ENFORCING THE *AVENA* DECISION IN U.S. COURTS

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The *Avena* decision[1] concerned Article 36 of the Vienna Convention on Consular Relations, a treaty that the United States ratified in 1969.[2] Article 36 provides that a party country that arrests a national from another party country is required to advise the national that he can communicate with and seek assistance from his consulate.[3] An Optional Protocol to this Convention, which the United States also ratified in 1969 but recently withdrew from, provides that the International Court of Justice (ICJ) at The Hague has jurisdiction to hear disputes "arising out of the interpretation or application of the Convention."[4]

The ICJ has heard several cases involving violations of Article 36 by the United States: the *Breard* case brought by Paraguay,[5] the *LaGrand* case brought by Germany,[6] and most recently the *Avena* case brought by Mexico.[7] In its *Avena* decision, the ICJ held that Article 36 confers individual rights, that the United States violated those rights with respect to fifty-one Mexican nationals, and that, as a remedy for these violations, in cases involving severe penalties, the United States was re-

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1. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

2. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

3. *Id.* at 100–01, 596 U.N.T.S. at 292–94.

4. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 324, 596 U.N.T.S. 487 [hereinafter Optional Protocol]. The United States withdrew from the Optional Protocol in 2005. Letter from Condoleezza Rice, U.S. Secretary of State, to Kofi Annan, U.N. Secretary-General (Mar. 7, 2005), http://untreaty.un.org/English/CNs/2005/101_200/186E.doc.

5. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9).

6. LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

7. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

quired to provide the Mexican nationals with review and reconsideration of their convictions and sentences, notwithstanding any rules of procedural default that might otherwise bar such review and reconsideration.[8] The domestic effect of this decision is currently being litigated, both in cases involving the Mexican nationals directly discussed in the *Avena* decision, and in cases involving foreign nationals not directly covered by the decision but with respect to whom the Vienna Convention was violated.[9]

This Article makes three points: First, even though the *Avena* decision is binding on the United States internationally, the United States legal system should not give direct effect to the decision. Second, the general concept of "comity" does not provide a basis for automatically accepting the ICJ's treaty interpretation in *Avena*. Third, it may nevertheless be appropriate for United States courts to give some deference to the ICJ's treaty interpretation to the extent that the treaty is ambiguous and the ICJ's interpretation is reasonable. I will then describe what I believe the implications of these three points are for current litigation in the United States concerning violations of the Vienna Convention.

My first argument is that the United States legal system should not give direct effect to the ICJ's decision in *Avena*—or, indeed, to any ICJ decision. That an international tribunal's decision is binding on the United States does not reveal anything about the domestic legal status of the decision. Both the United States and the international community have consistently regarded international obligations and domestic implementation as separate questions. The ICJ itself has stated in its Vienna Convention decisions, including *Avena*, that the United States could implement the decisions "by means of its own choosing."[10]

Those who advocate giving the *Avena* decision direct effect would allow the decision to override otherwise applicable state law and state judicial decisions.[11] In other words, the advocates

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8. *Avena*, 2004 I.C.J. at 64–67.

9. *See* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006); *see also Ex Parte* Medellin, No. AP-75207, 2006 WL 3302639 (Tex. Crim. App. Nov. 15, 2006).

10. *Avena*, 2004 I.C.J. at 60–63; *LaGrand*, 2001 I.C.J. at 516.

11. *See, e.g.*, Linda E. Carter, *Lessons from* Avena*: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations*, 15 DUKE J. COMP. & INT'L. L. 259 (2005) (discussing, in general, how the United States should implement the *Avena* decision).

are arguing that the decision should be given the status in the United States of preemptive federal law.[12] The Supremacy Clause of the U.S. Constitution, however, states that there are only three types of supreme federal law: federal statutes, treaties, and the Constitution itself.[13] Thus international judicial decisions are not themselves supreme federal law under our Constitution.

There is nothing in the United States treaty relationship with the ICJ that suggests that ICJ decisions will have direct domestic legal effect. Article 59 of the ICJ Statute provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."[14] In addition, the United Nations Charter simply provides that nations "undertak[e] to comply" with decisions of the ICJ to which they are a party, with no suggestion of any automatic judicial enforceability.[15] Furthermore, the only mechanism for enforcing ICJ decisions that the Charter provides is enforcement through the United Nations Security Council.[16]

If the United States legal system were to give direct effect to the *Avena* decision, this action would raise several constitutional concerns. First, ICJ judges are not subject to the appointment and life tenure provisions set forth for the federal judiciary in Article III of the Constitution, making it problematic to vest ICJ judges with the authority to displace United States laws and decisions directly.[17] In addition, because the *Avena* decision would override state criminal laws and procedures—matters that the Supreme Court has said are an important part of state sovereignty[18]—such direct effectuation would

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12. *See, e.g.*, *id.* at 276–77 (discussing different approaches that the United States legal system could take to implement the *Avena* decision).

13. U.S. CONST. art VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

14. Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, 1062, T.S. No. 993 [hereinafter Statute].

15. U.N. Charter art. 94, para. 1.

16. *Id.* at para. 2.

17. *Compare* U.S. CONST. art. III, § 1 (providing that federal judges shall hold their offices "during good Behaviour"), *with* Statute, *supra* note 14, at art. 3 and art. 4 (providing that the ICJ be comprised of fifteen judges who are elected by the U.N. General Assembly and Security Council).

18. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 729 (1991) (holding that an adequate state procedural ground can bar federal review of a constitutional claim).

raise federalism concerns. Giving direct judicial effect to an international decision such as *Avena* would also undermine the flexibility of the political branches in deciding whether and how to comply with a particular ruling. Moreover, treating cases such as *Avena* as domestic precedent could make the political branches less willing to consent to international adjudication in the future.

My second argument is that the concept of "comity" does not warrant automatic acceptance by United States courts of the ICJ's reasoning in *Avena*. United States courts often provide some "comity," or respect to foreign decisions, and therefore recognize and enforce them.[19] A French contract judgment, for example, may well be enforced in a federal court.[20] Even though courts in the United States often provide comity to foreign legal decisions, there are a number of differences between giving deference in that context and giving precedential effect to an ICJ decision. The notion of comity stems from respect for equivalent sovereign states and thus does not necessarily apply to a state's relationship with an international institution.[21] More importantly, when United States courts enforce foreign judgments as a matter of comity, they do so only for the actual parties to the judgment.[22] The only parties to the *Avena* decision, however, were the United States and Mexico, not the individuals seeking to have that decision given direct effect. Relatedly, when enforcing foreign judgments, United States courts do not treat the foreign decisions as binding precedent in other cases in the way advocated for the *Avena* decision.

Furthermore, existing United States laws, policies, and precedents always condition comity. Those who seek to have courts in the United States apply the *Avena* decision are seeking to override these laws, policies, and precedents concerning, for

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19. *See, e.g.*, Pilkington Bros. P.L.C. v. AFG Indus., Inc., 581 F. Supp. 1039, 1043 (D. Del. 1984) ("[A]n American court will under principles of international comity recognize a judgment of a foreign nation if it is convinced that the parties in the foreign court received fair treatment . . . .").

20. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113 (1895) (requiring that a lower court enforce a French decision because of principles of comity).

21. 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4473 n.9 (2d ed. 2002).

22. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAW § 98 (1971) ("A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned.").

example, the procedural default doctrine.[23] The argument for comity also is weaker because the United States has withdrawn from the Optional Protocol giving the ICJ jurisdiction over these types of disputes.[24] The United States' withdrawal from the Protocol creates less of an ongoing relationship with the ICJ.

Nevertheless, it may be appropriate for United States courts to give some deference to the ICJ's interpretation of the Vienna Convention when the United States is a party to an ICJ case. Other things being equal, it is desirable to have a common understanding of the meaning of a treaty, and when the United States has consented to adjudication in an ongoing tribunal like the ICJ, it arguably has delegated some interpretive authority to the tribunal. The Supreme Court in *Breard v. Greene* noted that it should give "respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such."[25]

A possible analogy here is to *Chevron* deference in administrative law, pursuant to which courts defer to certain statutory interpretations by administrative agencies.[26] Some might argue that *Chevron* deference for ICJ decisions is too strong, given that administrative agencies are subject to more procedural and institutional restraints under United States law than is the ICJ. In addition, the statement from *Breard* sounds weaker than *Chevron* deference.[27] In any event, even strong *Chevron* deference is appropriate only when the underlying law is unclear and the decision is reasonable.

Applying these points to the ICJ's decision in *Avena* leads to the following conclusions. First, the decision itself is not directly enforceable in U.S. courts: *Avena* does not operate like a Supreme Court decision. Second, U.S. courts are not obligated as a matter of comity to accept the ICJ's reasoning in that deci-

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23. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977) (discussing the procedural default rule in relation to the admissibility of inculpatory statements).

24. Letter from Condoleezza Rice, U.S. Secretary of State, to Kofi Annan, U.N. Secretary-General, *supra* note 4.

25. 523 U.S. 371, 375 (1998) (per curiam).

26. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); *see also* Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

27. *Compare Breard*, 523 U.S. at 375 (suggesting that the Court provide "respectful consideration" to treaty interpretation by an international court), *with Chevron*, 467 U.S. 837 (directing U.S. courts to defer to certain statutory interpretations by U.S. administrative agencies).

sion. Third, it may nevertheless be appropriate to provide some deference to the ICJ's interpretation of Article 36 of the Vienna Convention, to the extent that the treaty is ambiguous and the ICJ's interpretation is reasonable. Fourth, applying this standard might entail accepting the ICJ's conclusion that Article 36 confers not only state rights but also individual rights: Article 36 does, after all, refer several times to the arrested national's "rights."[28] The Supreme Court in *Breard* stated that Article 36 "arguably confers on an individual the right to consular assistance following arrest," so the Court seemed to recognize that this could be a reasonable interpretation.[29] Moreover, the executive branch has not denied that the Vienna Convention is self-executing in the sense that it has some domestic effect without the need for implementing legislation.[30]

Finally, however, the ICJ's reasoning that the United States cannot apply neutral rules of procedural default to bar claims based on Article 36 is *not* a reasonable construction of the treaty and should not be accepted. Article 36 itself recognizes that the rights in the Convention "shall be exercised in conformity with the laws and regulations of the receiving State."[31] Moreover, the Supreme Court in *Breard* noted that there is a strong presumption that the procedural rules of the forum state govern the implementation of a treaty in that state.[32]

Rules of procedural default, which require both the timely raising of claims and exhaustion of remedies, are fundamental rules of criminal procedure in the United States.[33] Indeed, these rules can bar consideration of even the most basic constitutional claims, and thus it is very strange to say that these rules are not applicable to a treaty claim. Under the ICJ's reasoning, however, even if a lawyer strategically avoided raising a Vienna Convention violation in order to save it for later to see how the trial and sentencing went, his client would be enti-

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28. Vienna Convention, *supra* note 2, at art. 36.

29. *Breard*, 523 U.S. at 376.

30. *See, e.g.*, Valerie Epps, *Violations of the Vienna Convention on Consular Relations: Time for Remedies*, 11 WILLAMETTE J. INT'L L. & DISP. RESOL. 1, 7–8 (2004) (citing S. EXEC. REP. NO. 91-9, app. at 2, 5 (1969)) (executive branch memorandum regarding the implementation of the Vienna Convention that provided that the treaty was entirely self-executing and did not require any implementing legislation)).

31. Vienna Convention, *supra* note 2, at art. 36.

32. *Breard*, 523 U.S. at 375.

33. *See* Rose v. Lundy, 455 U.S. 509 (1982); Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977).

tled to review and reconsideration based on the treaty claim—something disallowed for constitutional claims even under the most liberal habeas corpus precedent of the Warren Court.[34] Finally, overriding neutral state procedural default rules that are not being used to discriminate against federal law raises serious federalism concerns, which is another reason not to defer to the ICJ on this issue.

34. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 439 (1963).