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Vienna Convention on Consular Relations: Overview of U.S. Implementation and International Court of Justice (ICJ) Interpretation of Consular Notification Requirements

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Summary

On March 31, 2004, the International Court of Justice (ICJ) ruled in the case of *Avena and Other Mexican Nationals* that the United States had failed to comply with its obligations owed to Mexico and its foreign nationals under the Vienna Convention on Consular Relations. It further instructed the United States to review and reconsider the convictions and sentences of foreign nationals denied requisite consular information owed under Convention Article 36, and held that U.S. state or federal procedural default rules should not prevent relief from Article 36 violations.

The Vienna Convention on Consular Relations is a multilateral agreement codifying consular practices originally governed by customary practice and bilateral agreements between States. Most countries, including the United States, are parties to the Convention. The United States is also a party to the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, under which it has agreed to accept the jurisdiction of the ICJ to settle disputes between Convention parties regarding the agreement's provisions. In recent years, three countries (Paraguay, Mexico, and Germany) have brought cases to the ICJ disputing U.S. practice in relation to Convention Article 36. Article 36 provides that when a foreign national is arrested or detained, authorities of the receiving State must notify him "without delay" of his right to have his country's local consular officer contacted.

While the United States has adopted measures to ensure federal law enforcement compliance with the provisions of Article 36, no federal law ensures state and local compliance with Convention consular notification requirements. Regardless, U.S. federal and state courts have generally not granted foreign nationals relief for Article 36 violations, often because state and federal procedural default rules, including those federal rules enacted pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA), prevent consideration of such claims if they are not raised on a timely basis. In *Breard v. Greene*, the Supreme Court upheld the application of federal procedural default rules to Convention claims, including in instances where such rules precluded federal habeas relief from sentences imposed by state courts. If the United States decided to comply with the ICJ's ruling, legislative measures might be required. U.S. jurisprudence concerning the Vienna Convention, along with the requirements of AEDPA, make it unlikely that U.S. courts will uniformly abide by the ICJ's ruling. In order to comply with the ICJ's decision concerning the nonapplicability of the procedural default rule to Convention claims, AEDPA may need to be amended to permit further review of Article 36 claims. Further, the United States could seek to improve state and local compliance with Convention provisions through federal legislative measures. Whether or not Congress has the power to commandeer state and local officials to execute U.S. treaty obligations remains an undecided issue, and Congress might decide to implement less direct measures to assure state compliance with the ICJ's ruling.

Contents

Vienna Convention on Consular Relations: Overview of U.S. Implementation and International Court of Justice (ICJ) Interpretation of Consular Notification Requirements

In accordance with the Vienna Convention on Consular Relations (Vienna Convention),[1] a multilateral international agreement designed to codify customary international practice concerning consular relations, the United States has pledged to inform detained foreign nationals of their right to have their respective consular offices notified of their detention. In practice, this obligation has not always been fulfilled, and questions have arisen as to what, if any, legal remedy is owed to foreign nationals who are not informed of their right to notify their consulate. U.S. courts have split on the issue of whether the Convention creates individual rights for affected foreign nationals, although in most cases U.S. courts have denied foreign nationals relief from Convention violations on either procedural or substantive grounds. On March 31, 2004, the International Court of Justice (ICJ) issued a ruling in the case of *Avena and Other Mexican Nationals (Mexico v. United States of America*)[2] that clarified State notification obligations under the Vienna Convention, and additional measures may be required if the United States intends to comply with the ICJ's ruling.

Background on the International Court of Justice and the Vienna Convention Optional Protocol

The International Court of Justice is the principal judicial organ of the United Nations.[3] Under the U.N. Charter, a Member State is obligated to comply with any ICJ decision to which it is a party.[4] The United States is also a party to the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes

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

[2] Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment (Mar. 31, 2004), *available at* [http://212.153.43.18/icjwww/idocket/imus/imusjudgment/imus_imusjudgment_20040331.pdf] [*hereinafter "Avena*"].

[3] U.N. Charter at Art. 92.

[4] *Id.* at Art. 94(1).

(Optional Protocol), under which Convention parties agree to accept the jurisdiction of the ICJ to resolve disputes between them concerning Convention implementation.[5]

In 1946, the United States declared that it recognized the compulsory jurisdiction of the ICJ over matters relating to, *inter alia*, (1) the interpretation of a treaty; (2) the existence of any fact which, if established, would constitute a breach of an international obligation; and (3) the nature or extent of the reparation to be made for the breach of an international obligation.[6] In its declaration, however, the United States made clear that the declaration accepting compulsory jurisdiction by the ICJ did not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America ...."[7] In 1985, the United States informed the ICJ that it no longer recognized the ICJ as having compulsory jurisdiction of matters involving the United States.[8] Nevertheless, the United States did not rescind certain international agreements that it had entered, including the Optional Protocol, which recognized ICJ jurisdiction to resolve particular international legal disputes.

Whether ICJ decisions concerning the Vienna Convention are legally binding upon U.S. courts pursuant to the Optional Protocol is a matter of debate. A majority of Supreme Court Justices has implicitly suggested that ICJ opinions are only advisory for purposes of domestic law,[9] while a vocal minority of Justices has argued that ICJ decisions regarding the Vienna Convention are binding on U.S. courts pursuant to the Optional Protocol.[10]

Background on the Vienna Convention Article 36

Traditionally, States (i.e., countries) have provided consular services to assist their nationals in other countries. The Vienna Convention on Consular Relations was completed in 1963 as a means of codifying consular practices originally governed by customary international law and bilateral agreements between States. Most countries, including the United States, are parties to the Vienna Convention, and the United States has "relied increasingly on it as the principal basis for the conduct of [its] consular activities."[11] The Vienna Convention enumerates basic legal rights and duties of signatory States including, *inter alia*, (1) the establishment and conduct of consular relations and (2) the privileges and immunities of consular officers and offices in the "receiving State" (the country where the foreign consular office has

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[5] For example, the United States brought a case against Iran during the Hostage Crisis concerning Iran's failure to respect the inviolability of consular premises and officers. *See* United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgement (May 24, 1980).

[6] United States Declaration of Aug. 14, 1946, 61 Stat. 1218,1 U.N.T.S. 9.

[7] *Id.*

[8] United States Department of State, *U.S. Terminates Acceptance of ICJ Compulsory Jurisdiction*, 86 DEP'T ST. BULL. 67 (Jan. 1986).

[9] *See infra* at pp. 8-10, 18-20.

[10] *See infra* at pp. 11, 17.

[11] United States Department of State, Bureau of Consular Affairs, Consular Notification and Access, Part 5: Legal Material, *available at* [http://travel.state.gov/notification5.html].

been established). If the receiving State infringes upon the legal rights afforded to the "sending State" (the State that has established a consular office in the receiving State) under the Vienna Convention, the sending State is permitted to reciprocate this treatment against the foreign consulates that the receiving State has established in the sending State.[12]

Article 36 of the Vienna Convention provides that when a foreign national is "arrested or committed to prison or to custody pending trial or is detained in any other manner," appropriate authorities within the receiving State must inform him "without delay" of his right to have his native country's local consular office notified of his detention.[13] With the detained national's permission, a consular officer from his country may then "converse and correspond with him and ... arrange for his legal representation."[14] Article 36(2) provides that these rights "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."[15]

The consular notification provisions of Article 36 can potentially have a number of benefits for a detained foreign national. If a sending State is made aware of the arrest or detention of one of its nationals in the receiving State, it might take diplomatic or other steps to ensure that its national is treated fairly by the receiving State. A consular official might also have more expertise in the laws and practices of the receiving State than the detained national, and might also be able to arrange for the arrested national to receive better legal representation than he might otherwise receive in the receiving State. Consular assistance might also be useful to a detained foreign national in building a defense to criminal charges raised against him in the receiving State. For example, a consular official might be able to assist the detained national in obtaining evidence or witnesses from the sending State that will either bolster the national's defense against the charges made against him or, in cases in which the national is subsequently convicted, assist the national in arguing for leniency in sentencing.

Because different States provide different degrees of protections to foreign nationals, the advantages accrued by a foreign national via consular access may vary from State to State. For example, whereas the United States provides detained foreign nationals in criminal cases with the same degree of constitutional protections as U.S. citizens, including the right to a court-appointed lawyer and various other due process protections, certain other parties to the Convention may not guarantee foreign nationals such protections. Therefore, a U.S. citizen detained in a country without such protections might suffer more serious consequences from being deprived of information relating to his consular officials than a foreigner detained in the United States.

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[12] Vienna Convention at Art. 72(2).

[13] *Id.* at Art. 36.

[14] *Id.*

[15] *Id.*

U.S. Implementation and Judicial Interpretation of Vienna Convention Article 36

The United States ratified the Vienna Convention in 1969, six years after signing the agreement. The legislative history concerning ratification of the Convention suggests that the United States believed that the Convention would have minimal impact upon U.S. domestic law and practice. Prior to the Senate giving its advice and consent to ratification of the Vienna Convention, the State Department legal advisor submitted testimony to the Senate Committee on Foreign Relations concerning the Department's understanding of the Convention's purpose and effect. According to the State Department, the Vienna Convention was entirely self-executing and therefore did "not require any implementing or complementing legislation" to come into force.[16] Indeed, the State Department concluded that the Convention did "not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions."[17] The Senate Committee subsequently transmitted the Vienna Convention to the full Senate with a recommendation of consent to ratification, along with an accompanying Report listing factors that had resulted in the Committee's approval of the Convention. The first factor described in the Report was the Committee's belief that the Convention "does not change or affect present U.S. laws or practice."[18] The following sections describe U.S. implementation of Vienna Convention Article 36, as well as judicial interpretation of Convention requirements as they relate to claims for relief raised by foreign nationals who were not notified of their right to contact their country's consular officials following their arrest.

U.S. Implementation of Article 36 Requirements at the Federal Level. The view of the State Department and Senate Committee on Foreign Relations that ratification of the Vienna Convention required no implementing legislation was perhaps influenced by the adoption of certain federal regulations two years earlier. Under regulations first adopted in 1967 by the Department of Justice (DOJ), "in every case in which a foreign national is arrested the arresting [federal] officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given."[19] The arresting federal officer is further required to "inform the nearest U.S. Attorney of the arrest and of the arrested person's wishes regarding consular notification."[20] Immigration officials are also required to notify all detained aliens of their right to communicate with their local consulate.[21] Although these regulations were adopted two years prior to U.S. ratification of the Vienna Convention in order to comply with various bilateral

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[16] S. EXEC. REP. NO. 91-9, App. at 5 (1969).

[17] *Id.*

[18] S. EXEC. REP. NO. 91-9 at 2 (1969).

[19] 28 C.F.R. § 50.5(a)(1).

[20] *Id.* at § 50.5(a)(2).

[21] 8 C.F.R. § 242.2(g).

consular treaties previously entered into by the United States, they nevertheless fulfill the notification requirements of Vienna Convention Article 36.[22]

U.S. Implementation of Article 36 Requirements at the State Level. U.S. obligations under Article 36 are not limited to actions taken by federal officials; the Vienna Convention makes no distinction between the notification duties owed by federal, state, and local officials within a receiving State. But while federal law enforcement officials are required by regulation to act in a manner compliant with the Vienna Convention, no federal law or regulation has been adopted to compel state or local law enforcement officials to notify foreign nationals of their right under Convention Article 36, possibly because of federalism concerns.[23] Instead, the State Department has attempted to ensure state and local compliance with Article 36 by regularly distributing manuals, pocket cards, and training resources to state and local officials concerning the consular notification obligations owed under the Vienna Convention.[24] These materials characterize Vienna Convention obligations as "binding on federal, state, and local government officials to the extent that they pertain to matters within such officials' competence," and stress that "*in all cases, the* [arrested or detained] *foreign national must be told of the right of consular notification and access.*"[25]

In a written brief to the ICJ during the *Avena* case, the United States noted that "some states have incorporated consular notification procedures into their booking procedures, as the Department of State has recommended," while others have not.[26] Other states have incorporated consular information into their statements of *Miranda* rights, but most have not taken such action.[27]

Judicial Remedies Available for Article 36 Violations at the Federal or State Level. Despite the existence of federal regulations concerning consular notification and State Department efforts to ensure state and local authorities' compliance with Vienna Convention Article 36, foreign nationals are not always

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[22] Indeed, some courts have stated that the Vienna Convention was the basis behind these regulations, despite the Convention being ratified two years after their implementation. *See, e.g.*, United States v. Calderon-Medina, 591 F.2d 529, 531 n.6 (9th Cir. 1979).

[23] The constitutional implications of requiring state officials to execute U.S. treaty obligations is discussed *infra* at pp. 20-23.

[24] These materials can be viewed and downloaded at [http://travel.state.gov/CNAdownloads.html].

[25] U.S. DEPT. OF STATE, CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICERS TO ASSIST THEM 13 (1998), *available at* [http://travel.state.gov/CNAdownloads.html] (italics in original).

[26] COUNTER-MEMORIAL OF THE UNITED STATES OF AMERICA IN *THE CASE OF AVENA AND OTHER MEXICAN NATIONALS (MEXICO V. UNITED STATES OF AMERICA)*, STATEMENT OF FACTS, CHAPTER II at 35 (Nov. 3, 2003), *available at* [http://212.153.43.18/icjwww/idocket/imus/imuspleadings/imus_ipleadings_20031103_c-mem_toc.pdf]

[27] *Id.*

provided with requisite consular notification information following their arrest or detention. While the failure to notify an arrested or detained foreign national of his right to consular notification would appear to constitute a *prima facie* violation of Vienna Convention Article 36 if the national belonged to a signatory State, it is unclear what, if any, judicial remedy is available to the national under U.S. law. Indeed, the Vienna Convention does not expressly provide any specific remedy to an arrested foreign national if he is not informed of his right to have his local consular office notified, and the State Department has historically taken the view that "The [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law."[28]

Various federal and state courts have opined on the issue of whether the Convention Article 36 creates a judicially-enforceable right to relief for detained foreign nationals who are not provided with requisite consular information. A number of federal courts has endorsed the view that violations of the Vienna Convention cannot be remedied through judicial action, [29] while a similar number has concluded otherwise.[30] For its part, the Supreme Court has only gone so far as to

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[28] United States v. Li, 206 F.3d 56, 61 (1st Cir. 2000) (quoting State Department answer to question posed by the First Circuit); *see also* United States v. Page, 232 F.3d 536 (6th Cir. 2000).

[29] *See, e.g.*, United States v. Banaban, 85 Fed. Appx. 395 (5th Cir. 2004) (holding that Vienna Convention does not create individually enforceable rights); Mendez v. Roe, 88 Fed. Appx. 165 (9th Cir. 2004) (denying federal habeas relief for violation of Vienna Convention Article 36, as no clearly established federal law directed that Article 36 instituted a judicially enforceable right); United States v. Jimenez-Nava, 243 F.3d 192 (5th Cir. 2001), *cert. denied*, 121 S. Ct. 2620 (holding that the Vienna Convention does not provide detained foreign nationals with a private right of action, and giving strong consideration to State Department opinion that Convention does not confer enforceable individual rights); United States v. Emuegbunam, 268 F.3d 377 (6th Cir. 2001), *cert. denied*, 535 U.S. 977 (2002)(holding that foreign nationals have no right under the Vienna Convention to consular access, and noting that preamble to the Convention disclaims creation of individual rights); United States v. Ademaj, 170 F.3d 58, 67 (1st Cir.1999) (finding that "the Vienna Convention itself prescribes no judicial remedy or other recourse for its violation."); Gordon v. State, 863 So. 2d 1215 (Fla. 2003) (holding that petitioner for state habeas relief lacked standing to assert claim under Article 36 because the treaty created rights between States, not their individuals); Rodriguez v. State, 837 So. 2d 478 (Fla. Dist. Ct. App. 5th Dist. 2002) (Mexican national lacked standing to claim Vienna Convention violation in absence of protest from Mexico).

[30] *See, e.g.*, United States v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000), *cert. denied*, 531 U.S. 991 (2000) (holding that Vienna Convention establishes individual rights enforceable by courts); United States v. Esparza-Ponce, 193 F.3d 1133 (9th Cir. 1999) (holding that detained foreign national has standing to assert right under Vienna Convention to have consulate notified); Standt v. City of New York, 153 F. Supp. 2d 417 (S.D.N.Y. 2001) (holding that Vienna Convention Article 36 provides detained individuals with a private right of action enforceable through 42 U.S.C. § 1983); United States v. Hongla-Yamche, 55 F. Supp. 2d 74 (D. Mass. 1999) (holding that the Vienna Convention confers an individual right to consular notification and a detained individual has standing to challenge an alleged violation); United States v. Torres Del-Muro, 58 F. Supp. 2d 931 (C.D. Ill. 1999) (recognizing a private right of action for violations of Vienna Convention Article 36); United States v. Briscoe, 69 F. Supp. 2d 738 (D.V.I. 1999).

posit that the Convention "arguably" confers a private right of action for an arrested or detained foreign national who was subject to an Article 36 violation.[31]

Regardless of this split, the courts have recognized that a violation of any right provided to a foreign national by Vienna Convention Article 36 would warrant judicial relief only in limited circumstances. The courts have routinely found that Article 36 violations do not require the suppression of evidence or dismissal of an indictment against an arrested foreign national; drastic remedies that are generally available to an arrested individual only when a fundamental constitutional right is implicated.[32] The failure to notify an individual of his consular rights would not deny him the right to a court-appointed attorney, a speedy trial, or any of the other due process protections generally afforded to U.S. citizens, and the courts have therefor concluded the Article 36 violations do not implicate an affected foreign national's constitutional rights.[33] Accordingly, even in cases where a foreign national is recognized as having an enforceable right under the Vienna Convention, the courts have generally concluded that such a right entitles the national to relief only in circumstances where an Article 36 violation prejudiced him in some capacity, either by altering the outcome of his case or changing the actions that the defendant took.[34]

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

[32] *See, e.g., Jimenez-Nava*, 243 F.3d at 192; United States v. De La Pava, 268 F.3d 157 (2nd Cir. 2003) (holding that government failure to comply with Article 36 did not provide a basis to dismiss an indictment); *Li*, 206 F.3d at 60 ("irrespective of whether or not the [Vienna Convention] create[s] individual rights to consular notification, the appropriate remedies do not include suppression of evidence or dismissal of the indictment"); *Page*, 232 F.3d at 540-41 (6th Cir. 2000); United States v. Chaparro-Alcantara, 226 F.3d 616, 620-21 (7th Cir. 2000); *Lombera- Camorlinga*, 206 F.3d at 882 (reversing decision by Court of Appeals panel and holding that violation of Vienna Convention's consular notification requirement does not require suppression of subsequently obtained evidence in a criminal proceeding against arrested foreign national); United States v. Chanthadara, 230 F.3d 1237 (10th Cir. 2000); United States v. Cordoba-Mosquera, 212 F.3d 1194 (11th Cir. 2000).

[33] *See, e.g.*,United States v. Minjares-Alvarez, 264 F.3d 980, 987 (10th Cir. 2001) ("There is no reason to think the drafters of the Vienna Convention had [the] uniquely American [Fifth and Sixth Amendment] rights in mind ... given the fact that even the United States Supreme Court did not require the Fifth and Sixth Amendment post-arrest warnings until it decided Miranda in 1966, three years after the treaty was drafted"), *quoting Lombera-Camorlinga*, 206 F.3d at 886; *Li*, 206 F.3d at 61 ("Article 36 of the Vienna Convention...[does] not create — explicitly or otherwise — fundamental rights on par with the right to be free from unreasonable searches, the privilege against self-incrimination, or the right to counsel"); Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997) (holding that the Supremacy Clause does not convert Vienna Convention violations into violations of constitutional rights); United States v. Bin Laden, 132 F. Supp. 2d 168 (S.D.N.Y. 2001).

[34] *See, e.g.*, Hernandez v. United States, 280 F. Supp. 2d 118 (S.D.N.Y. 2003) (rejecting Dominican defendant's appeal to relief, absent evidence that consultation with Dominican Republic consulate would have altered the outcome of his case); Bieregu v. Ashcrof, 259 F. Supp. 2d 342 (D.N.J. 2003) (rejecting prisoner's claims under Alien Tort Claims Act and Federal Tort Claims Act for violations of the Vienna Convention, as defendant had failed to show causation and damages related to trial and conviction); United States v. Ore-Irawa, 78 F. Supp. 2d 610 (E.D. Mich. 1999) (holding that for actual prejudice to be demonstrated to justify a claim of relief for Article 36 violation, a foreign national must demonstrate that

(continued...)

In many instances, lawyers representing foreign nationals do not raise the issue of Article 36 violations at trial or pre-trial hearings, possibly because neither they nor their clients are aware of the Vienna Convention. As a result, potential claims for relief from Article 36 violations may be precluded from being raised under state or federal procedural default rules. If a petitioner fails to raise a claim in state court concerning an Article 36 violation prior to being convicted and sentenced, state courts acting under state procedural default rules will likely deny him an opportunity to reopen his case for purpose of raising the Article 36 claim, regardless of whether or not his failure to be informed of his right to consular notification prejudiced him in some capacity. Although Congress has provided the lower federal courts with authority to review state court criminal convictions on a writ of habeas corpus, the scope of this review is limited by statute. Pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA) enacted by Congress in 1996, a foreign national petitioning for habeas relief in federal court must have first raised the allegation of a treaty, statutory, or constitutional violation in state court if he is to be provided an evidentiary hearing on the basis of that violation for purposes of federal habeas review.[35] Accordingly, the failure of a foreign national to timely raise an Article 36 claim for relief may preclude him from receiving judicial relief, regardless of the merits of his claim.

The Supreme Court discussed U.S. interpretation of its obligations under the Vienna Convention, as well as the applicability of the procedural default rule to claims of relief from Article 36 violations, in the case of *Breard v. Greene*.[36] The *Breard* case concerned Paraguayan national Angel Francisco Breard who, though convicted on rape and murder charges and sentenced to death by a Virginia state court,[37] had not been informed of his right under Article 36 to have the Paraguayan consulate contacted at any point prior to being convicted and sentenced to death. Breard's motion for habeas relief in federal district court was denied on procedural default grounds, as he had failed to raise the issue in Virginia state court proceedings. In conjunction with Breard's federal appeal, the Republic of Paraguay also brought suit in federal district court against certain Virginia officials for violating Paraguay's rights as a signatory party to the Vienna Convention. In addition, just prior to Breard's scheduled execution, Paraguay instituted proceedings in the ICJ alleging that the United States had violated both Paraguay and Breard's rights under the Vienna Convention by failing to provide Breard with requisite consular information

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(...continued)
there was a likelihood that the contact with the consul would have resulted in meaningful assistance); United States v. Miranda, 65 F. Supp. 2d 1002 (D. Minn. 1999) (holding that criminal defendant must establish prejudice from violation of rights under Vienna Convention); United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250 (D. Utah 1999) (foreign national must prove prejudice through indication that he would have availed himself of right to consult consulate and contact with consul would have assisted him).

[35] *See* 28 U.S.C. §§ 2254(a), (e)(2). A possible exception enabling otherwise procedurally defaulted constitutional claims to be raised in federal habeas courts occurs when the claim relies upon "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* at § 2254(e)(2)(A)(i).

[36] 523 U.S. at 371.

[37] The Supreme Court characterized the evidence indicating Breard's guilt as "overwhelming." *Id.* at 373.

prior to his conviction and sentence. Prior to the Supreme Court issuing an opinion on Breard and Paraguay's applications to stay Breard's execution, the ICJ issued a Provisional Measures Order (PMO) instructing the United States to "take all measures at its disposal to ensure that ... Breard is not executed pending a final decision in these [ICJ] proceedings."[38]

The issuance of a PMO by the ICJ did not prevent the Supreme Court from issuing a *per curiam* opinion denying Breard and Paraguay's claims for relief, and Breard was subsequently executed. While noting that "respectful consideration" should be given to the ICJ's interpretation of the Vienna Convention,[39] the Supreme Court apparently did not view the ICJ as having definitive authority to either resolve questions of Convention interpretation or issue legally-binding orders upon U.S. courts.[40]

The Supreme Court held that it was clear that Breard procedurally defaulted on his Article 36 claim by failing to raise the claim in state court, and he was therefore precluded from relief by federal courts on those grounds. Both Paraguay and Breard had argued that even if a foreign national failed to raise an Article 36 claim in state court on a timely basis, that claim could nevertheless be heard in federal court because as a treaty ratified by the United States, the Vienna Convention held status as the "supreme law of the land" and therefore trumped the procedural default doctrine.[41] The Court, however, ruled this interpretation to be "plainly incorrect" for two reasons.[42]

First, the Court concluded that the Vienna Convention itself did not require any modification to U.S. procedural default rules. The Court found that "it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."[43] Examining the language of the Convention, the Court concluded that Article 36 did not alter or create an exception to traditional U.S. procedural default rules in cases where a foreign national was not provided with requisite consular information.[44]

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[38] International Court of Justice, Provisional Measures Order, Paraguay v. United States (Apr. 9, 1998) *available at* [http://212.153.43.18/icjwww/idocket/ipaus/ipausorder/ipaus_iorder_090498.HTM].

[39] *Breard*, 523 U.S. at 375.

[40] Indeed, the Court declined to act to enforce an ICJ PMO in a subsequent case concerning U.S. application of the Vienna Convention. *See* Fed. Republic of Germany v. United States, 526 U.S. 111 (1999). In opposing the stay of the execution of a German foreign nation on account of an ICJ PMO, the U.S. Solicitor General argued that "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief." *Id.* at 113.

[41] *Breard*, 523 U.S. at 375.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 375-76.

Secondly, the Court rejected Breard and Paraguay's claim that the Vienna Convention superceded federal procedural default rules on account of the "last-in-time doctrine." The last-in-time doctrine recognizes that "An act of Congress ... is on a full parity with a treaty, and that when a statute is subsequent in time [and] is inconsistent with a treaty, the statute to the extent of the conflict renders the treaty void."[45] Claims for relief under the Vienna Convention are "subject to this subsequently enacted rule, just as any claim ... would be."[46] Accordingly, the Court concluded that the enactment of AEDPA limited any rights afforded to a foreign national under Convention Article 36, so as to prevent a petitioner an evidentiary hearing in front of a federal habeas court on account of an Article 36 violation if he "has failed to develop the factual basis of [the] claim in State court proceedings.[47]

Further, the *Breard* Court noted that even if an Article 36 claim was not precluded by AEDPA, it would be "extremely doubtful" that the remedy for an Article 36 violation would ever be the overturning of a final judgment of conviction absent a showing that the violation had an effect on the trial. The Court seemed to be skeptical that consular notification would make a difference in a trial's outcome, positing that U.S. attorneys are "likely far better to explain the United States legal system ... than any consular official ...."[48]

The Court also rejected Paraguay's claim that the Convention raised a private right of action on behalf of a foreign nation to set aside its national's criminal conviction and sentence for a violation of Article 36. First, the Court noted that neither the Convention's text nor history clearly provided for such a right of action. Secondly, the Court concluded that the Eleventh Amendment of the U.S. Constitution provides a more fundamental barrier to such relief, as it has been interpreted by the Courts to stand for the proposition that "the States [of the United States], in the absence of consent, are immune from suits brought against them ... by a foreign State."[49] Though a possible exception to the standard exists when judicial relief is necessary to prevent a continuing violation of a federal right by a state,[50] the *Breard* Court concluded that no such continuing violation had occurred with respect to Paraguay, as the failure to notify the Paraguayan Consul "occurred long ago and has no continuing effect [upon his rights]."[51]

Following *Breard*, the Supreme Court has denied petitions for a writ of certiorari in cases claiming Vienna Convention violations.[52] In doing so, the Court's interpretation of Article 36 and the relief it offers to foreign nationals has been questioned by Justices Stevens and Breyer. Both have noted that subsequent ICJ

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[45] *Id.* at 376, *quoting* Reid v. Colvert, 354 U.S. 1(1957) (plurality opinion).

[46] *Id.*

[47] *Breard,* 523 U.S. at 376.

[48] *Id.* at 377.

[49] *Id.* at 377, *quoting* Principality of Monaco v. Mississippi, 292 U.S. 313, 329-30 (1934).

[50] *See* Milken v. Bradley, 433 U.S. 267 (1977).

[51] *Breard,* 523 U.S. at 378.

[52] *See, e.g.*, Torres v. Mullin, 124 S.Ct. 919 (2003) (denying cert.).

rulings interpreting the Vienna Convention appear to conflict with the majority's holding in *Breard*, and they appear to believe that the ICJ's interpretation of Convention obligations should be deemed binding on U.S. courts in light of the jurisdictional authority provided to the ICJ by the Convention's Optional Protocol.[53]

Interpretation of Article 36 by the International Court of Justice

Since 1998, the ICJ has agreed to hear three cases challenging U.S. application of Vienna Convention Article 36 in death penalty cases. In each of these cases, the petitioning State requested the ICJ to order the United States to rescind the convictions and death sentences of certain nationals of the petitioning State on account of an alleged failure by the United States to comply with its Article 36 obligations.[54] Although the ICJ did not find that the petitioning State was owed such relief in any of these cases, in two cases the ICJ ordered the United States to review the sentences and convictions of foreign nationals who had not been provided with requisite consular information owed under Convention Article 36. The following sections describe the three cases brought to the ICJ concerning U.S. implementation of Article 36.

Paraguay v. United States of America. As previously noted, in conjunction with its appeal to the U.S. Supreme Court seeking a stay in the execution of Paraguayan national Angel Breard, the Republic of Paraguay filed an application with the ICJ seeking a ruling that the United States had failed to comply with the duties owed to Breard and Paraguay under Vienna Convention Article 36. Paraguay asked the ICJ to require the United States to halt Breard's execution and rescind his conviction on account of having failed to inform him of his right to notify Paraguayan consular officials of his arrest[55] As mentioned previously, the ICJ immediately issued a PMO instructing the United States to "take all measures at its disposal" to prevent Breard's execution pending a final ICJ ruling, but Breard was nevertheless executed soon after the U.S. Supreme Court denied Breard and Paraguay's appeal in *Breard v. Greene*. In response, Paraguay rescinded its case

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[53] *See id.* at 919 . (Stevens, J. dissent) (disputing the "hastily crafted" opinion in *Breard* and arguing that, in light of subsequent ICJ jurisprudence, applying the procedural default rule to Article 36 is "not only in direct violation of the Vienna Convention, but it is also manifestly unfair"); Torres v. Mullin, 124 S.Ct. 562, 563-65 (Breyer, J. dissent) (suggesting that the ICJ Optional Protocol obligates U.S. courts to follow the ICJ's decisions concerning Vienna Convention interpretation and application).

[54] The three countries that have petitioned the ICJ oppose the death penalty, and their petitions concerned nationals sentenced to death by U.S. courts.

[55] *See* Application of the Republic of Paraguay in the case of Vienna Convention on Consular Relations (Paraguay v. United States of America) (Apr. 3, 1998). Paraguay asserted that it was "entitled to *restitutio in integrum*: the re-establishment of the situation that existed before the United States failed to provide the notifications and permit the consular assistance required by the Convention." *Id.* at ¶ 4.

without the ICJ ever deciding the merits of Paraguay's claims against the United States for violating Article 36.[56]

Federal Republic of Germany v. United States of America (*Lagrand Case).* Shortly after Paraguay rescinded its claim against the United States, Germany brought a case to the ICJ against the United States for failing to notify two German nationals of their ability to have German consular officials contacted following their arrest.[57] The *LaGrand* case concerned German brothers Karl and Walter LaGrand, who were arrested in Arizona and charged with attempted armed robbery, kidnaping, and murder, and subsequently convicted and sentenced to death by an Arizona state court.[58] Their claims for relief on account of not being informed of the rights afforded under Convention Article 36 were procedurally defaulted from being raised in U.S. state or federal court, with the Supreme Court finding that they had "failed to show cause to overcome this bar."[59] It was not disputed that U.S. authorities had not informed the LaGrands of their right to have German consular authorities notified of their arrest at any time prior to their being convicted and sentenced to death.[60] At the time that Germany filed its case with the ICJ, Karl LaGrand had already been executed and Walter LaGrand's execution was impending. A day before Walter LaGrand's scheduled execution, Germany filed its petition with the ICJ, and the ICJ immediately issued a PMO instructing the United States to "take all measures at its disposal" to ensure that Walter LaGrand was not executed pending a final decision by the ICJ.[61] Just as it had viewed the ICJ's PMO in *Paraguay v. Breard* as non-binding, the U.S. Supreme Court declined to treat the *LaGrand* PMO as binding when Germany attempted to have the Court enforce it against Arizona,[62] and Walter LaGrand was subsequently executed. Unlike Paraguay, however, Germany did not rescind its claim against the United States upon the execution of its national.

In June 2001, the ICJ issued its decision in *LaGrand*. The ICJ's interpretation of Article 36 in *LaGrand* differed from that taken by U.S. courts in a number of ways. First, contrary to the conclusion reached by a number of U.S. courts, the ICJ concluded that the Vienna Convention did not simply confer rights upon signatory

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[56] *See* International Court of Justice, Order of Discontinuance in the Case Concerning the Vienna Convention on Consular Relations (Paraguay V. United States of America) (Nov. 10, 1998) *available at* [http://212.153.43.18/icjwww/idocket/ipaus/ipausorder/ipaus_iorder_981110.htm].

[57] *See* Fed. Rep. of Germany v. United States (*LaGrand Case*), Final Judgment (June 27, 2002), *available at* [http://212.153.43.18/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm []*hereinafter* "*LaGrand*"].

[58] For a background on the LaGrands' case and its procedural history in U.S. courts, *see* Stewart v. LaGrand, 526 U.S. 115 (1999).

[59] *Id.* at 119 (discussing Walter LaGrand's petition exclusively, as Karl LaGrand had already been executed).

[60] *LaGrand* at ¶ 123.

[61] *See* International Court of Justice, Provisional Measures Order, Germany v. United States of America (Mar. 3 1999).

[62] Fed. Republic of Germany v. United States, 526 U.S. 111 (1999) (*per curiam*).

States, but also provided certain "individual rights" to these States' nationals pursuant to Article 36.[63] The ICJ further held that the United States was obligated to provide foreign nationals covered under the Convention with a means to challenge their convictions and sentences on account of having not been provided with the requisite consular information owed under Article 36.[64]

Secondly, the ICJ held that U.S. procedural default rules as they had been applied in the cases of the LaGrand brothers, "had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under ... [Article 36] are intended,' and therefore constituted a violation of Article 36."[65] Indeed, the ICJ concluded that a claim for redress for Convention violations could be raised regardless of whether consular notification would have resulted in a different verdict,[66] because a failure by the receiving State to fully comply with the requirements of Article 36 was sufficient to enable the sending State and its affected nationals to raise a claim seeking redress.[67] In cases where a foreign national had not been provided with requisite consular information and had been "sentenced to severe penalties," an apology by the United States to the sending State would be an insufficient form of redress.[68]

Finally, the ICJ disputed the refusal by the United States to abide with the PMO instructing the United States to take all necessary measures to prevent Walter LaGrand's execution before the ICJ had issued a final ruling on the merits of Germany's case. The ICJ characterized its PMOs as binding law upon participants in ICJ cases, and held that the United States therefore had a legal obligation to fully comply the ICJ's PMO and final rulings.[69]

In reaching its decision in *LaGrand*, the ICJ took note of the U.S. commitment, reiterated throughout the proceedings, "to ensure implementation of the specific measures adopted in performance of its obligations under Article 36," and concluded that "this commitment must be regarded as meeting the Federal Republic of Germany's request for a general assurance of non-repetition."[70] The ICJ held, however, that "should nationals of ... Germany nonetheless be sentenced to severe penalties, without their rights under Article 36 ... having been respected, the United States ... by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention."[71]

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[63] *LaGrand* at ¶¶ 77, 89.

[64] *See id.* at ¶¶ 77, 86-89, 125.

[65] *Id.* at ¶ 91.

[66] *Id.* at ¶ 74.

[67] *See id.* at ¶ 123.

[68] *Id.*

[69] *LaGrand* at ¶¶ 110, 115-16.

[70] *Id.* at ¶ 128; *see also id.* at ¶ 123.

[71] *Id.* at ¶ 128.

Mexico v. United States of America (*Avena and Other Mexican Nationals*). On January 9, 2003, Mexico filed a case with the ICJ against the United States for purported violations of Vienna Convention Article 36. Mexico alleged that 54 Mexican nationals presently awaiting execution in the United States were not informed of their right to have Mexican consular officials notified "without delay" of their arrests, with many of the named nationals having not been informed of their right to consular notification at any time prior to being convicted and sentenced. Unlike in the previous cases filed with the ICJ by Paraguay and Germany, none of the named nationals in Mexico's application to the ICJ was scheduled to be executed in the near future.[72]

On March 31, 2004, the ICJ issued a judgment partially in favor of Mexico. In doing so, the ICJ first dismissed the jurisdictional and admissibility challenges presented by the United States. Of particular note, the ICJ concluded that Mexico did not have to exhaust local remedies within the United States (i.e., allow Mexican nationals to exhaust their judicial appeals) before Mexico could seek a determination by the ICJ that its rights under Vienna Convention had been violated.[73] Further, although the United States alleged that Mexico's own failure to consistently comply with its Vienna Convention obligations towards detained U.S. citizens precluded it from raising a claim against the United States, the ICJ found that even if these claims were accurate, "this would not constitute a ground of objection to the admissibility of Mexico's claim."[74]

With respect to the merits of Mexico's claims, the ICJ concluded that the United States had violated its obligations under the Vienna Convention by failing to properly notify Mexican nationals of their right to have Mexican consular officials notified of their arrest, which in turn deprived Mexican consular officers of their right under Article 36 to render assistance to their detained nationals.[75] Further, the ICJ ordered the United States to remedy these violations, holding that the United States is required to provide "by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals" named in *Avena* that takes into account the rights afforded to these nationals under Vienna Convention Article 36.[76] The ICJ noted that in the cases of all but three of the named nationals in *Avena*, the

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[72] *See* Application of the United Mexican States in the case of Mexico v. United States of America (Avena and Other Mexican Nationals) (Jan. 9, 2003), *available at* [http://212.153.43.18/icjwww/idocket/imus/imusorder/imus_iapplication_20030109.PDF].

[73] *Avena* at ¶ 40. The court made note that the individual rights of Mexican nationals "are to be asserted, at any rate in the first place, within the domestic legal system of the United States. Only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection." *Id.* However, because Mexico's claim before the ICJ was based in part upon the injuries it had itself suffered, directly and through its nationals, on account of alleged U.S. violations of Article 36, the ICJ concluded that Mexico did not need to exhaust domestic remedies in the U.S. before exercising its right under the Convention's Optional Protocol to bring suit to the ICJ. *See id.*

[74] *Id.*at ¶ 47.

[75]*See id.* at ¶¶ 106, 153.

[76]*LaGrand* at ¶ 153.

criminal proceedings had not yet reached a stage where U.S. procedural default rules would preclude judicial reexamination of the Mexican nationals' convictions and sentences.[77]

The ICJ made clear that it was not requiring that the convictions and sentences of the Mexican nationals named in *Avena* be overturned; only that *both* the convictions and sentences needed to be reviewed in light of the violations of the Vienna Convention that had occurred, and that this reconsideration must focus on the manner in which Convention violations might have affected the nationals' convictions and sentences.[78] The United States had argued that the possibility of executive clemency in cases where a convicted foreign national had been denied consular information owed under Article 36 constituted sufficient "review and reconsideration" and also complied with the ICJ's previous ruling in *LaGrand*.[79] The ICJ disagreed, however, and made clear that such reconsideration was to made via judicial review, having concluded that clemency review through the executive branch was "not sufficient in itself to serve as an appropriate means of 'review and reconsideration.'"[80]

Further, the ICJ held that the United States must take additional steps to grant prospective relief to Mexico against future Vienna Convention violations. Although the ICJ acknowledged U.S. efforts to ensure that U.S. state and local law enforcement authorities complied with the Vienna Convention, including via outreach efforts by the U.S. State Department, the ICJ concluded that in all cases a foreign national of a Convention party must be informed of rights under Article 36 once grounds exist to believe the person is a foreign national, going so far as to suggest (though not require) that such notice could be given along with the reading of an arrestee's *Miranda* rights.[81]

Importantly, the ICJ did not limit the scope of its holding to the Mexican nationals directly at issue in *Avena*, and implied that the reasoning of its decision also applied to U.S. treatment of other foreign nationals protected by the Vienna

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[77] *Avena* at ¶ 113.

[78] *Id.* at ¶¶ 121-128.

[79] *Id.* at ¶¶ 136-143. The United States argued that clemency review enabled consideration of the effect that Article 36 violations may have had upon foreign nationals' sentences, even if procedural default rules precluded these nationals from seeking judicial review of their sentences and convictions. *See* COUNTER-MEMORIAL OF THE UNITED STATES OF AMERICA IN THE CASE OF AVENA AND OTHER MEXICAN NATIONALS (MEXICO V. UNITED STATES OF AMERICA), CHAPTER VI: THE UNITED STATES COMPLIES WITH ALL OF THE OBLIGATIONS UNDER ARTICLE 36 OF THE VCCR, at 109-121 (Nov. 3, 2003), *available at* [http://212.153.43.18/icjwww/idocket/imus/imuspleadings/imus_ipleadings_20031103_c-mem_toc.pdf]. For example, the United States noted that former Illinois Governor George Ryan commuted the death sentences of at least 3 individuals named in the *Avena* case on account of these nationals' allegedly not having received requisite consular information required by Article 36. *Id.* at 114-15, n.247.

[80] *Avena* at ¶¶ 142-143

[81] *See id.* at ¶¶ 64, 149.

Convention.[82] Accordingly, the *Avena* decision could potentially provide Mexico and all other Convention signatory States with grounds to challenge alleged Article 36 violations and demand judicial review of their affected nationals' convictions and sentences.

Potential U.S. Responses to ICJ Decisions Concerning Implementation of Convention Article 36

According to the ICJ's holdings in *LaGrand* and *Avena*, the United States is not presently complying with its treaty obligations under Vienna Convention Article 36. The United States has a number of options to deal with these ICJ decisions. The first would be to maintain its current position. If the United States decided to comply with these decisions, it may need to (1) provide further judicial review of the convictions and sentences of the named defendants in *Avena* and (2) prospectively modify federal and possibly state procedural default rules so as to prevent foreign nationals from being denied the opportunity to seek remedies against violations of their rights under Article 36. The United States might also consider methods to improve notification procedures by state and local law enforcement officials, so as to reduce the possibility that an Article 36 violation will occur. The United States could potentially respond to the ICJ's decisions in a number of ways, though various U.S. options have differing policy and constitutional implications.

Possible Considerations in Deciding whether to Comply with the ICJ Decisions in *Avena and LaGrand*. One possible way for the United States to respond to the ICJ's rulings in *Avena* and *LaGrand* is to simply disregard them. In support of this policy, some might argue that it would be too costly and burdensome for the United States to ensure that every foreign national covered by the Vienna Convention is provided requisite consular information and guaranteed judicial access to pursue claims for relief from Convention violations. Those opposed to complying with the ICJ decision might further argue that the United States should not alter its domestic criminal procedures on account of the opinion of a non-U.S. judicial body, especially given the fact that the ICJ's interpretation of the Vienna Convention appears to run contrary to historical U.S. legislative, executive, and judicial interpretation of U.S. obligations under the Convention.[83] On the other hand, some might argue that failure to comply with the ICJ rulings might have significant diplomatic consequences upon U.S. relations with Mexico and other Convention parties, and might make other countries less likely to afford U.S. citizens Article 36 protections.[84] Further, some might argue that U.S. noncompliance with

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[82] *Id.* at ¶ 151 ("To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention ... the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States").

[83] *See supra* at pp. 4-11.

[84] Pursuant to Article 72(2) of the Vienna Convention, when a State infringes upon the legal rights afforded to another State, the offended State may proportionately restrict the legal

(continued...)

ICJ rulings might establish a precedent for other countries to disregard ICJ rulings concerning the Vienna Convention and other matters, and such noncompliance might undermine international legal institutions in a manner arguably contrary to long-term U.S. interests.[85]

Judicial Compliance with ICJ Decisions Interpreting Article 36. If the United States chose to comply with the ICJ's holdings in *LaGrand* and *Avena*, some might argue that no further legislative action is necessary to ensure U.S. compliance. It could be argued that by ratifying the Optional Protocol of the Vienna Convention, the United States agreed to accept ICJ rulings concerning U.S. obligations under the Vienna Convention as binding. Accordingly then, some might argue that the federal courts have a legal obligation to recognize ICJ decisions as binding law concerning the nonapplicability of the procedural default rule to Convention claims, and these courts must also apply the ICJ's interpretation of U.S. Convention obligations when reviewing state and federal claims for habeas relief. Because the Supremacy Clause of Article VI of the U.S. Constitution states that "the laws of the United States ... all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound" by them, some might argue that states too would be legally obligated to comply with ICJ decisions concerning Convention application.[86] This position has been taken by Justice Breyer and Stevens in dissenting Supreme Court opinions[87] and at least one federal court subsequent to the ICJ's decision in *LaGrand*.[88]

It does not appear certain, however, that federal and state courts would take such a position for a number of reasons. First, there is a question as to the legal authority that ICJ rulings have upon U.S. courts, and how any such authority relates to that of

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(...continued)
rights it affords to the offending State under the Convention.

[85] The United States has relied on ICJ rulings in the past to condemn certain practices taken by other nations. For example, the United States previously sought and received a judgment by the ICJ ruling that Iran's seizure and holding of U.S. diplomatic and consular officials in 1979 was a violation of Iran's Vienna Convention obligations which required redress. Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgement (May 24, 1980). On the other hand, the United States has also previously chosen not to comply with an ICJ judgment ordering it to pay reparations to Nicaragua for acts of aggression when the United States disputed the ICJ's jurisdiction and argued that U.S. actions towards Nicaragua were necessary, *inter alia*, to defend Central American allies of the United States against communist insurgents allegedly harbored and supported by Nicaragua. *See* Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States). As a result of the ICJ's judgment in the *Nicaragua* case, the United States subsequently rejected the ICJ's compulsory jurisdiction over U.S. actions, though it did not rescind its agreement to the Optional Protocol providing the ICJ with jurisdiction over Vienna Convention disputes concerning the United States.

[86] U.S. CONST., Art VI, § 2.

[87] *See supra* note 53.

[88] *See* U.S. ex rel. Madej v. Schomig, 223 F. Supp. 2d 968 (N.D.Ill.,2002) (giving consideration to ICJ's holding in *LaGrand*, and finding that state procedural rule could not serve as basis for denial of relief based on state's violation of Vienna Convention).

the U.S. Supreme Court. As discussed previously, the *Breard* Court's interpretation of U.S. obligations under Article 36, at least with the respect to how these obligations relate to U.S. criminal procedural rules, conflict with the rulings of the ICJ.[89] Article 3 of the U.S. Constitution states that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[90] This power "shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, *and Treaties made* ...."[91] Ultimately, U.S. lower courts interpreting the Vienna Convention may conclude that it is the U.S. Supreme Court rather than the ICJ that has final say under the U.S. constitutional system as to the meaning and applicability of the Vienna Convention (or any other treaty), at least so far as the international agreement applies to domestic U.S. practice. Accordingly, these courts would likely apply the Supreme Court's holding in *Breard* as to the obligations owed by the Vienna Convention; though such courts may nevertheless follow the Supreme Court's lead in *Breard* and give the ICJ's rulings "respectful" — though not binding — consideration. A number of lower courts has continued to abide by the Convention interpretation adopted by the Supreme Court or other U.S. federal courts after the ICJ issued its ruling in *LaGrand*.[92]

As discussed previously, AEDPA provides an additional, statutory barrier toward federal courts reconsidering and reviewing Article 36 violations by state and local law enforcement officials when such claims were not first raised in state court. Even prior to the Supreme Court's ruling in *Breard*, it had been a well-established principle in constitutional law that the authority of a federal statute trumps that of a

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[89] *Compare supra* at pp. 8-11 *with supra* at pp. 11-16.

[90] U.S. CONST., Art III, § 1.

[91] U.S. CONST., Art III, § 2.

[92] *See, e.g., Banaban*, 85 Fed. Appx. at 395 (holding that Vienna Convention does not create individually enforceable rights); *Mendez*, 88 Fed. Appx. at 165 (denying federal habeas relief for violation of Vienna Convention Article 36, as no clearly established federal law directed that Article 36 instituted a judicially enforceable right); *Emuegbunam*, 268 F.3d at 377 (appeal subsequent to *LaGrand* decision rejecting premise the Article 36 creates individual rights enforceable in federal courts); Jimenez v. Dretke, 2004 WL 789809 (N.D.Tex. 2004) (applying U.S. jurisprudence concerning Article 36 rather than ICJ interpretations in *LaGrand* and *Avena*); Cauthern v. State, 2004 WL 315068 (Tenn.Crim.App. 2004) (unpublished) (holding that, "[g]iven the lack of direction from the United States Supreme Court, we take our lead from the general principle that treaties are not presumed to create privately enforceable rights," despite the fact that petitioner raised ICJ's ruling in *LaGrand*); State v. Navarro, 659 N.W.2d 487 (Wis.App. 2003) ("In the absence of explicit language in [the Vienna Convention] granting individual foreign nationals a right of enforcement and a definitive directive from the United States Supreme Court, we can see no reason to depart from the well-established general principles of international law, the expressed position of the State Department, and the apparent long-standing practices of the international community to find that Navarro has a private right of action he can enforce in a state criminal proceeding"); Valdez v. State of Oklahoma, 46 P.3d 703, 706-10 (Okla.Crim.App. 2002) (in state post-conviction proceeding, noting the ICJ's decision in *LaGrand* but holding that Court's ruling in *Breard* precluded it from considering procedurally defaulted Article 36 claim); State v. Martinez-Rodriguez, 33 P.3d 267 (N.M. 2001) (holding that Mexican national did not have standing to bring claim for relief from Vienna Convention violation).

treaty enacted earlier in time.[93] This does not mean that an earlier treaty is rescinded by a subsequent, conflicting federal law; its *application* is limited by the subsequent congressional action.[94] Thus, even if the United States has an international legal obligation pursuant to the ICJ's rulings to provide review for all Article 36 claims made by affected foreign nationals, U.S. federal law may prevent this obligation from being fulfilled.

If Congress deemed it appropriate to ensure review and reconsideration of state convictions and sentences of foreign nationals denied the rights owed to them under Article 36 when the foreign national has not raised an Article 36 claim in state court, it would likely have to amend AEDPA to enable federal habeas review of such claims. Absent such authorization, it appears unlikely that the United States could fully comply with the ICJ's rulings requiring the elimination of procedural default rules that inhibit foreign nationals from raising Article 36 claims, unless the fifty states amended their procedural default rules to allow review and reconsideration of the sentences and convictions of foreign nationals raising Article 36 claims.

Better State and Local Law Enforcement Article 36 Notification Procedures. Because present outreach efforts by the State Department have not been wholly successful in ensuring that foreign nationals arrested by state and local law enforcement officials are provided with necessary consular information, Congress also might consider employing more direct measures to ensure state and local law enforcement compliance with Convention requirements.

One such option would be for Congress to enact legislation requiring state and local authorities to (1) inform arrested persons of their right to have their consulate notified, in a manner similar to traditional *Miranda* procedures and (2) contact relevant consular authorities on an arrested foreign national's behalf if the national approves of such notification. A direct legal requirement on state and local officials to comply with Article 36 requirements would likely reduce the frequency of Vienna Convention violations at the state and local level, and also reduce the possibility that review and reconsideration of a foreign national's conviction and sentence would be warranted on account of the national having been deprived of requisite consular notification information.

The constitutional grounds concerning federal commandeering of state and local law enforcement officials to ensure compliance with U.S. obligations under the Vienna Convention or other federal treaties remains untested. In the cases of *New York v. United States*[95] and *Printz v. United States*,[96] the Supreme Court declared two federal laws that attempted to commandeer state executive and legislative authority to be unconstitutional abridgements of state rights protected by the Tenth

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[93] *See, e.g.*,Head Money Cases, 112 U.S. 580 (1884); Whitney v. Robertson, 124 U.S. 190 (1888); The Chinese Exclusion Case, 130 U.S. 581 (1889); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 (1987).

[94] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 n.2 (1987); LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 209-10 (2nd ed. 1996).

[95] 505 U.S. 144 (1992).

[96] 521 U.S. 898 (1997).

Amendment of the U.S. Constitution.[97] The *Printz* case especially raises concern regarding the constitutionality of any federal legislation requiring state and local law enforcement officials to notify foreign nationals of their ability to have their consulates contacted pursuant to Convention Article 36. In *Printz*, the Supreme Court ruled in a 5-4 opinion that a federal law requiring local law enforcement officials to conduct background checks on handgun purchasers as part of a federal program was an unconstitutional infringement of states' Tenth Amendment rights. Some might argue that, applying *Printz*, a federal law requiring state and local law enforcement officials to provide arrested or detained foreign nationals with consular information and access would be constitutionally impermissible.

On the other hand, the Supreme Court has previously upheld congressional action taken to give force to a ratified treaty, even when such action would otherwise impede on a state's rights under the Tenth Amendment. In the 1920 case of *Missouri v. Holland*, the Supreme Court upheld a federal law regulating the killing of migratory birds that had been adopted pursuant to a treaty between the United States and Great Britain, despite a Tenth Amendment challenge by the State of Missouri.[98] Notwithstanding the fact that a similar statute enacted in the absence of a treaty had been ruled unconstitutional, the Court ruled in an opinion by Justice Holmes that the federal law at issue in *Holland* was a proper exercise of Congress's power to make laws necessary and proper for the execution of a binding treaty, and it was not "forbidden by some invisible radiation from the general terms of the Tenth Amendment."[99] Accordingly, some might argue that, applying *Holland*, Congress has constitutional authority to enact legislation requiring state and local officials to take actions that will comply with U.S. obligations under the Vienna Convention.

The holding of *Holland* appears to remain good law, as the Supreme Court has continued to cite to it approvingly even following its decision in *Printz*,[100] albeit apparently never in support of the proposition that the treaty power goes so far as to permit Congress to enact legislation commandeering state and local officials to perform actions to fulfill U.S. treaty obligations.[101] However, the scope of the Court's holding in *Holland*, especially with respect to the scope of the "invisible radiation" emanating from the Tenth Amendment, remains open to interpretation. One constitutional and international legal scholar has argued that Justice Holmes's opinion in *Holland*:

> did not say that there were no limitations on the Treaty Power in favor of the states, only that there were none in any 'invisible radiation' from the Tenth Amendment. The Constitution

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[97] U.S. CONST., amend. X ("[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states ...").

[98] 252 U.S. 416 (1920).

[99] *Id.* at 434-35.

[100] *See, e.g.,* United States v. Lara, 124 S.Ct. 1628 (2004) (citing *Holland* to stand for the proposition that "treaties made pursuant to that power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal'") (internal citation omitted).

[101] The *Holland* case concerned a law imposing duties upon federal wildlife agents rather than state game wardens.

> probably protects some few states' rights, activities, and properties against any federal invasion, even by treaty.[102]

It is unclear whether the constitutional prohibition against federal commandeering of state and local law enforcement officials would be sustained when such commandeering was pursuant to federal legislation implementing a treaty obligation, as opposed to legislation enacted solely pursuant to Congress's commerce power, as had been the case in *Printz.* In the words of one commentator examining the historical foundations of U.S. treaty-making power and its relationship with the Tenth Amendment, "Whether [Tenth Amendment protections] apply in the treaty context and to what extent remain open questions about which there already has been and will continue to be substantial disagreement."[103] Indeed, a number of legal scholars has raised this question in recent years, particularly with respect to the Vienna Convention, without reaching a clear consensus.[104]

If Congress adopts legislation commandeering state and local law enforcement so as to ensure their compliance with U.S. obligations under the Vienna Convention, it appears likely that a legal challenge would be brought against the federal government alleging an infringement of states' Tenth Amendment rights, and it is unclear whether such legislation would be upheld as constitutional. Accordingly, if Congress sought to pursue this question, to affect state and local law abidance with the Vienna Convention in a manner beyond the outreach program already employed by the State Department, it might instead consider legislation that influences states and localities less directly than through commandeering, such as legislation conditioning federal funding for state services upon state compliance with the procedures described in Vienna Convention Article 36 and the ICJ's rulings in *LaGrand* and *Avena*. Conditioning federal funding upon state performance of a particular function has been a long-standing practice that has been upheld on several occasions by the Supreme Court.[105] Although conditioning federal funding on state compliance with Vienna Convention procedures would not guarantee that every state would adopt necessary measures, it may provide states with a strong incentive to take actions necessary to ensure U.S. compliance with the ICJ's rulings concerning application of the Vienna Convention.

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[102] HENKIN, *supra* note 94, at 193.

[103] David M. Golove, *Treaty-making and the Nation: the Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH.L.REV. 1075, 1087 (2000).

[104] *See, e.g.*, Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003); Molora Vadnais, *A Diplomatic Morass: An Argument Against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations*, 47 U.C.L.A. L. REV. 307 (1999); Carlos Manuel Vázquez, Symposium, *Breard, Printz, and the Treaty Power*, 70 U. COLO. L. REV. 1317 (1999); Note, *Too Sovereign but Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?*, 116 HARV. L. REV. 2654 (2003); Janet R. Carter, Note, *Commandeering under the Treaty Power*, 76 N.Y.U. L. REV. 598 (2001).

[105] *See, e.g.*,*New York*, 505 U.S. 144 (upholding federal encouragement of particular state action through the conditioning of federal funding, even while prohibiting the federal government from directly compelling state action); South Dakota v. Dole, 483 U.S. 203 (1987) (upholding congressional conditioning of highway funds on States' adoption of minimum drinking age as constitutional exercise of congressional spending power).

It might also be possible to argue that the commandeering principle does not apply to federal legislation concerning state courts, and that Congress might therefore enact legislation requiring state courts to inform alien prisoners at court proceedings of their right to have relevant consular officials notified of their arrest and detention. The cases of *Printz* and *New York* established constitutional prohibitions on the federal commandeering of state executive and legislative branches, but did not speak to the subject of federal commandeering of the state judiciary. The Supreme Court has previously found that requiring state courts to enforce federal laws was permissible under the Supremacy Clause.[106] It might be argued, however, that while the Supremacy Clause may permit the federal government to require state courts to *adjudicate* federal claims, it does not go so far as to permit the federal government to commandeer state courts to perform non-adjudicatory functions, such as informing foreign nationals of their rights under the Vienna Convention.

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[106] *See* Testa v. Katt, 330 U.S. 386 (1947).