The Federal Republic of Germany v. The United States of America: The Individual Right to Consular Access

Daniel J. Lehman*

I. Introduction

Imagine you are in a foreign jail. You have no understanding of the legal process or what rights you may or may not have. You may not have a working knowledge of the language of your interrogators or even know why you are being questioned. You do not know what or what not to tell them. You are without friends or resources. You are completely at the mercy of the unknown.[1] Cesar Roberto Fierro, who now sits on death row in Texas, faced a very similar situation.[2]

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* J.D. expected 2003, University of Minnesota. B.A. 1996, Michigan State University. I would like to thank Dennis A. Hachler of Pendleton, Oregon, for introducing me to and advising me on this topic. I would also like to thank Mark Warren of Amnesty International Canada, Sandra Babcock of Minneapolis, Minnesota, and Professor David Weissbrodt of the University of Minnesota Law School for their valuable advice and expertise on this issue. I would like to thank Yolanda Guzman and Mary Schug for their valuable assistance with this project, as well as my parents and Professor Donald Marshall for their support and encouragement.

1. This hypothetical illustrates the earliest and most basic issues faced by a detained noncitizen, not only in a country with a stereotypically corrupt military government, but in the United States as well. *See, e.g.*, Press Release, Amnesty Int'l, Torture–A Modern Day Plague (Oct. 18, 2000) (reporting that "torture or ill-treatment by state agents occurred in over 150 countries and was widespread in more than 70," and that from 1997 to 2000, people have "died as a result of torture in over 80 countries"), http://web.amnesty.org/ai.nsf/THEMES/TORTURE. One could imagine how a citizen of one of these nations would perceive her situation when in the custody of U.S. authorities and unaware of the safeguards afforded to those within the U.S. criminal justice system.

2. *See* Fierro v. State, 706 S.W.2d 310, 320 (Tex. Crim. App. 1986). Mr. Fierro was convicted and sentenced to death in Texas for the 1979 murder of an El Paso taxi cab driver. *See id.* Police obtained a confession from Mr. Fierro by informing him that his parents were in the custody of the Ciudad Juarez police and subject to a particularly notorious police commandante, thereby causing him to fear the worst for his parents. Brief of Amicus Curiae United Mexican States in Support of Petition for Writ of Certiorari at 5-9, Fierro v. Lynaugh, 879 F.2d 1276 (5th Cir. 1989); *see also Ex parte* Fierro, 934 S.W.2d 370, 371 (Tex. Crim. App. 1996) (noting that the trial court in a state habeas corpus proceeding found a strong likelihood

This scenario becomes somewhat less formidable when the detainee has the advice and backing of his or her nation's consulate.[3] The consulate will typically provide information concerning the receiving State's[4] legal system and provide support for the defendant.[5] This guidance helps ensure the protection of the sending State's citizens within the legal boundaries of the receiving State.[6] Article 36 of the Vienna Convention on Consular Relations (Vienna Convention) established a standard protocol to facilitate these consular functions.[7]

Law enforcement officials in the United States do not consistently honor Vienna Convention obligations, and U.S. courts have been reluctant to give the necessary effect to the treaty to achieve compliance with its obligations.[8] The reasons courts have

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that the confession was coerced by joint action of the Ciudad Juarez police and the El Paso police).

3. *See, e.g.*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, ASSISTANCE TO CITIZENS ARRESTED ABROAD, *at* http://travel.state.gov/arrest.html (1997) (providing a list of services for U.S. citizens arrested abroad); *see also* Gregory Dean Gisvold, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 MINN. L. REV. 771, 783-84 & nn.51-54 (1994) (noting that most countries have procedures in place for consular authorities to provide assistance to their citizens when detained by foreign authorities).

4. *See generally* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. This Comment will use the Vienna Convention terminology, which refers to the State of which the nonresident detainee is a citizen as the "sending State." *Id.* The "receiving State" refers to the nation in which the citizen is present at the time of detention. *Id.*

5. *See, e.g., id.* (defining consular functions).

6. For example, consular authorities representing a noncitizen defendant in the United States could provide an explanation of the right to have legal representation provided. *See, e.g.*, People v. Medina, No. 97 CR 307, Division B (Colo. Dist. Ct. 1998), http://www.state.co.us/defenders/Library/Mata-Medina/Antonio%20Mata-Medina%20Order.html (stating that the defendant wanted, but could not afford, an attorney and did not understand that the State would provide one at no charge); *see also* Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996) (noting that the Canadian government "require[s] that the Canadian consul obtain case-related information if requested by the arrestee to the extent that it cannot otherwise be obtained by the arrestee").

7. *See* Vienna Convention on Consular Relations, *supra* note 4, art. 36, 21 U.S.T. at 100-01, 596 U.N.T.S. at 292-94. The Convention's Optional Protocol on Disputes grants jurisdiction to the International Court of Justice to resolve all disputes arising from the Vienna Convention and to give an authoritative interpretation to the Vienna Convention's provisions. 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].

8. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 375-78 (1998) (holding that there was an Article 36 violation but that the claim was precluded because it was not raised in the state court); *see also* United States v. Jimenez-Nava, 243 F.3d 192,

given for denying relief for violations of convention obligations include procedural default, lack of prejudice to the defendant, and that the treaty does not stipulate an individual right to relief.[9] Courts have looked to the State Department use of informational resources as providing adequate protection against Vienna Convention violations.[10] The State Department's acknowledgment of the importance of compliance with Article 36 obligations is evident from its publication of a handbook instructing law enforcement officials on the notification of consular rights.[11] The

198 (5th Cir. 2001) (holding that the Vienna Convention does not create an individually enforceable right for an arrested foreign national to consult with consular officials); United States v. Lombera-Camorlinga, 206 F.3d 882, 886 (9th Cir. 2000) (en banc) (holding that a violation of the Vienna Convention's consular notification requirement does not require suppression of subsequently obtained evidence in a criminal proceeding against a noncitizen defendant); Commonwealth v. Quaranibal, 763 A.2d 941, 945 (Pa. Super. Ct. 2000) (holding that the Article 36 claim was precluded because it was not raised at trial or on direct appeal, but that even if it had been raised, the treaty does not confer individual rights and that appellant suffered no prejudice.)

9. *See* sources cited *supra* note 8.

10. *See Lombera-Camorlinga*, 206 F.3d at 887-88. In this split decision of the Ninth Circuit sitting en banc, the majority pointed out the State Department's role in investigating and implementing treaty provisions. *See id.* at 887. The court stated that "the fact that the State Department is willing to and in fact does work directly with law enforcement to ensure compliance detracts in this instance from the traditional justification for the exclusionary rule." *Id.* at 887-88. The court noted that the framers of the Vienna Convention could not have had the unique character of the Fifth and Sixth Amendments in mind, and therefore such remedies as the exclusionary rule could not have been intended. *See id.* at 886. The court cited *Arizona v. Evans*, 514 U.S. 1, 10-11 (1995), for the proposition that "[t]he exclusionary rule operates as a judicially created remedy designed to safeguard against future violations . . . through the rule's general deterrent effect. As with any remedial device, the rule's application has been restricted to those instances where its remedial objectives are thought most efficaciously served." *Lombera-Camorlinga*, 206 F.3d at 888. The dissent countered by characterizing the State Department's practice in this area as being "equivalent to securing enforcement by a toothless, clawless lion." *Id.* at 888 (Boochever, J., dissenting). The dissent further noted that suffering imprisonment to "which [defendants] would not have been subjected had their rights been observed . . . hardly conforms to the . . . principles embodied in the United States Constitution." *Id. See also infra* notes 135-136 and accompanying text (discussing exclusion of evidence as a remedy for government misconduct).

11. *See* BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE, AND OTHER LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM, *at* http://travel.state.gov/consul_notify.html (1998). The handbook lists the Article 36 obligations and states that "[w]hen foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified." *Id.* at pt. 1. The handbook emphasizes the importance of notification as it would pertain to U.S. citizens abroad:

Justice Department also affirmatively acknowledges that notification of consular rights is required of its agents.[12]

This issue is of great importance in the wake of the September 11 attacks on the United States and the ensuing "War on Terrorism."[13] As of January 11, 2002, law enforcement officials within the United States have detained more than 700 foreign nationals on immigration violations or other charges.[14] Some consulates do not even know the number of their citizens who are currently in detention.[15]

U.S. violations of Article 36 first came to the attention of the International Court of Justice (ICJ) at The Hague in a proceeding instituted by Paraguay concerning one of its citizens, Angel Francisco Breard.[16] The ICJ found the case within its jurisdiction and issued an order requesting the United States to refrain from executing Breard pending its final decision.[17] Subsequent to the U.S. Supreme Court's denial of Breard's habeas corpus petition[18] and his execution, Paraguay discontinued its ICJ proceedings against the U.S.[19]

> 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.

Id. *See also infra* note 81 (noting the use of the above pamphlet as a defense before the ICJ to show U.S. compliance with Vienna Convention obligations).

12. *See* Notification of Consular Officers upon the Arrest of Foreign Nationals, 28 C.F.R. § 50.5 (2001).

13. *See, e.g.*, Evan Thomas et al., *Justice Kept in the Dark*, NEWSWEEK, Dec. 10, 2001, at 37 (noting the effects of the antiterrorism dragnet on noncitizens in the U.S. following the September 11 attacks).

14. Tamar Lewin, *A Nation Challenged: The Detainees; Rights Groups Press for Names of Muslims Held in New Jersey*, N.Y. TIMES, Jan. 23, 2002, at A9.

15. *See, e.g.*, William Glaberson, *A Frustrated A.C.L.U. Tries to Guide Consulates Through a Thicket*, N.Y. TIMES, Jan. 2, 2002, at A11 (reporting that the deputy consul for Morocco stated that his consulate is unaware of both the number and identity of Moroccan citizens in detention).

16. *See* Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 249 (Apr. 9).

17. *See id.* at 258; *see also infra* notes 62-68 and accompanying text (discussing the Supreme Court's treatment of Article 36 in *Breard v. Greene*, 523 U.S. 371 (1998)).

18. *See Breard*, 523 U.S. at 378.

19. *See* Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 426, 427 (Nov. 10).

In *LaGrand Case*,[20] the ICJ had occasion to interpret and address Article 36 issues when Germany brought an action against the United States subsequent to the execution of two of its citizens in Arizona. This Comment will look at the issues the ICJ addressed, analyze its holdings within the context of U.S. jurisprudence, and determine the effects on similarly situated defendants in the future. This discussion will include issues arising in many Article 36 cases, including death penalty cases.[21]

Section II of this Comment will provide a background of Article 36, and detail the Article and related jurisprudence in the United States before *LaGrand*.[22] Section III will examine the *LaGrand* case and the issues the ICJ decided.[23] Section IV will apply the holdings of the ICJ to previous U.S. court decisions to determine what changes should result from the ICJ's interpretation of Article 36 in *LaGrand*.[24] Section IV will also look at cases in which courts found that an individual right to notification exists.[25] Finally, Section IV will address the remedies that may be available to establish a policy of compliance with Vienna Convention obligations and to preserve fair and adequate access to the due process of the laws that is the hallmark of the U.S. legal system.[26]

This Comment will show that Article 36 creates an individual right for a noncitizen in U.S. custody to receive consular assistance from his or her consulate that, when violated, often infringes upon constitutional protections.[27] The United States should observe its obligation under Article 36 to ensure that noncitizen defendants receive the protections guaranteed citizen defendants in U.S. courts. Observation of Article 36 does not create any "special" rights upon which the noncitizen defendant may call; it simply

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20. LaGrand Case, (F.R.G. v. U.S.), 40 I.L.M. 1069 (June 27, 2001).

21. *See* John Quigley, *Execution of Foreign Nationals in the United States: Pressure from Foreign Governments Against the Death Penalty*, 4 ILSA J. INT'L & COMP. L. 589, 589-91 (1998). Half of the world's nations do not use capital punishment, and none of the Western European nations do. *Id.* at 589. The United States faces extensive opposition, especially from the Western European nations, to its capital punishment practices. *See id.* at 589-91.

22. *See infra* notes 28-71 and accompanying text.

23. *See infra* notes 72-90 and accompanying text.

24. *See infra* notes 91-159 and accompanying text.

25. *See infra* notes 152-157 and accompanying text; *see also infra* note 49 (listing additional relevant cases).

26. *See infra* notes 135-159 and accompanying text.

27. *See* U.S. CONST. amends. IV-VIII; *see also infra* notes 97-159 and accompanying text.

helps secure the same treatment as the citizen defendant receives in U.S. courts. This Comment will look at remedies which are intended to preserve this fair and equal treatment expected in the U.S. legal system.

II. Background

A. The Vienna Convention on Consular Relations and Optional Protocol on Disputes

The United Nations General Assembly convened the United Nations Conference on Consular Relations in 1963 to establish and codify a uniform consular protocol.[28] Among the most important contributions of the resulting Convention was a provision to facilitate communication between detained individuals and their consulates.[29] This issue was the subject of extensive debate,[30] resulting in the inclusion of Article 36 into the Vienna Convention.[31]

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28. *See* Luke T. Lee, *Vienna Convention on Consular Relations*, INT'L CONCILIATION, Jan. 1969, at 41, 41-47. The changing international political climate following World War II brought the need for a uniform consular code to the attention of the United Nations. *Id.* at 46-47.

29. *See* LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 107 (1966).

30. *See id.* at 107-14. The provision in the Vienna Convention for consular notification was one of the most hotly contested items at the convention. *See id.* at 107. Objections to a consular notification provision included: an administrative burden may result for countries with large numbers of immigrants; individuals may not want their country to be notified; some nations have laws requiring the consent of the detained before a third party may be notified; the provision would create a higher degree of protection than that afforded citizens of the receiving country; and the right of a national from a sending State to communicate with her consulate is not within the scope of the instant convention, but that of the Declaration of Human Rights. *See id.* at 109-10. Many nations, including the United States, strongly argued in support of a consular access provision, and following a series of amendments, the Article was passed in its present form. *See id.* at 111-14.

31. Article 36 of the Vienna Convention on Consular Relations states:

COMMUNICATION AND CONTACT WITH NATIONALS OF THE SENDING STATE

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

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

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its

The United States ratified the Vienna Convention on Consular Relations and the Optional Protocol on Disputes on December 24, 1969.[32] The six-year delay between the signing of the treaty and ratification was due to executive branch disagreement over the sufficiency of the standards of the consular relations rules.[33] The United States did not believe the Convention went far enough to ensure proper standards for consular communication.[34]

The Vienna Convention contains a built-in procedure for the adjudication of disputes arising from the Convention provisions.[35] The Optional Protocol Concerning the Compulsory Settlement of Disputes confers upon the ICJ compulsory jurisdiction over the interpretation of the treaty to the parties to the protocol.[36] The

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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.

Vienna Convention on Consular Relations, *supra* note 4, art. 36, 21 U.S.T. at 100-01, 596 U.N.T.S. at 292-94.

32. *See id.*, 21 U.S.T. at 373.

33. *See* 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, 568-69 nn.9-16 (1997).

34. *See id.* at 569 & n.14. The executive branch preferred the bilateral treaties that the United States had previously joined which provided higher standards for consular accessibility. *See id.* Evidence from the Senate debate on ratification explicitly stated that the standards set forth by the Convention were lower than those for the bilateral agreements on consular relations to which the United States was a party. *See id.* at 569 n.14 (citing 115 CONG. REC. S30,997 (daily ed. Oct. 22, 1969) (statement of Sen. Fulbright)).

35. *See* Optional Protocol, supra note 7, 21 U.S.T. 325, 596 U.N.T.S. 487.

36. *See id.* The preamble and Article I of the Protocol state the jurisdiction of the International Court of Justice over disputes arising out of the Convention:

The States Parties to the present Protocol and to the Vienna Convention

United States is a party to this Optional Protocol.[37]

When law enforcement seizes an individual in the United States, he is entitled to a presumption of innocence[38] and a guarantee of the protections afforded by the Constitution.[39] Since one of the main objectives of a consulate is to assure fair treatment of its citizens abroad, this protection is unavailable when a detainee's consular access is inhibited.[40] The importance of consular access is especially evident in capital cases where access to mitigating evidence may only be possible through consular assistance.[41]

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of Consular Relations, hereinafter referred to as "the Convention", adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963,

Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period,

Have agreed as follows:

Article I

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Id. preamble and art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488.

37. *See* LEE, *supra* note 29, at 198-204. The United States, despite its longstanding tradition of refusing to confer meaningful jurisdiction on an international court, proposed a disputes clause to the Convention. *See id.* at 189-90. The United States argued that a codification of international law would require measures to ensure compliance. *See id.* at 199. The Convention concluded with the present Optional Protocol. *See id.* at 204. The United States had effectively come forth as an important proponent for the acceptance of the ICJ's jurisdiction over the Convention. *See id.*

38. *See* Herrera v. Collins, 506 U.S. 390, 398 (1993).

39. Two themes that consistently arise in Article 36 discussions are the rights established under the Fifth and Sixth Amendments. The Fifth Amendment protects a defendant from self-incrimination. U.S. CONST. amend. V; Miranda v. Arizona, 384 U.S. 436, 439 (1966). The Sixth Amendment states that an accused shall have the assistance of counsel in presenting his defense. U.S. CONST. amend. VI. The Sixth Amendment, applicable to the states through the Fourteenth Amendment, requires a State to provide counsel for a criminal defendant who cannot afford representation. Gideon v. Wainwright, 372 U.S. 335, 339-40 (1963). A corollary to this right is that counsel must render *effective* assistance. *See* Powell v. Alabama, 287 U.S. 45, 56-59 (1932); Strickland v. Washington, 486 U.S. 668, 686 (1984).

40. *See supra* notes 3-6 and accompanying text.

41. *See infra* notes 126-130 and accompanying text (explaining the necessity of consular assistance in obtaining from the sending State mitigating evidence that would be otherwise unattainable).

B. Article 36 Jurisprudence in the United States

United States v. Calderon-Medina[42] was among the first cases in which a defendant asserted an individual right to consular notification and access.[43] The Ninth Circuit held that individual rights might flow from Article 36.[44] The court held that if Calderon-Medina could show prejudice resulting from the violation, then his deportation would be unlawful.[45]

The Ninth Circuit revisited the issue the following year in *United States v. Rangel-Gonzales*.[46] Rangel-Gonzales was not informed of his right to contact the Mexican Consulate upon his detention.[47] The court dismissed the charges, finding that the Consulate could have assisted the defendant in a way that might have favorably influenced the outcome of the case.[48]

Courts have not decided whether the Vienna Convention creates an individually enforceable right outside of the

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42. 591 F.2d 529 (9th Cir. 1979).

43. *See id.* at 531.

44. *See id.* Despite arguments that the treaty was meant to benefit consular efficiency, the court noted that:

> [P]rotection of some interests of aliens as a class is a corollary to consular efficiency. This is evident because consular functions listed in [A]rticle 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. at 531-32 n.6 (citing 115 CONG. REC. 30,945 (1969)).

45. *See id.* at 532.

46. 617 F.2d 529 (9th Cir. 1980).

47. *See id.* at 531. Rangel-Gonzales was arrested for illegal reentry into the United States after deportation. *Id.* at 529. He filed an affidavit stating that he had not been informed of his right to contact the Mexican Consulate and that if he had known of this right, he would have contacted the consulate. *Id.* at 531.

48. *See id.* The affidavit of the Mexican Consul General in Seattle stated that his office would visit a Mexican citizen who requested assistance, assist him in contacting friends and an attorney, and possibly send a consular official to the deportation hearing. *Id.* The court referred to a statement by an experienced immigration lawyer who stated that, with the appropriate assistance, the defendant could have obtained a voluntary departure rather than deportation. *See id.* Family members, along with legal and social groups, also stated that they would have assisted the defendant if aware of his situation. *Id.*

The court concluded that these statements "made a prima facie showing of prejudice within the meaning of *Calderon-Medina*." *Id.* The court found that the defendant had met the burden of showing that he did not know of his right to consult with his consulate, that he would have done so had he known, and "that there was a likelihood that the contact would have resulted in assistance to him in resisting deportation." *Id.* at 533.

immigration context.[49] Courts have often decided that there was no prejudice to the defendant and then worked "backwards" from that point to avoid deciding whether an individual right exists.[50] Courts have refused to hear Vienna Convention claims which were not properly raised in a lower court.[51] Courts have acted under the assumption that even if there is an individual right under Article 36, it is not a *constitutional* right, and therefore available remedies are not applicable.[52] Many courts have looked at the "plain meaning" of the treaty and, seeing that there was no specified remedy, declared that a common remedy, such as exclusion of evidence, did not apply.[53]

Because the two most notable recent cases in this area of law have involved the death penalty,[54] a brief examination of applicable jurisprudence is required. Justice Marshall's opinion in *Ford v. Wainwright*[55] noted the heightened scrutiny for

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49. U.S. courts have been quite reluctant to decide this issue. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 377 (1998) (stating that the Vienna Convention arguably confers on an individual the right to consular assistance following arrest). *Compare* United States v. Chucks Emuegbunam, No. 00-1399, 2001 U.S. App. LEXIS (6th Cir. Oct. 5, 2001) (stating that the treaty did not create an individually enforceable right) *with* Standt v. City of New York, 153 F. Supp. 2d 417, 431 (S.D.N.Y. 2001) (holding, in a case of first impression in that district, that the Vienna Convention conferred a private right of action of an individual which may be pursued via 42 U.S.C. § 1983) *and* State v. Reyes, 740 A.2d 7 (Del. Super. Ct. 1999) (finding an individual right to notification and ordering the suppression of evidence resulting from a tainted confession).

50. *See, e.g.*, Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996) (finding that although Texas admitted there was a violation of the Vienna Convention, there was no evidence of a prejudicial effect); *see also Breard*, 523 U.S. at 376-77 ("The Vienna Convention . . . arguably confers . . . an . . . individual right . . . . [I]t 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 this action no such showing could even arguably be made.").

51. *See infra* Part II.C.

52. *See, e.g.*, United States v. Lombera-Camorlinga, 206 F.3d 882, 885 (9th Cir. 2000) (en banc) (holding that while some treaties may explicitly contain individually enforceable rights, the Vienna Convention does not explicitly identify remedies for breach of its terms).

53. *See, e.g.*, Rocha v. Texas, 16 S.W.3d 1, 17 (Tex. Crim. App. 1999) (citing federal decisions in which the common remedies were not applicable since no remedy was specified and declining to exclude evidence since that court would be the only jurisdiction in the world excluding evidence obtained in violation of a treaty). *But see Reyes*, 740 A.2d 7 (suppressing statements obtained without notifying the defendant of his Vienna Convention rights).

54. *See Breard*, 523 U.S. 371; LaGrand Case (F.R.G. v. U.S.), 40 I.L.M. 1069 (June 27, 2001).

55. 477 U.S. 399 (1986).

evidentiary factors involved in the death penalty process.[56] In death penalty proceedings, the "factfinder must have all possible relevant information about the individual defendant whose fate it must determine."[57] The Supreme Court has held that a State may not prohibit the capital defendant from submitting *any* relevant information.[58]

C. Breard v. Greene *and the Antiterrorism and Effective Death Penalty Act*

Congress passed the Antiterrorism and Effective Death Penalty Act of 1996[59] (AEDPA) to grant law enforcement additional tools to combat increasing threats of terrorism and to "speed up" what it perceived to be a slow and drawn-out death penalty process.[60] The pertinent provision of the Act precludes federal habeas corpus review for claims that did not first arise in state court.[61]

In deciding *Breard v. Greene*,[62] the Supreme Court applied the AEDPA and the doctrine of procedural default to a habeas

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56. *See id.* at 414. Marshall's discussion mirrors the "death is different" holding of *Gregg v. Georgia*, 428 U.S. 153, 188-89 (1976). The *Gregg* Court, in upholding Georgia's death penalty statute, mandated a strict and careful process to initiate the death penalty. *See Gregg*, 428 U.S. at 189-90.

57. *Ford*, 477 U.S. at 413 (citing Jurek v. Texas, 428 U.S. 262 (1976)).

58. *See id.*

59. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. §§ 2241-2255 and adding 28 U.S.C. §§ 2261-2266 (Supp. 1996)).

60. *See* Deborah L. Stahlkopf, *A Dark Day for Habeas Corpus: Successive Petitions Under the Antiterrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115, 1115 (1998). ("[I]n April 1996 Congress passed the Antiterrorism and Effective Death Penalty Act . . . [which] accomplished a decade-long effort to ensure that a . . . capital sentence imposed by a state court could be carried out without awaiting the disruptive, dilatory tactics of counsel for condemned prisoners.") (citing *A Constitutional Amendment for Crime Victims, 1997: Hearing on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. (1997) (statement of Sen. Hatch)).

61. *See* Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998). A federal habeas corpus petitioner may not bring a claim without first exhausting "all available state court remedies." *Id.* (citing Matthews v. Evatt, 105 F.3d 907, *cert. denied* 118 S. Ct. 102, and 28 U.S.C. § 2254(b)). The court stated that since Breard did not raise his Vienna Convention claim in a Virginia state court, a remedy was unavailable in a federal proceeding. *See id.* ("If a state court clearly and expressly bases its dismissal of a *habeas corpus* petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the *habeas corpus* petitioner has procedurally defaulted his federal habeas claim." (citing Coleman v. Thompson, 501 U.S. 722, 731-32 (1991))).

62. 523 U.S. 371 (1998).

corpus petition asserting an Article 36 violation.[63] The Court found that the AEDPA precluded this claim because Breard did not raise the issue in a state court proceeding.[64] The Court reasoned that the AEDPA, as an Act of Congress and on equal footing with a treaty, supercedes language in a prior enacted treaty inconsistent with the Act.[65] The Supreme Court denied the request for a stay of execution, which the ICJ had requested[66] pending further proceedings in that court.[67] The Supreme Court took note of the pending ICJ proceeding, but indicated that it was initiated too late in the process to have bearing on the decision.[68]

The responsibility for a failure to raise an Article 36 claim in state proceedings lies in the nature of the violation itself. An Article 36 violation occurs when the detaining official fails to inform the defendant of her right to speak with her consulate. This violation is comparable to the government misrepresenting to the defendant her rights as a detained individual. Therefore, without adequate legal advice from the often state-provided attorney, this claim *cannot* arise.[69] The failure to bring a Vienna Convention claim may lie with the defendant's counsel[70] or with an

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63. *See id.* Defendant Breard was convicted of rape and homicide in Virginia. Breard v. Commonwealth, 445 S.E.2d 670 (Va. 1994). Breard filed a federal habeas corpus petition alleging violation of his rights under Article 36. *Breard*, 523 U.S. at 373. The Republic of Paraguay, which had become aware of Breard's conviction sometime after January 1996, filed a separate action seeking declarative and injunctive relief against the Governor of Virginia. Paraguay v. Allen, 134 F.3d 622, 625 (4th Cir. 1998). The Vienna Convention claim first arose in the habeas corpus petition and did not arise in the state court proceeding. *Breard*, 523 U.S. at 375.

64. *See Breard*, 523 U.S. at 375-76.

65. *See id.* at 376-77.

66. *See* Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 258 (Apr. 9).

67. *See Breard*, 523 U.S. at 375. The Supreme Court held that:

> [W]ith respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.

Id. The Court then stated that assertions of error which defendant did not raise in state courts may not provide the basis for federal habeas corpus review. *See id.* at 376.

68. *See id.* at 378.

69. It hardly seems logical that a defendant could assert a right to consular access, part of which is the right to be notified of this right, without first having knowledge of the right.

70. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (citing several instances of attorneys representing capital defendants who lacked even the most basic knowledge of criminal defense or who were so grossly under-funded that

inadequately funded public defense system.[71]

III. The *LaGrand* Case

The Federal Republic of Germany brought an action against the United States before the ICJ on its own behalf and on behalf of two of its citizens.[72] The ICJ's jurisdiction is limited to cases brought by two States or disputes concerning treaties specifically providing for the ICJ to resolve disputes.[73] The ICJ's jurisdiction rests on the Vienna Convention's Optional Protocol granting the ICJ jurisdiction to settle disputes arising from interpretations of the Convention.[74] An ICJ decision is typically only binding as to the parties and the case before it, but the Optional Protocol to the Vienna Convention mandates that an ICJ interpretation of the treaty is authoritative.[75]

In 1982, Karl and Walter LaGrand were convicted of murder and sentenced to death in Arizona.[76] The LaGrands were German citizens, a fact of which the State of Arizona was aware in 1984, at the very latest.[77] However, it was not until June 1992 that

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they were rendered incapable of providing a proper defense).

71. *See, e.g.*, Albert L. Vreeland, II, *The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626, 640 (1991) (citing studies showing that the resources allocated to public defenders are often grossly "deficient in light of the needs of adequate representation").

72. *LaGrand Case*, (F.R.G. v. U.S.) 40 I.L.M. 1069, 1073-74 (June 27, 2001).

73. *See generally* DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 11 (3rd ed. 2001) (discussing the ICJ's general jurisdictional limitations).

74. *LaGrand*, 40 I.L.M. at 1080-85; *see also supra* notes 35-36 and accompanying text (explaining the procedure concerning the jurisdictional issues of the Optional Protocol to the Vienna Convention).

75. *Compare* WEISSBRODT ET AL., *supra* note 73, at 11 *with supra* notes 30-32 and accompanying text. The Optional Protocol conveys an authoritative interpretation of the Vienna Convention to parties to the Protocol. Optional Protocol, *supra* note 7, preamble and art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488. The United States and Germany are both parties to the Optional Protocol. *LaGrand*, 40 I.L.M. at 1076.

76. State v. LaGrand, 734 P.2d 563, 565 (Ariz. 1987). The brothers were convicted of murder in the first degree, attempted murder in the first degree, attempted armed robbery, and two counts of kidnapping. *Id.* The LaGrands were responsible for stabbing the deceased twenty-four times and stabbing another multiple times. *Id.* at 566.

77. There is a dispute as to when the authorities were aware of the LaGrands' nationality. *LaGrand*, 40 I.L.M. at 1076. Germany argued that authorities in Arizona, including probation and immigration officers, knew of the brothers' citizenship shortly after their arrest. *Id.* at 1076-77. The United States claimed the question centered on who was a "competent authority" within the meaning of

German authorities became aware of the LaGrands' imprisonment and pending executions.[78] Thereafter, an official from the Consulate-General of Germany in Los Angeles made several visits to the brothers in prison.[79]

The United States did concede that it had failed to perform its obligations under Article 36.[80] However, the United States pointed to the various efforts made to implement treaty obligations within law enforcement.[81] The ICJ noted that, at the time the LaGrands learned of their rights under the Convention, the doctrine of procedural default prevented an effective exercise of those rights.[82] The ICJ found it immaterial whether or not Germany would have granted assistance to the brothers or whether the LaGrands would have accepted such assistance; it was enough that government action (or inaction) rendered such assistance impossible.[83]

The ICJ interpreted paragraph 1(b) of Article 36 as creating an individual right for the detained national to consular notification.[84] The ICJ then addressed the application of

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Article 36. *Id.* at 1077. The United States claimed "competent authority" referred only to the arresting and detaining authorities, who claimed to have become aware of the brothers' German citizenship in late 1984, and not "other authorities." *Id.*

78. *Id.* at 1077. The LaGrands, who became aware of their consular rights from other sources and not from Arizona authorities, contacted the German Consulate. *See id.* The German government was unaware that the State of Arizona had knowledge of the LaGrands' citizenship until eight days before the scheduled execution of Walter LaGrand on March 3, 1999. Federal Republic of Germany v. United States, 526 U.S. 111 (1999) (Breyer, J., dissenting).

79. *See LaGrand*, 40 I.L.M. at 1077.

80. *Id.* at 1076-77.

81. *See* Counter-Memorial Submitted by the United States of America, LaGrand Case (F.R.G. v. U.S.), paras. 20-23 (Mar. 27, 2000), http://www.icj-cij.org/icjwww/idocket/igus/iguspleadings/igus_ipleading_countermemorial_us_2000 0327.htm. The United States pointed to various State Department efforts to gain compliance. *See id.* at para. 20; *see also supra* note 11 and accompanying text (describing the handbook provided to law enforcement officers regarding consular notification).

82. *See LaGrand*, 40 I.L.M. at 1084. The ICJ stated that the United States could not rely on this preclusion doctrine to defend itself against a wrong which it had committed. *See id.* It was also undisputed that, as soon as the LaGrands had learned of their rights under the Convention, they promptly sought to plead those rights. *Id.*

83. *See id.* at 1086-87. Germany, in fact, insisted that it had given the LaGrands assistance in raising the Vienna Convention claim and that it helped the LaGrands' attorneys investigate their childhood in Germany for mitigating evidence. *Id.* at 1077.

84. *See id.* at 1086-87. The ICJ noted the specific text of Article 36(1)(b), which states, "[t]he said authorities [referring to the detaining authorities] shall inform the person concerned without delay of *his rights* under this subparagraph." *Id.*

procedural default in this case.[85] The ICJ stated that a procedural rule could not be used to prevent "full effect [from being] given to the purposes for which the rights accorded under this article are intended."[86] The ICJ attached significance to the fact that the United States' Article 36 violation resulted in the issue not arising in the required timely fashion.[87] By the time the LaGrands were aware of their consular rights, the preclusion doctrine rendered the issue defaulted.[88] Accordingly, the ICJ held:

> [B]y not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers after violations referred to . . . had been established, the United States of America breached its obligation to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 2, of the Convention.[89]

The ICJ concluded that the United States must allow for review and reconsideration in all cases involving noncitizen detainees "subjected to prolonged detention or convicted and sentenced to severe penalties" and whose Convention rights had not been observed.[90]

IV. Protecting the Individual Defendant From the Undue Prejudice of an Article 36 Violation

The *LaGrand* decision did not announce an interpretation of the Convention that the United States had not debated and accepted during the Convention or its subsequent Senate ratification.[91] The fundamental precepts of the treaty are not in

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(quoting Vienna Convention on Consular Relations, *supra* note 4, art. 36(1)(b), 21 U.S.T. at 101, 596 U.N.T.S. at 292). The ICJ stated that this sentence specifically states that an individual right exists within the text of subparagraph (b). *See id.* The ICJ noted Germany's assertion that the duties imposed by Article 36 may be at the level of a "human right," but the ICJ did not find it necessary to decide whether consular access was indeed a "human right." *Id.*

85. *See id.* at 1090. The ICJ did not find fault in the premise of the procedural default rule per se, but in its application to the case at hand. *See id.*

86. *Id.*

87. *See id.* at 1090. The ICJ noted that the violation deprived the LaGrands of private representation that the German consulate could have provided at an earlier stage of the proceedings. *See id.*

88. *See id.* The ICJ stated that the procedural default application in this case prevented "full effect" from being given to the Article 36 rights. *Id.*

89. *Id.* at 1102 (concerning final judgment of the court regarding the procedural default issue).

90. *Id.* at 1100.

91. *See supra* notes 28-34 and accompanying text.

question; rather, it is the failure to address violations of these obligations.[92] The decision announces only the elementary principle that appropriate measures are necessary to address Convention violations in order to minimize the likelihood of a future breach.[93]

The United States' failure to give full effect to Vienna Convention obligations continues after the *LaGrand* ruling.[94] The courts and the defense bar must take action to safeguard consular protection for noncitizen detainees. Without the possibility of impairment to the specific case or to the law enforcement body, there is no reason, other than goodwill, for law enforcement to make an effort to comply with treaty obligations. It follows that the most effective measures to ensure compliance are those that create incentives for law enforcement officials to take the necessary precautions that ensure the protection of an individual detainee's right to consular access.

The ICJ ruling requires that appropriate measures be taken to properly address Article 36 violations.[95] This calls for substantive and, at times, remedial measures. The efforts the United States has made to ensure compliance with Convention obligations have been only prophylactic in nature and confer no substantive remedies or incentives for law enforcement compliance.[96]

A. The LaGrand *Decision and U.S. Law Are Not Mutually Exclusive*

On its face, the ICJ ruling that the United States cannot use the doctrine of procedural default to preclude an Article 36 claim seems to be in direct conflict with the Supreme Court's decision in *Breard*.[97] The ICJ ruling arguably may not be, however, in direct

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92. *See LaGrand*, 40 I.L.M. at 1100.

93. *See id.* at 1101.

94. *See supra* notes 14-15 and accompanying text.

95. *See LaGrand*, 40 I.L.M. at 1101.

96. *See supra* note 81 and accompanying text. The State Department efforts are entirely aimed at educating law enforcement officials on the necessity of consular notification. *See supra* note 11 and accompanying text.

97. *See supra* notes 64-67 and accompanying text. The Court's application of the procedural default doctrine to the *Breard* case came in a situation in which the defendant offered no proof of prejudice resulting from the violation. *See* Breard v. Greene, 523 U.S. 371 (1998). In contrast, in *LaGrand*, Germany offered to provide mitigating evidence that may have affected the brothers' sentence. *LaGrand*, 40 I.L.M. at 1086.

conflict. The *Breard* Court applied the AEDPA to the status of then-existing Article 36 interpretation.[98] The Court did leave open the possibility for further consideration subsequent to, and in light of, an ICJ ruling.[99]

The text of the Vienna Convention stipulates that the laws and regulations of the signatory nations must give full effect to the purposes and rights stipulated therein.[100] It therefore violates the Vienna Convention terms to apply the AEDPA so as to preclude an Article 36 claim from arising, thereby inhibiting possible remedial measures. Creation of a judicial exception for Article 36 claims need not conflict with the principle of stare decisis ("let the decision stand"), since future litigation will occur in light of the ICJ interpretation.[101]

The Vienna Convention, as a ratified treaty to which the United States is a party, is the law of the land,[102] and individual rights created by a treaty are applicable with the same force as statutory rights flowing from legislation enacted by Congress.[103] The Court, by stating that Article 36 *arguably* conveys a right to the individual and expressing its interest in the scheduled ICJ proceedings, left themselves with an opportunity to further consider this issue.[104] In the future, the Court must take into account the specific delegation to the ICJ of the authority to interpret the terms of the treaty.[105] It would be entirely against the intent of the Article's framers and that of the Senate, by consenting to the treaty, to ignore the ICJ interpretation.[106] The ICJ ruling should persuade the Court to recognize an individual right to consular access, thereby giving respect to the ruling and

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98. *See supra* notes 62-68 and accompanying text. At the time, there was no authoritative interpretation as to whether Article 36 created individual rights.

99. *See Breard*, 523 U.S. at 378 (noting that it was unfortunate that the ICJ proceedings had not occurred prior to the decision).

100. *See* Vienna Convention on Consular Relations, *supra* note 4, 21 U.S.T. at 100-01, 596 U.N.T.S. at 292-94.

101. *See supra* notes 82-90 and accompanying text.

102. *See* U.S. CONST. art. VI, cl. 2.

103. *See* Standt v. City of New York, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001) (citing Ackermann v. Levine, 788 F.2d 830, 838 (2d Cir. 1986) and Whitney v. Robertson, 124 U.S. 190, 194 (1888)).

104. *See Breard*, 523 U.S. at 376.

105. *See supra* note 36 and accompanying text.

106. *See supra* notes 35-37, 73-75 and accompanying text. It is particularly instructive of the intent of the framers and of the U.S. representatives that the United States supported the ICJ's jurisdiction over the Convention given the United States' long-standing aversion to granting an international court jurisdiction over its affairs.

full effect to the treaty obligations.

The ICJ interpretation that the AEDPA cancels out conflicting text within the Convention only seems to consider Congress' intentions of the broad purpose of the AEDPA and assumes Congress intended the AEDPA to supercede *all* preexisting law.[107] It is extremely doubtful that Congress could have intended to withdraw from this treaty and therefore expose U.S. citizens abroad to the possible harms that the treaty was designed to avert.[108] Without direct evidence of contrary intent from Congress, an interpretation that the AEDPA supercedes the Vienna Convention would produce an "absurd result" contrary to the public good.[109] Given the legislative history of the treaty and the ratification, it is evident that a great deal was at stake and that Congress has a strong interest in protecting individual U.S. citizens in foreign countries.[110] In agreeing to the terms of the Vienna Convention, the United States is obligated to observe these same interests that other nations have in protecting their citizens abroad.[111]

A court reviewing an Article 36 claim should note that the State and Justice Departments' interpretations of Article 36 affirmatively convey an obligation to inform the detained national

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107. The Congressional debate surrounding the AEDPA was silent on the Vienna Convention. *See, e.g.*, 142 CONG. REC. H3604-05 (1996) (demonstrating no congressional intent to withdraw from the Vienna Convention).

108. *See supra* notes 28-34 and accompanying text. The legislative history of both the Convention and Congressional debate are quite instructive on the intent of the framers and subsequent Senate ratification. The United States recognized early the importance of consular access and was reluctant to enter an agreement which would leave U.S. citizens abroad without the protection the government could supply and the citizens would expect. *See supra* notes 33-34 and accompanying text (noting the importance of consular access to the United States).

109. Congress could not have intended to leave U.S. citizens abroad without the protections afforded by Article 36. The Court should not assume, without evidence of specific congressional intent, and especially in light of the State Department's acknowledgement of the importance of notification, that Congress would withdraw from the Vienna Convention. This would produce the kind of "absurd" result which courts should avoid. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring) (noting that an interpretation of a statute, despite the plain meaning of its text, which produces an "absurd" result would not be proper absent clear evidence of Congressional intent).

110. *See supra* notes 28-34 and accompanying text.

111. Unilateral and subjective action would breach the terms of the Vienna Convention, rendering the treaty ineffective. *See generally* Vienna Convention on the Law of Treaties, May 23, 1969, art. 60, paras. 1-2, 1155 U.N.T.S. 331, 346 (defining remedies available to countries for a material breach of treaty terms). Customary international law allows for "suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting state." *Id.*

of his right to consular notification.[112] The State Department's interpretation should receive *Chevron*[113] deference absent a clear statement from Congress to the contrary.[114] In granting deference, courts should give ample weight to the inherently prejudicial effect of an Article 36 violation.[115]

B. Enforcement of Vienna Convention Rights in U.S. Courts

An interpretation that an individual right exists in Article 36 raises this related issue: an individual right exists, but there is no available avenue for enforcement or review.[116] Redress might be available through a case-by-case evaluation of the facts to determine the prejudicial effect of the violation on the defendant's constitutional rights. For example, if a defendant whose Article 36 rights have been violated cannot adequately give a valid waiver of his Fifth Amendment right against self-incrimination, then suppression of the resulting confession would be in order.[117] In this instance, Article 36 rights would be enforced to serve the Article's proper function of ensuring that a noncitizen defendant receives equal treatment of the laws within the United States.

The apparent pattern in federal habeas corpus petitions requesting relief for Article 36 violations is that the defendant did not know of his right to consular notification until it was too late for the defendant's consulate to take any meaningful action on his

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112. *See supra* notes 11-12 and accompanying text.

113. Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

114. *See id.* at 843-44. Absent a clear statement from Congress to the contrary, a court should give great weight to an agency construction of a statute made by an agency charged with its implementation. *Id.* This same canon of interpretation is applicable to State Department treaty interpretations. *See, e.g.*, El Al Isr. Airlines v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable view of the Executive Branch concerning the meaning of an international treaty.").

115. This "inherent prejudice" refers to the disadvantages placed upon the noncitizen defendant by failing to notify him of his consular rights. The denial of an opportunity to seek an avenue of assistance expressly provided for in Article 36 is arguably prejudicial to a defendant. *Cf. infra* note 144 (citing an example of a noncitizen detainee unable to comprehend his *Miranda* rights).

116. There are no procedures established for review or enforcement of Convention violations, at least not in matters directly related to a criminal proceeding. At least one court has recognized a cause of action for civil damages under 42 U.S.C. § 1983. *See* Standt v. City of New York, 153 F. Supp. 2d 417 (S.D.N.Y. 2001). For a discussion of *Standt*, see *infra* notes 152-157 and accompanying text.

117. *See infra* notes 135-136 and accompanying text (explaining the exclusionary rule).

behalf.[118] Whether fault lies with the attorneys representing the defendant at the state trial or with the appellate courts, it stems from government misconduct.[119] Currently the burden of this misconduct falls on the defendant, who must bear the full force of the law.

The failure to notify a defendant of her right to consular assistance effectively leaves her without consulate assistance. Without knowledge of the right, it follows that a defendant cannot raise this issue. If the defendant's attorney is not aware of or does not raise the issue, the defendant faces the possibility of procedural default, thereby forever losing any claim she might have had.[120] Denying a defendant a forum in which to address this issue is repugnant, not only to the ICJ opinion, but also to decency and justice.

1. Ineffective Assistance of Counsel and Prosecutorial Misconduct as Grounds for Habeas Corpus Relief

If a defendant's attorney failed to recognize the Article 36 violation at a time when consulate help would have been advantageous, or knew of the violation but did not raise the issue, the defendant may be able to use ineffective assistance of counsel as ground for habeas corpus relief.[121] An ineffective assistance of counsel claim must show that counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that this deficiency rendered the outcome of the proceedings unreliable.[122] Ignoring

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118. *See, e.g.*, Breard v. Greene, 523 U.S. 371 (1998); Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996) (involving defendants who were unaware of their right to consular access until long after conviction).

119. The United States, in ratifying the Vienna Convention, has specifically agreed to notify all detainees within its jurisdiction of their consular rights. *See supra* note 31-32 and accompanying text. This obligation serves, inter alia, as a foundation to allow the detainee access to his nation's consulate. Therefore, without the government's failure to comply, there would be no contestable issue.

120. *See supra* notes 61-63 and accompanying text.

121. There is a strong argument that an attorney failing to recognize or investigate this issue has denied the defendant effective assistance of counsel. Although the ineffective assistance may stem from the lack of resources allocated to the appointed representation, *see supra* note 70, or from the lack of a particular knowledge of Vienna Convention issues, the defendant is nonetheless denied the full benefit of his Sixth Amendment right to counsel. *See supra* note 39 (discussing the Sixth Amendment right to counsel).

122. Strickland v. Washington, 466 U.S. 668, 687 (1984). The test's first prong gives great deference to the attorney's professional judgment. *Id.* at 689-90. The second prong imposes an affirmative duty on the defendant to prove actual

the necessity and importance of the consular assistance cannot be characterized as tactical lawyering, but rather as a failure to access resources possibly available to the defendant.

The defendant who learns of his Article 36 rights after conviction could also argue that prosecutorial misconduct played a part in his conviction or sentencing.[123] The prosecution has, or should have, knowledge of Article 36 obligations.[124] This failure to disclose the violation and to advise the defendant of his rights may prevent discovery of exculpatory or mitigating evidence.[125]

2. The Impact of Article 36 Violations on Sentencing and the Death Penalty

In capital cases, the sentencing phase of the trial is crucial, essentially determining whether the convicted defendant lives or dies. Here, the defendant has a constitutional right to bring forth any mitigating evidence.[126] It is evident that in the case of the noncitizen defendant, his consulate has access to records and evidence relating to his background that might otherwise be unobtainable by him.[127]

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prejudice. *Id.* at 693. This affirmative duty does not, however, require the defendant to prove that the deficient representation more likely than not influenced the outcome of the proceeding. *Id.*

123. State rules for attorney conduct have regulations requiring prosecutors to disclose information relating to the defendant's guilt or mitigating circumstances. See, *e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.34(b) (1999), which states:

> A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to a defendant who has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment.

Id.

124. *See* Counter-Memorial Submitted by the United States of America, LaGrand Case (F.R.G. v. U.S.), paras. 20-23 (Mar. 27, 2000), http://www.icj-cij.org/icjwww/idocket/igus/iguspleadings/igus_ipleading_countermemorial_us_2000 0327.htm (noting State Department distribution of information on notification obligations to law enforcement officials, including prosecutors).

125. *See supra* note 123. New York state rules, for example, refer to the "existence of evidence" that may "negate the guilt" or "mitigate the degree" or "reduce the punishment." N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.34(b) (1999). The consulate could provide evidence unattainable by the defendant's attorney in this country.

126. *See* Gregg v. Georgia, 428 U.S. 153, 162-68 (1976). In order to not offend the Eighth Amendment ban on cruel and unusual punishment, a court must employ strict application guidelines and give the opportunity for mitigating evidence to be presented before a sentence may be passed. *See id; see also* McKoy v. North Carolina, 494 U.S. 433, 442 (1990) ("The Constitution requires States to allow consideration of mitigating evidence in capital cases.").

127. *See supra* note 83 and accompanying text; *see also* Faulder v. Johnson, 81

The Supreme Court has interpreted the Eighth Amendment to require that no barrier to the consideration of mitigating evidence may exist in a death penalty case.[128] A defendant is denied the opportunity to bring forth relevant mitigating evidence when an Article 36 violation precludes the defendant from bringing forth such evidence before the procedural bar has been raised.[129] In the capital punishment context, the failure to provide a forum to consider mitigating evidence would violate the Eighth Amendment's scrutiny requirements for application of the death penalty.[130]

If the defendant brings a habeas corpus petition asserting an Article 36 violation and proof that her consulate is able to provide sufficient support for the existence of mitigating or possibly exculpatory evidence that is unattainable without the consulate's assistance, a court should permit the evidence to be presented. In doing so, the court must note that the cause for the defendant's inability to provide the evidence earlier stems from the State's denial of a statutorily created individual right and must address the issue as one of government misconduct.

It is also of note how the basic facts of the *Breard* case may have influenced the Court's decision.[131] Justice Blackmun once observed that "easy cases make bad law."[132] Arguably, the Court was not willing to give Breard an opportunity to delay the punishment and instead, left that decision to the Virginia governor.[133] The Court noted that no discernable benefit to the defendant Breard would have come out of further proceedings,[134] and therefore it would be possible to evaluate the decision in terms of judicial economy. If the facts had been such that there was a more tangible prejudice to Breard from the violation, such as hampering his opportunity to present mitigating evidence, the

F.3d 515, 520 (5th Cir. 1996) (noting that the Canadian government requires the Canadian consul to "obtain case-related information if requested by the arrestee to the extent that it cannot otherwise be obtained by the arrestee").

128. *See McKoy*, 494 U.S. at 442.

129. *See supra* notes 59-61 and accompanying text.

130. *See supra* notes 54-58 and accompanying text.

131. Overwhelming evidence showed that Breard had committed an extremely brutal murder. *See* Breard v. Green, 523 U.S. 371, 372-73 (1998).

132. O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 804 (Blackmun, J., concurring) (observing that Holmes' observation that "hard cases make bad law" is applicable to the obvious and simple cases as well).

133. *See Breard*, 523 U.S. at 378.

134. *See id.* at 377-78.

Court may have reached a different conclusion.

In a capital case, courts could give substance to compliance efforts by providing a hearing to a defendant whose Convention rights were violated and allowing the sending State's consulate a full opportunity to bring forth information bearing on the case. If the sending State's consulate can bring forth evidence which would have bearing upon any part of the case, at any stage of the proceedings, then further action is warranted to assure that the defendant suffers no prejudice resulting from the violation.

3. Suppression of Evidence Resulting from Violations of Article 36

Evidence that is derived from government misconduct that violates certain constitutional rights is labeled "fruit of the poisonous tree" and is not admissible in a criminal proceeding.[135] Such evidence is deemed inadmissible in order to secure future compliance by the state actor with constitutional requirements.[136] While it has not been the practice to include violations of Article 36 in the list of violations warranting suppression of evidence,[137] it is nonetheless possible.[138]

One argument used to deny exclusion of evidence in violation of Article 36 is that the framers of the Vienna Convention could not have taken into account the distinct characteristics of the U.S. legal system when drafting the Article.[139] This argument fails to

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135. *See, e.g.*, United States v. Massey, 437 F. Supp. 843, 852-55 (M.D. Fla. 1977) (providing a detailed history of the "fruit of the poisonous tree" doctrine). Evidence seized or confessions obtained in violation of a defendant's constitutional rights are inadmissible as evidence against him. *Id.* This doctrine not only covers evidence directly obtained from unlawful circumstances but also information obtained from that evidence. *Id.* at 852 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1920)). The State has the burden to prove that evidence is properly obtained. United States v. Twilley, 222 F.3d 1092, 1097 (2000) (citing United States v. Johns, 891 F.2d 243, 245 (9th Cir. 1989)).

136. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 491-99 (1966) (holding that evidence obtained using coercive techniques or in disregard of the defendant's Sixth Amendment Right to Counsel is inadmissible); *see also* Mapp v. Ohio, 367 U.S. 643, 648 (1961) ("[C]onviction[s] by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . . . [S]uch evidence 'shall not be used at all.'" (citing Weeks v. United States, 232 U.S. 383, 392 (1914) and *Silverthorne Lumber Co.*, 251 U.S. at 392)).

137. *See supra* note 53 and accompanying text.

138. *See, e.g.*, State v. Reyes, 740 A.2d 7 (Del. Super. Ct. 1999).

139. *See supra* note 10; *see also* Rocha v. Texas, 16 S.W.3d 1, 17 (Tex. Crim. App. 1999) (stating that no other jurisdiction in the world excludes evidence for a treaty violation).

consider that the language of the Article itself requires the ratifying nations to give full effect to the treaty within their respective legal systems.[140]

In order to grant relief, courts hearing Article 36 claims have uniformly required, yet rarely found, that actual prejudice result from the Vienna Convention violation.[141] Courts treat Article 36 violations as being somewhat removed from other obligations.[142] They look first for prejudice, and then, if no prejudice is found, look no further.[143] The specific circumstances surrounding the initial arrest and detention may provide attorneys with useful background to establish a constitutional violation.[144] An attorney who recognizes that there has been a delay in informing, or a failure to inform, the defendant of his Article 36 rights must immediately bring a suppression motion based on that violation.[145]

Although violation of a treaty right is the equivalent of a statutory, not constitutional, right,[146] there is the possibility that an infringement upon constitutional rights results. If so, an Article 36 violation may be included in the "totality of the circumstances" which courts are required to examine when determining the voluntariness of a confession, for example.[147]

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140. *See supra* note 31.

141. *See supra* notes 45, 49-50 and accompanying text.

142. *See supra* notes 44, 48-49 and accompanying text.

143. *See supra* note 50 and accompanying text. As it appears, the courts look to the treaty violation as the "primary violation" and decide either that there was no prejudice resulting from the Article 36 violation or, if there was prejudice, the defendant does not have an individual right to enforce the violation, and the analysis ends.

144. *See* People v. Medina, No. 97 CR 307, Division B (Colo. Dist. Ct. 1998), http://www.state.co.us/defenders/Library/Mata-Medina/Antonio%20Mata-Medina%20Order.html. Defendant. Medina was read his *Miranda* warning in both English and Spanish. *Id.* When asked if he wanted an attorney, the defendant indicated that he wanted an attorney, but could not afford one. *Id.* He did state that he wanted to speak to a "judge or someone." *Id.* It is clear from these statements that he did not understand that he was entitled to have representation provided for him. It is also a permissible inference that in stating that he "wanted to talk to a judge or someone" he invoked his Sixth Amendment right to counsel. Nevertheless, the judge found that the statements he made to interrogators, and the derivative information was admissible as evidence. *See id.*

145. *See id.* In *Medina*, the defendant was arguably denied both his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel because he did not understand the nature of these rights. A court examines the "totality of the circumstances" to determine if, for example, a confession was voluntary. Withrow v. Williams, 507 U.S. 680, 693 (1993).

146. *See supra* notes 102-103 and accompanying text.

147. *Withrow*, 507 U.S. at 693-94. The potential elements of the totality of the circumstances include: "police coercion, the length of the interrogation; its location;

While a court may not find a citizen of the United Kingdom unduly prejudiced by an Article 36 violation, an immigrant worker from rural Mexico may not have the ability to place his *Miranda* warning in the proper context, where a waiver of these rights may be deemed reliable.

The noncitizen defendant, possibly unaware of U.S. legal customs and without the assistance of her consulate, may not be able to comprehend these constitutional rights and thus grant a legitimate waiver of these rights.[148] It is axiomatic that one cannot give a valid waiver of rights that one does not understand. The fear of suppression of evidence would persuade law enforcement officials to see the necessity of complying with the treaty and would thereby advance compliance.[149] An argument that suppression will induce law enforcement compliance with Article 36 obligations is strong in instances where compliance will assure protection of the noncitizen defendant's constitutional rights. Adding an Article 36 violation as a factor in determining the "totality of the circumstances" to determine if a confession was obtained in violation of the Fifth Amendment would not be an improper extension of the doctrine, but an application which would serve the purpose of deterring future improper conduct.

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its continuity; the defendant's maturity; education; physical condition; and mental health." *Id.* at 693-94 (citations omitted).

148. *See* State v. Reyes, 740 A.2d 7, 13-14 (Del. Super. Ct. 1999). The court noted that:

> [W]hen a foreign national is arrested, especially one who is unable to speak the language of the receiving State, it is likely that he will be unfamiliar with the receiving State's criminal justice system, and may be unable to defend himself, not just due to ignorance, but also due to possible discrimination based on his national origin.

Id.; *see also supra* note 1 (demonstrating the apprehension the noncitizen may have toward the criminal justice system resulting from experience in her native land).

149. *See supra* note 10. In *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000) (en banc), the majority held that suppression is not a proper remedy for Article 36 violations. *See id.* at 886. They noted the effect of the suppression remedy on future violations of the right. *See id.* at 887. They did not consider it appropriate in this instance, as an individual right created under the Vienna Convention was not a *constitutional* right, for which suppression was an available remedy. *See id.* at 886. The court also stated its belief that the State Department was the proper vehicle for treaty implementation and not the judicial system. *See id.* The dissent, however, in characterizing the State Department's policy toward the treaty's enforcement as essentially cosmetic, stated that a confession obtained in violation of the Vienna Convention should be suppressed like any other confession obtained improperly in violation of the Fifth Amendment. *See id.* at 892-94.

4. 42 U.S.C. § 1983 as a Remedy for Article 36 Violations

Section 1983 of title 42 the United States Code provides a cause of action for "any citizen of the United States or other person within the jurisdiction thereof" for deprivation of "any rights, privileges, or immunities secured by the Constitution and laws" by a person acting under the color of state law.[150] Under the statute, liability is also extended to municipalities or other local government entities for deprivations of federal rights, in some circumstances.[151]

The recent federal district court decision of *Standt v. New York*[152] illustrates the possibility for action under 42 U.S.C. § 1983 to remedy a violation of the Vienna Convention.[153] The *Standt* court, determining that Article 36 creates an individual right,[154] found the treaty to be "self-executing"[155] and therefore giving rise to a cause of action under § 1983.[156] The court found the denial of consular rights was a compensable injury under the statute.[157]

Law enforcement officials, aware of the possibility of civil actions, will have incentive to assure that those within their custody are notified of their consular rights at the earliest possible moment. The specter of civil damages for noncompliance may serve as a powerful weapon for achieving compliance with Vienna Convention obligations. The successful § 1983 action may be of little comfort to the defendant facing a harsh criminal sentence, but it provides a powerful tool for civil liberties organizations to bring claims on behalf of detainees with the objective of achieving

150. 42 U.S.C. § 1983 (1994).

151. Monell v. Dep't of Soc. Serv., 436 U.S. 658, 690 (1978).

152. 153 F. Supp. 2d 417, 422-30 (S.D.N.Y. 2001).

153. *See id.* at 422-30. It is necessary to differentiate the action brought by Mr. Standt, as an individual, from the § 1983 claim brought by the Republic of Paraguay, which the Supreme Court rejected in *Breard v. Greene*, 523 U.S. 371 (1998). *Breard* explained that "Section 1983 provides a cause of action to any '*person* within the jurisdiction' of the United States for the deprivation 'of any rights, privileges, or immunities secured by the Constitution and laws.'" *Id.* at 378 (emphasis added). Paraguay is not a person within meaning of § 1983 and, therefore, the statute does not apply to it. *Id.*

154. *Standt*, 153 F. Supp. 2d at 425-27.

155. *Id.* at 423. A treaty is self-executing if "it provides rights to individuals rather than merely setting out the obligations of signatories." *Id.* at 423 n.3 (citing Breard v. Pruett, 134 F.3d 615, 622 (Butzner, J., concurring)). A determination that a treaty is self-executing creates "standing" in the individual plaintiff to assert a cause of action. *Standt*, 153 F. Supp. 2d at 423.

156. *See id.*

157. *See id.* at 431.

compliance with treaty obligations.

C. *Education as a Tool to Protect Vienna Convention Rights*

Despite the State Department's widespread dissemination of literature on the issue, the fact is that Article 36 violations continue to occur.[158] These continuing violations create an obligation for the defense bar to take the initiative in educating its members on how to recognize and pursue litigation on such violations. It would take little time in a Continuing Legal Education course to bring these issues to the attention of the defense bar. A well-informed defense bar would be much more likely to raise Article 36 issues at an early stage and avoid procedural barriers.[159]

Conclusion

The Vienna Convention on Consular Relations did not create an obligation that interferes with the procedures of the U.S. judicial system. It merely provides a means to allow a nation to provide assistance on behalf of its citizens abroad and for those citizens to get such assistance. An Article 36 violation may deny the noncitizen defendant the same constitutional protections to which a U.S. citizen is entitled when in custody.

The attorney charged with advocating on behalf of the criminal defendant must inquire immediately, as a matter of practice, of the defendant's nationality in order to maintain an effective defense and, in more severe cases, such as those involving the death penalty, effectively bring forth mitigating evidence. Timely and relevant application of principles of criminal law to Article 36 issues will provide an opportunity for the defendant to gain the valuable advice and assistance of his consular officials.

The judicial system is charged with ensuring protection of the rights procured by the legislative and executive branches. It is the

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158. *See supra* notes 14-15 and accompanying text (noting the continuing Convention violations).

159. It is noteworthy that a large number of foreign nationals are represented by state-provided attorneys. *See* CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES (Nov. 2000) 9 tbl.19 (stating that 69.7% of noncitizen state prison inmates and 58.7% of noncitizen federal prison inmates had appointed counsel). The entity whose laws the defendant faces and who denied defendant consular rights is the same party that provides the defense which, whether by lack of information or funding, fails to litigate the Article 36 claim. It is this fact upon which the international community may look with distrust.

judicial system, insulated from political pressures, which must apply established principles of law to ensure non-prejudicial application of the laws. This will assure protection of the right to consular access and all other rights. Through the use of established remedial measures, the judiciary can secure the rights granted by the Vienna Convention.

There is a final consideration, extraneous to the individual rights of the detained noncitizen to consular access, which the judicial system should take into account. The United States, now more than ever, needs to portray itself as a complete and cooperative member of the international community. As a world leader, the United States may be compelled to take unilateral action on international affairs. There may be a time and a place for a nation to act alone, to take the initiative, and make a stand apart from the rest of the world. Denying a detained individual consular assistance furthers no appreciable goal when balanced against the loss of credibility to the United States as a defender of human rights resulting from infringement of an individual right deemed so important as to require codification and agreement by each of the parties to the Vienna Convention.