

**THE UNENFORCEABLE RIGHTS TO
CONSULAR NOTIFICATION AND ACCESS
IN THE UNITED STATES: WHAT'S
CHANGED SINCE THE *LAGRAND* CASE?**

*Anthony N. Bishop**

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* B.A., 1994, Stephen F. Austin State University; J.D., 1997, Texas Tech University School of Law; Staff Attorney, Second District Court of Appeals, Fort Worth, Texas; Adjunct Instructor of Government, Tarrant County College—NW Campus. The views and opinions expressed in this paper are entirely those of the author or supporting authorities cited herein and do not represent the views of any of the justices or staff at the Second District Court of Appeals or of the State of Texas. Furthermore, this paper is based on the author’s research of cases, laws, books, legal journals, and newspaper articles. It does not reflect any personal experiences the author has had as a Staff Attorney with the Second District Court of Appeals.

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I. INTRODUCTION

This is how it could go down. Jack, an American male in his thirties, is on a pigeon-hunting trip in Filadelfia, Paraguay. While several of Jack's friends were supposed to join him on the hunting trip, everyone canceled at the last minute, leaving just him and his bilingual hunting guide, Pedro. Jack and his friends booked Pedro far in advance because he was supposed to be the best dove hunter in Filadelfia.

As Jack and Pedro are trekking through the Paraguayan countryside, Jack trips over a rock and falls to the ground, landing on his rifle that fires a shot directly into the back of Pedro's head, killing him instantly. Hoping that the worst did not just happen, Jack slowly raises his head to see if Pedro is still in front of him. He is, but he is lying face down in a stream. Blood is trickling downstream from the back of Pedro's head, and he is not moving. Jack realizes he is in a terrible situation for an American: he is in a foreign country, alone; he does not speak Spanish; and he is in the middle of the woods holding the rifle that just shot a man in the back of the head—a popular man at that. He panics and starts running, not knowing for sure if he is going to the police or going to the airport to get out of Paraguay before anyone discovers that Pedro is missing. In the heat of the moment, he decides to run to his hotel, grab his passport, and catch the next flight out of Paraguay to the United States. Jack has temporarily forgotten that Filadelfia is four-and-a-half hours from the nearest international airport in Asunción.

As Jack is running back to his hotel, some local hunters come across Pedro's body. The police are called, Pedro's schedule is tracked down, and forensics experts arrive on the scene to

begin a homicide investigation. The police immediately suspect murder because of the manner in which he was killed and because Pedro has no valuables of any sort on his body (the local hunters took advantage of the dead Pedro to fill their pockets). It takes a matter of minutes for the police to learn that Pedro was taking an American on a pigeon-hunting trip and that the American is staying at the Hotel Florida in Philadelphia.

The police are sent to the hotel to talk to Jack. When they arrive at the hotel, they learn that Jack is not in and that no one has seen him since early in the morning. They decide to wait for him in his room. About two hours later, Jack rushes into his room completely disheveled, breathing heavily, and wearing a shirt with blood on it. Intent on quickly grabbing his things and leaving the country as soon as possible, Jack does not notice the two men in black suits sitting on the sofa in the waiting area of his room. As he is rushing toward the door, suitcase in hand, the police arrest him. The appearance of flight confirms their suspicions that he murdered Pedro. The police say something to him in Spanish that he does not understand, but has a pretty good idea what it is about. He hears the word "*asasino*" followed by "*americano*" and is pretty sure they have discovered Pedro's body.

The next couple of weeks go by pretty quickly. Jack confesses to killing Pedro to the police, but tries repeatedly to explain that it was an accident. The police, however, do not appear to understand a word he is saying. To make matters worse, his lawyer speaks poor English with a harsh accent, and Jack does not trust him. His lawyer keeps insisting that Jack confess to murder and beg for forgiveness, telling him he is more likely to receive a lenient sentence if the judge sees he is truly contrite. But Jack refuses to beg for forgiveness because he did not do anything wrong. It was an accident.

After a two-hour trial, none of which Jack understands, a life sentence is handed down, followed by the judge saying some pretty nasty things to him about how all Americans are the same and how they think they can get away with murder. Of course, this version was the translation Jack got from his attorney—the judge seemed to have said much more. His lawyer's translation always seemed to be a condensed version of

what was really being said.

For the next two years, Jack counts on the Paraguayan appellate courts to discover the truth and let him go, but his appeals lead to nothing. Jack starts to accept the idea that he will be spending the rest of his life in a Paraguayan prison when another inmate asks him why he never met with his consular representative to ask for assistance following his arrest. "You know you have a right to it, don't you? I thought all Americans knew that." The rights that the inmate was referring to are the rights to consular notification and access under Article 36 of the Vienna Convention on Consular Relations, which provides:

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 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;
 - (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 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.

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.¹

Well, like most Americans, Jack did not know he had any such rights. To make matters worse, neither the police, his attorney, nor the judge told him he had these rights. All of them now deny ever knowing these rights existed.

Jack immediately contacts his lawyer, requesting that he set up a meeting with his consular representative. Meetings are arranged, and promises of immediate release are made by the American ambassador who is angry that an American was never told of his consular rights and has spent five years in prison for murder when all he was guilty of is being clumsy. A hearing is arranged before the trial judge who denies all relief because the issue was not raised at trial. The judge explains:

The failure of the American defendant to raise at trial the failure of the police to inform him of his consular rights has resulted in waiver. We have procedural rules that establish when such errors must be raised. It is the responsibility of the defendant to ensure errors are timely brought to the attention of the court, even when the defendant is *an American*.

The Paraguayan appeals courts affirm the trial court's ruling, and a diplomatic crisis arises over Jack, the American who was denied all civil liberties by a Third World country.

But slowly, Jack's cause dies out in the United States as the State Department is repeatedly reminded by the Paraguayan government of how the same situation arose back in the 1990s with Angel Breard, a Paraguayan citizen who was executed in

1. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, paras. (1)-(2), 21 U.S.T. 77, 100-01, 596 U.N.T.S. 261, 292-93 [hereinafter Vienna Convention].

Virginia for murder, even though Paraguay and Breard pleaded with the State Department and the American judiciary that his conviction and sentence be overturned because he had never been informed he had consular rights.² To avoid the media latching on to the apparent double standard of U.S. foreign policy and waving it around for all the world to see, a deal is worked out. Jack's sentence will be reduced to twenty years in exchange for an apology from Paraguay to the United States for breaching the treaty. An apology to Jack is not part of the deal. Jack is now eligible for release in fifteen years.

Had Jack been informed of his rights under the Vienna Convention to meet with his consular representative,³ he may have been provided more information about the Paraguayan legal system and how it works. He may have been told that, in Paraguay, it benefits the defendant to confess guilt.⁴ He may have been encouraged to follow the advice of Paraguayan lawyers, or he may have retained another lawyer, preferably one who spoke better English. He may have received a translator. The State Department may have been able to assist him in gathering mitigating evidence from the United States. But most importantly, he may have been able to obtain the support of the U.S. government to ensure a fair trial. The information came too late and procedural default prevented his use of a right that nations, including the United States, have recognized as fundamental in order to ensure adequate protection of their nationals during criminal proceedings in a foreign state.⁵

The sadly ironic part of Jack's story is that what occurred in Paraguay is what repeatedly occurs in the United States—foreign nationals in this country are repeatedly denied the ability to effectively exercise their consular rights.⁶ Many

2. See Memorial of the Republic of Paraguay (Para. v. U.S.), I.C.J. Pleadings (Breard) paras. 2.1, 2.25, 2.27, 2.47 (Oct. 9, 1998), available at http://www.icj-cij.org/icjwww/idocket/ipaus/ipauspleadings/ipaus_memorial_paraguay_19981009.htm [hereinafter Memorial of the Republic of Paraguay].

3. See Vienna Convention, *supra* note 1, at 21 U.S.T. at 100-01, 596 U.N.T.S. at 292-93.

4. See Memorial of the Republic of Paraguay, *supra* note 2, para. 2.6.

5. See Vienna Convention, *supra* note 1, at 21 U.S.T. at 100-01, 596 U.N.T.S. at 292-93.

6. See William J. Aceves, *The Vienna Convention on Consular Relations: A*

denials result from police and judicial officials failing to timely inform the defendant that such rights exist.⁷ Like Jack's case, many times the error is discovered after a sentence is handed down, at which point the error is waived.⁸ Other cases, however, have involved instances where the error was raised before trial, but the courts ruled there was no judicial remedy available to the defendant to cure the error.⁹ Repeatedly, courts refer the foreign national to diplomatic measures as the proper method of remedying the harm.¹⁰ In other words, an apology from the United States to the foreign national's country will solve the problem.¹¹ Ultimately, the rights to consular notification and access under Article 36 are essentially becoming empty promises to foreign nationals in the United States.¹²

In June 2001, the International Court of Justice (ICJ) in The Hague issued its landmark decision in the *LaGrand Case*, holding that the Vienna Convention confers individual rights and that the "procedural default" rule could not be invoked to deny a foreign national his rights under the Convention.¹³ The suit arose as a result of the failure by American officials to timely inform German foreign nationals of their rights under the Vienna Convention.¹⁴ Both foreign nationals were executed despite the breach.¹⁵ Although the decision of the ICJ is binding on the United States,¹⁶ most courts in the United States

Study of Rights, Wrongs, and Remedies, 31 VAND. J. TRANSNAT'L L. 257, 260 (1998).

7. See *id.* at 275.

8. See, e.g., *id.* at 260; *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam).

9. See, e.g., *United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 990 (S.D. Cal. 1999).

10. See, e.g., *United States v. Li*, 206 F.3d 56, 65 (1st Cir. 2000), *cert denied*, 531 U.S. 956 (2000).

11. See *id.* at 65.

12. See Rebecca E. Woodman, *International Miranda? Article 36 of the Vienna Convention on Consular Relations*, 70 J. KAN. B. ASS'N 41, 48 (2001).

13. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104, para. 91 (June 27), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm.

14. See *id.* para. 38.

15. See *id.* paras. 29, 34.

16. See Statute of the International Court of Justice, as annexed to the Charter of the United Nations, June 26, 1945, art. 94, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 [hereinafter Statute of the International Court of Justice]; see also PETER MALANCZUK,

continue to follow the precedents established in the United States before *LaGrand*.¹⁷ These precedents established that: (1) the Vienna Convention does not confer individual rights (or courts assumed, without deciding, that rights exist, but that there is no remedy);¹⁸ (2) the failure to be informed of the right to consular access is subject to waiver or procedural default;¹⁹ (3) dismissal of an indictment or a new trial is not required for a violation of Article 36;²⁰ and (4) evidence obtained in violation of the Convention is not subject to suppression.²¹

The fact that protection of consular rights has not been improved in the United States since *LaGrand* indicates that the lessons of the past have not been learned. It is no small affair when countries such as Paraguay and Germany, American allies, file suit against the United States in the International Court.²² Both states risked damage to their relations with the United States to pursue a cause they believed just.²³ Many more countries may be willing to sue the United States to force compliance with its obligation under the Vienna Convention, a treaty the United States expects other countries to comply with when the rights of American citizens are at stake.²⁴ Many

AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 51, 288 (7th rev. ed. 1997).

17. See, e.g., *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam); see also *United States v. Li*, 206 F.3d 56, 65 (1st Cir. 2000), cert. denied, 531 U.S. 956 (2000).

18. See, e.g., *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir. 2001), cert. denied, 533 U.S. 962 (2001); but see, e.g., *United States v. Esparza-Ponce*, 193 F.3d 1133, 1138 (9th Cir. 1999) (stating Article 36 confers individual rights).

19. See *Breard v. Greene*, 523 U.S. at 375-76.

20. See *Li*, 206 F.3d at 60.

21. See, e.g., *Breard v. Greene*, 523 U.S. at 376; *Jimenez-Nava*, 243 F.3d at 198; *Li*, 206 F.3d at 60; but see, e.g., *State v. Reyes*, 740 A.2d 7, 9-10 (Del. Super. Ct. 1999), overruling recognized by *State v. Vasquez*, Cr. A. No. 98-01-0317, 2001 WL 755930, at *1 n.5 (Del. Super. Ct. May 23, 2001) (unpublished order) (recognizing individual rights enforceable through suppression of evidence; this case was later overruled).

22. See Chad Thornberry, Comment, *Federalism vs. Foreign Affairs: How the United States Can Administer Article 36 of the Vienna Convention on Consular Relations Within the States*, 31 MCGEORGE L. REV. 107, 109-10 (1999).

23. See Memorial of the Republic of Paraguay, *supra* note 2, para. 2.27; Press Release 2001/16 bis, International Court of Justice (F.R.G. v. U.S.), paras. 4-5 (June 27, 2001), available at http://www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001-16bis_20010627.htm.

24. See 4 AM. JUR. 2D *Ambassadors, Diplomats and Consular Officials* § 6 (1995).

countries may also become less willing to ensure that American nationals are informed of their consular rights. Undoubtedly, the failure of the United States to abide by the Vienna Convention will have a negative impact on diplomatic relations with other countries.²⁵

The purpose of this paper is to discuss some of the federal and state opinions addressing the Vienna Convention that have been issued since *LaGrand* to demonstrate where the American judicial system and state and federal governments generally, and presently, stand when it comes to enforcing and protecting the consular rights of foreign nationals in this country. A review of *LaGrand* and the other cases that have been brought to the international spotlight is necessary to understand where the United States lags behind in its interpretation and enforcement of the Convention. Cases such as *Breard*, the 1999 advisory opinion of the Inter-American Court on Human Rights,²⁶ and *LaGrand* show what the United States, as the self-described leader in promoting human rights,²⁷ has failed to do in the past and, if it wishes to comply with international law, should be striving to achieve in enforcing Article 36.

25. See, e.g., John Moritz & Karen Brooks, *Fox Cancels Visit Over Execution*, FORT WORTH STAR-TELEGRAM, Aug. 15, 2002, at A1 (discussing decision of President Vicente Fox of Mexico to cancel trip to Texas to visit President Bush due to Texas's failure to commute death sentence of Javier Suarez Medina, a Mexican citizen who was executed in Texas even though he had never been informed of his consular rights).

26. Inter-Am. C.H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, (ser. A) No. 16 (1999) [hereinafter *The Right to Information*, Advisory Opinion OC-16/99].

27. E.g., Karen DeYoung, *President Against Relaxing Cuban Economic Sanctions, Increase in U.S. Aid to Dissidents Supported*, WASH. POST, May 19, 2001, at A5 (quoting President Bush as stating, "We might not sit on some commission [i.e., the U.N. Commission on Human Rights], but we will always be the world's leader in support of human rights.").

II. CONSULAR RIGHTS IN THE UNITED STATES BEFORE *LAGRAND*A. *Background*²⁸

In 1969, the U.S. Senate ratified the Vienna Convention on Consular Relations, a multilateral treaty requiring States to notify foreign nationals immediately upon their arrest of their right to meet and communicate with their consular representatives in the State.²⁹ The consular representative also has the right to arrange for the foreign national's legal representation.³⁰ This treaty governs the functions of consulates in approximately 165 countries.³¹ The United States is also subject to Principle 16(2) of the U.N. Body Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Article 38(1) of the U.N. Standard Minimum Rules for the Treatment of Prisoners, and several bilateral treaties setting similar requirements for consular notification.³²

As a result of the Senate's ratification, the Vienna Convention is the supreme law of the land and is binding on the states.³³ The Convention is also a self-executing treaty and thus is equivalent to an act of Congress, making it operable without

28. Portions of this section appear in Anthony N. Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. TEX. L. REV. (forthcoming Jan. 2003).

29. 115 CONG. REC. 30,997 (daily ed. Oct. 22, 1969); Vienna Convention, *supra* note 1, 21 U.S.T. at 100-01, 596 U.N.T.S. at 292-93.

30. Vienna Convention, *supra* note 1, 21 U.S.T. at 100-01, 596 U.N.T.S. at 292-93.

31. Death Penalty Information Center, *Foreign Nationals and the Death Penalty in the United States* (Aug. 15, 2002), at <http://www.deathpenaltyinfo.org/foreignnatl.html>.

32. U.N. Standard Minimum Rules for the Treatment of Prisoners, approved July 31, 1957, E.S.C. Res. 663(c), U.N. ESCOR, 24th Sess., Supp. No. 1, U.N. Doc. E/3048 (1957), amended May 13, 1977, E.S.C. Res. 2076, U.N. ESCOR, 62nd Sess., Supp. No. 1, U.N. Doc. E/5988 (1977), available at http://www.unhchr.ch/html/menu3/b/h_comp34.htm; *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, U.N. GAOR, 43d Sess., Annex, Supp. No. 49, at 297-300, U.N. Doc. A/43/49 (1988); see also *Basic Principles for the Treatment of Prisoners*, G.A. Res. 45/111, U.N. GAOR, 45th Sess., Annex, Supp. No. 49A, at 199-200, U.N. Doc. A/45/49 (1990).

33. See U.S. CONST. art. VI, § 1, cl. 2; *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *Hauenstein v. Lynham*, 100 U.S. 483, 489 (1879).

the need for enabling legislation.³⁴ As a self-executing treaty, it gives rise to judicially enforceable rights.³⁵

The U.S. government considers consular notification requirements to be extremely important and has relied on customary international law in addition to international treaties when interpreting the extent of the right to consular notification:

While the field of consular relations is now largely occupied by the treaties discussed above, the United States *still looks to customary international law as a basis for insisting upon adherence to the right of consular notification*, even in the case of countries not party to the [Vienna Convention] or any relevant bilateral agreement. Consular notification is in *our view a universally accepted, basic obligation that should be extended even to foreign nationals who do not benefit from the [Vienna Convention] or from any other applicable bilateral agreement*. Thus, in all cases, the minimum requirements are to notify a foreign national who is arrested or detained that the national's consular officials may be notified upon request; to so notify consular officials if requested; and to permit consular officials to provide consular assistance if they wish to do so.³⁶

The State Department also views the requirement that

34. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 6.7, at 214 (4th ed. 1991); Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 596-98, n.200 (1997); see also *United States v. Torres-Del Muro*, 58 F. Supp. 2d 931, 932 (C.D. Ill. 1999) (noting Vienna Convention is self-executing).

35. See *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

36. U.S. DEP'T OF STATE, PUB. NO. 10518, CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE AND LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM (1998), available at http://travel.state.gov/consul_notify.html (Summary of Requirements Pertaining to Foreign Nationals) (emphasis added) [hereinafter *Consular Notification and Access Instructions*]; see also, e.g., Peter Finn, *World Court Rebukes U.S. Over Execution of Germans*, WASH. POST, June 27, 2001, at A20 (quoting deputy State Department spokesman Phillip Reeker as saying, "Consular notification is very important for Americans abroad and we certainly recognize that we have to provide consular notification for foreign nationals in the United States.").

notification be made “without delay” to mean “as quickly as possible and, in any event, no later than the passage of a few days.”³⁷ Moreover, in a manual explaining the requirements of the Vienna Convention to law enforcement officers across the country, the Department of State has also taken the “golden rule” approach to consular rights:

These are mutual obligations that also pertain to American citizens abroad. In general, you should treat a foreign national as you would want an American citizen to be treated in a similar situation in a foreign country. This means prompt, courteous notification to the foreign national of the possibility of consular assistance, and prompt, courteous notification to the foreign national’s nearest consular officials so that they can provide whatever consular services they deem appropriate.³⁸

The record of the United States, however, in treating foreign nationals as it “would want an American citizen to be treated” could leave Americans in the same position Jack faced in Paraguay, rotting away in the prison of a Third World country.

When foreign nationals have tried to exercise their consular rights in the United States, federal and state courts, following the State Department’s interpretation of the Convention, have repeatedly taken the position that the Vienna Convention does not provide individual rights.³⁹ The courts have stated that “in resolving doubts about the interpretation” of a treaty, “the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight.”⁴⁰ Since 1970, the State

37. Tenagne Tadesse, Note, *The Breard Aftermath: Is The U.S. Listening?*, 8 SW. J. L. & TRADE AM. 423, 432-33 (2001) (quoting October 24, 1973 State Department statement appearing in LUKE T. LEE, CONSULAR LAW AND PRACTICE 143-44 (2d ed. 1991)).

38. Consular Notification and Access Instructions, *supra* note 36.

39. See, e.g., *United States v. Li*, 206 F.3d 56, 63-64 (1st Cir. 2000), *cert. denied*, 531 U.S. 956 (2000).

40. E.g., *United States v. Emuegbunam*, 268 F.3d 377, 392 (6th Cir. 2001), *cert. denied*, 122 S.Ct. 1450, 152 L.Ed.2d 392 (2002) (quoting *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933)); see also *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 168 (1999) (“Respect is ordinarily due the reasonable views of the [e]xecutive [b]ranch

Department has taken the view that the Vienna Convention does not create individual rights.⁴¹ “In the view of the State Department, the only remedies for failures of consular notification under the Vienna Convention are diplomatic, political, or exist between states under international law.”⁴² This position is in accordance with the view of the State Department and the Senate taken during the ratification proceedings of the Vienna Convention.⁴³

According to the State Department, “the parties to the Convention have attempted to remedy violations of Article 36 through investigations and apologies.”⁴⁴ The State Department states that it has “historically enforced the Vienna Convention itself, investigating reports of violations and apologizing to foreign governments and working with domestic law enforcement to prevent future violations when necessary.”⁴⁵ And, according to the State Department, many countries, if not most, “with which the United States raises concerns that consular notification obligations have been violated with respect to U.S. citizens will undertake to investigate the alleged violation and, if it is confirmed, to apologize for it and undertake to prevent future recurrences.”⁴⁶

The State Department also claims that “no country remedies violations of the Vienna Convention through its criminal justice system.”⁴⁷ While this assertion may have been true at one time,

concerning the meaning of an international treaty.”); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (“While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.”).

41. *Emuegbunam*, 268 F.3d at 392; see *Li*, 206 F.3d at 63-64; see also *United States v. Jimenez-Nava*, 243 F.3d 192, 197 (5th Cir. 2001), cert. denied, 533 U.S. 962 (2001).

42. *Emuegbunam*, 268 F.3d at 392; *United States v. Page*, 232 F.3d 536, 541 (6th Cir. 2000), cert. denied, 532 U.S. 1056 (2001); *Li*, 206 F.3d at 63.

43. See *Li*, 206 F.3d at 64-65.

44. *Emuegbunam*, 268 F.3d at 392.

45. *Id.* at 392-93 (quoting *United States v. Lombera-Camorlinga*, 206 F.3d 882, 887 (9th Cir. 2000), cert. denied, 531 U.S. 991 (2000)).

46. *Li*, 206 F.3d at 65 (quoting Department of State Answers to the Questions Posed by the First Circuit in *United States v. Nai Fook Li* at A-3 (1999), available at <http://www.state.gov/documents/organization/7111.doc> [hereinafter Answers]).

47. *Emuegbunam*, 268 F.3d at 393 (citing *Li*, 206 F.3d at 65 (quoting Answers,

it appears that this is no longer the case. Two courts in the United Kingdom have suppressed evidence obtained in violation of Article 36, and in neither case was a showing of prejudice required.⁴⁸ Despite this fact, courts continue to follow the views and statements of the State Department, claiming that, because no other country remedies violations of Article 36 in criminal proceedings, there is “a belief among Vienna Convention signatory nations that the treaty’s dictates simply are not enforceable in a host nation’s criminal courts.”⁴⁹ As a result, courts justify not allowing suppression as a remedy in the United States because this would result in “an inconsistent meaning [of the treaty] among the signatory nations.”⁵⁰ The courts state that “refusing to resort to the exclusionary rule promotes ‘harmony in the interpretation of an international agreement.’”⁵¹

While the courts refrain from remedying violations of Article 36, federal, state, and local policing departments continue not to advise foreign nationals of their consular rights.⁵² Although the federal government and some states have demonstrated some efforts in attempting to prevent continued violations,⁵³ others

supra note 46, at A-1).

48. See *R. v. Van Axel & Wezer*, (Snaresbrook Crown Court May 31, 1991) (HHJ Sich) (reported in LEGAL ACTION 12), Sept. 1991; *R. v. Bassil & Mouffareg*, (Acton Crown Court July 28, 1990) (HHJ Sich) (reported in LEGAL ACTION 23), Dec. 1990; see also Woodman, *supra* note 12, at 47 (discussing above cases); Kelly Trainer, Comment, *The Vienna Convention on Consular Relations in the United States Courts*, 13 TRANSNAT'L LAW. 227, 267 n.248 (2000) (discussing above cases).

49. *E.g.*, *Emuegbunam*, 268 F.3d at 393 (quoting *Li*, 206 F.3d at 66).

50. *United States v. Jimenez-Nava*, 243 F.3d 192, 199-200 (5th Cir. 2001), *cert. denied*, 533 U.S. 962 (2001); see also *United States v. Minjares-Alvarez*, 264 F.3d 980, 987 (10th Cir. 2001) (“Indeed, no other country has interpreted the Vienna Convention to require suppression as a remedy for a violation of Article 36.”).

51. *Jimenez-Nava*, 243 F.3d at 200 (quoting *United States v. Lombera-Camorlinga*, 206 F.3d 882, 888 (9th Cir. 2000), *cert. denied*, 531 U.S. 991 (2000) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 325 cmt. d (1987) (“Treaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between national legal systems.”))).

52. *E.g.*, Death Penalty Information Center, *supra* note 31.

53. See, *e.g.*, Frank Main, *Police to Tell Foreigners They Can Call Consul*, CHI. SUN-TIMES, Sept. 26, 2000, at 10 (discussing upgrades by Chicago police of consular procedures); Henry Weinstein, *Foreigners on Death Rows Denied Rights*, L.A. TIMES,

have not found the problem important enough to correct, even when the foreign national is facing the death penalty. Several foreign nationals who were not informed of their consular rights are on death row and several have been executed without notification of their consular rights.⁵⁴ Moreover, the efforts made to prevent future violations have not shown themselves to be effective. The main reason for the repeated violations appears to be due to a lack of knowledge on the part of law enforcement, the judiciary, and the legal profession of the protections afforded foreign nationals under the Vienna Convention.⁵⁵ Another problem is that there is no incentive among law enforcement officials to prevent future violations, even if officials know a violation is occurring.⁵⁶ And once the error is brought to light, the continued failure of state and federal officials to remedy the violations demonstrates a conscious disregard for international law and the Vienna Convention, a treaty that the United States expects all party nations to follow.⁵⁷

Although the United States is reluctant to change its interpretation of Article 36,⁵⁸ State parties to the Convention have shown their unwillingness to succumb to the decisions of American courts on cases involving the Convention.⁵⁹ States have turned to international litigation before international tribunals and to the use of diplomatic pressure to bring meaning to the commitments of the United States under the Vienna

Dec. 10, 1998, at A1 (stating L.A. Police Department added consular notification provisions to its procedure manuals in 1996); Press Release, Office of the Attorney General, State of Texas, *Local Authorities Urged to Honor an International Pledge*, (May 2001), available at <http://www.oag.state.tx.us/newspubs/opeds/200105art36a.htm> (detailing efforts in Texas to distribute a pamphlet to law enforcement personnel, detailing detainees' rights to contact their consulate).

54. See Death Penalty Information Center, *supra* note 31 (listing foreign nationals currently on Death Row and those that have been executed in the United States).

55. *Id.*

56. *See id.*

57. *Id.*

58. *See* *Breard v. Greene*, 523 U.S. 371, 377 (1998) (per curiam).

59. *See, e.g., LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm (Germany filed suit alleging that U.S. violated LaGrand brothers Article 36 rights.).

Convention.⁶⁰ One example is the *Breard* case. While the *Breard* case was not brought to a conclusion in the International Court of Justice,⁶¹ it does demonstrate the measures States, and American allies, are willing to take to protect the lives of their citizens and to force the United States to abide by Article 36.

*B. The Breard Case (Paraguay v. United States)*⁶²

In 1998, Paraguay sued the United States for Virginia's failure to inform Angel Francisco Breard of his consular rights before sentencing him to death.⁶³ Breard was arrested on September 1, 1992, for suspicion of murder and attempted rape.⁶⁴ Arlington, Virginia police officers found Breard's Paraguayan passport while searching his apartment around the time of his arrest.⁶⁵ Thus, they knew he was a foreign national.⁶⁶ The United States also conceded that the state police officers failed to inform Breard of his consular rights in violation of Article 36.⁶⁷

Before trial, state prosecutors offered Breard a plea bargain in which Virginia would only seek life imprisonment in return for his guilty plea.⁶⁸ Breard refused to accept the plea bargain.⁶⁹ Instead, he told his lawyers that he wanted to confess to committing the crime before the jury and explain to the jury that he was under a satanic curse at the time of the crime.⁷⁰ Breard thought the jury would be more lenient if he told them

60. Death Penalty Information Center, *supra* note 31.

61. See Memorial of the Republic of Paraguay, *supra* note 2, para. 2.6.

62. Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9). The discussion on the *Breard* case uses material and substantially similar language as that in Anthony N. Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. TEX. L. REV. (forthcoming Jan. 2003).

63. *E.g.*, Memorial of the Republic of Paraguay, *supra* note 2, paras. 1.1, 2.1, 2.10.

64. Memorial of the Republic of Paraguay, *supra* note 2, para. 2.1.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* para. 2.3.

69. *Id.* para. 2.7.

70. *Id.* paras. 2.7, 2.8.

what happened.⁷¹ His attorneys attempted to dissuade him from taking this course, but Breard did not trust his lawyers and did not understand the American plea bargaining process, which does not exist in Paraguay.⁷² In Paraguay, a sentence can be reduced where, as in Breard's case, the defendant's confession is the only direct evidence of the crime.⁷³ The law in Paraguay also generally favors confessions in return for leniency.⁷⁴ Breard's decision to reject the plea bargain would have been rational in Paraguay where the plea bargain would have been considered void.⁷⁵ Breard presented his version of the events to the jury and was later sentenced to death.⁷⁶

Throughout the state and federal appellate proceedings, Breard was never informed of his consular rights, and no Paraguayan official participated in his appeals.⁷⁷ His conviction was affirmed by the Virginia Supreme Court, and the U.S. Supreme Court denied his petition for writ of certiorari.⁷⁸ It was not until April 1996, when only habeas corpus review proceedings in federal district court were available, that Paraguayan consular officials became aware of Breard's case.⁷⁹

The Republic of Paraguay filed a civil action in the United States District Court for the Eastern District of Virginia to challenge Breard's conviction based on the violations of Article 36,⁸⁰ and Breard filed an application for habeas relief, with the assistance of consular officials.⁸¹ The district court denied the claims in each proceeding.⁸² In denying Breard's habeas petition,

71. *Id.* para. 2.6.

72. *Id.* paras. 2.6, 2.7, 2.11.

73. *Id.* para. 4.30.

74. *Id.*

75. *Id.* paras. 4.30, 4.31.

76. *Id.* paras. 2.8, 2.10.

77. *Id.* para. 2.15.

78. *Id.* para. 2.13; Breard v. Commonwealth, 445 S.E.2d 670, 682 (Va. 1994), *cert. denied*, 513 U.S. 971 (1994).

79. Memorial of the Republic of Paraguay, *supra* note 2, para. 2.16.

80. Paraguay v. Allen, 949 F. Supp. 1269, 1271 (E.D. Va. 1996), *aff'd* 134 F.3d 622, 627-28 (4th Cir. 1998).

81. See Breard v. Netherland, 949 F. Supp. 1255 (E.D. Va. 1996); see also Memorial of the Republic of Paraguay, *supra* note 2, para. 2.16.

82. *Allen*, 949 F. Supp. at 1275; Breard v. Netherland, 949 F. Supp. at 1269.

the court ruled Breard had defaulted on his claim that state authorities had violated Article 36 because he did not raise it in state proceedings.⁸³ In dismissing Paraguay's complaint, the court stated that, because Breard was then receiving consular access, the court did not have the power to enjoin the execution to provide retrospective relief.⁸⁴ The Fourth Circuit upheld the decision.⁸⁵ Virginia set his execution date for April 14, 1998.⁸⁶

Both Paraguay and Breard filed writs of certiorari in the U.S. Supreme Court.⁸⁷ Meanwhile, Paraguay worked behind the scenes through diplomatic channels to obtain assurances that the U.S. government would stop Breard's execution while review was pending.⁸⁸ The United States rejected all requests for such assurances.⁸⁹ On April 3, 1998, Paraguay instituted proceedings with the International Court of Justice (ICJ) and filed a request for provisional measures of protection.⁹⁰ On April 9, 1998, the ICJ issued a unanimous order requiring the United States to "take all measures at its disposal to ensure that . . . Breard is not executed pending the final decision in these proceedings."⁹¹ The court also informed the parties that it would take steps "to ensure that any decision on the merits be reached with all possible expedition."⁹²

On April 9, the day of the ICJ's provisional order, the United

83. Breard v. Netherland, 949 F. Supp. at 1263.

84. Allen, 949 F. Supp. at 1273; Memorial of the Republic of Paraguay, *supra* note 2, para. 2.20.

85. Paraguay v. Allen, 134 F.3d 622, 624 (4th Cir. 1998).

86. Memorial of the Republic of Paraguay, *supra* note 2, para. 2.23; Order at 1664, Commonwealth v. Breard, (Feb. 25, 1998) (No. CR 92-1467)

87. See Petition for Writ of Certiorari, Paraguay v. Gilmore, 523 U.S. 371 (Feb. 24, 1998); Petition for Writ of Certiorari, Breard v. Greene, 523 U.S. 371 (Mar. 11, 1998); see also Memorial of the Republic of Paraguay, *supra* note 2, paras. 2.22, 2.24.

88. Memorial of the Republic of Paraguay, *supra* note 2, paras. 2.26-.30.

89. *Id.* para. 2.29.

90. *Id.* para. 2.31; see also Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), Request for the Indication of Provisional Measures of Protection, (Order of Apr. 3, 1998).

91. Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), Request for the Indication of Provisional Measures of Protection (Order of Apr. 9, 1998), para. 41.

92. Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), (Time-Limits Order of Apr. 9, 1998).

States submitted a copy of the order to the Supreme Court.⁹³ On April 10, 1998, Breard filed an original petition for writ of habeas corpus and a supplemental application for a stay of execution with the Supreme Court, relying on the ICJ's provisional order.⁹⁴ On the same day, Paraguay also submitted a supplemental application for a stay of execution on the grounds that the Supreme Court should give effect to the ICJ's Provisional Measures Order because of the United States's treaty obligations and as a matter of comity.⁹⁵ On April 13, Paraguay also moved for leave to file an original action in the Supreme Court to request an injunction against Breard's execution because of the ICJ's Provisional Measures Order.⁹⁶ Paraguay also wrote the Solicitor General of the United States and the Legal Advisor to the Department of State, requesting them to ask the federal government to fulfill its obligations under the Provisional Measures Order.⁹⁷

Later that day, the United States responded to the provisional order by taking two separate, but coordinated, actions.⁹⁸ First, the Solicitor General of the United States, joined by the Legal Advisor, submitted a brief to the Supreme Court arguing that the ICJ's Provisional Measures Order was "precatory rather than mandatory" and urged the Supreme Court to deny Breard's and Paraguay's pending requests for relief from the execution.⁹⁹ "The United States advised the Court that, while '[t]his case . . . does not raise any questions concerning the ability of the United States to sue in order to enforce compliance with the Vienna Convention,' the means

93. Memorial of the Republic of Paraguay, *supra* note 2, para. 2.34.

94. *Id.* para. 2.35; Breard v. Greene, 523 U.S. 371, 374-75 (1998) (per curiam); *see also* Supplemental Brief in Support of Application for a Stay of Execution, Breard v. Greene, 523 U.S. 371 (Apr. 10, 1998) (No. 97-8214).

95. Memorial of the Republic of Paraguay, *supra* note 2, para. 2.36; Supplemental Brief Application for a Stay of or Injunction Against Execution, Breard v. Greene, 523 U.S. 372 (Apr. 10, 1998) (No. 97-1390; A-738).

96. Memorial of the Republic of Paraguay, *supra* note 2, para. 2.37; Breard v. Greene, 523 U.S. 371 (1998) (per curiam).

97. Memorial of the Republic of Paraguay, *supra* note 2, para. 2.38.

98. *Id.* paras. 2.40-41.

99. *Id.* (quoting Brief for the United States as Amicus Curiae at 51, Paraguay v. Gilmore, 523 U.S. 371 (1998) (No. 97-1390)).

available to stop the execution 'include only persuasion [of the Governor of Virginia] and not legal compulsion through the judicial system."¹⁰⁰

Meanwhile, Secretary of State Madeleine Albright, in a letter to the Governor of the Commonwealth of Virginia, James S. Gilmore, III, advised him that the provisional order was "non-binding."¹⁰¹ Albright requested, however, that Governor Gilmore grant a reprieve to Breard.¹⁰² The Secretary's letter was included in the brief of the United States to the Supreme Court.¹⁰³

On April 14, 1998, Paraguay filed a reply to the Solicitor General's brief and again urged the U.S. Supreme Court to enforce and respect the Provisional Measures Order.¹⁰⁴ That evening, the Supreme Court issued a per curiam decision denying all the pending requests for relief because Breard procedurally defaulted on his claims under the Vienna Convention by failing to timely raise them in the state court.¹⁰⁵ The Court reasoned that, while it gave "respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such," under international law, the procedural rules of the forum state govern the implementation of the treaty in that state absent a clear and express statement to the contrary.¹⁰⁶ The Court stated that "this proposition is embodied in the Vienna Convention, itself, which provides that the rights expressed in the Convention 'shall be exercised in conformity with the laws and regulations of the

100. *Id.* (quoting Brief for the United States as Amicus Curiae at 15 n.3 & 51, *Paraguay v. Gilmore*, 523 U.S. 371 (1998)).

101. *Id.* para.2.41 (quoting Letter from Madeline K. Albright, Secretary of State of the United States, to James S. Gilmore III, Governor, Commonwealth of Virginia (Apr. 13, 1998)).

102. *Id.*

103. Memorial of the Republic of Paraguay, *supra* note 2, para. 2.41.

104. *Id.* para. 2.42 (citing Reply to the Brief for the United States as Amicus Curiae, *Paraguay v. Gilmore*, 523 U.S. 371 (Apr. 14, 1998) (No. 97-1390; A-738)).

105. *Id.* para. 2.43; *see Breard v. Greene*, 523 U.S. 371, 375-76 (1998) (per curiam).

106. *Breard v. Greene*, 523 U.S. at 375 (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 539 (1987)).

Receiving State,' provided that 'said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.'"¹⁰⁷ Consequently, because Breard did not assert his Vienna Convention claim in state court, he "failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia," which require that assertions of error in criminal proceedings be raised first in state court to form the basis for relief in federal habeas review.¹⁰⁸

The Court also discounted Breard's argument that the Convention was the "supreme law of the land" and trumped the procedural default doctrine, stating that the procedural default rule also applies to provisions of the Constitution.¹⁰⁹ The Court recalled that it had previously held "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."¹¹⁰ Although the Vienna Convention "arguably confers on an *individual the right to consular assistance* following arrest," it has been in effect since 1969.¹¹¹ In 1996,

before Breard filed his habeas petition raising claims under the Vienna Convention, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which provides that a habeas petitioner alleging that he is held in violation of "treaties of the United States" will, as a general rule, not be afforded an evidentiary hearing if he "has failed to develop the factual basis of [the] claim in State court proceedings." Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be. This rule prevents Breard from establishing that the violation of his Vienna Convention rights prejudiced him. [Thus, w]ithout a hearing, Breard cannot establish, [regardless how novel

107. Breard v. Greene, 523 U.S. at 375.

108. *Id.* at 375-76.

109. *Id.* at 376.

110. *Id.* (quoting Reid v. Covert, 354 U.S. 1, 18 (1957)).

111. *Id.* (emphasis added).

the claims,] how [consular officials] would have advised him, how the advice of his attorneys differed from the advice [consular officials] would have provided, and what factors he considered in electing to reject the plea bargain that the State offered him.¹¹²

Although the Court could have stopped there, it went on to address the likelihood of Breard's success if his claims were properly preserved for review.¹¹³ The Court stated that "it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial."¹¹⁴ And, according to the Court, "no such showing could even arguably be made" because:

Breard decided not to plead guilty and to testify at his own trial contrary to the advice of his attorneys, who were likely far better able to explain the United States legal system to him than any consular official would have been. Breard's asserted prejudice—that had the Vienna Convention been followed, he would have accepted the State's offer to forgo the death penalty in return for a plea of guilty—is far more speculative than the claims of prejudice courts routinely reject in those cases were [sic] an inmate alleges that his plea of guilty was infected by attorney error.¹¹⁵

After learning of the Supreme Court's decision, both Breard and Paraguay immediately filed a new complaint in the United States District Court for the Eastern District of Virginia, requesting the court to give effect to the Provisional Measures Order and to grant emergency relief staying or enjoining the imminent execution.¹¹⁶ The district court denied the relief

112. *Id.* (quoting 28 U.S.C. §§ 2254(a), (e)(2) (1994 & Supp. IV 1994)); *see also* *Teague v. Lane*, 489 U.S. 288 (1989).

113. *Breard v. Greene*, 523 U.S. at 377.

114. *Id.*

115. *Id.*

116. Memorial of the Republic of Paraguay, *supra* note 2, para. 2.44 (citing Complaint, *Breard v. Reno* (E.D. Va. Apr. 14, 1998) (No. 3:98CV226) and Complaint, *Paraguay v. Gilmore* (E.D. Va. Apr. 14, 1998) (No. 3:98CV227), both *voluntarily dismissed without prejudice* (Apr. 27, 1998)).

around 9:00 p.m. on April 14,¹¹⁷ and the Fourth Circuit Court of Appeals affirmed the district court's ruling following emergency appeals.¹¹⁸

Around 10:00 p.m. that evening, Governor Gilmore announced he would not grant a reprieve, stating that “[t]he U.S. Department of Justice, together with the Virginia Attorney General, [made] a compelling case that the International Court of Justice [had] no authority to interfere’ with Virginia’s criminal justice system.”¹¹⁹ Further, according to the Governor, “[s]hould the International Court resolve this matter in Paraguay’s favor, it would be difficult, having delayed the execution so that the International Court could consider the case, to then carry-out the jury’s sentence despite the ruling [of] the International Court.”¹²⁰ Breard was executed by lethal injection at approximately 10:39 p.m. on April 14.¹²¹

Paraguay did not pursue its claims against the United States after Breard was executed.¹²² On November 2, 1998, Paraguay requested that the case be removed from the ICJ’s docket.¹²³ The case was discontinued on November 10, 1998.¹²⁴

In *Breard*, both the federal government and the state of Virginia disregarded international law.¹²⁵ Even though an ICJ Provisional Measures Order was in place, the Supreme Court did not stay the execution pending the ICJ’s decision.¹²⁶ Failing

117. Memorial of the Republic of Paraguay, *supra* note 2, para. 2.44.

118. *Id.* para. 2.45.

119. *Id.* para. 2.46 (quoting Press Release, Commonwealth of Virginia, Office of the Governor, Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard (Apr. 14, 1998), reprinted in Jonathan I. Charney & W. Michael Reisman, *Agora: Breard*, 92 AM. J. INT’L L. 666, 675 (1998)).

120. Memorial of the Republic of Paraguay, *supra* note 2, para. 2.46.

121. *Id.* para. 2.47.

122. See Press Communiqué 98/36, International Court of Justice, Case Removed From the Court’s List at the Request of Paraguay, (Nov. 11, 1998), available at <http://www.lawschool.cornell.edu/library/cijwww/icjwww/ipresscom/ipress1998/ipr9836.htm>.

123. *Id.*

124. See Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 426 (Order of Nov. 10).

125. *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam); *Breard v. Pruett*, 134 F.3d 615, 619-21 (4th Cir. 1998).

126. *Breard v. Greene*, 523 U.S. 371, 378 (1998) (per curiam).

to abide by the order was not only contrary to U.S. obligations under international law in that the Provisional Measures Order was entered pursuant to the ICJ's powers under Article 41 of the Statute of the International Court of Justice,¹²⁷ to which the United States is a party.¹²⁸ But the Supreme Court also contradicted its own position of giving "respectful consideration to the ICJ's interpretation of an international treaty." The Supreme Court instead decided *Breard* "on an eleventh-hour motion to stay Breard's execution and decided the matter without full briefing or argument."¹²⁹ Finally, the U.S. government's position before the Supreme Court on the binding nature of the ICJ's Provisional Measures Order not only contravenes international law, but contradicts the position taken by the United States in 1979 when it challenged Iran's detention of hostages at the American Embassy.¹³⁰ By proceeding with Breard's execution even though Governor Gilmore recognized that an opinion of the ICJ might make it difficult to do so,¹³¹ he assigned to himself and the State of

127. *Id.* at 375.

128. See Statute of the International Court of Justice, art. 41, para. 41-42; U.N. CHARTER art. 93, para. 1.

129. John Quigley, *LaGrand: A Challenge to the U.S. Judiciary*, 27 YALE J. INT'L L. 435, 436 (2002).

130. See Case Concerning U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 6-7 (May 24) (stating the United States instituted proceedings, requested a provisional measures order, and requested the ICJ to adjudge and declare, *inter alia*, that the Iranian Government had violated its international legal obligations to the United States. The United States insisted that Iran must: (1) ensure the immediate release of the hostages; (2) afford U.S. diplomatic and consular personnel the protection and immunities to which they were entitled (including immunity from criminal jurisdiction) and provide them with facilities to leave Iran; (3) submit the persons responsible for the crimes committed to the competent Iranian authorities for prosecution, or extradite them to the United States; and (4) pay the United States reparation, in a sum to be subsequently determined by the Court). Incidentally, the United States in that case also argued that Iran failed to comply with the Vienna Convention and that Iran's breach of the Convention constituted a grave violation of consular practice and acceptable standards of human rights. Richard C. Dieter, *International Perspectives on the Death Penalty: A Costly Isolation for the U.S.*, Death Penalty Information Center, at <http://www.deathpenaltyinfo.org/internationalreport.html>; William J. Aceves, *International Decisions: The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 94 AM. J. INT'L L. 555, 560 (2000).

131. See Press Release, Commonwealth of Virginia, Office of the Governor,

Virginia the authority to determine the binding nature of international law, a prerogative that under the Constitution, is left solely to the federal government.¹³² As one commentator noted, “The interests of the United States at the ICJ should not have been made to depend on how the Governor of Virginia would respond to a request from the Secretary of State to give effect to the ICJ ruling.”¹³³ And while procedural default provides legitimate grounds for disposing of an argument in habeas proceedings, American courts are not required to rigidly apply procedural rules, such as waiver and procedural default when substantial rights, such as the right to life, are at stake and where “failure to review the claim will result in a fundamental miscarriage of justice.”¹³⁴ Contrary to the opinion of

Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard (Apr. 14, 1998), *reprinted in* Charney & Reisman, *supra* note 119, at 674.

132. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (stating that because the Constitution gives the federal government exclusive authority to manage the nation’s foreign affairs, “rules of international law should not be left to divergent and perhaps parochial state interpretations”); see also Philip Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT’L L. 740, 740-43 (1939) (discussing the proper role of the states in international law); cf. Christopher E. van der Waerden, Note, *Death and Diplomacy: Paraguay v. United States and the Vienna Convention on Consular Relations*, 45 WAYNE L. REV. 1631, 1658 (1999).

In weighing the nation’s foreign relations interests against competing federalism concerns, the Administration chose to put states’ rights ahead of others. Yet, only the timing of Breard’s execution was at stake and not the death sentence itself, and the Administration’s actions have not only unnecessarily put Americans abroad at risk, but also weakened the nation’s standing in and commitment to international law.

Id.

133. Lori Fidler Damrosch, *Agora: Breard—The Justiciability of Paraguay’s Claim of Treaty Violation*, 92 AM. J. INT’L L. 697, 703 (1998).

134. See, e.g., *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (stating one exception to the procedural default rule is “the circumstance in which the habeas petitioner can demonstrate a sufficient probability that our failure to review his federal claim will result in a fundamental miscarriage of justice”); *Lisenba v. California*, 314 U.S. 219, 236 (1941) (stating due process requires the state courts, in conducting criminal trials, must proceed consistently with “that fundamental fairness” that is “essential to the very concept of justice”); *Carter v. Bowersox*, 265 F.3d 705, 716 (8th Cir. 2001), *cert. denied*, 122 S.Ct. 1566, 152 L.Ed.2d 487 (2002) (quoting MO. SUP. CT. R. 29.12(b)) (“[W]hether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.”); *United States v. Harrison*, 198 F.3d 247 (6th Cir. 1999) (unpublished table decision, *available at* 1999 WL 1111520) (“Under the

the Supreme Court, the facts and circumstances surrounding Breard's trial show that he did not grasp the danger he posed to himself by explaining to the jury his reasons for committing murder.¹³⁵ A consular representative would have likely prevented him from making such a fundamental and prejudicial mistake.¹³⁶

The right to meet with consular officials was established to ensure that foreign nationals' rights in the host country are adequately protected during criminal proceedings.¹³⁷ That did not occur for Breard. Evidence shows that Breard did not understand the consequences of explaining his version of the events to the jury.¹³⁸ He did not understand the American criminal justice system and did not trust his attorneys.¹³⁹ A consular representative could have explained the plea bargaining process, influenced Breard to take his lawyers' advice, and saved Breard from his own ignorance. Had an American been placed in a similar situation abroad, it is not likely that the criminal proceedings would have proceeded without protest from the United States. The President of the United States would likely demand consular access.¹⁴⁰ For example, when a U.S. spy plane made an emergency landing on

'plain error' standard of review, courts of appeal are authorized to correct particularly egregious errors, those errors that seriously affect the fairness, integrity or public reputation of judicial proceedings or which require prompt action to correct a miscarriage of justice.").

135. See John Cary Sims & Linda E. Carter, *Representing Foreign Nationals: Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool*, THE CHAMPION, (1998), available at <http://www.nacdl.org/champion/articles/98sep01.htm> (criticizing the Supreme Court holding on this point, stating "a sounder assumption would be that Breard could not evaluate the value of the plea bargain or testifying without understanding why it might be prudent for him to proceed differently in the United States than he would if prosecuted in the Paraguay").

136. See *id.*

137. See *id.*

138. See *id.*; Kadish, *supra* note 34, at 582.

139. See Sims & Carter, *supra* note 135; Kadish, *supra* note 34, at 582.

140. See Michael A. Lev & John Diamond, *U.S. Fumes as China Holds on to Air Crew*, CHI. TRIB., Apr. 3, 2001, at N1 (quoting Bush demanding China give "immediate access by our embassy personnel to our crew members. . . . I am troubled by the lack of a timely Chinese response to our request for this access. . . . I call on the Chinese government to grant this access promptly.").

a Chinese island in 2001 after colliding in the air with a Chinese jet fighter, President Bush demanded that the pilots and crew be given immediate consular access, citing the Vienna Convention, to which China is a party.¹⁴¹

By placing immediate political interests over the long-term goals sought to be accomplished by international treaties, the federal and state policies of ignoring the protections of Article 36 will likely come back to haunt the United States in the future. As Justice Heiple of the Supreme Court of Illinois stated in a dissenting opinion,

What is cavalierly dismissed here is that the consular notification requirement is meant to ensure that foreign nationals imprisoned abroad have adequate legal representation and that they should be tried in accordance with principles of justice generally recognized in the international community It is important to note that this protection is designed for Americans abroad as well as for foreign nationals in the United States.¹⁴²

C. Murphy, Mexico, and Advisory Opinion OC-16/99 of the Inter-American Court of Human Rights

On September 4, 1992, Mario Murphy, a Mexican national, was arrested by Virginia Beach police for murder.¹⁴³ Following his arrest, Murphy waived his constitutional rights and confessed to committing the offense.¹⁴⁴ He later pleaded guilty to murder-for-hire and to conspiracy to commit murder, and the court sentenced him to death.¹⁴⁵ Murphy had never been informed of his consular rights.¹⁴⁶ His death sentence was

141. *Id.*; *Consideration of Effective Measures to Enhance the Protection, Security, and Safety of Diplomatic and Consular Missions and Representatives: Report of the Secretary-General*, U.N. GAOR, 55th Sess., Annex, Agenda Item 158, at 8, U.N. Doc. A/55/164 (2000).

142. *People v. Madej*, 739 N.E.2d 423, 432 (Ill. 2000) (Heiple, J., dissenting).

143. *See Murphy v. Netherland*, 116 F.3d 97, 99 (4th Cir. 1997).

144. *Id.*

145. *Id.*

146. *Id.*

affirmed by the Virginia Supreme Court.¹⁴⁷

In his federal habeas petition, Murphy argued that his conviction and death sentence were constitutionally invalid because the police had failed to inform him of his consular rights.¹⁴⁸ The Fourth Circuit affirmed the trial court's denial of Murphy's habeas claims on three grounds: (1) there was no substantial showing of a violation of a constitutional right under 28 U.S.C. section 2253(c)(2) because "even if the Vienna Convention on Consular Relations could be said to create individual rights (as opposed to setting out the rights and obligations of signatory nations), it certainly does not create constitutional rights"; (2) Murphy's claims were barred by procedural default because he failed to raise them in state court; and (3) Murphy failed to establish prejudice from the violation of his consular rights.¹⁴⁹

Although the court ruled that Murphy waived his claim because he failed to raise it in state court,¹⁵⁰ at oral argument, the Virginia Assistant Attorney General and two of the panel judges admitted they had never heard of the Vienna Convention before Murphy's case.¹⁵¹ In the court's opinion, however, it blamed Murphy's failure to raise the Convention on his trial counsel, stating "[t]he Vienna Convention . . . has been in effect since 1969, and a reasonably diligent search by Murphy's counsel . . . would have revealed the existence and applicability (if any) of the Vienna Convention."¹⁵² The court did not mention the Mexican Consulate's amicus curiae brief, which outlined the "flexible and far-reaching assistance to avoid imposition of the death penalty" consular officials could have provided Murphy had he requested consular assistance.¹⁵³ Instead the court stated in its opinion:

147. *Id.*

148. *Id.*

149. *Id.* at 99-101.

150. *Id.* at 99.

151. See Amnesty Int'l, *United States of America: Violation of the Rights of Foreign Nationals Under Sentence of Death*, at 2-3 (AI Index AMR 51/01/98) (Jan. 1998) [hereinafter *Violation of Rights*].

152. *Murphy*, 116 F.3d at 100.

153. *Violation of Rights*, *supra* note 151, at 3.

There is also no evidence to support Murphy's generalized assertion that the Mexican consulate could have helped him obtain mitigating evidence from Mexico that would have affected his sentencing hearing. As the district court found, Murphy has made "no showing of what evidence the Mexican consulate would have produced." Furthermore, Murphy's assertion that the Mexican consulate could have helped him obtain character testimony from his relatives in Mexico does not establish prejudice because Murphy has failed to show how assistance from the consulate was necessary to obtain such testimony and because such character testimony would have been largely duplicative of the character testimony that was actually presented at the sentencing hearing.¹⁵⁴

The day after Murphy's execution, the State Department apologized to the Mexican Embassy for the failure of Virginia officials to provide Murphy with consular notice.¹⁵⁵

Three months after Murphy's execution, the Mexican government, pursuant to Article 64(1) of the American Convention on Human Rights,¹⁵⁶ requested that the Inter-American Court of Human Rights issue an advisory opinion clarifying the minimum judicial guarantees and due process rights to consular assistance of foreign nationals who are not informed of their consular rights and are subsequently sentenced to death.¹⁵⁷ On October 1, 1999, the Inter-American Court of Human Rights issued Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees for the Due Process of Law*.¹⁵⁸ Although the United States has not ratified the American Convention, it has signed the treaty, and thus under international law, it is

154. *Murphy*, 116 F.3d at 101.

155. *Violation of Rights*, *supra* note 151, at 3.

156. American Convention on Human Rights, Nov. 22, 1969, art. 64(1), 1144 U.N.T.S. 123, 159-60 (allowing members of the Organization of American States to consult the Inter-American Court regarding the interpretation of the American Convention "or other treaties concerning the protection of human rights in the American states").

157. See *The Right to Information*, Advisory Opinion OC-16/99, *supra* note 26, paras. 1-4; see also Aceves, *supra* note 130, at 555-56 n.3.

158. *The Right to Information*, Advisory Opinion OC-16/99, *supra* note 26.

obligated to respect the terms of the American Convention in good faith.¹⁵⁹ The United States, however, has refused to submit to the jurisdiction of the Inter-American Court.¹⁶⁰

After affirming its competence to render an advisory opinion concerning the interpretation of not only the American Convention, but also other international agreements such as the Vienna Convention,¹⁶¹ the Inter-American Court addressed the merits of Mexico's request.¹⁶² First, the court concluded that, based on the Vienna Convention's text and its *travaux préparatoires*, Article 36 "endows a detained foreign national with individual rights that are the counterpart to the host State's correlative duties."¹⁶³ In reaching this determination, the court noted that Article 36 serves the dual purpose of recognizing the State's right to assist its nationals through [its] consular officers and recognizing the "correlative right of the national of the sending State to contact the consular officer to obtain that assistance."¹⁶⁴

In addressing whether Article 36 protects human rights, the court identified ways in which a consular official can assist a detained national.¹⁶⁵ For example, consular officials assist foreign nationals by providing or retaining a lawyer, obtaining evidence in the national's country of origin, verifying the manner in which legal assistance is provided, and monitoring

159. See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 18 § a, 1155 U.N.T.S. 331, 336, 8 I.L.M. 679, 686; WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 184 (2d ed., Cambridge University Press 1997) (1993).

160. See Kathryn Sikkink, *Reconceptualizing Sovereignty in the Americas: Historical Precursors and Current Practices*, 19 HOUS. J. INT'L L. 705, 710 n.22 (1997) ("Because the United States has ratified neither the optional protocol to the Covenant on Civil and Political Rights nor the American Convention on Human Rights, and has not recognized the jurisdiction of the Inter-American Court, it can not be said to have a comprehensive human rights policy.").

161. The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, paras. 30-69.

162. *Id.*

163. *Id.* para. 84.

164. *Id.* para. 80; Aceves, *supra* note 130, at 558.

165. The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, paras. 85-87; Aceves, *supra* note 130, at 558.

the foreign national's detention.¹⁶⁶ Thus, the court concluded that the rights under Article 36 concern "the protection of human rights and [are] part of the body of international human rights law."¹⁶⁷

The court also considered the meaning of the phrase "without delay."¹⁶⁸ According to the court, because "without delay" was added to the Convention to ensure that a foreign national was informed of his consular rights, interpretation of the phrase should serve this purpose.¹⁶⁹ For consular assistance to be effective, the court determined that "a foreign national must be informed of his rights at a time that will allow him to prepare an effective defense."¹⁷⁰ Accordingly, the "timing" of the notification "must be appropriate to achieving that end."¹⁷¹ Thus, "without delay" means that foreign nationals must be informed of the right to consular assistance "at the moment they are deprived of liberty and, in any case, before they make their first statements to the authorities."¹⁷²

The court also determined that enforcement of the right to consular assistance was not conditioned upon the sending State protesting the denial of the rights to one of its nationals.¹⁷³ The right is conditioned solely on the will of the foreign detainee and not the State.¹⁷⁴ "[I]t would be illogical to make exercise of these rights or fulfillment of these obligations subject to protests from

166. The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, para. 86; Aceves, *supra* note 130, at 558

167. The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, para. 87; Aceves, *supra* note 130, at 558.

168. See The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, paras. 98-106.

169. *Id.* para. 106; Aceves, *supra* note 130, at 558.

170. Aceves, *supra* note 130, at 558; The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, para. 106.

171. The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, para. 106; Aceves, *supra* note 130, at 558.

172. The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, para. 106; Aceves, *supra* note 130, at 558.

173. The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, para. 89; Aceves, *supra* note 130, at 558.

174. The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, para. 90; Aceves, *supra* note 130, at 558.

a State that is unaware of its national's predicament."¹⁷⁵

The court also looked at the relationship between Article 36 of the Vienna Convention and Article 14 of the International Covenant on Civil and Political Rights, which establishes minimum due process guarantees.¹⁷⁶ Taking into account the expansive developments in international human rights law, the court stated:

The *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider [the relationship between the two treaty provisions] in the context of the evolution of the fundamental rights of the human person in contemporary international law.¹⁷⁷

Based on this analysis, the court stated that due process of law in the International Covenant "derives from the inherent dignity of the human person."¹⁷⁸ And to ensure that due process of law is provided, a defendant must be permitted to "exercise his rights and defend his interests" like any other person.¹⁷⁹ Consequently, "the judicial process must recognize and correct any real disadvantages that those [facing criminal proceedings] might have".¹⁸⁰

175. The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, para. 92; Aceves, *supra* note 130, at 558.

176. The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, para. 111; Aceves, *supra* note 130, at 559.

177. The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, para. 115.

178. *Id.* para. 116 (quoting the International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (1966) [hereinafter International Covenant on Civil and Political Rights]).

179. *Id.* para. 117; Aceves, *supra* note 130, at 559.

180. The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, para. 119.

The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.¹⁸¹

Thus, the individual's rights under Article 36 give meaning to due process under Article 14 of the International Covenant.¹⁸² As such, "the minimum guarantees established in Article 14 . . . can be amplified in light of other international instruments like the Vienna Convention . . . , which broadens the scope of the protection afforded to those accused."¹⁸³

Regarding the consequences of failing to notify a foreign national of his right to consular assistance, the court focused on the consequences to a defendant facing the death penalty.¹⁸⁴ The court stated:

Because the right to information is an element of Article 36(1)(b) of the Vienna Convention on Consular Relations, the detained foreign national must have the opportunity to avail himself of this right in his own defense. Non-observance or impairment of the detainee's right to information is prejudicial to the judicial guarantees.¹⁸⁵

The court noted that because there was a trend in the international community toward abolition of capital punishment and because both the International Covenant and the American Convention limit capital punishment to the most serious crimes, the failure to notify a capital defendant of his consular rights amounted to a violation of due process and an arbitrary

181. *Id.*

182. *Id.* para. 124 (discussing the International Covenant on Civil and Political Rights, *supra* note 178, art. 14); Aceves, *supra* note 130, at 559.

183. The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, para. 124.

184. *Id.* paras. 125-37.

185. *Id.* para. 129.

deprivation of life.¹⁸⁶ These violations, the court states, “give rise to international responsibility and an obligation to provide reparations.”¹⁸⁷ Arguably, this reasoning can also be applied to a noncapital conviction: the failure to notify a foreign national of his consular rights in a noncapital case resulting in a conviction and prison sentence is an arbitrary deprivation of liberty under Article 9 of the International Covenant.¹⁸⁸

Finally, the court held that the obligations under the Vienna Convention must be enforced by all State parties, regardless of whether they have a federal or unitary system of government.¹⁸⁹ The court stated that “a State cannot plead its federal structure to avoid complying with an international obligation.”¹⁹⁰ In other words, the U.S. government cannot claim to be unable to interfere with the actions of states when they fail to enforce the Convention’s provisions.¹⁹¹ Thus, the United States can be held accountable for the violations of Article 36 by state governments.¹⁹²

Attempts to rely on the Inter-American Court’s advisory opinion in the United States have been unsuccessful. For example, at the federal level, the First Circuit Court of Appeals, in *United States v. Li*, dismissed the relevance of the advisory opinion and stated that “[t]he United States is not a party to the treaty that formed the [Inter-American Court of Human Rights], and is not bound by that court’s conclusions.”¹⁹³ In *United States*

186. *Id.* paras. 130-37.

187. Aceves, *supra* note 130, at 559; The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, para. 137.

188. See International Covenant on Civil and Political Rights, *supra* note 178, art. 9(1).

189. The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, paras. 139-40; Aceves, *supra* note 130, at 560.

190. The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, paras. 139 (relying on Vienna Convention on the Law of Treaties, *supra* note 159, art. 29, 1155 U.N.T.S. at 339 (Article 29 of the Vienna Convention on the Law of Treaties states, “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”); Garrido and Baigorria Case, Reparations (art. 63(1) American Convention on Human Rights), Inter-Am. C.H.R., para. 46 (ser. C) no. 39 (1998).

191. Aceves, *supra* note 130, at 560.

192. See *id.*

193. *United States v. Li*, 206 F.3d 56, 64 n.4 (1st Cir. 2000) (en banc), *cert.*

v. Lombera-Camorlinga, the Ninth Circuit did not mention the advisory opinion even though the defendants, amici, and the United States referred to it in their briefs.¹⁹⁴ Both courts addressed the violations of Article 36 en banc and concluded that violations of the Vienna Convention had occurred, but that there was no judicial remedy available.¹⁹⁵ At the state level, however, at least five judges have recognized the importance of the Inter-American Court's rulings, but none were in the majority.¹⁹⁶

The *Breard* case and the Inter-American Court's advisory opinion can be seen as precursors to the inevitable decision of the ICJ in the *LaGrand* case. As a result of the continual violation of Article 36 and lack of progress toward its enforcement in American courts, it was only to be a matter of time before another State party to the Convention sought a binding decision from the ICJ regarding a violation of the Vienna Convention by the United States.

III. THE *LAGRAND* CASE (*GERMANY V. UNITED STATES*)¹⁹⁷

In 1999, the United States again ignored its international commitments when it permitted Arizona to execute two German nationals who had not been informed of their consular rights before conviction.¹⁹⁸ Karl and Walter LaGrand were sentenced to

denied, 531 U.S. 956 (2000); see *Aceves*, *supra* note 130, at 562.

194. *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 991 (2000); *Aceves*, *supra* note 130, at 562-63.

195. *Li*, 206 F.3d at 64; *Lombera-Camorlinga*, 206 F.3d at 887-88.

196. See *People v. Madej*, 739 N.E.2d 423, 430 (Ill. 2000) (McMorrow, J., concurring and dissenting in part) (stating that the holding of Inter-American Court "mirrors" the Illinois Supreme Court's "own recognition that death penalty cases require 'a high standard of procedural accuracy'"); *Rocha v. State*, 16 S.W.3d 1, 26 (Tex. Crim. App. 2000) (Holland, J., concurring, joined by Meyers, Price, and Johnson) (relying in part on Inter-American Court's decision to support the view that Article 36 "endows a detained foreign national with individual rights").

197. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm.

198. See *id.*; see also Finn, *supra* note 36, at A20. The discussion on the *LaGrand* case uses material and substantially similar language that appears in Anthony N. Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. TEX. L. REV. (forthcoming Jan. 2003).

death in 1984 for a murder committed during a bank robbery.¹⁹⁹ They learned of their rights to consular assistance ten years later *from other prisoners* after it was too late to challenge the error on appeal.²⁰⁰

After Germany learned of the violation, it actively attempted to prevent the execution of the LaGrands.²⁰¹ But through both diplomatic and legal channels, Germany kept running into the same obstacle—the LaGrands were barred from raising consular notification issue because of procedural default.²⁰² On March 2, 1999, about a week after Karl LaGrand's execution,²⁰³ and the day before Walter's scheduled execution, Germany filed proceedings in the ICJ, challenging the failure of the United States to inform the LaGrand brothers of their consular rights.²⁰⁴ Germany argued that because the United States had violated its binding obligations under Article 36 of the Vienna Convention, Germany was prevented from providing timely assistance to the LaGrand brothers.²⁰⁵

Immediately after Germany filed suit, the ICJ issued a unanimous order for provisional measures ordering the United States to "take all measures at its disposal" to prevent the execution of Walter LaGrand until the court reached a final decision on the treaty violation.²⁰⁶ The United States protested the order, claiming there was insufficient time for it to comply.²⁰⁷ Under the same time constraints, however, the United States was able to challenge Germany's late appeal to the U.S.

199. *LaGrand Case*, 2001 I.C.J. 104, para. 14.

200. *Id.* paras. 15, 22; see Amnesty Int'l, *United States of America: A Time for Action—Protecting Consular Rights of Foreign Nationals Facing the Death Penalty*, at 1 (AI Index: AMR 51/106/2001) (Aug. 2001) [hereinafter *Protecting Consular Rights*].

201. *Protecting Consular Rights*, *supra* note 200, at 1.

202. *LaGrand Case*, 2001 I.C.J. 104, para. 29.

203. *Protecting Consular Rights*, *supra* note 200, at 1-2.

204. *LaGrand Case*, 2001 I.C.J. 104, para. 30.

205. *Id.* para. 38; *Protecting Consular Rights*, *supra* note 200, at 1-2.

206. *LaGrand Case*, 2001 I.C.J. 104, para. 32; *Protecting Consular Rights*, *supra* note 200, at 2.

207. See *Protecting Consular Rights*, *supra* note 200, at 2; Finn, *supra* note 36, at A20 (stating a U.S. representative argued before ICJ that ability "to delay the execution was constrained by the last-minute timing of the German filing and the fact that the United States is 'a federal republic of divided powers'").

Supreme Court, arguing that the Provisional Measures Order of the ICJ was not legally binding.²⁰⁸ Ironically, as mentioned before, when the United States filed suit against Iran for redress over the hostage crisis, the United States argued before the ICJ that the court's emergency orders should be legally binding as a matter of principle.²⁰⁹

After the U.S. Supreme Court dismissed Germany's appeal seeking compliance with the ICJ order,²¹⁰ Arizona Governor Jane Hull allowed the execution of Walter LaGrand to proceed, over the Arizona Board of Executive Clemency's unprecedented recommendation that Walter LaGrand be granted a reprieve so that Germany could properly pursue proceedings before the ICJ.²¹¹ Governor Hull decided the execution should go forward "in the interest of justice and with the victims in mind."²¹²

Unlike Paraguay in the *Breard* case, Germany continued its efforts to obtain a binding judgment despite Walter LaGrand's execution.²¹³ In a five-day hearing in November 2000, Germany and the United States presented arguments before the ICJ.²¹⁴ Germany argued that Article 36 of the Vienna Convention confers rights on individual nationals as well as on signatory States and that the United States had violated those rights.²¹⁵ Germany asked the ICJ to rule that the application by the United States of the "procedural default" doctrine resulted in a breach of the treaty because the Vienna Convention requires that local laws and regulations give full effect to its provisions.²¹⁶

208. *Protecting Consular Rights*, *supra* note 200, at 2; *LaGrand Case*, 2001 I.C.J. 104, para. 33.

209. *See Finn*, *supra* note 36, at A20.

210. *LaGrand Case*, 2001 I.C.J. 104, para. 33.

211. *Id.* para 31; *Protecting Consular Rights*, *supra* note 200, at 2, n.5 ("The reprieve was intended to provide Germany with the time to file an orderly application with the ICJ. German authorities maintained that their late application was unavoidable because they had only recently established that Arizona officials became aware of the LaGrands' nationality shortly after their arrest in 1982.")

212. *LaGrand Case*, 2001 I.C.J. 104, para. 31 (quoting Governor Hull).

213. *Protecting Consular Rights*, *supra* note 200, at 2.

214. *See id.*

215. *LaGrand Case*, 2001 I.C.J. 104, para. 38; *Protecting Consular Rights*, *supra* note 200, at 2.

216. *LaGrand Case*, 2001 I.C.J. 104, paras. 12(2), 60; *Protecting Consular*

Germany argued that the ICJ's Provisional Measures Orders are binding under international law and that parties before the court, and subject to the orders, must comply with their terms.²¹⁷ Finally, Germany asked the ICJ to rule that the United States must provide assurances that it will fully comply with the Vienna Convention in the future and that it will provide meaningful reviews and remedies in criminal cases where German nationals in the United States are not informed of their consular rights.²¹⁸

The United States admitted that it had violated its treaty obligations to Germany, but argued that the ICJ had no jurisdiction over the United States on various issues submitted to it.²¹⁹ The United States also argued that the Vienna Convention does not provide individual rights and that its domestic procedures in criminal cases had no bearing on its treaty obligations.²²⁰ The United States contended that the provisional orders of the ICJ are not binding on it and that the issue regarding the prosecution and execution of the LaGrand brothers was beyond the jurisdiction of the ICJ.²²¹ Finally, the United States apologized for the breach of Article 36 and claimed that it was taking steps to improve its compliance.²²²

On June 27, 2001, the ICJ issued its judgment in the *LaGrand Case*.²²³ By fourteen votes to one,²²⁴ the ICJ held that the United States had "breached its obligations to the Federal

Rights, *supra* note 200, at 2.

217. *LaGrand Case*, 2001 I.C.J. 104, para. 44; *Protecting Consular Rights*, *supra* note 200, at 2.

218. *LaGrand Case*, 2001 I.C.J. 104, para. 117; *Protecting Consular Rights*, *supra* note 200, at 2.

219. *LaGrand Case*, 2001 I.C.J. 104, paras. 39, 46; *Protecting Consular Rights*, *supra* note 200, at 2.

220. *LaGrand Case*, 2001 I.C.J. 104, paras. 42, 50, 85; *Protecting Consular Rights*, *supra* note 200, at 2.

221. *LaGrand Case*, 2001 I.C.J. 104, para. 96; *Protecting Consular Rights*, *supra* note 200, at 2.

222. *LaGrand Case*, 2001 I.C.J. 104, paras. 119, 123; *Protecting Consular Rights*, *supra* note 200, at 2.

223. *LaGrand Case*, 2001 I.C.J. 104; *Protecting Consular Rights*, *supra* note 200, at 2.

224. *LaGrand Case*, 2001 I.C.J. 104, para. 128; *Protecting Consular Rights*, *supra* note 200, at 2.

Republic of Germany and to the LaGrand brothers” under the Vienna Convention by failing to promptly inform Karl and Walter LaGrand after their arrest of their right to communicate with their consulate.²²⁵ Expressly recognizing individual rights to consular notification and access under Article 36, the ICJ explained that:

It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen.²²⁶

The ICJ held that in future cases “it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.”²²⁷ By not allowing judicial consideration of the consular rights violation on appeal, the United States violated the consular rights of the LaGrands.²²⁸ Further, “the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences . . . [and] prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defense as provided for by the Convention.”²²⁹ The ICJ also dismissed the United States’s argument that it was improperly acting as an international court of appeals for domestic criminal convictions:

Although Germany deals extensively with the practice of American courts as it bears on the application of the Convention, all three submissions seek to require the Court to do no more than apply the relevant rules of

225. *LaGrand Case*, 2001 I.C.J. 104, para. 128(3); *Protecting Consular Rights*, *supra* note 200, at 2.

226. *LaGrand Case*, 2001 I.C.J. 104, para. 74.

227. *Id.* para. 125.

228. *Id.* para. 77; *Protecting Consular Rights*, *supra* note 200, at 3.

229. *LaGrand Case*, 2001 I.C.J. 104, para. 91.

international law to the issues in dispute between the Parties to this case. The exercise of this function, expressly mandated by Article 38 of its Statute, does not convert this Court into a court of appeal of national criminal proceedings.²³⁰

Finally, the ICJ held that its provisional orders are fully binding in character and create legal obligations.²³¹ Thus, by failing to “take all measures at its disposal to ensure that Walter LaGrand [was] not executed pending the final decision” of the ICJ, the United States breached its obligation under the Provisional Measures Order.²³² The ICJ did not set out specific remedies for the United States to consider in addressing past violations of the treaty in criminal cases.²³³ Instead, it stated that it would be “incumbent upon the United States to allow review and reconsideration” of those cases by means of its own choosing.²³⁴ The ICJ stated that the “apology” of the United States to Germany was “not sufficient” under the circumstances.²³⁵

The ICJ established three significant points that apply to future Article 36 disputes and that are binding on the United States: (1) Article 36 creates individual, personal rights to consular access and notification; (2) domestic procedural barriers, such as procedural default, may not be used to prevent judicial review and potential remedies for serious violations of Article 36; and (3) the United States “must provide the means by which such cases can be *reviewed and reconsidered*.”²³⁶ It is significant that the ICJ recognized that Article 36 provides individual rights to consular notification and access, which can be exercised without fear of waiver. However, requiring the United States to provide an effective means of review and

230. *Id.* para. 52; *Protecting Consular Rights*, *supra* note 200, at 3.

231. *LaGrand Case*, 2001 I.C.J. 104, para. 109; *Protecting Consular Rights*, *supra* note 200, at 3.

232. *LaGrand Case*, 2001 I.C.J. 104, paras. 114-15.

233. *Protecting Consular Rights*, *supra* note 200, at 3.

234. *LaGrand Case*, 2001 I.C.J. 104, para. 125; *Protecting Consular Rights*, *supra* note 200, at 3.

235. *LaGrand Case*, 2001 I.C.J. 104, para. 123.

236. *Id.* paras. 77, 91, 125; *Protecting Consular Rights*, *supra* note 200, at 3 (emphasis added).

reconsideration of convictions where a violation of Article 36 has occurred will have a more lasting impact on the rights of foreign nationals in this country.²³⁷ Only by providing an effective means of review and reconsideration can the violations of the past be corrected and future violations be prevented. But deferring to the U.S. determination of how best to review and remedy wrongful convictions, while consistent with the terms of the treaty, has resulted in no changes to the review of U.S. violations of Article 36.²³⁸ Federal and state law enforcement officials continue to violate the consular rights of foreign nationals, and federal and state courts continue to deny the Convention the force of law by declining to recognize that the Convention provides judicially-enforceable individual rights with judicial remedies.²³⁹

“On several occasions, the U.S. Supreme Court has indicated that the interpretation of international agreements by international tribunals should be given respectful consideration by the federal courts.”²⁴⁰ Professor Aceves points out, however,

237. See Bernard H. Oxman & William J. Aceves, *International Decision: LaGrand (Germany v. United States)*, 96 AM. J. INT'L L. 210, 216-17 (2002).

238. See discussion *infra* Part IV.

239. See, e.g., *United States v. Felix-Felix*, 275 F.3d 627, 635 (7th Cir. 2001) (“[E]ven if the Convention was violated, the district court correctly refused to suppress evidence on that ground.”); *United States v. Emuegbunam*, 268 F.3d 377, 392 (6th Cir. 2001), *cert. denied*, 122 S.Ct 1450, 152 L.Ed.2d 392 (2002) (concluding that the Vienna Convention does not create a right of consular access); *United States v. Carrillo*, 269 F.3d 761, 771 (7th Cir. 2001), *cert denied*, 122 S.Ct. 1576, 152 L.Ed.2d 496 (2002) (holding that exclusion of evidence seized in violation of consular rights is not a proper remedy); *United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001) (“Even if we assume *arguendo* that De La Pava had judicially enforceable rights under the Vienna Convention—a position we do not adopt—the Government’s failure to comply with the consular-notification provision is not grounds for dismissal of the indictment.”); *United States v. Robinet*, 27 Fed. App. 895, 897 (9th Cir. 2001).

The government did not ignore Robinet’s request for consular notification.

The district court disbelieved Robinet’s testimony that he had made such request, and we accord significant deference to the district court’s credibility determination. . . . In any event, suppression is not among the judicial remedies available for violation of Article 36 of the Vienna Convention.

(citations omitted); see also *Darling v. State*, 808 So. 2d 145, 165-66 (Fla. 2002); *People v. Carrera*, No. D035410, 2001 WL 1356993, at *9 (Cal. App. Oct. 6, 2001).

240. Aceves, *supra* note 130, at 563; see also *Breard v. Greene*, 523 U.S. 371, 375 (1998) (*per curiam*).

that "it is becoming increasingly difficult to find this principle applied in practice."²⁴¹ Moreover, the decisions of the ICJ and the Inter-American Court and the willingness of State parties to the Convention to sue the United States over violations of Article 36 demonstrate that the international community does not support the United States's position on Article 36.²⁴² As a result, it will be increasingly difficult for the United States to assert, both abroad and in this country, that the State Department's interpretation of Article 36 is consistent with international law. And the longer the United States insists on its unilateral interpretation of the treaty, the greater the likelihood will be of more lawsuits like *LaGrand* being filed against it in international tribunals and of further damage to U.S. diplomatic relations with other countries.

IV. CONSULAR RIGHTS IN THE UNITED STATES SINCE *LAGRAND*

Since the ICJ issued its decision in *LaGrand*, many state and federal courts have declined to decide whether Article 36 confers an individual right.²⁴³ Remedies such as suppression of evidence and dismissal of indictments continue to be considered improper for violations of Article 36.²⁴⁴ Courts have also held that no harm occurs to the foreign national when his attorney fails to challenge violations of Article 36,²⁴⁵ even though, before *LaGrand*, some courts held that reasonably diligent attorneys representing foreign nationals should be aware of treaty obligations affecting the defendant's rights.²⁴⁶ Ironically, although police authorities still fail to inform foreign nationals of the right to consular access, often because they are unaware that they are required to do so, the courts are placing the burden on foreign nationals and their attorneys to be aware of the rights under Article 36 and declining to address a violation if it was not

241. Aceves, *supra* note 130, at 563.

242. See, e.g., *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104, paras. 1, 77 (June 27), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm.

243. See, e.g., *De La Pava*, 268 F.3d at 164-65; *Darling*, 808 So. 2d at 165-66.

244. See, e.g., *Robinet*, 27 Fed. App. at 897.

245. See, e.g., *Darling*, 808 So. 2d at 166; *De La Pava*, 268 F.3d at 166.

246. See, e.g., *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997).

timely raised.²⁴⁷

The failure to timely raise a violation of Article 36 begs the question of whether there is any point in doing so. Because most courts have effectively declared that no remedy exists for foreign nationals even if the violation is timely brought to their attention, pointing out the violation may be a fruitless endeavor. Attorneys representing foreign nationals, however, should not lose sight of the fact that, regardless of the current posture of a majority of American courts toward Article 36, the international community recognizes Article 36 as creating an individual right, perhaps even a human right. Attorneys should preserve the dignity of this right even while American courts refuse to recognize it or provide a means to enforce it. By continuing to challenge the violations as they occur, especially since *LaGrand*, American courts will be reminded of the recurring violations of Article 36 in the United States and may eventually be inclined to take measures to prevent future violations.

A. *No "Right" to Consular Assistance in the U.S.*

Despite the ICJ's determination that Article 36 confers an individual right to consular notification,²⁴⁸ the advisory opinion of the Inter-American Court that Article 36 provides a human right,²⁴⁹ and the U.S. Supreme Court's statement in *Breard* that Article 36 "arguably" creates individual rights,²⁵⁰ many federal and state courts continue to hold that Article 36 does not confer judicially enforceable rights of any kind.²⁵¹ Other courts have avoided the issue of whether an individual right exists and instead have addressed whether the remedy sought by the

247. See, e.g., *United States v. Sanchez*, 39 Fed.App. 10, 11 (4th Cir. 2002).

248. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104, para. 77 (June 27), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm.

249. The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, paras. 85, 87.

250. *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam).

251. See, e.g., *United States v. Emuegbunam*, 268 F.3d 377, 392 (6th Cir. 2001), cert. denied, 122 S.Ct 1450, 152 L.Ed.2d 392 (2002); *United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001); *Bell v. Commonwealth*, 563 S.E.2d 695, 706 (Va. 2002); *State v. Martinez-Rodriguez*, 33 P.3d 267, 273 (N.M. 2001).

foreign national is recognizable under the treaty.²⁵²

The preamble to the Convention has been relied on by some courts to rebut the existence of an individual right under Article 36.²⁵³ The preamble states, “[T]he purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.”²⁵⁴ Courts have also relied on paragraph 1 of Article 36 to support their position that Article 36 does not confer an individual right;²⁵⁵ it states that the provisions of Article 36 are framed “[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State.”²⁵⁶ While the preamble may show the intent of the framers when drafting the Vienna Convention, critics contend that Article 36 is being interpreted to exclude a right that is entirely consistent with the language of the treaty.²⁵⁷ Moreover, the preamble and paragraph 1 of Article 36 must be viewed in context with the

252. See, e.g., *United States v. Contreras-Cortez*, No. 01-8030, 2002 WL 734772, at *2 (10th Cir. Apr. 26, 2002); *State v. Issa*, 752 N.E.2d 904, 914-15 (Ohio 2001); *Darling v. State*, 808 So. 2d 145, 165-66 (Fla. 2002); *Lopez v. State*, 558 S.E.2d 698, 700 (Ga. 2002); *State v. Lopez*, 633 N.W.2d 774, 783 (Iowa 2001); *State v. Tuck*, 766 N.E.2d 1065, 1067 (Ohio Ct. App. 2001).

253. See *Emuegbunam*, 268 F.3d at 392; *De La Pava*, 268 F.3d at 164.

254. Vienna Convention, *supra* note 1, 21 U.S.T. at 79, 596 U.N.T.S. at 262.

255. See *Emuegbunam*, 268 F.3d at 392; *De La Pava*, 268 F.3d at 16-65.

256. Vienna Convention, *supra* note 1, 21 U.S.T. at 100, 596 U.N.T.S. at 292.

257. Joan Fitzpatrick, *The Unreality of International Law in the United States and the LaGrand Case*, 27 YALE J. INT'L L. 427, 427-28 (2002) (“[The] language of Article 36(1)(b) could hardly be clearer in its conferral of rights on detained individuals. . . . That [it] has been so systematically misinterpreted in the United States is troubling, and reflective of a resistance to view treaties as a meaningful source of legal constraint on the conduct of domestic officials”); Woodman, *supra* note 12, at 43 (“[T]here really should be no dispute as to whether Article 36 . . . confers individual rights.”); see also *United States v. Calderon-Medina*, 591 F.2d 529, 531 n.6 (9th Cir. 1979) (disputing government’s reliance on preamble).

Protection of some interests of aliens as a class is a corollary to consular efficiency. This is evident because consular functions listed in Article 5 of the Convention include “helping and assisting nationals . . . of the sending State” and “representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State . . . where such nationals are unable . . . to assume the defenses of their rights and interests.”

Id. (citations omitted).

rest of Article 36's provisions. Article 36 also discusses consular access as a "right" enjoyed by an individual, a "right" that the individual must be informed about.²⁵⁸ Further, the *travaux preparatoires* to the Convention indicate that the framers, including the United States, intended Article 36 to confer individual rights.²⁵⁹ Finally, the ICJ and the Inter-American Court have rejected the interpretation of Article 36(1) as only spelling out the obligations of States to each other.²⁶⁰

American courts have also relied, albeit selectively, on Supreme Court precedents to support their position that treaties, such as the Vienna Convention, do not create individual rights.²⁶¹ For example, in *United States v. De La Pava*,²⁶² the Second Circuit relied on the Supreme Court's decision in the *Head Money Cases*²⁶³ to support its determination that no individual right was conferred by Article 36.²⁶⁴ In the *Head Money Cases*, the Supreme Court stated, "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."²⁶⁵ In following this rule, the Second Circuit recognized that "even where a treaty provides certain benefits for nationals of a particular state[,] . . . it is traditionally held that any rights arising out of such provisions are, under international law, those of the states and . . . individual rights are only derivative through the

258. Vienna Convention, *supra* note 1, 21 U.S.T. at 100, 596 U.N.T.S. at 292.

259. See Kadish, *supra* note 34, at 596-98 & n.200 (stating that the United States submitted an amendment to Article 36(1)(b) proposing notification to the consul of a national's arrest or detention be made at the request of the foreign national in order to protect the rights of the foreign national).

260. See *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104, para. 77 (June 27), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm; see also The Right to Information, Advisory Opinion OC-16/99, *supra* note 26, para. 26.

261. See *United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001) (citing the *Head Money Cases*, 112 U.S. 580, 598 (1884)).

262. *De La Pava*, 268 F.3d at 164.

263. *Head Money Cases*, 112 U.S. at 598.

264. *De La Pava*, 268 F.3d at 164.

265. *Head Money Cases*, 112 U.S. at 598.

states.”²⁶⁶ The *Head Money Cases*, however, do not provide the Supreme Court’s only view on the issue, for the Court has also recognized that treaties can, in some circumstances, create individually enforceable rights.²⁶⁷ Furthermore, the position of the *De La Pava* court overlooks the growing body of international human rights law based on treaties entered into between States since the *Head Money Cases* were decided in 1884, which recognize individual rights that State parties are to protect.²⁶⁸

At the state level, the Virginia Supreme Court in *Bell v. Commonwealth*²⁶⁹ directly addressed the ICJ’s ruling holding that an individual right exists under the Convention.²⁷⁰ Edward Nathaniel Bell, a Jamaican national, was convicted of capital

266. *De La Pava*, 268 F.3d at 164 (quoting *United States ex. rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975) *cert. denied sub nom.*, *Lujan v. Gengler*, 421 U.S. 1001 (1975)); *see also* *Garza v. Lappin*, 253 F.3d 918, 924 (7th Cir. 2001), *cert. denied*, 533 U.S. 924 (2001) (“[A]s a general rule, international agreements, even those benefitting private parties, do not create private rights enforceable in domestic courts.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 907 cmt. a. (“International agreements . . . generally do not create private rights or provide for a private cause of action in domestic courts.”).

267. *See* *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992) (stating in part, “The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation.”); *United States v. Rauscher*, 119 U.S. 407, 419-20 (1886) (holding that through the provisions of the extradition treaty, requirement of specialty—permitting prosecution only for the crime on which extradition was based—could serve as a defense to an attempted prosecution for another crime); *United States v. Lombera-Camorlina*, 206 F.3d 882, 885 (9th Cir. 2000), *cert. denied*, 531 U.S. 991 (2000) (relying on the above cases and stating “[T]he Supreme Court has recognized that treaties can in some circumstances create individually enforceable rights.”); *but see* *United States v. Jimenez-Nava*, 243 F.3d 192, 198 & n.6-8 (5th Cir. 2001), *cert. denied*, 533 U.S. 962 (2001).

268. *See, e.g., Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948); *International Covenant on Civil and Political Rights*, *supra* note 178 (stating that one of the purposes of the United Nations is the promotion of human rights and that States party to the agreement will ensure these rights); *American Convention on Human Rights*, *supra* note 156, pt. 1, ch. 1, art. 1 *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) (stating that States party to the Convention will protect human rights).

269. *Bell v. Commonwealth*, 563 S.E.2d 695 (Va. 2002).

270. *Id.* at 706.

murder and sentenced to death.²⁷¹ After his arrest, Bell told police officials that he was born in Jamaica and had been in the United States for approximately seven years.²⁷² He was read his Miranda rights and then answered questions for approximately thirty minutes.²⁷³ After the questioning ended, Bell was told that, because he was a Jamaican national, his consulate would be advised of his arrest.²⁷⁴ According to police officials, Bell responded that he did not want anyone to contact the Jamaican consulate, but they explained to him that it was “mandatory.”²⁷⁵

Thirty-six hours after Bell’s arrest, the police faxed a notification to the Consulate of Jamaica in Washington, D.C., advising that Bell had been arrested.²⁷⁶ The officer who sent the fax stated that he was not aware of any response by the Consulate of Jamaica to the faxed notification.²⁷⁷ When asked why there had been a thirty-six-hour delay in making this notification, the officer candidly admitted that it was just an oversight.²⁷⁸ He also acknowledged that he and the other police officers who questioned Bell had attended training regarding law enforcement’s responsibilities to foreign nationals who are arrested in this country.²⁷⁹

Before trial, Bell moved to dismiss the indictment and to suppress his statements because of the violations of Article 36.²⁸⁰ The trial court denied his motion.²⁸¹ On appeal, he argued

that his rights under the Vienna Convention were violated in three respects: (1) he was not advised of his right to communicate with his consulate, (2) he was not advised of the police department’s obligation to notify his consulate until after he made his statement to the

271. *Id.* at 700, 702.

272. *Id.* at 705.

273. *Id.*

274. *Id.*

275. *Id.* at 705.

276. *Id.* at 705-06.

277. *Id.*

278. *Id.* at 706.

279. *Id.*

280. *Id.* at 705.

281. *Id.* at 708.

police, and (3) there was an inordinate delay in notifying his consulate that he had been arrested.²⁸²

In support of his arguments, Bell relied on the ICJ's decision in *LaGrand*, claiming Article 36 of the Vienna Convention creates an individual right to consular notification and access, that a showing of prejudice is not necessary to establish a violation of that article, and that the *LaGrand* court decided the question of appropriate remedies when a violation occurs.²⁸³ Bell also argued that the Virginia Supreme Court was "bound" to apply the ICJ's decision in *LaGrand* and that the only remedy for the violation of his rights under Article 36 was a new trial in which his statement to the police was suppressed.²⁸⁴ The Virginia Supreme Court disagreed.²⁸⁵

The court first concluded that any rights that Bell had under Article 36 of the Vienna Convention were not violated because the lapse of thirty-six hours from arrest to notification was not unreasonable.²⁸⁶ Contrary to the reasoning of the Inter-American Court, the Virginia Supreme Court believed that thirty-six hours meets Article 36's requirement that a foreign national be notified of his rights "without delay."²⁸⁷

With regard to whether Bell had any rights to begin with, the court stated that the ICJ in *LaGrand* "did not hold that Article 36 of the Vienna Convention creates legally enforceable individual rights that a defendant may assert in a state criminal proceeding to reverse a conviction."²⁸⁸ Instead, the *Bell* court appears to have narrowly interpreted the ICJ's holding as recognizing an individual right that can only be invoked at the ICJ by a State party to the Convention.²⁸⁹ In the Optional

282. *Id.* at 706.

283. *Id.* (citing *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104, paras. 63, 77 (June 27), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm).

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

[We] conclude that the ICJ, contrary to Bell's assertions, did not hold that Article 36 of the Vienna Convention creates legally enforceable individual

Protocol for the Compulsory Settlement of Disputes, the United States and the other parties agreed that the ICJ is the primary forum for the settlement of disputes under the Convention.²⁹⁰ Under the Optional Protocol, only States may bring disputes to the ICJ.²⁹¹

The court also noted that the ICJ specifically left the means of review of violations to the United States, which, according to the court, was an acknowledgment by the ICJ that “in the absence of a clear statement to the contrary, procedural rules of a forum State govern the implementation of a treaty in that State.”²⁹² The court, however, appears to be espousing two contradictory views of the ICJ’s opinion. On the one hand, the individual rights under Article 36 can only be enforced in proceedings before the ICJ, but on the other hand, the procedural rules of the United States apply in enforcing the terms of the treaty. In *LaGrand*, the court specifically held, “Based on the text of these provisions, the Court concludes that Article 36, paragraph 1 creates individual rights, which, by virtue of Article I of the Optional Protocol, *may be invoked* in this Court by the national State of the detained person.”²⁹³ This holding, contrary to the Virginia court’s interpretation, does not limit the venue where the individual right can be enforced.²⁹⁴ Although the right “may” be enforced in the ICJ, there is no indication that the ICJ attempted to exclude other venues or methods of enforcement. The opposite is true. By leaving the

rights that a defendant may assert in a state criminal proceeding to reverse a conviction. Instead, the ICJ stated that “Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in [the ICJ] by the national State of the detained person.”

Id.

290. Optional Protocol to the Vienna Convention on Consular Relations. Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. I, 21 U.S.T. 325, 326, 596 U.N.T.S. 487, 488 [hereinafter Optional Protocol] (“Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice . . .”).

291. *Id.*

292. *Bell*, 563 S.E.2d at 706-07.

293. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104, para. 77 (June 27), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm (emphasis added).

294. *Id.*

method of enforcement of Article 36 rights to individual States, the ICJ recognized that the individual rights under Article 36 would be enforced according to mechanisms established by the host State.²⁹⁵ Undoubtedly, the ICJ contemplated that rights would be enforced or protected in criminal proceedings in state courts in the United States. The Virginia Supreme Court even acknowledged this holding when it stated, “The ICJ also held that if the United States should fail in its obligation under Article 36, then the United States should allow *review of the conviction and sentence* by taking into account the violation of *the rights set forth in the Vienna Convention*.”²⁹⁶

The Supreme Court of New Mexico has also held that no individual right exists under Article 36.²⁹⁷ In *New Mexico v. Martinez-Rodriguez*, the court addressed the issue of whether an individual right exists under Article 36 in terms of whether a foreign national has standing to challenge a violation of the convention.²⁹⁸ Looking to treaty law, the court stated that courts generally will find that a treaty provides a private right of action only if the document explicitly provides such a right.²⁹⁹ “In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning.”³⁰⁰ The text of the treaty must be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”³⁰¹

Applying these general principles and looking to the

295. *Id.*

296. *Bell*, 563 S.E.2d at 706 (emphases added).

297. *State v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2002).

298. *Id.* at 272 (stating that the threshold question is whether an individual foreign national has standing to assert a claim under the Vienna Convention in a domestic criminal case).

299. *Id.* at 272 (citing *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 442 (1989) (interpreting the Geneva Convention of the High Seas to mean that the Convention only sets forth substantive rules of conduct and did not create a private right of action in the absence of any language to that effect); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) (“International treaties are not presumed to create rights that are privately enforceable.”)).

300. *Id.* (quoting *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992)).

301. *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 638 (5th Cir. 1994) (quoting the Vienna Convention on the Law of Treaties, *supra* note 159, art. 31.1, 1155 U.N.T.S. at 340, 81 I.L.M. at 691-92).

convention's preamble and the first sentence of Article 36, the court stated that the Vienna Convention "appears to be a customary international treaty whose purpose is to facilitate consular activity between sending and receiving states."³⁰² Thus, while notifying arrested foreign nationals that they may confer with their nation's consul facilitates for the exercise of consular functions, a determination that the Convention confers benefits upon arrested foreign nationals is not tantamount to determining that the Convention was intended to create a private right of action.³⁰³ According to the court, the Convention's text "does not state or even suggest that the signatories intended to provide for individual judicial enforcement of the provisions."³⁰⁴ Rather, the court stated that the intentions of the signatories regarding the proper forum for addressing violations of the treaty are reflected in the Optional Protocol.³⁰⁵ Of course, the court's reasoning here might be supportable, but for the ICJ ruling in *LaGrand* that the United States must provide a means of review and reconsideration for violations of Article 36.³⁰⁶

The New Mexico Supreme Court also stated that because a treaty involves foreign affairs and not domestic criminal law, "the national interest has to be expressed through a single authoritative voice."³⁰⁷ . . . The negotiation and administration of treaties is a matter reserved to the executive branch of the federal government with ratification by the Senate."³⁰⁸ Thus, the court relied on the State Department's interpretation of the

302. *Martinez-Rodriguez*, 33 P.3d at 273.

303. *Id.*

304. *Id.* (citing *United States v. Ademaj*, 170 F.3d 58, 67 (1st Cir. 1999) (holding that "the Vienna Convention itself prescribes no judicial remedy or other recourse for its violation"); *United States v. Li*, 206 F.3d 56, 66 (1st Cir. 2000) (en banc), *cert. denied*, 531 U.S. 956 (2000) (Selya, J., concurring) ("Nothing in the Vienna Convention text explicitly provides for judicial enforcement of their consular access provisions at the behest of private litigants.")).

305. *Id.*

306. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104, para. 6 (June 27), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgement/igus_ijudgement_20010625.htm.

307. *Martinez-Rodriguez*, 33 P.3d at 273 (quoting *Li*, 206 F.3d at 67).

308. *Id.* (citing U.S. CONST. art. II, § 2, cl. 2).

treaty in its analysis:

With regard to the [Vienna Convention], the State Department has consistently taken the position that although implementation of the treaty may benefit foreign nationals, it does not create judicially enforceable individual rights that can be remedied in the criminal justice systems of the member states. According to the State Department, “[t]he [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law.” The [Vienna Convention], after all, is an agreement negotiated among sovereign states, including the United States and Mexico, not New Mexico and Mexico.³⁰⁹

Based on the foregoing reasons, the court determined that the provisions of the Vienna Convention do not create legally enforceable individual rights.³¹⁰

Several state courts since *LaGrand*, however, have avoided specifically determining whether Article 36 encompasses an individual right, or provides individual standing, to challenge a violation of Article 36.³¹¹ Instead, these courts have taken the position that even if such a right exists, the relief requested by the foreign national is not available under Article 36, or they have assumed, without deciding, that individual rights exist.³¹² For example, in *Darling v. State*, the defendant challenged his death sentence on the ground that he was not informed of his consular rights.³¹³ The Florida Supreme Court stated that, although it is “unclear that the Vienna Convention creates individual rights enforceable in judicial proceedings,” it did not need to reach the issue because the defendant “failed to show that he was prejudiced by the claimed violation.”³¹⁴ Quoting the

309. *Id.* at 274 (citations omitted).

310. *Id.*

311. See *Darling v. State*, 808 So. 2d 145, 165-66 (Fla. 2002); *Lopez v. State*, 558 S.E.2d 698, 699-700 (Ga. 2002); *State v. Lopez*, 633 N.W.2d 774, 783 (Iowa 2001); *State v. Tuck*, 766 N.E.2d 1065, 1067 (Ohio Ct. App. 2001).

312. See *Darling*, 808 So. 2d at 165-66; *Lopez v. State*, 558 S.E.2d at 699-700; *State v. Lopez*, 633 N.W.2d at 783; *Tuck*, 766 N.E.2d at 1067.

313. *Darling*, 808 So. 2d at 165.

314. *Id.* at 165-66.

United States Supreme Court in *Breard*, the court stated that “it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial.”³¹⁵ In reaching its decision, the court noted that it and several other courts have had the opportunity to address whether Article 36 creates an individual right, and “all have sidestepped the issue.”³¹⁶

On the other hand, the Georgia Supreme Court in *Lopez v. State* assumed, without deciding, that individual rights exist under Article 36.³¹⁷ Lopez, a Mexican national, argued that his custodial statement should have been suppressed and a new trial ordered because state authorities failed to inform him of his consular rights.³¹⁸ The Georgia court stated that, although “international treaties do not [generally] create individual rights which can be privately enforced in court proceedings[,] . . . assuming *arguendo* that the Vienna Convention is an exception to that general rule, nothing in its text requires the suppression of evidence.”³¹⁹ Any rights created by the Vienna Convention, the court stated, “do not rise to the level of a constitutional right protected by the judicially-created remedies sought by Lopez.”³²⁰ Furthermore, according to the court, Lopez failed to show prejudice.³²¹

Like the Georgia Supreme Court, the Iowa Supreme Court in *State v. Lopez* also assumed, “without deciding[,] that Article 36 creates an individually enforceable right of [consular] notification.”³²² Although it assumed a right existed under Article 36, it held that, to the extent Article 36 creates an individually enforceable right, there is no remedy for a violation unless actual prejudice is demonstrated.³²³ The basis for this

315. *Id.* at 166 (quoting *Breard v. Greene*, 523 U.S. 371, 372 (1998)).

316. *Id.* at 166 n.19.

317. *Lopez v. State*, 558 S.E.2d at 700.

318. *Id.* at 699-700.

319. *Id.* at 700.

320. *Id.*

321. *Id.*

322. *State v. Lopez*, 633 N.W.2d 774, 783 (Iowa 2001).

323. *Id.* at 782-83.

reasoning, according to the court, is that Article 36 rights are not fundamental.³²⁴

The court then followed the test for prejudice used by several federal courts when addressing violations of the Immigration and Naturalization Service (INS) consular notification requirements.³²⁵ Under this test, the defendant has the burden of establishing that: “(1) he did not know of his right; (2) he would have availed himself of the right had he known of it; and (3) ‘there was a likelihood that the contact with the consulate would have resulted in assistance to him.’”³²⁶ Although the Iowa Supreme Court adopted this test, it stated that “‘it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial.’”³²⁷

In examining the evidence, the court determined that Lopez had failed to establish prejudice.³²⁸ First, Lopez testified at a posttrial hearing that he knew by the time of his trial that he had a right to consular assistance and waited until after he was convicted to advise his lawyer to contact the Mexican consulate.³²⁹ The court stated that “[s]uch conduct belies any claims that he would have sought such assistance had he known of such right.”³³⁰ Lopez also claimed “that a consular official would have arranged for alternate legal counsel that would have

324. *Id.* at 783.

325. *United States v. Villa-Fabela*, 882 F.2d 434, 440 (9th Cir. 1989), *overruled on other grounds*, *United States v. Proa-Tovar*, 975 F.2d 592, 594-95 (9th Cir. 1992) (en banc) (interpreting INS regulation 8 C.F.R. § 242.2(f) (1996), now 8 C.F.R. § 236.1(e)), *overruled on other grounds*, *United States v. Proa-Tovar*, 975 F.2d 592, 594-95 (9th Cir. 1992) (en banc); *United States v. Rangel-Gonzales*, 617 F.2d 529, 533 (9th Cir. 1980); *United States v. Calderon-Medina*, 591 F.2d 529, 530-32 (9th Cir. 1979); *United States v. Raven*, 103 F. Supp. 2d 38, 40-41 (D. Mass. 2000); *United States v. Briscoe*, 69 F. Supp. 2d 738, 746-47 (D.V.I. 1999); *United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 990 (S.D. Cal. 1999); *United States v. Tapia-Mendoza*, 41 F. Supp. 2d, 1250, 1254 (D. Utah 1999); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125-26 (C.D. Ill. 1999), *aff'd*, 226 F.3d 616 (7th Cir. 2000), *cert. denied*, 531 U.S. 1026 (2000).

326. *Villa-Fabela*, 882 F.2d at 440 (quoting *Rangel-Gonzales*, 617 F.2d at 530).

327. *State v. Lopez*, 633 N.W.2d at 783 (quoting *Breard v. Greene*, 523 U.S. 371, 377 (1998)).

328. *Id.*

329. *Id.* at 783-84.

330. *Id.* at 784.

been better able to communicate with Lopez”; that “alternate counsel selected by the consulate would have properly obtained separate trials for the robbery and drug tax stamp charges”; and that, “had he been able to contact the consulate, he would have accepted a plea agreement offered by the State.”³³¹ The court discounted these attempts to show prejudice, stating “that they are all speculative.”³³² Further, Lopez “point[ed] to no evidence in the record to support these claims either by way of affidavit of the Mexican consulate or by his own testimony.”³³³ Thus, the court concluded that “Lopez did not show that contacting the Mexican consulate would have resulted in assistance to him as he now contends. Our conclusion does not require us to determine whether the violation had an effect on the trial.”³³⁴

In 1999, before the ICJ decided *LaGrand*, several courts recognized that Article 36 provides an individual right that could be enforced in state or federal criminal proceedings.³³⁵ One of these cases was a decision by a Delaware Superior Court in *State v. Reyes*.³³⁶ According to the court, because the Vienna Convention is a self-executing treaty, it creates rights that are enforceable in the courts of the United States.³³⁷ The court then went a step further and held that suppression is an appropriate remedy.³³⁸ The State, unhappy with the court’s decision, moved

331. *Id.*

332. *Id.*

333. *Id.* (relying on *Breard v. Greene*, 523 U.S. at 376 (noting that the defendant could not “establish how the Consul would have advised him, how that advice of his attorneys differed from the advice the Consul could have provided, and what factors he considered in electing to reject the plea bargain that the State offered him”).

334. *Id.*

335. See *United States v. Esparza-Ponce*, 193 F.3d 1133, 1138 (9th Cir. 1999) (relying on *United States v. Lombera-Camorlinga*, 170 F.3d 1241 (9th Cir. 1999)); *United States v. Ore-Irawa*, 78 F. Supp. 2d 610, 612-13 (E.D. Mich. 1999); *United States v. Torres-Del Murro*, 58 F. Supp. 2d 931, 933 (C.D. Ill. 1999); *United States v. Hongla-Yamche*, 55 F. Supp. 2d 74, 77 (D. Mass. 1999); *United States v. \$69,530.00 in United States Currency*, 22 F. Supp. 2d 593, 594 (W.D. Tex. 1998); *State v. Reyes*, 740 A.2d 7, 9-10 (Del. Sup. Ct. 1999).

336. *Reyes*, 740 A.2d at 9-10.

337. *State v. Reyes*, No. 9805001002, 1999 WL 743598, at *2 (Del. Sup. Ct. Aug. 17, 1999).

338. *Reyes*, 740 A.2d at 14.

for a rehearing.³³⁹ In denying the motion for rehearing, the court stated that

the failure to inform a foreign national of his right under the Vienna Convention to contact his national consul does not automatically require that his statements be suppressed; rather, the foreign national must demonstrate that he has suffered some kind of cognizable prejudice. Having reviewed the record in its entirety, this Court found that it “is not holding that a violation of Vienna Convention is prejudice per se . . . [i]t is merely stating that in this case, the Court has made a specific finding of prejudice.”³⁴⁰

The court found prejudice to exist where (1) the State conceded that defendant was not informed of his consular notification rights and (2) the defendant made incriminating statements, which the State sought to introduce in its case-in-chief.³⁴¹

The *Reyes* opinion was later overruled, and the same court stated that “it is very likely that [it] would decide the matter differently now based on the current state of the law regarding consular notification.”³⁴²

By failing to recognize individual rights under Article 36, many American courts have seen no reason to provide a remedy for a violation of the provisions of Article 36.³⁴³ The reasoning is that if the individual has no rights to consular assistance and notification, then there is no need for a remedy. Because Article 36 is meant to protect the State party to the convention rather than individuals,³⁴⁴ courts claim that suppression of

339. *Reyes*, 1999 WL 743598, at *1.

340. *Id.*

341. *Id.* at *3 (footnotes omitted).

342. *State v. Vasquez*, No. CR.A. 98-01-0317-R2, 2001 WL 755930, at *1 (Del. Super. Ct. May 23, 2001).

343. *See, e.g.*, *United States v. Page*, 232 F.3d 536, 541 (6th Cir. 2000), *cert. denied*, 532 U.S. 1056 (2001) (indicating the remedies available, in the opinion of the State Department, are diplomatic in nature); *United States v. Duarte-Acero*, 296 F.3d 1277, 1282 (11th Cir. 2002) (relying on the State Department’s interpretation that remedies under Article 36 are only “diplomatic, political, or derived from international law”).

344. *See Breard v. Greene*, 523 U.S. 371, 378 (1998).

evidence or dismissal of an indictment are not sensible remedies. This reasoning, however, is no longer tenable since the *LaGrand* case. And the continued declaration that no rights exist under Article 36 contradicts the Supreme Court's view that courts "give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret [it]."³⁴⁵ Furthermore, the fact that so many courts since *LaGrand* have either assumed without deciding, or discounted the need to determine, whether an individual has rights under Article 36 leads one to question whether the courts themselves are certain that Article 36 does not confer individual rights. By declining to address the issue and resolve the conflict, courts are creating confusion in the law.

Incidentally, the Department of Justice and the INS have enacted agency regulations to ensure compliance with Article 36.³⁴⁶ While the performance of federal officials in complying with these regulations has failed to demonstrate the effectiveness of the regulations, the United States has implicitly

345. *Id.* at 375.

346. 8 C.F.R. § 236.1(e) (2002).

Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States. Existing treaties with the following countries require immediate communication with appropriate consular or diplomatic officers whenever nationals of the following countries are detained in removal proceedings, whether or not requested by the alien and even if the alien requests that no communication be undertaken in his or her behalf. When notifying consular or diplomatic officials, Service officers shall not reveal the fact that any detained alien has applied for asylum or withholding of removal.

Id.; 28 C.F.R. § 50.5(a)(1) (2002).

In every case in which a foreign national is arrested the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given. If the foreign national does not wish to have his consul notified, the arresting officer shall also inform him that in the event there is a treaty in force between the United States and his country which requires such notification, his consul must be notified regardless of his wishes and, if such is the case, he will be advised of such notification by the U.S. Attorney.

Id.; see also *United States v. De La Pava*, 268 F.3d 157, 163-64 (2d. Cir. 2001) (stating that to ensure compliance with Article 36, the INS and the Justice Department have issued regulations "to the same effect").

recognized that to comply with Article 36, it must protect the individual rights of foreign nationals.³⁴⁷ However, when federal officials argue against a judicial remedy in federal court for violations of the Vienna Convention, which their own regulations seek to enforce, their commitment to ensuring compliance with Article 36 seems dubious at best.

B. Suppression of Evidence for Violation of Article 36

Under the Restatement (Third) of the Law of Foreign Relations, the recognized remedy for a treaty violation is restoration of the *status quo ante*, the position they would have been in had the violation not occurred.³⁴⁸ Following this principle, the logical remedy for violations of Article 36 is suppression of evidence obtained in violation of the treaty. The practice in American courts, however, regarding the admissibility of statements obtained from a foreign national before being informed of his consular rights has not changed since *LaGrand*. The general rule in federal and state courts is that the suppression of statements obtained from a foreign national, who was neither apprised of nor aware of his consular rights before making the statements, is not an appropriate remedy.³⁴⁹ Some courts, however, appear willing to consider suppressing statements obtained in violation of Article 36 if prejudice or harm is shown.³⁵⁰ But because many courts do not recognize individual rights arising from Article 36, they refuse to suppress statements, concluding that the only remedy available to the defendant is through diplomatic channels.³⁵¹

Since *LaGrand*, federal courts addressing whether suppression is a viable remedy for evidence seized before a foreign national was informed of his consular rights have been quick to dispose of the issue. They have held that suppression or

347. See 8 C.F.R. §236.1(e); 28 C.F.R. §50.5(a)(1).

348. RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 901 (1987).

349. See *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000) (en banc), *cert. denied*, 531 U.S. 956 (2000).

350. See *Nunez-Medina v. State*, 817 So. 2d 937, 939 (Fla. Dist. Ct. App. 2002).

351. See *United States v. Page*, 232 F.3d 536, 541 (6th Cir. 2000), *cert. denied*, 532 U.S. 1056 (2001).

exclusion is not warranted for a violation of Article 36.³⁵² For example, the Seventh Circuit Court of Appeals twice refused to reconsider the issue,³⁵³ and the Ninth Circuit Court of Appeals did the same in light of its previous ruling in *United States v. Lombera-Camorlinga*.³⁵⁴ In *Lombera-Camorlinga*, the court held that the exclusion of statements obtained as the result of post-arrest interrogation is not available to individuals under the Vienna Convention.³⁵⁵ This trend has played out in the other circuits as well.

On November 20, 2001, the First Circuit Court of Appeals, in *United States v. Cowo*, affirmed the trial court's denial of a motion to suppress statements obtained from Cowo at the time of his arrest because he had not been informed of his consular rights.³⁵⁶ The court declined to reconsider its prior holding in *Li*, which held that "irrespective of whether or not the [Vienna Convention] create[s] individual rights to consular notification, the appropriate remedies do not include suppression of evidence or dismissal of the indictment."³⁵⁷ In response to Cowo's argument that *Li* was wrongly decided, the court stated, "Even if we assume, for argument's sake, that in some extraordinary circumstance a panel might be warranted in declaring an earlier en banc decision obsolete and refusing to follow it, [Cowo] has offered no adequate justification for applying such a long-odds exception here."³⁵⁸

352. See *United States v. Contreras-Cortez*, No. 01-8030, 2002 WL 734772, at *2 (10th Cir. 2002) (holding that even if the Vienna Convention creates individual rights, suppression is not an available remedy for violations of it); *United States v. Felix-Felix*, 275 F.3d 627, 635 (7th Cir. 2001); *United States v. Carrillo*, 269 F.3d 761, 771 (7th Cir. 2001), *cert. denied*, 122 S.Ct. 1576, 152 L.Ed.2d 496 (2002); *United States v. Robinet*, No. 00-50495, 2001 WL 1631475, at *1 (9th Cir. 2001).

353. *Felix-Felix*, 275 F.3d at 635; *Carrillo*, 269 F.3d at 771.

354. See *United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001) (relying on *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 991 (2000)).

355. *Lombera-Camorlinga*, 206 F.3d at 885.

356. *United States v. Cowo*, No. 00-1499, 2001 WL 1474774, at *1 (1st Cir. 2001).

357. *Id.* (quoting *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000) (en banc), *cert. denied*, 531 U.S. 956 (2000)).

358. *Id.* (quoting *Stewart v. Dutra Constr. Co., Inc.*, 230 F.3d 461, 467-68 (1st Cir. 2001)).

Approximately one month after *LaGrand*, the Tenth Circuit Court of Appeals in *United States v. Minjares-Alvarez* followed its precedent and held that suppression of statements taken in violation of Article 36 was not an appropriate remedy.³⁵⁹ Minjares argued that Article 36 creates an individual right of access, that he was prejudiced by not meeting with consular officials, and that, had he been afforded consular access, he would not have waived his constitutional rights.³⁶⁰ The court first responded that it “remains an open question whether the Vienna Convention gives rise to any individually enforceable rights.”³⁶¹ The court noted that recently several courts of appeals, including the Tenth Circuit, had considered the question and declined to address it directly.³⁶² Instead, the courts, including the Tenth Circuit, have concluded that even if the Vienna Convention does create individual rights, suppression is not an appropriate remedy for a violation of those rights.³⁶³ While the court was aware of the ICJ’s recent decision in *LaGrand*, it stated that the ICJ had not considered the applicability of the exclusionary rule to violations of the Vienna Convention.³⁶⁴

According to the court, several considerations support the outcome that suppression is not an appropriate remedy:

First, “[t]he exclusionary rule was not fashioned to vindicate a broad, general right to be free of agency action not authorized by law, but rather to protect specific, constitutionally protected rights.” [And] [s]ince the Vienna Convention does not create fundamental

359. *United States v. Minjares-Alvarez*, 264 F.3d 980, 986 (10th Cir. 2001).

360. *Id.*

361. *Id.* (citing *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam)).

362. *Id.*

363. *Id.* (citing *United States v. Chanthadara*, 230 F.3d 1237, 1255-56 (10th Cir. 2000), *cert. denied*, 122 S.Ct. 457, 151 L.Ed.2d 376 (2001)); *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000) (en banc), *cert. denied*, 531 U.S. 956 (2000); *United States v. Page*, 232 F.3d 536, 540 (6th Cir. 2000), *cert. denied*, 532 U.S. 1056 (2001); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 621 (7th Cir. 2000), *cert. denied*, 531 U.S. 1026 (2000); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000), *cert. denied*, 531 U.S. 1131 (2001); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 991 (2000)).

364. *Id.* at 987 n.3.

rights on par with those set forth in the Bill of Rights, [the court was] unwilling to enforce Article 36 with the judicially created remedy of suppression. Further, “[d]efendants who assert violations of a statute or treaty that does not create fundamental rights are not generally entitled to the suppression of evidence unless that statute or treaty provides for such a remedy.”³⁶⁵

Thus, because the Vienna Convention does not expressly incorporate a suppression remedy and there is no evidence that the Vienna Convention’s drafters intended to remedy violations of Article 36 through the suppression of evidence, suppression is not appropriate.³⁶⁶

Even if suppression was an appropriate remedy for a violation of the Vienna Convention, the court stated it would not be appropriate in this case because Minjares had not demonstrated that he was prejudiced by the violation of the treaty.³⁶⁷ In reaching this conclusion, the court considered that Minjares was raised primarily in the United States, he understood his constitutional rights, and he was generally familiar with this country’s criminal processes.³⁶⁸ The Vienna Convention, however, does not require a showing of prejudice in order to remedy a violation of it. Thus, the court relied on the explicit wording of the text to decide that suppression was not appropriate, but did not look to the text of the Convention to determine whether a showing of prejudice was also required.³⁶⁹ Finally, the court deferred to the district court’s finding that the defendant’s assertion that he would have contacted the consulate was not credible.³⁷⁰

Some state courts since *LaGrand* have reached the same result as federal courts regarding suppression.³⁷¹ But not all

365. *Id.* (quoting *Li*, 206 F.3d at 61).

366. *Id.* at 986-87.

367. *Id.* at 987 (citing *United States v. Chanthadara*, 230 F.3d 1237, 1256 (10th Cir. 2000), *cert denied*, 122 S.Ct. 457, 151 L.Ed.2d 376 (2001) (“Even presuming the Vienna Convention creates individually enforceable rights, Mr. Chanthadara has not demonstrated that denial of such rights caused him prejudice.”)).

368. *Id.* at 988.

369. *Id.* at 985-88.

370. *Id.* at 988.

371. *See, e.g.*, *Nunez-Medina v. State*, 817 So. 2d 937, 939 (Fla. Dist. Ct. App.

have been willing to do so. In *Villareal v. State*, a Texas court of appeals reluctantly relied on the prior holding of the Texas Court of Criminal Appeals in *Rocha v. State* to hold that suppression is not warranted under the Texas Code of Criminal Procedure.³⁷² The reluctance, in part, appears to have arisen due to Texas's unique statutory scheme that courts follow when determining whether evidence should be suppressed. Article 38.23 of the Texas Code of Criminal procedure states:

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.³⁷³

The *Villareal* court disagreed with the Texas Court of Criminal Appeals's interpretation of Article 38.23.³⁷⁴

Rocha was sentenced to death for committing murder during the course of a robbery.³⁷⁵ After his arrest, Rocha was interviewed by the police and eventually gave a recorded statement to the police after he had been read his Miranda rights.³⁷⁶ Before giving a statement, he was not informed of his rights under Article 36 of the Vienna Convention, even though the police were aware that he was a Mexican citizen.³⁷⁷ Rocha challenged the failure of the police to inform him of his consular rights as a violation of Article 38.23 of the Texas Code of Criminal Procedure.³⁷⁸ The Court of Criminal Appeals, however, determined that Article 38.23 was not an appropriate mechanism to enforce the treaty obligation.³⁷⁹

According to the Court of Criminal Appeals, the word "laws,"

2002); *People v. Ortiz*, No. B145601, 2002 WL 937642, at *5 (Cal Ct. App. 2002); *Villarreal v. State*, 61 S.W.3d 673, 680 (Tex. App.—Corpus Christi 2001, pet. ref'd).

372. *Villarreal*, 61 S.W.3d at 680.

373. TEX. CRIM. PROC. CODE ANN. art. 38.23(a) (Vernon Supp. 2002).

374. *Villareal*, 61 S.W.3d at 679-80.

375. *Rocha v. State*, 16 S.W.3d 1, 4 (Tex. Crim. App. 2000).

376. *Id.* at 11-12.

377. *Id.* at 13.

378. *Id.*

379. *Id.* at 19.

as used in Article 38.23(a), does not include treaties.³⁸⁰ For the court, the placement of the words “laws” in Article 38.23 and “Law” in the Supremacy Clause of the United States Constitution determined the outcome.³⁸¹

The court noted that in “Article 38.23, ‘laws’ is placed in a series with ‘Constitution,’”³⁸² and that “[t]he Supremacy Clause of the United States Constitution also places ‘laws’ in a series with other terms.”³⁸³

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.³⁸⁴

Because the Supremacy Clause indicates that “constitution,” “laws,” and “treaties” all constitute separate items that are the “supreme law of the land,” when the word “laws” is used in a series, it would appear to be distinct from treaties.³⁸⁵ However, when “law” is used as an overarching concept, it encompasses constitutions, laws, and treaties.³⁸⁶ Thus, because “‘laws’ and ‘Constitution’ both appear in Article 38.23, the narrower meaning of laws, as being distinct from treaties, would appear to apply.”³⁸⁷ The court stated that “[t]o hold otherwise would render the word ‘Constitution’ redundant in Article 38.23 because a constitution and a treaty both constitute ‘law’ in the broad usage of that word.”³⁸⁸

The majority continued explaining the distinction:

The orthographic difference between “laws” and “law” should also be noted. In the Supremacy Clause, “laws”

380. *Id.* at 13-14.

381. *Id.*

382. *Id.* at 13.

383. *Id.* at 14.

384. U.S. CONST. art. VI, cl.2.

385. *Rocha*, 16 S.W.3d at 14.

386. *Id.*

387. *Id.*

388. *Id.*

is used as a countable plural that refers to statutes. On the other hand, “law” is used by the Supremacy Clause as a collective noun—a singular noun referring to plural objects—to refer to several different types of governmental commands (i.e. constitution, statutes, treaties). Under Supremacy Clause usage then, constitutions and treaties are “law” but are not “laws.” Article 38.23 uses the countable plural “laws”—an indication that the provision refers to statutes and not to “law” in a more general sense.³⁸⁹

While the majority opinion is *somewhat* confusing, Judge Holland’s concurring opinion provides a more succinct explanation of what the majority was getting at:

The majority concludes that Article 38.23 is not the proper enforcement mechanism for treaties. In support of this conclusion, the majority states that because “laws” is placed in a series with “Constitution” in Article 38.23, while “laws” is placed in a series with “Constitution” and “treaties” in the Supremacy Clause of the United States Constitution, we should infer that the Texas Legislature, by omission, did not mean to include treaties within the scope of Article 38.23. This interpretation means that a “treaty” should not be considered a “law” for purposes of Article 38.23. I disagree with this interpretation.³⁹⁰

Looking to U.S. Supreme Court’s opinion in *Edye v. Robertson*,³⁹¹ Judge Holland concluded that treaties are “laws” of the United States under Article 38.23:

[A] treaty may also contain provisions which confer certain rights upon the citizens of 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. . . . The constitution of the United States places such provisions as these in the same category as other laws of congress by its declarations that “this constitution and the laws made

389. *Id.*

390. *Id.* at 23 (Holland, J., concurring).

391. *Edye v. Robertson*, 112 U.S. 580 (1884).

in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.” A treaty, then, is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.³⁹²

Judge Holland also stated “that treaties are ‘to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.’”³⁹³ Therefore, according to Judge Holland, a treaty must be construed as a statute in Texas courts if that treaty determines the rights of private citizens.³⁹⁴ Judge Holland also noted that Texas courts have recognized that treaties are equal to statutes.³⁹⁵ For example, in *Quintero v. State*,³⁹⁶ “[t]he El Paso Court of Appeals acknowledged that, according to the Supreme Court, ‘extradition treaties are equivalent to statutes.’”³⁹⁷ Judge Holland also stated that in the court of criminal appeals’ latest treatment of Article 36 in *Maldonado v. State*, it specifically stated that “[u]nder the Supremacy Clause of the United States Constitution, states must adhere to United States treaties and give them the same force and effect as any other federal law. Thus, a violation of this treaty would arguably fall under the language in Article 38.23(a) if the issue is raised by the evidence.”³⁹⁸ Interestingly, one commentator has pointed out that *Maldonado* was not a death penalty case, but *Rocha* was.³⁹⁹

392. *Rocha*, 16 S.W.2d at 24 (Holland, J., concurring) (quoting *Edye*, 112 U.S. at 598-99).

393. *Id.* at 24-25 (quoting *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10 (1936)).

394. *Id.* at 25.

395. *Id.*

396. *Quintero v. State*, 761 S.W.2d 438 (Tex. App.—El Paso 1988, no writ), *cert. denied*, 493 U.S. 826 (1989).

397. *Rocha*, 16 S.W.3d at 25 (quoting *Quintero*, 761 S.W.2d at 440).

398. *Id.* (quoting *Maldonado v. State*, 998 S.W.2d 239, 247 (Tex. Crim. App. 1999) (citations omitted)).

399. Woodman, *supra* note 12, at 46.

In *Villarreal*, the Corpus Christi Court of Appeals found it difficult to deny that Article 36 was not part of the “laws of the United States.” Forced to apply the ruling of the Texas Court of Criminal Appeals, the court stated:

As noted by Judge Holland, in her well-reasoned concurring opinion, we find it impossible to reconcile the *Rocha* majority’s holding that a treaty is not a “law” for [A]rticle 38.23 purposes with U.S. Supreme Court case law expressly concluding that a treaty is the equivalent of a statute. . . . We are, however, bound by the slim majority holding of the court of criminal appeals in *Rocha*. Accordingly, we must reject Villarreal’s argument that violation of the Vienna Convention rendered his statement inadmissible.⁴⁰⁰

Even if state courts consider suppression of evidence as a viable remedy for a violation of Article 36, they also require an additional showing of prejudice or the showing of a causal connection between the violation of Article 36 and the evidence at issue in the suppression hearing before the conviction will be reversed.⁴⁰¹ A California court of appeals stated that exclusion of evidence was not an appropriate remedy, “especially . . . in light of appellant’s failure to show he would have behaved any differently if the police advised him of his right to call the consulate.”⁴⁰² Even Judge Holland in *Rocha* stated that the defendant would have to show prejudice under Article 38.23 of the Texas Code of Criminal Procedure:

Even when the terms of the Vienna Convention are violated, the Supreme Court has stated that it is “extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial.” . . . In other words, the evidence should establish a causal connection between a violation of the Vienna Convention and the evidence at issue in the

400. *Villareal v. State*, 61 S.W.3d 673, 679-80 (Tex. App.—Corpus Christi 2001, pet. refd) (citations omitted).

401. *Nunez-Medina v. State*, 817 So. 2d 937, 939 (Fla. Dist. Ct. App. 2002) (stating that even if suppression were an available remedy, a showing of prejudice would have to be made).

402. *People v. Ortiz*, No. B145601, 2002 WL 937642, at *5 (Cal. Ct. App. 2002).

suppression hearing. The evidence must be shown to have been obtained by the authorities as a result of the violation of one's rights under the Vienna Convention. . . . Article 36 of the Vienna Convention relates to procedures and duties of police officers following the arrest of a suspect—in this instance, a suspect who is a foreign national. A defendant's statements to police should not be suppressed when it has not been shown that there is a causal connection between those oral statements and the failure to be warned of rights under Article 36 of the Vienna Convention.⁴⁰³

Although the Virginia Supreme Court in *Bell* initially denied that any right to consular assistance exists outside the ICJ's jurisdiction, it also determined that harm must be shown in order for a foreign national to seek suppression of statements obtained in violation of Article 36.⁴⁰⁴ The court stated, "In criminal proceedings in the receiving State, i.e., the United States, a harmless error analysis is routinely used when deciding whether to suppress a defendant's statement made as a result of a violation of the Fifth Amendment right against self-incrimination."⁴⁰⁵ The court reasoned that the same analysis should apply when a foreign national seeks to suppress statements because of an alleged violation of Article 36.⁴⁰⁶ Thus, the court held that even if Bell's rights under Article 36 were violated as a result of police questioning him before advising him of his rights to consular notice and access, any such error was harmless because evidence of Bell's guilt was overwhelming.⁴⁰⁷ In ruling against Bell, the court also relied on his failure to allege or demonstrate "any prejudice resulting from the fact that approximately 36 hours elapsed before his consulate was notified of his arrest, nor has he asserted that he would not have answered the police officers' questions if he had first been advised of his right to communicate with his

403. *Rocha*, 16 S.W.3d at 29-30 (citations omitted).

404. *Bell v. Commonwealth*, 563 S.E.2d 695, 706-07 (Va. 2002).

405. *Id.* at 707.

406. *Id.*

407. *Id.*

consulate.”⁴⁰⁸ The court also noted that “Bell . . . objected to his consulate receiving notice of his arrest.”⁴⁰⁹

Finally, although the *Bell* court implied that suppression could be a remedy if harm was shown, it then shut the door on any potential use of the remedy in the future. The court stated, “[E]ven if Article 36 creates legally enforceable individual rights, it does not provide—explicitly or otherwise—that a violation of those rights should be remedied by suppression of evidence.”⁴¹⁰ Such a remedy, the court stated, is generally not available unless a fundamental right is implicated.⁴¹¹ Because the language of Article 36 does not create fundamental rights comparable to the privilege against self-incrimination, Bell’s claim that his statement to the police should be suppressed as a remedy to the alleged violation of his rights under Article 36 “finds no support in the provisions of the Vienna Convention.”⁴¹²

In *State v. Issa*, Ahmad Fawzi Issa, a Jordanian citizen, was convicted of murder and sentenced to death in Ohio.⁴¹³ He was not informed of his consular rights prior to giving incriminatory statements to the police.⁴¹⁴ Issa challenged the admissibility of his post-arrest statements for the first time on appeal and argued that because testimony was admitted regarding these statements that had been obtained in violation of the Vienna Convention, his conviction should be reversed and a new trial ordered.⁴¹⁵ Because the appellant raised the issue for the first time on appeal, he was required to show that plain error existed: “Plain error exists when it can be said that[,] but for the error,

408. *Id.*

409. *Id.*

410. *Id.* (relying on *United States v. Li*, 206 F.3d 56, 61 (1st Cir. 2000), *cert. denied*, 531 U.S. 956 (2000); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125-26 (C.D. Ill. 1999), *aff’d*, 226 F.3d 616 (7th Cir. 2000), *cert. denied*, 531 U.S. 1026 (2000)).

411. *Id.*

412. *Id.*

413. *State v. Issa*, 752 N.E.2d 904, 9-13 (Ohio 2001).

414. *Id.* at 914 n.1 (stating that because the record did not reflect whether the police advised the appellant of his consular rights, the court assumed that he was not advised of his rights).

415. *Id.* at 914.

the outcome of the trial would clearly have been otherwise.”⁴¹⁶

In addressing his complaint, the Supreme Court of Ohio recognized that courts throughout the country have held that suppression is not a remedy for violation of the Vienna Convention, but

[f]or the purposes of this case, we assume, without deciding, that upon his arrest appellant had an individually enforceable right under Article 36 to be informed of his right to consular notification and that the appropriate remedy for the violation of that right is the suppression of appellant’s post arrest statement.⁴¹⁷

In a footnote, however, the court went on to state that it doubted “whether suppression is the appropriate remedy for a violation of the [Vienna Convention].”⁴¹⁸ According to the court, “[r]ights of persons arising under treaty are regarded as if they arose under a statute of this state. Thus, as in the case of a statutory violation, the exclusionary rule is not an appropriate sanction, absent an underlying constitutional violation, unless the treaty expressly provides for that remedy.”⁴¹⁹

The court also noted that the Vienna Convention does not require suppression as a remedy, and consistent with past federal and state court rulings, the Ohio court interpreted this lack of remedy to mean that suppression is not required in American courts.⁴²⁰ The court repeated the frequently relied on justification:

“[T]here is no indication that the drafters of the Vienna Convention had these ‘uniquely American rights in mind, especially given the fact that even the United States Supreme Court did not require Fifth and Sixth Amendment post-arrest warnings until it decided *Miranda* in 1966, three years after the treaty was drafted.” “[N]o other signatories to the Vienna Convention have permitted suppression under similar circumstances, and . . . two (Italy and Australia) have

416. *Id.* at 915.

417. *Id.* at 914-15.

418. *Id.* at 915 n.2.

419. *Id.* (citations omitted).

420. *See id.* at 915 n.2.

specifically rejected it.”⁴²¹

The Ohio Supreme Court, however, may have appreciated the fact that, without suppression, there is no deterrent to repeated violations and no incentive to adhere to the treaty’s requirements. The court stated, “Regardless of the appropriate remedy for violations of its provisions, the VCCR is the law of the land *and police officers are required to comply with its terms.*”⁴²²

The *Issa* court then conducted a plain error review.⁴²³ The court determined that the evidence against Issa for murder was so strong that suppression of the testimony regarding his statements to the police would not have affected the outcome of the trial.⁴²⁴ The court also discounted the importance of consular assistance,⁴²⁵ even though the National Association of Criminal Defense Lawyers, arguing as *amicus curiae*, stated that:

[I]f the Jordanian Consulate had been advised of appellant’s arrest, it would have provided assistance with certain aspects of the mitigation portion of appellant’s trial. Specifically, *amicus* suggested that Jordanian officials could have provided complete transcripts of appellant’s educational record rather than just the certificates of completion and good behavior that were presented in mitigation.⁴²⁶

In addition, *amicus* stated that consular officials could have assisted one of the appellant’s brothers in obtaining a visa to attend Issa’s trial and that his brother would have been able to provide mitigation testimony during the penalty phase of the trial.⁴²⁷

The court rejected these arguments on the basis that, even assuming this evidence would have been produced as suggested, it was essentially cumulative of other evidence already available at trial:

421. *Id.* (citations omitted).

422. *Id.* (emphasis added).

423. *Id.* at 915.

424. *Id.* at 916.

425. *See id.*

426. *Id.*

427. *Id.*

Even assuming that Jordanian consul would have provided assistance to Issa's defense in the manner suggested by *amicus*, that assistance would not have affected the jury's penalty recommendation. Appellant provided proof that he had completed the schooling and that he was well behaved in school. The transcripts would not have added any additional weight to the mitigating evidence. With regard to a visa for appellant's brother, appellant's attorney advised the trial court that had appellant's brother been available, his testimony would have been similar to the testimony of Jamal Issa, also appellant's brother, who did provide mitigation testimony. Therefore, his testimony would have provided no additional weight to the mitigating factors.⁴²⁸

Approximately four months later, the Ninth District Court of Appeals in Ohio followed the dicta of *Issa* to conclude that suppression was not an enforceable remedy for a violation of Article 36.⁴²⁹ Instead of assuming without deciding that a foreign national can suppress post-arrest statements obtained in violation of Article 36, like the Ohio Supreme Court did in *Issa*, the court concluded that "even if the treaty creates individual rights, suppression of evidence is not an available remedy."⁴³⁰ The court relied on the Ohio Supreme Court's footnoted skepticism regarding whether suppression of evidence was a viable remedy.⁴³¹

While suppression is not required or mentioned in the Convention, the American judicial system has frequently looked for effective means of addressing violations of laws in order to deter future violations of a person's rights.⁴³² Apologies by the

428. *Id.*

429. *State v. Tuck*, 766 N.E.2d 1065, 1067 (Ohio Ct. App. 2001).

430. *Id.*

431. *Id.*

432. *See, e.g.*, *United States v. Doe*, 125 F.3d 1249, 1253 (9th Cir. 1997) ("The court may exercise its supervisory power 'to remedy a constitutional or statutory violation; to protect judicial integrity by ensuring that a conviction rests on appropriate considerations . . . ; or to deter future illegal conduct.'" (quoting *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991)); *United States v. Reyes-Salgado*, No. 00-10331, 2001 WL 804119, at **1 (9th Cir. July 17, 2001) ("A district court may dismiss an indictment on the grounds of outrageous government conduct if the conduct amounts

State Department to a foreign country and pursuit of other forms of diplomacy do not address the real problem, which is the U.S. courts' repeated violations of the treaty. These diplomatic efforts do not assist the foreign national, who is the party truly injured by the violation and who is facing criminal prosecution. The ICJ has held that the prevention of such violations is a purpose of the Vienna Convention.⁴³³ Furthermore, the ad hoc determination of whether suppression is a remedy in some cases, but assuming, without deciding, that it is a remedy in other instances, creates confusion about the law. The ad hoc approach may lead some to believe that the courts are willing to accept suppression as a remedy for an Article 36 violation when the court knows the defendant has failed to show prejudice, but are unwilling to do so when the remedy may actually change the outcome of the case. Finally, as Judge Thomas of the Ninth Circuit explains, there is no reason for limiting the use of the exclusionary rule solely to violations of constitutional rights.⁴³⁴ "[T]he application of the exclusionary rule to confessions has been firmly established in American jurisprudence from the beginning of the Republic, long before its Constitutional dimension was explored by the courts."⁴³⁵ Moreover, the U.S. Supreme Court "has not limited the use of the exclusionary rule to constitutional violations."⁴³⁶

to a due process violation. If the conduct does not rise to the level of a due process violation, the court may nonetheless dismiss under its supervisory powers. These powers may be exercised for three reasons: to remedy a constitutional or statutory violation; to protect judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; or to deter future illegal conduct."); *Vega v. State*, No. 337-01, 2002 WL 1379247, at *4 (Tex. Crim. App. June 26, 2002) ("When a law enforcement officer violates the laws of his or her own state, even while acting in good faith, the exclusion of the evidence is appropriate because this remedy serves to deter future violations.").

433. See *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104, paras. 124-25 (June 27), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgement/igus_ijudgement_20010625.htm.

434. *United States v. Lombera-Camorlinga*, 206 F.3d 882, 892-95 (9th Cir. 2000) (Thomas, J., dissenting), cert. denied, 531 U.S. 991 (2000).

435. *Id.* at 892.

436. *Id.* at 892 n.2 (citing *United States v. Blue*, 384 U.S. 251, 255 (1966)).

C. No Dismissal of Indictment

Foreign nationals whose consular rights have been violated have also sought to have indictments dismissed. Before *LaGrand*, such attempts were rejected by courts,⁴³⁷ and since *LaGrand*, at least two federal courts have addressed the issue, both continuing the pattern of denial.⁴³⁸

In *De La Pava*, the defendant argued on appeal that he received ineffective assistance of counsel at trial because his attorney failed to move to dismiss the indictment after learning that the defendant had not been informed of his right to consular assistance.⁴³⁹ The court first looked to whether the government's failure to comply with Article 36 called for dismissal of the indictment.⁴⁴⁰ The court held it did not, relying on its precedent that the consular-notification provision of the Vienna Convention and its related regulations did not create any "fundamental rights" for a foreign national.⁴⁴¹

The court then looked to *De La Pava*'s ineffective assistance of counsel claim.⁴⁴² First, the court stated that counsel's failure to move to dismiss did not fall below an objective standard of reasonableness because, "[a]t the time of *De La Pava*'s hearings before the District Court, no Court of Appeals had held that this provision of the Vienna Convention formed a basis for a motion to dismiss an indictment."⁴⁴³ The court stated that there is

437. See, e.g., *United States v. Page*, 232 F.3d 536, 540 (6th Cir. 2000), *cert. denied*, 532 U.S. 1056 (2001) (citing *United States v. Li*, 206 F.3d 56, 62 (1st Cir. 2000), *cert. denied*, 531 U.S. 956 (2000); *Lombera-Camorlinga*, 206 F.3d at 886; *United States v. Cordoba-Mosquera*, 212 F.3d 1194 (11th Cir. 2002), *cert. denied*, 531 U.S. 1131 (2001)).

438. *United States v. De La Pava*, 268 F.3d 157 (2d Cir. 2001); *United States v. Duarte-Acero*, 296 F.3d 1277 (11th Cir. 2002).

439. *De La Pava*, 268 F.3d at 163.

440. *Id.* at 163-66.

441. *Id.* at 165. (relying on *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1994) ("Although compliance with our treaty obligations clearly is required, we decline to equate [the consular notification] provision [of the Vienna Convention] with fundamental rights.")).

442. *Id.* at 166.

443. *Id.* (relying on *Smith v. Singletary*, 170 F.3d 1051, 1054 (11th Cir. 1999) ("[A]s an acknowledgment that law is no exact science, the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized. . . ."); *Nelson v. Estelle*, 642 F.2d 903, 908 (5th Cir. Unit A Apr. 1981)).

“nothing in the history of the Convention and its ratification [that] would have given counsel reason to believe that such a motion had the slightest probability of success.”⁴⁴⁴ Finally, the court reasoned counsel was not ineffective because it was not likely that, but for the alleged deficiency on the part of De La Pava’s counsel, there was a reasonable probability that the outcome of his proceedings would have been different.⁴⁴⁵ “Because a foreign national cannot seek dismissal of an indictment on the basis of an alleged failure of the Government to notify him of his right to consular notification under the Vienna Convention, any motion by De La Pava’s counsel to this effect would have been futile.”⁴⁴⁶

The decision of the Eleventh Circuit Court of Appeals in *United States v. Duarte-Acero* confirms that Article 36 has become an unenforceable right of international law in the United States.⁴⁴⁷ In 1982, Jose Ivan Duarte-Acero, a Columbian citizen, was indicted for conspiracy to murder two Drug Enforcement Administration (DEA) agents.⁴⁴⁸ Duarte was arrested in Ecuador in 1997 and brought to Florida for trial.⁴⁴⁹ He was tried, convicted, and sentenced to life imprisonment.⁴⁵⁰

Before trial, Duarte filed two motions to quash the indictment.⁴⁵¹ In the first motion, he argued that the double-jeopardy provision of the International Covenant on Civil and Political Rights and the international principle of *non bis in idem*⁴⁵² barred his prosecution for the offenses because he had already been tried and convicted for the same offenses in Columbia.⁴⁵³ In his second motion to dismiss, Duarte argued that his indictment should be quashed because he was denied his

(“[C]ounsel is normally not expected to foresee future new developments in the law.”).

444. *De La Pava*, 268 F.3d at 166.

445. *Id.*

446. *Id.*

447. *United States v. Duarte-Acero*, 296 F.3d 1277, 1282 (11th Cir. 2002).

448. *Id.* at 1278.

449. *Id.*

450. *Id.*

451. *Id.* at 1280.

452. “Not twice for the same thing.” BLACK’S LAW DICTIONARY 1665 (7th ed. 1999).

453. *Duarte-Acero*, 296 F.3d at 1280.

right to consular assistance under Article 36 of the Vienna Convention, as well as other rights under the International Covenant.⁴⁵⁴ Although the undisputed evidence showed that Duarte repeatedly requested that the Columbian consulate be informed of his arrest *and that those requests were ignored*,⁴⁵⁵ the trial court denied his motions.⁴⁵⁶

The Eleventh Circuit Court of Appeals followed its own precedent, *United States v. Cordoba-Mosquera*,⁴⁵⁷ in determining whether the appellant was prejudiced by the U.S. violation of Article 36.⁴⁵⁸ In *Cordoba-Mosquera*, the Eleventh Circuit held that neither suppression of evidence nor dismissal of an indictment were appropriate remedies for Article 36 violations.⁴⁵⁹ But the *Cordoba-Masquera* court also indicated that the defendant's failure to show prejudice influenced its decision to rule against the foreign national's alleged Article 36 claims.⁴⁶⁰

In upholding the trial court's denial of Duarte's second motion to dismiss the indictment, the court balked at deciding whether the absence of prejudice was central to its decision in *Cordoba-Mosquera*. Instead, it declared that the remedy Duarte was seeking, *i.e.*, dismissal of the indictment for Article 36 violation, was unavailable.⁴⁶¹ The court stated that "the Vienna Convention itself disclaims any intent to create individual rights, stating that its purpose 'is not to benefit individuals but to ensure the efficient performance of functions by consular posts.'"⁴⁶² Furthermore, the court stated that "the Convention

454. *Id.*

455. *Id.* at 1279.

456. *Id.* at 1280.

457. *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000), *cert. denied*, 531 U.S. 1131 (2001).

458. *Duarte-Acero*, 296 F.3d at 1281.

459. *Cordoba-Mosquera*, 212 F.3d at 1196.

460. *Id.*

461. *Duarte-Acero*, 296 F.3d at 1281.

462. *Id.* at 1281-82 (quoting Vienna Convention, *supra* note 1, 21 U.S.T. at 79, 596 U.N.T.S. at 262; *United States v. Emuegbunam*, 268 F.3d 377, 392 (6th Cir. 2001), *cert. denied*, 122 S.Ct. 1450, 152 L.Ed.2d 392 (2002); *United States v. Jimenez-Nava*, 243 F.3d 192, 196 (5th Cir. 2001), *cert. denied*, 533 U.S. 962 (2001); *United States v. Li*, 206 F.3d 56, 62 (1st Cir. 2000) (en banc), *cert. denied*, 531 U.S. 956 (2000)).

nowhere suggests that the dismissal of an indictment is an appropriate remedy for a violation.”⁴⁶³ The court also looked to “[e]xtra-textual sources” in reaching its conclusion.⁴⁶⁴ First, the State Department, whose “interpretation of a treaty is entitled to great deference,”⁴⁶⁵ has “consistently stated that the only remedies for a violation of the Vienna Convention are diplomatic, political, or derived from international law.”⁴⁶⁶ The court also noted that no party to the Vienna Convention has dismissed a criminal charge based on a violation of Article 36.⁴⁶⁷ Relying on all-too-familiar support, the court also stated, “Indeed, two parties, Italy and Australia, have specifically rejected that possibility. And international agreements should be consistently interpreted among the signatories.”⁴⁶⁸ Therefore, the Eleventh Circuit Court of Appeals joined its “sister circuits” by holding that dismissal of an indictment is not warranted for a violation of Article 36.⁴⁶⁹

Duarte also pursued his alleged violations of the International Covenant on Civil and Political Rights on appeal, claiming that his rights under Articles 9, 12(4), 13, and 14 of the International Covenant were violated and warranted dismissal of the indictment against him.⁴⁷⁰ First, Duarte argued that his arrest was contrary to Ecuadorian procedures, the procedures of the Vienna Convention, and Article 9 of the International Covenant because he was not given a hearing to determine the legality of his arrest.⁴⁷¹ Duarte also argued that, because he was

463. *Id.* at 1282 (relying on *United States v. Page*, 232 F.3d 536, 540 (6th Cir. 2000), *cert. denied*, 532 U.S. 1056 (2001); *Li*, 206 F.3d at 62).

464. *Id.*

465. *Id.*

466. *Id.* (citing *Emuegbunam*, 268 F.3d at 392; *Li*, 206 F.3d at 63-64; *Jimenez-Nava*, 243 F.3d at 197).

467. *Id.* (citing *Emuegbunam*, 268 F.3d at 393; *Page*, 232 F.3d at 541; *Li*, 206 F.3d at 65).

468. *Id.* (citations omitted).

469. *Id.* (citing *U.S. v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001); *Page*, 232 F.3d at 541; *Li*, 206 F.3d at 60).

470. *Id.*

471. *Id.*

No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such

not allowed to enter Colombia after his arrest in Ecuador, his rights under Article 12(4) were violated.⁴⁷² Similarly, Duarte contended “that he was not granted an opportunity to argue against expulsion from Ecuador before he was expelled into the custody of the United States[,]” and that this was violative of Article 13, which prevents a person from being expelled from a country without a hearing.⁴⁷³ Finally, Duarte argued that “his rights were violated under [Article 14] because he was given no hearing—fair, public, competent, independent, impartial, or otherwise—before being flown to the United States.”⁴⁷⁴

After considering Duarte’s claims, the court stated that “[w]hile the violations alleged by Duarte may run afoul of the [International Covenant], the [Covenant] does not appear to afford him any relief.”⁴⁷⁵ “First, the plain language of the [Covenant] indicates that its provisions govern the relationship between a State and the individuals within the State’s

procedure as are established by law. . . . Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that a court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Id. (quoting The International Convention on Civil and Political Rights, Mar. 23, 1976, art. 9, 999 U.N.T.S. 171, 175-76 [hereinafter ICCPR or International Convention]).

472. *Id.* (“No one shall be arbitrarily deprived of the right to enter his own country.” (quoting ICCPR, *supra* note 471, art. 12(4), 999 U.N.T.S. at 176)).

473. *Id.* at 1283.

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Id. (quoting ICCPR, *supra* note 471, art. 13, 999 U.N.T.S. at 176).

474. *Id.*

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Id. (quoting ICCPR, *supra* note 471, art. 14(1), 999 U.N.T.S. at 176).

475. *Id.*

territory.”⁴⁷⁶ For example, “Article 2(1) requires that ‘[e]ach State Party to the present Covenant undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.’”⁴⁷⁷ Because the violations alleged by Duarte occurred in Ecuador, not the United States, the United States is not obligated to provide relief for alleged violations of the International Covenant committed by other nations.⁴⁷⁸ The court ignored the fact that United States DEA agents were involved in the alleged violations of Duarte’s human rights.⁴⁷⁹

Courts have interpreted the International Covenant in much the same way as the Vienna Convention, stating it does not create judicially-enforceable individual rights.⁴⁸⁰ The court stated, “Treaties affect United States law only if they are self-executing or otherwise given effect by congressional legislation.”⁴⁸¹ Thus, because “Articles 1 through 27 of the ICCPR are not self-executing . . . [and] Congress [has not] passed implementing legislation[,] . . . the ICCPR is not binding on federal courts.”⁴⁸² As a result, the court held that Articles 9, 12(4), 13, and 14 of the International Covenant do not require the dismissal of the indictment.⁴⁸³

While it is certainly true that Congress has declared the International Covenant not to be self-executing,⁴⁸⁴ several authorities indicate that such status may only prohibit an individual from relying on the treaty to present a cause of action.⁴⁸⁵ A criminal defendant may still be able to rely on the

476. *Id.*

477. *Id.* (quoting ICCPR, *supra* note 471, art. 2(1), 999 U.N.T.S at 173).

478. *Id.*

479. *See id.* at 1281-84 (addressing only the issue whether the ICCPR creates individual rights).

480. *Id.* at 1283.

481. *Id.*

482. *Id.* (relying on 138 CONG. REC. §§ 4783, 4784 (daily ed. Apr. 2, 1992)).

483. *Id.*

484. *United States v. Duarte-Acero*, 208 F.3d 1282, 1284 n.8 (11th Cir. 2000) (stating the Senate consented to the ICCPR subject to the United States declaration that provisions of Articles 1 through 27 of the Covenant are not self-executing).

485. *See United States v. Alvarez-Machain*, 504 U.S. 655, 668-69 (1992) (allowing individuals to raise defense under treaty even without implementing language

treaty as a defense regardless of whether it is self-executing or requires legislation to be implemented.⁴⁸⁶ This argument does not appear to have been raised at trial or on appeal.

D. Waiver/Procedural Default & Effective Assistance of Counsel

Although a foreign national may not know that he has a right to consular access upon his arrest, courts require the defendant or his attorney to timely raise the failure of the police or judiciary to notify him of his consular rights. This is so despite the fact that the treaty specifically places the burden on the state to inform a foreign national about his consular rights and, upon request, to provide him with access to consular officials. Thus, it is incumbent upon the defendant or his attorney to be aware that such rights exist in order to challenge the failure of the state to fulfill its duties under the treaty.

Two recent cases from the Fourth Circuit Court of Appeals demonstrate that the burden lies on the foreign national not to waive his rights.⁴⁸⁷ In both cases, the defendant alleged that his guilty plea was invalid because it was entered without the defendant having been informed of his right to consular access.⁴⁸⁸ In both instances, the Fourth Circuit Court of Appeals held that the defendant waived the argument on appeal because it was not raised in the trial court.⁴⁸⁹ The holdings do not address whether the defendants or their attorneys knew the defendants had this waivable right. This fact matters little,

in certain circumstances); *see also* Christian A. Levesque, Comment, *The International Covenant on Civil and Political Rights: A Primer for Raising a Defense Against the Juvenile Death Penalty in Federal Courts*, 50 AM. U. L. REV. 755, 775-79 (2001) (discussing the difference between relying on a treaty as a defense and as a cause of action); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 721 (1995) (discussing the difference between right of action under a treaty, which requires either the implementation of the treaty or that the treaty be self-executing, and raising a treaty as a defense to criminal prosecution, which does not require a right of action).

486. *See* Levesque, *supra* note 485, at 775-76.

487. *See* *United States v. Sanchez*, No. 01-4507, 2002 WL 552318, at *2 (4th Cir. Apr. 15, 2002); *United States v. Dixon*, No. 01-4298, 2002 WL 220073, at *2 (4th Cir. Feb. 13, 2002).

488. *See Sanchez*, 2002 WL 552318, at *1; *Dixon*, 2002 WL 220073, at *2.

489. *See Sanchez*, 2002 WL 552318, at *1; *Dixon*, 2002 WL 220073, at *2.

however, because courts have held that no remedy exists for violations of Article 36, regardless of whether the defendant and his attorneys were aware of the convention's existence.⁴⁹⁰ While "ignorance of the law is no excuse for committing a crime,"⁴⁹¹ this maxim does not necessarily apply to ignorance of one's rights.⁴⁹² But courts have essentially applied this principle to foreign nationals when their consular rights are at issue, even though reports indicate that often the police and courts themselves do not know that consular rights exist.⁴⁹³

Richard Dieter, Director of the Death Penalty Information Center, states that "there is a pervasive lack of knowledge about law enforcement's obligations under the Vienna Convention. Police routinely fail to notify foreign nationals of their rights,

490. See *United States v. De La Pava*, 268 F.3d 157, 163 (2d Cir. 2001) (holding counsel was not ineffective for failing to move to dismiss indictment for violation of Article 36 because dismissal of indictment was not a proper remedy); *Murgas v. United States*, No. 99-CV-1723, 2002 WL 553462, at *2 (N.D.N.Y. Apr. 10, 2002); *Zavala v. State*, 739 N.E.2d 135, 143-44 (Ind. Ct. App. 2000) (holding no prejudice occurred when attorney failed to inform a foreign national of his consular rights; attorney admitted to not being aware of the Vienna Convention).

[T]he mere fact that his attorney failed to inform petitioner of the Vienna Convention does not imply that the outcome of his case was tainted. Petitioner does not explain how contacting the Panamanian consulate would have affected the result of his case, and the court does not believe that the failure to contact the consulate had an impact on the outcome. Petitioner's own attorney was "likely far better able to explain the United States legal system to him than any consular official would have been," and petitioner offers no evidence that the [Panamanian] consulate could have offered any assistance that his attorney did not.

Murgas, 2002 WL 5333462, at *2 (quoting *Beard v. Greene*, 523 U.S. 371, 377 (1998)). But see *Ledezma v. State*, 626 N.W.2d 134, 151-52 (Iowa 2001) (holding that trial counsel rendered ineffective assistance of counsel, *inter alia*, when he failed to inform the defendant of his right to consular access under Article 36 of the Vienna Convention; "Criminal defense attorneys are not equipped to provide the same services as the local consulate.").

491. *Pope v. Illinois*, 481 U.S. 497, 517 (1987).

492. Cf. *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960) ("A prolonged interrogation of an accused who is ignorant of his [constitutional] rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror."); *Johnson v. Zerbst*, 304 U.S. 458, 464-69 (1938) (stating a person cannot waive constitutional right through ignorance or negligence).

493. See Dieter, *supra* note 130.

partly because they are unaware of the law.”⁴⁹⁴ For example, Gerald Arenberg, Executive Director of the Association of Retired Police Chiefs, stated, “In my 47 years in law enforcement, I have never seen anything from the State Department or FBI about this ‘duty to inform arrestees.’”⁴⁹⁵ More recently, press coverage of a recent pre-trial hearing involving Mexican national Carlos Cortez, who was arrested for murder in 1999, revealed that Kentucky officials violated Cortez’s consular rights because they did not know he had any.⁴⁹⁶

Disdain is also a factor in the repeated violations of Article 36. A spokesperson for the California Attorney General’s Office stated in 1998, “Californians elect their legislators and their governor to write the laws . . . [T]hey should not have to abdicate that authority to foreign treaties approved by someone in Washington.”⁴⁹⁷ When New York Police Commissioner Howard Safir was asked about the Vienna Convention, he first stated that he had never heard of it, but then, after it was explained to him, he stated, “Oh, right, that treaty we’re not enforcing.”⁴⁹⁸ During an interview of a Virginia prosecutor who tried Mario Murphy, a Mexican national sentenced to death, the prosecutor mocked the Vienna Convention stating, “I mean, what is the remedy? I suppose Mexico could declare war on us. . . . To me, it’s a completely ridiculous issue.”⁴⁹⁹ Further demonstrating his ignorance of the convention, the prosecutor

494. *Id.*; see also *Protecting Consular Rights*, *supra* note 200, at 7 (stating that evidence “indicates that frequent violations of Article 36 rights continue across the USA. Both local and federal law enforcement agents remain largely ignorant of or heedless of their binding treaty obligations.”).

495. See Dieter, *supra* note 130, (quoting Gerald Arenberg, Executive Director of the Association of Retired Police Chiefs).

496. See Louise Taylor, *States Ignore Foreign Detainees’ Rights Denying Agreed-On Access to Consulates is Routine in the U.S.*, LEXINGTON HERALD-LEADER, July 16, 2001, at A1; see also Henry Weinstein, *Foreigners on Death Rows Denied Rights*, U.S. SAYS, L.A. TIMES, Dec. 10, 1998, at A1 (“[S]ome 26,000 police departments exist in the United States, and many do not appear to be aware of the treaty’s requirements.”).

497. See Stanley Meisler & John Glionna, *Activists Say Courts Abuse Rights of Juvenile Defendants*, L.A. TIMES, Nov. 18, 1998, at A3 (quoting Rob Stutzman).

498. See Dieter, *supra* note 130, (quoting Howard Safir, New York Police Commissioner).

499. *Violation of Rights*, *supra* note 151 (quoting Virginia prosecutor Robert Humphreys).

stated, “The burden is on [the defendant] to say, ‘Hey excuse me, I’m a Mexican citizen. Tell my Embassy.’”⁵⁰⁰ A Texas prosecutor similarly argued, during a capital trial, that the Vienna Convention was irrelevant because it is not Texas law: “If you pick up the criminal code, it doesn’t say anything about the Geneva [sic] Convention.”⁵⁰¹ But why would a Texas prosecutor think differently when then-Governor George W. Bush claimed that Texas was not bound by the Convention because the state had not signed it?⁵⁰²

The ignorance or disdain of the police or judicial authorities toward the Vienna Convention does not relieve them of their burden to notify the foreign national of his consular rights. Interestingly, ignorance of Article 36 still pervades the legal and law enforcement communities, even though some courts have stated that “[t]reaties are one of the first sources that would be consulted by a *reasonably diligent counsel* representing a foreign national.”⁵⁰³ In other words, failing to research the treaty law when representing a foreign national is tantamount to ineffective assistance of counsel.⁵⁰⁴ Other courts, however, have also held that counsel is not ineffective for failing to move for dismissal of an indictment or to file a motion to suppress when Article 36 is violated because these are not remedies available to

500. *Id.* But see *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104, para. 60 (June 27), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgement/igus_ijudgement_20010625.htm (stating the United States may not rely on procedural default, i.e., waiver, when it “was the United States itself which had failed to carry out its obligation under the Convention to inform the LaGrand brothers”).

501. See Dieter, *supra* note 130, (quoting statements from Armando Villafranca, *Consulate Issue Raised in Trial of Mexican Convicted of Murder*, HOUSTON CHRON., Oct. 2, 1997, at A25).

502. *Violation of Rights*, *supra* note 151, at 2.

503. *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (emphasis added); *Breard v. Pruett*, 134 F.3d 615, 620 (4th Cir. 1998); *Gregory v. United States*, 109 F. Supp. 2d 441, 449 (E.D. Va. 2000); see also *Ledezma v. State*, 626 N.W.2d 134, 152 (Iowa 2001) (explaining that a defense attorney representing a foreign national in a criminal case has a duty to investigate both domestic and foreign laws).

504. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (stating that the issue is whether counsel’s assistance was reasonable under all the circumstances and prevailing professional norms at the time of the alleged error); *Ledezma*, 626 N.W.2d at 152 (“When representing a foreign national criminal defendant, counsel has a duty to investigate the applicable national and foreign laws.”).

the defendant.⁵⁰⁵ Thus, a foreign national is presented with a unique catch-22 situation when challenging the effective assistance of counsel—his attorney may be ineffective for not discovering the protections of the treaty, but because there is no judicial remedy available for redressing violations of Article 36, counsel will not be held accountable.⁵⁰⁶ Ironically, courts have placed the onus on defense counsel to know the treaty law when representing foreign nationals, but have not held federal and state authorities to the same standard of “reasonableness.”

In the recent case of *Valdez v. State* before the Oklahoma Court of Criminal Appeals, both the issue of whether procedural default bars review of an Article 36 claim and a related ineffective assistance of counsel claim were addressed by the court.⁵⁰⁷ Oklahoma scheduled Valdez, a Mexican national, to be executed on August, 30, 2001.⁵⁰⁸ Valdez, however, had not been timely informed of his right to consular access.⁵⁰⁹ The Oklahoma Court of Criminal Appeals granted Valdez an indefinite stay of execution on September 10, 2001.⁵¹⁰ His attorneys had filed a petition with the court arguing that the recent *LaGrand* case was a binding judgment that must be applied by U.S. courts and warranted a new trial.⁵¹¹ Based on a previous concurring opinion by Judge Chapel in *Flores v. State*,⁵¹² it seemed that the court

505. See, e.g., *United States v. De La Pava*, 268 F.3d 157, 166 (2d Cir. 2001); *United States v. Arguijo*, No. 99 C 7034, 2001 WL 99702, at *3 (N.D. Ill. Jan. 31, 2001); *Gregory*, 109 F. Supp. 2d at 449–50; *Cortez v. State*, 561 S.E.2d 142, 148 (Ga. Ct. App. 2002); *People v. Ortiz*, 740 N.Y.S.2d 747, 749–50 (N.Y. County Ct. 2001); *State v. Martinez-Lazo*, 999 P.2d 1275, 1278 (Wash. Ct. App. 2000).

506. See, e.g., *Ortiz*, 740 N.Y.S.2d at 749-50.

507. *Valdez v. State*, 2002 Okla. Crim App. 20, ¶17-28; 46 P.3d 703, 708-10. A similar discussion of the *Valdez* case appears in Anthony N. Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. TEX. L. REV. (forthcoming Jan. 2003).

508. *Violation of Rights*, *supra* note 151, at 10.

509. *Valdez*, 2002 Okla. Crim. App. ¶6; 46 P.3d at 705.

510. *Id.* ¶3.

511. *Id.* ¶10; 46 P.3d at 706.

512. *Flores v. State*, 1999 Okla. Crim. App. 52, ¶4; 994 P.2d 782, 788 (Chapel, J., concurring). The concurring opinion stated that the failure of the U.S. courts to remedy violations of the Vienna Convention

puts U.S. citizens traveling abroad at risk of being detained without notice to U.S. consular officials. Why should Mexico, or any other signatory country,

would follow the *LaGrand* decision and rule favorably for Valdez.

Although the court ruled in Valdez's favor,⁵¹³ it was not directly because of the *LaGrand* decision or due to the failure of the police to inform him of his consular rights. Instead, the court held that his court-appointed attorney was ineffective for failing to discover mitigation evidence of his mental state that could have resulted in him not being sentenced to death.⁵¹⁴ Incidentally, the mitigation evidence that the court relied on in determining that Valdez's attorney was ineffective was brought to light only after he was afforded access to his consular officials and an attorney retained by Mexican consular officials began representing him.⁵¹⁵ Once informed of his consular rights, consular officials assisted Valdez at his clemency hearing before the Oklahoma Board of Pardons and Paroles.⁵¹⁶ The Mexican government retained experts and experienced attorneys to assist Valdez.⁵¹⁷

An investigation of Valdez's background and medical history revealed that Valdez suffers from severe organic brain damage, was born into extreme poverty, received limited education, and grew up in a family plagued by alcohol abuse and instability.⁵¹⁸ Most importantly, according to his attorneys, Valdez experienced head injuries when he was younger, which greatly altered his behavior.⁵¹⁹ The experts, who evaluated Valdez's Quantitative Electroencephalogram (QEEG), noted that the damage to the frontal lobe of his brain had disrupted the frontal lobe's ability to regulate the temporal lobes.⁵²⁰ One expert reported, "This malfunction creates thought disturbances,

honor the Treaty if the U.S. will not enforce it? The next time we see a *60 Minutes* piece on a U.S. citizen locked up in a Mexican jail without notice to any U.S. governmental official we ought to remember these cases.

Id.

513. *Valdez*, 2002 Okla. Crim. App. ¶28; 46 P.3d at 710-11.

514. *Valdez*, 2002 Okla. Crim. App. ¶28; 46 P.3d at 710.

515. *Id.* ¶25.

516. *Valdez*, 2002 Okla. Crim. App. ¶7; 46 P.3d at 706.

517. *Id.*

518. *Id.*

519. *Id.*

520. *Id.* ¶8.

impairs judgment, and compromises impulse control. . . . Use of alcohol would exacerbate these problems.”⁵²¹ Experts also stated that another syndrome associated with Valdez’s type of brain damage is the distortion of religious beliefs.⁵²²

This information, including the evidence of the violation of Article 36, was presented to the Oklahoma Pardon and Parole Board at Valdez’s clemency hearing; the Board recommended that Valdez’s death sentence be commuted to life in prison without the possibility of parole.⁵²³ Although this new information, obtained by the Mexican consulate was presented to Governor Frank Keating, he denied clemency.⁵²⁴ In a letter to Mexican President Vicente Fox on July 20, 2001, Governor Keating stated that he was aware of the recent decision in *LaGrand* and that he had reviewed and reconsidered Valdez’s conviction and sentence “by taking account of the admitted violation of Article 36 of the Vienna Convention regarding consular notification, as well as the information provided by, among others, representatives of your government.”⁵²⁵ After reviewing the matter, Governor Keating concluded that “[n]o compelling reason exists to undermine the confidence and integrity of the jury and the courts in this case.”⁵²⁶ He believed that the violations of Valdez’s consular rights were “regrettable and inexcusable,” but resulted only in “harmless errors.”⁵²⁷ Clemency, Governor Keating stated, was not appropriate in this case because it would “presume greater rights for foreign nationals that, in my judgment, are not warranted.”⁵²⁸

521. *Id.* (quoting from the affidavit of Maurice B. Sherman, Ph.D.).

522. *Id.*

523. *Id.* ¶9.

524. *Id.*

525. *Protecting Consular Rights*, *supra* note 200, at 9 (quoting *Letter from Oklahoma Governor Frank Keating to Mexican President Vicente Fox*); see also Valdez, 2002 Okla. Crim. App. ¶9; 46 P.3d at 706; Brooke A. Masters, *U.S. Deprived Mexican a Fair Trial, Appeal Says*, WASH. POST, Aug. 23, 2001, at A8.

526. *Protecting Consular Rights*, *supra* note 200, at 9 (quoting *Letter from Oklahoma Governor Frank Keating to Mexican President Vicente Fox*); see also Valdez, 2002 Okla. Crim. App. ¶9; 46 P.3d at 706; Masters, *supra* note 525, at A8.

527. *Protecting Consular Rights*, *supra* note 200, at 9.

528. *Id.* (quoting *Letter from Oklahoma Governor Frank Keating to Mexican President Vicente Fox*).

The Oklahoma Court of Criminal Appeals, nonetheless, granted Valdez an indefinite stay to address his application for writ of habeas corpus.⁵²⁹ However, because Valdez was seeking relief through a post-conviction writ of habeas corpus,⁵³⁰ under Oklahoma's Capital Post-Conviction Procedure Act, he had to show that an intervening change in the law was unavailable at the time of either his direct appeal or his original application in order to challenge his conviction as being in violation of Article 36 and to avoid the effect of the procedural default rule.⁵³¹ Valdez argued that the court must follow the decision of the ICJ in *LaGrand* and provide him relief because Oklahoma admitted violating his rights under Article 36 of the Vienna Convention.⁵³² In support of his position, Valdez presented several reasons why a new trial should be ordered: (1) the United States is bound by the ICJ's rulings concerning interpretation or application of the Convention because it signed and ratified the Optional Protocol to the Vienna Convention and the U.N. Charter acknowledging compliance with the decisions of the ICJ; (2) principles of *stare decisis* require the Oklahoma Supreme Court to follow the ruling in *LaGrand*; (3) the doctrine of issue preclusion makes *LaGrand* binding on the United States because the United States fully developed, defended, and argued its position in *LaGrand* and knew it would be bound by the ICJ's decision; (4) the United States must follow the law of treaties under the rule of *pacta sunt servanda*; (5) to apply the ICJ holding to only some foreign nationals and not all would violate the Equal Protection Clause of the U.S. Constitution;

529. *Valdez*, 2002 Okla. Crim. App. ¶3; 46 P.3d 704-05.

530. *Id.*

531. OKLA. STAT. ANN. tit. 22 § 1089(D)(8), (9) (West 2001) (providing review and relief of a legal claim by post-conviction habeas corpus is only available if: (1) the legal basis of the claim "was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date"; or (2) the legal basis of the claim "is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date."). Review and relief is also available when the factual basis of the claim was unavailable or "not ascertainable through the exercise of reasonable diligence on or before that date." *Id.*

532. *Valdez*, 2002 Okla. Crim. App. ¶10; 46 P.3d at 706.

(6) denying *LaGrand's* interpretation of Article 36 rights to him because he is not German would create an inconsistent result contrary to the foreign relations law policy designed to achieve uniformity of result; and (7) Oklahoma is bound by the law of treaties to the same extent as the United States.⁵³³

Mexico also filed an amicus brief asserting that Oklahoma could not rely on procedural default to preclude review of Valdez's claims because application of the doctrine would violate the Supremacy Clause and because the ICJ determined that application of the procedural default rule effectively prevents "full effect" to the rights accorded under Article 36.⁵³⁴ According to the brief, because the rule of procedural default would preclude the Oklahoma Supreme Court's ability to review and consider the merits of Valdez's claims, the court must not follow the doctrine and, instead, must effectuate the purposes of Article 36 of the Convention.⁵³⁵ Mexico also argued that under the Supremacy Clause of the U.S. Constitution, the State of Oklahoma is bound by the terms of the U.S. ratification of the U.N. Charter.⁵³⁶ According to Mexico, the language of Article 94 of the U.N. Charter clearly states that "each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."⁵³⁷

Mexico also argued the ICJ's ruling is binding upon the Oklahoma court because it is binding under customary international law, which is part of the law of the United States.⁵³⁸ Thus, "[b]ecause the United States ratified the Optional Protocol to Article 36 of the Vienna Convention, it has specially agreed to be bound to the ICJ's jurisdiction over disputes involving the interpretation or application of the Convention."⁵³⁹ Mexico also adopted Valdez's claim that the United States would violate its obligations under the

533. *Valdez*, 2002 Okla. Crim. App. ¶16; 46 P.3d at 707-08.

534. *Valdez*, 2002 Okla. Crim. App. ¶17; 46 P.3d at 708.

535. *Id.*

536. *Valdez*, 2002 Okla. Crim. App. ¶16 n.19; 46 P.3d at 708.

537. *Id.* (quoting U.N. CHARTER art. 94, para. 1).

538. *Valdez*, 2002 Okla. Crim. App. ¶16 n.20; 46 P.3d at 708.

539. *Id.*

Convention on the Elimination of All Forms of Racial Discrimination by applying a different rule to Valdez, a non-German citizen, than the ICJ applied to the LaGrands, German citizens.⁵⁴⁰ Finally, while Mexico acknowledged that the judgment in *LaGrand* binds only the parties to the litigation, it argued that “the principles pronounced in the case, including that an apology for a breach of Article 36 of the Convention is insufficient, is authoritative precedent for all States party to the Convention.”⁵⁴¹

In convincing the court that it should entertain his application for post-conviction relief, Valdez argued that the legal basis for relief, *i.e.*, the *LaGrand* decision, was previously unavailable.⁵⁴² The Oklahoma Court of Criminal Appeals disagreed, however, stating that the legal basis for his claim had been available to him from the time of his arrest.⁵⁴³ Other Oklahoma defendants have raised claims relating to violations of the Vienna Convention’s consular notification provisions, and Valdez did not advance a reasonable explanation for his failure to previously assert the violation.⁵⁴⁴

Further, the court reasoned that:

LaGrand is not a “new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state. . . .” Only that portion of *LaGrand* which pronounced the Convention confers “individual rights” and which addressed our doctrine of procedural default is arguably new law.⁵⁴⁵

But because the issue of whether the Convention creates individual rights has been raised in courts across the United States for years, Valdez could reasonably have raised the issue

540. *Valdez*, 2002 Okla. Crim. App. ¶16 n.21; 46 P.3d at 708.

541. *Valdez*, 2002 Okla. Crim. App. ¶16 n.22; 46 P.3d at 708.

542. *Valdez*, 2002 Okla. Crim. App. ¶12; 46 P.3d at 707.

543. *Valdez*, 2002 Okla. Crim. App. ¶21; 46 P.3d at 709.

544. *Id.* ¶21 (citing *Flores v. State*, 1999 Okla. Crim. App. 52; 994 P.2d 782; *Martinez v. State*, 1999 Okla. Crim. App. 33; 984 P.2d 813; *Al-Mosawi v. State*, 1998 Okla. Crim. App. 18; 956 P.2d 906).

545. *Valdez*, 2002 Okla. Crim. App. ¶22.

before the *LaGrand* decision.⁵⁴⁶ With regard to the procedural default issue, the court stated that “until such time as the supreme arbiter of the law of the United States changes its ruling, its decision in *Breard* controls this issue.”⁵⁴⁷ According to the court, a holding that the ICJ’s ruling overrules a binding decision of the United States Supreme Court and affords a judicial remedy to an individual for a violation of the Convention would amount to an interference with the nation’s foreign affairs and would run afoul of the U.S. Constitution.⁵⁴⁸

Although the court reasoned that Valdez could have asserted his arguments before the decision in *LaGrand*, the court reviewed the merits of Valdez’s post-conviction claim for relief on the ground that his counsel was ineffective for failing to ascertain his prior medical problems before trial (i.e., before Valdez received consular access).⁵⁴⁹ The court explained that Valdez’s court-appointed counsel was inexperienced in capital cases:

[I]n fact, [Valdez’s] case was his counsel’s *first* capital case. [Valdez’s] trial counsel did not have the financial resources available to properly investigate [his] childhood, social history or other aspects of his life. While arguments can be made that trial counsel could have requested funds to hire expert witnesses, it is evident that trial counsel’s inexperience in capital litigation caused him to believe such funds were unavailable.⁵⁵⁰

The court then went on to admit that it “cannot ignore the significance and importance of the factual evidence *discovered with the assistance of the Mexican Consulate.*”⁵⁵¹ Based on the record, it was evident to the court that “the Government of Mexico *would have intervened in the case, assisted with [Valdez’s] defense, and provided resources to ensure that he*

546. *Id.*

547. *Id.*

548. *Id.* ¶23.

549. *Valdez*, 2002 Okla. Crim. App. ¶27; 46 P.3d at 710.

550. *Id.* ¶25.

551. *Id.* (emphasis added).

*received a fair trial and sentencing hearing.*⁵⁵²

Thus, the court recognized that “the evidence discovered with the assistance of the Mexican Consulate could have been discovered earlier” and “that [it] was *not* discovered due to trial counsel’s inexperience and ineffectiveness.”⁵⁵³ The court concluded that “[a]lthough the claim of ineffective trial counsel was raised in prior proceedings to secure relief, appellate counsel(s) also failed to discover this evidence without the assistance of the Mexican Consulate.”⁵⁵⁴

Although this Court has addressed claims relating to trial counsel’s effectiveness in his prior appeals, in those appeals, this Court was not presented with a claim that trial court failed to discover evidence relating to Petitioner’s social, mental, and health history. This Court was not presented with a claim that trial counsel did not inform Petitioner he could have obtained financial, legal and investigative assistance from his consulate. We believe trial counsel, as well as representatives of the State who had contact with Petitioner prior to trial and *knew* he was a citizen of Mexico, *failed in their duties to inform Petitioner of his right to contact his consulate*. In hindsight, and so many years following Petitioner’s conviction and direct appeal, *it is difficult to assess the effect consular assistance, a thorough background investigation and adequate legal representation would have had*. However, this Court cannot have confidence in the jury’s sentencing determination and affirm its assessment of a death sentence where the jury was not presented with very significant and important evidence bearing upon Petitioner’s mental status and psyche at the time of the crime. Absent the presentation of this evidence, we find there is a reasonable probability that the sentencer might “have concluded that the balance of aggravating and mitigating circumstances did not

552. *Id.* (emphasis added).

553. *Id.* ¶26; *see also* Strickland v. Washington, 466 U.S. 668, 687 (1984) (discussing the two components that must be satisfied for a court to reverse a conviction based on ineffective assistance of counsel).

554. *Valdez*, 2002 Okla. Crim. App. ¶26 n.24; 46 P.3d at 710.

warrant death.”⁵⁵⁵

Thus, the court ultimately granted relief because “an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.”⁵⁵⁶

While the Oklahoma Court of Criminal Appeals was not willing to follow the *LaGrand* decision in reversing the conviction,⁵⁵⁷ the court implicitly admitted that the protections afforded to foreign nationals under Article 36 are extremely important and that their denial can be prejudicial to the defendant at trial. Only through the intervention of Mexico’s consular officials was Valdez able to obtain adequate representation at his clemency proceedings,⁵⁵⁸ and only through their assistance was favorable mitigation evidence found that might have resulted in a different verdict other than death.⁵⁵⁹ The facts of *Valdez* lend credence to the arguments made in *Breard* and *LaGrand* and several other cases where Article 36 rights have been at stake: The failure to abide by the terms of the treaty can be harmful. Prejudice can occur.

V. THE ROAD AHEAD

Since the *LaGrand* decision was issued, no visible changes have taken place in the practices of state and federal governments to ensure that foreign nationals’ consular rights are protected. The number of state and federal cases that have come down in the last year gives some indication of the number of *reported* times that Article 36 has been violated in the United States since *LaGrand*. While some of those violations likely occurred before *LaGrand*, all the violations are inexcusable because the Vienna Convention has been in force in this country since 1969. Undoubtedly, many more violations of Article 36 have occurred since September 11 that we may never hear

555. *Valdez*, 2002 Okla. Crim. App. ¶27; 46 P.3d at 710 (quoting *Strickland*, 466 U.S. at 695) (emphases added).

556. *Id.* ¶28.

557. *Valdez*, 2002 Okla. Crim. App. ¶¶19-22; 46 P.3d at 708-09.

558. *See Valdez*, 2002 Okla. Crim. App. ¶7; 46 P.3d at 706.

559. *See Valdez*, 2002 Okla. Crim. App. ¶26; 46 P.3d at 710.

about.⁵⁶⁰ Just as troubling as the number of violations that have occurred since *LaGrand* is the scarcity of courts that mentioned *LaGrand* in addressing these violations. The courts that have addressed Article 36 violations since *LaGrand* have done so with knowledge, constructive or otherwise, of the ICJ's decision, and those courts that did not address the case failed to give respectful consideration to the ICJ.⁵⁶¹ As Joan Fitzpatrick states:

Even where an authoritative international body conclusively finds that the United States has violated a treaty, domestic bodies remain unruffled and complacent. A deeply ingrained pattern of treaty violations proceeds apace. Violation of the Vienna Convention is costless to those committing the violations. The judiciary continues to ignore violations of the Vienna Convention, as if the ICJ had not spoken.⁵⁶²

If the past is any indication of what is to come in the future, the violations of Article 36 will continue to be unaddressed by the courts. Unless, perhaps, U.S. courts learn from past cases and begin to follow international law in the future. That does not appear to be happening.

On August 14, 2002, Texas executed Javier Suarez Medina, a Mexican national, for the murder of a Dallas undercover police officer, even though Suarez had not been informed of his consular rights at the time of his arrest.⁵⁶³ The Dallas County

560. See Christopher Bollyn, *In the Name of Security, Thousands Denied Constitutional Rights*, AM. FREE PRESS, Nov. 25, 2001, at http://www.americanfreepress.net/11_25_01/In_Name_of_Security_Thousands/in_name_of_security_thousands.html ("Spokesmen from the Justice and State Departments could not confirm . . . that the United States was abiding by the terms of the [Vienna Convention] and notifying consulates of detainees."); see also Michelle Mittelstadt, *Ashcroft Says 603 in Custody; Groups Urge Disclosure of Names, Details of Charges in Terror Probe*, DALLAS MORN. NEWS, Nov. 28, 2001, at A1.

561. See *Breard v. Greene*, 523 U.S. 371, 375 (1998); see also *United States v. Minjares-Alvarez*, 264 F.3d 980, 987 n.3 (10th Cir. 2001) (discussing the *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgement/igus_ijudgement_20010625.htm); *Valdez v. State*, 2002 Okla. Crim. App. 20; 46 P.3d 703, 709 (discussing the *LaGrand Case*, 2001 I.C.J. 104); *Bell v. Commonwealth*, 563 S.E.2d 695, 706 (Va. 2002) (discussing the *LaGrand Case*, 2001 I.C.J. 104).

562. Fitzpatrick, *supra* note 257, at 428.

563. See Ginger Thompson, *An Execution in Texas Strains Ties With Mexico*

Assistant District Attorney said that Mexican consular authorities were not informed of Suarez's arrest because "Dallas police and prosecutors had no way of knowing [that he was] a Mexican national."⁵⁶⁴ This statement seems implausible. Although Suarez immigrated to the United States when he was three (he was nineteen at the time of the murder), he was carrying a green card when he was arrested and told police officers during a taped-confession the day after his arrest that he was from Mexico.⁵⁶⁵ Furthermore, Suarez's name alone should have indicated to police and prosecutorial authorities that Suarez might be from another country.

Protests over Suarez's execution were waged throughout the international community. The Mexican Congress passed a joint resolution asking Texas Governor Rick Perry and President Bush to intervene and reduce Suarez's sentence to life.⁵⁶⁶ Mexico and sixteen other nations, including Poland, Switzerland, Brazil, and Argentina, filed court briefs or wrote letters, pleading for clemency for Suarez.⁵⁶⁷ Although the use of the death penalty was an issue, "most of the international protests against the United States focus[ed] on violations of the Vienna Convention."⁵⁶⁸ Following the execution, President Fox cancelled a scheduled trip to meet with President Bush at his ranch in Crawford, Texas.⁵⁶⁹ The cancellation, according to Mexican officials, was meant to serve as an "unequivocal sign of repudiation" of Suarez's execution.⁵⁷⁰ Further, "Mexico is confident that the cancellation of this important presidential visit contributes to strengthening respect among all nations for the norms of international law, as well as the conventions that regulate the relations between nations."⁵⁷¹ A statement made by

and Others, N.Y. TIMES, Aug. 16, 2002, at A6; Karen Brooks, *Fox Asks Perry to Suspend Execution*, F.W. STAR-TELEGRAM, Aug. 13, 2002, at A1.

564. Brooks, *supra* note 563, at 565.

565. *Id.*

566. *Id.*

567. Thompson, *supra* note 563, at 565.

568. *Id.*

569. *Id.*

570. *Id.*

571. *Id.* (quoting a statement made by the Mexican government).

Governor Perry before the execution, however, calls into question whether Texas even understood what the protests were about: “We understand and appreciate their concern. . . . *We try to share with them the appropriate information that we would on any case.* It will be handled as it would for any individual who commits a heinous crime against our citizens.”⁵⁷² It is because Texas failed to share information in the first place, however, that protests over Suarez’s execution had reached such a fevered pitch.⁵⁷³

International outcry was also recently heard in another case, involving a British citizen, the death penalty, and the Vienna Convention.⁵⁷⁴ On March 12, 2002, Tracy Housel was executed for murder despite never having been informed of his consular rights and over the protests of the British government, the European Union, and nongovernmental organizations.⁵⁷⁵ Pleas for clemency again fell on deaf ears even though the Vienna Convention was violated.⁵⁷⁶ The scenario seen by Breard, the LaGrands, Suarez, and Housel will likely continue. As pointed out during the protests over Suarez’s execution, there are more than 120 foreign nationals on death row.⁵⁷⁷ Because Mexico has vowed to fight the use of the death penalty against its citizens in the United States,⁵⁷⁸ we will likely be seeing more protests from Mexico, as more than half of the foreign nationals on death row are from Mexico. Perhaps, another suit will soon be brought before the ICJ to serve as a reminder to the United States of its obligations to foreign nationals under international law, which it seems to have forgotten so quickly in a little over a year.

The situation in the United States, however, is not completely hopeless. Although every means of seeking to protect

572. Brooks, *supra* note 563 (emphasis added).

573. *Id.*

574. See Kate Randall, *British Citizen Executed in the U.S. Despite International Protests*, WORLD SOCIALIST WEB SITE, Mar. 14, 2002, at http://www.wsws.org/article/2002/mar2002/exec-m14_prn.shtml.

575. *Id.*

576. *Id.*

577. Thompson, *supra* note 563.

578. *Id.*

a foreign national's rights under Article 36 seem destined to fail, the following must be considered: (1) two international bodies with authority to interpret the Vienna Convention have stated that Article 36 creates individual, if not human, rights, and the United States Supreme Court may also be willing to accept this conclusion;⁵⁷⁹ (2) under the binding decision of the ICJ, the United States is required to provide review and reconsideration of convictions of Article 36 violations according to its domestic procedural rules, and those courts that fail to do so are in violation of international law;⁵⁸⁰ (3) many American courts have implied that appropriate remedies may be available if prejudice is shown, so that with the proper record, a defendant may have a chance of reversal or at least review by a higher court;⁵⁸¹ and (4) regardless of what initial violations of Article 36 occur in a case, access to consular officials, even if provided late in criminal proceedings, can still be effective in protecting a foreign national's rights.⁵⁸²

Civil suits may also provide opportunities to remedy violations of Article 36. In *Standt v. City of New York*, a German national sued the City of New York for, among other things, failing to allow him to meet with consular officials, even though he asked to do so.⁵⁸³ While under arrest for driving while intoxicated (charges that were eventually dropped), Standt alleged that he was physically abused by police officials.⁵⁸⁴ A federal judge held that a private right of action exists under the

579. See *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104, para. 77 (June 27), available at http://www.icj-cij.org/iccjwww/idocket/igus/igusjudgement/igus_ijudgement_20010625.htm; Inter-Am. C.H.R., The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, paras. 83-84 (ser. A) no. 16, (Oct. 1, 1999); see also *Breard v. Greene*, 523 U.S. 371, 375-76 (1998) (recognizing that the Vienna Convention might confer an individual right).

580. See *LaGrand Case*, 2001 I.C.J. 104, para. 125.

581. See, e.g., *Darling v. State*, 808 So. 2d 145, 165-66 (Fla. 2002) (refusing to reach a decision on a claim that Article 36 was violated because no prejudice was shown); *State v. Lopez*, 633 N.W.2d 774, 783 (Iowa 2001) (stating that a defendant must show actual prejudice because Article 36 does not confer a fundamental right).

582. See *Valdez v. State*, 2002 Okla. Crim. App. 20; 46 P.3d 703, 706.

583. *Standt v. City of New York*, 153 F. Supp. 2d 417, 420 (S.D.N.Y. 2001).

584. *Id.* at 420-21.

Vienna Convention for individuals detained by foreign officials and that the individual could bring a civil suit under 42 U.S.C. §1983 for “violation of his right to consular notification.”⁵⁸⁵ Thus, if no remedy is provided in the criminal proceedings, at least some form of monetary compensation may be available to the defendant from the detaining authorities.⁵⁸⁶

Based on the protests from the international community over Suarez’s execution, it is becoming increasingly clear that the United States is standing alone in its interpretation of Article 36. And while the State Department contends that it regularly works with law enforcement officials to ensure compliance with the requirements of Article 36, those reminders have not proven effective in preventing violations of Article 36.⁵⁸⁷ Because the international community recognizes the Vienna Convention as conferring individual rights,⁵⁸⁸ the State Department’s reliance on diplomatic measures to remedy violations of Article 36 also appears to be an unacceptable way among other signatory States to enforce the Convention. If the United States values its relations with other countries, it should take the concerns voiced by the international community seriously, and it should take more aggressive measures to ensure that foreign nationals arrested in this country receive timely and effective consular notice and access. And in those instances where the convention has been violated, the United States should attempt to ensure that appropriate and effective remedies are provided to the foreign national whose rights have

585. *Id.* at 427-29; *see also* Anthony v. City of New York, No. 00 Civ. 4688 (DLC), 2002 WL 73719, at *6 (S.D.N.Y. Apr. 25, 2002) (stating the district court in *Standt* did not create a new cause of action under section 1983, but merely confirmed that such a cause of action exists).

586. *See Standt*, 153 F. Supp. 2d at 429 (distinguishing civil damages from remedies in criminal proceedings, stating that damages for unlawful detention are “much less ‘drastic’ than suppressing incriminatory evidence or dismissing an indictment against a properly charged criminal defendant”).

587. *See* United States v. Emuegbunam, 268 F.3d 377, 392-93 (6th Cir. 2001), *cert. denied*, 122 S.Ct. 1450, 152 L.Ed.2d 392 (2002); United States v. Lombera-Camorlinga, 206 F.3d 882, 887-88 (9th Cir. 2000), *cert. denied*, 531 U.S. 991 (2000).

588. Inter-Am. C.H.R., The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, para. 84 (ser. A) no. 16, (Oct. 1, 1999).

been violated. Instead, the use of diplomacy to remedy violations of Article 36 has resulted in two ships passing in the night: the United States is sailing alone in one direction, while the other State parties to the Convention are sailing together in the opposite direction.

VI. CONCLUSION

In addressing the violations of Article 36, U.S. courts have essentially created unenforceable rights to consular notification and access. In the United States, Article 36 has, in a sense, become a “toothless, clawless lion.”⁵⁸⁹ While there is a right in international law to consular notification and access, which some American courts have recognized,⁵⁹⁰ few have been willing to enforce these rights or ensure that they have any strength. For American courts to bring themselves in line with international law, they should cease relying on the interpretations of the State Department, which are no longer tenable in light of the *LaGrand* case. The courts should begin respecting the binding decision of the ICJ. As it stands now, courts are deferring “to the post-hoc rationalization of an agency charged with enforcement of a treaty provision [whose] enforcement has been so notably lax.”⁵⁹¹

What is remarkable about the cases addressing consular rights violations since *LaGrand* is how few of them even mention the ICJ’s decision. A court in the United States, if it is to interpret international treaties, should be responsible for knowing the interpretations given to those treaties by international tribunals that have the authority to interpret them. It would be hypocritical for a court to require a defense attorney to know that he should be aware of the Vienna Convention and the cases interpreting it, while courts do not hold themselves to the same standard.

In interpreting the Vienna Convention in light of *LaGrand*, courts should consider the potential ramifications of continuing to follow a line of precedents that denies the existence of rights

589. *Lombera-Camorlinga*, 206 F.3d at 888 (Browning, J., dissenting).

590. *United States v. Calderon-Medina*, 591 F.2d 529, 531 n.6 (9th Cir. 1979).

591. *Lombera-Camorlinga*, 206 F.3d at 890.

and remedies under Article 36. Principles of comity and the need to deter future violations should be primary considerations. The Vienna Convention is not just about Angel Breard, Walter and Karl LaGrand, and Mario Murphy. The Vienna Convention is also about Jack, the hopeless American tourist, trapped in the maze of a foreign judicial system, which is now spiteful of American arrogance toward international law. In interpreting Article 36, courts should ask themselves, "Are the future diplomatic interests of the United States and its citizens traveling abroad not compelling reasons to comply with the Vienna Convention?"

President Bush recently stated that he has no objection to international treaties "as long as they protect American interests and reflect the reality of the world today."⁵⁹² While President Bush's remarks should not be the proper method for determining whether to abide by international commitments, even under this "reality of the world" test, the United States and American courts should strive to provide an effective means of ensuring compliance with Article 36 and the decision in *LaGrand*. When an American travels abroad, his rights are at stake every time a foreign national's consular rights are violated in the United States. The best way to ensure that "other nations honor the treaty by providing consular access to our nationals is to demand strict adherence to the right to consular access for foreigners in *our* country. If the United States fails in its responsibilities under the convention, then other member countries may choose to do unto us as we have done unto them."⁵⁹³

592. David E. Sanger, *Prisoners Straddle an Ideological Chasm*, N.Y. TIMES, Jan. 27, 2002, at A16 (discussing remarks made by President Bush); see also Katharine Q. Seelye, *Powell Asks Bush to Review Stand on War Captives*, N.Y. TIMES, Jan. 27, 2002, at A1.

593. *State v. Issa*, 752 N.E.2d 904, 935 (Ohio 2001) (Stratton, J., dissenting).