BREACH WITHOUT REMEDY IN THE INTERNATIONAL FORUM AND THE NEED FOR SELF-HELP: THE CONUNDRUM RESULTING FROM THE *MEDELLÍN* CASE

by
*Scott W. Lyons**

The Supreme Court decision in Medellín v. Texas *has created considerable doubt as to what methods exist for remedying breaches of treaty-based obligations. In* Medellín, *the Court acknowledged there was a violation of the Vienna Convention on Consular Rights (VCCR), yet did not find that this breach led to a remedy for Mr. Medellín or others similarly situated. This Article examines the current uncertainty surrounding available remedies for breaches in VCCR treaty obligations. Review of the strategies employed by the United States and Mexico to prevent irreparable breaches of the VCCR demonstrates these methods were insufficient. More significantly, the traditional options for redress for an irreparable breach are limited in availability to Mexico, demonstrating the limitations of international law in remedying these types of breaches. The Article explores unilateral self-help measures that states like Mexico may employ to seek redress, suggesting that these may be the only available remedies after* Medellín.

* Acting Director of Programs, American Society of International Law; American University (M.A., 2005); American University, Washington College of Law (J.D., 2004); University of Michigan (B.A., 1998). I would like to thank Professor Margaret McGuiness for her feedback and advice. I wish to thank my wife, Michele Rose Lyons, for her editing, support, love, and patience in making my writing possible.

I. INTRODUCTION

On August 5, 2008, the State of Texas executed a Mexican national, Jose Ernesto Medellín Rojas, despite failing to inform the Mexican consulate of his original arrest. Under Article 36 of the Vienna Convention on Consular Relations (Vienna Convention or VCCR), a party state has an obligation to inform detained or arrested foreign nationals of their consular notification rights.[1] The convention further requires the arresting authorities to notify the consulate of the arrest and to forward communications from the arrested person to the consulate.[2] Unfortunately, these treaty-based obligations are breached by party states, including regularly by the United States. Moreover, the methods for repairing this type of breach and the consequences for an irreparable breach are still unsettled, as is the impact of these breaches on international law and foreign policy.

In five sections, this Article discusses this uncertainty surrounding the remedies for VCCR violations and the options for seeking redress when the breaches become irreparable. First, the Article will provide background on the legal courses of action that led to irreparable

[1] Vienna Convention on Consular Relations, April 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention]. Article 36(1)(b) reads: "[T]he competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph."

[2] *Id.* art. 36(1)(b)–(c). Article 36(1)(c) states: "[C]onsular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

breaches of international law by the United States. Second, the Article will discuss the insufficient methods employed by both the United States and Mexico to prevent these irreparable breaches. Third, the Article will examine the fundamental principles of international law related to remedies when the remedy of restoration becomes impossible. Fourth, the Article will highlight the limitations on the traditional avenues for remedies of international legal obligations. Finally, the Article will conclude that self-help may be the only available method for remedy, subject to Mexico's international legal obligations.

II. OVERVIEW: CIRCUMSTANCES BEHIND THE *MEDELLÍN V. TEXAS* CASE

In *Medellín v. Texas*,[3] a Mexican national, sentenced to death by the State of Texas, challenged his conviction in the U.S. Supreme Court on the basis that he was not accorded his VCCR rights. The International Court of Justice (ICJ) had previously ruled in *Avena and other Mexican Nationals (Avena)*[4] that the United States must provide "by means of its own choosing, review and reconsideration"[5] of the convictions of fifty-one Mexican nationals on death row in ten U.S. states, including petitioner Medellín. However, the U.S. Supreme Court subsequently decided in *Medellín* that the ICJ decision was not binding within U.S. domestic law for lack of an implementing U.S. congressional statute. Moreover, the Court found that a February 2005 executive memorandum from U.S. President George W. Bush stating that the United States intended to comply with the *Avena* decision did not create "directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions."[6] While the ICJ and the U.S. Supreme Court both acknowledged that the United States breached its VCCR obligations,[7] the successive legal decisions did not result in a remedy for Mr. Medellín or the other fifty Mexican nationals. Mexico returned to the ICJ following the U.S. Supreme Court decision with a Request for Interpretation of the *Avena* decision, its only avenue for revisiting the *Avena* decision, and a Request for Indication of Provisional Measures of Protection, the ICJ's quasi-equivalent of a temporary injunction.[8] The

[3] Medellín v. Texas, 128 S. Ct. 1346 (2008).

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

[5] *Id.* at 72. *See also* Dinah L. Shelton, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, 98 AM. J. INT'L L. 559 (2004) (providing background on the *Avena* case).

[6] *Medellín*, 128 S. Ct. at 1353.

[7] *Avena*, 2004 I.C.J. at 45–46; *Medellín,* 128 S. Ct. at 1374.

[8] Request for Interpretation of the Judgment, Avena and Other Mexican Nationals (Mex. v. U.S.) (June 5, 2008), *available at* http://www.icj-cij.org/docket/files/139/14582.pdf; Request for the Indication of Provisional Measures of Protection Submitted by the Government of the United Mexican States,

ICJ's resultant indication of provisional measures demanded the maintenance of status quo pending judgment on the interpretation.[9] However, this action by the ICJ still failed to prevent the execution of Mr. Medellín.[10] Thus, as a result of the execution, an irreparable breach occurred of U.S. obligations owed to Mexico under the VCCR[11] and of U.S. obligations to abide by the result of the ICJ decision and "give effect to the judgment" under Article 94 of the United Nations (UN) Charter.[12]

Under the ICJ decision, the United States could have provided a remedy "by means of its own choosing."[13] However, the U.S. executive branch was constrained by U.S. domestic law, especially the "federal structure, in which the constituent states . . . retain a substantial degree of autonomy, particularly in matters relating to criminal justice" and the "constitutional structure of . . . divided executive, legislative, and judicial functions of the government at the federal level."[14] The United States has argued that its efforts constituted "undertak[ing] to comply" for purposes of its UN Charter obligations,[15] but regardless, the ICJ's designated remedy of "review and reconsideration" still did not take place.[16] Further, since the method for redress for failure of the obligation to implement ICJ decisions is via referral to the UN Security Council, for which the United States has a veto over all recommendations and

Avena and Other Mexican Nationals (Mex. V. U.S.) (June 5, 2008), *available at* http://www.icj-cij.org/docket/files/139/14580.pdf.

[9] Request for Interpretation of the Judgment, Request for the Indication of Provisional Measures, Avena and Other Mexcian Nationals (Mex. v. U.S.) 2008 I.C.J. (Order of Jul. 16, 2008), *available at* http://www.icj-cij.org/docket/files/139/14639.pdf. [hereinafter *Provisional Measures*].

[10] *See* Medellín v. Texas 129 S. Ct. 360 (2008) (per curiam) (denying stay of execution and petition for writ of habeas corpus).

[11] *Provisional Measures*, 2008 I.C.J. paras. 72–73.

[12] U.N. Charter art. 94. The International Court of Justice is the principal judicial body of the U.N. *See* U.N. Charter art. 92.

[13] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 72 (Mar. 31) ("[The Court f]inds 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 . . . .").

[14] Request for Interpretation of the Judgment of 31 March 2004, *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2008 I.C.J Pleadings para. 7 (Public Sitting, Verbatim Record) (June 19, 2008 at 3pm) *available at* http://www.icj–cij.org/docket/files/139/14592.pdf.

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

[16] There are competing claims about whether Mr. Medellín has been given "review and reconsideration." The ICJ contended that Mr. Medellín did not receive "review and reconsideration." However, the August 4, 2008 brief submission by the State of Texas continuously reiterates the belief that Mr. Medellín was given multiple cases of "review and reconsideration." *See* Brief in Opposition at 12–16, Medellín v. Texas, 129 S. Ct. 360 (2008) (Nos. 08–5573, 08A98) *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/08/texas-bio-05-5573.pdf.

decisions,[17] Mexico is left with no viable avenue of remedy for breaches of international obligations.

Treaties often do not specify the remedies for a breach. However, in this case, the absence of a specified remedy for breaches that were acknowledged by courts on both the domestic and international planes provides the incongruous results of both a violation of law and an adverse judicial decision with no possibility of any remedy. As a result, Mexico may be left to consider alternative methods of redress for the *Medellín* and *Avena* decisions. While these methods will have a political and legal nature, they will also be based entirely upon principles of self-help.

The uncertainty of Mexico's legal rights is distinct from the question of whether the VCCR conveys any individual justiciable right to remedy. Regardless, Mr. Medellín's capacity for an individual remedy was manifestly extinguished upon his execution. However, Mexico's claim, which is at the heart of the international treaty obligation, persists due to the United States' breach of its obligations to Mexico. The question thus remains of what remedy is available to Mexico.

III. FAILURE OF STRATEGIES BY MEXICO AND THE UNITED STATES TO PREVENT THE IRREPARABLE BREACH

Both Mexico and the United States took several actions to prevent a substantial breach of international law. However, the result is that the United States violated the VCCR and failed to comply with an ICJ decision to give "review and reconsideration" because none of the preventative measures were sufficient.

A. U.S. Domestic Breaches & Previous U.S. Action in Response to Breaches

In the *Avena* case, the ICJ found the United States to be in breach of its VCCR obligations, and the petitioners sought relief in the U.S. federal court system in conjunction with executive action. This is not a case of first instance. In two earlier ICJ cases, the *Breard v. Greene*[18] and *LaGrand*[19] cases, involving a national from Paraguay and a national from Germany respectively, preliminary advisory measures were declared against the United States, the U.S. executive branch informed the states of the ICJ's notice, requested that the states take actions to comply, and the cases were appealed to the U.S. Supreme Court. However, in both cases, there

[17] *See* U.N. Charter art. 27, para. 3; *Id.* art. 94, para. 2.

[18] Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9). *See also* William J. Aceves, *Application of the Vienna Convention on Consular Relations (Paraguay v. United States)*, 92 AM. J. INT'L L. 517, 517–22 (1998) (providing background on the *Breard* case).

[19] LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27). *See also* William J. Aceves, *LaGrand (Germany v. United States)*, 96 AM. J. INT'L L. 210, 210–14 (2002) (providing background on the *LaGrand* case).

was no final ICJ judgment for the U.S. Supreme Court to consider, and the foreign nationals were executed.

In *Breard v. Greene*, a murder case in the Commonwealth of Virginia in 1998, the ICJ requested the United States to utilize all measures to prevent the execution of the Paraguayan national, Angel Francisco Breard, pending the final ICJ decision. The U.S. Supreme Court rejected both the Republic of Paraguay's and Breard's petition for habeas corpus relief due to the procedural default rule.[20] Further, the Governor of the Commonwealth of Virginia rejected the U.S. executive branch's separate request to intervene. Breard was executed before the ICJ could decide the merits of the case.

In *LaGrand*, the German government did not file the proceedings in front of the ICJ until 1999, after the execution of one of the LaGrand brothers, Karl LaGrand, and just before the scheduled execution of the other brother, Walter LaGrand, leaving little time for provisional measures or a decision on the merits.[21] Germany petitioned the U.S. Supreme Court for preliminary injunction against the United States and the Governor of the State of Arizona, but the Court refused to exercise its original jurisdiction on the matter.[22] The State of Arizona would not postpone the execution to allow for "review and reconsideration," namely an examination as to whether the case outcome was affected by denial of VCCR rights. Thus, injunctive relief was not provided by the U.S. courts or any other government branch, including the State of Arizona.

In *Murphy v. Netherland*,[23] another murder case in the Commonwealth of Virginia, but without ICJ intervention, a Mexican national pled guilty and was sentenced to death without receiving his VCCR rights. The Fourth Circuit rejected his case because, *inter alia*, Murphy could not prove that the lack of consular notice had prejudiced his case.[24] The U.S. federal court system thus denied relief for Murphy despite finding that the United States violated the VCCR and that the Commonwealth of Virginia continually disregarded the Vienna Convention.[25]

In addition to the *Medellín v. Texas* decision, these three cases above further show that the U.S. federal courts will not remedy VCCR obligations owed to other party states and will not order any type of habeas corpus relief on the U.S. state court level to prevent an irreparable breach of the VCCR.[26] This lack of U.S. federal intervention

[20] Breard v. Green, 523 U.S. 371, 374–75 (1998) (per curiam).

[21] *See LaGrand*, 2001 I.C.J. at 478.

[22] Fed. Republic of Germany v. United States, 526 U.S. 111 (1999) (per curiam).

[23] Murphy v. Netherland, 116 F.3d 97, 98 (4th Cir. 1997).

[24] *Id.* at 100–01.

[25] Memorandum Opinion, Murphy v. Netherland (No. 3, 95–CV–856) at 7.

[26] *Cf.* Sanchez-Llamas v. Oregon, 548 U.S. 331, 347 (2006) (finding that "where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for

creates a pattern of U.S. courts as insufficient venues to remedy U.S. international obligations.[27]

B. Future Legislative Fixes to U.S. Domestic Breaches

While President Bush, via memorandum,[28] attempted to give effect to the ICJ's *Avena* decision, and thus provide for the specified redress of review and reconsideration in Texas courts, the U.S. Supreme Court held that this action did not create direct enforceable federal law capable of providing the designated remedy.[29] The Court indicated that Congress has the authority to implement the treaty into domestic law and thus provide an opportunity for redress.[30] In response, the House of Representatives introduced the "Avena Case Implementation Act of 2008,"[31] which provides individuals with a legal right to relief for a violation of Article 36 of the Vienna Convention and allows for "any relief required to remedy the harm done by the violation."[32] This legislative action would meet and go beyond the remedy required by the ICJ under the *Avena* judgment. However, even though the Act applies to violations occurring before its enactment, it was not passed in time to prevent the execution of Mr. Medellín, and thus, if reintroduced, only can provide a

the federal courts to impose one on the States through lawmaking of their own"); *but see* Torres v. Oklahoma, No. PCD–04–442, 2004 WL 3711623, at *1 (Okla. Crim. App. May 13, 2004) (staying the execution and ordering an evidentiary hearing to determine if the conviction had been prejudiced by lack of consular notification).

[27] *Cf.* Head Money Cases, 112 U.S. 580, 598 (1884) ("It is obvious that with all this the [domestic] judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.").

[28] Request for Interpretation of the Judgment, Public Sitting, *supra* note 14, para. 8. "The United States is a party to the Vienna Convention on Consular Relations . . . and the Conventions's Optional Protocol Concerning the Compulsory Settlement of Disputes . . . , which gives the International Court of Justice . . . jurisdiction to decide disputes concerning the 'interpretation and application' of the Convention. 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 inter-national 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." (quoting Memorandum from George W. Bush, President, to the Att'y Gen. (Feb. 28, 2005), *available at* http://brownwelsh.com/Archive/2005-03-10_Avena_compliance.pdf.

[29] Medellín v. Texas, 128 S. Ct. 1346, 1353 (2008).

[30] *Id.* at 1369.

[31] H.R. 6481, 110th Cong. § 1 (2008). The Act was not passed in the 110th Congress.

[32] *Id.* § 2(b)(2).

remedy to some of the Mexican nationals under the *Avena* ruling.[33] The same quandary applies to the legislation considered in the State of Texas, which will not be introduced, if at all, until Spring 2009. Thus, neither legislative action nor "voluntary compliance" by the State of Texas[34] provided a remedy for the breach in the case at hand.

C. ICJ Interim Measures to Prevent the Irreparable Breach

In another attempt to prevent the execution of Mr. Medellín and other Mexican nationals in Texas by obtaining the desired "review and reconsideration," Mexico returned to the ICJ with a Request for Interpretation of the *Avena* decision and a request for indication of Provisional Measures of Protection. The ineffectiveness of these two measures once again revealed the limited courses of action by Mexico to prevent an irreparable breach.

Mexico desired to return to the ICJ to place additional pressure on the United States to comply with its obligations. However, as the United States, after the *Avena* decision, subsequently pulled out of the Optional Protocol to the Vienna Convention,[35] the ICJ no longer had jurisdiction over the United States in contentious VCCR cases. Mexico's only avenue for returning to the ICJ regarding *Medellín v. Texas* was to invoke Article 60 of the Statute of the Court with a Request for Interpretation.[36] Article 60 provides a special jurisdictional basis for the Court to clarify its previous judgments. Mexico claimed that a dispute existed regarding whether the U.S. obligation was one of result or means.[37] However, in oral arguments, the United States stated that it did not contest any aspect of Mexico's interpretation, and instead, that it fully agreed that the obligation was one of result.[38] In order for the ICJ to have a jurisdictional basis, the Court had to find an ongoing dispute regarding "the meaning or scope." To find a dispute, the Court utilized both a broader French

[33] The United States acknowledged before the ICJ that there was not enough time to pass legislation through both houses of Congress to implement the *Avena* decision even with U.S. desire to comply. *See* Request for Interpretation of the Judgment, Public Sitting, *supra* note 14, paras. 21, 26.

[34] Medellín v. Texas, 129 S. Ct. 360 (2008) (per curiam).

[35] Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 UST 325, 326, 596 UNTS 487, 487.

[36] Statute of the International Court of Justice, June 26, 1945, art. 60, 59 Stat. 1031, 33 U.N.T.S. 993 ("In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.").

[37] Request for Interpretation of the Judgment of 31 March 2004, *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2008 I.C.J. Pleadings para. 8 (June 19, 2008 at 10 a.m.) (Public Sitting, Verbatim Record), *available at* http://www.icj-cij.org/docket/files/139/14590.pdf. *See also Report of the International Law Commission on the Work of Its Fifty-third Session*, 54–57, U.N. Doc. A/56/10 (2001), *available at* http://www.un.org/law/ilc (for a discussion of obligations of means versus results).

[38] Request for Interpretation of the Judgment, Public Sitting, *supra* note 14, at 9 para. 3.

version of the statutory language and a summary conclusion without support of factual evidence that a difference of view existed.[39]

Under the stretched legal foundation, Mexico was able to seek and obtain an indication of provisional measures. This new ICJ holding required the United States to "take all measures necessary to ensure" that the named Mexican individuals in Texas most threatened with execution were not executed pending the ICJ's judgment on the Request for Interpretation and were provided with the reparation of "review and reconsideration."[40] Mexico was able to obtain a very unusual step with the ICJ's indication of provisional measures after a final judgment on the merits of the original case. Provisional measures had previously been issued in the *Breard* and *LaGrand* cases,[41] but they came before a final decision by the ICJ in an attempt to preserve rights pending the outcome of the contentious case. The provisional measures were considered a win for Mexico. They also succeeded in ratcheting up the international pressure on the United States. However, the impact was negligible because the provisional measures were not newly binding on the party states and there was no consequence for failure to comply.

The provisional measures were effectively a restating of an existing U.S. obligation under the original *Avena* decision. The Indication of Provisional Measures used similar bellicose language typically found in authorization of use of force that the United States must take "all measures necessary."[42] However, this action by the ICJ did not increase, magnify, or alter the United States' previous obligation to carry out the *Avena* decision and create injunctive relief. Thus, even a return to the ICJ and its willingness to use an expansive interpretation of its jurisdiction to issue provisional measures were insufficient to remedy the breach of the VCCR, hold off an irreparable breach, or prevent the United States from additionally violating its UN Charter obligations.

D. Previous Assurances and Guarantees of Non-Repetition (AGNR)

In the *LaGrand* case involving violations of Article 36 of the VCCR for German nationals, complete reparations could not be given.[43] Thus, Germany instead requested from the ICJ an assurance that violations of Article 36 of the VCCR would not be repeated by the United States. The United States committed to implementing measures to comply with its

[39] *Provisional Measures*, 2008 I.C.J. (dissenting opinion of Judge Buergnethal).

[40] *Id.* para. 80.

[41] *See* Vienna Convention on Consular Relations, *supra* note 18, at 258; LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

[42] *See* U.N. Charter art. 42 ("Should the Security Council consider that measures [not involving armed force] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces *as may be necessary* to maintain or restore international peace and security."(emphasis added)).

[43] *LaGrand*, 2001 I.C.J. at 516. Karl LaGrand, one of the two LaGrand brothers, had already been executed by the time the ICJ rendered its decision.

obligations under the VCCR and the ICJ confirmed that the U.S. commitment satisfied Germany's request.[44] However, even with significant U.S. effort, these measures were insufficient to prevent future breaches and reflect the limitations of this preventive remedy even when accompanied by full U.S. cooperation and consent.

Assurances and Guarantees of Non-Repetition (AGNR) are a diplomatic and remedial tool in international law that directly impact the domestic sphere. AGNR are a step beyond remedial fixing of past harms as affirmative actions for prevention of future violations. The core principle of AGNR is, in addition to cessation of the current harm if it is an on-going one, an inherent agreement that the harm will not occur again or, at a minimum, concrete actions will be taken to reduce the possibility of a violation.[45] AGNR are thus unlike most remedies, which are not accompanied by future obligations, since they are for past or current wrongs.

International tribunals have rarely imposed AGNR. The *Trail Smelter* case[46] is one of the original examples of AGNR imposed by an international court on domestic action. In this arbitration case, the dispute centered on pollution coming from Canadian mining and smelting activities just across the border.[47] The legal arbitration decision not only required Canada to pay compensation to the United States for past damages, but also required Canada to utilize equipment to measure and reduce pollution below certain guidelines, to report on the pollution levels on a monthly basis, and to pay additional compensation if the pollution levels exceeded the designated limits.[48]

The ICJ had previously been reluctant to impose remedies as intrusive as AGNR because such remedies involve a substantial intervention into domestic affairs, may violate sovereignty, and promote a backlash against international institutions.[49] In addition, the ICJ lacks power to enforce remedies within a domestic sphere. Instead, the ICJ relies on cooperative measures, leaving the determination of method of action to the discretion of the breaching party.[50] The ICJ thus limits itself in its choice of remedies, despite finding in the *LaGrand* case that it is not so limited by international law.

In the *LaGrand* case, the United States argued that AGNR is not an acceptable remedy to be examined by the ICJ under international law for

---

[44] *Id.*

[45] Scott M. Sullivan, *Changing the Premise of International Legal Remedies: The Unfounded Adoption of Assurances and Guarantees of Non-Repetition*, 7 UCLA J. INT'L & FOREIGN AFF. 265, 268 (2002).

[46] Trail Smelter Arbitration (U.S. v. Can.), 3 R. Int'l Arb. Awards 1911 (1938).

[47] *Id.* at 1922.

[48] *Id.* at 1924–37.

[49] Sullivan, *supra* note 45, at 276.

[50] *See* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 72 (Mar. 31) (finding that the United States could utilize measures of own choosing).

an additional reason: its uncertainty under international law due to its progressive nature.[51] However, the ICJ found that absent explicit language on remedies in a treaty, the Court has the power to determine whether a remedy is acceptable under international law.[52] Hence, while the ICJ has chosen less intrusive methods in the past, it has the option of using AGNR as a remedy.

The challenges and limitations of AGNR in VCCR cases are extensive. First, the guarantee is merely demanding that the party state make good on a previously established obligation. Second, in response to the *LaGrand* case, the United States had already increased its prior efforts to reduce the likelihood of VCCR violations with production and distribution of tens of thousands of pamphlets and pocket cards for law enforcement personnel, training programs, and direction by the FBI Law Enforcement Bulletin to comply with the treaty notification obligations.[53] However, the United States, in pulling out of the Optional Protocol, has acknowledged that it cannot sufficiently prevent violations of VCCR and would continuously be subject to ICJ litigation over the issue regardless of these efforts. Thus, the previous AGNR and U.S. concerted action together proved incapable as a proactive remedy of preventing U.S. breach and the violations of Article 36 of the VCCR that occurred to the fifty-one named Mexican nationals.

E. U.S. Government Actions to Prevent the Irreparable Breach Regarding Mr. Medellín

Following the *Avena* decision, the U.S. government actively tried to implement the ICJ decision to prevent a breach of its UN Charter Article 94 obligations. The government actions included: (1) issuing the Presidential Memorandum; (2) sending letters from the Attorney General and the Secretary of State to the U.S. state courts, including multiple letters to the State of Texas; (3) guaranteeing appearances in court by the Justice Department on behalf of Mr. Medellín; (4) filing amicus briefs; and (5) orchestrating high level diplomatic discussions to find alternative approaches for "review and reconsideration."[54] These actions reflected a determination to remedy for the breach of VCCR obligations and provide "review and reconsideration." However, despite its efforts, the United States could not prevent an irreparable breach of

[51] LaGrand Case (F.R.G. v. U.S.) 2000 I.C.J. Pleadings, paras 5.14–19, 7.15–16 (Nov. 14 at 3pm) (Public Sitting, Verbatim Record).

[52] LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 485 (June 27).

[53] Notification of Consular Officers upon the Arrest of Foreign Nationals, 28 C.F.R. § 50.5 (2001); Counter-Memorial of the United States (F.R.G. v. U.S.) LaGrand Case, 2000 I.C.J. Pleadings (Mar. 27, 2000); M. Wesley Clark, *Providing Consular Rights Warnings to Foreign Nationals,* FBI L. ENFORCEMENT BULL., Mar. 2002, at 22–29, *available at* http://www.fbi.gov/publications/leb/2002/mar02leb.pdf.

[54] Request for Interpretation of the Judgment, Public Sitting, *supra* note 14, at paras. 6, 10, 13, 20, 21.

its international legal obligations because of U.S. federal and constitutional structures.

IV. GENERAL PRINCIPLES OF REDRESS IN INTERNATIONAL LAW

The purpose of remedies are to restore the injured party from the illegal or wrongful act through general legal principles such as restitution, injunctive relief, specific performance, compensation, and assurance of non-repetition.[55] The remedy for treaty violations is inherently a dispute between nation-states to be resolved by international law. As indicated by the U.S. Supreme Court in the *Head Money Cases*:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war.[56]

It is a principle of international law that a party state must make amends for violations of treaty obligations, including those committed by subsidiary governmental bodies.[57] This principle applies to both minor breaches and substantial breaches because "when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect."[58] In addition, the fundamental Articles on State Responsibility, also called Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles), while non-binding, set out remedy guidelines for violations of international legal obligations.[59] Restoration to status quo, if possible, is viewed as the preferred remedy. If this option is impossible, then compensation should be provided, and if this remedy is also impossible, then "satisfaction" must be given.

These principles were confirmed by the Permanent Court of International Justice, the precursor to the ICJ, which declared in the *Factory at Chorzow* case that "reparation must, as far as possible, wipe out

---

[55] *See* Sanja Djajic, *Victims and Promise of Remedies: International Law Fairytale Gone Bad*, 9 SAN DIEGO INT'L L.J. 329, 331 (2008).

[56] Head Money Cases, 112 U.S. 580, 598 (1884) (finding that treaties do not hold a privileged position above other congressional acts).

[57] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 207 (1987) ("A state is responsible for any violation of its obligations under international law resulting from action or inaction by (a) the government of the state, (b) the government or authorities of any political subdivision of the state, or (c) any organ, agency, official, employee, or other agent of a government or of any political subdivision, acting within the scope of authority or under color of such authority.").

[58] Gabčikovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. 7, 38 (Sept. 25) (citation omitted); *cf.* Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, 1950 I.C.J. 221, 228 (Jul. 18).

[59] *Report of the International Law Commission on the Work of Its Fifty-third Session*, *supra* note 37, at 81.

all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[60] The principles were further reiterated by the Inter-American Court of Human Rights, which stated that there is a duty to make reparations in cases imposing the death penalty after a violation of Article 3 of the VCCR.[61] Remedies are important to make the injured party whole and to deter wrongdoing.[62] However, they do not have to be specified in the treaty. "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."[63]

All party states have a good-faith obligation under the fundamental principle of *pacta sunt servanda*.[64] The only limitation is *jus cogens*,[65] which does not exist in the case at hand. Thus, all failings to carry out treaty requirements in good faith are a breach subject to remedies and reparations. In the *Medellín* case, due to the irreparable breach caused by the execution, "review and reconsideration" can no longer be provided. It is impossible to determine the consequences of the violation of the VCCR for Mr. Medellín, or for any other individual not provided with "review and reconsideration."[66] However, the extinguishing of individual

[60] 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13). For a more recent case example, *see Gabčikovo-Nagymaros Project*, 1997 I.C.J. at 81 (finding that there is "a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it").

[61] Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Inter-Am. Ct. H.R., Advisory Opinion OC-16/99, para. 137, (Oct. 1, 1999), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf.

[62] DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 44–45 (1999).

[63] *Factory at Chorzow*, 1928 P.C.I.J. (ser. A) No. 17 at 21.

[64] *Pacta sunt servanda* is Latin for "agreements must be kept." It is a fundamental principle of international law that is applied to agreements entered in good faith.

[65] *Jus cogens* is literally Latin for "compelling law," but in international agreements, it means "preemptory norm." *See* Vienna Convention on the Law of Treaties, art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

[66] *Cf.* Torres v. Oklahoma, 120 P.3d 1184, 1188 (Okla. Crim. App. 2005). The Oklahoma court decided that the failure to provide consular notice did not prejudice the verdict. In the case of Rafael Camargo Ojeda, the State of Arkansas reduced the sentence to life imprisonment in exchange for a waiver of review and reconsideration. Others of the fifty-one Mexican nationals had their sentences commuted to life imprisonment under the blanket commutation by the Governor of Illinois or by the U.S. Supreme Court decision in *Roper v. Simmons*, which declared capital punishment for juvenile offenders unconstitutional. 543 U.S. 551, 578 (2005). These last commutations of sentences would not fulfill the requirement of "review and reconsideration."

rights, which may not have existed in the first place, does not eliminate the rights conferred to Mexico under the VCCR.[67]

When a foreign national suffers an injury resulting from a treaty breach, it is that foreign national's government's right to claim damages, and not necessarily the individual's right, because nation-states are the subjects of all international legal agreements.[68] As noted in the *Mavrommatis Palestine Concessions* case:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.[69]

Thus, Mexico is entitled to pursue damages for violations of its treaty-based rights that caused injuries to its nationals.[70]

V. TRADITIONAL AVENUES OF REDRESS FOR AN IRREPARABLE BREACH

For breaches of VCCR treaty obligations, the traditional avenues of redress are through the ICJ, the Security Council, and the domestic court system of the state where the harm occurred. However, due to unique legal and political dynamics, many of those avenues are unavailable to Mexico. Mexico is thus unfairly limited in seeking appropriate compensation for the irreparable breaches in the case at hand.

A. Options for Redress from the ICJ

The ICJ has a well-established power to determine the appropriate remedy for breaches,[71] as it did in the original decision in *Avena*. The

---

[67] LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 492 (June 27).

[68] *See* Panevezys-Saldutiskis Railway, 1938 P.C.I.J. (ser. A/B) No. 76 at 16; Payment of Various Serbian Loans Issued in France (Fr. v. Serb., Croat. & Slovn.), 1929 P.C.I.J. (ser. A) No. 20-21; Reparations for Injuries Suffered in Service of the United Nations, 1949 I.C.J. 174, 181–82 (April 11) ("only the party to whom an international obligation is due can bring a claim in respect of its breach"). *See also* C.F. AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 55–57 (1990).

[69] *See* Mavrommatis Palestine Concessions, (1924), P.C.I.J. (ser. A) No. 2, at 12.

[70] *See* Corfu Channel (U.K. v. Alb.) 1949 I.C.J. 244, 245 (Dec. 15); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1981 I.C.J. 45 (May 12); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169, 172 (May 10).

[71] Legality of Use of Force (Serb. & Mont. v. Belg.) 2004 I.C.J. 279, 339 (Dec. 15) (separate opinion of Judge Higgins) ("The power of the [ICJ] to identify remedies for any breach of a treaty, in a case where jurisdiction was based solely upon the treaty

authority to decide "the nature or extent of the reparation" comes from Article 36(2) of the ICJ Statute.[72] Despite its ability to do so, the ICJ has a very limited history of choosing remedies beyond declaratory judgments. Due to this rarity and the consensual nature of its jurisdiction, non-compliance with its final judgments is rare, and therefore, ICJ decisions regarding non-compliance are rare.[73] Instead, the ICJ has typically preferred to reserve the determination of remedies beyond the declaratory judgment to be negotiated by the party states, with the negotiations possibly accompanied by legal guidelines.[74] This preference is consistent with the ICJ's encouragement to settle all cases.[75]

Despite this preference, the Court has the possibility of every type of remedy at its disposal, including remedies resulting from injuries incurred directly by a state and from injuries incurred indirectly through its citizens.[76] This possibility is evident from the very first contentious case between nation-states. In the *S.S. "Wimbledon"* case, the Permanent Court of International Justice awarded financial damages for injuries resulting from a violation of the Treaty of Versailles even though the treaty itself did not discuss damages.[77] Furthermore, the ICJ has held in the *Corfu Channel* case that it not only can decide that there is a duty to pay compensation, but also can determine the amount of compensation to be awarded as damages.[78] Support for the principle that the ICJ can award damages was again reinforced in the later *Fisheries Jurisdiction* case, in which the Court's jurisdiction came directly from a treaty.[79] The Court found a violation of international law and an obligation to pay compensation. However, the Court found the award of compensation to be part of the underlying dispute.

In the most relevant dispute to the case at hand, the *Iranian Hostages* case, involving the unlawful seizure of diplomatic personnel and property, the United States asked the Court to declare a violation of international law, to order Iran to perform certain acts to remedy the

concerned, has been regarded as within the Court's inherent powers in the *Corfu Channel* case and in the *LaGrand* case.") (citations omitted). *See Corfu Channel*, 1949 I.C.J. at 249 (assessing the amount of compensation due from the People's Republic of Albania to the United Kingdom).

[72] Statute of the International Court of Justice, *supra* note 36, art. 36.

[73] Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434 (2004).

[74] *See* Rosalyn Higgins, *Remedies and the International Court of Justice: An Introduction, in* REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA 1, 9–10 (Malcolm D. Evans ed., 1998) (discussing the *Gabčikovo-Nagymaros Project*).

[75] Passage through the Great Belt (Fin. v. Den.), 1991 I.C.J. 12, 20 (Provisional Measures Order of July 29).

[76] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 1993 I.C.J. 3, 7 (Provisional Measures Order of April 8).

[77] S.S. "Wimbledon" (U.K. v. Ger.), 1923 P.C.I.J. (ser. A) No. 1, at 33 (Aug. 17).

[78] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 26 (Apr. 9).

[79] Fisheries Jurisdiction (F.R.G. v. Ice.), 1974 I.C.J. 175, 203 (July 25).

situation, and to order Iran to pay damages to the United States.[80] The ICJ ordered immediate actions by Iran, but declined to specify damages and left the financial compensation to be negotiated. The Court indicated that if the parties could not agree on the "form and amount of such reparation . . .[it] shall be settled by the Court . . . ."[81] The Court's action in the *Iranian Hostages* case reinforces the Court's strong preference for the parties to negotiate and determine the extent of the injury, damages, and resulting compensation. However, this case also demonstrates that the Court will intervene if the parties cannot reach an agreement.[82]

The ICJ previously employed a two-step process. In the first stage, the Court declares a violation of international law on the merits and suggests reparation; then, the Court provides a period for negotiations.[83] If needed, the Court next moves to a second stage to assess damages.[84] The Court took these steps in the *Case Concerning Certain Phosphate Lands in Nauru* even though the Republic of Nauru did not make a request for the Court to proceed to a damages determination.[85]

With regards to *Avena* and the execution of Mr. Medellín, the ICJ retained jurisdiction over the case and remained seized of the matter through its findings under the Request for Interpretation, even though the United States pulled out of the Optional Protocol. Thus, the ICJ could claim jurisdiction for the issuance of new remedies to resolve the dispute since "review and reconsideration" are no longer available for Mr. Medellín. The Court could then impose remedial fines on the United States as if the United States were a debtor state.[86] Mexico could attempt this avenue of compensation for the irreparable breach in the case at hand. The difficulty lies in both assessing damages, as many of the remaining fifty Mexican nationals will receive "review and reconsideration" over some indeterminate time frame, and in enforcing the damage assessment. Furthermore, the United States could refuse to accept the Court's determination, effectively refusing to participate, as the United States did in the *Military and Paramilitary Activities in and Against Nicaragua* case.[87] Moreover, if the U.S. refuses to comply, there

[80] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 6 (May 24).

[81] *Id.* at 45.

[82] SHABTAI ROSENNE, BREACH OF TREATY 117 (1985).

[83] Ian Brownlie, *Remedies in the Court of Justice*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 557, 560–61 (Vaughn Lowe & Malgosia Fitzmaurice eds., 1996).

[84] *Id.*

[85] Certain Phosphate Lands in Nauru *(*Nauru v. Austl.), 1992 I.C.J. 240, 247 (June 26).

[86] Ted L. Stein, *Contempt, Crisis, and the Court: The World Court and the Hostage Rescue Attempt*, 76 AM. J. INT'L L. 499, 528 (1982).

[87] *Military and Paramilitary Activities in and Against Nicaragua*, 1984 I.C.J. at 187.

may be little recourse since the ICJ is not properly supported by enforcement mechanisms.[88]

B. Options for Redress by the UN Security Council

Article 94(2) of the UN Charter states, "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by 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."[89] The operative language "decide" indicates that the UN Security Council can make binding obligations on any offending state or employ the power of the collective member states of the United Nations under the guise of maintaining "international peace and security." Thus, the Security Council can effectively order a nation-state to comply with an ICJ decision or be subjected to a number of other measures, such as economic sanctions or lawfully authorized use of force. This powerful enforcement mechanism, could in many cases, if not for political limitations, enforce any desired remedies suggested by the ICJ or separately punish a nation-state for non-compliance even without a determination of damages. To this point, the Security Council has never issued a resolution offering recommendations or decisions based upon an ICJ decision.[90] Moreover, the *Avena* case and the failure to stop the execution of Mr. Medellín will not be the first instance of UN Security Council action on VCCR matters.

Due to the veto power held by the United States as one of the five permanent members of the Security Council over all Security Council resolutions, the designated next step by Mexico for redress is likely blocked and unavailable. Further, the Security Council does not automatically address any failure to comply with an ICJ decision. The language in Article 94(2) provides that, in the case of non-compliance with an ICJ final judgment, "the other party *may* have recourse to the Security Council, which *may*, if it deems necessary, make

[88] W.M. Reisman, *The Enforcement of International Judgments*, 63 AM. J. INT'L L. 1, 4 (1969).

[89] U.N. Charter art. 94, para. 2.

[90] S*ee* Reisman, *supra* note 88, at 10 n.30 (citing one of the few examples where the Court came close because the United Kingdom lodged the question of enforcement of the *Anglo-Oil Co.* case on the agenda of the Security Council, but the U.S.S.R. indicated it would have vetoed any enforcement against Iran). In the South West Africa cases, it appeared that the Security Council would have to take an enforcement role due to the belief that South Africa would not comply with an adverse judgment. However, the case never reached that point due to jurisdictional standing issues. Separately, following the decision in *Military and Paramilitary Activities in and Against Nicaragua*, the United State vetoed a draft Security Council resolution calling for compliance with the judgment in conformity with the relevant provisions of the UN Charter. *See* U.N. Doc. S/18428 (Oct. 28, 1986) (vetoed by S.C. Doc. S/PV.2718 (Oct. 28, 1986)).

recommendations . . . ."[91] Since, even if the United States were to take the highly unlikely step of not exercising its veto on a matter concerning remedial measures against itself, Security Council action must be predicated on a finding of a threat to international peace and security.[92] Mexico would have difficulty claiming that the United States' failure to comply with *Avena* and the subsequent execution of Mr. Medellín reaches the required threshold for the Security Council to take enforcement action. The lack of enforcement measures via the Security Council does not invalidate the *Avena* ruling or reduce the culpability for the breaches, but it does raise the question of Mexico's other available avenues for remedy.

Mexico's other avenues for recovery within the UN system are also restricted. If the ICJ were to award financial compensation to Mexico for its injury, Mexico, in theory, could reach out to international financial institutions such as the International Bank for Reconstruction and Development (World Bank) for a lien or seizure of assets without going through the Security Council.[93] However, not only would these institutions object on procedural and jurisdictional grounds, but the United States is the primary donor to these institutions, has a prominent place on the institutions' boards, and participates in nominating the heads of these institutions. Therefore, it is challenging for Mexico to seek compensation in this manner.

However, the failure of the United States to comply with an ICJ judgment exposes it to sanctions through all of these international institutions. Mexico may be able to execute an ICJ damages judgment through non-forcible means of self-help, such as the seizure of assets, to satisfy a compensation award.

C. Options for Redress from U.S. Domestic Courts

U.S. courts have recognized the right of foreign governments to bring claims against domestic government entities for violations of international law. In *Republic of Argentina v. City of New York*, the Republic of Argentina successfully brought a claim against New York City to reclaim property taxes paid on consulate property under the premise that the property was exempt under customary international law.[94] Similarly, in *Finland v. Pelham*, the Finnish government successfully brought an action over taxes on consulate property against the Town of Pelham in the State of New York, citing U.S. treaty obligations under Article 21 of the Treaty of Friendship, Commerce, and Consular Rights

[91] Reisman, *supra* note 88, at 14 (discussing the negotiations over the strength of the language in Article 94(2) of the UN Charter) (emphasis added).

[92] *See* U.N. Charter, arts. 33–37.

[93] S*ee* Reisman, *supra* note 88, at 16–17.

[94] Republic of Argentina v. City of New York, 250 N.E.2d 698 (N.Y. 1969).

between the United States and Finland.[95] Under the premise that a breach of a treaty provision is, in effect, an injury to a nation-state, Mexico could seek redress due to the violation. However, Mexico must show a private right of action that can be recognized by U.S. federal courts, namely a continuing injury stemming from a violation of a federal right.[96] In the *Breard* case, the U.S. Supreme Court held that "neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States courts to set aside a criminal conviction and sentence for violation of consular notification provisions," especially when there is no ongoing harm.[97]

In these circumstances, Mexico is prevented from seeking redress for VCCR violations within U.S. courts because the *Medellín* Court found the treaty was not self-executing and was not accompanied by appropriate implementing legislation.[98] The treaty thus is not enforceable within U.S. law. Further, even if the treaty was found to be self-executing, Mexico would have to show an ongoing harm from violations of the VCCR that occurred long ago. Thus, while the United States is bound to the treaty on the international plane, judicial remedies are not available to a claimant state through U.S. courts.

VI. RESORT TO SELF-HELP AS AN OPTION FOR REDRESS

Because there are no adequate mechanisms for remedying violations of the VCCR, permitting the party-states to take unilateral self-help measures may be important in the international system to encourage compliance and maintain justice.[99] Unilateral self-help measures for redress can no longer include the use or threat of force, since the enactment of the UN Charter. However, the right to use non-force measures still exists in international law.[100] These countermeasures would automatically be illegal if not for the fact that they are reprisals for past harm, and even then are constrained by proportionality, necessity, and other international obligations.[101]

---

[95] Republic of Finland v. Town of Pelham, 270 N.Y.S.2d 661, 663 (N.Y. App. Div. 1966). *See also* Treaty of Friendship, Commerce, and Consular Rights, U.S.–Fin., Feb. 13, 1934, 49 Stat. 2659, 2674.

[96] The Eleventh Amendment to the Constitution bars lawsuits by a foreign government against a state government in federal court. However, in *Breard*, the U.S. Supreme Court noted that due to an exception established in *Ex parte Young*, a party suffering injury from a violation of a federal right might seek relief if the violation is ongoing and the relief is probable. *Ex parte* Young, 209 U.S. 123, 155–56 (1908).

[97] Breard v. Greene, 523 U.S. 371, 377 (1998).

[98] Medellín v. Texas, 128 S. Ct. 1346, 1357 (2008).

[99] John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 VA. J. INT'L L. 881, 887 (1999).

[100] *Id.* at 900.

[101] *Id.* at 900–01.

A. Options for Redress Established by Precedent Set by the Iranian Hostages Case

There is an important inquiry into whether self-help actions would be viewed as punitive, or would be viewed as a way to put pressure on the United States to comply with the ICJ decision.

The *Iranian Hostages* case, the first case brought before the ICJ resulting from a breach of the Vienna Convention, is relevant to the case at hand. On November 29, 1979, the United States instituted proceedings against Iran for violations of obligations owed to the United States by the taking over of the U.S. Embassy in Tehran and the holding of consular staff as hostages.[102] The ICJ issued provisional measures demanding the return of the Embassy and the release of the hostages.[103] Further, the ICJ issued a decision reaffirming the breach and the continued violation of VCCR obligations, and indicating that Iran must pay reparations for injuries to the United States.[104] Iran failed to provide representation at the ICJ and did not comply with the decision.

The United States could have taken recourse in the Security Council per Article 94(2) of the UN Charter. While the Security Council issued several resolutions condemning the Iranian actions and stating that the UN body would remain seized of the matter, no measures were implemented under UN recommendation or decision. Instead, the United States instituted unilateral sanctions against Iran with support from Western allies, justified by both the provocative Iranian actions and the failure to comply with the ICJ provisional measures. The unilateral sanctions included: (1) Presidential Proclamation 4702 imposing a ban on the importation of Iranian oil into the United States; [105](2) Executive Order 12170 blocking all property within U.S. jurisdictions owned by the Iranian Central Bank and government;[106] (3) Executive Order 12205 instituting an embargo on U.S. exports to Iran;[107] and (4) Executive Order 12211 imposing a ban on Iranian imports to the United States and travel by U.S. citizens to Iran.[108]

The economic sanctions were shown to be under the premise of applying pressure for compliance by Iran with its VCCR obligations and

[102] Application Instituting Proceedings and Request for the Indication of Provisional Measures of Protection, United States Diplomatic and Consular Staff in Tehran, United States Diplomatic and Consular Staff in Tehran, 1982 I.C.J. Pleadings 1, 4 (Nov. 29, 1979), *available at* http://www.icj-cij.org/docket/files/64/9545.pdf.

[103] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7, 8 (Dec. 15); Press Communique No. 79/7, I.C.J., The I.C.J. Implements Preliminary Measures (December 15, 1979).

[104] *United States Diplomatic and Consular Staff in Tehran,* 1980 I.C.J. at 3.

[105] Proclamation No. 4702, 44 Fed. Reg. 65581 (Nov. 14, 1979), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=31675.

[106] Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 418, 428 (1980) (citing 44 Fed. Reg. 65581 (1979)).

[107] Exec. Order No. 12,205, 45 Fed. Reg. 24099 (Apr. 9, 1980).

[108] Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 657, 658 (citing 45 Fed. Reg. 26,685, 26,686 (Apr. 21, 1980).

for remedying the breach, and not punitive. The sanctions were argued to have the purpose of resolving the dispute because the executive orders were revoked once the hostages were released, with the exception of the order blocking Iranian property in the United States, which could be viewed as collection of damages per the ICJ decision. The ICJ, normally adverse to direct actions that could escalate a dispute, had judges accept the U.S actions as "some kind of normal counter-measures."[109] Beyond the obligations, if any, owed to individuals harmed, obligations were owed to the United States, as a separate legal entity, under Article 36 of the VCCR. These obligations included free communication between consular officials and nationals of the sending state, freedom of communication with consular officials themselves, and the right to visit detained U.S. nationals.[110] These obligations were breached and a judicial decision specified the payment of reparations.

If the ICJ were to determine financial damages against the United States, it is possible that Mexico could seek enforcement of the decision by utilizing its own domestic courts. The United States has assets in Mexico that could be seized to pay money owed to Mexico. This principle is well established for recognition of arbitration awards, but there is limited precedence for ICJ decisions. The purpose of the ICJ is for party states to resolve their disputes peacefully through international bodies instead of resorting to domestic action that could exacerbate a conflict. However, in this case, since Mexico has already turned to the ICJ for resolution of the dispute, Mexico could cite the Iranian seizure and the long international history of attaching foreign assets to settle claims.[111] For instance, the United States and the United Kingdom previously froze hundreds of millions of dollars of Egyptian assets after the Suez Canal crisis.[112] In addition, the United States has taken similar action against a multitude of other nation-states. Mexico could have a strong basis for self-help through its domestic legal system, but this action is predicated on the ICJ reaching a new determination of compensation so that Mexico has a firm legal basis to resort to its own courts.

---

[109] *United States Diplomatic and Consular Staff in Tehran,* 1980 I.C.J. at 52 (Morozov, J., dissenting).

[110] Memorial of the Government of the United States, United States Diplomatic and Consular Staff in Tehran, 1982 I.C.J. Pleadings 121, 173 (Jan. 11, 1980).

[111] *See* Oscar Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT'L L. 1, 7 (1960). ("[A state] should be free to seize assets of the debtor state within its control for the purpose of satisfying an award of damages. Even if the award does not call for monetary compensation, it would seem to be open to the winning state to attach assets in order to bring about compliance by the creditor state.").

[112] Thomas T.F. Huang, *Some International and Legal Aspects of the Suez Canal Question*, 51 AM. J. INT'L L. 277, 304 (1957) (noting that this action was taken "both as a precautionary and as a retaliatory measure").

B. Mexico's Economic Self-Help: Targeted Sanctions

With few traditional options available for redress, Mexico would contend that other self-help actions are "necessary to secure compliance" of UN Charter obligations and remedy its injury. Thus, just as with the United States and Iran, Mexico could employ economic sanctions to extract reparation for the irreparable breaches and to put additional pressure on the United States to provide the remedy specified by the ICJ for the remaining Mexican nationals. Per the ILC Draft Articles, economic countermeasures do not require Security Council approval and thus could not be prevented by a U.S. Security Council veto.[113]

The biggest hurdle for this type of unilateral enforcement of remedies would be the lawfulness of Mexico's actions. In international law, there used to be fewer legal restrictions on coercive action. For example, use of force used to be lawful to bring about payment of financial obligations. Blockades were previously permitted for the failure to pay debts, even when a treaty existed that specifically prohibited the use of force for debts, as long as the debtor state failed to pay or negotiate the award for an arbitral tribunal.[114] Sanctions and embargoes were considered a successful strategy for coercive enforcement and they were a regular part of disputes between nation-states. Now there are more restrictive legal guidelines regulating the actions of nation-states.

Any economic retaliatory sanctions or enforcement action by Mexico is subject to its World Trade Organization (WTO) General Agreement on Tariffs and Trade (GATT)[115] obligations to the United States. Action by Mexico would have to be proportional, necessary, and the least trade restrictive option. The ILC Draft Articles require that countermeasures by an injured nation-state shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured nation-state.[116] Consequently, the countermeasures must be based on the inducement necessary to satisfy the debt and not be unduly

[113] *See Report of the Int'l Law Comm'n on the Work of Its Fifty-third Session*, *supra* note 37, at 13 (omitting UN approval or WTO approval for the implementation of countermeasures).

[114] *See* Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts art. 1, Oct. 18, 1907, 36 Stat. 2241, 2251, 1 Bevans 607, 614. The Convention did not apply "when the debtor State . . . after accepting the offer [of arbitration], prevents any 'Compromis' from being agreed on, or, after the arbitration, fails to submit to the award." *See* Reisman, *supra* note 88, at 12 n.35 (discussing the blockade of Venezuela for non-payment of debts). This type of use of force was outlawed by the U.N. Charter. U.N. Charter art. 2, para. 4.

[115] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A–11, 55 U.N.T.S. 194.

[116] *Report of the Int'l Law Comm'n on the Work of Its Fifty-third Session*, *supra* note 37, at art. 49 (reading "Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question").

coercive.[117] The countermeasures must also be justified by showing that other avenues for remedying the dispute were unavailable or ineffective. Mexico would have to contend that economic sanctions were the only way to receive the appropriate compensation for the breach. Further, Mexico's actions must be for recovery purposes or to induce a certain remedial action by the United States, as opposed to being punitive in nature, in order to be considered countermeasures.

Regardless of the proportional and necessary nature of economic sanctions by Mexico, they would still likely clash with Mexico's WTO free-trade obligations. As noted, the execution of Mr. Medellín not only breached the VCCR, but also breached the UN Charter. Even if Mexico's sanctions can be attributed to remedying the United States' breach and bringing about compliance with a fundamental treaty obligation, they may create a conflict between the trade agreements and UN obligations. Sanctions by Mexico would violate GATT Article III and/or XI.[118] However, Article 103 of the UN Charter states, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[119] The United States' UN Charter obligation, namely to give effect to the ICJ decision under Article 94, trumps all other treaty obligations, including its WTO and NAFTA obligations. However, the issue is more complex, because Mexico would be utilizing countermeasures that are contrary to trade agreements to enforce its rights under the UN Charter instead of using these methods to comply with its UN Charter obligations.

It is unsettled whether the enforcement of UN Charter rights prevails over other international obligations. In international law, when trade rules conflict with other international norms such as human rights law or *jus cogens*, the trade rules arguably do not trump. However, it is uncertain whether a right under the UN Charter would follow the same standard, and thus justify countermeasures and enable Mexico to use trade sanctions. Since Article 103 of the UN Charter may be insufficient to validate such countermeasures, Mexico would have to justify them under GATT provisions. On the other hand, Mexico may not be able to do so, because it is uncertain whether a state may ever lawfully violate WTO trade rules as remedy for non-WTO violations.

There are a few past examples of states adopting trade countermeasures for non-trade related reprisals. In 1974, Germany

[117] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uraguay Round, art. 22, para. 4, 33 I.L.M. 1240, *available at* http://www.wto.org/english/docs_e/legal_e/28–dsu.pdf.

[118] GATT, *supra* note 115, arts. III, XI.

[119] U.N. Charter art. 103.

blocked Iceland from trading fish in its ports in direct response to the seizure of a German boat off the coast of Iceland.[120] Germany claimed its response was justified under "general principles and rules of international law."[121] A similar dispute occurred when the United States banned the importation of tuna from Canada in response to Canada's detention of U.S. fishing boats.[122] While neither case definitely answered whether economic countermeasures can lawfully be adopted in response to independent violations of treaty law, they raise the possibility that Mexico would be able to resort to similar self-help methods.

If it chooses to implement countermeasures, Mexico may be protected from the WTO panel's finding it acted unlawfully. In the *Soft Drinks* case,[123] the Appellate Body indicated that, if countermeasures were adopted in response to a general international law conflict, as opposed to a WTO trade-based conflict, the WTO adjudicative bodies would not have jurisdiction to hear the dispute.[124] Thus, the United States would lack a forum to contest the sanctions even if their legality were questionable.

Finally, Mexico could make its argument under Article XX of GATT, which lays out exceptions to the trade obligations. Article XX(d) could be read to permit countermeasures to impose pressure on the United States to comply with its VCCR and ICJ obligations. Article XX(d) states that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to secure compliance with laws or regulations."[125] Mexico could argue that the countermeasures are specifically designed to bring about compliance with the VCCR and the UN Charter, and are not for punitive reasons. After the precedent in the *Soft Drinks* case, Mexico could contend that it is directly trying to bring about compliance within the United States and U.S. domestic law, "rather than [at the] international level."[126] Alternatively, Mexico could cite Article XX(b) of GATT, which permits violation of the trade laws "to protect human . . . life or health."[127] Since there is still a direct threat to Mexico's citizens of the

[120] Minutes of Meeting of the GATT Council, GATT Doc. No. C/M/103 (Feb. 18, 1975).

[121] *Id.* at 15.

[122] Report of the Panel, *United States—Prohibition of Imports of Tuna and Tuna Products from Canada*, ¶2.1, L/5198 (Feb. 22, 1982) GATT B.I.S.D. (29th Supp.) at 91, 92 (1983).

[123] Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7 2005).

[124] Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6 2006) (relying on Article 3(2) DSU, which indicates that the dispute settlement system is to "preserve [the] rights and obligations [of Members] under the covered agreements, and to clarify the existing provisions of those agreements.").

[125] GATT, *supra* note 115, art. XX(d).

[126] Panel Report, *supra* note 123, at para. 8.179.

[127] GATT, *supra* note 115, art. XX(b).

death penalty until the United States fulfills its international obligations under *Avena*, Mexico could argue that its actions are protective of lives. These WTO-based arguments are untested, but may facilitate lawful redress.

It has been separately argued that Mexico should target the State of Texas specifically, instead of the United States generally, for failure to comply with the ICJ decision and the concurrence in the *Medellín* decision, which implored the State of Texas to take action to prevent the United States' breach of its obligations. The argument to target Texas stems from the concept that the U.S. executive branch has tried to comply with the *Avena* judgment and Texas is thus responsible for the United States' breach. Further, other U.S. state courts have begun to recognize that "like the operation of the procedural default argument, the idea that [a U.S. state] can completely ignore its treaty obligations without consequence essentially obliterates the purpose for which the rights under the Vienna Convention were intended."[128]

This narrow action is unlikely because trade sanctions based on a domestic intra-state origin would be very difficult and costly to enforce. Moreover, several U.S. states currently have *Avena*-named Mexican nationals on death row, so a targeted action could not be entirely successful as a preventative measure. Finally, the biggest problem is that targeting the State of Texas runs counter to principles of international law. The responsibility for implementation and redress falls to the U.S. federal government regardless that the primary inhibition to "review and reconsideration" stemmed from Texas and other U.S. states.

C. Mexico's Political Self-Help: Political Fall-Out in Multiple Realms of Cooperation

Mexico also has several punitive political measures at its disposal. These political measures could be viewed as punitive or as a method to put additional pressure on the United States to provide the remedy specified by the ICJ for the remaining fifty individuals. They include: (1) slowdown of border cooperation on issues relating to immigration, drug smuggling, and terror prevention; (2) visa delays; (3) extradition delays; (4) administrative delays related to economic and business relations; and (5) weakening of diplomatic communication. The *Medellín* Court recognized that the United States could be subject to significant political fall-out and to political retaliation for its breach.[129] Mexico could not resort to violating the VCCR, as it is still bound by the treaty's obligations irrespective of the United States' breach. However, Mexico could make

[128] Virginia v. Pham, Crim No. K105537 (Va. Cir. Ct. Jan 3, 2006).

[129] The breach will harm the United States' "plainly compelling . . . [interest] in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law." Medellín v. Texas, 128 S. Ct. 1346, 1375 (2008). (Stevens, J., concurring) (internal citation omitted).

the functions of the U.S. diplomatic service in Mexico more difficult. None of these political actions provide redress for the breaches of international law nor are they measurable as reparations. Instead, they reflect the political fall-out that could result from Mexico's limited avenues for remedy.

VII. CONCLUSION: UNCERTAINTY FOR REDRESS EXPOSED THE LIMITATIONS OF INTERNATIONAL LAW

In conclusion, Mexico's redress for the irreparable breach is limited, and the only known available remedies all have uncertain legal standing. While previous international theorists have proposed an amendment to the ICJ statute to bestow stronger enforcement mechanisms,[130] the current arrangement is incapable of enforcing remedies for serious breaches of VCCR and UN Charter obligations. The fundamental purpose of a judicial system is to resolve disputes and provide a remedy when an attributable injury occurs. In the case of Mr. Medellín , an undeniable injury occurred, namely that the United States failed to provide consular notification, and no "review and consideration" was provided before his execution. However, due to an unfortunate confluence of legal and judicial structures on the domestic and international plane, there is no recourse for this injury.

Moreover, the United States has revealed that it will prevent future conflicts with the ICJ on this issue by pulling out of the Optional Protocol for the VCCR. The result is that no party state will be able to seek remedies through the ICJ in future breaches by the United States, which are certain to transpire.[131] Furthermore, there will be no remedy within the U.S. domestic system until the U.S. Congress passes implementing legislation

The results of the *Medellín* and *Avena* decisions show the limitations of international law and the need for greater clarity of remedies. Otherwise, party states will return to resorting to self-help and the escalation of disputes that the UN system and dispute resolution mechanisms were meant to prevent.

[130] S*ee* Reisman, *supra* note 88, at 26–27.

[131] The United States may also suffer similar limitations in the enforcement of its treaty-based rights and protections for its citizens.