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16 *Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2003 and 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)*, 2008

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I Introduction

Between 1998 and 2008, the International Court of Justice (ICJ) heard a trio of cases on the application of the 1963 Vienna Convention on Consular Relations (VCCR),[2] in the context of the arrest, trial and sentencing of foreign nationals by the US: the *Breard case* brought in 1998 by Paraguay,[3] the *LaGrand case* brought in 1999 by Germany,[4] and the *Avena case* brought in 2003 by Mexico.[5]

The *Avena case* presented the ICJ with the opportunity to clarify and expand on points of law that it had previously made in the *LaGrand case*. But, unlike the *LaGrand case*, it unleashed a torrent of litigation in the US, resulting in rulings by the US Supreme Court that redefined the way the US incorporates its international legal obligations into its domestic legal system.

1 The author would like to thank Nadine Kheshen for her help in the research and editing of this piece.
2 *Vienna Convention on Consular Relations*, 24 April 1963, 596 U.N.T.S 261, *entered into force* 19 March 1967.
3 *Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), Order of 10 November 1998, I.C.J. Reports 1998*, p. 426.
4 *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466.
5 *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 12.

This chapter focuses on Mexico's reasons for taking the momentous step of filing a case against the US, the consequences of this decision, both legal and political, and the contribution that the *Avena* decision made to international law.

II Background

The VCCR has long been one of the centrepieces of the international legal architecture. To date, it has achieved quasi-universal acceptance, having been ratified by 177 states.[6] Yet, despite its importance, it rarely grabs headlines. Only when it is violated do states realize how crucial compliance is to ensure that the rights of their nationals abroad are respected, as well as the rights of non-nationals under their jurisdiction.

The VCCR consists of 79 articles, most of which provide for the operation of consulates, the privileges and immunities of consular officials posted to foreign countries, and the functions of consular agents. Consular officials act as a cultural bridge for nationals who face foreign criminal procedure, by providing translation, arranging legal representation, helping gather mitigating evidence, and hiring defence counsel.

These functions are regulated by Article 36 (1) of the VCCR, which provides that 'consular officers shall be free to communicate with nationals of the sending State and to have access to them' and nationals of the sending state will, likewise, have the same right to communicate and access their consular officers.[7] If a national of a sending state is detained and the national 'so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State.'[8] The authorities of the receiving state also have a responsibility to 'inform the person concerned without delay of his rights.'[9] These rights include allowing a consular officer to 'visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation.'[10] Furthermore, while paragraph 2 states that these rights 'shall be exercised in conformity with the laws and regulations of the receiving State,' it maintains the exception that 'said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.'[11]

The US has, by a large margin, the highest number of detainees in the world – almost 2.3 million – and approximately 5% are foreigners (thus, about 120,000).[12] In theory, each of these should have been informed, either during their arrest or arraignment, of their right to notify their consular authorities. However, in a country as large as the US, with multiple levels of law enforcement in each state, each with its own criminal justice system, as well as a federal justice system, compliance with the requirements of Article 36 of the VCCR is far from universal and automatic. It should be no surprise then, that over the years several states have objected to the occasional denial of consular assistance to their nationals. In the late 1990s, Paraguay, Germany and Mexico decided to challenge the non-compliance with the VCCR of the US before the ICJ.

Mexico had the greatest interest in the issue and the highest stakes. Because of the close ties with the US, the prominence of Mexican nationals in the US territory, and the importance of their remittances to the Mexican economy, Mexico considers treatment of its nationals, particularly when they have been arrested, a priority of governmental concern. At the time of the *Avena* case, there were about 10 million Mexican nationals living in the US.[13] A good portion of the roughly 120,000 foreigners detained in US prisons around that time were likely to be Mexican citizens. Mexico has more consulates and consular officers in the US than any other state, with over forty-five consulates and hundreds of consular officers trained, specifically, to intervene on behalf of Mexican nationals.[14]

For years before taking the momentous step of filing a case before the ICJ, Mexico had been contesting the non-compliance of the US with the VCCR to no avail. Mexico closely observed when, in 1998, Paraguay brought a case to the ICJ claiming that the US had violated the VCCR by not providing Angel Breard, a Paraguayan national, the opportunity to benefit from consular assistance. Eventually, Paraguay caved under diplomatic pressure from the US and withdrew its application, preventing the ICJ from ruling on the merits.[15] However, the following year, Germany brought a similar case after the denial of consular assistance to two German nationals (the LaGrand brothers), who had been arrested, tried, and sentenced to death in Arizona.[16] This time, the ICJ did rule on the merits and found the US in violation of

6 United Nations Treaty Collection, status as at 9 August 2015. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en (accessed 1 June 2016).

7 *Vienna Convention on Consular Relations*, art. 36.1(a).

8 Ibid., art. 36.1(b).

9 Ibid.

10 Ibid., art. 36.1(c).

11 Ibid., art. 36. 2.

12 R. Walmsley, 'World Prison Population List', International Centre for Prison Studies, 9th Ed., 2010. Available at: www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf (accessed 1 June 2016).

13 J. Zong and J. Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, Migration Policy Institute (26 February 2015). Available at: www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#MexicanImmigrants (accessed 1 June 2016).

14 C. Amirfar, 'AALS Panel – Mexico v. U.S.A. (Avena) – Arguments of Mexico', *European and International Law* 5, 2004, 376.

15 *Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), Order of 10 November 1998*, supra note 2.

16 *LaGrand, I.C.J. Reports 2001*, supra note 4, p. 466, para. 14.

both the VCCR and an order to stay the execution that it had issued while the case was being decided on the merits.[17]

III The ICJ judgment in the *Avena case*

The ICJ ruling in the *LaGrand case*, coupled with the continuing non-compliance by the US with the VCCR and the uniquely high stakes for Mexican nationals, convinced Mexico to take the bull by the horns. On 9 January 2003, it instituted proceedings before the ICJ alleging violation of all paragraphs and sub-paragraphs of Article 36 of the VCCR to the detriment of 52 Mexican nationals who had been tried and were awaiting execution in US prisons. Mexico also filed a request before the ICJ for the indication of provisional measures asking the Court to request that the US, *inter alia*, take 'all measures necessary to ensure that no Mexican national be executed.'[18]

Yet there were important differences between the facts of the *LaGrand* and *Avena* cases that warranted Mexico's departure from Germany's script. For instance, in the *LaGrand case*, the two brothers had been executed before the ICJ could reach a decision on the merits, whereas, at the time of the *Avena* proceedings, all Mexican nationals in question were still alive. Thus, while Germany could only seek reparations and non-repetition, Mexico insisted on restitution. As a result, Mexico built and expanded upon the *LaGrand* script; it argued that the US had failed to provide meaningful 'review and reconsideration' of the conviction and sentencing by neglecting to account for the violations of the VCCR, as required by the *LaGrand* decision.[19]

The ICJ took the *LaGrand case* as a point of departure for its reasoning on the merits, too, and went further. Although the Court adopted provisional measures to stay the execution of the detainees in both the *LaGrand* and *Avena* cases, the wording of the Court's order in the *Avena case* was stronger than that of the *LaGrand case*. For example, in the *Avena case*, the Court indicated that the US 'shall' – rather than 'should' – take necessary measures to stay the execution of three Mexican nationals, whose execution were imminent, pending the final judgment of the ICJ.[20] This was an obvious reaction to the failure of the US to ensure that the Governor of Arizona stayed the execution of the *LaGrand* brothers and a reminder that provisional measures are binding orders. Indeed, if one was to look for a tangible contribution from the *LaGrand/Avena* litigation to international law, this

17 Ibid., at para. 115.
18 *Avena and Other Mexican Nationals (Mexico v. United States of America), Order of 5 February 2003, I.C.J. Reports 2003*, p. 77, para. 18.
19 *LaGrand, I.C.J. Reports 2001*, supra note 4, p. 466, para. 128(7).
20 *Avena and Other Mexican Nationals, Order of 5 February 2003*, supra note 18, p. 77, para. 59(a).

would be the resolution of the debate on whether ICJ provisional measures are binding.

The decision of the ICJ in the *Avena case* has given rise to a very large number of scholarly commentaries, and we defer to those for a detailed account. Here, it suffices to say that the main points of contention in the *Avena case* were the obligation to provide consular information 'without delay' in accordance with VCCR Article 36 (1)(b) and the failure to provide meaningful 'review and reconsideration' of the conviction and sentencing, given the violation. The Court declared that the term 'without delay' does not necessarily mean 'immediately upon arrest', rather, the duty to provide consular information exists once there are grounds to believe that the individual being detained is a foreign national.[21] Accordingly, the Court found that, with the exception of one detainee, the US had violated its obligation to provide consular notification 'without delay'.[22] The Court further found that, in 49 cases, the US had violated its obligations, to enable Mexican consular officers to communicate with, have access to, and visit their nationals, and in 34 cases, the US had violated its obligation to enable Mexican consular officers to arrange for legal representation of their nationals.[23]

Mexico claimed that the US had also violated Article 36(2) by failing to provide 'meaningful and effective review and reconsideration of the convictions and sentences'.[24] The US argued that in the American legal system courts are barred from doing so by the so-called 'procedural default rule', which is a doctrine applied by American federal courts that requires a state prisoner seeking a writ of *habeas corpus* in federal court to have first presented his or her federal law argument to the state courts in compliance with state procedural rules.[25] Failure to do so bars any subsequent attempt to present the same argument to the federal courts on collateral review. This argument led the Court to take a jab at the US, by observing that the procedural default rule had not been revised despite the ICJ's judgment in the *LaGrand case*, which called attention to the problems regarding the application of this rule caused for defendants relying on violations of the VCCR in appeal proceedings.[26]

However, the Court also gave the US a break by holding that, although Article 36(2) of the VCCR had been violated by the US in the cases of three Mexican nationals, judicial re-examination was still possible in the other 49 cases.[27] Accordingly, the Court found that Mexico's request for *restitutio in*

21 *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment*, supra note 5, p. 12, para. 85–8.
22 Ibid., at para. 89.
23 Ibid., at para. 90–91.
24 Ibid., at para. 107.
25 Ibid., at para. 110.
26 Ibid., at para. 112–113.
27 Ibid., at para. 20.

integrum – meaning partial or total annulment of the conviction and sentencing of the state court – would not be an appropriate remedy; rather, adequate reparations would be a 'review and reconsideration' of the convictions and sentencing of the Mexican nationals by courts in the US.[28] The Court also indicated that the methods employed for 'review and reconsideration' should be left to the US to determine, so long as the violations of rights guaranteed under the VCCR were taken into account.[29] The Court found no evidence indicating a 'regular and continuing' pattern of breaches by the US of the VCCR, and, in fact, it acknowledged the efforts undertaken by the US to encourage implementation of its obligations under the VCCR, and considered this as a demonstration of commitment by the US in satisfaction of Mexico's request.[30]

Finally, fully aware of its role in the architecture of the international community and the precedential value of its judgments, the Court observed that, while the *Avena case* concerned only the 52 Mexican nationals in question, its judgments could not be taken to imply that the Court's conclusions would not be extended to other foreign nationals finding themselves in similar situations in the US.[31] This statement not only put the US on notice as to how the Court would rule should it be seized for the fourth time by another state raising these same violations, but it also signalled to the rest of the world, both that the Court considers itself the ultimate judge for the international community, and that its rulings extend beyond the specific case and become part of the international legal regime.

Other than that and the clarification of what 'without delay' means under the VCCR, the *Avena* decision did not add much substance to the body of international law regulating consular relations. The paradigm shift had already happened with *LaGrand*. The *Avena case* was, as it has been poetically framed, 'a fight for the soul of *LaGrand*.'[32] However, the *Avena case* will go down in history as a turning point in the discussions of how international law and domestic law interface, and what place international law has within the US legal system.

IV The legal fallout in the US and the aftermath

The ICJ issued its ruling on 31 March 2004. Within a few days, both the US government and the attorneys representing the Mexican nationals took steps to ensure implementation of the ICJ decision. The ICJ had asked US courts, both state and federal, to 'review and reconsider' the convictions and sentences of the Mexican nationals who had not been provided consular

28 Ibid., at para. 123 and 148.
29 Ibid., at para. 122.
30 Ibid.
31 *Avena and Other Mexican Nationals, Judgment*, supra note 5, p. 12, para. 151.
32 C. Amirfar, op. cit., p. 378.

assistance without delay. A judicial melee ensued, one that left a major casualty on the battlefield: the reputation of the US as an international law-abiding nation.

The first case was that of Osvaldo Torres, one of the individuals named in the *Avena case*. His attorneys filed an application for post-conviction relief. On 13 May 2004, the Oklahoma Court of Criminal Appeals decided to grant an indefinite stay of execution and remanded an evidentiary hearing to assess whether Torres had suffered prejudice by the violations of his consular rights.[33] On the same day, and after having been requested to do so by the US Department of State, the Governor of Oklahoma decided to grant clemency and commute the death sentence to life without parole.[34] That rendered subsequent litigation of the case moot and it was accordingly dismissed by the Oklahoma Court of Criminal Appeals.[35]

In February 2005, President George W. Bush attempted to ensure the compliance of state courts with the ICJ decision by issuing a memorandum for the Attorney General 'determining that the US will discharge its international obligations under the decision of the International Court of Justice ... by having State courts give effect to the decision in accordance with the general principles of comity in cases filed against 51 Mexican nationals addressed in that decision.'[36] While the US Government was taking steps to ensure compliance with the ICJ ruling, it also decided to shield itself from future VCCR litigation before the ICJ by formally withdrawing from the Optional Protocol to the VCCR concerning the Compulsory Settlement of Disputes, which had been the basis of the ICJ jurisdiction in the *Breard*, *LaGrand*, and *Avena* cases.[37]

Inevitably, the US Supreme Court was bound to weigh in on the issue, which it did in several rounds commencing with the *Sanchez-Llamas v. Oregon case*.[38] Moises Sanchez-Llamas, a Mexican national, had been convicted of attempted murder in Oregon. Mario Bustillo, a Honduran national, had been convicted of murder in Virginia. Both had not been sentenced to death, but to lengthy detention periods, and in neither case had the detainees' consulates been informed. Both Sanchez-Llamas and Bustillo filed *habeas* petitions arguing that their right to consular notification had been violated. However, the courts in Oregon and Virginia both ruled that, because these claims had not been argued at the trial court level, they were

33 *Torres v. State, No. PCD-04-442, (Okla. Crim. App. May 13, 2004).*
34 *Torres v. State*, 2005 OK CR 17, para. 2, 120 P.3d 1184, 1186.
35 Ibid.
36 Memorandum for the Attorney General from the President of the United States of America on Compliance with the Decision of the ICJ in Avena (28 February 2005).
37 S. Charnovitz, 'Correcting America's Continuing Failure to Comply with the Avena Judgment', *The American Journal of International Law* 106, 2012, 579.
38 *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

procedurally barred. The two cases were then consolidated and brought before the US Supreme Court.[39]

On 28 June 2006, the Supreme Court decided that the ICJ's rulings in *LaGrand* and *Avena* were not conclusive for courts in the US: faced with the interpretation of an international agreement by an international court, all American courts needed to do was to give the decision 'respectful consideration', but by no means were they bound by it.[40] The Supreme Court also found that state courts could admit evidence against defendants even if the evidence was obtained in violation of the VCCR.[41] Article 36 claims, if not timely brought, could be procedurally barred by state procedural default rules.[42] Finally, the ICJ's interpretation of Article 36 of the VCCR, requiring that the rule of procedural default be set aside, was inconsistent with the adversarial nature of the American criminal justice system, so the US could not have intended to accept that interpretation when it negotiated and ratified the VCCR.[43] However, at this time the Supreme Court did not rule as to whether Article 36 created individual rights that require honouring in state criminal proceedings.[44]

Meanwhile, the case of one of the individuals named in *Avena*, José Ernesto Medellin Rojas, was pending before the Fifth Circuit Court. After the ICJ handed down its decision in *Avena*, the Fifth Circuit Court rejected the request of Medellin's attorneys for revision of his case, holding that it could not overrule the Supreme Court's *Sanchez-Llamas* finding that the ICJ's rulings have no binding effect on courts in the US, and adding that Article 36 of the VCCR does not create individually enforceable rights.[45]

Medellin asked Texas' courts to implement the memorandum issued by President Bush.[46] On 15 November 2006, the Texas Court of Criminal Appeals found that it was not bound by the memorandum as the President had no constitutional authority to order state courts to follow a decision of the ICJ.[47] The case was then referred to the US Supreme Court, which, by a vote of six to three, upheld the ruling, finding that neither the ICJ judgment in *Avena* nor the memorandum constituted directly enforceable federal law.[48] While the Supreme Court acknowledged that the *Avena* judgment was binding as a matter of international law,[49] it found, nonetheless, that as a matter

39 *State v. Sanchez-Llamas*, 338 Or. 267, 108 P.3d 573 (2005); *Bustillo v. Johnson*, 546 U.S. 1002 (2005) opinion after grant of cert. sub nom. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).
40 *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 333.
41 Ibid., at 350.
42 Ibid., at 359.
43 Ibid., at 334.
44 Ibid., at 342.
45 *Medellin v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004).
46 Ibid., at 663.
47 *Ex parte Medellin*, 223 S.W.3d 315, 335 (Tex. Crim. App. 2006).
48 Ibid., at 518 and 532.
49 Ibid., at 535.

of US domestic law, a treaty has no domestic effect unless Congress gave it such force, or it is self-executing.[50]

Article 94(1) of the UN Charter obligates each member of the United Nations 'to comply with the decision of the International Court of Justice in any case to which it is a party.' To add insult to injury, the US Supreme Court excused the US of this obligation by finding that Article 94(1) was neither self-executing nor had Congress implemented legislation to give ICJ decisions effect in US courts.[51] By issuing the memorandum President Bush had overstepped the limits of his powers, encroached on the prerogatives of Congress, and the rights of states of the Union.[52] The Court interpreted Article 94 of the UN Charter as a commitment of the US to ensure implementation, but one not intended to vest ICJ decisions with immediate legal effect in domestic courts. The Court based its finding on the fact that Article 94(2) contains a mechanism to ensure compliance with decisions of the ICJ: referral to the UN Security Council. The US Supreme Court conveniently glossed over the fact that self-referral to the Security Council by the US Government would be absurd, and referral by another state, such as Mexico, would be blocked by US veto power.

Mexico made a last-ditch effort to stop the execution of Medellin and four other nationals by returning to the ICJ with a request for interpretation of the *Avena* ruling (eventually rejected by the Court), and new provisional measures.[53] It asked the Court to request that the US undertake all necessary measures to ensure that the five nationals were not executed, and that the US inform the Court of all measures taken to that effect.[54] On 16 July 2008, the ICJ found that it had *prima facie* jurisdiction to adopt the provisional measures requested, and that there was enough urgency and risk of irreparable harm to warrant their adoption.[55] The order put the US Government between the proverbial rock and a hard place. On the one hand, it faced an order from an increasingly irritated ICJ, peeved by the repeated lack of compliance with its orders and decisions, and on the other, the Supreme Court's Medellin judgment had emasculated the White House, denying it a legal basis to request governors to stay executions. All the executive branch could do was appeal to state governments to graciously agree to stay executions. To add a further ironic twist to an already grotesque imbroglio, it is worth recalling that President George W. Bush had been governor of Texas before Governor Rick Perry, and he himself had refused to stay the execution

50 Ibid., at 505.
51 Ibid., at 508.
52 Ibid., at 528.
53 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), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 311, para. 5–6.
54 Ibid., at para. 13.
55 Ibid., at para. 73–74.

of Mexicans who had not benefitted from consular assistance. Likewise, Governor Perry rejected calls from Mexico and President Bush. José Medellin was executed on 5 August 2008.

The decision of the ICJ on the Request of Interpretation of the Avena ruling, coupled with the withdrawal of the US from the Optional Protocol to the VCCR, barred any subsequent litigation of the dispute before the ICJ. However, the tussle between the executive, legislative, and judiciary branches, and between the federal government and state authorities, continued.

President Barack Obama was sworn in on 20 January 2009, the day after the ICJ decision. He came to power on a promise of radical departure from the policies of the Bush administration and with a broad mandate from the American electorate to effect change. In the judgment interpreting *Avena*, the ICJ had left the US '[a] choice of means ... in the implementation of its obligation and, failing success within a reasonable period of time through the means chosen, it must rapidly turn to alternative effective means of attaining that result.'[56] Observers of the VCCR mix-up would have bet on the Obama administration to seize the moment to seek legislation from Congress to resolve the problem once and for all. However, facing a financial crisis of unprecedented magnitude, and entangled in two costly and bloody wars, the White House did not recognize this issue as a high priority. As a result, the problem dragged on.

In June 2011, Senator Patrick Leahy (D- Vermont), the Chairman of the Senate Judicial Committee, introduced legislation regarding US compliance with its obligations under the VCCR.[57] The Consular Notification Compliance Act intended to give jurisdiction to federal courts to review the cases of foreign nationals on death row in the US who had not received consular assistance as required.[58] It included those individuals named in the *Avena case*, who had not yet been executed, as well as future similar cases. But, while Leahy's bill languished in the Senate, the legal battle to stop executions raged on. On 7 July 2011, the US Supreme Court handed down another ruling in the case of Humberto Leal Garcia, a Mexican national who had not been given consular assistance and who had been sentenced to death. Leal claimed that his conviction had been vitiated by a violation of the VCCR.[59] Leal's attorneys, as well as the US Government, appearing as *amicus curiae*, asked the Supreme Court to stay the execution so that Congress could have the time to consider Leahy's bill.[60] In a 5 to 4 decision, the Court denied Leal's application for stay of execution.[61] It stood fast to its

56 Ibid., at para. 47.
57 Charnovitz, op. cit. n. 41, p. 577.
58 Ibid.
59 *Garcia v. Texas*, 131 S. Ct. 2866, 2867 (2011).
60 Ibid.
61 Ibid., at 2868.

Medellin ruling that international legal obligations are not binding unless Congress enacts them in a statute. Expressing scepticism that such legislation would ever be enacted, it dryly observed that its role is 'ruling with the law at present, not what it might become in the future.'[62] Despite calls to Texas from the President, the State Department, and Mexico, all asking for a last-minute reprieve, Leal was duly executed within just a few hours of the Supreme Court's ruling.

Finally, after years of wrangling, a first step was taken towards ensuring proper implementation of the VCCR in 2014 when the US Supreme Court issued an amendment to the Federal Rules of Criminal Procedure. Since 1 December 2014, under Title II, Rule 5 (d) 'If the defendant is charged with a felony, the judge must inform the defendant of the following: (F) that a defendant who is not a US citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested — but that even without the defendant's request, a treaty or other international agreement may require consular notification.'[63] As a result, notification must be provided to any defendant at their initial appearance, without attempting to determine the defendant's citizenship.[64]

Whether Article 36 of the VCCR creates individual rights that may be invoked in judicial proceedings, and what, if any, remedy may exist for their violation, remains an open question as far as the US legal system is concerned.[65] The amendment issued by the Supreme Court applies only to federal courts, while the various states of the Union approach the matter differently. Indeed, one of the consequences of the Medellin and Leal Garcia decisions by the US Supreme Court is that 'the United States is no longer one nation when it comes to honouring consular commitments because the rights received by a foreign national often depend on the state in which the individual is apprehended.'[66] The states of the Union most resistant to the reach of the VCCR happen to also be retentionist on capital punishment. Furthermore, they are predominantly located in the south, where most Mexican nationals tend to live. It is clear that Mexico has still a long way to

62 Ibid., at 2867–8; *Medellin I*, 552 U.S. at 523–24.
63 Fed. R. Crim. P. 5.
64 Ibid., see Committee Notes on Rules-2014 Amendment.
65 Ibid.
66 Charnovitz, op. cit. n. 41, p. 575. Charnovitz cites, as example, the Supreme Court of Massachusetts, which, in 2011, held that if an alien did not receive the notification required by Article 36 of the Vienna Convention, a challenge to the conviction may be made in a motion for a new trial. In so holding, the court 'acknowledge[d] and accept[ed] the conclusion of the ICJ regarding the obligation that art. 36 creates when clear violations of its notice protocols have been established, that is, to provide some process by which the soundness of a subsequent conviction can be reviewed in light of the violation.' *Commonwealth v. Gautreaux*, 458 Mass. 741, 751 (2011).

before it can claim it obtained its desired outcome throughout the course this protracted legal struggle.

As it has been aptly remarked, '[w]e have always known about the possility that a [State of the Union] could cause a US treaty violation by fusing to comply with America's international obligations. What is new out the *Avena* affair is that such misbehaviour can persist even in the face an ICJ judgment against the United States. As a result, the reputation of e United States for being a law-abiding nation has been undermined.'[67]

Eight years after the Medellin ruling, the Supreme Court remains ıswayable. Congress, rather than the President or the federal judiciary, has e role of effectuating compliance with the ICJ when states' laws or courts ıce the US in violation of a treaty. Considering how divided and ineffece the US Congress has been since the beginning of the 2000s, it is unlikely at the international and constitutional crisis triggered by the *Avena case* d cases that succeeded it will be resolved any time soon.

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17 *Nottebohm (Liechtenstein v. Guatemala), 1951*

Alfred M. Boll[1]

The *Nottebohm Case (Liechtenstein v. Guatemala)*[2] involved issues related to a state's right to attribute its nationality by naturalization, the relationship between nationality in municipal and international law, and a state's obligation to recognize another state's attribution of nationality and the right of diplomatic protection and international claims. The majority held Liechtenstein's application inadmissible as Friedrich Nottebohm could not be considered its national for the purposes of international law, preventing the International Court of Justice (hereinafter 'ICJ' or 'Court') from considering the case's merits and whether Guatemala had committed wrongful acts against Liechtenstein and Nottebohm.

The case is perhaps best known for the criticism that has been levied against the judgment. Most authors draw its relevance narrowly and qualify its significance as limited due to what has been called 'unconvincing' reasoning.[3] Weis calls the case's circumstances 'quite exceptional', appending the adage 'bad cases make bad law'.[4] The Court made several sweeping, arguably questionable, pronouncements on the nature of nationality and naturalization, and the case is, however, still frequently cited by authors as indicative of broad rules of international law with respect to nationality.[5] Egües, for

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2 *Nottebohm Case (Liechtenstein v. Guatemala) (Second Phase), Judgment, I.C.J. Reports 1955.* During the case's first phase the Court had held that it was entitled to hear the case, Guatemala having argued the Court's jurisdiction had expired. *Nottebohm Case (Liechtenstein v Guatemala) (Preliminary Objections), I.C.J. Reports 1953.*

3 O. Dörr, 'Nottebohm case', in *Max Planck Encyclopedia of Public International Law*, Heidelberg: Max Planck Foundation for International Peace and the Rule of Law, 2015. For a list of critical commentary, see J. Kunz, 'The Nottebohm judgment', *American Journal of International Law* 54, 1960, 537–8, note 2.

4 Weis, P., *Nationality and Statelessness in International Law*, Alphen aan den Rijn: Sijthoff & Noordhoff, 1979, p. 180.

5 Although Sloane's characterization of the case as having become 'a kind of doctrinal mantra' appears overstated. R. Sloane, 'Breaking the genuine link: The contemporary international regulation of nationality', *Harvard International Law Journal* 50, 2009, 3–4.