to be harmful to Morocco's willingness to negotiate on the conflict with the Arab Saharaoui Democratic Republic. Hence, in this case, the UNSC has privileged the political solution of a referendum, notwithstanding the presence of a legal opinion on the subject issued by a body of the same system.

In the case of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the result has been so far similar to the other two presented. In it, the ICJ deems the construction of the security wall as contrary to International Law thus obligating Israel to dismantle it, and considers the UNSC under the obligation to "consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall (...) taking due account of the present Advisory Opinion." Of the three UNSC resolutions issued after this Opinion, none has specifically ordered such measures.

While the last two examples presented are advisory opinions requested by the UNGA to the ICJ and not actual Judgments, the lack of compromise towards the solution of these problems with the construction of a strong legal backbone show how independent the actions of the Security Council regarding support to ICJ decisions tend to be, and a proof of how ineffective may be the intervention of the UNSC in order to bring a solution to the *Avena* issue.

3. *Vetoing and justice: fairness in the one coercion body*

Even if the possibility of gathering support within the voting members of the UNSC is foreseeable, so is the possibility of not one, but two permanent members voting against it. It must be taken into account that the *Avena* Judgment may be seen, as the United States

argued before the ICJ, an intrusive and dangerous precedent against sovereignty. If seen as such, it would fit in the record of vetoes employed by the People's Republic of China.

On the other hand, a veto by the United States seems in order, notwithstanding the ICJ's recognition of the willingness of the United States to comply with its judgment, since the United States so declared during the hearings of the *Avena* Judgment interpretation in 2008. Even though the United States' federal executive has taken coherent actions towards achieving the obligation of result it bears under *Avena*, the eventual pressure of the United States Senate against the executive if it were not to veto a UNSC action against the United States seems too scandalous, making it even more difficult for internal actions to be taken in order to fulfil the United States international obligation.

In the end, if Mexico were to take the issue before the UNSC, a veto would have two important consequences. First, a veto would bring a new legal dead end for the *Avena* Judgment and a politically awkward situation in its relation with the United States and Mexico's acting as UNSC member ending until December 2010. Second, while the examples provided above were to a certain degree neutral towards the ICJ by ignoring it, an actual opposition of a UNSC resolution against an ICJ Judgment would draw a disastrous precedent, undermining the very coherence of the system.

Under such a perspective, trying to invoke the provisions of Article 94 (2) of the UN Charter into action without considering the possibility of a veto –which wouldn't be an easy position to the United States either-, even if such request is a lawful procedure under the Charter, can actually be seen as irresponsible. This would be, contrary to Mexico's proposals and declarations on the importance of international law and counterproductive against the complying attitude shown by the United States executive in international fora in the recent months.

4. Possibilities of the UNSC tabling the issue

Nevertheless, since Article 94(2) indicates that in such cases the UNSC can make recommendations or take actions, a suitable approach for Mexico might be that of striving for the UNSC to issue a recommendation rather than risking on asking it to take action against the United States' non compliance.

While the separate diplomatic intervention of different countries, including a letter by the European Parliament inviting the United States to comply with the *Avena* Judgment have proven unsuccessful actions, the opening of a forum in which the different member countries of the UNSC and invited UN members discuss the implications of the *Avena* Judgment may prove a useful tool, both for the advancement of similar situations in different countries, including within Mexico's legal framework, and as an important call upon the actors in the United States to take the necessary actions for the Judgment to be implemented.

C. The necessary formulation of consistent actions within the United States

Whereas the federal executive of the United States has repeatedly shown a certain independent commitment to implement the necessary actions to comply with the *Avena* Judgment, through this work it became clear that it is not, under its own constitutional law, powerful enough to accomplish such actions on its own. In other words, the United States' compliance towards international obligation, while not excused by local law, is currently pending on the time its constituent powers take to develop an adequate response, but not directly on an unwillingness to comply *per se*. Nevertheless, for such timing to be effective and acceptable, it must maintain a reasonable rhythm.

1. Through the Legislative branch

As it has been suggested in section III.C.2. of this work, congressional support to a presidential action to override state judicial procedures might, in theory, make the action successful. It can be stated as well that an Act approved by both chambers of Congress and then signed by the President would have the same effect.

Though not very much commented, in 14 July 2008, beginning the last quarter of the 110th Congress, an Act intending to create a civil action to provide judicial remedies to carry out VCCR obligations was introduced in the House of Representatives by Democrat California Representative Howard Berman. Named as the *Avena Case Implementation Act*, it was co-sponsored by three fellow Democrats from California, Michigan and Massachusetts and referred to the Judiciary Committee.

The original text of the Act set an optimistic expectative for it accounted violations committed previous to its enactment and did not limit relief only to those named Mexican nationals in *Avena*, as the presidential memorandum did. Mr. Medellin's defence took note of such introduction some days later and mentioned the possible enactment of relevant legislation in Congress as a motive to stay the execution in its last recourse before the Supreme Court. Nevertheless, the Supreme Court considered such enactment as improbable and, as we have reviewed, decided not to grant such grace.

Until the end of the 110th Congress in 3 January 2009, the bill was never reported by the Committee and thus was far from being voted by the House, proving the Supreme Court's assumption to be accurate. Even if it had been reviewed by the Judiciary Committee, the outcome of a hypothetic vote in the House was uncertain, notwithstanding if Democrats accounted for 54% of the seats.

2. Through the United States Judicial System

The divided record of decisions within the Supreme Court regarding the granting of review and reconsideration based solely on VCCR related claims leads to presume a willingness of the Supreme Court to review the issue. Even though the Supreme Court seems harsh to accept further submissions that rely on international law not enacted by Congress, two alternatives for the respect of VCCR rights based in local law seem to be a suitable remedy, if only for some cases.

On 9 September 2008, the United States Court of Appeals for the Seventh Circuit decided the case of Jhonbull Osagiede, a Nigerian national who filed for habeas corpus on the basis of ineffective assistance of counsel, which had failed to inform him, among other things, of his VCCR rights. Basing itself on previous decisions denying the effectiveness of VCCR violations statements later in the procedure, in 2006 the District Court of the Northern District of Illinois had deemed malpractice of counsel as non existent since "failing to raise an argument likely to fail is not professionally incompetent behaviour." However, the higher court decided to grant his habeas petition considering that there was a reasonable probability that the outcome would have been different had his Six Amendment

right to counsel –that is, had the detainee been advised by his counsel of his VCCR rights- been sheltered.

Such nuanced constitutional perspective resulted effective in granting a certain level of review. Nevertheless, the author of this work believes that, even if this precedent would make counsellors more aware of their duty when representing foreign nationals and would hopefully reduce the number of future cases, its applicability would only extend to early stages of appeal and would not give an answer to advanced cases.

A second alternative for the prevention of further cases on this matter could be an enhancement of the Miranda warning in order to notify the detainee of his consular contact rights immediately upon detention.[156] Doing so would not contradict the consideration by the Supreme Court that the detainee is not individually entitled to such right, but would avoid the right of the sending state be breached by the United States. Such proposal, even if ambitious, would greatly cooperate in repairing the United States image of non-willingness to comply with its international agreements.

[156] Even though such an action could in theory be enacted by the legislative, given the origin of and the 2004 enhancements of Miranda-related rights in cases before the Supreme Court, it would be suitable for such body to begin the transition.

V. Conclusions and proposals

As a last part of this work, the author notes some brief thoughts on further developments on the protection of consular rights.

A. Due Process of Law

The importance of the Advisory Opinion of the Inter-American Court of Human Rights remains vital for further cases elsewhere. Only a brief introduction was given in this work since the United States is not a party to the Protocol of San José and therefore it is not a subject to the ICHR jurisdiction. Nevertheless, the perspective that the ICHR provides in its analysis constitutes a much stronger tool for the enforcement of VCCR rights in the Americas, relying on their importance in due process and their enforceability by the individual.

Even though the decision on *Medellin* must be understood as a great victory for federalism in the United States, for the Supreme Court does recognize the obligation to comply under international law, it remains, to the eyes of the author, a decision that dangerously procrastinates or neglects, if only temporarily, to deal with the problematic on the domestic enforcement and effect of treaties in the United States, notwithstanding its serious counter position against due process of law.

Due process of law, ironically, as briefly reviewed in the section dealing with the formulation of consistent doctrine through the United States Courts, seems a suitable argument for the current rejection of intrusive measures within the United States legal system. In 2006 already and relying on *LaGrand* and *Avena*, the Bundesverfassungsgericht, Germany's Federal Constitutional Court, determined that its criminal courts should consider the legal consequences of a violation under the VCCR, since failure to do so constitutes, under German law, an infraction upon a defendant's right to fair trial.[157] In the same sense, jurisprudence in the United States could lead towards such solution under the protection given by its sixth and fourteenth constitutional amendments.

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[157] BUNDESVERFASSUNGSGERICHT [Federal Bureau of Documents], 2 BvR 2115/01, (Sept. 19, 2006) available at <<http://www.bundesverfassungsgericht.de/entscheidungen/rk20060919_2bvr211501.html>> [last accessed on 16 July 2009]

B. Judicial Comity

It is important to signal that the presidential memorandum based the reason of its action on reciprocity with other countries by signalling such reciprocity as a condition *sine qua non* for review and reconsideration to take place. Had the memorandum succeeded, it would have not only been limited to the listed Mexican nationals, but its future application towards correcting similar violations would be subject to the concession of reciprocal grace by the sending state.

If future proposals to implement *Avena* were to be based on general principles of comity, such condition could politically bias judicial procedures. legally creating a difference between nationalities when being judged in a criminal court in the United States. Such deviation would legally make certain nationalities more vulnerable to judicial mistakes than others. The author of this work believes that, should the proper mechanisms for review and reconsideration in the case of VCCR violations be designed, such mechanisms must rely on the effectiveness and fairness of Law and not on the humour of politics or politicians.

C. International Judicial Activism

In its dissenting opinion of the Judgment of 19 January 2003 on Mexico's request for interpretation, ICJ Justice Bernardo Sepúlveda regrets that, by not signaling the United States failure to comply with the *Avena* Judgment, the ICJ has missed and ignored an opportunity, in his opinion, to "adjudge the consequences of internationally wrongful acts of a State", therefore halting the development of international law and not responding to the conflict between conflicting interpretations of the Judgment.

While the author of this work considers the activism of the greatest minds present in the highest tribunals both nationally and internationally as a key factor for a straightforward development of the regime of law, he also believes that urgency must not precede importance and caution. It must be remarked that tribunals evolve cautiously, and in doing so they assure the pertinence and weight of their decisions. The fact that both the ICJ and the ICHR decided to advance together towards a new paradigm in human rights protection

must be regarded as a considerable advancement for a ten year evolution, as constantly noted throughout this text.

D. The need for a stronger International Justice System

On a UNSC meeting on the Pacific Settlement of Disputes in May of 2003, ICJ Justice Nabil Elaraby signalled the importance for the UNSC and the ICJ to act, he said, "in tandem". The need for a closer work of the UNSC and the ICJ is just one of the different options needed for the International Justice System to be enhanced. As seen in the introductory chapters of this work, non compliance can be expected when few of the states accept the importance of the peaceful resolution of disputes via judicial procedures. Actors in the world stage cannot be conceived anymore as free agents without responsibilities, acting with an individual agenda and without regard to the importance of international law.

E. Developments within the United States and further questions

It is clear that the solution for the current case of the Mexican nationals named under *Avena*, the main theme of this work, is now in the hands of policy makers and judges in the United States. Nevertheless, it must be noted that the international effort for the protection of consular rights remains an important theme in international relations and will bring further complexity as relations among states grow more interdependent.

The *Avena* case, the final one in a trilogy before the International Court of Justice and a starting point for a succession of foreseeable cases before the Inter-American Court of Human Rights, delineates the different scenarios and possibilities for similar situations all throughout the orb. Lessons from this case must be most useful for Mexico's reflection, whose internal practice of fundamental rights and foreign speech on international compliance are distanced with an increasing gap, which is an important topic to be analyzed in latter works.

Germany, whose case before the ICJ was briefly mentioned through this work, is a good example of the measures the United States could take to realign its jurisprudence with that of the ICJ. It is also a clear example of the measures Mexico should approach to assure that the treatment it demands abroad be provided in its own territory.

1. New president, new strategies?

The election of senators Barack Obama and Joseph Biden Jr. to the White House and the turn of ruling party pose an optimistic panorama for the near future on the attitude of the United States towards international law and responsibility.

The change led by President Obama can be seen within three particular initiatives: the new attitude of the United States Government vis à vis the International Criminal Court, the successful candidacy for a membership at the United Nations' Human Rights Council, and an important diplomatic activeness rather than just a foreign policy.

Biden, on the other hand, having participated as Chariman or Ranking Member of the Senate Judiciary Committee for 17 years -particularly on criminal justice issues- and at the Senate Foreign Relations Committee for the last decade, poses important experience for an equitable solution to be found.

Whereas throughout this work the available judicial options for the implementation of the *Avena* Judgment have been described as growing rare and desperate, the author is hopeful that the changes in the Government permit the renewal of the effort once portrayed in section II.A. of this work, that is, the return to diplomatic understanding on the matter. Under such possibility, the establishment of a bilateral presidential committee of experts to study the question may prove of great utility to solve the situation of the Mexican nationals still detained.

2. The renewal of the Supreme Court, a possibility for realignment?

Whereas the recent changes in the Supreme Court of the United States signified no alteration in its vote-equilibrium, a change in its perspective is not at ease. During the recent Sotomayor's hearings in the Senate it can be inferred, by the extent of the examination, the Senate's preoccupation over many issues.

The first and most important one: judicial activism overcoming common sense. Senators attacked fiercely at the thought that the judges erode the texts of the Constitution by creating new rights, diverging away from the plan of the founding fathers. In doing so, judges also overcome the labour of the legislative. Congress, as they remarked, is the will

and voice of the people, and they can't allow judges at the Supreme Court to rule controversially on delicate issues.

Notwithstanding the historic relevance of the current renewal in the Supreme Court, it seems that future developments towards realignment on this matter may follow the same line projected in the last chapter of this work; with a tremendous step back should the Supreme Court overturn the 7th Circuit's decision on Osagiede. However, should a change in the Supreme Court's equilibrium happen and based on the opinions expressed in dissents seen so far allow this author to predict a step forward towards realignment with ICJ doctrine.

3. How far is the Congress of the United States willing to comply?

So far, no bill has been introduced at the federal level indicating the enactment of actions towards compliance with the ICJ Judgment in particular or to the recognition of VCCR rights in general. It would seem that the current composition of both the House of Representatives and the Senate could be favourable to such an introduction, since both are dominated by Democrats at a 3/2 ratio and it was a far left Democrat that introduced the *Avena* Act one year ago.

Nevertheless, during Sotomayor's hearings, another important concern was related to Sotomayor allegedly following foreign legislation in her judgments. Even though the question is not directly connected to this case and mostly irrelevant, the fact that it is present in the collective mind of Congress, as is the immigration issue, would make an *Avena* Act subject to strong criticism. Again, Bilateral Congressional meetings could be an ideal forum for treating the issue, thus the importance of Mexican legislators aware of such delicate theme between both countries.

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