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HAGUE INTERNATIONAL TRIBUNALS

Judicial Competence and Judicial Remedies in the *Avena* Case

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Abstract

The last decade marked the unprecedented increase in the importance of the role of judicial bodies in the maintenance of international legal order and their assumption of hitherto unprecedented judicial powers. The principle of consent and its implications are the issues that pose major questions on possible limitations in this process. The tension between these conflicting factors has been witnessed in the treatment by the ICJ of the disputes related to the right of convicted foreign nationals to consular notification. In *LaGrand*, the Court made substantial advances in terms of diminishing the role of the principle of consent as an obstacle to proper judicial enforcement of international obligations. *Avena* – a similar case – demonstrates that such an approach has acquired an important degree of consistency in the ICJ's jurisprudence.

Key words

exhaustion of local remedies; inherent powers of international courts and tribunals; interpretation of jurisdictional clauses; judicial jurisdiction; judicial remedies; principle of consent

The International Court of Justice (ICJ) has recently shown a growing inclination to consider the substantive character of a dispute, such as the norms and violations involved, in deciding jurisdiction and admissibility. This trend is most notable when one compares *Avena*[1] with *LaGrand*,[2] which this article does at length. The *Avena* judgment is closely connected to and largely follows the earlier decision of *LaGrand*. Both cases involved US violations of Article 36 of the Vienna Convention on Consular Relations,[3] and both highlight some major issues of judicial competence and judicial

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1. *Case Concerning Avena and Other Mexican Nationals (Mexico v. USA)*, Judgment of 31 March 2004, General List No. 128, at www.icj-cij.org (last visited 1 Nov. 2004) (not yet published) (hereafter Judgment). The references to the Judgment and individual opinions are made from the text available at the Court's website.
2. *Case Concerning the Vienna Convention on Consular Relations (Germany v. United States of America)*, Merits, Decision of 27 June 2001, General List No. 104 (hereafter *LaGrand*); see also A. Orakhelashvili, 'Questions of International Judicial Jurisdiction in the *LaGrand* Case', (2002) 15 LJIL 105–30.
3. 1963 Vienna Convention on Consular Relations, 596 UNTS 261 (24 April 1963). Art. 36 reads as follows: Communication and contact with nationals of the sending State

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

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

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

remedies. Moreover, *LaGrand* was widely referred to in *Avena*, both in the parties' submissions and in the Court's reasoning. The analysis in this article therefore pays close attention to the relationship between these cases.

With regard to the scope of its jurisdiction, the Court in *Avena* followed *LaGrand* in affirming the indispensable link between the substantive resolution of the dispute in accordance with international law and the consequent construction of the scope of jurisdictional clauses. However, *Avena* broke new ground in many respects. For example, with regard to the scope of the local remedies rule, the Court showed a degree of flexibility in applying that rule when it took into account the nature and context of the violations involved. However, the approach it explicitly relied on still needs some interpretation in terms of the applicable contexts of the case. Finally, in terms of the law of judicial remedies, the Court reaffirmed its power to issue consequential orders to states, directing them to perform specific actions to undo illegalities. However, the Court also had to consider the fact that the cause of action in *Avena* was limited to the terms of the Vienna Convention for Consular Relations. This was important in terms of which remedies were available.

The *Avena* judgment deals with several pertinent issues of international law, such as nationality, consular relations, and diplomatic protection. However, this article focuses on the significant issues from the perspective of the competence of international tribunals and judicial remedies. Several issues dealt with in the judgment will be addressed: the tension between the concept of inherent judicial powers and the principle of consent as basis of judicial jurisdiction; the limitations on applicability of the duty to exhaust local remedies before the submission of a claim to an international tribunal; and the kinds of remedies the ICJ can award to redress the breaches on which it adjudicates. Finally, some broader implications of the Court's substantive and remedial findings in *Avena* will be examined. Following a brief discussion of the background and context of the case, each of the above issues will be discussed in order.

1. The background and context of the case

The *Avena* case involved allegations that a number of Mexican nationals were convicted of crimes and sentenced without being able to contact the consular offices

addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(*c*) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. 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.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

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of the state of their nationality. Mexican consulates similarly did not learn of the cases in a timely fashion so as to be able to respond to these situations by means of exercising their right to visit those convicted.

In response, Mexico instituted proceedings on 9 January 2003 against the United States before the ICJ for violations of the Vienna Convention on Consular Relations. In terms of the Court's jurisdiction, Mexico referred to Article 36(1) of the Court's Statute and Article I of the Optional Protocol to the Vienna Convention conferring on the Court jurisdiction over disputes arising out of the interpretation and application of the Vienna Convention.

In its Application, Mexico complained of 52 cases of violation by the United States of its obligations under Article 36 of the Vienna Convention to inform Mexican nationals of their right to consular assistance and to provide relief adequate to redress such violations. In at least 49 of these cases, Mexican nationals were tried, convicted, and sentenced to death. The other three Mexican nationals were also tried and convicted, and had exhausted all judicial remedies; clemency was the only remaining remedy in their case.[4] Mexico claimed that all the individuals referred to in the Application were its citizens at the time of their arrest. In 50 cases, the individuals were never informed of their rights under the Vienna Convention, and in 29 cases Mexican consular authorities learned of the detention of their nationals only after death sentences were handed down. In 23 other cases Mexico allegedly learned of the trials and convictions through sources other than the competent US authorities required under Article 36 of the Vienna Convention.[5]

On the same day that Mexico filed its Application, it requested that the Court provide provisional measures necessary to prevent the execution of the 52 Mexican citizens. On 11 January 2003, the governor of Illinois, exercising his clemency review power, commuted the sentences of all convicts awaiting execution in that state, including three individuals named in Mexico's application.[6] Mexico consequently withdrew its request with regard to those three individuals, but its Application remained otherwise unchanged. The Court found that three other Mexican nationals, having exhausted all judicial remedies, were at risk of execution in the following months or weeks.[7] The Court issued an Order accordingly,[8] and the United States confirmed in due course that none of the named individuals had been executed.[9]

In subsequent proceedings the Court dealt with US objections to jurisdiction and admissibility, but dismissed them in order to proceed to merits. On the substance of Mexico's claims,[10] the Court found that the United States had breached its obligations

4. These were Mr Fierro, Mr Moreno, and Mr Torres, numbered for the purposes of the case as No. 31, No. 39, and No. 53 respectively, Judgment, *supra* note 1, para. 20.
5. Ibid., paras. 19–20.
6. These were Mr Cabalerro, Mr Flores and Mr Solache, numbered for the purposes of the case as No. 45, No. 46, and No. 47 respectively, ibid., para. 21.
7. Ibid.; Judgment, *supra* note 1, para. 21.
8. Order of 5 Feb. 2003, General List No. 128.
9. Judgment, *supra* note 1, paras. 3, 21.
10. 'Mexico ask[ed] the Court to adjudge and declare:

    (1) that the United States, in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row described in this Application, violated its international legal obligations to

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under Article 36 of the Vienna Convention with regard to 51 Mexican nationals by not informing them of their rights under Article 36 and also by not informing Mexican consular posts of the situation, thereby depriving them of the right to render the assistance provided for by the Vienna Convention.[11] Consequently the United States was bound to review and reconsider the convictions and sentences, and to do the same if in the future Mexican nationals were convicted and sentenced without their rights under Article 36 of the Vienna Convention being respected.[12]

In the final judgment, the Court noted that the Order indicating provisional measures was meant to stay in force until the Court delivered the judgment. After that, the Order ceased to be operative and the obligations it imposed on the United States were replaced by the obligations embodied in the judgment itself.[13]

2. Interpretation of jurisdictional clauses with special reference to inherent judicial powers

Avena involves the issue of interpretation and application of the jurisdictional clause under Article I of the Protocol to the Vienna Convention, namely the issue of how the scope of such clauses should be construed to ensure their effectiveness and

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Mexico, in its own right and in the exercise of its right of consular protection of its nationals, as provided by Articles 5 and 36, respectively of the Vienna Convention;

(2) that Mexico is therefore entitled to restitutio in integrum;

(3) that the United States is under an international legal obligation not to apply the doctrine of procedural default, or any other doctrine of its municipal law, to preclude the exercise of the rights afforded by Article 36 of the Vienna Convention;

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the 54 Mexican nationals on death row or any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are international or internal in character;

(5) that the right to consular notification under the Vienna Convention is a human right;

and that, pursuant to the foregoing international legal obligations,

(1) the United States must restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States international legal obligations;

(2) the United States must take the steps necessary and sufficient to ensure that the provisions of its municipal law enable full effect to be given to the purposes for which the rights afforded by Article 36 are intended;

(3) the United States must take the steps necessary and sufficient to establish a meaningful remedy at law for violations of the rights afforded to Mexico and its nationals by Article 36 of the Vienna Convention, including by barring the imposition, as a matter of municipal law, of any procedural penalty for the failure timely to raise a claim or defence based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention; and

(4) the United States, in light of the pattern and practice of violations set forth in this Application, must provide Mexico a full guarantee of the non-repetition of the illegal acts.'

At subsequent stages of the proceedings Mexico maintained these submissions, *inter alia* asking the Court that the convictions and sentences against Mexican nationals must be vacated and cancelled. Judgment, *supra* note 1, paras. 12–14.

11. Ibid., operative paras. 4–5.
12. Ibid., operative paras. 9–11.
13. Ibid., para. 152.

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to support the judicial cognizance of the implications of breaches of the Vienna Convention.

This issue can be approached from different doctrinal perspectives. One may advance the argument based on the consensual nature of judicial jurisdiction[14] and suggest that the Court could take cognizance of the breaches of the Vienna Convention only if and to the extent that it is authorized to do so by the consent of the litigation parties. This view is based on the decentralized nature of the international legal order in which the consent of sovereign states is the only basis of their legal obligations, including obligations to submit disputes to international tribunals. The jurisdiction of international tribunals differs from the jurisdiction of national courts. National courts are established by the law and possess *ipso facto* compulsory jurisdiction within the ambit of their subject-matter competence. International tribunals are established by international agreements and their jurisdiction is based on the consent of states. Writers refer to this distinction and try to identify on this basis the fundamental difference in compulsory nature between national and international jurisdictions.[15] As Fitzmaurice emphasized,

> the obligation of a citizen in the domestic field to answer in court depends not on his own volition but upon the law of the land, which alone determines what tribunals have jurisdiction and in respect of what persons and suits. In the international field, the obligation of any state to appear before an international tribunal and its competence to hear a particular case depends directly or indirectly upon the agreement of the parties.[16]

On the other hand, it seems plausible that once a judicial tribunal is established by the consent of states, it must be able to resolve the disputes submitted to it finally and effectively. The inherent powers of international tribunals enable them to decide on the issues that are necessary for the final resolution of judicial disputes, and in this field the relevance of the principle of consent is limited.[17] Under that approach,

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14. S. Rosenne, *The Law and Practice of the International Court, 1920–1996* (1997), 569; E. Lauterpacht, *Aspects of Administration of International Justice* (1991), 23; H. Lauterpacht, *The Development of International Law by the International Court* (1958), 338; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), 736 et seq.
15. Rosenne, for instance, has suggested the following: 'In approaching questions of jurisdiction – the core of the work of the Court – it is necessary to put aside notions which have their origin in concepts of the internal law of States. Even the words have different meanings. Within States, to establish courts and to allocate to each its jurisdiction is an element in the organization of the State and is usually a matter for legislative action. In international law and relations, this is not a function of government but a voluntary and collective act on the part of sovereign and co-ordinate States which, in fact, in exercise of their sovereignty agree to forgo part of their rights to the extent that they establish an international court and enable it to act.' *Supra* note 14, at 528–9.
16. Fitzmaurice, *supra* note 14, at 436.
17. There are different approaches to the concept of inherent powers. See H. Thirlway, 'The Law and Procedure of the International Court of Justice', (1998) BYIL 4, at 6 ('When Jurisdiction is referred to, it must always be asked, "jurisdiction to do what?" Jurisdiction or competence is not, in the sense in which those terms are used in relation to a dispute, a general property vested in the court or tribunal contemplated: it is the power, conferred by the consent of the parties, to make a determination on specified disputed issues which will be binding on the parties because that is what they have consented to'). See also, for the particular scepticism about the inherent powers of the Court, ibid., at 21. Thirlway construes the Court's incidental jurisdiction as that based on the inherent powers of the Court to decide as to its declining to exercise the jurisdiction. Briggs, on the other hand, sees the incidental jurisdiction of the Court in the light of inherent powers that the Court may resort to in order to support the exercise of its principal jurisdiction. These are, for example,

the Court could take cognizance of the consequences of the breaches of the Vienna Convention even if this would not be strictly justified by reference to consensual principle.

Avena was preceded by other cases involving diplomatic protection that were brought before the Court on the basis of jurisdictional clauses in treaties. In *Elettronica Sicula* (*ELSI*), the parties did not in fact contest the jurisdiction of the Court based on Article XXVI of the US–Italy Treaty on Friendship, Commerce and Navigation of 2 June 1948, and the Court took note of that.[18] In *LaGrand*, the respondent contested jurisdiction, contending that the applicability of the jurisdictional clause under Article I did not provide for the Court's power to decide on incidental issues of whether the provisional measures ordered were complied with and whether the Court was competent to order the remedy of the guarantees of non-repetition. The Court rejected such arguments by reference to inherent judicial powers to adjudicate these incidental issues as an integral part of substantive, or mainline, jurisdiction provided in the jurisdictional clause of Article I. The Court made it clear, in the language of inherent powers, that it has the judicial powers inferable from a tribunal's judicial character, which is independent of the consent of the litigating parties. The Court also made it clear that, where jurisdiction exists over the substance of a dispute, that jurisdiction covers the adjudication on the compliance with the provisional measure orders that may have been indicated in the given case, as well as the issue of applicable remedies.[19] The Court's treatment of this issue was consistent with the established jurisprudence on inherent powers with regard to judicial remedies.[20] In *Chorzow Factory*, the Permanent Court of International Justice (PCIJ) affirmed that the power to award reparations as a natural consequence of every internationally wrongful act was within its jurisdiction and that no additional consent of the parties was necessary.[21] In *Corfu Channel*, the PCIJ considered that it possessed the inherent jurisdiction to calculate the compensation, since this issue was the precondition of the finality of the settlement of a dispute.[22] In *Fisheries Jurisdiction*, the ICJ, despite objections by the respondent, construed the issue of compensation for wrongful acts as an inherent part of the dispute and thus affirmed its inherent jurisdiction to decide this issue.[23] In *Nicaragua*, the Court expressly

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the powers with regard to remedies, the indication of provisional measures, or the interpretation of judicial decisions, as well as the power of a tribunal to determine its own jurisdiction. The Court may exercise these incidental powers regardless of the consent of the respondent. See H. Briggs, 'The Incidental Jurisdiction of the International Court of Justice as Compulsory Jurisdiction', in F. v.d. Heydte, I. Seidl-Hohenveldern, S. Verosta, and K. Zemanek (eds.), *Völkerrecht und Rechtliches Weltbild. Festschrift für Alfred Verdross* (1960), 92–3, 95. On discussion of conceptual issues related to inherent powers, see P. Gaeta, 'Inherent Powers of International Courts and Tribunals', in L. C. Vorhah et al. (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003), 353–72. On the nature and scope of inherent powers, see generally A. Orakhelashvili, 'The Concept of International Judicial Jurisdiction: A Reappraisal', (2003) 3 *The Law and Practice of International Courts and Tribunals* 501, at 534–8.

18. See *ELSI*, [1989] ICJ Rep. 347–8.
19. *LaGrand*, *supra* note 2, paras. 43–48. See also Orakhelashvili, *supra* note 2, at 113–16.
20. See generally I. Brownlie, 'Remedies in the International Court of Justice', in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (1996), 557–8; G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice', (1958) BYIL 81–2.
21. *Chorzow Factory*, (1926) PCIJ Ser. A, No. 7, at 23.
22. *Corfu Channel*, Merits, [1949] ICJ Rep. 26.
23. *Fisheries Jurisdiction*, [1974] ICJ Rep. 203.

affirmed that 'jurisdiction to determine the merits of a dispute entails jurisdiction to determine reparation'.[24] These instances confirm that the inherent elements of the Court's jurisdiction are necessary to ensure 'the effectiveness of the undertaking contained in the jurisdictional clause' and that the Court shall be considered as possessing the relevant jurisdictional powers.[25]

In this context, the impact of *LaGrand* was to extend the applicability of inherent judicial powers not only to specific aspects of reparation, but also to the prospective remedy of the guarantees of non-repetition. While the Court's earlier decisions were concerned with the categories of *reparation*, *LaGrand* was concerned with the broader category of *remedies*.[26]

In *Avena*, Mexico requested the Court to follow *LaGrand* in affirming that a dispute regarding the remedies for violations of the Convention is a dispute on the interpretation and application of the Convention, and is thus within the Court's jurisdiction. Therefore the Court had jurisdiction to decide on restitution and other applicable remedies.[27] The United States contended that the Court lacked jurisdiction on several grounds, since Mexico's submissions 'asked the Court to decide questions which do not arise out of the interpretation or application of the Vienna Convention, and which the United States never agreed to submit to the Court'.[28] In several objections the United States contended that the Mexican submissions involved issues of the US judiciary's conduct and the qualification of the right of foreign detainees to consular notification as a human right. The Court rejected these objections, since it considered that these issues related to the interpretation of the Vienna Convention, over which it clearly had jurisdiction.[29]

It is especially noteworthy that the third US objection to the jurisdiction of the Court related to the Mexican claim that it was entitled to *restitutio in integrum* and that the United States was under an obligation to re-establish the situation that existed prior to the convictions and sentencing of Mexican nationals in violation of international law. The United States submitted that by subsuming remedial powers into the scope of the Court's jurisdiction under the Optional Protocol, the Court would assert its power to review the appropriateness of the sentences passed under the US legal system.[30] The United States contended that to require from it specific acts in its criminal justice system would endanger the independence of its courts and, most significantly, that 'for the Court to declare that the United States is under a specific obligation to vacate convictions and sentences would be beyond its jurisdiction'.[31] Thus the respondent clearly referred to the consensual principle to establish that the Court was precluded from ordering certain kinds of remedial action.

Mexico referred to the Court's power to interpret the Vienna Convention and to determine the appropriate forms of reparation for the breaches. In its view, these

24. *Nicaragua*, Merits, [1986] ICJ Rep. 142.
25. H. Lauterpacht, *The Development of International Law by the International Court* (1958), 246, 248.
26. *LaGrand*, *supra* note 2, para. 48.
27. Memorial of Mexico, Judgment, *supra* note 1, paras. 32–3.
28. Judgment, *supra* note 1, para. 26.
29. Ibid., paras. 27–30, 35.
30. US Counter-Memorial, *Ibid.*, para. 3.9.
31. Judgment, *supra* note 1, paras. 31–2; US Counter-Memorial, paras. 3.9–3.10.

two considerations were sufficient to defeat the objection.[32] The Mexican attitude proceeds from the assumption of an inherent link between substantive issues in a dispute and judicial competence to deal with these substantive issues.

The Court approved Mexico's approach since it was 'unable to uphold the contention of the United States that, even if the Court were to find that the breaches of the Vienna Convention were committed by the United States of the kind alleged by Mexico, it would still be without jurisdiction to order *restitutio in integrum* as requested by Mexico'. The Court further referred to *LaGrand*, that where jurisdiction exists over the substance of the dispute, it automatically covers jurisdiction to order remedies.[33] The Court thereby followed its established approach to remedial competence.

The Court's approach clearly supports the existence of inherent powers to award judicial remedies and the indispensable link between substance and jurisdiction in this field.[34] Such a link cannot be disrupted even by reference to the fact that judicial jurisdiction is based on consent. Furthermore, the Court's approach is in accordance with the principle of effectiveness as a principle of treaty interpretation, since the Court here quite justifiably assumed that once it has jurisdiction over the interpretation of a treaty clause, then it has jurisdiction over all relevant issues of the application of that clause. This reinforces the view that the restrictive interpretation of a treaty clause and the interpretive principle of effectiveness are mutually incompatible.[35] Treaty clauses, including jurisdictional clauses, must be interpreted in a way which ensures their effective operation in terms of the final resolution of judicial disputes.

It also seems that in *Avena* the United States chose a course of objection different from those it employed in *LaGrand*. It no longer objected to remedial powers as inherent powers, but merely expressed its disagreement with specific ways of exercising those judicial powers to the extent that they would interfere with the administration of justice within its municipal legal system. The objections based on the consensual principle related not so much to the remedial powers as such, but to the way in which those powers were exercised. Regardless, these objections were overruled by reference to inherent judicial powers.

3. Admissibility of claims and exhaustion of local remedies

The United States objected that Mexico's Application was inadmissible with regard to claims on behalf of any person who had failed to exhaust the local remedies. It referred to the fact that a large number of the cases were still pending before

32. Judgment, *supra* note 1, para. 33.
33. Ibid., para. 34.
34. *Supra* notes 20–8.
35. On the principle of effectiveness as an interpretive principle, see H. Lauterpacht, 'Restrictive Interpretation and Effectiveness in the Interpretation of Treaties', (1949) BYIL 50–51, 69. Effectiveness as a canon of interpretation is found in the 1969 Vienna Convention on the Law of Treaties, Art. 31(1), which refers to the plain meaning of a treaty in the light of its object and purpose as the primary method of treaty interpretation.

its courts.[36] Mexico referred to national law obstacles to making use of domestic remedies, and considered these remedies ineffective.[37]

Generally, the objection of non-exhaustion of local remedies can be defeated if remedies are ineffective – for example, if the judiciary is subservient to the executive.[38] The Court in *Interhandel* had dismissed the Swiss claims because the company's case, which Switzerland had upheld, was still pending before US courts.[39] The Court's approach was criticized on the grounds that the litigation in the United States had lasted ten years and hence the remedies in question were not effective.[40] In any case, it appears that the exhaustion of local remedies in a specific case is very much an issue of appreciation, dependent on different factual and legal circumstances.

Although the Mexican submission in *Avena* was arguably sufficient for the Court to dismiss the plea of non-exhaustion of local remedies due to ineffectiveness, the Court chose another approach. It referred to Mexico's submission that it was pursuing the case 'in its own right and in the exercise of diplomatic protection of its nationals'. Mexico argued that the case involved not only alleged violations of individuals' rights under Article 36 of the Vienna Convention, but also violations of the rights of the sending state itself. The Court concluded that

> In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1*(b)*. The duty to exhaust local remedies does not apply to such a request.[41]

The Court's distinction between different types of injuries in terms of applicability of the local remedies rule deviates from previous jurisprudence. In *ELSI* the Court clarified that, in order to avoid the local remedies rule, a state must demonstrate that the injury it claims is not just a breach of an international obligation in force between the applicant and the respondent, but is a direct injury to the state. The crucial test is whether a state acts for the redress of injury to its national or to itself as such.[42] If these criteria were applied in *Avena*, the Court would conclude that the claims of breaches of the Vienna Convention concerned Mexican nationals only and not Mexico as such, and possibly would dismiss the case on the basis of non-exhaustion of local remedies.

However, the Court did not reconcile this decision with that of *ELSI*. It is not easy to decide whether the Court overruled *ELSI* or just distinguished it, possibly due to the humanitarian factors heavily present in *Avena* that were lacking in *ELSI*. If *Avena*

36. Judgment, *supra* note 1, para. 38.
37. Ibid., para. 39.
38. See I. Brownlie, *Principles of Public International Law* (2003), 475. The local remedies rule also does not apply in the case of indigence of the applicant or general legal fear in the community, as affirmed by the Inter-American Court of Human Rights in *Exceptions to the Exhaustion of Domestic Remedies*, Advisory Opinion OC-11/90, 10 Aug. 1990, Ser. A, No. 11.
39. [1959] ICJ Rep. 26.
40. Judge Armand-Ugon, [1959] ICJ Rep. 87.
41. Judgment, *supra* note 1, para. 40.
42. *Elettronica Sicula*, [1989] ICJ Rep. 42–3.

overrules *ELSI*, then applicant states can avoid the local remedies rule by submitting that they are suing for the injury caused to themselves, whether or not from an injury to its nationals.[43] This would render the local remedies rule meaningless. It is better to hold that *ELSI* was implicitly distinguished in *Avena*, perhaps due to exceptional factors.

Arguably the Court was justified in not requiring the exhaustion of local remedies on the basis of the humanitarian dimension of the case, especially the danger to human lives. This is made clear in Judge Vereshchetin's reasoning.[44] Had the Court explicitly adopted Judge Vereshchetin's approach, this could provide quite an innovative, yet legitimate, exception to the local remedies rule.

The Court in *Avena* refrained from pronouncing on whether the right to consular information is a human right.[45] It neither expressly affirmed nor expressly or implicitly rejected that. By contrast, the Inter-American Court has explicitly affirmed that the right to consular information is a human right and its enforceability is not subject to the protests of the sending state.[46] However, it seems that the purely factual situation of persons being at risk of losing their lives is a factor separate and independent from the purely legal question of whether the right to consular information is a human right.

Alternatively, because of the number of alleged violations of the Vienna Convention, these violations can be qualified as administrative practice involving the massive and systematic violations of individual rights. In such cases, courts other than the ICJ have consistently refused to apply the local remedies rule. The organs of the European Convention on Human Rights do not apply the local remedies rule to cases involving legislative and administrative practices.[47] There is a close link between exhaustion of local remedies and administrative practice.[48] The Inter-American Court of Human Rights refuses to apply the local remedies rule to cases involving

> a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others. In such cases, resort to these remedies becomes a senseless formality.[49]

It is possible that the ICJ was unwilling expressly to follow the human rights tribunals, partly perhaps as the subject of litigation in *Avena* involved inter-state

43. Judge Vereshchetin pointed out that nothing in the context of violations of the Vienna Convention justifies the assumption that, in invoking the rights of individuals, states can escape the applicability of the local remedies rule or that the matter falls outside the normal regime of diplomatic protection. See Judgment, *supra* note 1 (Separate Opinion, Judge Vereshchetin, para. 4). Judge Vereshchetin stressed that the Mexican claim was a diplomatic protection claim through which Mexico espoused the rights of its nationals, and direct injury to Mexico could arise only after the violations of the rights of its nationals provided. Ibid., para. 7.
44. Judge Vereshchetin referred to the specific circumstances that all the Mexican nationals concerned were already on death row and lives were at stake. Ibid., para. 12.
45. The Court stated that it 'need not decide' on this issue. Judgment, *supra* note 1, para. 124.
46. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Oct. 1, 1999, Ser. A, No. 16 (1999).
47. 176/56, *First Cyprus*, 299/57, *Second Cyprus*, 2 YB ECHR, 184, 190; 3321/67, *Greek*, 11 YB ECHR, 726; 4448/70, *Second Greek*, 13 YB ECHR, 134; 5310/71, *Ireland v. UK*, 15 YB ECHR, 120; *Ireland v. UK*, 19 YB ECHR, 762, 768; 9940–44/82, *Turkish* case (admissibility), 4 HRLJ, 550.
48. 5310/71, *Ireland v. UK*, 15 YB ECHR, 164.
49. *Velasquez Rodriguez*, Ser. C, No. 4, para. 68.

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bilateral obligations, but it nevertheless implicitly achieved the outcome that human rights tribunals would have achieved. Arguably the Court just extended to the field of consular protection the principles applied by human rights tribunals with regard to serious and massive human rights violations.

In fact, the Court rejected the Mexican request to find the 'regular and continuing' pattern of breaches of Article 36 of the Vienna Convention by the United States. However, the Court's view that 'there is no evidence properly before it that would establish a general pattern' concerned Mexico's assertion that such a general pattern existed beyond the 52 cases of treatment of Mexican nationals involved in *Avena*.[50] Therefore the fact that there is arguably no general pattern beyond those 52 cases does not mean that they cannot on their own constitute a phenomenon reminiscent of the general or systematic treatment of Mexican nationals contrary to international law.[51]

The failure to acknowledge the general character of US practice involving violations of Article 36 is not without problems. The Court acknowledged in both *Avena* and *LaGrand* that the United States recognized that systemic efforts were needed to ensure compliance within its legal system with the requirements of Article 36. This circumstance, together with Mexican claims, must have been sufficient for the Court not to require exhaustion of local remedies on the same basis as human rights tribunals.

4. The law of judicial remedies

4.1. The competence to order judicial remedies

After having decided that the US conduct with regard to Mexican nationals violated Article 36 of the Vienna Convention, the Court turned to the legal consequences of the breach. Earlier in the judgment the Court affirmed its power to order *restitutio in integrum*, that is a consequential order directing a state to undertake certain steps and measures to remedy the wrong caused, as part of its inherent powers.[52]

The remedy of restitution that Mexico asked the Court to apply required that the Court's consequential order direct the Respondent to undertake certain steps and measures – in this case in the Respondent's domestic legal system. In the *LaGrand* proceedings, the issue of the Court's power to order such consequential remedies became acutely significant. The Court affirmed its competence to order such a remedy – in that case the guarantees of non-repetition – even in the face of fierce objections by the Respondent.[53] In a way, *La Grand* has been a test case confirming that consequential judicial remedies can be ordered even with respect to a state's action within its domestic law. This has been affirmed in the Court's jurisprudence in different ways.

50. Judgment, *supra* note 1, para. 149. Along these lines, Mexico claimed that there were more than 100 cases of violations of the Vienna Convention with regard to the detained Mexican nationals in the United States. Ibid., para. 146.
51. Mexican Memorial, Ibid., paras. 392–97, referring to regular and historic non-compliance with Art. 36. In *Greece v. UK*, the European Commission addressed the issue of administrative practice in terms of exhaustion of local remedies in the situation involving 49 cases of human rights violations. See 2 YB ECHR, 178–180.
52. Judgment, *supra* note 1, para. 34.
53. *LaGrand*, *supra* note 2, paras. 117–125. For an analysis see Orakhelashvili, *supra* note 2, at 121–9.

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In the *Arrest Warrant* case the Court found that Belgium's issuance of an arrest warrant against the incumbent Congolese foreign minister contravened the international law of state immunity and consequently ordered Belgium to cancel the arrest warrant.[54] In *Land and Maritime Boundary between Cameroon and Nigeria*,[55] the Court took it for granted that it can direct states to undertake certain steps and measures. Thus, having determined that sovereignty over disputed areas belonged to Cameroon or to Nigeria, the Court ordered each party to withdraw its administration and military forces from the areas that belonged to the other party. Nigeria was ordered to withdraw, expeditiously and without condition, its administration and forces from the Bakassi peninsula and the part of the Lake Chad area that fell within Cameroon's sovereignty. Cameroon was ordered to withdraw its administration and such forces as might have been present in the areas of Lake Chad belonging to Nigeria.[56] In terms significant for the judicial remedies, the Court also stressed that submissions of a party asking for the judicial remedy of guarantees of non-repetition are admissible.[57]

Similarly, the Inter-American Court has demanded that a state party to the American Convention on Human Rights cancel the outcome of proceedings conducted in breach of the right to fair trial and ensure that a new trial would take place.[58] The Court ordered the respondent state to amend the laws that it declared to be in violation of the American Convention on Human Rights.[59] In *Loayza Tamayo*, the Inter-American Court directed to the respondent state that the amount of compensation paid to the applicant shall not be subject to any deductions or taxes.[60] Similarly, in *Suarez Rosero*, the same Court ordered the state not to subject to any fine or taxes the compensation to be received by the victim.[61]

The ICJ's practice from *LaGrand* onwards, as well as the practice of other tribunals, has clearly affirmed the Court's power to order remedies directing states to undertake certain steps and measures. The Court in *Avena* would not conceivably be expected to hold otherwise. Also similarly to *LaGrand*, the Court in *Avena* had to perform a two-stage analysis with regard to the remedies requested and examine, beyond its competence to award specific remedies, whether the circumstances of the case required awarding the particular form of remedy.

4.2. The issue of restitution and its adequacy in the present case

The central point was Mexico's request for *restitutio in integrum* consisting of 'the obligation to restore the *status quo ante* by annulling or otherwise depriving full

54. *Case concerning the Arrest Warrant of 11 April 2000*, Judgment of 14 February 2002, General List No. 121, paras. 72–76. Congo viewed this remedy as legal restitution, para. 73, and so did the Court, para. 76.
55. Judgment of 10 October 2002, General List No. 104.
56. Ibid., paras. 314–15, and operative para. V, the Court *inter alia* referring to the *Temple* case, where it ordered Thailand to withdraw its forces from the area of the temple it considered to be situated in the territory of Cambodia. See [1962] ICJ Rep. 37.
57. See Judgment, *supra* note 1, para. 318, though there was no need to make such an order, since the Court specified the boundary between the two states in definitive and mandatory terms.
58. *Castillo Petruzzi*, para. 221 and operative para. 13, (2000) 7 *International Human Rights Reports* 744–46.
59. Ibid., para. 122 and operative para. 14.
60. *Loayza Tamayo*, para. 189 and operative para. 9, 116 ILR, at 439, 442.
61. *Suarez Rosero*, para. 76 and operative paras. 1 and 4, 118 ILR, at 113, 119–20.

force or effect the conviction and sentences of all 52 Mexican nationals'.[62] Mexico submitted that restitution in this case meant the US duty to vacate sentences: 'restoration of the *status quo ante* requires relieving the person subjected to the unfair proceeding of the legal effects of the tainted conviction and sentence'. Only this could ensure that the sending state and its nationals could exercise their rights under the Convention in the new proceedings.[63] Mexico submitted that the restoration of *status quo ante* was possible and nothing in the US legal system hampered that.[64] The United States contended that if *LaGrand* was followed, it would have to provide not restitution but 'review and reconsideration' of convictions and sentences.[65] However, this perhaps overlooks the fact that in *LaGrand* the Applicant asked the Court for the remedy mentioned by the United States, while in *Avena* the Applicant expressly requested restitution. On the other hand, it could be arguable that the review and reconsideration can, under certain circumstances, themselves constitute the *restitutio in integrum* for breaches of Article 36 of the Vienna Convention.

The Court referred as a starting point to *Chorzow Factory*, according to which 'the breach of an engagement involves an obligation to make the reparation in adequate form'. It further cited *Chorzow Factory* to the effect that 'reparation must, as far as possible, wipe out 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'.[66] However, the Court did not refer to what the Permanent Court said next in *Chorzow Factory*, namely that reparation should cover

> restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.[67]

The reference to that passage was required in *Avena* because the Court inquired into what was 'reparation in adequate form' as mentioned by the Permanent Court and held that this must be determined in 'the concrete circumstances surrounding each case'.[68] It was also important that the Permanent Court itself determined what are adequate forms of reparation in specific circumstances.

It is arguable that the findings of *Chorzow Factory* were not directly transferable to *Avena*, since the latter case involved different circumstances. Nevertheless, the principle of *Chorzow*, especially the sequence of remedies it lays down, is universal and must be applied in every case. Moreover, the *Chorzow* principle is flexible enough to allow for considering the specificities of cases like *Avena*. One specificity is the factor that the cause of action does not extend to the general behaviour of the respondent state but is limited by the terms and violations of the specific treaty,

62. Judgment, *supra* note 1, paras. 116–117.
63. Mexican Memorial, ibid., paras. 364–73, 374 et seq. Mexico asserted that by way of restitution, all proceedings, statements, and evidence obtained prior to the notification of its nationals of their right to consular assistance must be excluded.
64. Ibid., paras. 387–388.
65. Judgment, *supra* note 1, para. 118.
66. Ibid., para. 119.
67. (1928) PCIJ Ser. A, No. 17, at 47.
68. Judgment, *supra* note 1, para. 119.

such as the Vienna Convention of 1963 and its Optional Protocol I. This factor can have bearing on the issue of which remedies can be available. That, in turn, can have an impact on the issue of whether *restitutio in integrum* is available and what kinds of implication it may have.

This is especially important, since the issue of where the remedy of the review and reconsideration stands in the general law of remedies had to be clarified, especially in terms of existing sources and practice. In terms of the source or authority for choosing the given type of remedy, it is significant that, in *LaGrand*, the Court decided on the remedy of non-repetition without quoting the specific authority for that, and limited itself to the general logic and examination of the submissions of the parties.[69] As in *LaGrand* and later in *Arrest Warrant*, the Court in *Avena* did not refer to the Articles on State Responsibility of the International Law Commission (ILC)[70] for determining an issue of state responsibility and remedies. This relatively consolidated jurisprudential approach by the Court in its reluctance to refer to the Articles on State Responsibility, in contrast to the Court's more friendly and receptive approach to Draft Articles adopted by ILC on first reading in earlier jurisprudence of the International Court and arbitral tribunals,[71] indicates that there is still no judicial authority as to the juridical status and weight of those Articles in terms of remedies.

Thus in *Avena* means of identifying the applicable types of remedies was the same as in *LaGrand*: the general logic of the law of remedies applied to the submissions of the parties and the general context of the case, including the scope of the cause of action. The Court noted, by reference to *LaGrand*, that the remedies to make good the violations of Article 36 were that the Respondent permit review and reconsideration of the cases of Mexican nationals covered by the subject matter of the dispute.[72] The Court refused to hold that the United States was bound to cancel the convictions and sentences of 52 Mexican nationals, since the propriety of convictions and sentences was not the subject matter of the dispute, which merely covered the interpretation and application of the Vienna Convention. The Court distinguished the case at hand from *Arrest Warrant*, where it had ordered the cancellation of the arrest warrant issued against the incumbent foreign minister of a state, since the arrest warrant was itself the subject matter of the dispute; and the *Avena* case was merely about the breaches of the Vienna Convention as anterior to the convictions and sentences, not about the correctness or lawfulness of the convictions and sentences as such.[73] One

69. *LaGrand*, *supra* note 2, paras. 117–124.
70. For the text of the ILC Articles on State Responsibility and the Commentaries thereto see the Report of the International Law Commission on the work of its Fifty-third Session (2001), *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), 43, 59.
71. *Gabcikovo-Nagymaros (Hungary v. Slovakia)*, [1998] ICJ Rep. 39–46, 55–6; *Cumaraswamy* (Advisory Opinion), General List No. 100, para. 62; *Rainbow Warrior*, 82 ILR 551–4, 572, 576. This approach is partly confirmed by the fact that in the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, General List No. 131, para. 140, the Court indeed referred to Art. 25 of the ILC Articles on State Responsibility, which is about the state of necessity as a circumstance precluding the wrongfulness of an internationally wrongful act. However, it must be borne in mind that the Court has referred to Art. 25 together with Art. 33 of the ILC Articles adopted on first reading in 1996, which enunciates principles similar to those of the later Art. 25. In addition, the issue of the circumstances precluding wrongfulness had been dealt with earlier in *Rainbow Warrior* and *Gabcikovo*.
72. Judgment, *supra* note 1, para. 121.
73. Ibid., paras. 123–124.

could also add that in the relevant practice of the Inter-American Court the acts that were the object of the consequential orders were themselves the subject matter of litigation.[74]

Thus in ordering the remedies the Court had to focus on redressing the failure of consular notification in breach of Article 36 of the Vienna Convention. It followed *LaGrand* and held that the United States must provide for the review and reconsideration of convictions and sentences against the persons involved to clarify whether the violation of Article 36 caused actual prejudice to each defendant in the process of the administration of criminal justice.[75] Such review and reconsideration is not free of limitations, but shall relate to both the sentence and the conviction, and must take into account the violation of rights under Article 36 of the Vienna Convention.[76] The Court held that it is the judicial process that is best suited to this task; the clemency procedure, although sometimes helpful, as was the case with regard to three of the Mexican nationals, does not meet the requirements of effective review and reconsideration as envisaged by the Court.[77]

The nature of the remedy the Court ordered is of interest and most resembles, among traditional remedies in the law of state responsibility, *restitutio in integrum*. The Court in *Avena* explicitly affirmed its competence to order *restitutio in integrum*, but did not expressly apply the term to a measure resembling it. The remedy of review and reconsideration of convictions and sentences in proceedings involving breaches of Article 36 of the Vienna Convention is, in fact, restitution with regard to those breaches, since it is meant to re-establish the situation existing before these breaches. The breaches consisted of the failure to guarantee the right to consular notification and were the direct subject matter of the claims brought by the Applicant before the Court on the basis of the Vienna Convention as opposed to general international law. The remedy ordered by the Court is also similar to the remedy of the guarantees of non-repetition as ordered in *LaGrand*.[78] However, the difference from *LaGrand* is that there the review and reconsideration was applied as a prospective remedy to violations that might have occurred in the future, while in *Avena* this duty was imposed on the Respondent for the purposes of reversal of violations already committed and has the effect of *restitutio in integrum*, rather than the guarantees of non-repetition.

The Court's approach in *Avena* is in accordance with the principle in *LaGrand* that it is empowered to give consequential remedial orders to states in order to ensure due reparation. The only difference between *Avena* and *LaGrand* is the difference in circumstances of each case.

4.3. Guarantees of non-repetition

Apart from ordering the United States to review and reconsider the cases that had *already* resulted in breaches of Article 36 of the Vienna Convention, the Court was

74. *Supra* notes 61–4.
75. Judgment, *supra* note 1, paras. 121, 128–134.
76. Ibid., para. 138.
77. Judgment, *supra* note 1, paras. 140–43.
78. *LaGrand*, *supra* note 2, paras. 117–127.

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requested to address the issue of safeguards against *future* similar violations. Mexico requested the Court to order the United States to 'provide appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance' with Article 36 of the Vienna Convention. Mexico noted that existing efforts in the United States had proved ineffective in preventing regular and continuing violation by its competent authorities of consular notification and assistance rights guaranteed under Article 36. Such violations were continuing, and fresh legal safeguards were needed for their prevention. The United States continued to rely on clemency procedures to allow for review and reconsideration of cases as it had been bound under *LaGrand*. This allowed the legal rules hampering US compliance with Article 36 of the Vienna Convention to have their inevitable effect.[79]

The Court followed *LaGrand* and ordered the United States to provide for guarantees of non-repetition through review and reconsideration of the convictions and sentences in cases possibly involving the violations of Article 36 in the future.[80] Indeed, if the respondent fails in the future to comply with Article 36 of the Vienna Convention, it is under a clear duty to allow the review and reconsideration of the cases on the basis of the applicant's claims. Mexico may invoke this duty of the United States, and thereby possesses an essential degree of legal security. The Court's approach in *Avena* follows the reversal in *LaGrand* of the hitherto dominant principle, as asserted in *Nuclear Tests*, that 'once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it'.[81]

5. Some broader implications of substantive and remedial findings in *Avena*

In terms of the remedies for violations of the Vienna Convention, the Court made one observation of a general character. The issues it examined in *Avena* related to 'the general application of the Vienna Convention'. The fact that the proceedings and remedies ordered in the case at hand were limited to Mexican nationals 'cannot be taken to imply that the conclusions reached by [the Court] in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States'.[82] That differed from the attitude in *LaGrand*, where the remedies ordered by the Court concerned German nationals only.[83] However, the Court in *Avena* took a broader view, emphasizing that other foreign nationals cannot be left without protection either. This attitude in *Avena* is something more than just

79. Judgment, *supra* note 1, paras. 144–46.
80. Ibid., paras. 149–150 and operative para. 11.
81. *Nuclear Tests*, [1974] ICJ Rep. 417.
82. Judgment, *supra* note 1, para. 151.
83. Therefore this is inferable at least from the Declaration of President Guillaume, *LaGrand, supra* note 2, especially paras 2 and 3, expressly referring only to German nationals. Judge Guillaume stressed that there can be no question of *a contrario* interpretation of operative para. 7 in *LaGrand*, which related to remedies. President Guillaume's statement has perhaps expressed the view of the whole Court and could also mean the implicit reference to the duties under general international law without the Court being able to focus on this explicitly in *LaGrand*.

a statement that states should observe their international obligations whether or not their behaviour is or can be made the subject of judicial proceedings. It goes beyond that through affirming the applicability of findings, including those about remedies, to all situations whether or not they are covered by the subject matter of the proceedings at hand and emphasizing that the United States has similar substantive and remedial obligations towards all other states.

That is yet another circumvention of the principle of consent as the basis of international judicial competence. In some cases the Court considers itself precluded, because of the lack of jurisdiction, from expressing its view on substantive legal issues involved in a dispute. What the Court does in such cases is to state generally that despite the lack of jurisdiction, states parties to proceedings remain responsible for violations of their obligations under international law, and on some occasions briefly outline the substantive content of those obligations.[84] But in *Avena*, where the Court's jurisdiction was established only with regard to the dispute between Mexico and the United States, the Court went further than its previous practice and extended its findings on substance of the dispute, and most importantly on remedies, to situations involving the nationals of states other than Mexico. This might also partly have been caused by the Court finding that the United States was repeatedly in violation of its obligations under the Vienna Convention, bearing in mind the findings in *LaGrand*.

In addition, the Court spoke of 'other foreign nationals' as opposed to nationals of other parties to the Vienna Convention on Consular Relations. The Court expressly used this expression, despite the fact that it dealt with the application of the Vienna Convention. The Court's approach can be explained either by its willingness to influence the repeated pattern of violations of the Vienna Convention by the United States or by its presumed belief that Article 36, as a multilateral treaty of general application, was reflective of customary international law on the subject.[85] Whichever option is right, the Court's inclination to circumvent the principle of consent is clear, especially if it is considered that, as follows from the earlier jurisprudence, the Court's jurisdiction over the interpretation and application of a treaty does not automatically give it similar jurisdiction over the customary rules of identical content.[86]

6. Concluding remarks

It is a positive development that the treatment of certain issues of judicial competence and judicial remedies acquires an increased degree of consistency in the ICJ's jurisprudence. *Avena* is a clear step in this direction. This enables the Court, provided

84. *Legality of the Use of Force, Provisional Measures (Yugoslavia v. Belgium et al.)*, Order of 2 June 1999, (1999) 38 ILM, para. 48; *Congo–Rwanda, Provisional Measures*, Order of 10 July 2002, General List No. 126, para. 93.
85. It is affirmed that the Vienna Convention reflects the customary law on the subject. See Brownlie, *supra* note 38, at 356–7; I. Wikremasinghe, 'Immunity of State Officials and International Organisations', in M. Evans (ed.), *International Law* (2003), 306–7. The Court affirmed the same in *Tehran Hostages*, [1979] ICJ Rep. 31, although with regard to the provisions other than Art. 36.
86. The general reasoning on this issue is developed in *Nicaragua*, Jurisdiction and Admissibility, [1984] ICJ Rep. 424–6, and *Nicaragua*, Merits, [1986] ICJ Rep. 92–7.

that such consistency is duly followed and expanded, to deal with disputes brought before it with increased efficiency. It also diminishes the weight of the theoretical assumption that judicial organs are precluded from effectively resolving disputes by means of awarding adequate judicial remedies. *Avena* is in this respect yet another stage in the growing tendency of different international tribunals to disregard pleas based on the principle of consent if such is required for the effective and just resolution of a dispute in accordance with the requirements of substantive international law.[87] In cases from *LaGrand* onwards, the Court affirms its competence to award specific kinds of remedies, especially restitution and guarantees of non-repetition. This complex process confirms the need for, and the adequacy of, the comprehensiveness of the judicial approach to remedies, and the corresponding assumption of the comprehensiveness of the power to order judicial remedies.

The development of the ICJ's jurisprudence also affects state attitudes on these issues. One could note in this regard the transformation after *LaGrand* of the US attitude to the pertinent issue of judicial remedies. The scope of issues with regard to which the United States referred to the principle of consent as a factor in opposing the award of certain remedies is significantly narrower in *Avena* than in *LaGrand*.

Given that, following *LaGrand*, the Court feels free to overrule certain objections based on the principle of consent or to circumvent the implications of that principle, the question arises of why the Court has not decided to elaborate on the characteristics and consequences of the right to consular information as a fundamental human right.[88] An affirmative finding on that issue would enable the Court to follow the approach of the Inter-American Court, but this also would result in the Court assuming jurisdiction over issues prima facie not covered by the Vienna Convention. One way of justifying this could be a broader construction of the doctrine of inherent powers, so that the Court, while dealing with the violations of a treaty instrument, is equally able to focus on the facts that are the very cause of those violations and award remedies in relation to them, even if those facts are not per se covered by the relevant treaty. The Court in *Avena* was close to such an outcome. The fact that it did not take place here is not sufficient reason for assuming that it will not take place in the future, or that it would be unjustified as a matter of principle.

87. For example, in *Chrysostomos* and *Loizidou*, the European Commission of Human Rights and the European Court of Human Rights have also overruled the pleas based on the principle of consent by holding that the reservations attached to the declarations of the respondent state accepting the compulsory jurisdiction of these organs were invalid and did not affect the validity of entire declarations. See *Chrysostomos*, (1991) 12 HRLJ, 113–24; *Loizodou*, Preliminary Objections, 1995, ECHR Ser. A-310. In the cases of *Ivcher Bronstein* and *Constitutional Court*, the Inter-American Court of Human Rights decided to adjudicate even in the face of an attempted withdrawal of the respondent state from the jurisdiction of the Court. See *Ivcher Bronstein*, *Jurisdiction*, Judgment of 24 September 1999, Ser. C, No. 54 (1999); *Constitutional Court*, Judgment of 24 September 1999, Ser. C, No. 55 (1999).

88. Judgment, *supra* note 1, para. 124.