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# The Right to Consul and the Right to Counsel: A Critical Re-Examining of State v. Martinez-Rodriguez

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# THE RIGHT TO CONSUL AND THE RIGHT TO COUNSEL: A CRITICAL RE-EXAMINING OF *STATE V. MARTINEZ-RODRIGUEZ*

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## I. INTRODUCTION

In the United States, millions of foreign nationals may be arrested or detained in a given year for a variety of reasons.[1] The prospect of detention in general may be intimidating, but for an individual being held in a foreign land the experience can be disconcerting. Article 36 of the Vienna Convention on Consular Relations (Convention),[2] a multilateral treaty to which the United States is a party, should provide some aid to persons facing such situations through its guarantees to consular access and communication. The United States, however, has struggled to honor its commitments under Article 36.[3] This struggle is partly a result of the manner in which American federal and state courts have interpreted the treaty.[4]

This Note discusses the approach that the New Mexico Supreme Court has taken on questions concerning the Vienna Convention on Consular Relations. It then suggests a workable approach that will bring the state into compliance with its responsibilities under the treaty without making drastic jurisprudential leaps.

Part II examines the legal background against which New Mexico's leading case on the matter, *State v. Martinez-Rodriguez*,[5] was decided, including the leading federal, international, and state case law, as well as the underlying legal principles that make judicial enforcement of Article 36 a difficult matter.[6] Part III explains *State v. Martinez-Rodriguez* and its rationale, including its finding that the Convention creates no individually enforceable right,[7] and its dicta concerning whether prejudice can ever flow from a violation of Article 36.[8] Part IV then analyses the rationale of *Martinez-Rodriguez* and demonstrates how it should be reconsidered.[9] Specifically, it demonstrates that the New Mexico Supreme Court's interpretation of the Convention is contrary to the text of Article 36 and to the International Court of Justice's (ICJ)[10] interpretation of that text.[11] It also shows that

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1. Alan Macina, Comment, Avena & Other Mexican Nationals*: The Litmus for* Lagrand *& the Future of Consular Rights in the United States*, 34 CAL. W. INT'L L.J. 115, 118 (2003).

2. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 [hereinafter Vienna Convention].

3. Kelly Trainer, Comment, *The Vienna Convention on Consular Relations in the United States Courts*, 13 TRANSNAT'L LAW. 227, 230 (2000) ("American courts have continually found ways to keep from affording foreign nationals their rights under the Vienna Convention.").

4. *Id.*

5. 2001-NMSC-029, 33 P.3d 267.

6. *See infra* Part II.

7. *See infra* Part III.B.1.

8. *See infra* Part III.B.3.

9. *See infra* Part IV.

10. "The International Court of Justice is the principle judicial organ of the United Nations (UN)." International Court of Justice, The Court, http://www.icj-cij.org/court/index.php?p1=1 (last visited Sept. 29, 2007). Its functions include settling disputes between states (where it has jurisdiction to do so) and issuing advisory opinions at the request of international agencies. *Id.* With respect to the Vienna Convention on Consular relations, the ICJ has jurisdiction to hear disputes between States, pursuant to the Optional Protocol found in the treaty.

the New Mexico Supreme Court's reliance on State Department interpretation and United States Supreme Court precedent has been undercut by subsequent developments.[12] This Note then examines the New Mexico Supreme Court's dicta concerning prejudice and suggests a reading of the court's prejudice analysis that will allow for a vindication of the right to consular access.[13] Part V suggests a viable way to supply detainees who have suffered a violation of their rights under the Vienna Convention with an appropriate remedy.[14] Finally, Part VI explains the importance of Article 36 of the Vienna Convention and the reasons that it should be honored.[15]

## II. BACKGROUND

### *A. The Vienna Convention on Consular Relations*

The Vienna Convention on Consular Relations[16] is a multilateral treaty that the United States signed in 1963[17] and ratified in 1969.[18] The treaty served to organize a previously haphazard consular institution among nations by defining "consular rights, privileges, and duties among signatory nations."[19] Article 36 of the Convention establishes principles protecting communication between foreign nationals and their consular officers.[20] With respect to foreign nationals who have been imprisoned, Article 36 provides that

> if he so requests, the competent authorities of the receiving State [the State in which the foreign national is being detained] shall, without delay, inform the consular post of the sending State [the state of origin] if...a national of that State is arrested or committed to prison or to custody.[21]

Furthermore, Article 36 states that "authorities shall inform the person concerned without delay of [these] rights."[22] Finally, Article 36, among other things, defers enforcement of its provisions to the law of the receiving state, with the proviso that "said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."[23] Read together, these provisions guarantee that a foreign national detained in a signatory state shall be

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Vienna Convention, *supra* note 2, 21 U.S.T. 77, Optional Protocol Concerning the Compulsory Settlement of Disputes, art. I [hereinafter Optional Protocol]; *see also infra* note 148. The ICJ's rulings are not binding precedent on American courts. *See infra* note 148.

11. *See infra* Part IV.A.
12. *See infra* Part IV.C–D.
13. *See infra* Part IV.E.
14. *See infra* Part V.
15. *See infra* Part VI.
16. Vienna Convention, *supra* note 2.
17. *Id.*
18. Anthony N. Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. TEX. L. REV. 1115, 1145 (2002).
19. Michael Fleishman, Note, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. L. 359, 362 (2003).
20. Vienna Convention, *supra* note 2, 21 U.S.T. 77, art. 36(1).
21. *Id.* art. 36(1)(b).
22. *Id.*
23. *Id.* art. 36(2).

notified without delay of the right to contact his consular post.[24] Some commentators have sought to analogize this guarantee to *Miranda* warnings.[25] In many respects, the two sets of rights are similar. For example, under both the Vienna Convention and *Miranda*, the detainee's ability to exercise the pertinent right is "premised on the arresting [officials'] duty to inform," so the duty to notify foreign detainees about their rights to consular access is "akin to the *Miranda* prophylactic against coercive sequestration."[26]

The two sets of rights, however, have important differences. First, the lack of "procedural urgency" and the time delays permitted in cases of consular notification indicate that the rights under the Convention do not carry a prohibition against interrogation pending consular access, nor do they provide a right to silence independent of or in addition to *Miranda*.[27] More importantly, "*Miranda* rights are attributed directly to the Constitution, while consular rights are derived from a treaty."[28] Such differences bear especially heavily on any discussion of the proper remedy for violations of Article 36.[29] Especially where suppression of statements or evidence gathered in violation of Article 36 is concerned, this distinction has been critical in the U.S. Supreme Court's rejection of suppression as a remedy.[30]

What is troubling is that despite having signed and ratified the Convention, and despite its own reliance on the treaty, recent high profile litigation has shown the United States to be a notorious violator of Article 36.[31] For example, the failure of the United States to comply with the treaty has been irksome for various countries whose citizens have faced serious criminal charges.[32] Many of those countries' citizens have faced severe consequences, including capital convictions and death sentences, without ever receiving the notice or consular assistance guaranteed in the Vienna Convention.[33] For that reason, other countries have sought means to compel

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24. Fleishman, *supra* note 19, at 365. In fact, Article 36 took on its final form as the result of a compromise "between strict mandatory notification and no notification." *Id.*

25. Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities During 1999 Through October 2000*, 16 AM. U. INT'L L. REV. 315, 327 (2001) (describing "those who seek to enforce provisions of the [Convention] as a kind of "'consular Miranda warning'"); *see also* Cara S. O'Driscoll, *The Execution of Foreign Nationals in Arizona: Violations of the Vienna Convention on Consular Relations*, 32 ARIZ. ST. L.J. 323, 327 (2000) ("In many instances, the rights under the Vienna Convention are seen as fundamental as *Miranda* rights.") (citation omitted).

26. Erik G. Luna & Douglas J. Sylvester, *Beyond* Breard, 17 BERKELEY J. INT'L L. 147, 151–52 (1999).

27. *Id.* at 152; Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2681 (2006) ("Article 36 has nothing whatsoever to do with searches or interrogations."). *Miranda* rights rise out of the constitutional privilege against self-incrimination and the right to counsel. *See* Miranda v. Arizona, 384 U.S. 436, 471 (1966) ("[W]e hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation.").

28. Luna & Sylvester, *supra* note 26, at 153.

29. *See infra* Part VI.A.

30. See *infra* Part V.A for a discussion of the Court's reasoning in rejecting suppression as a remedy.

31. *See* Curtis Bradley et al., Discussion, Medellin v. Dretke*: Federalism and International Law*, 43 COLUM. J. TRANSNAT'L L. 667, 669 (2005) (summarizing some of the major cases that have dealt with the issue).

32. *See, e.g.*, Lou Ann Bohn, Comment, *Understanding the Imposition of Capital Punishment on Foreign Nationals in the United States as a Human Rights Violation*, 21 WIS. INT'L L.J. 435, 435–37 (2003) (discussing the criticism that the United States has received for its obstinacy in such cases as *Avena & Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31)).

33. Bradley et al., *supra* note 31, at 669–70; *see also* Fleishman, *supra* note 19, at 359.

the United States to honor the treaty. These attempts to seek U.S. compliance with Article 36 are highlighted in the cases of *Breard v. Greene*,[34] *LaGrand*,[35] and *Avena*,[36] discussed below.

### *B.* Breard v. Greene, *the First U.S. Supreme Court Decision Discussing Article 36, Sets the Stage for Lower Court Confusion*

The first U.S. Supreme Court case to discuss violations of the consular notice provisions of the Convention was *Breard v. Greene*, a habeas corpus action decided in 1998.[37] The defendant, Angel Breard, a citizen of Paraguay, argued that his conviction and death sentence should be overturned because his rights under the Vienna Convention were violated.[38] Before the Supreme Court heard Breard's appeal, Paraguay, his nation of origin, instituted proceedings in the International Court of Justice on his behalf.[39] Although the ICJ issued a preliminary order requiring the United States to "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in [ICJ] proceedings,"[40] the Supreme Court decided not to intervene because the defendant procedurally defaulted his claim, and the state of Virginia executed Breard.[41]

In declining to intervene, the Supreme Court set the paradigm that would largely be followed in federal and state courts hearing similar claims.[42] First, the Court sidestepped what would seem to be the threshold issue of whether the Convention provides a right that may be judicially enforced.[43] Instead, the Court held that even if such a right existed, Breard was barred from raising it in a habeas corpus action because of procedural default.[44] The Court also discussed the possibility that, under a "harmless error" standard, Breard would not have prevailed.[45]

*Breard* disregarded an ICJ order, failed to answer the question of whether Article 36 grants standing to individual detainees to raise it in a judicial proceeding, and

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34. 523 U.S. 371 (1998).

35. LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27).

36. 2004 I.C.J. 128.

37. 523 U.S. at 371.

38. *Id.* at 373. Breard had been convicted five years earlier for the attempted rape and brutal murder of Ruth Dickie, and the physical evidence against him was compelling. *See* Breard v. Commonwealth, 445 S.E.2d 670, 673–74 (Va. 1994).

39. *Breard*, 523 U.S. at 374. The International Court of Justice has jurisdiction to hear disputes arising out of the Vienna Convention. *See* Optional Protocol, *supra* note 10, 21 U.S.T. 77, art. I.

40. *Breard*, 523 U.S. at 374.

41. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 39 (2005). Procedural default is a doctrine governing habeas corpus cases whereby a defendant will be said to have "procedurally defaulted a claim by failing to raise it on direct review, [and] the claim may [then] be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" Bousley v. United States, 523 U.S. 614, 622 (1998) (citations omitted).

42. See *infra* Parts II.D–E for a discussion of the most important domestic case law since *Breard*.

43. *Breard*, 523 U.S. at 377 ("[N]either the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States' courts...."); *id.* at 376 ("[The Convention] arguably confers on an individual the right to consular assistance following arrest....").

44. *Id.* at 375 ("It is clear that Breard procedurally defaulted his claim, if any, under the Vienna Convention by failing to raise that claim in the state courts.").

45. *Id.* at 377; *see also* Luna & Sylvester, *supra* note 26, at 149 ("In dicta, the Supreme Court also approved a 'harmless error' standard for violations of the Vienna Convention and questioned the viability of Breard's claim under that standard.").

adopted an application of procedural default that the ICJ would later criticize. In the years following the *Breard* ruling, the ICJ had the opportunity to hear two important cases, one brought by Germany (*LaGrand*) and the other by Mexico (*Avena*). In those cases, the ICJ attempted to answer the questions left by *Breard* and to give an authoritative view on how Article 36 should be implemented.

### *C. The Rulings of the International Court of Justice*

#### 1. *LaGrand*[46]

Shortly after Breard was executed, a striking repetition of Breard's story unfolded. In Arizona, two brothers from Germany, Karl and Walter LaGrand, were on death row.[47] A few days after Karl's execution, and a few days before Walter's scheduled execution, Germany followed the same path as Paraguay and initiated proceedings in the ICJ.[48] Germany asserted that the LaGrand brothers had been denied their right to consular notification.[49] Although the relief sought by Germany was "carefully framed" as a matter between states, rather than for the benefit of an individual, as a practical matter Germany was seeking relief for one of its citizens, not for the country.[50]

As in *Breard*, the order from the ICJ to stay the execution was ineffective and Arizona executed Walter LaGrand shortly after the order was promulgated.[51] Offended by the way in which the United States had disregarded its authority, the ICJ proceeded with the LaGrand case despite its apparent mootness and later issued a final judgment.[52]

In the final judgment, the ICJ concluded that Article 36 of the Convention created an individual right and that a detainee could therefore seek a judicial remedy for its violation.[53] Furthermore, the court ruled that the procedural default rule, as applied

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46. LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27).

47. *Id.* ¶ 14 ("On 14 December 1984, [the LaGrand brothers were] sentenced to death for first degree murder....").

48. Bernard H. Oxman & William J. Aceves, *LaGrand (Germany v. United States)*, 93 AM. J. INT'L L. 210, 210 (2002).

49. *See generally LaGrand*, 2001 I.C.J. 104 for detailed discussions of all of Germany's arguments.

50. *See* Bohn, *supra* note 32, at 454. Germany based its arguments not so much on the pending violation of a German national's human rights, but rather on the imminent infliction on Germany of yet another injury by the United States in addition to the original Vienna Convention breach. *Id.*

51. Bohn, *supra* note 32, at 457.

52. *Id.*

53. *LaGrand*, 2001 I.C.J. 104, ¶ 89. Courts have alternatively framed the issue in terms of standing. *See, e.g.*, Zavala v. State, 739 N.E.2d 135, 139 (Ind. Ct. App. 2000) ("[M]any courts, including the United States Supreme Court[,] have suggested that a party does have an individual 'right' under the Vienna Convention that grants the party 'standing' to seek redress from an alleged violation of the treaty."); Garcia v. State, 17 P.3d 994, 996 (Nev. 2001) ("[T]here is an initial question as to whether the defendant has standing to enforce his rights under the Vienna Convention...."). In *State v. Martinez-Rodriguez*, the New Mexico Supreme Court used standing language interchangeably with references to "judicially enforceable individual rights." *Compare* 2001-NMSC-029, ¶ 10, 33 P.3d 267, 272 ("[T]he threshold question is whether an individual foreign national has standing to assert a claim under the [Convention] in a domestic criminal case."), *with id.* ¶ 15, 33 P.3d at 274 ("[W]e...determine that the provisions of [Article 36] do not create legally enforceable individual rights."). Therefore, in order to raise a violation of Article 36, a court must find that a detainee has standing to do so, and that standing must arise out of the treaty.

in *LaGrand*, denied legal significance to Vienna Convention violations and that it therefore resulted in a breach of Article 36.[54] In addition, the ICJ stated that

> if the United States...should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.[55]

The ICJ, therefore, demanded that a remedy consisting of review and reconsideration of sentences and convictions be available in the case of a violation of the Vienna Convention.[56] Rather than defining this remedy explicitly, the ICJ explained that "[t]his obligation can be carried out in various ways. The choice of means must be left to the United States."[57]

Following the ruling in *LaGrand*, Mexico instituted proceedings against the United States in the ICJ, raising nearly the same issues. That case, *Avena*, is the most recent ICJ ruling on Article 36, and it expands on the ruling in *LaGrand*.

2. *Avena*

A few years after *LaGrand*, the ICJ again ruled on similar issues in *Avena and Other Mexican Nationals (Mexico v. United States)* (*Avena*).[58] In *Avena*, the government of Mexico argued that the United States violated the Convention in the cases of fifty-four Mexican nationals who were on death row in the United States at the time.[59] Mexico also demanded that the United States "enable full effect to be given to the purposes for which the rights afforded by Article 36 are intended,"[60] and that the United States "must take the steps necessary and sufficient to establish a meaningful remedy at law for violations of the rights afforded to Mexico and its nationals by Article 36 of the Vienna Convention."[61]

In its ruling in *Avena*, the ICJ reiterated the finding of *LaGrand* that the Vienna Convention created an individually enforceable right.[62] The court also reaffirmed its earlier ruling that, in the cases of defendants claiming their rights under Article 36 of the Convention, the United States must not use the procedural default doctrine when such use impedes the purposes of the Convention.[63] Finally, the ICJ fleshed

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54. *Lagrand*, 2001 I.C.J. 104, ¶¶ 90–91.

55. *Id.* ¶ 125.

56. *See id.* ¶ 126.

57. *Id.* ¶ 125.

58. 2004 I.C.J. 128 (Mar. 31). The ICJ did not rule on *Avena* until after the New Mexico Supreme Court heard and ruled on *State v. Martinez-Rodriguez*, 2001-NMSC-029, 33 P.3d 267, the case that will be analyzed in this Note. Consequently, *Avena* does not speak to the analysis of that case. It does, however, bear on the implications for future cases in New Mexico and is therefore presented here.

59. *Avena*, 2004 I.C.J. 128, ¶ 12.

60. *Id.*

61. *Id.*

62. *Id.* ¶ 40 ("The Court would recall that, in the *LaGrand* case, it recognized that 'Article 36, paragraph 1 [of the Vienna Convention], creates individual rights....'" (first alteration in original)).

63. *Id.* ¶ 112. The ICJ did not say that the procedural default rule, per se, violates the Convention. *Id.* Instead,

out the remedy of review and reconsideration.[64] The court explained that the review and reconsideration should be a judicial process[65] and that it should take into account the legal consequences of a violation and whether the violation "caused actual prejudice."[66]

### *D. The Most Recent Word of the U.S. Supreme Court*

Since the ICJ ruled in *LaGrand* and *Avena*, the U.S. Supreme Court has been asked in several cases to consider whether the Vienna Convention affords an individual right and what possible remedies may be appropriate if one exists. The most recent of those cases is *Sanchez-Llamas v. Oregon*.[67] In that case, however, the majority passed on the opportunity to decide whether the Vienna Convention creates an individually enforceable right.[68] Instead, it spoke to what it characterized as the dispositive issues of procedural default[69] and the inappropriateness of requiring exclusion of evidence as a result of violations of the Convention.[70] By declining to decide whether Article 36 confers an individual right, the Court left a split among the circuit courts, and accordingly considerable uncertainty.[71] It is notable, however, that four justices expressed their view that the Vienna Convention creates individually enforceable rights.[72] The majority expressed no disapproval of that notion but merely declined to decide the question.[73]

Although it declined to decide whether the Convention creates individual rights, the Supreme Court did express strong disapproval of the notion that suppression should be allowed as a remedy for violations.[74] The Court specifically held that "neither the Vienna Convention itself nor our precedents applying the exclusionary rule support suppression of [defendant's] statements to police."[75] The Court

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it explained that the "'problem arises when the procedural default rule does not allow [a detainee] to challenge a conviction and sentence by claiming...that the competent national authorities failed to comply with their obligations [under the treaty].'" *Id.* (quoting LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104, ¶ 90 (June 27)).

64. *Id.* ¶ 131.

65. *Id.* ¶ 140.

66. *Id.* ¶ 121.

67. 126 S. Ct. 2669 (2006).

68. *Id.* at 2677 ("[W]e find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights.").

69. *Id.* at 2687 ("[Defendant] cannot show that normally applicable procedural default rules should be suspended in light of the type of right he claims."). See *supra* note 41 for an explanation of the procedural default doctrine.

70. *Sanchez-Llamas*, 126 S. Ct. 2669 at 2682 ("[N]either the Vienna Convention itself nor our precedents applying the exclusionary rule support suppression of [defendant's] statements to police.").

71. *See* State v. Prasertphong, 75 P.3d 675, 688 n.7 (Ariz. 2003) (illustrating that different courts in different circuits have come to different conclusions on the question of whether Article 36 creates an individually enforceable right), *vacated on other grounds*, 541 U.S. 1039 (2004), *aff'd*, 114 P.3d 828 (Ariz. 2005).

72. In her concurring opinion, Justice Ginsburg stated, "I agree that Article 36 of the Vienna Convention grants rights that may be invoked by an individual in a judicial proceeding." *Sanchez-Llamas*, 126 S. Ct. at 2688 (Ginsburg, J., concurring). In addition, Justice Breyer, joined by Justices Stevens and Souter, said that he would have decided the question of whether an individual right existed in Article 36 and "would...answer it affirmatively." *Id.* at 2691 (Breyer, J., dissenting).

73. *Id.* at 2677 ("Because we conclude that [the defendants] are not in any event entitled to relief on their claims, we find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights.").

74. *Id.* at 2678 ("It would be startling if the Convention were read to require suppression.").

75. *Id.* at 2682. The exclusionary rule, which calls for suppression of evidence or statements made in

reasoned that the exclusionary rule was mainly applied to remedy constitutional violations, and that the violations of Article 36 were not constitutional in nature (because treaties have statutory, rather than constitutional weight).[76] Suppression of statements or evidence, therefore, was not considered to be the appropriate remedy.[77] The Supreme Court therefore has answered some questions, but it remains ambiguous on whether the Convention creates an individually enforceable right or whether a detainee must rely on the intervention of his nation of origin. Because of the lack of clear guidance, state courts have struggled to answer these questions themselves and have split in different directions.

### *E. State Court Rulings on Article 36 of the Convention*

With respect to the question of whether Article 36 creates an individually enforceable right, the picture of state courts is similar to that of the federal courts. Most have followed a pattern similar to that of the Supreme Court and have declined to answer the question.[78] Others have expressly decided that the Convention does not create an individually enforceable right.[79] It has been less common for state courts to find that the convention does create an individually enforceable right, and relief has been granted based on violations of Article 36 in only a few cases.[80] One of those cases, *State v. Reyes*,[81] was subsequently repudiated in the jurisdiction in which it was decided.[82]

*Reyes* is notable because it found the Vienna Convention to be an independent source of relief.[83] The remaining cases that have granted relief based on finding

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violation of the Fourth Amendment, "is a judicially created remedy designed to safeguard Fourth Amendment rights [of protection from illegal search and seizure] generally through its deterrent effect." United States v. Calandra, 414 U.S. 338, 348 (1974). Its use has been extended to some contexts outside the Fourth Amendment, but typically the Court is reluctant to do so. *Sanchez-Llamas*, 126 S. Ct. at 2680–81.

76. *Sanchez-Llamas*, 126 S. Ct. at 2680.

77. *Id.*

78. *See, e.g.*, People v. Preciado-Flores, 66 P.3d 155, 161 (Colo. Ct. App. 2003) ("It is not entirely clear whether the Vienna Convention creates a privately enforceable right."); Conde v. State, 860 So. 2d 930, 953 (Fla. 2003) (recognizing that the Convention arguably creates a right, but declining to decide because no remedy was available); Lopez v. State, 558 S.E.2d 698, 700 (Ga. 2002) (assuming, arguendo, that even if the Convention creates such a right, "[a]ny rights created by the Vienna Convention do not rise to the level of a constitutional right" that would invoke the exclusionary rule); Ledezma v. State, 626 N.W.2d 134, 151 (Iowa 2001) ("The majority of courts assume, without deciding, such a right does exist, and then hold the requested remedy is inappropriate or the defendant did not prove he was prejudiced by the alleged Article 36 violation.").

79. *See, e.g.*, Gomez v. Commonwealth, 152 S.W.3d 238, 242 (Ky. Ct. App. 2004) ("'[W]e are convinced that the Vienna Convention does not confer standing on an individual foreign national to assert a violation of the treaty in a domestic criminal case.'" (quoting State v. Navarro, 659 N.W.2d 487, 491 (2003)); State v. Longo, 148 P.3d 892, 898 (Or. 2006) ("Article 36 of the [Convention] does not create an individually enforceable right.")).

80. *Id.*

81. 740 A.2d 7 (Del. Super. Ct. 1999), *overruled as recognized in* State v. Vasquez, No. CR.A.98-01-0317-R2, 2001 WL 755930 (Del. Super. Ct. May 23, 2001) (unpublished opinion). In the case, the court allowed suppression of statements that were made by a detainee who had not been notified of his right to consular access. *Id.* at 8, 14–15. In doing so, the court explained that "(1) the Vienna Convention is the law of the land...; (2) the police conduct...violated Article 36 of the Convention; (3) Defendant...asserted a Vienna Convention violation in a timely manner; (4) Defendant has shown adequate prejudice to exist; and, (5) a violation Article 36 is ground for suppressing incriminating statements." *Id.* at 14.

82. Ramirez v. State, 619 S.E.2d 668, 673 n.5 (Ga. 2005) ("[*Reyes*] has been widely criticized and finally disapproved by the same court in *State v. Vasquez*." (citation omitted)).

83. *Reyes*, 740 A.2d, at 14 ("[A] violation of Article 36 is ground for suppressing incriminating statements made by foreign nationals while in police or government custody.").

Vienna Convention violations did so as part of the context of some other procedural failing, not because of the Vienna Convention alone. For example, in *Ledezma v. State*,[84] the Supreme Court of Iowa held that the defendant had "sufficiently established a claim for ineffective assistance of counsel."[85] As part of the basis for that decision, the court discussed the prejudice that could result from Vienna Convention violations.[86] It admonished criminal defense attorneys to apprise themselves of its importance and of the importance of consular access to foreign detainees.[87] *Ledezma* is odd, however, in that the court claimed not to decide whether the Vienna Convention provides an individually enforceable right[88] while at the same time discussing the prejudicial effect such a violation could have and suggesting to criminal defense lawyers that they have a duty to be aware of Article 36.[89]

The state courts, therefore, have not been unified on the question of whether Article 36 creates an individually enforceable right. Instead, most have avoided deciding,[90] and the remaining courts have split.[91] The state courts have, however, overwhelmingly stated that, if such a right did exist, a litigant raising the issue must show some prejudice as a result of any alleged violation.[92] Furthermore, state courts have been overwhelmingly hostile to the notion that suppression would be required as a remedy for Article 36 violations.[93] The uncertainty in the state courts reflects the uncertainty of the law in the Supreme Court of the United States. Because of this confusion, Article 36 is not being adequately enforced. Furthermore, the state courts offer little guidance on what the proper approach should be.

### *F. Difficulties in Honoring the Consular Notice Provisions*

The difficulties that the United States has had in honoring the consular notice provisions of the Convention have stemmed at least partly from the fact that enforcement of the provisions falls mainly on state and local law enforcement.[94] Unlike many of the other signatories to the Convention, the United States must deal with the tensions inherent in a federalist system that divides sovereignty between the

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84. 626 N.W. 2d 134 (Iowa 2001).

85. *Id.* at 152.

86. *Id.* at 151–52.

87. *Id.*

88. *Id.* at 150 ("We do not decide today whether the Convention actually creates an individual right to notification. Furthermore, we do not decide whether trial counsel renders ineffective assistance if he fails to inform a client...of the right....").

89. *Id.* at 152.

90. *See supra* note 81 and accompanying text.

91. *See supra* notes 77–78 and accompanying text.

92. People v. Preciado-Flores, 66 P.3d 155, 161 (Colo. Ct. App. 2002) ("Those courts that recognize a possible private right generally have held that the defendant must show prejudice." (citations omitted)).

93. State v. Martinez-Rodriguez, 2001-NMSC-029, ¶ 18, 33 P.3d 267, 275 ("[O]ther courts have...routinely held that suppression of evidence is not the proper remedy for a violation of the [Convention] because the treaty does not provide suppression as a remedy and does not create any fundamental, constitutional rights.").

94. Note, *Too Sovereign but Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?*, 116 HARV. L. REV. 2654, 2658 (2003) ("With respect to the Vienna Convention..., its ratification history indicates that the Senate was well aware that the burden of enforcing the consular notification provisions would fall to state and local governments." (citations omitted)).

states and the federal government.[95] Specifically, much of law enforcement has been considered a part of the police power that has traditionally been viewed as a function of the states, rather than of the federal government.[96] For that reason, the governmental entity that negotiated and signed the treaty—the Executive Branch of the Federal Government—must depend on states for the enforcement of Article 36.

In addition, the context of Article 36, being essentially a law enforcement matter, gives both state and federal courts a special responsibility to ensure that the United States honors the commitments it has made under the Convention because it is in the judicial system that the issues will be raised.[97] Despite this responsibility, state courts have had considerable difficulty carrying out that duty because of the lack of guidance. Both federal and state courts have heard a number of cases in which Vienna Convention violations have been raised, and different states have adopted different approaches in how they answer the basic questions concerning the meaning of Article 36 of the Convention.[98] Such a diversity of judicial approaches to interpreting the Vienna Convention on Consular Relations has not helped the United States in fulfilling its obligations under the treaty because foreign detainees have little way of knowing what their options are in judicial settings that do not uniformly give effect to the command of the treaty.

It was against this legal landscape of uncertainty that the New Mexico Supreme Court heard and decided the case analyzed in this Note, *State v. Martinez-Rodriguez*.[99]

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95. Although it is beyond the scope of this Note, it is important to point out that the federalist structure of the United States is further complicated by the existence of tribal sovereign entities. Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 285 (2003) ("Indian tribes have been something of an enigma in the federal Constitutional scheme for more than 200 years."). The status of tribes also raises questions about enforcement of the consular notice provisions of the convention. For more information, see, for example, Klint A. Cowan, *International Responsibility for Human Rights Violations by American Indian Tribes*, 9 YALE HUM. RTS. & DEV. L.J. 9 (2006) (discussing the status of indigenous tribes in the United States and their potential for violating international human rights laws and other obligations such as the Vienna Convention on Consular Relations).

96. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 615 (2000) ("[T]he suppression of [violent crime] has always been the prime object of the States' police power....").

97. *See Too Sovereign but Not Sovereign Enough*, *supra* note 94, at 2654 (discussing the fact that the burdens of Article 36 fall on state and local governments).

98. *See* Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: The International Court of Justice in* Mexico v. United States (Avena) *Speaks Emphatically to the Supreme Court of the United States About the Fundamental Nature of the Right to Consul*, 36 GEO. J. INT'L L. 1, 10 (2004). Kadish mentions at least three basic approaches that courts have taken in deciding Article 36 issues:

> Some courts have interpreted Article 36 to confer no fundamental right, and therefore no remedy is available. Other courts have held that individual rights may exist, but there is no remedy in the absence of a finding of prejudice. Finally, some courts have found that even if a defendant's claim passes procedural muster, no remedy is available if the violation was the product of "harmless error."

*Id.* Notably, the Tenth Circuit has adopted the second view. *Id.* at 14–15 (citing *United States v. Minjares-Alvarez*, 264 F.3d 980 (10th Cir. 2001), which declined to decide whether Article 36 conferred an individual right and argued that, where there was no prejudice, suppression was not available as a remedy). In addition to the three above approaches, because so many Vienna Convention claims are raised in habeas corpus proceedings, courts have often used procedural bars to avoid reaching the merits of Article 36 questions. *See infra* note 107; *see also* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2682–83 (2006) (discussing whether procedural default rules may preclude a litigant from raising an Article 36 claim).

99. 2001-NMSC-029, 33 P.3d 267. The next major ICJ case, *Avena & Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31), would not be decided until 2004. *See supra* Part II.C.2.

## III. *STATE V. MARTINEZ-RODRIGUEZ*

New Mexico is among the many states that have declined to adopt the ICJ's interpretation of the Vienna convention.[100] *State v. Martinez-Rodriguez*,[101] decided in 2001, is the major precedent on the issue in the state.

### *A. Facts and Procedural History*

In *Martinez-Rodriguez*, the New Mexico Supreme Court heard the appeal of Mexican national Ricardo Martinez-Rodriguez.[102] Martinez-Rodriguez had been convicted after a jury trial for three counts of first-degree murder, kidnapping with great bodily harm, and conspiracy to commit murder.[103]

Martinez-Rodriguez sought to have his convictions overturned on the ground, inter alia, that his rights to consular notification under the Vienna Convention had been violated when law enforcement failed to notify him of his right to consular access upon arrest.[104] This right that Martinez-Rodriguez claimed was violated allegedly arises out of Article 36(b) of the Vienna Convention on Consular Relations.[105] Consequently, he asked that statements he made to police be suppressed on the ground that his rights under Article 36 were violated.[106]

### *B. The Reasoning of* Martinez-Rodriguez

#### 1. Finding No Individually Enforceable Right

The New Mexico Supreme Court rejected Martinez-Rodriguez' Vienna Convention claim by holding that the Convention does not create an individually enforceable right and that a detainee therefore cannot litigate the issue himself.[107] The court reached this conclusion using traditional methods of treaty interpretation by observing that, in general, an international treaty is presumed not to create individual rights unless the document explicitly provides one.[108] Based on the presumption against the existence of individual rights in treaties, the court interpreted

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100. *See supra* note 82 and accompanying text.

101. 2001-NMSC-029, 33 P.3d 267.

102. *Id.* ¶ 1, 33 P.3d at 267.

103. *Id.*

104. The defendant, Martinez-Rodriguez, had filed a pretrial motion to suppress statements he made based on a violation of the Convention. *Id.* ¶ 8, 33 P.3d at 271. For this reason, no independent procedural barriers prevented him from raising the issue on appeal. *See supra* note 63 (discussing procedural default). Many of the cases involving violations of the Convention have involved the impact of procedural default on a violation, and procedural default has therefore been used as a way to dispose of these cases without deciding many of the questions addressed in this case. *See* Breard v. Greene, 523 U.S. 371, 375–76 (1998) ("By not asserting his Vienna Convention claim in state court, [defendant] failed to exercise his rights....Having failed to do so, he cannot raise a claim of violation of those rights now on federal habeas review."). The frequency with which procedural default has been used to prevent foreign detainees from raising the issue of violation of the Convention prompted the ICJ to specifically hold that such procedural bars should not be invoked in a way that undermines the obligations of the United States under the treaty. *See supra* note 56 and accompanying text. One author has even referred to procedural default as "the graveyard of so many Article 36 claims." Howard S. Schiffman, Breard *and Beyond: The Status of Consular Notification and Access Under the Vienna Convention*, 8 CARDOZO J. INT'L & COMP. L. 27, 46 (2000).

105. 2001-NMSC-029 ¶ 7, 33 P.3d at 271.

106. *Id.*

107. *Id.* ¶ 15, 33 P.3d at 274.

108. *Id.* ¶ 11, 33 P.3d at 272.

the text of the Convention, in conjunction with the language in its preamble, to find no judicially enforceable right.[109]

The New Mexico Supreme Court also cited *Breard v. Greene*,[110] a U.S. Supreme Court decision, to demonstrate that Court's reluctance to find an individually enforceable right in the context of a treaty.[111] The language from *Breard* that the court quoted spoke to whether a *nation* had the right to bring an action.[112] The New Mexico Supreme Court, however, explained that, "[w]ith the Supreme Court having expressed doubt that a signatory nation has a private right of action in domestic courts under the [Convention], it seems unlikely to us that the Court would find that an individual criminal defendant could pursue an action."[113]

2. Diplomacy as the Proper Means of Enforcing the Treaty

The New Mexico Supreme Court deferred to the State Department's interpretation of Article 36, noting that "the treaty is dealing with matters of international relations, not domestic criminal law....The negotiation and administration of treaties is a matter reserved to the Executive Branch of the federal government with ratification by the Senate."[114] The court, therefore, refused to "depart from the general principles of international law and the expressed position of the State Department."[115] As a result, the court left enforcement of the treaty to diplomatic rather than judicial channels, thus foreclosing the possibility of an individual raising a Vienna Convention claim in a judicial proceeding.[116]

3. A Lack of Prejudice

Even if an individual right is found to exist in Article 36, it will not be useful if a detainee cannot show that a violation affected the outcome of his case in some way. As dicta, the court explained that the defendant, Martinez-Rodriguez, did not suffer prejudice as a result of any alleged violation of his right to notification of consular access.[117] The court observed that, although the Mexican Consul had submitted an affidavit describing the type of assistance it would have offered the defendant, that assistance was duplicative of *Miranda*.[118] In addition, the defendant

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109. *Id.* ¶ 15, 33 P.3d at 274 ("The presumption against implying rights in international agreements weighs against Defendant's position. We conclude that this Court should not depart from the general principles of international law and the expressed position of the State Department to find that Defendant has a private right of action...." (citation omitted)).

110. 523 U.S. 371, 376 (1998) ("[N]either the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States courts to set aside a criminal conviction and sentence for violation of consular notification provisions.").

111. *Martinez-Rodriguez*, 2001-NMSC-029, ¶ 16, 33 P.3d at 274.

112. 523 U.S. at 377 (referring to the lack of clarity as to whether a "foreign nation" can bring a private right of action in U.S. courts).

113. *Martinez-Rodriguez*, 2001-NMSC-029, ¶ 16, 33 P.3d at 274.

114. *Id.* ¶ 14, 33 P.3d at 273 (citing U.S. CONST. art. II, § 2, cl. 2).

115. *Id.* ¶ 15, 33 P.3d at 274.

116. Id. ¶ 14, 33 P.3d at 274.

117. *Id.* ¶ 17, 33 P.3d at 274–75.

118. *Id.* ¶ 20, 33 P.3d at 276. Specifically, the Consul claimed that, if the defendant had been advised of his right to consular access, a consulate representative would have visited him and advised him not to speak to anyone, and that such silence would not bring adverse consequences. *Id.* The consulate representative would have also notified the defendant of a right to a certified interpreter and legal counsel. *Id.*

had not made inculpatory statements, so the prejudicial effect on his trial of any statements he did make was likely negligible.[119]

At the same time, the court said that "[t]he advice [that the Consul would have given] duplicates the rights guaranteed to Defendant by Miranda."[120] This might suggest that the Court would be strongly disinclined to find prejudice at all when the usual constitutional guarantees, such as *Miranda*, are honored. In other words, under such a view, federal constitutional guarantees would be presumed sufficient even for foreign nationals, and because Martinez-Rodriguez had been advised of his *Miranda* rights, he could not have suffered prejudice.

During its discussion of the lack of prejudice, the court registered its strong disapproval of the use of suppression as a remedy for Vienna Convention violations in the theoretical instance that a defendant could seek a judicial remedy for such violations.[121] Suppression was not warranted, according to the court, because such a remedy was designed to protect constitutional values, and signing the Vienna Convention did not implicate the constitution such that a violation of the treaty would give rise to a constitutional violation.[122] Moreover, the text of the Convention did not indicate a remedy of suppression.[123] Consequently, even if a defendant's rights were violated, the court found that the Convention did not allow a defendant to request that his statements be suppressed.

### C. *Justice Minzner's Concurrence in* Martinez-Rodriguez

In a concurring opinion, Justice Minzner disagreed with the court's finding that the Vienna Convention does not supply an individual right.[124] She interpreted the text of the Convention as providing such a right, arguing that the reference to "individuals" in the Preamble of the Convention should properly be read to refer to "'consular officials rather than civilian foreign nationals.'"[125] Justice Minzner also cited the legislative history of the Convention to support her argument.[126]

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119. *See id.* ¶ 19, 33 P.3d at 275. With respect to prejudice, it is unclear whether the New Mexico Supreme Court determined that in the case of *Martinez-Rodriguez* no prejudice was shown, or whether a violation of the consular notice provisions in general could not be considered prejudicial. The court said that in this case the advice of the Consul was duplicative of the *Miranda* rights. *Id.* ¶ 20, 33 P.3d at 276 ("The advice described by the Consul duplicates the rights guaranteed to Defendant by *Miranda*."). If, however, the advice that the defendant would have received was typical of what his Consul would provide to any of its nationals, lack of Consular access might almost never be prejudicial. The defendant in *Martinez-Rodriguez* had been convicted of a shocking list of violent crimes, and the physical evidence against him was overwhelming. The record showed that the defendant had been arrested while driving a vehicle belonging to one of the victims. *Id.* ¶ 4, 33 P.3d at 270. Furthermore, several samples of his fingerprints and DNA were discovered at the location of two of the murders, and other DNA evidence indicated that he had had a sexual encounter with one of the victims. *Id.* ¶ 6, 33 P.3d at 271. The defendant's identity and association with the stolen car and the other defendants was corroborated by an eyewitness. *Id.* The court also observed that he did not make any inculpatory statements prior to receiving legal representation and that he had received notification of his *Miranda* rights. *Id.* ¶ 19, 33 P.3d at 275.

120. *Id.* ¶ 20, 33 P.3d at 276.

121. *Id.* ¶¶ 18–19, 33 P.3d at 275–76.

122. *Id.* ¶ 18, 33 P.3d at 275 (citing Murphy v. Netherland, 116 F.3d 97, 99–100 (4th Cir. 1997)).

123. *Id.*

124. *Id.* ¶ 44, 33 P.3d at 282 (Minzner, J., concurring).

125. *Id.* ¶ 46, 33 P.3d at 282 (quoting Standt v. City of New York, 153 F. Supp. 2d 417, 425 (S.D.N.Y. 2001)). The Preamble states that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts." Vienna Convention, *supra* note 2, 21 U.S.T. 77, at 2.

126. *See Martinez-Rodriguez*, 2001-NMSC-029, ¶¶ 47–48, 33 P.3d at 282–83 (Minzner, J., concurring)

Next, Justice Minzner commented on the possibility of judicial remedies for Article 36 violations.[127] According to Justice Minzner, the rights created under Article 36 were designed to protect the procedural rights of foreign nationals and the "appropriate remedy for violation of those rights seem[s]...to be [a] proper subject[] for judicial interpretation and construction."[128]

## IV. ANALYSIS OF *STATE V. MARTINEZ-RODRIGUEZ*

The holding of *Martinez-Rodriguez* with respect to the Vienna Convention on Consular Relations, announced in September of 2001, came shortly after the ICJ's ruling in *LaGrand*. *LaGrand* was released in June of that same year, and in it the ICJ concluded that the Vienna Convention did create an individually enforceable right that the courts of the United States were bound to follow.[129]

The New Mexico Supreme Court did not mention the ICJ opinion, and it rejected Martinez-Rodriguez' Vienna Convention claim using three basic arguments: First, the court interpreted the Convention and held that the defendant had no claim because the Convention created no individual right.[130] The court did so using principles of treaty interpretation and also noted possible U.S. Supreme Court disapproval of the existence of an individually enforceable right under the Convention.[131] Second, the court noted that treaties are properly negotiated and administered by "the Executive Branch of the federal government with ratification by the Senate."[132] In making this argument, the court specifically deferred to the State Departments' interpretation of the treaty as being enforceable through diplomatic channels, saying that such an approach was necessary so that the United

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(citing, inter alia, 2 United Nations Conference on Consular Relations: Official Records, at 337, U.N. Doc. A/Conf.25/6, U.N. Sales. No. 63.X.2 (1963), for the proposition that the United States proposed language designed to protect the foreign detainee).

127. *Id.* ¶ 48, 33 P.3d at 283.

128. *Id.* ¶¶ 48–49, 33 P.3d at 283.

129. LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27). In *LaGrand*, the Federal Republic of Germany instituted proceedings against the United States on behalf of two citizens who where on death row in Arizona. *See supra* note 48 and accompanying text. Although both were executed before the ICJ's ruling, the ICJ insisted on hearing and ruling on the case. *See Lagrand*, 2001 I.C.J. 104, ¶ 34. In so doing, the ICJ found that the United States had violated the Vienna Convention on Consular Relations. *Id.* ¶¶ 123–26.

130. *See supra* Part III.B.1.

131. *Martinez-Rodriguez*, 2001-NMSC-029, ¶ 16, 33 P.3d at 274. Missing from the New Mexico Supreme Court's discussion is any mention of whether the Vienna Convention on Consular Relations is self-executing. Under U.S. law, treaties cannot create individual rights unless they are self-executing, or unless domestic implementing legislation is enacted. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987). Whether the Convention or Article 36 requires implementing legislation has not been squarely addressed by New Mexico courts. Strong authority, however, suggests that the Convention, in its entirety, is self-executing. First, during the ratification hearings, State Department Deputy Legal Adviser J. Edward Lyerly described the Convention as "entirely self-executive [sic] and [not requiring] any implementing or complementing legislation." S. EXEC. REP. No. 91-9, app., at 5 (1969). This legislative history has been commonly cited as support for a finding that the treaty is self-executing. *See, e.g.*, Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2694 (2006) (Breyer, J., dissenting) ("[I]t is common ground that the Convention is 'self-executi[ng].'" (citing S. EXEC. REP. No. 91-9, app., at 5 (1969)); Jogi v. Voges, 425 F.3d 367, 378 (7th Cir. 2005) (citing S. EXEC. REP. No. 91-9, app., at 5, and stating that such statements by the State Department deserve "great weight"), *opinion withdrawn and superseded*, 480 F.3d 822 (7th Cir. 2007); *Too Sovereign but Not Sovereign Enough*, *supra* note 94, at 2657 ("The Vienna Convention is clearly a self-executing treaty....").

132. *Martinez-Rodriguez*, 2001-NMSC-029, ¶ 14, 33 P.3d at 274 (citing U.S. CONST. art. II, § 2, cl. 2).

States could present a coherent, unified approach to treaties.[133] Third, the court found that, even if an individual had standing to bring an action to enforce the Convention, no prejudice occurred where the treaty was violated and so no Vienna Convention claim was born.[134] Each of these grounds is examined and criticized below.

### *A. Interpretation of the Treaty Should Lead to a Finding That Article 36 Creates an Individually Enforceable Right*

By its terms, Article 36 creates an individually enforceable right.[135] Subparagraph (b), for example, states that "[t]he said authorities shall inform the person concerned without delay of *his rights* under this subparagraph."[136] The New Mexico Supreme Court countered this argument by citing to the Preamble of the Convention, which says that the treaty is not designed to "'benefit individuals but to ensure the efficient performance of functions by consular posts,'"[137] and by pointing out that the purpose of Article 36 was, generically, to "'facilitat[e] the exercise of consular functions.'"[138]

Beside the fact that the text of Article 36 speaks more to the meaning of Article 36 than the Preamble, the cited purposes of the Convention and of Article 36 that are found in the Preamble do not contradict an existence of individual rights in the treaty. In other words, even if Justice Minzner's argument that "the Preamble's reference to 'individual[s]'" should only apply to consular officers is incorrect,[139] the Preamble and the cited purposes of Article 36 are compatible with the existence of individual rights. Given that Article 36 specifically refers to a person's "rights,"[140] it is possible that the treaty's framers found that certain individual rights were necessary to ensure that its purposes (facilitating the exercise of consular functions) would be properly brought about. It is, therefore, a tortured reading of the treaty to infer that an explicitly stated individual right does not exist by invoking general principles of Framers' intent when those principles are in no way hostile to the existence of individual rights. The better approach is to adhere to the plain meaning of the text to find that Article 36 does create individual rights.

Underlying the New Mexico Supreme Court's interpretation of the treaty, however, is a more difficult issue. One commentator has noted that "[t]here is a chasm between what U.S. courts consider to be the rule of individual rights under treaties (treaties generally do not create individually enforceable rights) and what international courts believe to be the rule of individual rights under treaties (that treaties do create individual rights)."[141] The New Mexico Supreme Court invoked the

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133. *Id.*

134. *See supra* Part III.B.3.

135. Vienna Convention, *supra* note 2, 21 U.S.T. 77, art. 36(b).

136. *Id.* (emphasis added).

137. *Martinez-Rodriguez*, 2001-NMSC-029, ¶ 13, 33 P.3d at 273 (quoting Vienna Convention, *supra* note 2, 21 U.S.T. 77, at 2).

138. *Id.* (quoting Vienna Convention, *supra* note 2, 21 U.S.T. 77, art. 36(1)).

139. *Id.* ¶ 46, 33 P.3d at 282 (Minzner, J., concurring) (quoting Standt v. City of New York, 153 F. Supp. 2d 417, 425 (S.D.N.Y. 2001)).

140. Vienna Convention, *supra* note 2, 21 U.S.T. 77, art. 36(1)(b).

141. Adrienne M. Tranel, Note, *The Ruling of the International Court of Justice in* Avena and Other Mexican Nationals*: Enforcing the Right to Consular Assistance in U.S. Jurisprudence*, 20 AM. U. INT'L L. REV. 403, 456 (2005) (footnotes omitted).

presumption against individual rights in treaties, stating that, "[a]s a general rule,...treaties do not create personal rights."[142] From there, the court proceeded to find that the Convention does not provide for an individually enforceable right.[143]

Such a "chasm" between the views of parties to a treaty is problematic, considering the contractual nature of a treaty, but it is a problem whose resolution is not necessary in the case of interpreting Article 36 of the Convention. Article 36 speaks for itself, and the ICJ has found a similar meaning in the text on multiple occasions. Even in the face of a presumption against individual rights in treaties, Article 36 is explicit in its language concerning detaining authorities' duty to inform the "person concerned" of "his rights."[144] In addition, the ICJ, the primary body responsible for interpreting the treaty in disputes between parties,[145] has determined that an individual right exists.[146] By the time the Vienna Convention questions were ruled on in *Martinez-Rodriguez*, the ICJ had stated in *LaGrand* that, "[b]ased on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights."[147]

Even though an ICJ ruling is not binding precedent for American courts,[148] the ruling should have been respected for several reasons. First, the Supreme Court of the United States has said that an ICJ interpretation deserves "respectful consideration" in judicial proceedings.[149] Duly entered treaties are the supreme law of the land,[150] and U.S. courts have rightly looked to ICJ decisions for guidance when that court has ruled on issues of treaties to which the United States is bound.[151] In addition, U.S. courts should respect ICJ treaty interpretations because a "treaty is designed 'to establish a single, agreed-upon regime' for the signatories."[152] In

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142. *Martinez-Rodriguez*, 2001-NMSC-029, ¶ 11, 33 P.3d at 272.

143. *Id.* ¶ 15, 33 P.3d at 274.

144. *See supra* Part IV.A.1.

145. The Optional Protocol of the Convention provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the [ICJ] and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." Optional Protocol, *supra* note 10, 21 U.S.T. 77, art. I. The United States withdrew from the Optional Protocol in 2005, raising new questions about the authority that an ICJ interpretation of the treaty should have in U.S. courts. Mark J. Kadish & Charles C. Olson, Sanchez-Llamas v. Oregon *and Article 36 of the Vienna Convention on Consular Relations: The Supreme Court, the Right to Consul, and Remediation*, 27 MICH. J. INT'L L. 1185, 1190 (2006). It is at least clear that U.S. courts do not view themselves as bound by ICJ rulings and, instead, give them "respectful consideration." Breard v. Greene, 523 U.S. 371, 375 (1998). It is also true that "each member of the United Nations has agreed to comply with decisions of the [ICJ] 'in any case to which it is a party.'" Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2684 (2006) (citation omitted).

146. LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104, ¶ 89 (June 27).

147. *LaGrand*, 2001 I.C.J. 104, ¶ 77.

148. *See Ex parte* Medellin, 223 S.W.3d 315, 330 (2006) ("*Avena* is not binding federal law....").

149. Breard v. Greene, 523 U.S. 371, 375 (1998). In *Breard*, the Court declined to follow the ICJ because it found no clear language in the treaty suggesting that it should override well-settled procedural default rules in the face of a Vienna Convention violation. *Id.*

150. U.S. CONST. art. VI, cl. 2 ("[A]ll treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

151. *See* Susan L. Karamanian, *"Outsourcing Authority?" Citation to Foreign Court Precedent in Domestic Jurisprudence: Briefly Resuscitating the Great Writ: The International Court of Justice and the U.S. Death Penalty*, 69 ALB. L. REV. 745, 748–49 (2006).

152. *Id.* at 749 (quoting Antonin Scalia, *Keynote Address: Foreign Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305, 305 (2004)). Even though the United States has withdrawn from the Optional Protocol granting jurisdiction to the ICJ in disputes arising from interpretation of the Convention, this principle of uniformity

other words, the treaty can be viewed in contractual terms. The United States benefits by being a party to the treaty and should therefore accept its burdens. In the interest of protecting parties' settled expectations, American courts should seek to implement the treaty in a way that comports with the view held by the other parties.

Furthermore, to ensure certainty in the application of the treaty, U.S. courts should give proper respect, even if not precedential weight, to the rulings of the ICJ. The court in *Martinez-Rodriguez*, therefore, should have consulted the ICJ opinion in *LaGrand*, and in the future New Mexico courts should be willing to at least examine the reasoning of *Lagrand* as well as the subsequent high profile decision in *Avena*.[153]

### *B. The States' Proper Place in Interpreting and Enforcing Treaties*

The U.S. Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties,"[154] and "[u]pon ratification, a treaty becomes the law of the land on an equal plane with federal statutes."[155] Given that the nation, and not an individual state, enters into treaties, the New Mexico Supreme Court was correct in stating that the national interest should be "'expressed through a single authoritative voice.'"[156] The court, however, arguably ignored the duty that states have to implement the treaty and to contribute to the nation's commitment to honor its obligations.

First, the Supremacy Clause of the Constitution states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[157] And although the Vienna Convention places a burden on states, "'treaties have invaded the most sensitive spheres of state autonomy'....With respect to the Vienna Convention in particular, its ratification history indicates that the Senate was well aware that the burden of enforcing the consular notification provisions would fall to state and local governments."[158] That the Convention invades the sphere of state police power is therefore not a sufficient justification for failure to implement its terms.

Regardless of this broad view of states' duty to enforce the Vienna Convention, some commentators have raised arguments based on federalism concerns. For example, one commentator has observed that the consular notice provisions of the

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still applies, because the United States is still bound by the treaty even if it does not submit to ICJ jurisdiction in future live disputes. If parties to the treaty ignore ICJ rulings, the Convention's usefulness will be undermined as each party adopts its own disparate view of what its provisions mean.

153. Avena & Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31). In *Avena*, the ICJ found that the United States violated the Convention in the case of several Mexican nationals who were on death row and that it owed them a remedy. *Id.* ¶ 128. Furthermore, the court reiterated its position, as stated in *LaGrand*, that the Convention creates individually enforceable rights. *Id.* ¶ 40.

154. U.S. CONST. art. II, § 2, cl. 2.

155. State v. Martinez-Rodriguez, 2001-NMSC-029, ¶ 11, 33 P.3d 267, 272 (citing U.S. CONST. art. VI, cl. 2).

156. *Id.* ¶ 14, 33 P.3d at 273 (quoting United States v. Li, 206 F.3d 56, 67 (1st Cir. 2000)).

157. U.S. CONST. art. VI, cl. 2; *see also Too Sovereign but Not Sovereign Enough*, *supra* note 94, at 2657 (arguing that because of the Supremacy Clause, the Vienna Convention on Consular Relations "supersedes inconsistent state law" (footnote omitted)).

158. *Too Sovereign but Not Sovereign Enough*, *supra* note 94, at 2658 (quoting David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1101 (2000)).

Vienna Convention may constitute a form of commandeering[159] because they affirmatively require state and local law enforcement to take certain actions.[160] The same author, however, concluded that Article 36 does not violate anticommandeering principles because of "conditional preemption."[161] For example, if Congress had the power to prohibit states from arresting foreign nationals, it could give states the choice between not being able to arrest foreign nationals and having the ability to arrest them under the condition that they honor Article 36 of the Convention.[162] In other words, the federal government could encourage states to comply with the treaty by agreeing to refrain from passing undesirable, but constitutional, legislation.[163] In addition, U.S. courts have observed that the Convention provides that "[t]he rights referred to [in Article 36] shall be exercised in conformity with the laws and regulations of the receiving State."[164] Considering the Constitution and the reality that treaties may impose burdens on state governments, the New Mexico Supreme Court should not have been so hasty to sidestep its obligation to enforce the treaty.

### *C. A Single Authoritative Voice*

The New Mexico Supreme Court's reliance on the State Department as the single authoritative voice in interpreting the Vienna Convention is flawed because the State Department's views are not always consistent. To support the notion that the "single authoritative voice" is contrary to the finding of an individually enforceable right under the Convention, the court quoted the U.S. State Department as saying that "the [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law."[165]

The court was correct to observe that the State Department's view concerning the treaty deserves "'great weight.'"[166] A court, however, has the ultimate responsibility to interpret a treaty for itself.[167] If the State Department takes a position that is contrary to the pronouncements of the ICJ, which has the duty of interpreting the treaty as among party nations, then a court is left to choose between opposite views

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159. The Supreme Court of the United States has held that Congress cannot commandeer state officers. Printz v. United States, 521 U.S. 898, 935 (1997).

160. Carlos Manuel Vasquez, Breard, Printz, *and the Treaty Power*, 70 U. COLO. L. REV. 1317, 1317 (1999) (discussing whether Article 36 of the Vienna Convention "contravenes the anticommandeering principle articulated in *Printz v. United States* and *New York v. United States*" (footnotes omitted)).

161. *Id.* at 1329–30.

162. *See id.*

163. *See* New York v. United States, 505 U.S. 144, 167 (1992). "[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *Id.* (citations omitted).

164. Vienna Convention, *supra* note 2, 21 U.S.T. 77, art. 36(2).

165. State v. Martinez-Rodriguez, 2001-NMSC-029, ¶ 14, 33 P.3d 267, 274 (alterations in original).

166. *Id.* ¶ 14, 33 P.3d at 273 (quoting United States v. Minjares-Alvarez, 264 F.3d 980, 987 (10th Cir. 2001)).

167. *See id.* (quoting *Minjares-Alvarez*, 264 F.3d at 987). With respect to federal courts, the Supreme Court of the United States recently argued that the "judicial power includes the duty 'to say what the law is'...[and if] treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department.'" Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2684 (2006) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

of two authorities, neither of which is binding upon it, but both of which should carry substantial weight in the determination. In such a quandary, the most correct result would be to adopt the position that best helps the United States honor its commitments under the treaty. In this case, that means a court should follow the ICJ and find an individual right. As state courts adopt this view and allow standing for individuals raising the issue of Vienna Convention violations, the United States would presumably lose its notoriety for blatantly ignoring the Consular Notice Provisions.

As stated above, the State Department may not be the unified voice against finding an individual right that the New Mexico Court believed it to be. The State Department's view that the Convention should be enforced through diplomacy, which is quoted in *Martinez-Rodriguez*,[168] arguably conflicts with language contained in the State Department's Foreign Affairs Manual. The manual speaks to the provisions of Article 36: "Our most important function as consular officers is to protect and assist private U.S. citizens or nationals traveling or residing abroad. Few of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail."[169] It is strange, then, that the State Department would express such concern for individuals when they are U.S. citizens abroad and yet imply that individuals are not the concern of these provisions of the Vienna Convention when foreign detainees in the United States invoke them.

In addition, even if the Court in *Martinez-Rodriguez* properly relied on the view expressed by the State Department to find no individually enforceable right under the Convention, the message from the Executive Branch of the Federal Government has arguably changed since that time and therefore warrants a reexamination of at least that portion of the Court's rationale.

In particular, the executive branch recently adopted a position in line with the ICJ with respect to at least one ruling. In the wake of the ICJ's ruling in *Avena*,[170] the President of the United States issued a memorandum to the U.S. Attorney General stating, "I have determined...that the United States will discharge its inter-national obligations under the decision of the [ICJ] in [*Avena*], by having State courts give effect to the decision."[171] This generalized endorsement of the ruling in *Avena* implicitly entails an endorsement of its parts, one of which is the finding that the Convention creates an individually enforceable right.[172]

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168. The State Department has said that "'the [only] remedies for failure of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law.'" 2001-NMSC-029, ¶ 14, 33 P.3d at 274 (quoting United States v. Li, 206 F.3d 56, 63–64 (1st Cir. 2000)).

169. 7 Foreign Affairs Manual § 412 (2004), *available at* http://www.state.gov/documents/organization/86604.pdf. An older version of the manual (which would have been in effect at the time *Martinez-Rodriquez* was decided) used similar language, stating that "[o]ne of the basic functions of a consular office has been to provide a 'cultural bridge' between the host community and the [U.S. National]. No one needs that cultural bridge more than the *individual U.S. citizen* who has been arrested in a foreign country...." 7 Foreign Affairs Manual § 401 (1984) (as quoted in Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2692 (2006) (Breyer, J., dissenting)) (emphasis added). It is notable that, while the "cultural bridge" language has been removed, the focus on the individual remains.

170. Avena & Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar 31).

171. Memorandum for the Attorney General (Feb. 28, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html.

172. *Avena*, 2004 I.C.J. 128, ¶ 40. In a recent case, the United States as amicus curiae argued that,

> although *Avena* is not enforceable in United States courts, [the defendant] is entitled to review

The President's memorandum thus provides powerful guidance from that branch whose view the New Mexico Supreme Court accorded "great weight" in interpreting Article 36 of the Convention.[173] Although the court deciding *Martinez-Rodriguez* did not have the benefit of the Presidential Memo, future courts hearing similar claims should take note of the guidance it offers.[174]

### *D. Looking to the U.S. Supreme Court for Guidance*

When the New Mexico Supreme Court decided in *Martinez-Rodriguez* that the Vienna Convention on Consular Relations does not create an individually enforceable right, it cited a dictum in *Breard v. Greene* that "'neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States courts to set aside a criminal conviction and sentence for violation of consular notification provisions.'"[175] The problem is that *Breard* did not actually decide that question and, in choosing to cite that particular dictum, the New Mexico Supreme Court ignored an equally important dictum that the Convention "arguably confers on an individual the right to consular assistance following arrest."[176] As a consequence, the New Mexico Supreme Court found that an individual detainee could not raise an Article 36 issue.[177] Because the U.S. Supreme Court did not decide that question, a determination of the relative weight of each of those utterances is little more than speculation.[178]

The language from *Breard* notwithstanding, the U.S. Supreme Court has allowed several more years to pass since *Martinez-Rodriguez* without committing to a position on whether a detainee has an individual right under the Convention. In the face of the ambiguity that remains in the Supreme Court, the *Breard* dictum upon which the New Mexico Supreme Court relied is not a good source of guidance.

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> and reconsideration [the remedy provided for in Avena] of the merits of his Vienna Convention claim to the extent that his claim relies on the President's determination that review and reconsideration...by [the state's] courts is necessary for compliance with the United States' international obligations.

*Ex parte* Medellin, 223 S.W.3d 315, 324 (2006) (internal quotation marks omitted) (penultimate alteration in original).

173. *See supra* note 171 and accompanying text.

174. It is true that the Presidential Memorandum addressed specifically *Avena* and constituted part of the diplomatic effort to properly resolve the individual cases involved in that situation. *See* Kadish & Olson, *supra* note 145, at 1230. Furthermore, a recent case has argued that the President exceeded his constitutional authority by attempting to direct courts to discharge duties under the ICJ's ruling. *Ex Parte Medellin*, 223 S.W.3d at 335–36 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)). The Memorandum, nonetheless, amounts to a positive reference to the ruling of the ICJ and should carry considerable persuasive weight in determining the State Department's position on Article 36.

175. State v. Martinez-Rodriguez, 2001-NMSC-029, ¶ 16, 33 P.3d 267, 274 (quoting Breard v. Greene, 523 U.S. 371, 377 (1998)).

176. *Breard*, 523 U.S. at 375.

177. *Martinez-Rodriguez*, 2001-NMSC-029, 17, 33 P.3d at 274.

178. The language that the New Mexico Supreme Court cited, however, was not directly related to whether an individual right was created under Article 36, but rather it spoke to whether a foreign *nation* could bring a private cause of action under that provision. *Martinez-Rodriguez*, 2001-NMSC-029, ¶ 16, 33 P.3d at 274 ("[With] the Supreme Court having expressed doubt that a signatory nation has a private right of action..., it seems unlikely to us that the Court would find that an individual criminal defendant could pursue an action.") (citing *Breard*, 523 U.S. at 375). Seen as such, the U.S. Supreme Court's recognition that the Convention "arguably" creates an individual right weighs against the New Mexico court's determination that the Court would disapprove of the existence of such a right.

The most recent case in the Supreme Court to discuss the issue, *Sanchez-Llamas v. Oregon*,[179] provides little guidance beyond *Breard* and does not express any disapproval of the notion that the Convention may create individually enforceable rights. Instead, it assumes, *arguendo*, that one exists.[180] The majority in *Sanchez-Llamas* again declined to decide whether the Vienna Convention creates an individual right and instead proceeded to dispose of the case by other means.[181] In addition, four of the justices explicitly stated their opinion that the Vienna Convention does provide an individual right.[182] A recent analysis of the decision in *Sanchez-Llamas* contends that a likely 4–4 split exists on the question of whether Article 36 creates an individually enforceable right.[183] According to the commentators, under the current Court, Justice Kennedy would be the determinative vote.[184] Based on his joining in the majority opinion of the recent *Hamdan v. Rumsfeld*[185] decision, "which strongly implied its support for finding individual rights under Common Article 3 [of the Geneva Convention]—and because the case for finding rights under Article 36 is stronger than the case for rights under Common Article 3—it is more likely than not that he also supports finding individual rights under Article 36."[186]

The U.S. Supreme Court seems, then, to be moving toward a finding that Article 36 creates an individually enforceable right. Therefore, however important the Supreme Court's supposed disapproval as expressed in *Breard* was to the holding in *Martinez-Rodriguez*, it has offered little guidance since that time. In *Sanchez-Llamas*, its wording was exceedingly ambiguous and at the least indicates a legal landscape that is shifting in favor of a finding that Article 36 does create individual rights. To the extent that *Breard* influenced the New Mexico Supreme Court's rationale, that portion of the rationale should be abandoned.[187]

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179. 126 S. Ct. 2669 (2006).

180. *Id.* at 2691 (Breyer, J., dissenting).

181. *See supra* Part II.D.

182. *See Sanchez-Llamas*, 126 S. Ct. at 2688 (Ginsburg, J., concurring) ("I agree that Article 36 of the Vienna Convention grants rights that may be invoked by an individual in a judicial proceeding...."); *id.* at 2691 (Breyer, J., dissenting; joined by Stevens, Souter, and Ginsburg, JJ., as to part II) ("A criminal defendant may, at trial or in a postconviction proceeding, raise the claim that state authorities violated the Convention in his case.").

183. Kadish & Olson, *supra* note 145, at 1199.

184. *Id.*

185. 126 S. Ct. 2749 (2006).

186. Kadish & Olson, *supra* note 145, at 1199–1200. According to Kadish and Olson, Kennedy may have refrained from explicitly deciding the issue because of his belief that the Court should refrain from deciding issues relating to treaty interpretation unnecessarily where Congress may give guidance. *Id.* at 1198. In reference to the general attitude of the Supreme Court toward international norms or law, one commentator has said that "the majority of the Justices sitting on the U.S. Supreme Court appear to be open to the possibility of using international norms in the Court's adjudicative process....Justices Stevens, Souter, Breyer, Ginsburg, and Kennedy all seem to favor this practice...." Josh Hsu, *Looking Beyond the Boundaries: Incorporating International Norms into the Supreme Court's Constitutional Jurisprudence*, 36 N.M. L. REV. 75, 77 (2006) (footnote omitted).

187. Considering that at least two bases for the rationale of *Martinez-Rodriguez* have been undermined—that the U.S. Supreme Court disapproves of finding an individual right and that the State Department's position is hostile to such a finding—the New Mexico Supreme Court has a strong reason to revisit the holding that the Vienna Convention does not create an individually enforceable right. Such a reexamination would be appropriate despite the rule of stare decisis. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) ("[W]e may enquire whether...the law's growth in the intervening years has left [a case's] central rule a doctrinal anachronism discounted by society; and whether [its] premises of fact have so far changed...as to render its central holding somehow irrelevant or unjustifiable...."). Now, the premises of facts are contrary to what was imagined by the court in *Martinez-Rodriguez* to the extent that it relied on an assertion that the State Department and the Executive Branch

### *E. The Possible Prejudice Caused by Vienna Convention Violations*

In dicta, the court in *Martinez-Rodriguez* explained that the defendant "[did] not show[] that he was prejudiced[188] by the officers' failure to abide by the treaty"[189] and was therefore not entitled to any of the remedies he sought.[190] On the facts of the case, this finding is sound. The defendant did not make inculpatory statements when he spoke to the officers that allegedly violated his right to consular notice,[191] and the fact that he was filing a pre-trial motion to suppress because of a violation of consular notification rights indicates that he in fact had notice of such a right before his trial.[192] Both at the arrest phase, during which he claimed the treaty violation occurred, and at the trial phase the defendant failed to make a showing that the treaty violation impacted his trial.[193]

Because the New Mexico Supreme Court disposed of the case by finding that no individually enforceable right exists in Article 36, it did not fully develop its discussion of the existence of lack of prejudice. The court's dicta on this point, therefore, leaves open at least two possible interpretations.[194] One interpretation is that the court simply found that the facts in Martinez-Rodriguez' case did not show prejudice because the defendant did not make any inculpatory statements to arresting officers before he became apprised of his rights under Article 36.[195] A second would be that a violation of the Convention is presumably non-prejudicial when a defendant gives a proper *Miranda* waiver.[196]

A reading of *Martinez-Rodriguez* as a fact-specific inquiry, devoid of any presumption against prejudice for Vienna Convention violations, would provide a fair framework for analyzing future Vienna Convention violations. First, it is the

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of the Federal Government reject the finding of an individual right in the Convention. *See* State v. Martinez-Rodriguez, 2001-NMSC-029, ¶ 14, 33 P.3d 269, 274. Furthermore, the U.S. Supreme Court no longer seems to disapprove of the finding of an individual right in the Convention (if it ever did). These portions of the rationale having been stripped, a future court could properly revisit that portion of the holding in *Martinez-Rodriguez*.

188. The New Mexico Court does not define "prejudice," but other courts have adopted a useful definition in the context of a denial of the right to consular access. The U.S. Court of Appeals for the Ninth Circuit has said that,

> [t]o establish prejudice, the defendant must produce evidence that 1) he did not know of his right; 2) he would have availed himself of the right had he known of it; and 3) "there was a likelihood that the contact would have resulted in assistance to him in resisting [his charge]."

United States v. Villa-Fabela, 882 F.2d 434, 440 (9th Cir. 1989) (quoting United States v. Rangel-Gonzales, 617 F.2d 529, 533 (9th Cir. 1980)). Despite the lack of a specific definition for prejudice, the New Mexico court discusses the Defendant's case in terms similar to the factors enumerated by the Ninth Circuit. *See Martinez-Rodriguez*, 2001-NMSC-029, ¶ 19, 33 P.3d at 275 ("[Defendant] has not demonstrated how the violation of the [Convention] affected the outcome of his case.").

189. *Martinez-Rodriguez*, 2001-NMSC-029, ¶ 19, 33 P.3d at 275.

190. Martinez-Rodriguez specifically requested that certain statements he made to arresting officers be suppressed because when he made them he was not aware of his right to consular access. *Id.* ¶ 7, 33 P.3d at 271.

191. *Id.* ¶ 19, 33 P.3d at 275.

192. *See id.* ¶ 8, 33 P.3d at 271.

193. *Id.* ¶ 20, 33 P.3d at 276.

194. It is useful to examine these interpretations and their accompanying implications because any possible future recognition of an individually enforceable right under the Convention in New Mexico would require it to determine whether it provides a useful analysis for the claims that would be brought.

195. *Martinez-Rodriguez*, 2001-NMSC-029, ¶ 19, 33 P.3d at 275.

196. *Id.* ¶ 20, 33 P.3d at 276 ("'Prejudice has never been—nor could reasonably be—found in a case where a foreign national was given, understood, and waived his or her Miranda rights.'" (quoting United States v. Alvarado-Torres, 45 F. Supp. 2d 986, 990 (S.D. Cal. 1999))).

fairest reading of the language of the case. In *Martinez-Rodriguez*, even aside from the fact that the physical evidence was overwhelming against the defendant,[197] thus decreasing the likelihood that his lack of access to a consul was prejudicial, the defendant actually had notification of his right before his trial.[198] He therefore could have had the benefit of consular access at least throughout his trial. Under such circumstances, there would be no reason to read into the case a broad rule that Vienna Convention violations are presumptively non-prejudicial. To do so would be to subject the court to criticism for establishing broad and improper precedent where a narrow ruling would have sufficed on the facts. As one author has noted with reference to other consular notification cases, and as Justice Blackmun rightly observed in another context, "'easy cases make bad law.'"[199] A narrow reading of *Martinez-Rodriguez* therefore avoids this accusation of overreaching and establishing precedent that was unnecessary to disposition of the case.[200] Such a reading is also most fair, considering the facts and language of the case.

In addition, a fact-specific analysis has textual support in the language of Article 36 of the Convention[201] and in the interpretation of Article 36 as set forth by the ICJ in *LaGrand* and *Avena*.[202] While Article 36 defers to the "laws and regulations of the receiving State,"[203] it also supplies the proviso that those laws and regulations "must enable full effect to be given to the purposes for which the rights accorded under [the] article are intended."[204] According to the Convention, then, the receiving State cannot rely on its own laws and regulations to subvert the purposes of the convention.

The ICJ's clarification of this point in its creation of the "review and reconsideration" remedy reflects an attempt to reconcile the tension between the

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197. The court noted that Martinez-Rodriguez was arrested while driving the stolen vehicle of one of the murder victims. *Id.* ¶¶ 3–4, 33 P.3d at 270–71. The Court further observed that

> Defendant's fingerprints were in the motel room [where the murder occurred] on an identification card of one of the victims. His fingerprints and his saliva, identified from DNA testing, were found on a beer can in the motel room. His DNA was also matched to anal swabs taken from the body of the third victim.

*Id.* ¶ 6, 33 P.3d at 271.

198. This is evident from the fact that the Defendant raised the Vienna Convention in a pre-trial motion. *Id.* ¶ 8, 33 P.3d at 271.

199. Daniel J. Lehman, Comment, The Federal Republic of Germany v. The United States of America*: The Individual Right to Consular Access*, 20 LAW & INEQ. 313, 334 (2002) (quoting O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 804 (1980) (Blackmun, J., concurring)).

200. The same observation applies to the court's method of disposing the case by finding that the Vienna Convention does not create an individually enforceable right. As other courts have done, the New Mexico court could have avoided making a decision on standing and found that in this case no prejudice was present considering the overwhelming physical evidence and the fact that any alleged right to consular notice would not have impacted the outcome of the case. *See supra* Part II.E.

201. As the treaty itself provides, "The rights...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 2, 21 U.S.T. 77, art. 36(2).

202. The court in *LaGrand* called upon American courts to provide "review and reconsideration." *See* LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104, ¶ 126 (June 27). Subsequently, *Avena* refined this, explaining that such review and reconsideration should be of a judicial nature and should be done with attention to possible prejudice caused by the Vienna convention violation. Avena & Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128, ¶¶ 138–40 (Mar. 31).

203. Vienna Convention, *supra* note 2, 21 U.S.T. 77, art. 36(2).

204. *Id.*

State's ability to apply its own laws and its obligation to allow those laws to give way when they would interfere with the purposes of the treaty. The ICJ's approach suggests that this tension should be resolved in a flexible manner that takes into account the specific facts of each alleged violation.[205] The *Avena* opinion specifically says that the receiving state must "guarantee that the violation and the *possible prejudice* caused by that violation will be fully examined."[206] The International Court's reference to "possible prejudice," in light of the deference that the treaty makes to the receiving State's law, evinces a lack of need for a presumption of any kind, whether for or against prejudice, and instead asks American courts to be flexible in their review of Vienna Convention claims within the limits of their own law.

Other commentators have endorsed the view that American courts should examine Article 36 violations with a "case-by-case evaluation of the facts to determine the prejudicial effect of the violation on the defendant's constitutional rights."[207] This fact-specific inquiry could be conducted in a neutral fashion, without a presumption either for or against prejudice. The standard applied could be the one enunciated in the Ninth Circuit deportation cases.[208] Under such a case-by-case analysis, a court would examine each alleged Article 36 violation and would ask whether the detainee knew of his right, whether "he would have availed himself of the right had he known of it," and whether "there was a likelihood that the contact would have resulted in assistance to him in resisting [his charge]."[209]

*Martinez-Rodriguez* might also be interpreted as holding that violations of the Convention are presumed to be non-prejudicial to defendants. This would be the broadest reading of the case and least in line with the purposes of the treaty and with the ICJ's interpretation.

Such a presumption against prejudice, if adopted as the rule, would be based on the New Mexico Supreme Court's statement in *Martinez-Rodriguez* to the effect that the protections afforded by Article 36 are duplicative of other constitutional protections.[210] Such a rule would be erroneous for various reasons.

First, it is exactly this type of inflexibility that the text of the Convention attempts to discourage in the proviso that "full effect...be given to the purposes for which the rights accorded under [Article 36] are intended."[211] Similarly, the ICJ has encouraged flexibility where domestic legal principles may, in some instances, need to give way to the obligations of the treaty.[212]

Second, it is possible to imagine circumstances under which a violation of the consular notice provisions of Article 36 would be prejudicial. For example, citizens of countries that are notorious for human rights violations may carry an inherent fear of brutal or corrupt law enforcement, and when they encounter American police they

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205. *Avena*, 2004 I.C.J. 128, ¶ 138.
206. *Id.* (emphasis added).
207. Lehman, *supra* note 200, at 331.
208. United States v. Villa-Fabela, 882 F.2d 434, 440 (1989) (citing United States v. Rangel-Gonzales, 617 F.3d 529, 533 (9th Cir. 1980)).
209. *Id.* (quoting *Rangel-Gonzales*, 617 F.3d at 533).
210. State v. Martinez-Rodriguez, 2001-NMSC-029, ¶ 20, 33 P.3d 269, 276.
211. Vienna Convention, *supra* note 2, 21 U.S.T. 77, art. 36(2).
212. Avena & Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128, ¶¶ 138–40 (Mar. 31).

may expect the same harsh treatment for silence or non-cooperation that they would see with the police of their own country. Even reading the *Miranda* rights would mean little to such a detainee.[213] For example, for some foreign detainees, "Miranda warnings alone may be insufficient to explain the American right against self-incrimination. The right to counsel in the United States may be similarly incomprehensible to foreign nationals who may presume that a public defender appointed by the state will represent the state."[214] In circumstances such as these, the detainee may be improperly induced to make false inculpatory statements or to otherwise proceed while ignorant of the rights afforded to him under our criminal justice system.

Seen as such, rather than being duplicative of *Miranda*, the rights under Article 36 may at times be necessary to facilitate foreign detainees' understanding of the *Miranda* rights. Violations of the Convention would therefore result in failure of the requirements of the *Miranda* rights, since those rights must be given and understood in order to be valid.[215] In other words, there are circumstances where a foreign detainee can only properly understand his *Miranda* rights if he is afforded the right to consular access.

Aside from *Miranda*, the circumstances under which a foreign detainee who does not know of his right to consular access makes inculpatory statements or confessions may indicate a lack of voluntariness.[216] In *Sanchez-Llamas*, the Supreme Court left the door open, saying, "defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police."[217] Defendants should, therefore, be able to raise the argument that "Article 36 claims should be included in the totality of the circumstances test [or a state's counterpart to that test] applied by state and federal courts to determine whether 'a confessant's will was overborne.'"[218]

These arguments reflect what is said to be a core value protected by Article 36 of the Convention: the right to consular access is supposed to provide a cultural bridge for those detained in foreign lands.[219] This argument is based on the idea that the Vienna Convention accords a "cultural bridge" between the detainee and the

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213. This is not a mere hypothetical. Amnesty International has pointed out that the state agents of over 150 countries apply torture and mistreat detainees. *See* Lehman, *supra* note 200, at 313 n.1. As Lehman observes, "One could imagine how a citizen of one of these nations would perceive her situation when in the custody of U.S. authorities and unaware of the safeguards afforded to those within the U.S. criminal justice system." *Id.*

214. Kadish & Olson, *supra* note 145, at 1187–88 (footnote omitted).

215. Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.").

216. Kadish & Olson, *supra* note 145, at 1209.

217. Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2682 (2006). This is an encouraging crack in the door, but it is still only a crack. Furthermore, it is ambiguous because the question of whether the Convention can even be raised by a criminal defendant is one of standing. As the New Mexico Supreme Court has stated, Article 36 "does not create judicially enforceable individual rights that can be remedied in the criminal justice systems of the member states." State v. Martinez-Rodriguez, 2001-NMSC-029, ¶ 14, 33 P.3d 267, 274 (citing United States v. Li, 206 F.3d 56, 63–64 (1st Cir. 2000)). The New Mexico Supreme Court thus seems to close the door even to a voluntariness claim because it would require that an individual have standing to raise it for judicial enforcement.

218. Kadish & Olson, *supra* note 145, at 1209 (quoting Smith v. Duckworth, 859 F.2d 909, 912 (7th Cir. 1988)). Under the totality of the circumstances test, which was enunciated in *Schneckloth v. Bustamonte*, the court considers several factors, such as "the youth of the accused; his lack of education; or his low intelligence; [and] the lack of any advice [about] his constitutional rights." 412 U.S. 218, 225–26 (1973) (citations omitted).

219. *See supra* note 169.

receiving state.[220] The New Mexico Supreme Court did not address the necessity of a cultural bridge arguably because the facts in *Martinez-Rodriguez* did not call for it. In other cases, however, the cultural bridge could be crucial to a detainee receiving a fair trial. If the detainee, for example, came from a country where protections such as those found in the American criminal justice system do not exist, he may be severely harmed because he does not understand what such protections mean, or he may doubt the reality of such protections, even when enunciated by state agents.[221] In such a case, the right to confer with a consulate would be critical in educating the detainee.

In addition, beyond the initial detention and interrogation process, foreign nationals who experience trial and sentencing without knowledge of their right to consular notification stand to suffer serious consequences. Without consular access, even if they have access to counsel, linguistic or cultural barriers may impede their counsel from communicating important concepts or information. In such a case, consular access would increase the chances that the detainee would understand the legal system and the consequences of his actions.[222]

Moreover, the presumption against prejudice requires guesswork about the nature of detainees facing violations of their rights under the Convention. Since the need for a cultural bridge is at the heart of the prejudice that can arise from Vienna Convention violations,[223] the presumption that the cultural bridge is unnecessary would need to be based on an assumption that fewer detainees are being prejudiced than are not when their rights are violated under the Convention.

Furthermore, unlike a presumption in *favor* of prejudice, for which some commentators have argued and which could at least be viewed as a deterrent to violations regardless of the number or scope of litigants who are or are not prejudiced, the presumption *against* prejudice does not serve a similar external goal. In fact, the presumption against prejudice might even encourage lassitude among law enforcement, because defendants who could show their rights were violated would still have to overcome a presumption that they did not suffer prejudice. When the scale is tipped toward the state, it will have little incentive to honor the obligations that the United States has undertaken. Therefore, a presumption against prejudice is possibly the least favorable of the approaches available from a reading of *Martinez-Rodriguez*. Its basis in reality would be unclear, and it would not help bring law enforcement into compliance with the Convention.

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220. Kadish, *supra* note 98, at 38 ("U.S. courts should follow the lead of the Inter-American Court and find that prejudice is presumed when an Article 36 violation occurs."). Note that the State Department has at least given the impression that it would presume prejudice where its own citizens faced detention abroad in saying that "[f]ew of our citizens need [consular] assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail." *Supra note* 169 and accompanying text. The "cultural bridge" language that the State Department used in the prior version of its manual reflects the same sentiment.

221. *See* Kadish & Olson, *supra* note 145, at 1187–88.

222. In a case such as this, adherence to the consular notice provisions would "enable full effect to be given to the purposes for which the rights accorded under [Article 36] are intended." Vienna Convention, *supra* note 2, 21 U.S.T. 77, art. 36(2). If detainees were informed of their right on a routine basis, their consul, if it chose to do so, could aid them in quickly finding competent counsel that would ensure that their rights were protected.

223. *See* Kadish, *supra* note 98, at 38.

As a final comment on prejudice, one approach that seems foreclosed by the court in *Martinez-Rodriguez* is the presumption that violations of the convention are prejudicial.[224] Some commentators, however, have advocated for such a position.[225]

One drawback to the "presumptive prejudice" approach is that it could result in remedies such as suppression or overturned convictions where such remedies are not deserved. For example, circumstances may arise under which defendants who are obviously guilty will have their convictions overturned, forcing a new trial. This would be a drain on limited court resources. The counter to this is that, in a fashion similar to *Miranda* rights, the risk of suppression or overturned convictions would serve as a strong incentive for law enforcement to understand and honor the pertinent provisions of the Convention. And, as compliance increased, the occasion to suppress evidence or overturn convictions might decrease.

One other problem with a presumption of prejudice is that such a presumption may not accurately reflect reality for most alleged Vienna Convention violations. A presumption of prejudice reflects the notion that, more often than not, a foreign detainee stands in need of the "cultural bridge" afforded by consular access. It also assumes that the detainee's consulate is more likely to offer assistance than not. If the main cases involving consular notice violations are any indication of reality, however, at least some detainees are less likely to have suffered prejudice.[226] Even in the absence of statistical data, the multitude of conceivable circumstances under which foreign detainees might not be prejudiced by a Violation of the Convention militates against a presumption of prejudice.[227]

A flexible, case-by-case approach therefore appears to be the most useful. It does not suffer the infirmities inherent in presumptions for or against prejudice, and it allows the court enough flexibility to offer a remedy where violation of the Convention has prejudiced a foreign national. Furthermore, by following an approach that is in line with the ICJ's recent ruling in *Avena*[228] and allowing for reconsideration and review for prejudice, the New Mexico Supreme Court would further the overall policies underlying the treaty and would help bring the United States into compliance.

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224. *See* State v. Martinez-Rodriguez, 2001-NMSC-029, ¶ 19, 33 P.3d 269, 275 (agreeing "with other courts which have required a showing of prejudice"). As far as announcing a rule, this language agreeing that a detainee must make a showing of prejudice is antagonistic to the idea that a presumption of prejudice exists.

225. Kadish, *supra* note 98, at 38 ("U.S. courts should follow the lead of the Inter-American Court and find that prejudice is presumed when an Article 36 violation occurs.").

226. For example, in *LaGrand*, the brothers seeking relief through Article 36 on the basis of German citizenship were German only as a technicality. LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104, ¶ 13 (June 27). They came to the United States as young children and only left once for a short period. *Id.* They were also the adoptive children of a U.S. national. *Id.* In *Martinez-Rodriguez*, the defendant's conviction was based on overwhelming evidence against him, and it appears that he made no inculpatory statements. 2001-NMSC-029, ¶ 19, 33 P.3d at 275. In such cases, the Article 36 violation does not impact the outcome because either the defendant had no need of the cultural bridge to apprise him of his option, or the defendant simply did not inculpate himself even if he did not have access to consul. In either event, no prejudice seems to be demonstrated.

227. For example, many foreign nationals who face the possibility of detention in the United States may have resided in the United States for extended periods of time. Many such potential detainees may come from developed nations where concepts of due process, though not exactly the same as those in the United States, are comparable.

228. Avena & Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128, ¶ 138 (Mar. 31).

## V. THE PROBLEM OF REMEDIES

Even if a court recognizes that the Convention confers an individually enforceable right and that a violation of the Convention resulted in prejudice, the question still remains: What remedy should be granted? The New Mexico Supreme Court was virtually silent on this question in *Martinez-Rodriguez* because it found that no individual right existed,[229] and even if such rights did exist, the defendant before the court was not prejudiced by any violation of alleged rights under the treaty.[230] The court only went as far as saying that suppression would be an inappropriate remedy in the event that the defendant did have standing to bring a claim that his rights to consular notification were violated.[231] Given the paucity of suggestions from the New Mexico Supreme Court concerning remedies for Vienna Convention violations, it is necessary to look elsewhere for guidance.

Because of its supposed expertise on interpreting the Vienna Convention on Consular Relations, the ICJ is a fitting place to begin the search for a remedy to the right of consular notification. In *LaGrand*, the ICJ recommended a basic framework for a remedy for violations of the Convention.[232] The ICJ then clarified the meaning and application of that framework in *Avena*: where there has been a violation of the consular notice provisions, there must be a means of effective review and reconsideration of both the trial and the sentence.[233] That review and reconsideration should entail a "procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention."[234] In developing that framework, the ICJ was intentionally vague and deferential, taking into account the right of the United States to apply its own laws.[235] The ICJ did note, however, that judicial rules like procedural default, though not in violation of the Convention generally, may be applied in a way that violates the treaty.[236]

The ICJ's rule is a useful starting point because it provides the basic framework that a procedure must exist by which violations can be reviewed and by which the legal impact and prejudice of those violations can be considered.[237] From that point, however, a Court must still consider exactly what should be done if a violation is reviewed and found to be prejudicial. The following are some possibilities.

### A. *Suppression as a Remedy for Article 36 Violations*

The remedy that is most commonly sought, and which the defendant sought in *Martinez-Rodriguez*, is suppression of evidence or statements gathered in purported violation of Article 36.[238] The Supreme Court of the United States has recently expressed disapproval of such a remedy, saying that "the Constitution requires the

229. State v. Martinez-Rodriguez, 2001-NMSC-029, ¶ 15, 33 P.3d 267, 274.
230. *Id.* ¶ 20, 33 P.3d at 276.
231. *Id.* ¶ 18, 33 P.3d at 275.
232. LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104, ¶ 125 (June 27).
233. 2004 I.C.J. 128, ¶¶ 138–41.
234. *Id.* ¶ 139.
235. *Id.* ¶ 131 ("[T]he Court acknowledges that the concrete modalities for such review and reconsideration should be left primarily to the United States.").
236. *Id.* ¶ 90.
237. *Id.* ¶ 138.
238. State v. Martinez-Rodriguez, 2001-NMSC-029, ¶ 7, 33 P.3d 267, 271.

exclusion of evidence obtained by certain violations of the *Fourth Amendment* and confessions exacted by police in violation of the right against compelled self-incrimination or due process."[239] Because the Supreme Court has recently held that this remedy is generally not available for Vienna Convention violations,[240] it would be unlikely that any state court will do so. The door, however, may not be completely closed. If the New Mexico Supreme Court decided that the Convention did supply an individually enforceable right, suppression might be obtained by relying on the Article 36 violation to show some other constitutional violation.[241] The Supreme Court of the United States hinted at this approach by saying, "A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police."[242] If voluntariness can be challenged through a showing of prejudice caused by an Article 36 violation, other constitutional or statutory violations should be equally susceptible to vindication using the Convention.[243]

Thus far, this is the main approach that has worked in other courts.[244] Moreover, it has the advantage of allowing a court to give effect to the Vienna Convention without making a wild departure from accepted practice. As explained in *Sanchez-Llamas*, suppression is not a remedy that is lightly granted because it puts substantial cost on the truth-finding process.[245] Where nothing in Article 36 indicates that suppression is a remedy, and where a violation of the provision alone does not prejudice a defendant, exclusion should therefore not be allowed. If, however, a violation of the Convention impinges upon some constitutional or other legally protected interest, a court should consider it and should be willing to grant relief in the proper situation, even exclusion.

The New Mexico Supreme Court has said that it analyzes exclusion as "judicial review of executive conduct."[246] Where executive conduct forms the basis of enforcement of the consular notice provisions of Article 36, the New Mexico judiciary should perform its duty in assuring that the state complies with the treaty

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239. Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2680 (2006) (citations omitted).

240. *Id.* at 2682.

241. Kadish & Olson, *supra* note 145, at 1211–20, 1208–23 (discussing other judicial remedies).

242. *Sanchez-Llamas*, 126 S. Ct. at 2682.

243. Kadish & Olson, *supra* note 145, at 1217 ("Under the Sanchez-Llamas majority's interpretation of the 'full effect' language in Article 36(2), an Article 36 violation could be raised in conjunction with any of the 'constitutional and statutory protections...[that] safeguard the same interests Sanchez-Llamas claims are advanced by Article 36.'" (alterations in original)). Kadish and Olson suggest specific possibilities such as ineffective counsel, due process ("[w]here inability to obtain evidence results in a fundamental miscarriage of justice"), or a failure by a court to make appropriate accommodations. *Id.* at 1217–20.

244. *See supra* Part II.F. It is important to point out that in one of the cases discussed the reversal of a conviction was granted rather than suppression. Ledezma v. State, 626 N.W. 2d 134, 138 (Iowa 2001). The theory, however, is the same because the Vienna Convention violation was seen as part of a broader attack on the effectiveness of counsel. *Id.* at 152.

245. 126 S. Ct. at 2680. The Court observed that "[w]e have applied the exclusionary rule primarily to deter constitutional violations....The *few* cases in which we have suppressed evidence for statutory violations do not help [the defendant]." *Id.* (emphasis added).

246. State v. Gutierrez, 116 N.M. 431, 446, 863 P.3d 1052, 1067 (1993) (citing Thomas S. Schrock & Robert C. Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 324–26 (1974)).

and should not shrink from invoking the exclusionary rule where an Article 36 violation causes a constitutional violation.[247]

*B. Jury Instructions*

One of the only other remedies for a violation of the right to consular notice seen in a judicial setting has been a jury instruction.[248] In a case before the Georgia Supreme Court, the jury was instructed that the defendant in question may have suffered a violation of his right to consular notice, and the court allowed the jury to weigh that information in its determination of the voluntariness of the defendant's statements.[249]

While the Georgia Supreme Court may be commended for its desire to offer a remedy for violation of Article 36, jury instructions seem to be of limited use in vindicating the rights of that provision. A major drawback to the use of jury instructions is that they do nothing to encourage state law enforcement to live up to its duties under the treaty. It would be much more effective to deprive law enforcement of the use of evidence or statements gathered in a way that takes advantage of foreign nationals who are deprived of the cultural bridge of Article 36.

Furthermore, from the point of view of a defendant, a jury instruction like the one given in Georgia is a weak remedy. A jury may have as little understanding of the need for access to consul and the cultural bridge it provides as the officers who violate the provisions of the Convention. The policies underlying Article 36 should not, therefore, be introduced into the decision-making process of a jury panel that is not likely to value them.

A jury instruction, therefore, may not remedy prejudice caused to a detainee if such prejudice occurs pursuant to a violation of Article 36. In addition, a jury charge can have but marginal impact on the conduct of law enforcement, in whose hands implementation of Article 36 lies.[250]

The more viable way to judicially vindicate the rights under Article 36 would be to consider whether the violation caused prejudice such that it could form the basis for an independent constitutional attack, such as voluntariness of statements or ineffective assistance of counsel.

## VI. THE SIGNIFICANCE OF ENFORCING ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

When studying these cases dealing with Vienna Convention violations, it is easy to ask, "why all of the fuss over a handful of particularly unsavory criminals, guilty of some of the worst crimes imaginable?" In fact, some commentators have observed that the animus behind the pursuit of the Vienna Convention claims is

247. See *supra* note 75 for a discussion of the exclusionary rule.

248. *See* Kadish, *supra* note 98, at 41 (citing State v. Ramirez, No. OOCR-3159-4 (Dekalb, Ga. Super. Ct. 2003)); Ramirez v. State, 619 S.E. 2d 668, 673–74 (Ga. 2005) (explaining that, in the trial court below, "an instruction was given to the jury that would allow it to consider the mandate of the Convention in order to assess the voluntariness of the statement").

249. Kadish, *supra* note 98, at 41.

250. *See supra* Part VI.A (discussing the New Mexico approach to exclusion as a means of checking the executive).

generally a desire to find ways to eliminate the death penalty in the United States.[251] Germany, for example, may have taken little or no interest in the case of Walter LaGrand had he and his brother been given life sentences rather than the death penalty. In fact, disgust with the practice of executing foreign nationals seems to be the most plausible explanation for why Paraguay, Mexico, or any other nation would expend such significant resources on instituting proceedings in the ICJ on behalf of individuals who were proven to have committed horrible, violent crimes.[252]

Antipathy toward the death penalty, however, is not the only reason that many individuals take an interest in the United States' frequent difficulties with Article 36 of the Convention. Among American observers, one important concern arises out of the notion that U.S. failure to protect foreign citizens' rights within its own borders will induce lassitude in other States that are parties to the Convention with respect to the provisions of Article 36. One commentator has poignantly observed that

> [i]ndividual American citizens are placed in harm's way when the government fails to adequately protect the rights of foreign citizens in the United States. This concern is larger than one case and is not spurred by sympathy for the likes of Angel Breard. Would the Vienna Convention rights have made a difference to Angel Breard? Probably not. But will these same guarantees make a difference to Americans detained abroad? You can bet their lives on it.[253]

This concern for the safety of Americans abroad is compelling and is echoed by the State Department in the context of the consular notice provisions of the Convention.[254]

This hearkens to the contractual nature of the Convention. Each party that has signed and ratified the treaty has, in essence, given up a small amount of its sovereign ability to deal with nationals from other signatory nations as it unilaterally chooses. The parties have given up that ability in exchange for a guarantee that their own citizens will benefit as states receiving their citizens honor reciprocal obligations under the treaty. If a nation would like to be free of its obligation to enforce the treaty, it should give up its right to rely on the same treaty, and should withdraw.

In addition to the arguments about the death penalty and the safety of U.S. citizens abroad, it is important to note that a belief in the notion of due process should animate adherence to the Convention. The cases of Angel Breard, Ricardo Martinez-Rodriguez, or the LaGrand brothers may not have raised serious due

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251. *See* Margaret E. McGuinness, Medellín, *Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 757 (2006). Discussing recent cases in which Vienna Convention violations have been raised, McGuiness argues that

> [t]he...cases arose not out of an abstract concern about U.S. treaty violations, or even out of concerns about the general effects of failures to notify foreign nationals of their rights—though, to be sure, these concerns motivated particular actors at particular times. That these cases arose at all was because the United States was out of step with an international trend toward de facto and de jure abolition of the death penalty.

*Id.*

252. *See, e.g.*, Fleishman, *supra* note 19, at 359 ("The Mexican government has spent unprecedented effort and resources on behalf of Mexican nationals facing death sentences in the United States.").

253. Erik G. Luna & Douglas J. Sylvester, *Beyond* Breard, 17 BERKELEY J. INT'L L. 147, 149 (1999).

254. *See supra* note 171 and accompanying text.

process questions. After all, Breard and Rodriguez were convicted of macabre crimes, and their convictions rested mainly upon overwhelming physical evidence. The Vienna Convention violations likely did not profoundly affect the outcome of their cases. Similarly, the need for a cultural bridge may not have been particularly strong for the LaGrand brothers who, despite their German citizenship, lived most of their lives in the United States, were more American than German, and may not have even spoken German.[255] The United States, however, as a whole and as the several states, has a responsibility to fulfill its obligations under the treaty so that violations will be less likely when cases come along in which real prejudice could result.

## VII. CONCLUSION

The New Mexico Supreme Court should reopen the door for defendants wishing to vindicate violations of their rights under Article 36 of the Vienna Convention on Consular Relations. The court should therefore revisit *Martinez-Rodriguez* and find that Article 36 supplies an individually enforceable right. By doing so, New Mexico courts would be more faithful to the text of the Vienna Convention. Furthermore, such a rule would be in harmony with the rulings of the ICJ, whose interpretations of the Vienna Convention offer guidance to all signatories and parties. Finally, finding an individual right in Article 36 would not be adverse to U.S. Supreme Court precedent and likely would presage a similar result in that Court.

The New Mexico Supreme Court should also avoid presumptions for or against prejudice in the event of violations and should instead conduct a case-by-case inquiry to determine whether a defendant was prejudiced at any stage of the proceedings by that violation. Finally, the court should be willing to examine that possible prejudice to determine whether it caused some other constitutional failing that would trigger the remedy of suppression. This remedy is most likely available for Vienna Convention violations if the violation can be argued as incorporated into some other constitutional claim such as ineffective counsel or a challenge to voluntariness.

255. LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104, ¶ 13 (June 27).