> Finally, we are also curious to learn more about how other States address the domestic legal questions raised by shifting interpretations of international agreements on the basis of subsequent practice after ratification, if the legislative branch is involved in approving such agreements prior to ratification.
>
> *Most-Favored-Nation clause*
>
> . . . .
>
> We support the Study Group's decision not to prepare new draft articles or to revise the 1978 draft articles. MFN provisions are a product of specific treaty formation and tend to differ considerably in their structure, scope and language. They also are dependent on other provisions in the specific agreements in which they are located, and thus resist a uniform approach. Given the nature of MFN provisions, we agree with the Study Group that interpretive tools or revised draft articles are not appropriate outcomes. . . .[2]

STATE DIPLOMATIC AND CONSULAR RELATIONS

Nevada Supreme Court Directs Hearing to Assess Possible Prejudice to Foreign National from Failure of Consular Notification in Capital Case

In September 2012, the Nevada Supreme Court in *Gutierrez v. State*[1] became the second state court[2] to order review and reconsideration of a Mexican national's capital sentence for failure of consular notification as directed by the International Court of Justice in *Avena*.[3] Gutierrez is one of the fifty-one Mexican nationals with death sentences at issue in *Avena*.

Gutierrez entered a no-contest plea to first-degree murder in the death of his three-year-old stepdaughter in 1994. He was sentenced to death. In the recent proceedings, the Nevada Supreme Court ruled that he should have a postconviction evidentiary hearing to assess, inter alia, whether he suffered prejudice because he did not receive the consular notification required by Article 36(1)(b) of the Vienna Convention on Consular Relations. Excerpts from the court's unpublished order follow:

> *Avena* does not obligate the states to subordinate their post-conviction review procedures to the ICJ ruling. Thus, the Supreme Court has rejected post-conviction claims similar to Gutierrez's by two other *Avena* defendants, Humberto Leal Garcia and Jose Ernesto Medellin, holding that "neither the *Avena* decision nor the President's Memorandum purporting to implement that decision constituted directly enforceable federal law," *Leal Garcia v. Texas*, 564 U.S. ___, ___, 131 S.Ct. 2866, 2867 (2011) (5-4 decision), to which state procedural default rules must yield. *Medellin I*, 552 U.S. at 498–99. Nonetheless, in declining to stay Leal Garcia's and Medellin's executions, the Supreme Court noted that neither had shown actual prejudice to a constitutional right due to lack of timely consular

[2] U.S. Mission to the United Nations Press Release No. 2012/248, Statement by Todd Buchwald, Assistant Legal Adviser for UN Affairs, Office of the Legal Adviser, on Agenda Item 79—Report of the International Law Commission on the Work of Its 64th Session at 67th GA Sixth Committee (Nov. 5, 2012), *at* http://usun.state.gov/briefing/statements/200301.htm.

[1] Gutierrez v. State, No. 53506, 2012 Nev. Unpub. LEXIS 1317 (Sept. 19, 2012) (order of reversal and remand).

[2] In 2004, the Oklahoma Court of Criminal Appeals concluded in *Torres v. State*, 120 P.3d 1184, 1188 (Okla. Crim. App. 2004), that Torres was prejudiced by a Vienna Convention violation. The governor of Oklahoma had previously commuted his death sentence to life imprisonment. *Id.* at 1186; *see* John R. Crook, Contemporary Practice of the United States, 99 AJIL 691, 695 (2005).

[3] Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 ICJ REP. 12 (Mar. 31).

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> access. . . . [W]hile, without an implementing mandate from Congress, state procedural default rules do not have to yield to *Avena*, they may yield, if actual prejudice can be shown. *See Medellin I*, 552 U.S. at 533, 536–37 & n.4 (Stevens, J., concurring) (discussing *Torres v. State*, No. PCD-04-442, 2004 WL 3711623 (Okla. Crim. App. May 13, 2004), where the State of Oklahoma "unhesitatingly assumed" the burden of complying with *Avena* by ordering "an evidentiary hearing on whether Torres had been prejudiced by the lack of consular notification"; Justice Stevens rightly described this burden as "minimal" when balanced against the United States' "plainly compelling interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law" (internal quotation marks omitted)).
>
> Unlike Medellin and Leal Garcia but like Torres, Gutierrez arguably suffered actual prejudice due to the lack of consular assistance. The Mexican consulate in Sacramento (the closest to Reno, where Gutierrez's death penalty hearing occurred) has provided an affidavit swearing that it would have assisted Gutierrez had it been timely notified. Although the form its assistance would have taken remains unclear—a deficiency an evidentiary hearing may rectify—cases recognize that, "[i]n addition to providing a 'cultural bridge' between the foreign detainee and the American legal system, the consulate may . . . 'conduct its own investigations, file amicus briefs and even intervene directly in a proceeding if it deems that necessary.'" *Sandoval v. United States*, 574 F.3d 847, 850 (7th Cir. 2009) (quoting *Osagiede v. United States*, 543 F.3d 399, 403 (7th Cir. 2008)).
>
> It is apparent that Gutierrez needed help navigating the American criminal system. At the time of his arrest, Gutierrez was 26 years old, had the Mexican equivalent of a sixth-grade education, and spoke little English. Rather than go to trial, he entered an unusual no-contest plea to first-degree murder. His sentence was determined after an evidentiary hearing by a three-judge panel. Both he and his wife were charged in connection with the death of their three-year-old daughter. There is some suggestion that his wife's role was greater than came out at his penalty hearing.
>
> A number of witnesses testified at Gutierrez's penalty hearing, some Spanish-speaking. Gutierrez and the State each had an interpreter, but the court had its own interpreter as well, Carlos Miguel Gonzalez, who interpreted for 3 of the State's 16 witnesses. A year after Gutierrez was sentenced to death, interpreter Gonzalez pleaded guilty to perjury that he committed during Gutierrez's death penalty hearing, when he swore he was certified and formally educated as an interpreter but was not.[4]

The court concluded that interpreter Gonzalez's role in Gutierrez's conviction raised significant issues of possible prejudice. It observed that, at the interpreter's perjury trial, prosecutors described him as a "sociopath" and his role as "integral" to the Gutierrez "death penalty hearing where he was interpreting."[5]

> [W]ithout an evidentiary hearing, it is not possible to say what assistance the consulate might have provided. Would the problems with interpreter Gonzalez have been recognized and addressed earlier? Would the hearing have been tape-recorded, in addition to stenographically reported? What is clear, though, is if a non-Spanish speaking U.S. citizen

[4] *Gutierrez*, 2012 Nev. Unpub. LEXIS at *3–7 (footnotes and citations omitted).

[5] *Id.* at *11.

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> were detained in Mexico on serious criminal charges, the American consulate was not notified, and the interpreter who translated from English into Spanish at the trial for the Spanish-speaking judges was later convicted of having falsified his credentials, we would expect Mexico, on order of the ICJ, to review the reliability of the proceedings and the extent to which, if at all, timely notice to the American consulate might have regularized them. Perhaps timely consular notice would not have changed anything for Gutierrez; perhaps the interpreter's skills, despite his perjury, were sound. These are issues on which an evidentiary hearing needs to be held.[6]

Justices Ron Parraguirre and James Hardesty dissented. They believed that Gutierrez's post-conviction petition for habeas corpus was procedurally defaulted and that he failed to show prejudice from lack of consular notification and from the interpreter's mistranslations.[7]

STATE JURISDICTION AND IMMUNITIES

Tenth Circuit Affirms Rwanda's President's Head-of-State Immunity

In October 2012, the U.S. Court of Appeals for the Tenth Circuit affirmed a decision by the U.S. District Court for the Western District of Oklahoma[1] dismissing a suit against Paul Kagame, the current president of Rwanda, on the basis of head-of-state immunity.[2] The wives of the former presidents of Rwanda and Burundi sued Kagame. Both of their husbands were killed when their plane was shot down by surface-to-air missiles in April 1994, an event triggering the 1994 Rwanda genocide. The plaintiffs alleged that Kagame ordered the attack on the plane.

The United States filed a suggestion of immunity in the district court and an amicus curie brief in the court of appeals. As summarized by the court of appeals,

> During the pendency of this action in the district court, the United States, at the request of the Rwandan Government, submitted a "Suggestion of Immunity" on behalf of President Kagame. Paragraph one states:
>
> > The United States has an interest in this action because the . . . Defendant, President Kagame, is the sitting head of state of a foreign state, thus raising the question of President Kagame's immunity from the court's jurisdiction while in office. The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations. . . . The interest of the United States in this matter arises from a determination by the Executive Branch of the Government of the United States, in consideration of relevant principles of customary international law, and in the implementation of its foreign policy and in the conduct of its international relations, to recognize President Kagame's immunity from this suit while in office.
>
> In a published opinion, the district court accurately measured the case, deferred to the United States Suggestion of Immunity, and dismissed the action against President Kagame.[3]

[6] *Id.* at *12–13.
[7] *Id.* at *13–16 (Parraguirre & Hardesty, JJ., dissenting).
[1] Habyarimana v. Kagame, 821 F.Supp.2d 1244 (W.D. Okla. 2011).
[2] Habyarimana v. Kagame, 696 F.3d 1029 (10th Cir. 2012).
[3] *Id.* at 1031 (citing district court opinion).

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