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Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul

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ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS: A SEARCH FOR THE RIGHT TO CONSUL

Mark J. Kadish*

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INTRODUCTION

This paper addresses Article 36 of the Vienna Convention on Consular Relations,¹ a treaty provision which is often violated by the United States.

Although the principle of *pacta sunt servanda* (agreements must be obeyed) has not always been scrupulously followed in the affairs of this and other nations, if we are to see the emergence of a 'new world order' in which the use of force is to be subject to the rule of law, we must begin by holding our own government to its fundamental legal commitments.²

With this language, the Ninth Circuit Court of Appeals added an international corollary to Justice Brandeis' prophetic dissent in *Olmstead v. United States*.³ The Ninth Circuit's admonition, like Brandeis', has

1. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 [hereinafter Vienna Convention or Convention]. Article 36(1)(b) of the Vienna Convention provides:

(b) [I]f 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.

Id. at 101.

2. *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991), *vacated*, 505 U.S. 1201 (1992) (remanded for further consideration in light of *United States v. Alvarez-Machain*, 504 U.S. 655 (1992)). The principle of *pacta sunt servanda* has been deemed the "fundamental principle of the law of treaties" by the International Law Commission. *Reports of the International Law Commission to the General Assembly*, [1966] 2 Y.B. Int'l L. Comm'n 211, U.N. Doc. A/6309/Rev. 1. This designation was included in Article 26 of the Vienna Convention on the Law of Treaties: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339 [hereinafter Treaty Convention]. The preamble to the Vienna Convention on the Law of Treaties also stresses the importance of the principle of *pacta sunt servanda*: "[T]he principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized." *Id.* preamble, at 332; *see also* SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 83-84 (2d ed. 1984).

3. Justice Brandeis stated:

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

been largely disregarded.⁴ The United States admits it has violated Article 36⁵ but refuses to provide a remedy to those aggrieved.⁶

Part I of this article introduces the Vienna Convention on Consular Relations and the history of this Treaty. Part II discusses Article 36, the provision directing authorities of a receiving State to inform detained or arrested foreigners of their right to contact their national consul. Part III discusses several U.S. courts' interpretations of Article 36 in the area of immigration law. Part IV introduces six cases that interpret Article 36 in the context of criminal law and procedure. Finally, Part V addresses the issues raised by these cases and concludes that the Treaty creates remedial rights which must be enforced by the federal courts under the U.S. Constitution.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (expressing the constitutional contours of the Fourth Amendment).

4. See, e.g., *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (forced repatriation of Haitians located beyond the territorial sea of the United States held not to violate Article 33 of the United Nations Convention Relating to the Status of Refugees); *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (federal courts have jurisdiction over foreign nationals who were kidnapped and brought to United States in violation of extradition treaty); *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995) (extradition treaty with Honduras); *Goldstar v. United States*, 967 F.2d 965 (4th Cir. 1992) (Hague Convention); *More v. Intelcom Support Servs., Inc.*, 960 F.2d 466 (5th Cir. 1992) (military employment treaty); *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979) (Convention on the High Seas), *cert. denied*, 444 U.S. 832 (1979); *In re Stephanie M.*, 7 Cal. 4th 295 (1994) (Vienna Convention on Consular Relations, art. 37).

5. See *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996) ("Texas admits that the Vienna Convention was violated."); Declaration of Bruce Gillies, exhibit 2 (Response of the State of Washington to U.S. Department of State Inquiry: Patrick James Jeffries) (June 29, 1993), at 8, *Jeffries v. Wood* [hereinafter Decl. of Gillies] ("[T]his office was unable to locate any law enforcement official that recalled advising Patrick Jeffries of the provisions of the Vienna Convention on Consular Relations Article 36.1(b) [sic] at the time of his arrest."); Merit Brief at 1, *Ohio v. Loza* (Ohio Ct. App., 12th Dist., Butler County, 1997) (Case No. CA96-10-0214) [hereinafter *Loza Merit Brief*] (videotape of confession shows that police knew Loza was a foreign national but did not inform him of his right to contact his consul). Materials submitted to the courts cited in this Article are on file with the author.

6. See *Loza Merit Brief*, *supra* note 5; see also *Murphy v. Netherland*, No. 3:95-CV-856, Memorandum Opinion at 7 (E.D. Va. July 26, 1996) [hereinafter *Murphy Memorandum Opinion*] (although the Virginia representatives did not explicitly admit to violating the Vienna Convention as in *Faulder*, 81 F.3d at 520, the court found such a violation: "The Court does not condone what appears to be Virginia's defiant and continuing disregard for the Vienna Convention. However, the Court finds that no violation here would permit § 2254 relief."); *Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D. Va. 1996) ("Virginia's persistent refusal to abide by the Vienna Convention troubles the Court. However, a violation of rights under the Convention is insufficient to permit § 2254 relief.").

I. VIENNA CONVENTION ON CONSULAR RELATIONS

In 1963, ninety-two nations codified existing international law on consular relations⁷ by adopting the multilateral treaty of the Vienna Convention on Consular Relations.⁸ Given the diversity of economic and political systems represented at the Conference, the Convention represents the broadest agreement possible on the topic of consular relations.⁹

The Convention was adopted by the United Nations in April, 1963.¹⁰ The United States, one of the original signers of the Vienna Consular Convention,¹¹ did not ratify the Treaty until 1969.¹² The six-year delay was due to a disagreement within the Executive Branch over whether the United States should participate in the multilateral Vienna Convention or continue negotiating bilateral agreements.¹³ The Executive Branch found the Vienna Convention deficient because it met only "minimum standards"

7. See *The United Nations Conference on Consular Relations*, 1963 U.N.Y.B. 510, U.N. Sales No. 64.I.1; see also Gregory Dean Gisvold, Note, *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, 780 n.38 (1994) ("As of 1993, 50 States had signed and 144 States had become parties to the Vienna Consular Convention."). The Convention was based on the International Law Commission's report which was drafted at its 1961 session. *The United Nations Conference on Consular Relations*, *supra*, at 510. The International Law Commission began working on its draft in 1955. The Commission completed its first draft in 1960 and distributed it to nations for their comments. The Commission's final draft was completed in 1961 and was submitted to the United Nations. The General Assembly decided to convene the Conference on Consular Relations. As a result, the General Assembly of the United Nations invited all nations participating in the convention to submit any amendments they wanted to propose prior to the convention so they could be considered along with the Commission's draft. See LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 16-17 (1966); see also Louis B. Sohn, *Sources Of International Law*, 25 GA. J. INT'L & COMP. L. 399, 402 (1995-96) (indicating that the International Law Commission's decision that International Law on Consular Relations was ripe for codification originally was initiated by a doctoral dissertation written by a student of the Fletcher School of Law and Diplomacy).

8. Vienna Convention, *supra* note 1. "In a generic sense, a *Consul* is an officer or agent accredited by his government to reside in a foreign country for multifarious purposes, but primarily, to represent, promote and protect its commercial interests and those of its citizens or subjects." JULIUS I. PUENTE, *THE FOREIGN CONSUL* 11 (1926). The Vienna Convention does not actually define the term consul. Article 1(d), however, defines a consular officer as "any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions." Vienna Convention, *supra* note 1, art. 1(d), 21 U.S.T. at 80. For a discussion of correct terminology in the realm of consular and diplomatic relations, see Cami Green, *Counsel, Consul or Diplomat: Is There Any Practical Significance For Practitioners?*, 1 U. MIAMI Y.B. INT'L L. 143 (1991).

9. LEE, *supra* note 7, at 16.

10. Final Act of the United Nations Conference on Consular Relations, Apr. 24, 1963, art. 14, 596 U.N.T.S. 458, 464.

11. See Gisvold, *supra* note 7, at 782 n.49.

12. 115 CONG. REC. S30997 (daily ed. Oct. 22, 1969).

13. See *id.* at S30953 (statement of Sen. Fulbright).

for rules governing consular relations.¹⁴ Nevertheless, the Convention was accepted, despite its shortcomings, since it would not affect existing bilateral treaties¹⁵ nor foreclose negotiations of future bilateral treaties.¹⁶

II. ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

Article 36 governs the communication and contact between a consul and nationals of his country.¹⁷ The language of Article 36(1)(b) requires

14. *Id.* See also LEE, *supra* note 7, at 16 (given diversity of political and economic systems of participating nations, the Treaty represents the broadest "area of agreement . . . possible"). Senator Fulbright stated:

The committee was told that the delay was largely due to a disagreement within the executive branch between those who advocated continuing the traditional U.S. bilateral approach to consular conventions or following the multilateral one represented by the Vienna Convention. . . . The multilateral versus bilateral argument points up a basic characteristic of the Vienna Convention. It embodies those standards upon which the 92 nations represented could agree. In many ways, these are minimum standards—not as high as those embodied in our bilateral treaties.

115 CONG. REC., *supra* note 12, at S30953.

15. See *id.* Prior to the Vienna Convention, consular law was controlled by bilateral and regional treaties. See LEE, *supra* note 7, at 16.

16. See 115 CONG. REC., *supra* note 12, at S30953 (statement of Sen. Fulbright).

17. See *The United Nations Conference on Consular Relations*, *supra* note 7, at 511. Article 36 of the Vienna Convention, entitled "Communication and contact with nationals of the sending State," 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

authorities of the receiving State¹⁸ to inform detained or arrested foreign nationals of their right to contact their national consul.¹⁹ The terms of this provision were subject to such extensive and divisive debate²⁰ that Article 36 was completely eliminated from the original draft of the Convention,²¹ and was revived only two days before the closing of the

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, *supra* note 1, art. 36, 21 U.S.T. at 100-01.

18. "Receiving State" refers to the State in which the foreign national has been arrested or detained. *See* 2 *United Nations Conference on Consular Relations: Official Records*, at 3, U.N. Doc. A/Conf.25/6, U.N. Sales. No. 63.X.2 (1963) [hereinafter *Official Records*].

19. *See The United Nations Conference on Consular Relations, supra* note 7, at 511. The Vienna Convention does not define arrest, custody or detention, but the United States has defined these terms in the Department of State's Foreign Affairs Manual:

'Arrest' means to take or keep a person in custody by authority of law. . . .

'Custody' means judicial or penal guarding or safekeeping of a person in accordance with law or local requirement. Custody may mean imprisonment or detention of a person in order to prevent escape. . . .

'Detention' means holding a person in custody or confinement before or without charging the person with a violation or crime. . . .

U.S. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL 403 (1984).

20. *Id. See also* LEE, *supra* note 7, at 107 ("Of all the provisions in the Vienna Convention, the one with by far the most tortuous and checkered background is indubitably Article 36 concerning consular communication and contact with the nationals of the sending state.").

21. *See* LEE, *supra* note 7, at 107. The Article was eliminated in the Thirteenth Plenary meeting of the Convention because it did not obtain the required two-thirds majority. *See id.*

The original draft of Article 36, submitted by the International Law Commission, provided:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
 - (a) Nationals of the sending State shall be free to communicate with and to have access to the competent consulate, and the consular officials of that consulate shall be free to communicate with and, in appropriate cases, to have access to the said nationals;
 - (b) The competent authorities shall, without undue delay, inform the competent consulate of the sending State if, within its district, a national of that State is committed to prison or to custody pending trial or detained in any other manner. Any communications addressed to the consulate by the person in prison, custody or detention shall also be forwarded by the said authorities without undue delay;
 - (c) Consular officials shall have the right to visit a national of the sending State who is in prison, custody or detention, for the purpose of conversing with him and arranging for his legal

Convention.²² One of the primary concerns about this Article was the provision requiring that notice be given to the consul of a foreign national who is arrested or detained.²³ The debate involved the question of the foreign national's autonomy and rights under the Treaty.²⁴ This debate continues in U.S. courts currently considering the provisions of Article 36 of the Vienna Convention.²⁵

III. INTERPRETATION OF ARTICLE 36

The issue of "right to consul"²⁶ was first considered by U.S. courts in 1979.²⁷ The first decisions were reviews of deportation hearings conducted by the United States Immigration and Naturalization Service

representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement [sic].

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 not nullify these rights.

2 *Official Records*, *supra* note 18, at 23-24.

22. See LEE, *supra* note 7, at 113.

23. See *id.* at 107.

At the crux of the issue were the duties of the receiving state to permit unimpeded communication between consuls and nationals of the sending state, to inform consuls of the imprisonment or detention within their district of such nationals, and to allow consuls to visit them in prison, custody or detention.

Id. The issue over the notice provision concerned a division between countries seeking automatic notification and those supporting individual freedoms; the latter argued that the decision to notify a consul belongs to the individual involved. See *id.* at 107-14.

24. See generally 1 *Official Records*, *supra* note 18. The delegate from the United Kingdom expressed his nation's rejection of a proposal that a consul would be notified only if the detained national so requested "because it could give rise to abuses and misunderstanding. It could well make the provisions of article 36 ineffective because the person arrested might not be aware of his rights." *Id.* at 83. The Australian delegate expressed his country's beliefs when stating, "There was no need to stress the extreme importance of not disregarding, in the present or any other international document, the rights of the individual. Those rights were all-important, and embodied in the principle upon which the United Nations was based." *Id.* at 331.

25. Article 36 has received very little attention in U.S. courts. However, litigation on the issue has developed in the past year as criminal law practitioners have become aware of the provision. Caselaw on this topic consists of approximately thirteen cases. See discussion *infra* Parts III, IV.

26. "The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph." Vienna Convention, *supra* note 1, art. 36(1)(b), 21 U.S.T. at 101. See *infra* Part V for an analysis of whether Article 36 confers an individual right on foreign nationals.

27. See *United States v. Vega-Mejia*, 611 F.2d 751 (9th Cir. 1979); *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979).

(INS), either on direct appeal²⁸ or through collateral attacks in criminal cases.²⁹ None of these cases required direct interpretation or application of the Vienna Convention because the issue was raised in the context of implementing an INS regulation.³⁰ The INS regulation found in 8 C.F.R. § 242.2, however, was promulgated to ensure compliance with Article 36 of the Vienna Convention.³¹ Consequently, some courts considered and discussed the Treaty's provisions.

In *United States v. Calderon-Medina*, the defendants were indicted for illegal re-entry following deportation in violation of 8 U.S.C. § 1326.³² The defendants challenged the lawfulness of their prior deportation on the basis that the INS violated its own regulation by not advising them of their right to contact their national consul.³³ After concluding that the lawfulness of a deportation may be collaterally attacked in a subsequent criminal proceeding,³⁴ the court held that

28. See, e.g., *Tejeda-Mata v. Immigration and Naturalization Serv.*, 626 F.2d 721 (9th Cir. 1980) (direct review of deportation hearing).

29. See, e.g., *Calderon-Medina*, 591 F.2d 529; *United States v. Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980); *United States v. Bejar-Matrecios*, 618 F.2d 81 (9th Cir. 1980).

30. The regulation provides in part:

Every detained alien shall be notified that he may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States. Existing treaties require immediate communication with appropriate consular or diplomatic officers whenever nationals of the following countries are detained in exclusion or expulsion proceedings, whether or not requested by the alien, and, in fact, even if the alien requests that no communication be undertaken in his behalf.

8 C.F.R. § 242.2(e) (1978). The regulation lists eighty-eight different countries, the majority of which have indicated by footnote that notification should be made under the following circumstance: "If national requests his government be notified, INS must notify *immediately*." *Id.*

31. *Calderon-Medina*, 591 F.2d at 531 n.6.

32. See *id.* This case was a consolidated appeal for *Calderon-Medina* and *Rangel-Gonzales*. See *id.* at 529. 8 U.S.C. § 1326 provides in pertinent part:

Any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States . . .

shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than \$1000, or both.

Id.

33. *Calderon-Medina*, 591 F.2d at 530. The district court dismissed the indictments against both defendants based on a finding that INS had violated at least one of its own regulations. See *id.*

34. See *id.* at 530-31. The issue of collateral attacks on deportations in subsequent criminal proceedings under 8 U.S.C. § 1326 was far from settled law at the time of this decision. The Supreme Court, in *United States v. Caceras*, 440 U.S. 741 (1979), held that violations of an administrative agency's regulations which were not mandated by the Constitution or federal statute did not warrant suppression of evidence obtained as a result of that violation. See *infra* note 47 and accompanying text. See also *United States v. Espinoza-*

"[v]iolation of a regulation renders a deportation unlawful only if the violation prejudiced interests of the alien which were protected by the regulation."³⁵ A two-part test was established for determining whether violation of an INS regulation made a deportation unlawful: (1) the regulation served to benefit the alien; and (2) the violation of that regulation prejudiced the alien.³⁶ In determining the applicability of the first prong of this test, the Ninth Circuit Court of Appeals analyzed Article 36.

It first examined the government's argument, supported by language in the Treaty's preamble, that the purpose of the Treaty was not to benefit individuals.³⁷ The court, however, had no difficulty finding that 8 C.F.R. § 242.2 benefited individual aliens; concluding that the protection of foreign nationals' interests is a corollary to consular efficiency since consular functions include protecting the interests of their nationals.³⁸ The Ninth Circuit Court of Appeals found, however, that the district court had not made the finding of prejudice required under the second prong of the test and remanded the case for a determination.³⁹

Calderon-Medina established that Article 36 of the Vienna Convention inherently granted a personal "benefit" to individuals.⁴⁰ The court, however, implicitly concluded that, without proof of prejudice, deprivation of the right to consul was not so fundamental as to render the proceeding unfair.⁴¹ In a companion case, *United States v. Rangel-Gonzales*, the Ninth Circuit Court of Appeals more fully addressed the prejudice requirement.⁴² The court reiterated that the burden of proof was

Soto, 476 F. Supp. 364, 366 (1979) (notification provision does not affect due process interests).

35. *Calderon-Medina*, 591 F.2d at 531.

36. *See id.*

37. *Id.* at 532 n.6. The preamble provides: "Realizing that the 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." Vienna Convention, *supra* note 1, preamble, 21 U.S.T. at 79.

38. *Calderon-Medina*, 591 F.2d at 532 n.6.

39. *Id.* at 532.

40. This determination was explicitly reiterated in *United States v. Rangel-Gonzales*, 617 F.2d 529, 532 (9th Cir. 1980) ("The right established by the regulation and in this case by treaty is a personal one.").

41. *See Calderon-Medina*, 591 F.2d at 531.

42. *Rangel-Gonzales*, 617 F.2d 529, also a collateral attack on a deportation proceeding, came to the Ninth Circuit with *Calderon-Medina* as a companion case. The case was remanded to the trial court to consider whether Rangel-Gonzales had been prejudiced by the INS' failure to notify him that he could consult his consul. The trial court found no prejudice, and that decision was appealed. *Id.* at 529. *See also* *United States v. Cerda-Pena*, 799 F.2d 1374, 1381-82 (9th Cir. 1986) (Nelson J., dissenting) (discussing relationship between *Calderon-Medina* and *Rangel-Gonzales*, and concluding that *Rangel-Gonzales* alone fully developed the prejudice standard).

on the defendant to show prejudice, which must "relate to the interests protected by the regulation."⁴³ In the context of this particular regulation, the protected interest "related to obtaining assistance in preparing a defense to the deportation."⁴⁴ Thus to show prejudice, preparation of that defense must have been materially affected.⁴⁵ The court found the requisite prejudice in Rangel-Gonzales' case.⁴⁶

Violation of agency regulations became an issue for Supreme Court review shortly after the *Calderon-Medina* decision. In *United States v. Caceres*, a criminal case, the Supreme Court held that evidence obtained in violation of Internal Revenue Service regulations which were not mandated by the Constitution or federal law was not required to be excluded from trial.⁴⁷ Within months of this ruling, the Eastern District of New York applied *Caceres* to a criminal case specifically involving 8 C.F.R. § 242.2.⁴⁸ The district court contrasted violation of 8 C.F.R. § 242.2 with a violation of "agency regulations designed to protect the petitioner's constitutional rights," finding that there was no claim that the regulation was based upon a constitutional or federal law provision as required by *Caceres*.⁴⁹ Consequently, the violation required no remedy.⁵⁰ The court, however, did not examine whether violation of Article 36 required a remedy.⁵¹

43. Rangel-Gonzales, 617 F.2d at 530.

44. *Id.*

45. *See id.*

46. "The appellant did show some likelihood that had the regulation been followed his defense and the conduct of the hearing would have been materially affected." *Id.* at 531.

47. *United States v. Caceres*, 440 U.S. 741 (1979). *Caceres* did not involve a collateral attack as in *Calderon-Medina*. *Caceres* was a criminal tax evasion case in which the defendant sought to have evidence obtained in violation of IRS regulations excluded from trial. *See id.* at 743. The evidence consisted of taped conversations between the defendant and an IRS agent which were taped without the defendant's knowledge. The basis for the defendant's motion to suppress was IRS regulations requiring authorization from the Department of Justice prior to taping a taxpayer's conversation without his consent. *See id.* at 744, n.3. These regulations concededly were violated. *See id.* at 743-44.

48. *United States v. Espinoza-Soto*, 476 F. Supp. 364 (E.D.N.Y. 1979) (defendant moved to suppress the order of deportation offered against him in criminal trial on the basis that INS violated 8 C.F.R. § 242.2 at the underlying deportation hearing).

49. *Id.* at 365-66. Apparently, there was no claim the regulation was based upon a federal treaty either. Although the Court cites *Calderon-Medina*, which expressly bases its opinion on the Vienna Convention, and acknowledges that *Caceres* requires enforcement of agency regulations when the regulation is mandated by the Constitution or federal law, the opinion does not mention the Vienna Convention.

50. *See id.* at 366. The Court also noted, as a second ground for dismissal, that collateral attacks on deportations were prohibited in the Second Circuit. *Id.*

51. The court narrowly focused on the INS regulation, although that regulation was based upon and had to conform with the requirements of Article 36. *See discussion infra* Part V.A (Supremacy Clause of the United States Constitution equates treaties with federal statutes as law of the land). *See also* *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By

The question of whether a collateral attack on deportation proceedings must be allowed in subsequent criminal cases reached the Supreme Court in 1987.⁵² *Mendoza-Lopez* determined that due process requires courts to permit such an attack where a procedural error in the administrative proceeding denied an alien judicial review of the deportation decision.⁵³ The Court, however, did not enumerate what kind of errors would be considered so fundamental as to deny judicial review,⁵⁴ but noted that the procedures required for fundamental fairness in an administrative proceeding are less stringent than those demanded in a criminal trial.⁵⁵

Not surprisingly, since *Mendoza-Lopez*, most courts that have addressed a violation of an alien's right to communicate with consul have determined that denial of this right is not fundamentally unfair.⁵⁶ Only one case since *Calderon-Medina* has even discussed the Vienna Convention, and in that case, *Waldron v. Immigration and Naturalization Serv.*, the Second Circuit Court of Appeals expressly rejected the notion that rights granted by a treaty could be equated with fundamental constitutional or statutory rights.⁵⁷ These determinations are now being

the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. . . . When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing."); *Head Money Cases*, 112 U.S. 580, 598 (1884) ("A treaty . . . is a law of the land as an act of Congress is . . .").

52. *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987).

53. *See id.* at 837-38. The basis of the decision, presumably, is the theory of waiver; if the procedural errors did not deprive the alien of judicial review, he inherently waived that review by not utilizing it, therefore he has no right to raise it collaterally in another proceeding. *See id.* at 839-40.

54. *Id.* at 839 n.17. The Court reiterated its prior holding in *Rose v. Clark*, 478 U.S. 570, 577 (1986), which noted that there are some errors that inherently render a trial fundamentally unfair. *Id.*

55. *Id.* "While the procedures required in an administrative proceeding are less stringent than those demanded in a criminal trial, analogous abuses could operate, under some circumstances, to deny effective judicial review of administrative determinations." *Id.*

56. *See, e.g., United States v. Villa-Fabela*, 882 F.2d 434, 440 (9th Cir. 1989) ("This Court does not take lightly the INS's breach of its duty to inform aliens of their rights. We find, however, that the violation of 8 C.F.R. § 242.2(f) did not so infect the deportation proceeding as to deprive Mr. Villa-Fabela of judicial review or render the proceeding fundamentally unfair within the meaning of *Mendoza-Lopez*."); *Douglas v. Immigration & Naturalization Serv.*, 28 F.3d 241, 245-46 (2d Cir. 1994) (defendant did not show that INS' failure to notify him of his right to contact consul prejudiced the preparation of his defense).

57. *Waldron v. Immigration and Naturalization Serv.*, 17 F.3d 511 (2d Cir. 1994). The court stated:

[T]he privilege of communication with consular officials [is] not [a] fundamental right[t] derived from the Constitution or federal statutes, such as the right to counsel, but is merely [a] provisio[n] created by agency regulations. . . . Although

tested in cases involving direct interpretation and application of the Vienna Convention itself, which are analyzed in the next Part of this article.

IV. DENIAL OF TREATY RIGHTS IN CRIMINAL CASES⁵⁸

The Department of Justice promulgated 8 C.F.R. § 50.5 to implement, in part, Article 36 in federal cases. This regulation requires Federal Bureau of Investigation agents to inform any alien arrested of his right to contact his consul. Presumably, violation of this regulation could be challenged in the same manner as the INS regulation considered in Part III.

The Vienna Convention on Consular Relations has become the focus of several state capital cases.⁵⁹ Following *Calderon-Medina* and *Rangel-Gonzales*, criminal defendants began challenging Article 36 violations in habeas corpus petitions.⁶⁰ Ancillary challenges have also been made by each foreign national's country, either through amicus curiae briefs,⁶¹

compliance with our treaty obligations clearly is required, we decline to equate such a provision with fundamental rights, such as the right to counsel, which traces its origins to concepts of due process.

Id. at 518. *But see* *Waldron v. Immigration and Naturalization Serv.*, 994 F.2d 71 (2d Cir. 1993).

58. This issue has been raised most often in state capital cases. Significantly, strong international sentiment against the death penalty has become the primary catalyst for challenges to treaty violations. *See* S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L.J. 719, 739-46 (1995). However, challenges to Article 36 violations could be made in other contexts. *See, e.g.*, Motion to Suppress, *United States v. Morales* (N.D. Ga. 1996) (No. 1:96-CR-407) (raising violation of Article 36 as basis for suppression of evidence obtained from a consent search where consent was given by foreign national who had not been informed of right to contact her consul under Article 36).

59. *See* *Jeffries v. Wood*, 103 F.3d 827 (9th Cir. 1996) (Canadian citizen convicted of capital murder in Washington State); *Faulder v. Johnson*, 81 F.3d 515 (5th Cir. 1996) (Canadian citizen convicted of capital murder in Texas); *Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996) (dual citizen of Argentina and Paraguay convicted of capital murder in Virginia); *Republic of Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996) (civil action against Virginia officials for violation of treaty rights in connection with *Breard v. Netherland*); *Ohio v. Loza*, 641 N.E.2d 1082 (Ohio 1994) (Mexican citizen convicted of capital murder in Ohio); *Murphy v. Netherland*, 431 S.E.2d 48 (Va. 1993) (Mexican citizen convicted of capital murder in Virginia).

An Article 36 violation was raised prior to *Faulder*, however, it was raised in an international forum. Complaints were lodged against the United States to the Inter-American Commission on Human Rights. *See* Shank & Quigley, *supra* note 58, at 722-27 (discussing the cases of Carlos Santana and Cesar Fierro, both convicted of capital murder in Texas).

60. *See supra* notes 29-46 and accompanying text.

61. Canada filed an amicus brief on behalf of Stanley Faulder. Brief of the Government of Canada as Amicus Curiae, *Faulder v. Johnson*, 81 F.3d 515 (5th Cir. 1996) (No. 95-40512).

official protests,⁶² complaints in international forums,⁶³ or, in the case of Paraguay, a civil suit in a U.S. district court.⁶⁴ The following cases are analyzed to indicate the current status of the "right to consul" issue which may soon reach the U.S. Supreme Court.

*A. Joseph Stanley Faulder*⁶⁵

Faulder, a Canadian citizen, was convicted of capital murder in Texas.⁶⁶ He was not notified at any time after his arrest that he could contact his Canadian Consul.⁶⁷ Faulder, who was later determined to have organic brain damage, made a complete and detailed confession of the murder.⁶⁸ At his first trial, the confession along with accomplice

[hereinafter Faulder Amicus Brief]. Mexico filed amicus briefs on behalf of Mario Murphy, Reply Brief of Amicus Curiae United Mexican States, *Murphy v. Netherland* (4th Cir. 1996) (No. 96-14) [hereinafter Murphy Amicus Brief], and Jose Loza. Brief Amicus Curiae of the United Mexican States, *Ohio v. Loza* (Ohio Ct. App., 12th Dist., Butler County 1997) (No. CA96-10-0214) [hereinafter Loza Amicus Brief]. Canada has also sought permission to file an amicus brief in support of Patrick Jeffries.

62. See Decl. of Gillies, exhibit 4 (Canadian Embassy, Diplomatic Note No. 183) (Oct. 28, 1993) ("The Canadian Government wishes to protest this breach of the United States authorities' obligation under Article 36.1(B) [sic] of the Vienna Convention on Consular Relations to notify an arrested Canadian citizen of his or her right to communicate with a Canadian consular post.").

63. See Shank & Quigley, *supra* note 58. In 1993, the Dominican Republic filed a complaint against the United States for violation of the Vienna Convention in relation to Carlos Santana's arrest. See *id.* at 746-47. In addition, a complaint was filed on behalf of Cesar Fierro in 1994. See *id.* at 747. As of this writing, no decision has been made in either case. Telephone interview with Secretariat Office of the International Commission on Human Rights (Mar. 3, 1997). Both men already have been executed. See *id.*

64. The Republic of Paraguay filed a suit for injunctive relief and declaratory judgment against various officials of the State of Virginia to force compliance with the Vienna Convention and receive a declaratory judgment that Article 36 had been violated. *Republic of Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996). The Paraguayan Consul for the Virginia District filed a claim under 42 U.S.C. § 1983 against those same officials for interfering with his ability to conduct his consular duties. See Complaint, *Republic of Paraguay v. Allen* at 18-19, 949 F. Supp. 1269 (E.D. Va. 1996) (No. 3:96CV745) [hereinafter Paraguay Complaint].

65. This case is currently pending appeal in the Fifth Circuit Court of Appeals.

66. See *Faulder v. Johnson*, 81 F.3d 515, 517 (5th Cir. 1996); *Faulder v. Texas*, 611 S.W.2d 630 (Tex. Crim. App. 1979). Faulder was convicted of murdering a 75-year-old woman during the course of a robbery in 1975. See *Faulder v. Texas*, 611 S.W.2d at 631. He was not charged with the crime until 1977, after he was arrested for an unrelated crime. See *id.* Accomplices in the murder testified against Faulder at trial. See *id.* at 632.

67. See *Faulder v. Johnson*, 81 F.3d at 520. After investigating and finding no evidence that Faulder had been advised of his Article 36 rights, Texas admitted that the Vienna Convention had been violated. See *id.*

68. See *id.* at 519; *Faulder v. Texas*, 611 S.W.2d 630, 641-42. (holding that the confession was obtained in violation of the Fifth Amendment to the United States Constitution).

testimony resulted in a death penalty conviction.⁶⁹ The conviction was reversed and a new trial was granted due to a *Miranda* violation;⁷⁰ the confession was excluded at the second trial.⁷¹ Faulder presented no affirmative evidence at the guilt phase of either trial, and no mitigating evidence.⁷² Faulder was again convicted of capital murder;⁷³ thereafter, his counsel recognized the Article 36 issue and raised it for the first time in a federal habeas petition.⁷⁴

The Fifth Circuit Court of Appeals, although accepting Texas's admission that the Vienna Convention had been violated, found that the Canadian Consul would not have provided any information that Faulder's attorneys did not have or could not have obtained.⁷⁵ Thus, there was no prejudice, and no reversal of his conviction.⁷⁶

69. See *Faulder v. Texas*, 611 S.W.2d 630. A witness testified that he met Faulder and a female at a bar. See *id.* at 632. After hearing Faulder claim to be a "safe cracker," the witness told Faulder of a house with a floor safe that probably contained money. See *id.* The witness took Faulder and the female to the house and drew a floor plan showing where the safe was located. See *id.* Faulder's confession "went into great detail" confirming the witness' testimony and further admitting going back to the house later with the female and killing the occupant during the robbery attempt. See *id.*

70. The court stated: "The fact that appellant was not physically mistreated during his incarceration or interrogation does not remove the taint to the confession which was secured in violation of his federally guaranteed constitutional rights as noted in *Miranda* and *Mosley* . . ." *Id.* at 634-35. See also *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966) (police officers must inform individuals in custody of their constitutional rights prior to questioning them about a crime and "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."); *Michigan v. Mosely*, 423 U.S. 96 (1975) (an individual's right to stop questioning must be scrupulously honored).

Aliens are entitled to the Fifth Amendment protections that are granted to all citizens of the United States. See U.S. CONST. amend. V (applies to "accused" rather than "citizen"). See also *Wong Wing v. United States*, 163 U.S. 228 (1896) ("all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] [A]mendments"); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

71. Cf. *Faulder v. Texas*, 611 S.W.2d at 641-42.

72. See *Faulder v. Texas*, 611 S.W.2d at 633; *Faulder v. Texas*, 745 S.W.2d 327, 329 (Tex. Crim. App. 1987).

73. See *Faulder v. Texas*, 745 S.W.2d at 328.

74. See *Faulder v. Johnson*, 81 F.3d 515 (5th Cir. 1996); see also *Shank & Quigley*, *supra* note 58, at 727 (noting that the courts' lack of attention to deprivation of right of access to consul stems largely from the fact that attorneys are often unaware of the right, and fail to raise it at trial or in initial appeal).

75. See *Faulder v. Johnson*, 81 F.3d at 520. However, Canada, in its amicus curiae brief submitted on behalf of Faulder, outlined the assistance the Consul would have provided Faulder, including medical and mental history information if the consul had been notified. See *Faulder Amicus Brief*, *supra* note 61, at 9-10. This information would have made the trial counsel aware of potential mental disorders, stemming from a serious accident when Faulder was a child, to be used in mitigation of sentencing. See *Faulder v. Johnson*, 81 F.3d at 519.

76. See *Faulder v. Johnson*, 81 F.3d at 517. Although the court cites no authority in its opinion, the analysis seemingly follows the *Calderon-Medina* test for prejudice. See *supra* notes 29-46 and accompanying text.

B. Patrick James Jeffries⁷⁷

Jeffries, also, is a Canadian citizen.⁷⁸ He was convicted of two counts of capital murder in Washington State.⁷⁹ There were no eyewitnesses to the crimes, and no murder weapon was ever found.⁸⁰ As a result, Jeffries was convicted on circumstantial evidence.⁸¹ He was never informed that he could contact his Canadian Consul at the time of his arrest, or any time thereafter.⁸² The Canadian government, seeking remedy through political channels, officially protested the United States' violation of Article 36(1)(b)⁸³ and sought to file an *amicus curiae* brief.⁸⁴

77. This case is currently pending appeal in the Ninth Circuit Court of Appeals.

78. See Decl. of Gillies, *supra* note 5, exhibit 1 (Canadian Embassy, Diplomatic Note No. 42) (Mar. 8, 1993).

79. See *Washington v. Jeffries*, 717 P.2d 722, 725 (Wash. 1986).

80. *Id.* at 726.

81. "The overwhelming circumstantial evidence indicates . . . that Jeffries killed the Skiffs, stole their money and property, lied as to the Skiffs' whereabouts and fled to Canada." *Id.*

82. See Decl. of Gillies, *supra* note 5, exhibit 2 (Letter from Attorney General of Washington to Acting Legal Adviser of U.S. State Department) (June 29, 1993). The letter was a response to the Canadian Government's request for investigation into violation of the Vienna Convention. The letter stated:

During this investigation, this office was unable to locate any law enforcement official that recalled advising Patrick Jeffries of the provisions of the Vienna Convention on Consular Relations Article 36.1(B) [sic] at the time of his arrest. . . . [I]t is our conclusion that if Mr. Jeffries was not informed of rights he may possess under the Vienna Convention, there was no prejudice whatsoever to him as a result of this oversight.

Id. at 8.

83. See *id.*

84. See Decl. of Gillies, *supra* note 5, exhibit 1, (Canadian Embassy, Diplomatic Note No. 42) (Mar. 8, 1993); Memorandum of Government of Canada as Amicus Curiae in Support of Motion for Leave to Amend Petition for Writ of Habeas Corpus, *Jeffries v. Wood*, (W.D. Wash. 1995) (No. C90-925D) [hereinafter *Jeffries Memorandum in Support of Motion for Leave to Amend*]. Canada filed this memorandum in support of Jeffries' Motion for Leave to Amend Petition for Writ of Habeas Corpus to raise the violation of Jeffries' right guaranteed by the Vienna Convention on Consular Relations. See *id.* at 1. Canada later filed a separate Motion of Government of Canada to Participate as Amicus Curiae and Memorandum in Support of Petitioner's Request for a Modification of January 24, 1996 Decision. The Ninth Circuit had held Jeffries' motion to amend his habeas petition in abeyance until a decision was made on another issue on appeal. In March 1993, the court granted habeas relief based on that other issue, therefore, the petition to amend became moot. *Jeffries v. Blodgett*, 988 F.2d 923 (9th Cir. 1993). The court, however, reconsidered and overruled its prior decision. See *Jeffries v. Wood*, 75 F.3d 491 (9th Cir. 1996). It was this reversal that prompted the Canadian Government to petition for reconsideration of the formerly pending motion to amend. See Motion of Government of Canada to Participate as Amicus Curiae and Memorandum in Support of Petitioner's Request for a Modification of January 24, 1996 Decision, *supra*, at 2.

*C. Mario Murphy*⁸⁵

Mario Murphy is a Mexican citizen.⁸⁶ He pled guilty in Virginia to capital murder for hire and conspiracy to commit capital murder.⁸⁷ Murphy was nineteen when he was approached by an acquaintance who offered him money to kill the husband of his girlfriend.⁸⁸ The girlfriend, who was pregnant with the acquaintance's child, was threatened with death by her husband.⁸⁹ Murphy and two other men killed the victim as planned by the acquaintance and girlfriend.⁹⁰ He and his five accomplices were eventually arrested, and he confessed to the crime.⁹¹ All of the defendants except Murphy were offered a negotiated plea.⁹² Murphy pled guilty to the capital charges without a negotiated plea⁹³ and received the death penalty after virtually no mitigating evidence was presented.⁹⁴ Murphy was never notified that he could contact his Mexican consul.⁹⁵ The right to consul issue was raised for the first time

85. Shortly before publication of this article, Mario Murphy was executed. See Ellen Nakashima, *Mexican Citizen Executed in Va. Despite Pleas From Government*, WASH. POST, Sept. 18, 1997, at D4, available in 1997 WL 12887257. The Fourth Circuit Court of Appeals dismissed Murphy's appeal. See *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997). On September 12, 1997, the U.S. Supreme Court denied Murphy's stay of execution and petition for certiorari. See *Murphy v. Netherland*, 1997 WL 562172 (U.S. Sept. 12, 1997).

86. See Amendment to Petition for Writ of Habeas Corpus at 2, *Murphy v. Netherland*, (E.D. Va. 1995) (No. 3:95-CV-856) [hereinafter *Murphy Amendment to Petition for Writ of Habeas Corpus*].

87. See *Murphy v. Virginia*, 431 S.E.2d 48, 49 (Va. 1993).

88. See *id.* at 49-50.

89. See Petition for Writ of Habeas Corpus at 4, *Murphy v. Netherland*, (E.D. Va. 1996) (No. 3:95-CV-856) [hereinafter *Murphy Petition for Writ of Habeas Corpus*].

90. See *Murphy*, 431 S.E.2d at 50-51.

91. *Id.* at 51. The arrest occurred over a year after the murder took place. See *id.*

92. See *Murphy Petition for Writ of Habeas Corpus*, *supra* note 89, at 2; see also Affidavit of Michael F. Fasanaro, Jr. (Murphy's attorney at trial) at 4, *Murphy v. Netherland* (E.D. Va. 1996) (No. 3:95-CV-856) [hereinafter *Fasanaro Affidavit*]. The affidavit states: "The involvement of officials of the Mexican government in the case or their presence at court proceedings, in my opinion, may have discouraged the prosecution from singling out Mario for the death penalty while the five other defendants, all United States citizens, were offered life." *Id.* at 4.

93. See *Murphy Petition for Writ of Habeas Corpus*, *supra* note 89, at 2; see also *Fasanaro Affidavit*, *supra* note 92, at 3-4 ("Based on my judgment that Mario had a better chance to receive a life sentence from [the judge] than from a Virginia Beach jury, I advised Mario to plead guilty without a plea agreement to the charge of capital murder.").

94. See *Murphy Petition for Writ of Habeas Corpus*, *supra* note 89, at 8-9 (mitigating evidence "consisted of the testimony of a jailer, Mario, and his mother.").

95. See *Murphy Amendment to Petition for Writ of Habeas Corpus*, *supra* note 86, at 4-5.

when Murphy filed a petition for writ of habeas corpus in the Eastern District of Virginia.⁹⁶

Murphy's habeas petition was dismissed because of a procedural defect.⁹⁷ Despite the district court's finding that the claim was procedurally defaulted, it felt compelled to discuss the issue due to "the sheer novelty of the claim."⁹⁸ In its discussion, the court, while stating that habeas relief could be granted for violations of treaties,⁹⁹ determined that the violation at issue caused no prejudice to the defendant.¹⁰⁰ Thus, the *Calderon-Medina* prejudice standard appears to have been applied.¹⁰¹ In deciding the case based on the prejudice analysis, the court avoided the issue of whether Article 36 confers an individual right; however, it apparently disagreed with the *Calderon-Medina* determination that Article 36 functions to benefit the individual alien: "the purpose of the Convention, true to its title, is to protect the function of consular offices and not specifically to protect individual foreign nationals."¹⁰² The Mexican Government filed an amicus curiae brief in support of Murphy's petition for habeas corpus.

96. See Murphy Amendment to Petition for Writ of Habeas Corpus, *supra* note 86; see also Appellant's Opening Brief at 17-25, *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997) (No. 96-14) (explaining novelty of Murphy's claim as justification for circumventing procedural default rule).

97. The petition, including the Article 36 issue, was dismissed due to a procedural default relating to the issues raised. See Murphy Memorandum Opinion, *supra* note 6.

98. *Id.* at 6.

99. See *id.* at 7 (citing 28 U.S.C. § 2254). But see Respondent-Appellee's Brief at 20 n.7, *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997) (Nos. 96-14, 96-21) (arguing that "a claimed treaty violation such as Murphy's would be incapable of supporting federal collateral relief"). This issue was thoroughly examined during Murphy's oral argument before the Fourth Circuit Court of Appeals. The court questioned jurisdiction based on the issue of whether denial of a habeas petition may be appealed under 42 U.S.C. § 2253. Telephone interview with William Wright, Attorney for Murphy (Apr. 8, 1997).

100. See Murphy Memorandum Opinion, *supra* note 6, at 7. The court noted that there was no showing of what evidence the Mexican Consulate would have produced to assist Murphy, and the court would not overturn a sentence based on speculation. See *id.* at 7-8. The court, however, did not condone "what appear[ed] to be Virginia's defiant and continuing disregard for the Vienna Convention." *Id.* at 7.

101. The court, however, did not cite to *Calderon-Medina*, the first case to set forth the standard of prejudice. See *supra* notes 29-46 and accompanying text.

102. Murphy Memorandum Opinion, *supra* note 6, at 6.

*D. Angel Breard*¹⁰³

Angel Breard, a dual citizen of Paraguay and Argentina,¹⁰⁴ was convicted of rape and murder in Virginia.¹⁰⁵ He made several trial decisions which were "objectively unreasonable" choices.¹⁰⁶ Breard was offered a plea agreement whereby the Commonwealth of Virginia would agree to forgo the death penalty in exchange for a guilty plea to murder.¹⁰⁷ He decided against accepting a negotiated guilty plea, and elected to "confess his crime to the jury on a plea of not guilty."¹⁰⁸ Breard's decision exemplified his misperception of the U.S. legal system; he believed that if he confessed his crime and explained his new "conversion and rebirth in Jesus Christ," the jury would forgive him as had Christ.¹⁰⁹ The jury was not so forgiving.¹¹⁰

Breard was never informed that he had the right to contact his national consul.¹¹¹ The issue was raised for the first time when he filed a federal petition for writ of habeas corpus in the Eastern District of Virginia.¹¹² The court, although finding that the issue was procedurally defaulted, concluded that "a violation of rights under the Convention is insufficient to permit [28 U.S.C.] § 2254 relief."¹¹³ This decision was

103. Breard's case is on appeal to the Fourth Circuit Court of Appeals. The oral argument is scheduled for October 1, 1997. A decision is expected within six months from this date. Telephone interview with Nancy Kinsley, Legal Assistant, McGuire, Woods, Battle & Boothe (Sept. 23, 1997).

104. See Petition for a Writ of Habeas Corpus at 7, *Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996) (No. 3:96CV366) [hereinafter *Breard Petition for a Writ of Habeas Corpus*].

105. See *Breard v. Netherland*, 949 F. Supp. 1255, 1260 (E.D. Va. 1996). (Breard was sentenced to ten years imprisonment and a \$100,000 fine for rape, and was sentenced to death for murder).

106. *Breard Petition for a Writ of Habeas Corpus*, *supra* note 104, at 16.

107. See *id.* at 6.

108. *Id.* at 6, 16.

109. *Id.* at 24. Breard believed he had committed the crime under a satanic curse from his ex-father-in-law. See *id.* at 6. His "conversion and rebirth in Jesus Christ," according to Breard, freed him from the curse. *Id.* at 24. Thus Breard believed that if the jury were told of the satanic curse and his rebirth in Jesus Christ, "they would understand that he had not been responsible for his actions at the time of the murder and would set him free." *Id.* at 24. Apparently, in South American jurisprudence, "the fact one believes he is under a satanic curse is mitigating evidence in the sentencing phase of a trial and a confession to a jury is likely to result in greater leniency." *Id.* at 24-25.

110. Breard received the death penalty. See *Breard v. Netherland*, 949 F. Supp. 1255, 1260 (E.D. Va. 1996).

111. See *id.* at 1263; *Breard Petition for a Writ of Habeas Corpus*, *supra* note 104, at 14.

112. *Breard*, 949 F. Supp. at 1263; *Breard Petition for a Writ of Habeas Corpus*, *supra* note 104, at 20.

113. *Breard*, 949 F. Supp. at 1263. The court cited its July 26, 1996 Memorandum Opinion in *Murphy v. Netherland* for this proposition. However, the Memorandum Opinion did not state that a violation of rights under a treaty was insufficient to permit § 2254 relief;

appealed to the Fourth Circuit Court of Appeals.¹¹⁴ Argentina filed an affidavit in support of Breard.¹¹⁵ Paraguay, however, went beyond merely filing an amicus brief by bringing a federal action against the state officials responsible for violating the Vienna Convention in Breard's case.¹¹⁶

*E. Republic of Paraguay*¹¹⁷

In September 1996, the Republic of Paraguay filed a civil action against eleven high ranking Virginia state officials.¹¹⁸ The complaint sought declaratory and injunctive relief,¹¹⁹ alleging a "pattern and practice [by state officials] of disregarding their obligations to notify consular officers under the Vienna Convention."¹²⁰ Additionally, the Paraguayan Consul alleged one count under 42 U.S.C. § 1983, claiming the officials' conduct deprived him of his Vienna Convention right to

rather, the court held that "no violation here would permit § 2254 relief." Murphy Memorandum Opinion, *supra* note 6, at 7.

114. Brief was filed by Breard on March 11, 1997.

115. Affidavit of Raul Granillo Ocampo, Ambassador of Argentine Republic in United States, submitted in Breard v. Netherland, 949 F. Supp. 1255 (E.D. Va. 1996) (No. 3:96CV366) [hereinafter Ocampo Affidavit].

116. See Republic of Paraguay v. Allen, 949 F. Supp. 1269 (E.D. Va. 1996); Paraguay Complaint, *supra* note 64, at 5-7.

117. This case is currently on appeal in the Fourth Circuit.

118. See Republic of Paraguay v. Allen, 949 F. Supp. 1269. The officials included the Governor, the State's Attorney General, the Director of Corrections, the Warden of the prison in which Breard was incarcerated, four Judges for the Circuit Court of Arlington County, the Attorney General for Arlington County, and the Chief of Police for Arlington County. See Paraguay Complaint, *supra* note 64, at 5-7. The defendants were selected because each had some responsibility for the arrest, conviction, sentencing, and future carrying out of the sentence of Angel Breard. See *id.*

119. Paraguay requested that the court:

1. Declare that defendants violated the Vienna Convention and the Friendship Treaty by failing to notify plaintiffs of Breard's arrest.
2. Declare that defendants continue to violate both treaties by failing to afford plaintiffs a meaningful opportunity to give Breard assistance during the proceedings against him.
3. Declare Breard's conviction void.
4. Enjoin defendants from taking any action based on the conviction and declare that any further action based on the conviction is a continuing violation of the treaties.
5. Grant an injunction vacating Breard's conviction and directing defendants to abide by the treaties during any future proceedings against Breard.

Republic of Paraguay, 949 F. Supp. at 1272.

120. Paraguay Complaint, *supra* note 64, at 11.

communicate with and assist Breard.¹²¹ As a remedy for the violation, Paraguay sought vacation of Breard's death sentence. "Unless [the] Court vacates Breard's conviction and orders defendants to abide by the law in any further proceedings, Paraguay will have no meaningful opportunity to exercise its rights guaranteed by the two Treaties."¹²² Paraguay's complaint was dismissed for lack of subject matter jurisdiction; the district court held that the Eleventh Amendment to the U.S. Constitution barred such actions.¹²³ This decision has also been appealed to the Fourth Circuit Court of Appeals.

F. Jose Loza¹²⁴

Jose Loza is a Mexican citizen convicted of murdering four people in Ohio, and sentenced to death.¹²⁵ Loza confessed to the murders after it was "suggested [by police officers] that Loza's girlfriend . . . and their unborn child might be electrocuted unless Mr. Loza took the blame for the murder."¹²⁶ No physical evidence tied him to the crime scene; therefore, the confession was crucial to the State's case.¹²⁷ In fact, the

121. See *id.* at 18-19. The Complaint also alleges violations of the Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.- Para., 12 Stat. 1091, which contains a most favored nation clause, see *id.* art. III, at 1093, entitling Paraguay to the same treatment received by other nations pursuant to bilateral treaties with the United States. See Paraguay Complaint, *supra* note 64, at 17-18. The United States has entered into numerous bilateral treaties with other nations which require immediate notification to the nation's consul of the arrest or detention of one of their nationals. *Id.* at 10 (citing Convention—Consular Officers, June 6, 1951, U.S.-U.K., art. 16, 3 U.S.T. 3426, 3439-40; Consular Convention, June 1, 1964, U.S.-U.S.S.R., art. 12(2), 19 U.S.T. 5018, 4027; Agreement on Consular Relations, Jan. 31, 1979, U.S.-China, para. 5, 30 U.S.T. 17, 21). Consequently, Paraguay argues it is likewise entitled to immediate notification. See *id.* For other international documents providing similar provisions see Gisvold, *supra* note 7, at 792-94.

122. Opposition to Defendant's Motion to Dismiss at 5, Republic of Paraguay v. Allen, 949 F. Supp. 1269 (E.D. Va. 1996) (No. 3:96CV745) [hereinafter Paraguay Opposition to Defendant's Motion to Dismiss].

123. See Republic of Paraguay, 949 F. Supp. 1269. Although the action was framed against State officials, "[t]he Eleventh Amendment also bars suits against state officials that are in fact against a state." *Id.* at 1272 (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984)).

124. This case is currently on appeal in the 12th Appellate District, Butler County, Ohio.

125. See Loza Merit Brief, *supra* note 5, at 1. The murder victims were the family of Loza's girlfriend, who was pregnant with Loza's child. See *id.* at 1-2. Dorothy Jackson, Loza's girlfriend, admitted that she obtained the weapon used in the killings. See *id.* at 2. Loza was sentenced to thirty years to life for one count, and to death for the remaining counts. See *id.* at 2-3.

126. *Id.* at 1.

127. See *id.* at 2.

State relied solely upon Loza's confession and the testimony of his girlfriend to obtain the conviction.¹²⁸

Although the police officers, who arrested Loza and took his confession, knew that he was a Mexican citizen, they never informed him that he could contact the Mexican consul for assistance.¹²⁹ The case has been appealed to the Ohio Court of Appeals, claiming a violation of the Vienna Convention.¹³⁰ This case is distinguishable from the other pending cases because there is no procedural default issue. As a result, the Ohio Court of Appeals will need to decide the case on the merits.¹³¹ The Government of Mexico has filed an amicus curiae brief in support of Loza.¹³²

These six cases raise serious issues that may well have far-reaching implications in international relations. By their active involvement in the appeals process,¹³³ foreign governments are both insisting and expecting that the United States respond appropriately to their allegations of Article 36 violations.¹³⁴

V. DOES ARTICLE 36 CONVEY A PRIVATE ENFORCEABLE RIGHT AND AN APPROPRIATE REMEDY?

The six cases pending appellate review raise very difficult questions for the courts to decide. Ignoring the collateral issue of procedural default raised in several of the cases,¹³⁵ the questions which must be

128. *Id.* at 2. Dorothy Jackson's testimony seems to be somewhat questionable. *See id.* at 9. She was paid two thousand dollars to testify. *See id.* She knew more details of the crime than the defendant, she obtained the murder weapon, she was seen at the family's residence on the day of the crime although she testified that she was not there, and she gave several different versions of the events. *See id.*

129. *Id.* at 1, 4-5.

130. *Id.* at 4-5.

131. All of the other habeas cases, as mentioned, have faced the task of overcoming procedural default barriers. The Republic of Paraguay faces the barrier posed by sovereign immunity under the Eleventh Amendment. *See supra* Part IV.A-E. Consequently, this may be the only case that actually reaches the merits of the issue.

132. *See* Loza Amicus Brief, *supra* note 61.

133. *See supra* Part IV.A-F; *see also* Hernán de J. Ruiz-Bravo, *Suspicious Capital Punishment: International Human Rights and the Death Penalty*, 3 SAN DIEGO JUST. J. 379 (1995) (article written by consul in charge of legal affairs and human rights in the Consulate General of Mexico, in Houston, Texas).

134. *See supra* note 5 and accompanying text.

135. The issue of procedural default raised by these cases is beyond the scope of this article. However, the pending cases have raised an interesting issue concerning the supremacy of international law which may well lead to Supreme Court review. The argument is that the language of Article 36(2) prohibits use of national law to thwart the fulfillment of the treaty provisions. There is support for this theory in the Conference debates. *See, e.g.,* 1 *Official*

answered are: (1) does the Vienna Convention confer a private enforceable right on individuals;¹³⁶ (2) if so, is violation of that right subject to an actual prejudice analysis; and (3) what is the appropriate remedy for violation of Article 36.

A. Self-Executing Treaty Doctrine¹³⁷

The question of whether a treaty confers personal enforceable rights is typically analyzed in the context of the doctrine of self-executing treaties. There are two distinct questions to resolve in determining whether a treaty is self-executing:¹³⁸ (1) whether the treaty requires implementing additional legislation before it can take effect;¹³⁹

Records, *supra* note 18, at 347 (statement of Spanish delegate expressing support for United Kingdom amendment, "which conformed to the principle that international law prevailed over municipal law."); *id.* at 348 (statement of United Kingdom delegate in response to Ukrainian delegate's complaint that municipal law should prevail over international law: "[T]hat objection could not apply to the rights recognized in paragraph 1 of Article 36."). The Amendment in question, which modified Article 36(2) was eventually adopted by the Conference. It read: "[S]ubject 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." 2 *Official Records*, *supra* note 18, at 181; 1 *Official Records*, *supra* note 18, at 348.

136. This question has been largely ignored by the courts, which have typically moved directly to the analysis of whether the violation prejudiced the defendant. *See infra* note 228 and accompanying text.

137. The doctrine of self-execution has been called "one of the most confounding" questions in treaty law. *United States v. Postal*, 589 F.2d 862, 876 (5th Cir. 1979). In fact, "[a]s noted in a memorandum prepared for the use of the Legal Advisor [sic] of the State Department, 'An examination of adjudicated cases and of some treatises and of some of the law reviews has failed to disclose a clear definition of the term "Self-Executing Treaty."'" *Id.* at 87 n.21 (citing Memorandum from Attorney Advisor Diven to Legal Advisor Gross, *Definition of "Self-Executing Treaty,"* MS. Dep't of State, file 711.009/4-2248 (Apr. 22, 1948), *reprinted in* MARJORIE M. WHITEMAN, 14 *DIGEST OF INTERNATIONAL LAW* 304 (1970)).

138. *See* Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1119 (1992) (the term "self-executing" has been analyzed in the following contexts: whether a treaty requires implementing legislation, whether a private individual has standing to assert a treaty provision, whether a treaty confers a private right of action, and whether a treaty confers a remedy); *see also* *More v. Intelcom Support Servs., Inc.*, 960 F.2d 466 (5th Cir. 1992). The court stated:

Whether a treaty is self-executing is an issue for judicial interpretation . . . and courts consider several factors in discerning the intent of the parties to the agreement: (1) the language and purposes of the agreement as a whole; (2) the circumstance surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute.

Id. at 469 (citations omitted).

139. *See, e.g., Postal*, 589 F.2d 862. The court stated:

and (2) whether the treaty confers private enforceable rights to individuals.¹⁴⁰

1. Implementing Legislation Requirement

The Supremacy Clause of the U.S. Constitution declares treaties to be "the law of the land."¹⁴¹ This statement, it has been argued, makes treaty provisions binding and enforceable in domestic courts upon ratification.¹⁴² However, the doctrine of self-executing treaties has acted,

A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.

Id. at 875 (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)).

140. See *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1274 (E.D. Va. 1996). This question has also been analyzed as an issue of standing. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1989) (in deciding whether a defendant who was abducted from Mexico had standing to raise the U.S.-Mexico Extradition Treaty as a defense, the Court held that only States are granted rights under international law, but when a State from which the defendant was abducted protests the abduction, the defendant has derivative standing to raise the treaty violation); see also *Vázquez*, *supra* note 138, at 1141 (distinguishing issue of standing from "right of action" and remedy). "A litigant has to establish a right of action only if he is seeking to maintain an action; a right of action is unnecessary if one is invoking a legal provision as a defense." *Id.* at 1142. For example, "defenders of the exclusionary rule argue that exclusion of evidence is the appropriate remedy for violations of the Fourth Amendment, yet it has not been thought that the defendant needed a right of action to invoke the Fourth Amendment for the purpose of excluding evidence." *Id.* at 1142 n.246.

141. U.S. CONST. art. VI, cl. 2. The Supremacy Clause provides:

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 of Laws of any State to the Contrary notwithstanding.

Id.

142. See, e.g., *Vázquez*, *supra* note 138, at 1097 ("In declaring treaties to be the law of the land, it was the Framers' intent to afford individuals a domestic legal sanction for treaty violations."). This scholar points out that "[t]he inability of the central government under the Articles of Confederation to secure compliance by the states with the nation's treaty obligations was among the principal animating causes of the Framers' decision to establish a new government under a new Constitution, rather than simply amend the Articles of Confederation." *Id.* at 1102. He cites for support James Madison's questioning of a proposed alternative:

Will it prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars? The tendency of the States to these violations has been manifested in sundry instances. The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shewn to us. This cannot be the permanent disposition of foreign nations. A rupture with other powers is among the

in certain circumstances, to limit the viability of treaty provisions.¹⁴³ Self-execution was first enunciated by Justice Marshall in 1829, in *Foster v. Neilson*:¹⁴⁴

Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as an equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the [treaty] import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.¹⁴⁵

Consequently, the status of each treaty must be determined individually.¹⁴⁶ The Vienna Convention on Consular Relations has been interpreted as being self-executing.¹⁴⁷ Nevertheless, the Supreme Court

greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole. The existing confederacy does not sufficiently provide against this evil.

Id. at 1102–03 (citing 32 Journals of the Continental Congress 316 (Mar. 21, 1787) (Roscoe R. Hill ed.)).

143. See Gisvold, *supra* note 7, at 787.

144. 27 U.S. (2 Pet.) 253 (1829); see also Vázquez, *supra* note 138, at 1113 (“Chief Justice Marshall’s opinion in *Foster v. Neilson*, which is considered to be the origin of the doctrine of self-executing treaties, partially resurrected the distinction between executory and executed treaty provisions that Justice Iredell [in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796)] thought had been interred by the Supremacy Clause.”).

145. *Foster*, 27 U.S. (2 Pet.) at 314. But see *Ware v. Hylton*, 3 U.S. (3 Dall.) 199. Justice Iredell’s circuit decision addresses the distinction between executory and executed treaties, concluding that the Supremacy Clause dispensed with the need for enacting legislation. *Id.* Iredell’s circuit opinion was overruled by the Supreme Court on other grounds. *Id.* See also Vázquez, *supra* note 138, at 1110–14 (for analysis of *Ware v. Hylton* with conclusion that the decision “establishes that, when a treaty creates an obligation of a state vis-à-vis individuals, individuals may enforce the obligation in court even though the treaty does not, as an international instrument, confer rights directly on individuals of its own force”).

146. See Gisvold, *supra* note 7, at 785 n.61 (citing RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 cmt. d (1987) [hereinafter RESTATEMENT]); see also *United States v. Postal*, 589 F.2d 862. The court stated:

The question whether a treaty is self-executing is a matter of interpretation for the courts when the issue presents itself in litigation . . . and, as in the case of all matters of interpretation, the courts attempt to discern the intent of the parties to the agreement so as to carry out their manifest purpose. . . . The parties’ intent may be apparent from the language of the treaty, or, if the language is ambiguous, it may be divined from the circumstances surrounding the treaty’s promulgation.

Id. at 876 (citations omitted).

147. S. EXEC. REP. NO. 91–9, app., at 5 (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, that the United States considers the Vienna Convention “entirely self-executive,” and requiring no Congressional implementing legislation); see also *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1274 (E.D. Va. 1996) (“Most frequently, the term [‘self-executing’] is used to refer to a treaty that does not require implementing legislation

has found that the Supremacy Clause is not a source of individual federal rights.¹⁴⁸ Consequently, the very significant question of whether the treaty in question confers private enforceable rights must still be addressed.¹⁴⁹

2. Private Enforceable Rights

Courts and commentators have suggested that individuals gain derivative rights under treaties.¹⁵⁰ Addressing this issue in the framework of the United States' Extradition Treaty with Mexico,¹⁵¹ the Supreme Court in *United States v. Alvarez-Machain* found that: "[t]he 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."¹⁵² Accordingly, a U.S. court must enforce treaty provisions raised by individuals if the treaty grants individuals enforceable rights. In fact, U.S. courts have long held that individuals can enforce treaty provisions where the treaty explicitly grants private rights.¹⁵³ And, as

before becoming federal law. . . . The parties agree that the treaties are 'self-executing' under this definition."); Loza Amicus Brief, *supra* note 61, at 7 ("Mexico intended and has treated it as self-executing."); RESTATEMENT, *supra* note 146, § 111 cmt. h (1986) (Executive Branch's statements concerning treaties carry great weight in determining whether the treaty is self-executing).

148. See *Dennis v. Higgins*, 498 U.S. 439, 450 (1991).

149. It should be noted, however, that most of the cases that have addressed this issue have either assumed a right under the Convention or avoided the issue by moving directly to a prejudice analysis. See *supra* notes 29-46, 76 and accompanying text.

150. See *United States v. Alvarez-Machain*, 504 U.S. 655, 681 n.26 (Stevens, J., dissenting) (construing U.S.-Mexico Extradition Treaty) ("[I]f an individual who is not a party to an agreement between the United States and another country is permitted to assert the rights of that country in our courts, as is true in specialty cases, then the same rule must apply to the individual who has been a victim of this country's breach of an extradition treaty and who wishes to assert the rights of that country in our courts after that country has already registered its protest."); *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1356 (9th Cir. 1991) (discussing U.S.-Mexican Extradition Treaty) ("[W]e fail to see the logic of the government's argument that the defendant has standing to object to personal jurisdiction in cases in which the United States has invoked the treaty but not in cases in which the treaty is invoked by the other signatory, particularly in light of the fact that the individual's right is 'derivative' of the rights of that other nation and it is the other nation, not the United States, which bargained for the provision which benefits the aggrieved individual."); *United States v. Calderon-Medina*, 591 F.2d 529, 532 n.6 (9th Cir. 1979) (construing Vienna Convention) ("[P]rotection of some interests of aliens as a class is a corollary to consular efficiency."); see also 1 *Official Records*, *supra* note 18, at 333 (statement of Indian delegate that he "did not agree that the International Law Commission's draft established a new right, for the right given to consulates implied a corresponding right for nationals").

151. Extradition Treaty, May 4, 1978, U.S.- Mex., 31 U.S.T. 5059.

152. *Alvarez-Machain*, 504 U.S. at 667.

153. See *infra* notes 156-159 and accompanying text; see also *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991) (treaty must directly accord enforceable rights); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988)

noted by the Ninth Circuit Court of Appeals in *United States v. Verdugo-Urquidez*, numerous treaty rights have in fact been enforced in our courts by individuals.¹⁵⁴ Thus, it must be determined whether the Vienna Convention grants an individual right to notification and access.¹⁵⁵

One of the most noted opinions discussing an individual's right to enforce treaty provisions is that of the *Head Money Cases*,¹⁵⁶ where the Supreme Court acknowledged that a treaty may "contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other"¹⁵⁷ The Court explained:

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.¹⁵⁸

The Court, however, failed to define which rights would be "of a nature to be enforced in a court of justice."¹⁵⁹ To make that determination, the courts must interpret the treaty in question.¹⁶⁰

Interpretation of treaties is governed by the Vienna Convention on the Law of Treaties (Treaty Convention).¹⁶¹ Article 31 provides the general rules of interpretation,¹⁶² and Article 32 provides for supplementary

("Treaty clauses must confer . . . rights in order for individuals to assert a claim 'arising under' them."); see generally Vázquez, *supra* note 138.

154. 939 F.2d 1341, 1355-57 (9th Cir. 1991).

155. The Eastern District of Virginia declared that the Vienna Convention is not self-executing. See *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1274 (E.D. Va. 1996). However, this statement was made in dictum and without any analysis.

156. 112 U.S. 580 (1884).

157. *Id.* at 598.

158. *Id.* at 598-99.

159. *Id.* at 599.

160. "In construing treaties, we use principles analogous to those that guide us in the task of construing statutes. . . . As with statutes, treaties are to be construed first with reference to their term[s]" *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1361-62 (2d Cir. 1992) (citations omitted).

161. Treaty Convention, *supra* note 2. The United States has not ratified the Treaty Convention, but it has been applied by courts and the Executive Branch in interpreting treaties. See *Haitian Ctrs. Council*, 969 F.2d at 1362.

162. Article 31 provides in pertinent part:

1. A treaty shall 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

means of interpretation.¹⁶³ The starting point is with a good faith¹⁶⁴ "elucidation of the meaning of the text" of the treaty.¹⁶⁵ The text must be read as a whole,¹⁶⁶ in context,¹⁶⁷ in light of the object and purpose of the treaty,¹⁶⁸ in consideration of relevant rules of international law,¹⁶⁹

-
- (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
-
- (c) Any relevant rules of international law applicable in the relations between the parties.

Treaty Convention, *supra* note 2, 1155 U.N.T.S. at 340.

163. Article 32 provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

Id.

164.

The principle of good faith underlies the most fundamental of all norms of treaty law—namely, the rule *pacta sunt servanda*. . . . It is often said that the principle of good faith in the process of interpretation underlies the concept that the interpretation should not lead to a result which is manifestly absurd or unreasonable.

SINCLAIR, *supra* note 2, at 119–20.

165. *Id.* at 115; *see also* Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988) ("in 'determining whether a treaty is self-executing' in the sense of its creating private enforcement rights, 'courts look to the intent of the signatory parties as manifested by the language of the instrument.'" (citations omitted)).

166. *Id.* at 127.

167. Article 31(b) of the Treaty Convention defines "context" as agreements or instruments made in relation to the treaty and accepted by the parties. *See* Treaty Convention, *supra* note 2, 1155 U.N.T.S. at 340. Such agreements could go so far as to include uncontested interpretations of treaty provisions given at conferences of the drafting committee. *See* SINCLAIR, *supra* note 2, at 130.

168. *See* SINCLAIR, *supra* note 2, at 115–19, 130–35. There are proponents of the notion that the object and purpose of a treaty are primarily gathered from the text of the treaty, particularly the preamble, *id.* at 118, as well as of the notion that "the search for the object and purpose of a treaty is in reality a search for the common intentions of the parties who drew up the treaty." *Id.* at 130.

169. "[E]very treaty provision must be read not only in its own context, but in the wider context of general international law, whether conventional or customary." *Id.* at 139. While it is arguable that the international law in force at the time of the conclusion of the treaty should be applied, there is evidence that evolution and development of international law may have some influence in treaty interpretation. *See id.* However, such an interpretation may not conflict with the "intentions and expectations of the parties as they may have been expressed during the negotiations preceding the conclusion of the treaty." *Id.* at 140.

and subsequent agreements and practices regarding interpretation or application of the treaty provisions.¹⁷⁰ Resort to the *travaux préparatoires*¹⁷¹ of the treaty may supplement the textual interpretation.¹⁷² However, the "plain meaning of treaty terms controls" unless it would render a result "inconsistent with the intent or expectations of its signatories."¹⁷³

The Vienna Convention on Consular Relations provides:

[I]f 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 subparagraph.¹⁷⁴

170. This provision does not encompass all practices in general, rather only those "concordant subsequent practice[s] common to all the parties." *Id.* at 138. Practices of individual nations may, however, be considered as part of the supplementary means of interpretation. *See id.*

171. One court has defined the term as "the international equivalent of legislative history" of the treaty, which consists of the "preparatory and conclusory circumstances of a treaty." *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1362 (2d Cir. 1992).

172. Sinclair has described the use of *travaux préparatoires* in treaty interpretation as:

The *travaux préparatoires* of a treaty, together with the circumstances of its conclusion, are characterised as "supplementary means" of interpretation which may be resorted to to confirm the meaning resulting from the application of the general rule, or to determine the meaning when the interpretation according to the general rule leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. . . . This is not to say that the *travaux préparatoires* of a treaty, or the circumstances of its conclusion, are relegated to a subordinate, and wholly ineffective, role.

SINCLAIR, *supra* note 2, at 115-16. Further:

no rigid temporal prohibition on resort to the *travaux préparatoires* of a treaty was intended by use of the phrase "supplementary means of interpretation". . . . The distinction between the general rule of interpretation and the supplementary means of interpretation is intended rather to ensure that the supplementary means do not constitute an alternative, autonomous method of interpretation divorced from the general rule.

Id. at 116.

173. *Haitian Ctrs. Council*, 969 F.2d at 1362 (citations and internal quotation marks omitted).

174. Vienna Convention on Consular Relations, *supra* note 1, art. 36(1)(b), 21 U.S.T. at 101 (emphasis added).

The provision unequivocally states that the rights in the subparagraph belong to the individual national and that he must be notified of these rights.¹⁷⁵ This mandate would appear to be "a rule by which the rights of the private citizen or subject may be determined;"¹⁷⁶ the rule requires that the authorities inform a detainee of his right to communicate with consul. Thus, the detainee has the right to be informed. However, the language must be considered in light of other interpretative factors.¹⁷⁷

Article 36 of the Vienna Convention on Consular Relations is an awkward place to enumerate the rights of an individual national.¹⁷⁸ The object and purpose of the Treaty, as set forth in the preamble, "is not to benefit individuals but to ensure the efficient performance of functions by consular posts" ¹⁷⁹ Without more, these factors weigh heavily against an interpretation that the Treaty grants an individual right.¹⁸⁰

175. However, the writing is ambiguous enough to have confused at least one court. See Loza Merit Brief, *supra* note 5, at 5-6 ("At the September 26, 1996, oral argument, the trial court was confused as to who the 'he' was in the term 'if he so requests' contained in Art. 36(1).").

176. See Head Money Cases, 112 U.S. 580, 598-99 (1884); see also *supra* notes 156-159 and accompanying text.

177. See *supra* notes 167-173 and accompanying text.

178. See Haitian Ctrs. Council, 969 F.2d at 1359-60 (arguing that the location of a provision in a statute influences its meaning).

179. Vienna Convention, *supra* note 1, preamble, 21 U.S.T. at 101. The preamble provides:

The States Parties to the present Convention,

Recalling that consular relations have been established between peoples since ancient times,

Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relation which was opened for signature on 18 April 1961,

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the 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,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows . . .

Id.

180. This argument has been raised by the United States government in most of the cases currently on appeal. See, e.g., Motion to Dismiss at 13, Republic of Paraguay v. Allen, 949 F. Supp. 1265 (E.D. Va. 1996) (No. 3:96CV745) [hereinafter Paraguay Motion to Dismiss] ("The express language of the Vienna Convention's preamble thus qualifies all of

However, considering the preamble language in relation to other relevant international treaties weakens that interpretation. The focus of the Vienna Convention on Consular Relations is on consuls; but the Treaty is not exclusively devoted to consular officers. The Treaty outlines the functions,¹⁸¹ the privileges,¹⁸² and immunities¹⁸³ of consuls. The privileges and immunities granted in the Vienna Convention are to enable the consul to perform his enumerated functions, not to benefit the consul personally.¹⁸⁴ Thus, the preamble language refers to the individual consul, not individual foreign nationals.¹⁸⁵

Comparison to other relevant treaties in existence at the conclusion of the Convention supports this interpretation. The Vienna Convention on Diplomatic Relations¹⁸⁶ has almost identical language in its preamble.¹⁸⁷ A resolution adopted at the conclusion of that Conference

the provisions that follow and unequivocally demonstrates that the intention of the signatories was *not* to benefit individuals, but merely 'to ensure the efficient performance of functions by the consular posts.'").

181. See Vienna Convention, *supra* note 1, art. 5, 21 U.S.T. at 82-85.

182. See *id.* art. 29 (Use of national flag and coat-of-arms), 21 U.S.T. at 96; art. 31 (Inviolability of the consular premises), 21 U.S.T. at 97; art. 32 (Exemption from taxation of consular premises), 21 U.S.T. at 98; art. 33 (Inviolability of the consular archives and documents), 21 U.S.T. at 98; art. 35 (Freedom of communication), 21 U.S.T. at 99-100; art. 36 (Freedom of contact with nationals), 21 U.S.T. at 100-01; art. 40 (Protection of consular officers), 21 U.S.T. at 103; art. 41 (Personal inviolability of consular officers), 21 U.S.T. at 103-04; art. 48 (Social security exemption), 21 U.S.T. at 107-08; art. 49 (Exemption from taxation), 21 U.S.T. at 108-09; art. 50 (Exemption from customs duties and taxes), 21 U.S.T. at 109; Article 52 (Exemption from personal services and contribution), 21 U.S.T. at 110.

183. See *id.* art. 43 (Immunity from jurisdiction), 21 U.S.T. at 104-05.

184. Article 36 begins: "With a view to facilitating the exercise of consular functions relating to nationals of the sending state . . ." *Id.* art. 36(1), 21 U.S.T. at 100.

185. See Transcript of Hearing, *Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996) (No. 3:96CV745). Breard's attorney argued:

We acknowledge that the preamble of the treaty which this Court quoted in the Mario Murphy case states that the purpose of the privileges and immunities is not to benefit individuals. But in order to give meaning to that, [it is] necessary to go back preceding that sentence to see what such privileges and immunities that sentence was referring to. The preceding sentence indicates that the privileges and immunities it was referring to there were those of consular officials. So, we submit that the sentence in the preamble really means that the privileges and immunities imported to consular officials have as their purpose enabling nations to conduct relations among themselves and not personal benefits.

Id. at 29-30.

186. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3229.

187. The preamble to the Vienna Convention on Diplomatic Relations provides:
The States Parties to the present Convention,

Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents,

Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of

clarifies the meaning of the preamble language.¹⁸⁸ The resolution suggests that the preamble merely establishes that the privileges and immunities granted to a consul should not be used by the consul as a shield against punishment for wrongdoing.¹⁸⁹ The Privileges and Immunities Clause in the Convention on the privileges and immunities of the United Nations also supports this interpretation.¹⁹⁰ Consequently,

international peace and security, and the promotion of friendly relations among nations,

Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,

Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,

Have agreed as follows . . .

Id. preamble, 23 U.S.T. at 3230.

188. The resolution provides:

The United Nations Conference on Diplomatic Intercourse and Immunities,

Taking note that the Vienna Convention on Diplomatic Relations adopted by the Conference provides for immunity from the jurisdiction of the receiving State of members of the diplomatic mission of the sending State,

Recalling that such immunity may be waived by the sending State,

Recalling further the statement made in the preamble to the convention that the purpose of such immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions,

Mindful of the deep concern expressed during the deliberations of the Conference that claims of diplomatic immunity might, in certain cases, deprive persons in the receiving State of remedies to which they are entitled to by law,

Recommends that the sending State should waive the immunity of members of its diplomatic mission in respect of civil claims of persons in the receiving State when this can be done without impeding the performance of the functions of the mission, and that, when immunity is not waived, the sending State should use its best endeavours to bring about a just settlement of the claims.

Resolution II, Consideration of Civil Claims, Apr. 14, 1961, 500 U.N.T.S. 218.

189. *See id.*

190. The clause provides:

Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

Convention on the Privileges and Immunities of the United Nations, art. IV, § 14, at 5, U.N. Doc. ST/LEG/19, U.N. Sales No. C/E/F/R/S.75.X.1 (1974).

the preamble to the Vienna Convention cannot, by itself, support a determination that Article 36 grants no personal right to individuals.

Since the textual interpretation provides only an ambiguous explanation of the Treaty's meaning, resort must be made to the *travaux préparatoires* of the Treaty for more information.¹⁹¹ These supplementary materials indicate that Article 36 of the Vienna Convention was intended to confer individual rights.

Committee and plenary meeting debates of the Vienna Conference show that there was significant debate over Article 36.¹⁹² In fact, numerous amendments were submitted, and the original draft was completely eliminated from the Convention when it failed to receive the requisite support.¹⁹³ In committee meetings, several nations' representatives expressed concern over individual rights.¹⁹⁴ One particular amendment, submitted by Venezuela, received a great deal of attention. This proposed amendment to Article 36(1)(a) completely eliminated reference to the national's freedom to communicate with his consul.¹⁹⁵ Some nations supported the amendment because they believed that the Treaty was an inappropriate place to establish an individual national's rights.¹⁹⁶ However, the amendment received strong

191. Of course, not all interpreters would agree with this position. *See, e.g.*, Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1365 (2d Cir. 1992) ("The government's fourth and final assault on the clear language of the Refugee Convention comes in the form of what Justice Scalia recently called 'that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history.'" (citing *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 521 (1992) (Scalia, J., concurring))).

192. The International Law Commission's draft and amendments submitted by various nations were voted on in the first and second committee meetings. The draft adopted by the Committee went on to the plenary meeting. Article 36 did not receive sufficient support in the first plenary meeting, and thus was eliminated from the original draft. *See generally Official Records, supra* note 18.

193. *See 2 Official Records, supra* note 18, at 130-32 (a total of nineteen amendments were submitted for Article 36 alone).

194. *See 1 Official Records, supra* note 18, at 338 (statement by Korean delegate) ("[T]he receiving State's obligation under paragraph (1) (b) [sic] [is] extremely important, because it relate[s] to one of the fundamental and indispensable rights of the individual."); *id.* at 339 (statement by Greek delegate) ("The Conference, in its task of codifying international law and customs on consular relations, was also following the present-day trend of promoting and protecting human rights.").

195. The Venezuelan amendment recommended that Article 36(1)(a) should provide only that "[t]he competent consulate and the officials of that consulate shall be free to communicate with and, if necessary, to have access to the nationals of the sending State." 2 *Official Records, supra* note 18, at 84.

196. 1 *Official Records, supra* note 18, at 332. In support of the Venezuelan amendment, Kuwait's delegate stated:

the International Law Commission's text introduced a novelty to the convention by defining the rights of the nationals of the sending States and not, as stated in paragraph 1 of the commentary, the rights of consular officials. The International

opposition.¹⁹⁷ It was withdrawn,¹⁹⁸ and eventually replaced with language which included the freedom of the individual to communicate with his consul.¹⁹⁹

Committee debate over Article 36(1)(b) and (2) also focused on the individual.²⁰⁰ Many countries insisted upon automatic notification to consuls in cases of arrest or detention of nationals.²⁰¹ A primary reason

Law Commission's draft was, in fact, defining rights which were not established under international law, and it might follow that those rights would have to be established.

Id. However, Kuwait felt "the rights of nationals of sending States . . . were irrelevant to the convention under discussion." *Id.* The Venezuelan delegate, responding to debate over the amendment:

insisted that he did not wish to limit the normal relations that existed between the consular officials and the nationals of sending States, or to deny that international agreement could be reached on the rights and duties of nationals. He merely wished to make it clear that the draft convention was not the appropriate instrument.

Id. at 333.

197. In opposition to the Venezuelan amendment, the Spanish delegate stated that: The right of the nationals of a sending State to communicate with and have access to the consulate and consular officials of their own country [is] one of the most sacred rights of foreign residents in a country. The fact that it was established under national law in no way conflicted with the need to establish it under international law.

Id. at 332. And the Indian delegate added that he "did not agree that the International Law Commission's draft established a new right, for the right given to consulates implied a corresponding right for nationals." *Id.* at 333.

198. *Id.* at 334.

199. *See supra* note 17 (text of Article 36 as adopted).

200. In fact, the United States submitted an amendment to Article 36(1)(b) proposing that notification to a consul of a national's arrest or detention be made "'at the request of a national of the sending State.'" 2 *Official Records, supra* note 18, at 73. The purpose of the amendment, according to the United States delegate, was to "protect the rights of the national concerned." 1 *Official Records, supra* note 18, at 337.

201. *See* 1 *Official Records, supra* note 18, at 37 (statement of Soviet delegate) ("What guarantee was there that the person concerned had been informed of his right, that he had refused to request that his consulate should be informed, or that he had not been the victim of undue influence? How could a person who was deprived of his liberty make use of his freedom?"); *id.* (statement of Tunisian delegate) ("The representative of the U.S.S.R. had very justly remarked on a serious omission in the text . . . for it contained no safeguard. Freedom was one of the most valuable possessions of man, and must not be restricted unless the restriction was accompanied by the greatest possible safeguards. When a State assumed the responsibility of committing a foreign national to prison, it must be obliged to inform the competent consul."); *id.* at 85 (statement of Tunisian delegate) (The joint amendment proposed "would deny to the consul the means of performing one of his most important functions under Article 5 and frustrate the national's right to protection from his consulate, for the decision to notify the consul of a national's detention in the receiving State would be left entirely to the discretion of that State's authorities."); *id.* at 38 (statement of Congolese delegate) ("the authorities of the receiving State might abstain from informing the consulate of the sending State of the detention of one of its nationals on the pretext that the individual concerned had not asked for it."); *id.* at 85 (statement of Greek delegate) ("The receiving

for such notification was to ensure due process safeguards for the protection of nationals;²⁰² however, concern for the free will of the affected national prevailed. The Committee, and eventually the Convention, adopted language that prohibits notification of the consul unless it is requested by the foreign national.²⁰³

Debate over paragraph two of Article 36 focused on an amendment submitted by the United Kingdom;²⁰⁴ some nations were concerned that the amendment would "accord privileged status to aliens."²⁰⁵ In response to the criticism of the amendment, the United Kingdom delegate responded "it [is] precisely with aliens and their rights that article 36 [is] concerned."²⁰⁶ Despite the concerns raised, the United Kingdom amendment was eventually adopted by the conference.²⁰⁷

The controversy over Article 36 continued into the plenary meetings. Near the close of the Conference, the United Kingdom submitted an amendment proposal to encourage a compromise on paragraph (1)(b); specifically, an obligation on the receiving State to inform the detained national of his rights under the paragraph.²⁰⁸ This amendment was eventually adopted two days before the Conference closed.²⁰⁹ As ultimately adopted, Article 36 contains each of the necessary safeguards proposed to protect individual freedoms, including a prohibition on notification unless the foreign national requests it and a requirement that the foreign national be told of his right to request such notification. Consequently, the "legislative history" of the Treaty supports the

State's obligation should be unqualified, to avoid the risk of authorities failing in their duty on some pretext.").

202. See *supra* note 202.

203. See, e.g., 1 *Official Records*, *supra* note 18, at 331 (statement of Australian delegate) ("[T]he fundamental right [of a nation to protect its nationals] must be qualified with regard to the wishes of the individual." The delegate further stated that "[t]here was no need to stress the extreme importance of not disregarding, in the present or any other international document, the rights of the individual. Those rights were all-important, and were embodied in the principle upon which the United Nations was based.").

204. See 2 *Official Records*, *supra* note 18, at 85. The amendment proposed language that was eventually adopted by the Conference.

205. 1 *Official Records*, *supra* note 18, at 347-48 (statement of Romanian delegate with which the Soviet delegate agreed).

206. *Id.* at 348.

207. *Id.* (the United Kingdom amendment was adopted by forty-two votes to fourteen, with eleven abstentions.)

208. In rejecting a proposed amendment that required notification only if the detained national so requested, the United Kingdom stated that such a rule "could give rise to abuses and misunderstanding. It could well make the provisions of article 36 ineffective because the person arrested might not be aware of his rights." *Id.* at 83. Consequently, the United Kingdom submitted its amendment. See *id.* at 83-84.

209. *Id.* at 348 ("Article 36 as a whole, as amended, was adopted by 42 votes to none, with 27 abstentions.").

interpretation that Article 36 was intended to confer individual rights on foreign nationals.

Subsequent practices of the United States, and other participating nations, also support the interpretation that an individual right was intended. The U.S. Executive Branch has demonstrated, in several ways, its interpretation of Article 36.²¹⁰ The Department of State was assigned to enforce the Vienna Convention on Consular Relations.²¹¹ Pursuant to this duty, the State Department has periodically sent notices to state and local officials reminding them of their obligations under the Treaty.²¹² The notices, sent to the governor and attorney general of each state and the mayors of all cities having a population exceeding 100,000 people,²¹³ require that a detained foreign national be informed of his right to have his government notified of his detention.²¹⁴

The State Department's Foreign Affairs Manual states the Department's views pertaining to the Vienna Convention in relation to U.S. citizens arrested abroad: "Article 36 of the Vienna Consular Convention provides that the host government must notify the arrestee without delay of the arrestee's right to communicate with the American consul."²¹⁵ The Manual defines "rights" as "all which [are] due a U.S.

210. See *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992) (suggesting that Executive Branch interpretations made in support of a litigation posture should carry less weight than evidence of a non-litigative "policy" interpretation, but emphasizing that, although the Executive Branch's interpretation of a treaty is entitled to great weight, it is not conclusive).

211. See Affidavit of Joan H. Colbert, Director of the Office of Public and Intergovernmental Liaison, Bureau of Public Affairs, U.S. Department of State, exhibits A, B, *Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996) (No. 3:96CV366).

212. See *id.*

213. See *id.* at 2.

214. The notice provides:

This is to remind all personnel with law enforcement responsibilities that the U.S. is obligated under international agreements and customary international law to notify foreign authorities when foreign nationals are arrested or otherwise detained in the U.S.

The arresting official should in all cases immediately inform the foreign national of his right to have his government notified concerning the arrest/detention.

Id., exhibit A, at 1. The State Department also issued a Notice for Law Enforcement Officials on Detention of Foreign Nationals, which reminds law enforcement personnel of the obligations under the Vienna Convention, and clarification that the United States has bilateral relationships with some countries, which mandate automatic notification. "If the detainee is a national of any other foreign country, the Vienna Convention on Relations and customary international law require that she/he must be informed immediately of the right to have his/her government notified." *Id.*, exhibit B, at 1.

215. U.S. DEP'T OF STATE, *supra* note 19, § 411.1. The location, title, and context of this provision is also telling as to the Department's interpretation of Article 36. Section 411 is entitled "Notification;" it instructs consuls that it is "essential that the consul obtain prompt

citizen who has been detained or arrested abroad by just claim.”²¹⁶ State Department public statements have expressed the same interpretation: “Recognition of the rights of notification and access is reflected in the Vienna Convention on Consular Relations, which is widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the convention.”²¹⁷

Two other Executive Branch agencies have similarly expressed the United States’s interpretation of Article 36 in the form of agency regulations. The INS requires that every detained alien be notified of his right to communicate with his consul.²¹⁸ The Department of Justice requires that an arrested foreign national be informed that his consul will be notified of his arrest unless he does not wish that the consul be so notified.²¹⁹ In addition to these Executive Branch policy statements, on May 7, 1996, Mexico and the United States entered into an independent bilateral agreement which indicates the United States’ view on the issue. The parties agreed:

[t]o provide any individual detained by migration authorities with notice of his/her legal rights and options, including the right to contact his/her consular representatives, and to facilitate communication between consular representatives and their nationals.²²⁰

These government documents and statements suggest a recognition that the intended scope of the obligation under Article 36 of the Vienna Convention was to grant an individual the right of notification and access to his consul.²²¹

notification whenever a U.S. citizen is arrested.” *Id.* § 411. Section 411.1, entitled “Vienna Consular Convention,” refers to the arrestee’s rights under the Convention. *Id.* § 411.1.

216. *Id.* § 403(r).

217. U.S. Dep’t of State Telegram No. 40298 to Embassy in Damascus (Feb. 21, 1975) (cited in LUKE T. LEE, *CONSULAR LAW AND PRACTICE* 145 (2d ed. 1991)).

218. 8 C.F.R. § 242.2(g).

219. 28 C.F.R. § 50.5(a)(1) (1993) Statement of Policy. The regulation, guided by separate bilateral treaties, requires officers to inform the foreign nationals that their consul must be notified if a bilateral treaty exists with their country requiring automatic notice. *Id.*

220. Memorandum of Understanding on Consular Protection of Mexican and United States Nationals, May 7, 1996, para. 2.

221. These interpretive documents and statements were made prior to the current “litigation posture” established by the six pending appellate cases discussed in Part IV. However, in light of the current “litigation posture,” the Attorney General for the State of Virginia claims both “the State Department and the Justice Department have informed the defendants’ [State of Virginia] counsel that . . . the Vienna Convention [was not] intended to create a judicial remedy for alleged violations or to create legal rights for individuals. Indeed,

Other nations have stated that the intent of the Conference was to grant an individual the right of notification.²²² In fact, such an interpretation has been clearly expressed in the pending U.S. appellate cases by Mexico,²²³ Canada,²²⁴ Paraguay,²²⁵ and Argentina.²²⁶ These nations, like the United States, are parties to the

the United States is considering the filing of a 'Statement of Interest' in this case." Paraguay Motion to Dismiss, *supra* note 180, at 18 n.8. The Department of Justice, in fact, has submitted an Amicus Curiae Brief in support of Allen. Telephone Interview with Nancy Kinsley, Legal Assistant, McGuire, Woods, Battle & Boothe (law firm representing Angel Breard) (Apr. 8, 1997). This brief may be entitled to great weight. See *More v. Intelcom Support Servs., Inc.*, 960 F.2d 466, 471 (5th Cir. 1992) ("accepting *arguendo* that the Treaty is ambiguous and admits of two constructions, one providing for self-executing private rights and another not so providing, we would have to accept the interpretation of the Department of Defense, the U.S. Government agency charged with enforcing the Treaty").

222. See *supra* notes 192-211 and accompanying text (United Nations debate over Article 36). However, these positions were propounded in light of the current litigation posture.

223. The Mexican government stated:

It is Mexico's understanding that the courts of the United States consider a right fundamental when it protects a basic human right, such as the right to life or liberty, and when it observance or denial impacts the overall fairness of the proceedings. The right of a foreign national to contact his consul is such a right. Its denial is a fundamental defect in the proceedings against a foreign national.

Murphy Amicus Brief, *supra* note 61, at 5; see also Loza Amicus Brief, *supra* note 132, at 9.

224. "The international community has recognized the importance of the right of foreign prisoners to be informed of their right to see their consul as set out in Article 36 of the Vienna Convention on Consular Relations." Faulder Amicus Brief, *supra* note 61, at 5.

The Consular Manual of The Department of Foreign Affairs and International Trade of Canada [1993 Ed.] sets out the duties of a Canadian consul and the assistance which can be provided to Canadian citizens. In section 2.4.4 it is stated that: . . . Persons detained or, arrested or imprisoned have the right under the Vienna Convention on Consular Relations to have their diplomatic or consular mission notified without delay of their arrest, and detaining authorities are obligated under international law to inform prisoners of this right.

Id. at 8. See also Jeffries Memorandum in Support of Motion for Leave to Amend, *supra* note 84, at 2-5. "There is no doubt that, under international law, the United States has a duty to facilitate foreign detainees in contacting their consul." *Id.* at 6. "It is submitted that this breach of the Convention deprived Mr. Jeffries of a fundamental right under international law . . ." *Id.* at 10.

225. "While Paraguay believes that, contrary to defendant's contention, article 36 of the Vienna Convention does create a right in favor of private individuals that Breard properly seeks to vindicate in his petition for habeas corpus, the question of whether a private right exists is irrelevant to this litigation." Paraguay Opposition to Defendant's Motion to Dismiss, *supra* note 122, at 17 n.5.

226. "Pursuant to the Vienna Convention on Consular Relations, the United States is required to inform any Argentine citizen arrested or detained in the United States that he or she has the right to request that the Argentine Consulate or Embassy be notified of his or her arrest or detention." Ocampo Affidavit, *supra* note 115, at 1. "The fact that Mr. Breard was never informed of his rights under the Vienna Convention on Consular Relations constitutes a violation of that treaty . . ." *Id.* at 4.

Vienna Convention on Consular Relations.²²⁷ Having thoroughly examined the Treaty provisions using an interpretive analysis which demonstrates that a private "right to consul" was intended to be conveyed by Article 36, the question of prejudice must now be considered.

B. Standard of Prejudice

Courts considering the issue of Article 36 violations have generally avoided the issue of whether an individual right exists by moving directly to a prejudice analysis.²²⁸ In *Calderon-Medina*, the defendant was required to prove that he was prejudiced by a government violation of the INS regulation implementing Article 36.²²⁹ This burden required proof that the "violation prejudiced interests of the alien which were protected by the regulation;"²³⁰ a showing which is required whether or not the violation is of a constitutionally grounded regulation.

The Second Circuit Court of Appeals rejected this *per se* prejudice analysis. It opined that "when a regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute, and the INS fails to adhere to it, the challenged deportation proceeding is invalid and a remand to the agency is required."²³¹ The court further stated that: "On the other hand, where an INS regulation does not affect fundamental rights derived from the Constitution or a federal statute, we believe it is best to invalidate a challenged proceeding only upon a showing of prejudice to the rights sought to be protected by the subject regulation."²³² Applying this standard, the court refused to equate treaty provisions "with fundamental rights, such as the right to counsel, which traces its origins to concepts of due process."²³³

227. The Treaty entered into force for Mexico on July 16, 1965, Loza Amicus Brief, *supra* note 132, at 5; Canada on August 17, 1974, Faulder Amicus Brief, *supra* note 61, at 4 n.3; Paraguay on December 23, 1969, *see* Paraguay Complaint, *supra* note 64, at 7; and the United States on October 22, 1969. *See* 115 CONG. REC. S30997 (daily ed. Oct. 22, 1969).

228. *See, e.g.*, *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997); *Faulder v. Scott*, 81 F.3d 515 (5th Cir. 1996); *Waldron v. Immigration and Naturalization Serv.*, 17 F.3d 511 (2d Cir. 1996); *Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996); *United States v. Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980); *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979).

229. 8 C.F.R. § 242.2(g).

230. *Calderon-Medina*, 591 F.2d at 531.

231. *Waldron*, 17 F.3d at 518.

232. *Id.*

233. *Id.*

Consequently, violation of the INS notice regulation based on Article 36 required a showing of prejudice.²³⁴ Although applying different analyses, *Calderon-Medina* and *Waldron* conclusively determined that a prejudice standard must be applied in cases involving the INS notice regulation; this prejudice standard has been carried over to cases challenging Article 36 violations.

Mami v. Van Zandt,²³⁵ a federal habeas petition, was the first case to consider a direct Article 36 violation.²³⁶ The defendant, a Jordanian citizen, claimed he requested to contact his consulate upon his arrest, but was refused access.²³⁷ The court denied the habeas petition stating that the "general assertion [that Article 36 of the Convention was violated] does not indicate how any constitutional right [was] violated. Mami gives no indication of what the Jordanian diplomatic officials could have done for him, or how he was in any way prejudiced by this."²³⁸ Thus, the prejudice standard established in cases involving administrative regulation violations was also applied to treaty violations. It is questionable whether this analysis is the result of correct reasoning.

In the United States, the *Miranda* doctrine²³⁹ was established to protect individuals in custody by ensuring their awareness of certain fundamental constitutional rights, which could only be waived knowingly and voluntarily.²⁴⁰ The Article 36 right of

234. *Id.* at 518-19. This decision was the exact opposite of the Second Circuit's original opinion in *Waldron v. INS*, 994 F.2d 71 (2d Cir. 1993). In that opinion, the court found that no showing of prejudice was required when INS regulations were violated. *Id.* at 78. During the short time period the first opinion was binding, *Ali v. Reno*, 829 F. Supp. 1415 (S.D.N.Y. 1993) was decided based upon that decision. In *Ali*, the district court argued that the far-reaching holding in *Waldron* was unnecessary because:

the right to counsel, and the right to have the consulate notified, and the right to be certified for appellate review are such basic rights that they might be found to exist, together with the right to be informed of their existence, without regard to the administrative regulations, and prejudice could most likely be inferred in most cases.

Id. at 1428.

235. No. 89 Civ. 0554 (TPG), 1989 U.S. Dist. LEXIS 5002 (S.D.N.Y. May 9, 1989).

236. This case is also the only non-death penalty case raising an Article 36 challenge. Mami pled guilty to first degree manslaughter. *See id.* at *1.

237. *See id.* at *1-2.

238. *Id.* at *2.

239. In *Miranda*, the Supreme Court defined certain procedures which must be complied with before a statement obtained from a suspect will be admissible at trial. *Miranda v. Arizona*, 384 U.S. 436 (1966).

240. *Id.* at 439, 444. *See also* *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (emphasizing that knowledge of the right to refuse consent to search is a factor to be considered in determining if a consent was voluntary); *United States v. Gonzales-Basulto*, 898 F.2d 1011, 1013 (5th Cir. 1990) (listing factors for determining whether consent to search

notification encompasses similar fundamental issues.²⁴¹ Yet, U.S. courts have consistently refused to acknowledge Article 36 notification rights by failing to equate the provision of the Treaty with a fundamental constitutional right, thereby finding no prejudice in its violation.²⁴² The reasoning of these decisions is flawed for two reasons. First, the Supremacy Clause includes treaty provisions, the Constitution, and federal statutes as the "law of the land,"²⁴³ thereby foreclosing such an interpretation. Second, Article 36 embodies a presumption of prejudice when a foreign national is arrested.²⁴⁴

When a treaty establishes an individual right, that right, having the force of law under the Supremacy Clause, must be enforced by the courts.²⁴⁵ Although a remedy is not necessary for violations of rights which cause no harm, there are some constitutional rights for

was voluntary including: voluntariness of the defendant's custodial status, presence of coercive police tactics, extent and level of defendant's cooperation, defendant's knowledge of right to deny consent, defendant's education and intelligence, defendant's belief that no evidence will be found).

241. See *supra* notes 194-201 and accompanying text.

242. See, e.g., *Waldron v. Immigration and Naturalization Serv.*, 17 F.3d 511 (2d Cir. 1994); *Loza Amicus Brief*, *supra* note 132, at 9 ("The court of common pleas said, 'Article 36 provides that aliens shall have the freedom to communicate with the appropriate consul. However, that provision does not equate to a fundamental right, such as the right to an attorney.'"); see also *Mami v. Van Zandt*, No. 89 Civ. 0554 (TPG), 1989 U.S. Dist. LEXIS 5002, at *2 (S.D.N.Y. 1989) ("Petitioner's general assertion does not indicate how any constitutional right is violated.").

243. U.S. CONST. art VI, cl. 2; see *Head Money Cases*, 112 U.S. at 580 (holding that the Constitution makes a treaty part of the supreme law of the land); *Reid v. Covert*, 354 U.S. 1, 18 (1957) ("an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty . . ."); *Murphy Amicus Brief*, *supra* note 61, at 5 ("It is Mexico's understanding that the courts of the United States consider a right fundamental when it protects a basic human right, such as the right to life or liberty, and when its observance or denial impacts the overall fairness of the proceedings. The right of a foreign national to contact his consul is such a right. Its denial is a fundamental defect in the proceedings against a foreign national.").

244. See 1 *Official Records*, *supra* note 18, at 347 (statement of Spanish delegate) ("In all the countries represented at the Conference, citizens were equal before the law, but by reason of his status the alien need[s] the assistance and protection of a consul in certain respects."); see also *Murphy Amicus Brief*, *supra* note 61, at 5 ("Article 36 of the Vienna Convention on Consular Relations is based on the understanding of the parties that a foreign national is prejudiced if left to navigate the foreign country's [sic] legal system in the absence of support from his countrymen. . . . [A]fter-the-fact assessments of whether the presumed prejudice actually resulted were not within the intent of either the United States or Mexico.").

245. See *United States v. Alvarez-Machain*, 504 U.S. 655, 662 (1992).

which violations will carry a presumption of harm.²⁴⁶ Article 36 access to consul is such a right.²⁴⁷

When a foreign national is arrested, he will likely be unfamiliar with the criminal justice system of the arresting nation.²⁴⁸ He will not understand the "nation's customs, police policies, or criminal proceedings," and may be unable to defend himself due to ignorance, lack of resources, and discrimination based on his national origin.²⁴⁹ He may have a language barrier that will deter understanding of the proceedings,²⁵⁰ and also may have difficulty obtaining evidence or witnesses from his home nation.²⁵¹ Furthermore, his cultural background may play a large role in the actual defense in the case.²⁵²

246. See *Chapman v. California*, 386 U.S. 18, 23 (1967). The Supreme Court acknowledged that certain constitutional rights are "so basic to fair trial that their infraction can never be treated as harmless error," one being the right to counsel. *Id.* at 23 n.8; see also *Strickland v. Washington*, 466 U.S. 668 (1984).

247. See *supra* note 243 and accompanying text; see also 1 *Official Records*, *supra* note 18, at 338 (statement of Korean delegate) ("[T]he receiving State's obligation under paragraph 1 (b) [is] extremely important because it relate[s] to one of the fundamental and indispensable rights of the individual."); *id.* at 332 (statement of Spanish delegate) ("The right of the nationals of a sending State to communicate with and have access to the consulate and consular officials of their own country . . . was one of the most sacred rights of foreign residents in a country. The fact that it [is] established under national law in no way conflict[s] with the need to establish it under international law."); cf. *Brooks v. Tennessee*, 406 U.S. 605 (1972) (stating that there is a presumption of prejudice where government interferes with defense counsel's ability to make independent decisions about how to conduct the defense); *Geders v. United States*, 425 U.S. 80 (1976) (noting the same presumption when government barred defense attorney from consulting with his client during an overnight recess).

248. See *Loza Amicus Brief*, *supra* note 132, at 9.

249. *Id.* See also *Graham v. Richardson*, 403 U.S. 365, 377 (1971) (holding that aliens constitute a specific minority deserving of enhanced judicial protection and making alienage a suspect classification under the Equal Protection Clause of the U.S. Constitution).

250. See *White v. Regester*, 412 U.S. 755, 768 (1973) (declaring that the Latino voter "suffers a cultural and language barrier that makes his participation in community processes extremely difficult").

251. See *SHANK & QUIGLEY*, *supra* note 58, at 721.

252. See Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1113 (1994) ("Cultural factors can be relevant to the defendant's motivations, premeditation or deliberation, provocation or heat of passion, and to the defendant's understanding and perception of the circumstances leading up to and immediately following the charged crime."). The foreign consul can assist a defense attorney in understanding these cultural differences and establishing a legitimate defense to the charges. See *Loza Merit Brief*, *supra* note 5, at 8 (arguing that Mexican consul would have assisted defense counsel in challenging statement made by the defendant by enlightening defense counsel of coerciveness of tactics used to obtain that statement based on cultural aspects of defendant's life). For an analysis of emerging "cultural defense" in the United States, see Deirdre Evans-Pritchard & Alison Dundes Renteln, *The Interpretation And Distortion Of Culture: A Hmong "Marriage By Capture" Case In Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1, 34-35 (1994) (arguing that "to see that justice is done, ethnic minorities may need to invoke different standards in order to be treated equally (compared to members of the dominant society). This is necessary because the dominant legal system is not

Consequently, because of culture,²⁵³ language barriers,²⁵⁴ and the inability to obtain evidence, a foreign national is inherently prejudiced when detained or in custody in a foreign criminal justice system.²⁵⁵ A consul's assistance can place him on par with a non-foreigner.²⁵⁶

The Vienna Conference on Consular Relations specifically recognized this disadvantage,²⁵⁷ as has the United States. The U.S.

neutral but is based on Eurocentric values. . . . Considering the status quo, ethnic minorities need cultural evidence to be admissible to assure equality for all."). *See also Note, The Cultural Defense In The Criminal Law*, 99 HARV. L. REV. 1293, 1295 n.16 (1986) (in arguing for individualized justice, the author notes that "[i]n addition to influencing the discretionary decisions of prosecutors and judges, cultural factors may informally influence the decision of juries at the trial stage.").

253. Culture has been defined as "special populations that share the same world view or tend to make the same assumptions about their environment." Joan B. Kessler, *Perspective: The Lawyer's Intercultural Communication Problems with Clients from Diverse Cultures*, 9 NW. J. INT'L L. & BUS. 64, 67 (1988) (quoting P. PEDERSEN ET AL., COUNSELING ACROSS CULTURE 17 (1976)). "[I]ntercultural communication occurs whenever the parties to a communication act bring with them different experiential backgrounds that reflect a long-standing deposit of group experience, knowledge, and values." *Id.* at 67 (quoting INTERCULTURAL COMMUNICATION: A READER 1 (L. Samovar & R. Porter eds., 1972)).

254. During intercultural exchanges, several factors contribute to communication barriers:

Perception is the 'internal process by which we select, evaluate, and organize stimuli from the external environment.' It is a key component to any communication, and especially to the intercultural exchange. . . . Even if both lawyer and client speak the same language, thought patterns may be different in the creation of the message. . . . Many other variables may also cause problems in the intercultural exchange between lawyer and client. Nonverbal communication aspects such as differences in use of personal space, and differences in the use and the value of time, are examples. Beliefs, attitudes, and values, roles, . . . the environment or setting in which the interaction takes place, and the world view of those involved are all other intercultural variables that might produce barriers affecting the intercultural exchange. . . . Other factors may cause problems in intercultural interaction. Lack of empathy, lack of trust, stereotyping, and especially ethnocentrism, or judging another culture according to one's own cultural values, may lead to communication problems.

Id. at 75-77 (citations omitted).

255. *See Loza Amicus Brief*, *supra* note 132, at 9; Breard Petition for a Writ of Habeas Corpus, *supra* note 104, at 19 ("The Convention, in effect, enacts a presumption of prejudice to foreign defendants who are not informed of their right to contact their consulates."); *see also Note, supra* note 252, at 1299 (1986) ("Treating persons raised in a foreign culture differently should not be viewed as an exercise in favoritism, but rather as a vindication of the principles of fairness and equality that underlie a system of individualized justice.").

256. *See id.* at 1299 n.34 and accompanying text; *See also Appellant's Reply Brief* at 5, *Murphy v. Netherland*, (4th Cir. 1997) (No. 96-14).

257. *See 1 Official Records, supra* note 18, at 347 (statement by Spanish delegate) ("There [is] no intention, as feared by the Romanian delegation, of according a privileged status to aliens. In all the countries represented at the Conference, citizens were equal before the law, but by reason of his status the alien need[s] the assistance and protection of a consul in certain respects."); *see also Chiu, supra* note 252, at 1109 (in arguing for acceptance of a

State Department, in fact, has described this right of access as the right to a "cultural bridge," and has acknowledged "[n]o one needs that cultural bridge more than the individual . . . who has been arrested in a foreign country"²⁵⁸ Not surprisingly, one of the primary functions of the consul is to protect his nationals abroad;²⁵⁹ to provide a "cultural bridge" and other assistance when his citizens need help.²⁶⁰ Article 36 assures that a detained or arrested

"cultural defense," particularly for Asian immigrants, this commentator recognized the fear of preferential treatment, but explained that: "To give Asian immigrants an extra benefit, an extra defense that white Americans do not have, seems to some like preferential treatment suspiciously reminiscent of race-based preferential policies like affirmative action. However, this position misses the fact that white Americans would not be able to raise a cultural defense because they have no need for a cultural defense. Modern American criminal law already embodies their mainstream values and mores.").

258. U.S. DEP'T OF STATE, *supra* note 19, at § 401.

259. Vienna Convention, *supra* note 1, art. 5, 21 U.S.T. at 82-85. Article 5 provides in part:

Consular functions consist in:

- (a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law; . . .
- (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State; . . .
- (i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;
- (j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State . . .

Id. The protective function is considered by many nations as the most important function of the consul. *See, e.g.,* Jeffries Memorandum in Support of Motion for Leave to Amend, *supra* note 84, at 7 ("The Canadian government considers that providing assistance to Canadians abroad is one of the most important tasks carried out by consular officials.").

260. In state death penalty cases, foreign nations have offered extensive assistance to their nationals through consuls. *See, e.g.,* Loza Amicus Brief, *supra* note 132, at 14 ("Mexico has adopted a policy of vigorous intervention when capital charges are lodged against a Mexican national or when Mexican nationals are sentenced to death. Indeed, some sectors of the Mexican Foreign Service in Mexico City are devoted to capital cases and are staffed by some of the consular officers who have received training in U.S. criminal law. Other officers who have received this training are stationed throughout the United States. . . . The assistance provided by the consul in the capital cases is wide-ranging and vigorous."); Ocampo Affidavit, *supra* note 115. The affidavit provides:

foreign national may contact his national consul for assistance early in the process.²⁶¹ Consequently, denial of Article 36 rights to a "cultural bridge" deprives the foreign national of equality of legal process and the ability to mount a proper defense.²⁶²

If the Argentine Republic had been informed of Mr. Breard's arrest prior to his trial, it would have sent a consular official to visit Mr. Breard in prison and assist him in understanding the American legal process. The Argentine Republic would have also provided assistance, including financial assistance, to Mr. Breard's brother to come from Argentina to be with his brother. Furthermore, the Argentine Republic would have assisted Mr. Breard's attorneys in their defense of his case.

At a minimum, the Argentine Republic would have provided the same level of assistance [as it provided to] attorneys representing Victor Saldaño, an Argentine citizen accused of capital murder in Texas. In Mr. Saldaño's case, the Argentine Republic's assistance included:

- a. obtaining Mr. Saldaño's military records from Argentina;
- b. obtaining Mr. Saldaño's school records and birth certificate from Argentina;
- c. obtaining Mr. Saldaño's criminal history and records from Argentina;
- d. sending an official from the Consulate in Houston to meet on several different occasions with Mr. Saldaño's [sic] in prison;
- e. sending a high-ranking official from Mr. Saldaño's province to observe the trial and provide assistance to his attorneys;
- f. providing financial assistance to Mr. Saldaño's mother while she was in the United States to observe and participate in the trial;
- g. sending an official from the Consulate in Houston to accompany Mr. Saldaño's mother during her visits with Mr. Saldaño's [sic] in prison;
- h. providing an official from the Consulate in Houston to serve as a translator between Mr. Saldaño's attorneys and various persons in Argentina; and
- i. sending an official from the Consulate in Houston to testify at Mr. Saldaño's trial regarding the authenticity of documents obtained from Argentina.

Id. at 3-4.

261. The United States Department of State has recognized that early access is essential in order for the consul to:

provide the arrestee with a list of reputable lawyers or information concerning local legal aid before the arrestee selects a lawyer who may prove to be a charlatan. It provides an opportunity for the consular officer to explain the legal and judicial procedures of the host government . . . at a time when such information is most useful.

U.S. DEP'T OF STATE, *supra* note 19, at § 412.

262. *See* *Faulder v. Scott*, Petition for Writ of Habeas Corpus, 102-03 (E.D. Tex. Dec. 2, 1992) ("The defendant's constitutional right to compulsory process includes the 'right to formulate his defense uninhibited by government conduct that, in effect, prevents him from interviewing witnesses who may have been involved and from determining whether he will subpoena and call them in his defense.'"); *Murphy Amendment to Petition for Writ of Habeas Corpus*, *supra* note 86, at 8 ("[T]he Commonwealth deprived Mario of a meaningful opportunity to present a complete defense and blocked his ability to gather exculpatory or mitigating evidence that quite plausibly could have had a material impact on sentencing."); *Breard Petition for a Writ of Habeas Corpus*, *supra* note 104, at 17 ("By arbitrarily and capriciously failing to abide by international law, the Commonwealth deprived Petitioner of a

Such a deprivation raises a presumption of prejudice, similar to the deprivation of the right to effective counsel described by the Supreme Court in *Strickland v. Washington*:²⁶³

In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.²⁶⁴

The Court particularly emphasized presumed prejudice in cases where governmental action interfered with a defense counsel's ability to defend his case.²⁶⁵ The Court's clear concern about such governmental interference is analogous to the right to consul issues presented when Article 36 is violated. Thus, violation of Article 36 must require remedies like those described in *Miranda* and *Strickland*, unless the government proves there was no prejudice.²⁶⁶

C. Remedy for Violation of Article 36

Despite strong evidence that Article 36 was intended to compensate for inherent prejudices against foreign nationals,²⁶⁷ there have been no remedies available for violations of Article

meaningful opportunity to present a complete defense and blocked his ability to gather mitigating evidence that probably would have had a material impact on the outcome of his trial and sentencing."); see also *United States v. Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980) (right to counsel does not equate to right to contact a consul). The court noted that police authorities are required to notify aliens of their right to counsel under regulations independent of the regulation requiring notice of consulate access. See *id.* Consequently, notification of right to counsel would not suffice to meet the requirements of the regulation; the alien has a right to both. The court acknowledged the different roles each would play in a case when it stated: "Even if we accept, arguendo, the assumption that the Mexican Consulate would have done nothing more than advise appellant of his right to counsel . . . it remains difficult from a practical standpoint to equate being advised by the INS in an adversary setting with being advised by the Mexican Consulate." *Id.* at 532-33.

263. 466 U.S. 668 (1984).

264. *Id.* at 692.

265. See *id.*

266. See *United States v. Calderon-Medina*, 591 F.2d 529, 532 (9th Cir. 1979) (Takasugi J., dissenting) (stating that the burden should be on the government to "establish the absence of prejudice").

267. See *supra* notes 192-210, 256-260 and accompanying text.

36.²⁶⁸ Official protests to the U.S. Executive Branch have yielded no remedial measures for violations of the Vienna Convention,²⁶⁹ nor have complaints with the Inter-American Court of Human Rights.²⁷⁰ It is doubtful that a complaint against the United States in the International Court of Justice would have much effect,²⁷¹ and foreign nations are unlikely to gain compliance through the U.S. judicial system.²⁷² However, the current habeas corpus cases on appeal provide an appropriate avenue for establishing remedies for violation of Article 36.

"As with federal statutes, it is not unusual for 'substantive rights [to] be defined by [treaty] but the remedies for their enforcement left undefined or relegated wholly to the states.'"²⁷³ Customary international law should guide the courts in determining a remedy.²⁷⁴ The appropriate remedy for a treaty violation under international law is to restore the status quo,²⁷⁵ which in the context of a criminal case, would require either exclusion of the evidence obtained in violation of the treaty or a new trial.²⁷⁶

The language of the Treaty also gives some indication of how the treaty rights are to be enforced:

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

268. See Gisvold, *supra* note 7, at 801-02.

269. See Decl. of Gillies, *supra* note 5, exhibit 4 (Diplomatic Note No. 183) ("The Canadian Government wishes to protest this breach of the United States authorities' obligation under Article 36.1(B) [sic] of the Vienna Convention on Consular Relations to notify an arrested Canadian citizen of his or her right to communicate with a Canadian consular post.").

270. See Shank & Quigley, *supra* note 58, at 722-27 (discussing cases of Cesar Fierro and Carlos Santana).

271. See *Committee of Citizens Living In Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988) (individuals do not have standing to enforce a decision of the International Court of Justice in the domestic courts of the United States).

272. See *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1274 (E.D. Va. 1996) (Eleventh Amendment bars suit by foreign nation for violation of treaty provisions); see also *Monaco v. Mississippi*, 292 U.S. 313 (1934).

273. Vázquez, *supra* note 138, at 1144 (quoting HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 533 (1988)).

274. See *id.* at 1143-45.

275. See Loza Amicus Brief, *supra* note 132, at 17 ("When a treaty is violated, the remedy is to restore the pre-existing situation to the fullest extent possible. This obligation to restore the *status quo ante* is a fundamental principle of international law.") (citing CLYDE EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* (1928); *Factory at Chorzów (Merits)* (Germ. V. Pol.), 1928 P.C.I.J. (ser. A), No. 17, at 47 (Sept. 13).

276. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Miranda v. Arizona*, 384 U.S. 436 (1966).

said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.²⁷⁷

The rights under Article 36 were intended to protect foreign nationals, particularly those detained or in custody.²⁷⁸ Where a foreign national is not notified of his right to consul, full effect has not been given to the Treaty. Furthermore, the purpose behind the Article 36 notification requirement, like that of *Miranda*, is to make a suspect aware of his rights before he unknowingly waives those rights.²⁷⁹ Consequently, full effect cannot be given to the Article once a foreign national has been convicted in violation of its provision unless a new trial is granted.²⁸⁰ A correct remedy necessarily demands a new trial in which the foreign national has full access to the "cultural bridge" envisioned by the world delegates of the Vienna Convention.²⁸¹ The cases of Jose Loza and Cesar Fierro exemplify why such a remedy is mandated.

Jose Loza, a Mexican citizen, was convicted of murdering his girlfriend's family primarily based on his own confession.²⁸² This confession was obtained when police officers told Loza that if he did not confess, they had evidence to ensure the execution of his girlfriend and their unborn child.²⁸³ Loza, being unfamiliar with the American legal system, and, having been reared in a culture where men are very protective of women, confessed to the crime.²⁸⁴ Had Loza spoken to a consul, who could have advised him that this was merely a police tactic to obtain a confession, or that international law forbids executing pregnant women,²⁸⁵ Loza may well have not confessed. Without the confession, it is unlikely Loza would have been convicted.²⁸⁶

277. Vienna Convention, *supra* note 1, art. 36(2), 21 U.S.T. at 101.

278. See *supra* notes 192-210, 256-260 and accompanying text.

279. See *supra* notes 239-240 and accompanying text.

280. "It is the expectation of all parties that there will be compliance and that when there is a failure of compliance a complete remedy will be willingly provided." Loza Amicus Brief, *supra* note 132, at 16.

281. See *supra* notes 192-210, 256-260 and accompanying text.

282. Loza's girlfriend also testified against him, but her testimony was not entirely credible. See *supra* note 128 and accompanying text.

283. See Loza Merit Brief, *supra* note 5, at 8.

284. See *id.*

285. See Louis Henkin, *U.S. Ratification Of Human Rights Conventions: The Ghost Of Senator Bricker*, 89 AM. J. INT'L L. 341, 343 (1995) (citing *General Comment*, Human Rights Committee, 52d Sess., at 3, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994)).

286. Loza Merit Brief, *supra* note 5, at 9.

Cesar Fierro was also convicted of capital murder based primarily on his own confession.²⁸⁷ Fierro's confession was obtained after he was informed that Mexican officials had arrested his parents and would not release them unless he confessed.²⁸⁸ Had Fierro been allowed to speak to his consul, Fierro would have been assured of his family's safety and would not have been coerced into confessing.²⁸⁹ Without the confession, it is likely that Fierro would not have been convicted.²⁹⁰ Only a reversal and new trial could correct these Article 36 violations.

CONCLUSION

In 1963, ninety-two nations came together to codify customary international law on consular relations. That codification became the Vienna Convention on Consular Relations. Included in the Convention is a provision which requires police authorities of participating nations to notify detained or arrested foreign nationals of their right to contact their consular officials. The United States has consistently violated this treaty provision, and these violations are currently being challenged by affected nationals and their home nations. Six appellate cases will soon require U.S. courts to decide whether a foreign national can enforce Article 36 of the Vienna Convention on Consular Relations, and, if so, the appropriate remedy.²⁹¹

The treaty language, as well as preparatory and subsequent actions and applications of Article 36 indicate that the drafters intended to create an individual private right. These materials also suggest that the right was intended to compensate for the inherent prejudice a foreign national is faced with when prosecuted in a foreign criminal justice system. Remedy for treaty violations, under international law, demands that the status quo be reinstated. Consequently, violation of Article 36 requires reversal of a conviction and a new trial, or, at least, exclusion of tainted evidence.

287. See Shank & Quigley, *supra* note 58, at 725-27. A sixteen-year-old informant testified against Fierro, but he was not very credible. See *id.* at 725.

288. See *id.* at 726.

289. See *id.* at 725.

290. See *id.*

291. Shortly before the publication of this article, Mario Murphy was executed following the Supreme Court's refusal to grant certiorari. See Ellen Nakashima, *Mexican Citizen Executed in Va. Despite Pleas From Government*, WASH. POST, Sept. 18, 1997, at D4, available in 1997 WL 12887257; *Murphy v. Netherland*, 1997 WL 562171 (U.S. Sept. 12, 1997).

The habeas corpus petitions on appeal provide the impetus for the courts to effectuate the obligations embodied in the treaty provisions found in Article 36.