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Federal Criminal Prosecutions and the Right to Consular Notification under Article 36 of the Vienna Convention

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FEDERAL CRIMINAL PROSECUTIONS AND THE RIGHT TO CONSULAR NOTIFICATION UNDER ARTICLE 36 OF THE VIENNA CONVENTION

*Roberto Iraola**

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I. INTRODUCTION

Under Article 36 of the Vienna Convention on Consular Relations (“Vienna Convention”),¹ a multilateral treaty ratified by the United States in 1969, foreign nationals who are arrested or detained abroad must be advised of their right to consular notification and access.² The United States has vigorously advocated the enforcement of Article 36 when dealing with American citizens detained abroad.³ However, in connection with some of the arrests and detentions arising from the September 11 attacks,⁴ several

¹ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261[hereinafter Vienna Convention].

² *Id.* at art. 36.

³ Kelly Trainer, Comment, *The Vienna Convention on Consular Relations in the United States Courts*, 13 TRANSNAT’L LAW 227, 230 (2000); see S. Adele Shank & John Quigley, *Foreigners on Texas’s Death Row and the Right of Access to a Consul*, 26 ST. MARY’S L.J. 719, 728-29 (1995); Ronald L. Hanna, Comment, *Consular Access to Detained Foreign Nationals: An Overview of the Current Application of the Vienna Convention in Criminal Practice*, 25 S. ILL. U. L.J. 163, 166 (2000). Last year, this commitment to the enforcement of Article 36 was manifested during the apparent detention of a five-year-old American child by Chinese authorities for twenty-six days. See Robert Kagan, *The Politics of Torture*, WASH. POST, Mar. 23, 2001, at A25 (quoting a State Department spokesman that “if a child [, who was a U.S. citizen,] was detained for 20 days without access to his parents, without the benefit of consular notification, that would be a real problem for us.”).

⁴ Approximately one month after the September 11 attacks, it was reported in the press that the government had arrested or detained 614 persons. See Jim McGee & Dan Eggen, *Probe Focuses on 220 Detained After Attacks*, WASH. POST, Oct. 10, 2001, at A1. This figure included 165 persons detained on immigration violations and an undisclosed number as material witnesses. *Id.* By early November 2001, the amount climbed to 1,182 persons, at which time the government announced that it would no longer issue running tallies of the number of people detained. See Amy Goldstein & Dan Eggen, *U.S. To Stop Issuing Detention Tallies*, WASH. POST, Nov. 9, 2001, at A16. During that month, it was further reported that approximately 600 persons remained in federal custody. See Dan Eggen, *About 600 Still Detained In Connection With Attacks, Ashcroft Says*, WASH. POST, Nov. 28, 2001, at A15. Of these, 104 apparently have been charged with criminal offenses; only 10 or 11 of them, however, were believed to have any relation to al Qaeda, the terrorist organization headed by Osama bin Laden which the United States holds responsible for the attacks on September 11, 2001. See David Firestone & Christopher Drew, *Al Qaeda Link Seen In Only A Handful of 1,200 Detainees*, N.Y. TIMES, Nov. 29, 2001, at A1. The remainder were being held on immigration violations. Dan Eggen, *Many Held On Tenuous Ties To Sept. 11*, WASH. POST, Nov. 29, 2001, at A18. In June 2002, it was reported in the press that at least 147 persons detained as part of the post-September 11 investigation were still in government custody. Christopher Newton, *Justice Department Reveals 147 People Still Held in Connection to September 11 Investigation*, ASSOC. PRESS, June 14, 2002, available at WL, ALLNEWSPLUS. Of those 147 persons, 74 were being held on immigration related charges and 73 on criminal charges, or violations related to the September 11 investigation. *Id.*

foreign governments reportedly raised “strong protests” about the failure of the State Department to notify them promptly about the apprehension of their citizens.⁵ The State Department, for its part, has maintained that the government is living up to its obligations under the Vienna Convention.⁶

The prosecution of a foreign national in connection with violations of American criminal law raises a number of questions with respect to the consular notification provision of the Vienna Convention. First, does a foreign national have standing under the law to assert a violation by the U.S. government of the notification and access provision? If so, what remedies, if any, are available to redress a violation of Article 36? For example, can a voluntary statement given by a defendant who has waived his rights under *Miranda v. Arizona*⁷ be suppressed if he was not advised of his rights to consular notification and access under Article 36? What about the indictment? Is it subject to dismissal for such a violation? Is a conviction susceptible to being overturned because of an Article 36 violation on direct appeal or col-

⁵ See *Canadian Detained in U.S. Jail Moved to Another Facility, Ottawa to Seek Answers*, CAN. PRESS, Jan. 3, 2002, LEXIS, News Library, News Group File; John Donnelly & Wayne Washington, *Diplomats Fault Lack of U.S. Notice on Many Detainees*, BOSTON GLOBE, Nov. 1, 2001, at A1. Following the September 11 attacks, the government interviewed approximately 5,000 Middle Eastern men on tourist, student and business visas. See Danny Hakim, *Inquiries Put Mideast Men In Spotlight*, N.Y. TIMES, Nov. 16, 2001, at B10; Greg Winter, *FBI Visits Provoke Waves of Worry in Middle Eastern Men*, N.Y. TIMES, Nov. 16, 2001, at B1. These voluntary interviews did not trigger any concerns under Article 36 of the Vienna Convention. See generally *United States v. Hongla-Yamche*, 55 F. Supp. 2d 74, 79 (D. Mass. 1999) (“[A] routine Customs inspection is not the sort of situation that will trigger the consular notification provision of the Convention.”).

⁶ See Shannan McCaffrey, *Diplomats Complain of Secrecy Surrounding Detainees from Their Countries*, CHICAGO TRIB., Jan. 1, 2002, available at 2002 WL 2607744. For example, in a case involving a Canadian citizen where Canadian officials insisted on proof that he had declined the right to have Canadian consul notified of the arrest, the State Department released copies of a document where the detained national had marked “no” beside the question captioned “Do you want us to notify your country’s consular officials?” Robert Russo, *U.S. Administration Goes To “Unusual” Lengths To Prove Canadian Legally Held*, CAN. PRESS, Jan. 9, 2002, available at 2002 WL 5763113. See generally DeNen L. Brown & Dan Eggen, *U.S. Holding Canadian In Embassy Bomb Plot*, WASH. POST, Aug. 2, 2002, at A20 (reporting that Canadian officials had delivered a diplomatic note to the State Department requesting information about the status of a Canadian citizen being held as a material witness in connection with a plot to blow up the Israeli and American embassies in Singapore and whether he wanted to meet with Canadian consul); Tom Jackman, *Terror Suspect Allowed To Seek Foreign Aid*, WASH. POST, July 18, 2002, at B2 (reporting that French consular officials were scheduled to meet with Zacarias Moussaoui, the only person to date facing prosecution directly related to the September 11 attacks, “in response to his request for help in defending himself against charges that he was part of the Sept. 11 conspiracy”).

⁷ 384 U.S. 436 (1966). *Miranda* provides that before questioning a suspect who is in custody, law enforcement must inform the suspect that: (i) he has the right to remain silent; (ii) any statement he makes may be used against him at trial; (iii) he has the right to be represented by an attorney during questioning; and (iv) if he cannot afford an attorney, one will be appointed for him. *Id.* at 478-79.

lateral attack?

This article responds to these questions and discusses the emerging federal criminal case law with respect to the consular notice provision of the Vienna Convention when a foreign national is arrested or detained.⁸ First, the article provides a general overview on the history of the Vienna Convention. The article then addresses the consular notification provision found in Article 36, the regulations promulgated by the Department of Justice affecting consular notification, and the guidance which has been provided about such notification by the Department of State. The article concludes with a discussion of how federal courts have analyzed challenges to criminal prosecutions for failure to comply with the consular notification requirement.

II. CONSULAR RELATIONS AND THE VIENNA CONVENTION

Protecting nationals through the auspices of “consular personnel⁹ is an ancient tradition¹⁰ recognized as fundamental to international law.”¹¹ In 1963, existing international law on consular relations was codified by ninety-two nations by adopting the multilateral treaty of the Vienna Convention.¹²

⁸ The Vienna Convention addresses numerous aspects of consular functions. This article focuses on Article 36, which is entitled “Communication and contact with nationals of the sending State.” Also, except for a brief discussion of state prisoners seeking relief through federal habeas corpus, this article is concerned with the impact of a violation of the consular notification provision of Article 36 in federal (and not state) criminal prosecutions. See *infra* Part V.B.4..

⁹ A consul has been defined as “an officer or agent accredited by his government to reside in a foreign country for multifarious purposes, but primarily, to represent, promote, and protect its commercial interests and those of its citizens or subjects.” Mark J. Kadish, *Article 36 Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT’L L. 565, 568 n.8 (1997) (quoting JULIUS I. PUENTE, *THE FOREIGN CONSUL: HIS JUDICIAL STATUS IN THE UNITED STATES* 11 (1926)); see Gregory Dean Gisvold, Note, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 MINN. L. REV. 771, 778 (1994) (“Consuls function as agents of their respective States, residing abroad to expedite and safeguard their government’s interests.”) (footnote omitted).

¹⁰ The roots of consular relations “can be traced to the city-states of ancient Greece. The Greek prostates acted as intermediaries between Greek colonists and local governments. As an effective political institution, however, the consul did not truly develop until the dawning of the commercial age during the early Middle Ages.” William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT’L L. 257, 262 (1998) (footnotes omitted).

¹¹ 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, 32 (2000) (footnote omitted).

¹² Kadish, *supra* note 9, at 568. One commentator has explained the history of the Vienna Convention as follows:

In 1949, the International Law Commission designated the subject of consular relations as an area ripe for codification. However, it did not begin examining the issue until 1955. After several years of study, the International Law Commission adopted the Draft Articles on Consular Relations on July 7,

In 1969, this 79-article treaty was ratified by the United States.¹³ The delay stemmed from concern over whether, given that the treaty met “only ‘minimum standards’ for rules governing consular relations,”¹⁴ the United States should instead continue negotiating bilateral agreements.¹⁵ Eventually, however, ratification of the treaty was sought because the Nixon Administration “believe[d] the agreement ‘constitute[d] an important contribution to the development and codification of international law and should contribute to the orderly and effective conduct of consular relations between States.’”¹⁶

To date, the Vienna Convention has been ratified by 160 countries.¹⁷ Further, it has been noted that “[b]ecause of the difference in political and economic systems represented at the meeting, the Vienna Convention is considered the most expansive agreement on the subject of consular relations.”¹⁸

1961. Subsequently, the General Assembly announced that it would convene a conference to prepare an international agreement on consular relations. The United Nations Conference on Consular Relations met in Vienna, Austria, from March 4 until April 22, 1963. Over ninety countries as well as several international organizations attended the Conference. On April 24, 1963, the Conference adopted the Vienna Convention and two optional protocols.

Aceves, *supra* note 10, at 263 (footnotes omitted); *see also* Trainer, *supra* note 3, at 231-32 (discussing history of the Vienna Convention); Gisvold, *supra* note 9, at 780 (same).

¹³ *See* Aceves, *supra* note 10, at 268 (“The Senate . . . approved the Vienna Convention on October 22, 1969, and it was formally ratified by President Nixon on November 12, 1969.”) (footnote omitted).

¹⁴ Kadish, *supra* note 9, at 568-69 (footnote omitted).

¹⁵ *See* Cara S. O’Driscoll, Comment, *The Execution of Foreign Nationals in Arizona: Violations of the Vienna Convention on Consular Relations*, 32 ARIZ. ST. L.J. 323, 326 n.20 (2000); Kadish, *supra* note 9, at 568-69. As noted by Senator Fulbright:

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

115 CONG. REC. S30953 (daily ed. Oct. 22, 1969).

¹⁶ Aceves, *supra* note 10, at 268 (quoting Ex. E, 91st Cong., 1st Sess., at VII (Statement of Secretary of State William Rogers) (1969)).

¹⁷ U.S. DEP’T OF STATE, Pub. No. 10518, CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AND OTHER OFFICERS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM, at 51-57 (1998) [hereinafter, CONSULAR NOTIFICATION AND ACCESS], available at http://www.state.gov/consul_notify.html.

¹⁸ O’Driscoll, *supra* note 15, at 326 (footnote omitted); *see* Victor M. Uribe, *Consuls at Work: Disseminated by The Research Repository @ WVU, 2002*

The State Department has stated that “Article 36 obligations are ‘of the highest order and should not be dealt with lightly.’”¹⁹

III. ARTICLE 36 OF THE VIENNA CONVENTION

The Vienna Convention recognizes that to facilitate the exercise of consular functions,²⁰ communication with the nationals²¹ of the sending state is essential.²² To that end, Article 36(1)(a) provides that “consular officers shall be free to communicate with nationals of the sending State and to have access to them.”²³ Conversely, “[n]ationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State.”²⁴

One important consular protection concerns assistance to a foreign national who has been arrested abroad.²⁵ A key provision of Article 36 obligates the receiving State to notify the national of a sending State²⁶ who has

Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice, 19 HOUS. J. INT’L L. 375, 384 (1997) (“[T]he 1963 Vienna Convention is the most important instrument on consular relations to date.”) (footnote omitted); see also Hanna, *supra* note 3, at 165 (“Because of its comprehensive nature and near universal applicability, the Vienna Convention now establishes the ‘baseline’ for most obligations with respect to the treatment of foreign nationals in the United States, and for treatment of U.S. citizens abroad by foreign governments.”) (footnote omitted).

¹⁹ Gisvold, *supra* note 9, at 793 (quoting ARTHUR W. ROVINE, U.S. DEP’T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 161 (1973)); O’Driscoll, *supra* note 15, at 340 (same).

²⁰ Article 5 identifies thirteen categories of consular functions. Vienna Convention, *supra* note 1, at art. 5, ¶¶ (a)-(m). The last is a catch-all provision that authorizes the performance of any other functions entrusted to a consular post by the sending State “which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.” *Id.* at art. 5, ¶ (m). One commentator has noted that “[i]n the cases of protection of nationals, the flexibility granted by this provision proves to be fundamental.” Uribe, *supra* note 18, at 386.

²¹ A foreign national, for purposes of the United States’ obligations under the Vienna Convention, is any person who is not an American citizen. CONSULAR NOTIFICATION AND ACCESS, *supra* note 17, at 18. A foreign national thus includes an illegal alien, as well as a lawful permanent resident. *Id.*

²² See Aceves, *supra* note 10, at 264.

²³ Vienna Convention, *supra* note 1, at art. 36, ¶ 1(a).

²⁴ *Id.*

²⁵ Shank & Quigley, *supra* note 3, at 727-28.

²⁶ Under the provisions of the treaty, the “sending State” is the country of the arrested foreign national and the “receiving State” is the arresting country. *United States v. Chaparro-Alcantara*, 226 F.3d 616, 620 n.1 (7th Cir.), *cert. denied*, 531 U.S. 1026 (2000).

been arrested, placed in custody, or otherwise detained,²⁷ that he has the right to have his consul notified, “without delay,” of such arrest or detention.²⁸ Specifically, Article 36(1)(b) states:

if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph[.]²⁹

The State Department has interpreted this provision³⁰ to require notification to the foreign national “as soon as reasonably possible under the circumstances”³¹ and suggested that officials comply with this requirement, where the arrest is followed by detention, by notifying the foreign national

²⁷ The Vienna Convention does not define the terms arrest, custody, or detention. Those terms, however, are defined in the Department of State’s Foreign Affairs Manual. Kadish, *supra* note 9, at 570 n.19 (citing to manual and defining terms).

²⁸ One commentator has observed that while some treaties pre-dating the Vienna Convention “recognize and provide for the obligation of the receiving state to notify the sending state when a national is detained, any provisions obligating them to notify the detainee of their right to consult with their consular authorities are conspicuously absent. That right seems to appear in the Vienna Convention.” Schiffman, *supra* note 11, at 33; *see also* Erik G. Luna & Douglas J. Sylvester, *Beyond Breard*, 17 BERKELEY J. INT’L L. 147, 154 (1999) (“Although prior customary international law embodied many of the rights included in the Vienna Convention, there is little evidence that the duty to inform was among them.”) (footnote omitted).

²⁹ Vienna Convention, *supra* note 1, at art. 36, ¶ 1(b). In addition to the Vienna Convention, the United States has entered into bilateral agreements with a number of countries which “require that consular officials be notified of the arrest and/or detention of one of their nationals regardless of their national’s request.” CONSULAR NOTIFICATION AND ACCESS, *supra* note 17, at 43.

³⁰ The State Department’s interpretation of a treaty’s provision is entitled to deference. *See, e.g.*, *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) (“Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.”); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (“[T]he meaning given [treaties] by the departments of government particularly charged with their negotiation and enforcement is given great weight.”).

³¹ *See United States v. Miranda*, 65 F. Supp. 2d 1002, 1005 (D. Minn. 1999) (finding violation of Article 36 where government failed to advise Mexican national of his rights to consular notification until two days after he was arrested, absent any evidence that earlier notification would not have been reasonably possible).

of his right to consular notification before he is booked.³² If the person arrested or otherwise detained has requested consular notification, the State Department has further opined that “within 24 hours and certainly 72 hours” notification must be provided.³³ Nothing in the provisions of Article 36 confer on a foreign national the right to speak with a consular representative before government agents commence an interrogation,³⁴ nor to delay an interrogation if the foreign national requests that consul be notified of the arrest.³⁵

With respect to the right of consular officers to visit, correspond and converse with a national who has been arrested, placed in custody, or is otherwise detained, Article 36(1)(c) provides:

consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.³⁶

Finally, Article 36(2) provides that the rights set forth under the first paragraph “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

³² CONSULAR NOTIFICATION AND ACCESS, *supra* note 17, at 20; *United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 991 (S.D. Cal. 1999), *aff'd*, 230 F.3d 1368 (table) (9th Cir. 2000).

³³ CONSULAR NOTIFICATION AND ACCESS, *supra* note 17, at 20.

³⁴ See *United States v. Ore-Irawa*, 78 F. Supp. 2d 610, 613 (E.D. Mich. 1999) (“[N]othing in . . . Article 36 . . . requires that an arresting officer inform a defendant of his rights under the Vienna Convention immediately upon arrest or before requesting consent to search.”); *Alvarado-Torres*, 45 F. Supp. 2d at 991 (“[T]he convention does not confer upon foreign nationals the right to speak with a consular representative before agents begin interrogation.”).

³⁵ *Alvarado-Torres*, 45 F. Supp. 2d at 991; see *United States v. Rodrigues*, 68 F. Supp. 2d 178, 184 (E.D.N.Y. 1999) (“[T]here is no requirement in the Convention that the interrogation of a foreign national must stop when he is told of Article 36’s consular notification provision.”); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1126 (C.D. Ill. 1999), *aff'd*, 226 F.3d 616 (7th Cir. 2000). Some commentators have noted that the State Department’s interpretation of the Vienna Convention providing the arresting state twenty-four to seventy-two hours to contact the consulate after the foreign national has requested notification “seriously undercuts claims that consular presence is a prerequisite to continued interrogation.” Luna & Sylvester, *supra* note 28, at 152.

³⁶ Vienna Convention, *supra* note 1, at art. 36 ¶ 1(c).

accorded under this Article are intended.”³⁷ While this subparagraph provides in part that the laws of the receiving State must allow for these rights to be given full effect, it has been suggested that “[t]he intention of this subparagraph seems to be to insure that the domestic criminal procedures of the receiving State are interfered with to the least extent possible.”³⁸

IV. DEPARTMENT OF JUSTICE REGULATIONS AND DEPARTMENT OF STATE ADVICE RELATING TO THE CONSULAR NOTIFICATION PROVISION OF THE VIENNA CONVENTION

To ensure compliance with the consular notification provision of Article 36 of the Vienna Convention, the Department of Justice issued regulations to the same effect.³⁹ Specifically, 28 C.F.R. § 50.5 states, in relevant part:

(a) This statement is designed to establish a uniform procedure for consular notification where nationals of foreign countries are arrested by officers of this Department on charges of criminal violations. It conforms to practice under international law and in particular implements obligations undertaken by the United States pursuant to treaties with respect to the arrest and detention of foreign nationals. Some of the treaties obligate the United States to notify the consular official only upon the demand or request of the arrested foreign national. On the other hand, some of the treaties require notifying the consul of the arrest of a foreign national whether or not the arrested person requests such notification.

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

³⁷ *Id.* at art. 36 ¶ 2.

³⁸ Schiffman, *supra* note 11, at 39 (footnote omitted).

³⁹ *See* United States v. De La Pava, 268 F.3d 157, 163 (2d Cir. 2001); *see also* Kadish, *supra* note 9, at 576 (“The Department of Justice promulgated [2]8 C.F.R. § 50.5 to implement, in part, Article 36 in federal cases.”). *But see* Molora Vadnis, *A Diplomatic Morass: An Argument Against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations*, 47 UCLA L. REV. 307, 318 (1999) (“Although these regulations were intended to ensure compliance with international treaties other than the Vienna Convention, the regulations satisfy the notice requirement of Article 36.”) (footnote omitted).

case, he will be advised of such notification by the U.S. Attorney.

(2) In all cases (including those where the foreign national has stated that he does not wish his consul to be notified) the local office of the Federal Bureau of Investigation or the local Marshal's office, as the case may be, shall inform the nearest U.S. Attorney of the arrest and of the arrested person's wishes regarding consular notification.⁴⁰

The regulations further assign the U.S. Attorney the obligation to notify foreign consul.⁴¹

The Department of State also has undertaken a number of initiatives to alert local and federal law enforcement officials about the consular notification requirements under Article 36.⁴² These measures have included issuing periodic notices to local governments explaining the requirements, the issuance of a handbook, and the release of a bulletin outlining the provisions of the Vienna Convention.⁴³

The most recent comprehensive publication by the Department of State regarding consular notification was issued in 1998.⁴⁴ This publication contains guidance and instructions relating to the detention, arrest, or death of, or the appointment of guardians for foreign nationals, as well as other issues concerning the provision of consular services to foreign nationals in the United States.⁴⁵ The publication notes that the obligations surrounding consular notification and access are binding on the federal government by virtue of the Supremacy Clause.⁴⁶

⁴⁰ 28 C.F.R. § 50.5 (2001). This section does not apply to arrests made by the Immigration and Naturalization Service ("INS") "in administrative expulsion or exclusion proceedings," since the INS has its own regulations governing notification. *Id.* § 50.5(b); see 8 C.F.R. § 236.1(e) (2002). As to arrests made by INS with respect to criminal violations of the immigration laws, the regulations provide that the "U.S. Marshal, upon delivery of the foreign national into his custody, shall be responsible for informing the U.S. Attorney of the arrest[.]" 28 C.F.R. § 50.5(b).

⁴¹ 28 C.F.R. § 50.5(a)(3).

⁴² See Trainer, *supra* note 3, at 239-40.

⁴³ See Aceves, *supra* note 10, at 274-75; Hanna, *supra* note 3, at 169; Trainer, *supra* note 3, at 239.

⁴⁴ See Luna & Sylvester, *supra* note 28, at 188 ("As part of a 'massive effort' in 1998 to increase awareness, the State Department promulgated a handbook detailing the treatment detained foreign nationals should receive under the Vienna Convention."); Schiffman, *supra* note 11, at 56-57 ("The U.S. State Department took a substantial step in January 1998 with the publication of its manual, 'Consular Notification and Access[.]'"); see also *supra* note 17.

⁴⁵ CONSULAR NOTIFICATION AND ACCESS, *supra* note 17, at 13-15.

⁴⁶ *Id.* at 44.

V. APPLICATION OF ARTICLE 36 OF THE VIENNA CONVENTION TO CRIMINAL PROCEEDINGS

As noted previously, Article 36 imposes three separate but interrelated obligations on the host country relating to a detained foreign national: “(1) a detainee’s right to contact a consul; (2) a consul’s right to contact the detainee; and (3) a detainee’s right to be informed by the detaining authorities of the right to contact a consul.”⁴⁷ In the last twenty-five years, the third of these obligations has been the subject of frequent litigation in the context of criminal prosecutions.

The scenario is straightforward. A foreign national is arrested. He is advised of his rights under *Miranda*,⁴⁸ but not of his right, under the Vienna Convention, to contact his consulate.⁴⁹ The defendant waives his *Miranda* rights and provides a statement. A challenge then is made at trial to suppress the statement and/or dismiss the indictment on the grounds that the government failed to advise the defendant of his right to consular notification and access under Article 36. The district court denies such relief, a conviction ensues, and the defendant challenges the conviction on appeal on similar grounds. Before turning to an analysis of the developing case law in this area, it is important to discuss generally certain legal principles governing treaties and their enforceability in federal courts by private individuals.

A. *The Supremacy Clause, Treaties, and the Self-Execution Doctrine*

Article VI of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State notwithstanding.⁵⁰

Since treaties are the “Law of the Land,” courts must give them the same consideration as they do federal statutes.⁵¹ Indeed, under the Supremacy

⁴⁷ Shank & Quigley, *supra* note 3, at 729 (footnote omitted).

⁴⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966); *see supra* note 7.

⁴⁹ *See Vienna Convention, supra* note 1, at art. 36 ¶ 1(b).

⁵⁰ U.S. CONST. art VI, § 2.

⁵¹ *See Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation.”); *The Head Money Cases*, 112 U.S. 580, 598 (1884) (“A treaty . . . is a law of the land as [is] an act of Congress . . .”). *See generally* Uribe, *supra* note 18, at 407 (“The Vienna Convention on Consular Relations

Clause, “treaty-based rights are superior to State laws or policies and even trump earlier inconsistent federal legislation.”⁵² But are such treaty-based rights privately enforceable by an individual? This turns on the doctrine of self-execution, described by one court as “one of the most confounding questions” in treaty law.⁵³

It has been suggested that two distinct questions must be “resolve[d] in determining whether a treaty is self-executing: (1) whether the treaty requires implementing additional legislation before it can take effect; and (2) whether the treaty confers private enforceable rights to individuals.”⁵⁴ As to the former, the evidence is compelling that the Vienna Convention requires no additional congressional implementing legislation.⁵⁵ With respect to the latter, there is disagreement among both commentators⁵⁶ and the courts.⁵⁷

was ratified by the United States, and therefore, has the status of ‘supreme Law of the Land’ and is binding on federal and local authorities.”).

⁵² Luna & Sylvester, *supra* note 28, at 154 (footnote omitted); see Schiffman, *supra* note 11, at 34 (“As supreme law, a treaty supersedes state law and policy.”) (footnote omitted); Aceves, *supra* note 10, at 289 (“Under th[e] doctrine [of *posterior derogat priori*], a treaty may be superseded by a subsequent act of Congress. Similarly, an act of Congress may be superseded by a subsequent treaty.”). A treaty, however, may not contradict the Constitution. See *Reid v. Covert*, 354 U.S. 1, 17 (1957) (“This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.”).

⁵³ *United States v. Postal*, 589 F.2d 862, 876 (5th Cir. 1979); see Schiffman, *supra* note 11, at 35 (“The precise definition and application of self-executing treaties is a source of much controversy and scholarly debate.”) (footnote omitted).

⁵⁴ Kadish, *supra* note 9, at 586-87 (footnotes omitted); see Luna & Sylvester, *supra* note 28, at 155 (discussing how treaties are deemed self-executing if the following two prongs are met: “First, the treaty must not require implementing legislation to take effect The second limit concerns the enumeration of interested parties Generally, courts will only allow individuals to bring claims where the language of the treaty specifically and directly evinces an intent to ‘confer[] rights on individuals.’”) (footnote omitted); Vadnis, *supra* note 39, at 315-16 (“The self-executing nature of the Vienna Convention should not be confused with the issue of invocability. Invocability refers to the question whether *even though* a rule of an international agreement is directly applied, a particular party can rely on this rule as ‘law’ in his particular case.”) (footnotes omitted) (emphasis in original); see also *United States v. Li*, 206 F.3d 56, 67 (1st Cir.) (en banc), *cert. denied*, 531 U.S. 956 (2000) (Selya and Boudin, J., concurring) (“The label ‘self-executing’ usually is applied to any treaty that according to its terms takes effect upon ratification and requires no separate implementing statute. Whether the terms of such a treaty provide for private rights, enforceable in domestic courts, is a wholly separate question.”) (footnote omitted).

⁵⁵ See Kadish, *supra* note 9, at 588; Luna & Sylvester, *supra* note 28, at 155 (“In the case of the Vienna Convention, the evidence is overwhelming that its obligations require no implementing domestic legislation. According to a White House official in 1969, the Convention is ‘entirely self-executi[ng] and does not require any implementing or complementing legislation.’”) (footnote omitted); CONSULAR NOTIFICATION AND ACCESS, *supra* note 17, at 44 (“Implementing legislation is not necessary . . . because executive, law enforcement and judicial authorities can implement these obligations through their existing powers.”).

⁵⁶ Compare Trainer, *supra* note 3, at 257 (“The language of the Vienna Convention confers a private right to sue when a foreign defendant is not given notification of his right to contact his consulate. To argue that an individual does not have standing to enforce Article 36 is to ignore the

In *Breard v. Greene*,⁵⁸ the Supreme Court observed in dicta that Article 36 “arguably confers on an individual the right to consular assistance following arrest[.]”⁵⁹ As a general matter, however, “international treaties, as agreements among sovereign nations, do not create individual rights that are enforceable by an individual[.]”⁶⁰ even when they benefit such a private party.⁶¹ In any event, as discussed below, the majority of courts have bypassed this question and proceeded directly to an analysis of the appropriate remedy for a violation of Article 36.

language of the Treaty.”) with *Vadnis*, *supra* note 39, at 315 (“Evidence suggests that the Senate never intended to confer such a right on arrested foreign nationals.”); James A. Deeken, *A New Miranda For Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations on State Governments in the Wake of Printz v. United States*, 31 VAND. J. TRANSNAT’L L. 997, 1022 (1998) (Arguing that interpreting the Convention “as granting personal rights would run against the resumption that international treaties do not create such rights. It also seems contrary to the language of the treaty, which indicates that the purpose of the Vienna Convention was to aid relations between countries and not to benefit individuals.”) (footnotes omitted). See generally, Schiffman, *supra* note 11, at 37-42 (citing cases and discussing whether the Vienna Convention was meant to create personal rights).

⁵⁷ Compare *United States v. Superville*, 40 F. Supp. 2d 672, 678 (D.V.I. 1999) (“The text of the Vienna Convention, the recorded intentions of its drafters, and the prevailing view among federal agencies and courts leads this Court to conclude that, as a detained alien, [defendant] ha[d] standing to seek relief for INS’ alleged violation of Vienna Convention Article 36, paragraph 1(b).”) with *United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001) (“The preamble to the Vienna Convention supports the view that the Convention created no judicially enforceable individual rights Moreover, paragraph 1 of Article 36 itself specifically states that the provisions of that Article are framed ‘[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State.’”) (footnote omitted) (quoting Vienna Convention, *supra* note 1, at art. 36 ¶ 1).

⁵⁸ 523 U.S. 371 (1998).

⁵⁹ *Id.* at 376. At the same time, the Supreme Court noted 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.” *Id.* at 377. This has led one commentator to remark that “[i]f the ability to assert a private right of action under a treaty is suspect for a member state, the rights of an individual criminal defendant to request relief must be viewed with even greater suspicion.” Schiffman, *supra* note 11, at 39 (footnote omitted).

⁶⁰ *United States v. Chaparro-Alcantara*, 226 F.3d 616, 620 (7th Cir.), *cert. denied*, 531 U.S. 1026 (2000); *accord United States v. Page*, 232 F.3d 536, 540 (6th Cir. 2000), *cert. denied*, 532 U.S. 1056 (2001).

⁶¹ See *Garza v. Lappin*, 253 F.3d 918, 924 (7th Cir. 2001) (“[A]s a general rule, international agreements, even those benefitting private parties, do not create private rights enforceable in domestic courts.”); *United States v. Jimenez-Nava*, 243 F.3d 192, 195 n.3 (5th Cir. 2001) (“[E]ven where a treaty provides certain benefits for nationals of a particular state . . . it is traditionally held that any rights arising out of such provisions are . . . those of the state and . . . individual rights are only derivative through the states.”) (quoting *United States v. Gengler*, 510 F.2d 62, 66 (2d Cir. 1975)); *De La Pava*, 268 F.3d at 164 (same); *Li*, 206 F.3d at 61 (same).

B. *The Evolving Federal Criminal Case Law*

Challenges by criminal defendants to the government's failure to advise them of their right to consular notification under Article 36 of the Vienna Convention upon arrest are reported in numerous district court cases addressing denials of motions to dismiss indictments and/or suppress statements, federal circuit court opinions reviewing convictions on direct appeal, and also district and circuit court opinions addressing collateral attacks to convictions. Since some of the first reported federal criminal cases that discussed the issue of consular notification (albeit in the context of the INS's regulations providing for the same⁶²) concerned prosecutions for illegal reentry into the United States, and because the analysis in those cases has been applied subsequently by some courts when addressing Article 36 challenges in non-immigration related prosecutions, those cases are examined first.

1. Consular Notification Challenges Involving INS Regulations in Prosecutions for Illegal Reentry After Deportation

In *United States v. Calderon-Medina*,⁶³ which involved a consolidated appeal, the government contested the dismissal of indictments against two defendants charging them with illegal reentry after deportation under 8 U.S.C. § 1326.⁶⁴ The district courts in those cases ruled that the INS's violation of its regulation concerning consular notification⁶⁵ rendered the original deportations unlawful.⁶⁶ The district courts further reasoned that, because the offense of illegal reentry after deportation required that there be a valid prior deportation, an element of the offense was lacking and the indictments consequently were dismissed.⁶⁷

On appeal, the Ninth Circuit rejected the rationale of the district courts that "conformity with applicable laws and regulations must be judged without inquiry into the prejudice caused to the defendant."⁶⁸ To the con-

⁶² See *supra* note 40.

⁶³ 591 F.2d 529 (9th Cir. 1979).

⁶⁴ 8 U.S.C. § 1326(b) provides for criminal penalties in connection with the reentry of certain removed aliens.

⁶⁵ See 8 C.F.R. § 236.1(e) (then known as 8 C.F.R. § 242.2(e)). At the time *Calderon-Medina* was decided, 8 C.F.R. § 242.2(e) stated: "Every detained alien shall be notified that he may communicate with the consular or diplomatic officers of the country of his nationality." 8 C.F.R. § 242.2(e) (1979).

⁶⁶ *Calderon-Medina*, 591 F.2d at 530.

⁶⁷ See generally *United States v. Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir.), *cert. denied*, 449 U.S. 864 (1980) ("In order to convict a defendant for a violation of § 1326, the prior deportation must have been lawful.").

⁶⁸ *Calderon-Medina*, 591 F.2d at 530.

trary, the court ruled that “[v]iolation of a regulation renders a deportation unlawful only if the violation prejudiced interests of the [defendant] alien which were protected by the regulation.”⁶⁹ Since no finding of prejudice had been made by the district courts below, the cases were remanded so that the defendants were “allowed the opportunity to demonstrate prejudice resulting from the INS regulation violations,” and the district courts, in turn, were given the chance to determine whether the violation of the regulation “harmed the [defendant] aliens’ interests in such a way as to affect potentially the outcome of their deportation proceedings.”⁷⁰

On remand, in *United States v. Rangel-Gonzales*,⁷¹ one of the two cases in the consolidated appeal, the district court found no prejudice.⁷² Applying the standard set forth in *Calderon-Medina*, the Ninth Circuit in *Rangel-Gonzales* reversed the ruling of the district court and found that the defendant had made a credible demonstration of prejudice because

[he] showed he did not know of his right to contact the consular officials, that he would have done so had he known, and that such consultation may well have led not merely to appointment of counsel, but also to community assistance in creating a more favorable record to present to the immigration judge on the question of deportation.⁷³

As a result, the court ruled that the indictment should be dismissed.⁷⁴

Both *Rangel-Gonzales* and *Calderon-Medina* involved collateral at-

⁶⁹ *Id.* at 531 (footnote omitted). In *United States v. Floulis*, 457 F. Supp. 1350 (W.D. Pa. 1978), decided prior to *Calderon-Medina*, the district court held that the INS’s failure to advise defendant of his right to consular notification under its regulation could not be deemed “critical to the fundamental fairness of the hearing” so as to justify dismissal of the indictment for illegal reentry after deportation, where the defendant “was represented by counsel at the deportation hearing.” *Floulis*, 457 F. Supp. at 1355.

⁷⁰ *Calderon-Medina*, 591 F.2d at 532; accord *United States v. Arambula-Alvarado*, 677 F.2d 51, 53 (9th Cir. 1982).

⁷¹ 617 F.2d 529 (9th Cir. 1980).

⁷² *Id.* at 530.

⁷³ *Id.* at 531; see Linda J. Springrose, *Strangers In A Strange Land: The Rights of Non-Citizens Under Article 36 of the Vienna Convention on Consular Relations*, 14 GEO. IMMIGR. L.J. 185, 192 (1999) (discussing evidence of prejudice presented and how the affidavit from the experienced immigration attorney “seems to have been the key for providing prejudice in th[e] case.”); Trainer, *supra* note 3, at 243-44 (same). As subsequently explained by the Ninth Circuit in *United States v. Cerda-Pena*, 799 F.2d 1371 (9th Cir. 1986), this standard “requires that an alien [defendant] produce some concrete evidence indicating that the violation of a procedural protection actually had the potential for affecting the outcome of his or her deportation proceedings.” *Id.* at 1379.

⁷⁴ *Rangel-Gonzales*, 617 F.2d at 533.

tacks on deportations⁷⁵ and were decided in the context of the INS regulation implementing the Vienna Convention.⁷⁶ As discussed below, their analysis with respect to prejudice has been used by some courts when confronting consular notification claims directly under Article 36.

2. Consular Notification Challenges Under Article 36 During the Pendency of a Prosecution

The district courts which have entertained motions to dismiss the indictment and/or suppress statements on the grounds that the defendants were not advised of their right to consular notification have ruled, almost uniformly, that neither of those remedies is appropriate.⁷⁷ In doing so, the dis-

⁷⁵ At the time *Rangel-Gonzales* and *Calderon-Medina* were decided, “[t]he issue of collateral attacks on deportations in subsequent proceedings under 8 U.S.C. § 1326 was far from settled law[.]” Kadish, *supra* note 9, at 572. n.34. In *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), the Supreme Court held that due process requires courts to permit a collateral attack on a deportation order in a prosecution under § 1326 where the error in the administrative proceeding has denied the alien judicial review of the order of deportation. Kadish, *supra* note 9, at 575. Following *Mendoza-Lopez*, courts have found, in the context of prosecutions for illegal reentry, that a violation of the INS regulation on consular notification does not deprive a defendant of judicial review or render the proceeding fundamentally unfair. *See, e.g.*, *United States v. Villa-Fabela*, 882 F.2d 434, 440 (9th Cir. 1989), *overruled in part on other grounds* by *United States v. Proa-Tovar*, 975 F.2d 592, 594-95 (9th Cir. 1992) (en banc); *United States v. Chairez*, 875 F. Supp. 609, 617-19 (D. Neb. 1994); *see also* 8 U.S.C. § 1326(d) (addressing limitation on collateral attack on underlying deportation order).

⁷⁶ *Rangel-Gonzales*, 617 F.2d at 530 (“[The regulation] was intended to insure compliance with this country’s treaty obligations to promote assistance from their country of origin for aliens facing deportation proceedings in the United States.”); *Calderon-Medina*, 591 F.2d at 531 (“The regulation admittedly violated here was evidently intended to ensure compliance with the Vienna Convention[.]”); *see also* Kadish, *supra* note 9, at 572-73.

⁷⁷ *See* *United States v. Awadallah*, 202 F. Supp. 2d 17, 40 (S.D.N.Y. 2002) (motion to dismiss indictment); *United States v. Duarte-Acero*, 132 F. Supp. 2d 1036, 1038 (S.D. Fla. 2001) (same); *United States v. Martinez-Villalva*, 80 F. Supp. 2d 1152, 1155-56 (D. Colo. 1999) (motion to suppress statement); *United States v. Ore-Irawa*, 78 F. Supp. 2d 610, 613-14 (E.D. Mich 1999) (motion to suppress statement and/or dismiss indictment); *United States v. Carrillo*, 70 F. Supp. 2d 854, 860-62 (N.D. Ill. 1999), *aff’d*, 269 F.3d 761 (7th Cir. 2001) (same); *United States v. Rodrigues*, 68 F. Supp. 2d 178, 184-85 (E.D.N.Y. 1999) (motion to suppress statement); *United States v. Miranda*, 65 F. Supp. 2d 1002, 1005-07 (D. Minn. 1999) (same); *United States v. Torres-Del Muro*, 58 F. Supp. 2d 931, 933-35 (C.D. Ill. 1999) (same); *United States v. Salameh*, 54 F. Supp. 2d 236, 279 (S.D.N.Y. 1999) (same); *United States v. Kevin*, No. 97 CR. 763 JGK, 1999 WL 194749, at *4 (S.D.N.Y. April 7, 1999) (motion to dismiss indictment); *United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 993-95 (S.D. Cal. 1999) (motion to suppress statement and/or dismiss indictment); *United States v. Tapia-Mendoza*, 41 F. Supp. 2d 1250, 1253-55 (D. Utah 1999) (motion to suppress statement); *United States v. \$69,530 in U.S. Currency*, 22 F. Supp. 2d 593, 595 (W.D. Texas 1998) (same); *United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084, 1097 (S.D. Cal. 1998). One court has ruled that regardless of whether prejudice from a violation of the Vienna Convention was shown, dismissal of a death penalty notice filed pursuant to 18 U.S.C. § 3593(a) of the Federal Death Penalty Act, was not a remedy that could be imposed for such a violation. *United States v. Bin Laden*, 126 F. Supp. 2d 290, 295-96 (S.D.N.Y. 2001); *see also* *United States v. Beckford*, 211 F.3d 1266 (table), 2000 WL 376155, at *13 (4th Cir. 2000) (affirming district

strict courts have undertaken the following analysis.

The threshold question confronted by the courts revolves around standing. Most courts have ruled that, irrespective of whether or not a foreign national has standing to raise an Article 36 violation,⁷⁸ before such a defendant would be entitled to seek a remedy such as dismissal of the indictment or suppression of evidence, he must first demonstrate prejudice, and in those cases, none was established.⁷⁹ Some of the courts have formulated the test for prejudice as requiring the defendant to demonstrate “(1) that he did not know of his right to consular notification; (2) that he would have availed himself of that right; and (3) that there was a likelihood that contact with the consul would have resulted in assistance to him.”⁸⁰

Even when prejudice is shown, many of the district courts have ruled that dismissal of the indictment or suppression of a defendant’s statement are not available legal remedies to cure the prejudice.⁸¹ With respect to the dismissal of an indictment, courts have reasoned that the Vienna Convention

court’s ruling denying motion to quash death penalty notice based on violation of Article 36 since defendant “was not sentenced to death and he [did] not demonstrate[] how the failure would have otherwise affected the outcome of the case.”).

⁷⁸ Some district courts have ruled that an individual has standing to assert rights under Article 36. See, e.g., *United States v. Briscoe*, 69 F. Supp. 2d 738, 745 (D.V.I. 1999); *Torres-Del Muro*, 58 F. Supp. 2d at 933; *United States v. Hongla-Yamche*, 55 F. Supp. 2d 74, 77-78 (D. Mass. 1999); *Alvarado-Torres*, 45 F. Supp. 2d at 988-89; *United States v. Superville*, 40 F. Supp. 2d 672, 678 (D.V.I. 1999); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999); *\$69,530.00 in U.S. Currency*, 22 F. Supp. 2d at 594. Other district courts have determined that the issue is murky and either have assumed standing for purposes of discussion, or ruled that it is not necessary to resolve the standing issue because the defendant has not established that he would be entitled to the relief requested even if he had standing. See, e.g., *Duarte-Acero*, 132 F. Supp. 2d at 1038; *Martinez-Villalva*, 80 F. Supp. 2d at 1156; *Ore-Irawa*, 78 F. Supp. 2d at 614 n.2; *Carrillo*, 70 F. Supp. 2d at 859; *Miranda*, 65 F. Supp. 2d at 1006; *Rodrigues*, 68 F. Supp. 2d at 181-183; *Kevin*, 1999 WL 194749, at *3; *Salameh*, 54 F. Supp. 2d at 278; *Tapia-Mendoza*, 41 F. Supp. 2d at 1253; *Esparza-Ponce*, 7 F. Supp. 2d at 1096.

⁷⁹ See *Martinez-Villalva*, 80 F. Supp. 2d at 1155-56; *Ore-Irawa*, 78 F. Supp. 2d at 613; *United States v. Kurdyukov*, 75 F. Supp. 2d 660, 664-65 (S.D. Tex. 1999); *Carrillo*, 70 F. Supp. 2d at 860; *Rodrigues*, 68 F. Supp. 2d at 182-85; *Kevin*, 1999 WL 194749, at *4; *Miranda*, 65 F. Supp. 2d at 1006; *Alvarado-Torres*, 45 F. Supp. 2d at 989-93; *Tapia-Mendoza*, 41 F. Supp. 2d at 1253; *Superville*, 40 F. Supp. 2d at 678; *Chaparro-Alcantara*, 37 F. Supp. 2d at 1126; *Esparza-Ponce*, 7 F. Supp. 2d at 1096. But see *Salameh*, 54 F. Supp. 2d at 279 (concluding first that suppression would not be a proper remedy but even if it were, a defendant must demonstrate prejudice); *Torres-Del Muro*, 58 F. Supp. 2d at 933 (omitting any discussion of prejudice and proceeding directly to remedy discussion).

⁸⁰ *Ore-Irawa*, 78 F. Supp. 2d at 613; see *Tapia-Mendoza*, 41 F. Supp. 2d at 1254; *Briscoe*, 69 F. Supp. 2d at 747; *Alvarado-Torres*, 45 F. Supp. 2d at 990; *Esparza-Ponce*, 7 F. Supp. 2d at 1097. This test has its roots in *Rangel-Gonzales*. See *Rangel-Gonzales*, 617 F.2d at 531.

⁸¹ See *Duarte-Acero*, 132 F. Supp. 2d at 1039; *Kurdyukov*, 75 F. Supp. 2d at 665; *Carrillo*, 70 F. Supp. 2d at 860; *Rodrigues*, 68 F. Supp. 2d 185; *Alvarado-Torres*, 45 F. Supp. 2d at 993-95; *Tapia-Mendoza*, 41 F. Supp. 2d at 1255.

provides for no such extraordinary remedy,⁸² and that outside of the context of cases charging illegal re-entry (and interpreting the INS regulation),⁸³ no reported decision has found that dismissal of the indictment would be an appropriate remedy for a violation of Article 36.⁸⁴ As to suppression of a defendant's statement for failure to advise him of his right to consular notification, courts have ruled that since the exclusionary rule generally is a remedy available to prevent violations of individual constitutional rights,⁸⁵ and since failure to satisfy the consular notification requirement does not rise to the level of a constitutional violation,⁸⁶ exclusion of evidence is not an appropriate remedy.⁸⁷

⁸² See *Carrillo*, 70 F. Supp. 2d at 860; *Kevin*, 1999 WL 194749, at *4.

⁸³ See *Rangel-Gonzales*, 617 F.2d at 529. With respect to the precedential value of *Rangel-Gonzales* and *Calderon-Medina*, it is important to recognize that in *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir.) (en banc), cert. denied, 531 U.S. 991 (2000), the Ninth Circuit ruled that suppression of evidence obtained as the result of post-arrest interrogation was not an appropriate remedy for a violation of the consular notification provision of Article 36. The court pointed out how *Rangel-Gonzales* and *Calderon-Medina* had relied on the INS regulation and stated that it did not have any occasion in those cases "to hold that the violation of the treaty alone was sufficient to permit a foreign national to overturn a deportation." *Lombera-Camorlinga*, 206 F.3d at 885; see *United States v. Cortez*, 217 F.3d 847 (table), 2000 WL 559888 (9th Cir. 2000) (reversing district court's decision granting motion to suppress evidence obtained in violation of Article 36 in light of *Lombera-Camorlinga*).

⁸⁴ See *Alvarado-Torres*, 45 F. Supp. 2d at 995 ("Unlike a charge of illegal reentry, agents' failure to advise Defendant of her right to contact the consul cannot possibly 'nullify' an element of the crimes charged.").

⁸⁵ See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (Fifth Amendment); *Massiah v. United States*, 377 U.S. 201 (1964) (Sixth Amendment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment). See generally *Arizona v. Evans*, 514 U.S. 1, 10 (1995) ("The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of . . . [constitutional] rights through the rule's general deterrent effect."); *Elkins v. United States*, 364 U.S. 206, 217 (1960) ("[The] purpose [of the exclusionary rule] is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it.").

⁸⁶ See, e.g., *Carrillo*, 70 F. Supp. 2d at 861 ("[A] violation of . . . Article 36 does not rise to the level of a constitutional violation."); *Rodriguez*, 68 F. Supp. 2d at 185 ("[F]ailing to satisfy the consular notification requirement of Article 36 does not rise to the level of a constitutional violation."); *Miranda*, 65 F. Supp. 2d at 1006 ("[T]he rights that the Convention establishes do not rise to the level of fundamental or constitutional rights."); *Torres-Del Muro*, 58 F. Supp. 2d at 934 ("[T]he failure to notify the foreign national of his right to speak with his consul, *per se*, does not implicate constitutional rights."); *Alvarado-Torres*, 45 F. Supp. 2d at 994 ("[B]ecause the Convention does not implicate fundamental Constitutional rights, nor does it expressly provide for the remedy of suppression, th[e] [c]ourt holds that suppression is not an appropriate remedy for its violation.") (footnote omitted); *Tapia-Mendoza*, 41 F. Supp. 2d at 1254 (agreeing that Convention "does not create constitutional rights"); *\$69,539 in U.S. Currency*, 22 F. Supp.2d at 595 ("[A] violation of a person's rights under the Vienna Convention does not trigger the exclusionary rule, unless the violation also results in an infringement of the person's constitutional rights under the Fourth, Fifth, Sixth, or Fourteenth Amendments.")

⁸⁷ See *Carrillo*, 70 F. Supp. 2d at 861; *Rodriguez*, 68 F. Supp. 2d at 185; *Torres-Del Muro*, 58
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Some courts have determined that absent a showing of prejudice, there is “no occasion to consider the remedy [of exclusion of evidence].”⁸⁸ At least two others have intimated that suppression of a statement made during arrest or detention may be an appropriate remedy if prejudice is shown.⁸⁹

3. Consular Notification Challenges Under Article 36 on Direct Appeal Following Conviction

The legal analysis undertaken by the circuit courts when confronting challenges by defendants who seek to overturn their convictions because of the government’s failure to advise them of their right to consular notification generally has tracked that of the district courts. Unlike the district courts, however, some circuit courts have held that the Vienna Convention does not create “judicially enforceable rights of consultation between a detained foreign national and his consular officer.”⁹⁰ Other courts have found it unrec-

F. Supp. 2d at 933-34; *Alvarado-Torres*, 45 F. Supp. 2d at 994; \$69,539 in U.S. Currency, 22 F. Supp.2d at 595; see also *United States v. Enger*, 472 F. Supp. 490, 545 (D.N.J. 1978) (“Declin[ing] to infer [exclusionary] rule from the Vienna Convention in the absence of a clear indication that the draftsmen of the Convention (and the executive branch of the United States at the time this nation became a signatory) intended to engraft such a rule on the . . . treaty.”) (footnote omitted).

⁸⁸ *United States v. Briscoe*, 69 F. Supp.2d 738, 748 (D.V.I. 1999); see also *Superville*, 40 F. Supp. 2d at 678 (declining to rule on whether prejudice from Article 36 violation must be demonstrated before relief may be obtained because defendant was notified of his right to consular access).

⁸⁹ See *Miranda*, 65 F. Supp. 2d at 1007 (defendant did “not ma[k]e the requisite showing of prejudice in order to justify suppression of any statements made during his arrest and detention”); see also *United States v. Kevin*, No. 97 CR. 763 JGK, 1999 WL 194749, at *4 (S.D.N.Y. April 7, 1999) (rejecting dismissal of indictment as a remedy while noting that in other contexts, suppression of evidence has been found to be an appropriate remedy but in the case at bar, “there ha[d] been no showing that the defendants have been prejudiced[.]”). It bears noting, however, that *Kevin* was decided prior to the Second Circuit’s opinion in *United States v. De La Pava*, 268 F.3d 157 (2d Cir. 2001), which declined to hold that a criminal defendant had no standing to enforce rights under the Vienna Convention and further ruled that even if he did, failure to comply with its consular notification provision would not serve as appropriate grounds to dismiss an indictment. *Id.* at 164-65.

⁹⁰ *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir. 2001); *United States v. Emuegbuman*, 268 F.3d 377, 394 (6th Cir. 2001). In support of its ruling, the court in *Emuegbuman* noted that it was significant that in *Federal Republic of Germany v. United States*, 526 U.S. 111, 111-12 (1999) and *Breard v. Greene*, 523 U.S. 371, 377 (1998), the Supreme Court held that the Vienna Convention did “not provide a signatory nation a private right of action in the federal courts to seek a remedy for a violation of Article 36.” *Emuegbuman*, 268 F.3d at 394. The court stated: “If a foreign sovereign to whose benefit the Vienna Convention inures cannot seek a judicial remedy, we cannot fathom how an individual foreign national can do so in the absence of express language in the treaty.” *Id.*; see also *United States v. Santos*, 235 F.3d 1105, 1109 (8th Cir. 2000) (Beam, J., concurring) (concluding that Vienna Convention does not grant private citizens enforceable rights in federal courts); *United States v. Li*, 206 F.3d 56, 66-67 (1st Cir. 2000) (Selya, J. & Boudin, J., concurring) (same).

essary to determine whether the Vienna Convention creates a right to consular notification that is individually enforceable because even if it did, the remedy for a violation of Article 36 can never be suppression of evidence or dismissal of the indictment.⁹¹

a. *Dismissal of Indictment or Suppression of Evidence*

In rejecting dismissal of the indictment as a remedy for a violation of Article 36, the circuit courts have reasoned that such a remedy is extraordinary and reserved for circumstances implicating fundamental rights which are not at issue with respect to the consular notification provisions found in Article 36.⁹² Similarly, with respect to the remedy of exclusion, “there is no general exclusionary rule for international law violations[.]”⁹³ Further, courts have ruled that since the rights, if any, created by Article 36 are not “fundamental rights on par with the right to be free from unreasonable searches, the privilege against self-incrimination, or the right to counsel[.]”⁹⁴ exclusion of evidence is an appropriate remedy only if the treaty provides for

⁹¹ See *De La Pava*, 268 F.3d at 165 (dismissal of indictment); *United States v. Minjares-Alvarez*, 264 F.3d 980, 986 (10th Cir. 2001) (suppression of evidence); *Li*, 206 F.3d at 60 (suppression of evidence or dismissal of the indictment); *United States v. Page*, 232 F.3d 536, 540 (6th Cir. 2000) (suppression of evidence or dismissal of indictment); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 621-22 (7th Cir. 2000) (suppression of evidence); *United States v. Lawal*, 231 F.3d 1045, 1048 (7th Cir. 2000), *cert. denied*, 121 U.S. 1165 (2001) (same); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000) (suppression of evidence obtained as the result of post-arrest interrogation); *United States v. Chanthadara*, 230 F.3d 1237, 1255-56 (10th Cir. 2000) (suppression of evidence); *United States v. Cordoba-Mesquera*, 212 F.3d 1194, 1196 (11th Cir. 2000) (suppression of evidence or the dismissal of an indictment); see also *Jimenez-Nava*, 243 F.3d at 198-99 (rejecting suppression of evidence as a remedy after finding that there was no enforceable right). See generally, *Luna & Sylvester*, *supra* note 28, at 179 (“It would take an enormous leap in logic . . . to argue that the signatories to the Vienna Convention intended for violations to be cured by the exclusion of evidence or the dismissal of the indictment.”).

⁹² *De La Pava*, 268 F.3d at 165; *Li*, 206 F.3d at 62; *Page*, 232 F.3d at 540; see *Cordoba-Mosquera*, 212 F.3d at 1196 (following *Li*).

⁹³ *Lawal*, 231 F.3d at 1048; see *Luna & Sylvester*, *supra* note 28, at 178 (“In general, international law, treaties, and norms do not require the exclusion of improperly obtained evidence.”).

⁹⁴ *Li*, 206 F.3d at 61 (citations omitted); see *Minjares-Alvarez*, 264 F.3d at 986 (“Vienna Convention does not create fundamental rights on par with those set forth in the Bill of Rights.”); *Lombera-Camorlinga*, 206 F.3d at 886 (“[T]his and other circuits have held in recent years that an exclusionary rule is typically available only for constitutional violations.”); *United States v. Salas*, 168 F.3d 484 (table), 1998 WL 911731, at *3 (4th Cir. 1998) (“[R]ights created by international treaties do not create rights equivalent to constitutional rights.”); see also *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (“[E]ven if the Vienna Convention on Consular Relations could be said to create individual rights (as opposed to setting out the rights and obligations of signatory nations), it certainly does not create constitutional rights.”); *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1993) (“Although compliance with our treaty obligations clearly is required, we decline to equate such a provision with fundamental rights.”).

such a remedy.⁹⁵ Of course, “there is no indication that the drafters of the Vienna Convention had these ‘uniquely American rights in mind, especially given the fact that even the United States Supreme Court did not require Fifth and Sixth Amendment post-arrest warnings until it decided *Miranda* in 1966, three years after the treaty was drafted.’”⁹⁶ Not surprisingly, “nothing in the text of the Vienna Convention indicates that a remedy of suppression is appropriate for violations of Article 36.”⁹⁷ Furthermore, it has been noted that the recognition of such a drastic remedy “not imposed by any other signatory to th[e] convention, would promote disharmony in the interpretation of an international agreement.”⁹⁸

To the extent it could be argued that the language of Article 36 is ambiguous, courts have found that the ratification history of the Vienna Convention and its subsequent operation, including the interpretation given to its provisions by the Department of State, all demonstrate that its directives with respect to consular notification are not individually enforceable.⁹⁹ In short, the only remedies for a violation of the consular notification provi-

⁹⁵ See *Jimenez-Nava*, 243 F.3d at 199 (“Absent an express provision in the treaty, the exclusionary rule is an inappropriate sanction.”); *Li*, 206 F.3d at 61 (“Defendants who assert violations of a statute or treaty that does not create fundamental rights are not generally entitled to the suppression of evidence unless that statute or treaty provides for such a remedy.”); *Page*, 232 F.3d at 540 (“[A] treaty must be regarded as equivalent to an act of the legislature. Thus, as in the case of a statutory violation, the exclusionary rule is an inappropriate sanction, absent any underlying constitutional violations or rights, unless the treaty expressly provides for that remedy.”) (citation omitted); *Chaparro-Alcantara*, 226 F.3d at 621 (“[A]s in the case of statutes, the exclusionary rule is an appropriate sanction for a violation of a treaty provision only when the treaty provides for that remedy.”). See generally *United States v. Giordano*, 416 U.S. 505, 528 (1974) (discussing how the exclusionary rule is applicable if constitutional violations are not involved if the statute so provides).

⁹⁶ *Page*, 232 F.3d at 541 (quoting *Lombera-Camorlinga*, 206 F.3d at 886); accord *Jimenez-Nava*, 243 F.3d at 198.

⁹⁷ *Chaparro-Alcantara*, 226 F.3d at 621; see *Minjares-Alvarez*, 264 F.3d at 986 (“As courts reviewing the Vienna Convention have consistently recognized, the treaty does not expressly incorporate a suppression remedy.”); *Page*, 232 F.3d at 540 (“Upon examination of the express provisions of the treaty, it is clear that nothing in the text requires suppression of evidence or dismissal of the indictment for violations of Article 36.”); *Li*, 206 F.3d at 62 (Noting that while the Vienna Convention may be facially ambiguous on the subject of whether it creates individually enforceable rights, it does “not . . . address whether those rights would justify suppression of evidence or the dismissal of an indictment.”).

⁹⁸ *Chaparro-Alcantara*, 226 F.3d at 622; *Page*, 232 F.3d at 541; *Jimenez-Nava*, 243 F.3d at 199-200; *Lombera-Camorlinga*, 206 F.3d at 888.

⁹⁹ *United States v. Emuegbunam*, 268 F.3d 377, 392 (6th Cir. 2001); *Li*, 206 F.3d at 63-66; see *Jimenez-Nava*, 243 F.3d at 197 (“State Department has consistently taken the position that the Vienna Convention does not establish rights of individuals, but only state-to-state rights and obligations” and that its “view of treaty interpretation is entitled to substantial deference.”); *Lombera-Camorlinga*, 206 F.3d at 887 (“The State Department indicates that it has historically enforced the Vienna Convention itself, investigating reports of violations and apologizing to foreign governments and working with domestic law enforcement to prevent future violations when necessary.”).

sion “are diplomatic, political, or exist between states under international law.”¹⁰⁰

b. Reversal of Conviction and Appellate Standards of Review

Some courts have observed that even if suppression of the evidence or dismissal of the indictment were available as remedies in some cases involving violations of Article 36, the defendant would have to demonstrate prejudice, and none was established in those cases.¹⁰¹ While the cases contain no meaningful discussion of precisely what prejudice a defendant must show, they make clear that the burden falls squarely on the defendant to demonstrate it.¹⁰² In one case, in support of its determination that no preju-

¹⁰⁰ *Li*, 206 F.3d at 63; *Emuegbunam*, 268 F.3d at 392; *Page*, 232 F.3d at 541. The court in *Lombera-Camorlinga* gave the following explanation for rejecting the suppression of evidence as a remedy for a violation of Article 36:

The State Department indicates that it has historically enforced the Vienna Convention itself, investigating reports of violations and apologizing to foreign governments and working with domestic law enforcement to prevent future violations when necessary. The addition of a judicial enforcement mechanism contains the possibility for conflict between the respective powers of the executive and judicial branches. Moreover, the fact that the State Department is willing to and in fact does work directly with law enforcement to ensure compliance detracts . . . from the traditional justification for the exclusionary rule: that it is the only available method of controlling police misconduct.

206 F.3d at 887-88. See *Emuegbunam*, 268 F.3d at 394 (A determination that a judicially enforceable mechanism exists “risks aggrandizing the power of the judiciary and interfering in the nation’s foreign affairs, the conduct of which the Constitution reserves for the political branches.”).

¹⁰¹ See *Minjares-Alvarez*, 264 F.3d at 987 (“[E]ven if suppression were an appropriate remedy for a violation of the Vienna Convention, it would not be appropriate in this case because [defendant] has not demonstrated he was prejudiced by a violation of the treaty.”); *Cordoba-Mosquera*, 212 F.3d at 1196 (“Even if the remedies requested by defendants may be available in some cases involving Article 36 violations, those remedies are not available absent a showing of prejudice.”); *United States v. Doe*, 201 F.3d 437 (table), 1999 WL 691842 *1 (4th Cir. 1999) (“[Defendant] had the burden of establishing that she was prejudiced by the Government’s failure to notify her of her rights under Article 36 . . . and . . . [she] did not establish prejudice.”); *United States v. Ediale*, 201 F.3d 438 (table), 1999 WL 991435 *1 (4th Cir. 1999) (“[R]ights created by international treaties do not create rights equivalent to constitutional rights. [Defendant] therefore must establish prejudice to prevail.”); *Salas*, 1998 WL 911731 at *3 (“Although [defendant] contends that had he been informed of his right under Article 36 he would have exercised it, he has not asserted how the failure would have affected the outcome of his case.”); see also *Li*, 206 F.3d at 78 (Torruella, C.J., concurring and dissenting in part) (“I would hold that the exclusionary rule *may* be an appropriate remedy, at least where the defendant alien can demonstrate prejudice from the violation of his treaty rights.”).

¹⁰² See *Minjares-Alvarez*, 264 F.3d at 987 (“[Defendant] has not demonstrated he was prejudiced by a violation of the treaty.”); *Cordoba-Mosquera*, 212 F.3d at 1196 (“Defendants have not

<https://researchrepository.wvu.edu/wvlr/vol105/iss1/7>

dice was established, the court found significant that defendant had been raised primarily in the United States, that he understood his constitutional rights and was generally familiar with the criminal process, and that the district court had not credited his assertion that he would have contacted his consulate had he been made aware of his Article 36 rights.¹⁰³

Circuit courts also have found that reversal of a conviction is not an appropriate remedy for an Article 36 violation because the Vienna Convention does not create individually enforceable rights.¹⁰⁴ But assuming that the Vienna Convention creates individually enforceable rights, courts have upheld convictions under the plain and harmless error standards of review. Before turning to a discussion of these cases, a brief description of the difference in these standards of review is instructive.

Broadly speaking, alleged errors at trial are reviewed by courts of appeal under the plain and harmless error standards of review. When the error asserted on appeal was not raised below, the appellate court examines the challenge under the plain error standard of review.¹⁰⁵ In *United States v. Olano*,¹⁰⁶ the Supreme Court set forth the limitations on an appellate court's ability "to correct an error not raised at trial [holding that] there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'"¹⁰⁷ Even "[i]f all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"¹⁰⁸ That condition is not likely to be met where the evidence against a defendant is "overwhelming."¹⁰⁹

The harmless error standard applies when the defendant raised the issue at trial but lost. This standard is more favorable to the defendant and requires a demonstration of error that "affect[s] substantial rights"; in other

identified how the government's alleged failure to comply with Article 36 prejudiced them in any way."); *Doe*, 1999 WL 691842 at *1 ("[Defendant] had the burden of establishing . . . prejudice[.]").

¹⁰³ See *Minjares-Alvarez*, 264 F.3d at 988.

¹⁰⁴ See *Emuegbunam*, 268 F.3d at 394 (holding that reversal of a conviction is inappropriate remedy for Article 36 violation because the Vienna Convention does not create a judicially enforceable right).

¹⁰⁵ FED. R. CRIM. P. 52(b) states: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

¹⁰⁶ 507 U.S. 725 (1993).

¹⁰⁷ *Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (quoting *Olano*, 507 U.S. at 732).

¹⁰⁸ *Johnson*, 520 U.S. at 462 (quoting *Olano*, 507 U.S. at 732 (internal quotation marks and citations omitted)).

¹⁰⁹ *Johnson*, 520 U.S. at 470.

words, error that is prejudicial.¹¹⁰ In contrast to plain error, it is the government, and not the defendant, who bears the burden of persuasion as to lack of prejudice.¹¹¹ There are two types of harmless error – constitutional and non-constitutional.

When the error complained of is constitutional in nature but does not amount to a “structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself,”¹¹² the test under *Chapman v. California*¹¹³ is whether the reviewing court is “able to declare a belief that [the error] was harmless beyond a reasonable doubt.”¹¹⁴ As noted above, the burden is on the government to establish that the error was harmless beyond a reasonable doubt.¹¹⁵

The nonconstitutional harmless error standard, a less exacting standard,¹¹⁶ is set forth in *Kotteakos v. United States*¹¹⁷ and asks whether the error had a “substantial influence” on the outcome of the trial.¹¹⁸ If the review-

¹¹⁰ FED. R. CRIM. P. 52(a) states: “Any error, defect, or irregularity which does not affect substantial rights shall be disregarded.” See *Olano*, 507 U.S. at 731, 734.

¹¹¹ See *Olano*, 507 U.S. at 734 (noting how on plain error review, “[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.”).

¹¹² *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). As explained by the Court in *Fulminante*, there is a certain category of constitutional errors not subject to harmless error analysis because they represent “structural defects in the constitution of the trial mechanism[.]” *Id.* at 309. Examples of such constitutional errors include the deprivation of the right to counsel at trial, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963); a biased judge, e.g., *Tumey v. Ohio*, 273 U.S. 510 (1927); unlawful exclusion of members of a defendant’s race from the grand jury, e.g., *Vasquez v. Hillery*, 474 U.S. 254 (1986); the right to a public trial, e.g., *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984); and the right to represent oneself at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177-78 (1984). In those cases, the conviction is automatically reversal.

¹¹³ 386 U.S. 18 (1967).

¹¹⁴ *Id.* at 24.

¹¹⁵ *Id.*

¹¹⁶ See 3A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 855, at 335 (2d ed. 1982) (“The test announced in *Chapman* for determining when a constitutional error is harmless is more exacting than the test for harmlessness of errors that are not of constitutional dimension.”).

¹¹⁷ 328 U.S. 750 (1946).

¹¹⁸ *Id.* at 765. As explained by the Court in *Kotteakos*:

[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. at 764-65.

ing court “has great doubt about whether an error affected a jury in this way, the judge must treat the error as if it did so.”¹¹⁹ We now turn to the cases that have applied the plain and harmless error standards of review to appeals where defendants have challenged their convictions on the basis of alleged violations of Article 36.

c. *Application of the Plain Error Standard*

One case illustrative of plain error analysis is *United States v. Ademaj*.¹²⁰ In *Ademaj*, the defendant, an Albanian national, was convicted of several drug-related offenses.¹²¹ When challenging his conviction on appeal, he argued for the first time that his Fifth Amendment rights to due process had been violated because he was never advised of his right to request assistance from the local Albanian consulate in his defense.¹²² Applying *Olano* and cases in the First Circuit interpreting it, the court ruled that the defendant failed to show how Albanian Consul would have assisted him or “that any material due-process right was infringed by the failure to notify the Consul.”¹²³ Additionally, the court found significant that the “Vienna Convention itself prescribe[d] no judicial remedy or other recourse for its violation, let alone vacatur of a conviction.”¹²⁴ In light of these factors, the court declined to find plain error in the government’s failure to advise defendant of his right to consular notification.

Another case where the court applied plain error analysis is *United States v. Chanthandara*.¹²⁵ There, the defendant, a Laotian national, argued in a post-trial motion that the government’s failure to advise him of his rights under Article 36 violated the Vienna Convention and constituted reversible error.¹²⁶ Reviewing this contention under the plain error standard of review (since defendant raised the issue for the first time after trial), the court ruled that no such error was established since defendant spoke English, had lived in the United States since he was six years old, had “no link to Laos other than technical citizenship,” and had “never requested officials to contact the Laotian consulate.”¹²⁷

¹¹⁹ O’Neal v. McAninch, 513 U.S. 432, 438 (1995) (quoting *Kotteakos*, 328 U.S. at 764-65).

¹²⁰ 170 F.3d 58 (1st Cir.), cert. denied, 528 U.S. 887 (1999).

¹²¹ *Id.* at 61.

¹²² *Id.* at 66-67.

¹²³ *Id.* at 67.

¹²⁴ *Id.*

¹²⁵ 230 F.3d 1237 (10th Cir. 2000).

¹²⁶ *Id.* at 1255.

¹²⁷ *Id.* at 1256.

d. *Application of the Harmless Error Standard*

A case illustrating the application of the constitutional harmless error standard is *United States v. Santos*.¹²⁸ Four days after his arrest for charges relating to the possession and sale of false identification documents (but five months before he was tried), and following a confession elicited after he waived his *Miranda* rights, defendant was advised of his right to have the Mexican consulate notified of his arrest.¹²⁹ He declined consular notification and thereafter moved to suppress his statement on the ground it was obtained in violation of the Vienna Convention.¹³⁰ The district court denied the motion, the defendant was convicted, and he subsequently appealed his conviction.¹³¹

The circuit court *assumed*, for purposes of argument, that the defendant had an individually enforceable right to consular notification, that the government's violation of that right rendered his confession involuntary, and that the appropriate remedy was suppression of the confession.¹³² Nevertheless, in light of the "overwhelming evidence" of guilt,¹³³ the court, applying constitutional harmless error analysis, found that "any error in admitting [defendant's] statements was harmless beyond a reasonable doubt."¹³⁴

¹²⁸ 235 F.3d at 1105 (8th Cir. 2000).

¹²⁹ *Id.* at 1107.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 1108.

¹³³ *Id.* The court noted that the government had not "limit[ed] itself to a smoking gun – it introduced an entire arsenal" of evidence against defendant. *Id.*

¹³⁴ *Id.* In support of its holding, the court relied on *Fulminante*, where the Supreme Court ruled that the erroneous admission of an involuntary confession does not require reversal if, upon review of the remainder of the evidence, the court is satisfied that "the admission of the confession was harmless beyond a reasonable doubt." 499 U.S. at 310. As to defendant's contention that the four-day delay was a "structural defect" analogous to the right to counsel in *Gideon*, the court in *Santos* found that "[e]ven if the Vienna Convention creates an enforceable right to consular participation in his trial, five months was more than enough for [defendant] to exercise it, and his own failure to do so c[ould] not fairly be charged to the government's four-day delay." 235 F.3d at 1108; *see also* *Polanco v. United States*, Nos. 99 Civ. 5739 (CSH), 94 CR. 453 (CSH), 2000 WL 1072303, *3 (S.D.N.Y. Aug. 3, 2000) (in context of motion to vacate under 22 U.S.C. § 2255, court recognizes that "a violation of the Vienna Convention's consular notice provision does not constitute a constitutional violation or a fundamental defect in the conduct of [the] trial"). *See generally* Luna & Sylvester, *supra* note 28, at 157 (noting that argument equating denial of Vienna Convention rights to "fundamental defect" in the proceedings "has been decisively rejected").

4. Consular Notification Challenges Under Article 36 on Collateral Attack

Several cases have involved collateral post-conviction attacks for failure to advise the defendant of his right to consular notification under Article 36. The leading case involving the assertion of an Article 36 claim by a state prisoner on habeas corpus in federal court is *Breard v. Greene*.¹³⁵

In *Breard*, the Supreme Court held that the claim by the defendant was procedurally barred because it had not been raised in the state proceedings.¹³⁶ The Court in *Breard* went on to state, citing *Fulminante*,¹³⁷ that even if the defendant had not procedurally defaulted on the claim, it “[was] extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial.”¹³⁸ In other cases dealing with state prisoners seeking federal relief through habeas corpus, where there has been no procedural default, courts similarly have found that the failure to demonstrate prejudice bars relief.¹³⁹

Federal prisoners seeking collateral relief for Article 36 violations

¹³⁵ 523 U.S. 371 (1998).

¹³⁶ *Id.* at 375-76.

¹³⁷ The reference to *Fulminante* has led some commentators to note that “[i]n dicta, the Supreme Court . . . approved a ‘harmless error’ standard for violations of the Vienna Convention[.]” Luna & Sylvester, *supra* note 28, at 149.

¹³⁸ As the Court in *Breard* explained:

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

523 U.S. at 377; *see Murphy*, 116 F.3d at 100 (noting that in addition to claim being procedurally barred, defendant also “failed to establish prejudice from the alleged violation of the Vienna Convention because he [was] unable to explain how contacting the Mexican consulate would have changed either his guilty plea or his sentence”); *see also Villapuerte v. Stewart*, 142 F.3d 1124, 1125 (9th Cir. 1998) (defendant failed to bring up Article 36 claim until his third petition seeking post-conviction relief).

¹³⁹ *See Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir.), *cert. denied*, 519 U.S. 995 (1996) (assuming the Vienna Convention confers rights enforceable by individuals, violation of Article 36 did not merit reversal of conviction); *Flores v. Johnson*, 210 F.3d 456, 457-58 (5th Cir.), *cert. denied*, 531 U.S. 987 (2000) (interpreting *Faulder*); *Mami v. VanZandt*, No. 89 CIV. 0554, 1989 WL 52308 *1 (S.D.N.Y. May 9, 1989) (“Petitioner’s general assertion does not indicate how any constitutional right [was] violated. [Petitioner] gives no indication of what the Jordanian diplomatic officials could have done for him, or how he was in any way prejudiced by this.”).

have met the same fate. In *Polanco v. United States*,¹⁴⁰ for example, the defendant, a citizen of the Dominican Republic, was convicted of drug-related offenses following a bench trial.¹⁴¹ Thereafter, he filed a motion for a new trial which the district court denied.¹⁴²

On appeal, defendant challenged the denial of his motion for a new trial.¹⁴³ The Second Circuit affirmed the ruling denying the motion and defendant then filed a *pro se* petition for habeas corpus relief, alleging, *inter alia*, that the arresting officer's failure to advise him of his rights to contact consular officials deprived him of due process.¹⁴⁴

In rejecting the petition, the district court preliminarily questioned whether a violation of Article 36 was cognizable in collateral attack, since "[i]t is well-established that only claims involving a lack of jurisdiction, errors of constitutional dimension or an error of law or fact that constitutes 'a fundamental defect which inherently results in a complete miscarriage of justice' are properly reviewable on habeas corpus."¹⁴⁵ The court then went on to find that assuming such a violation was cognizable, defendant had failed to demonstrate cause and prejudice for the failure to raise it on appeal.¹⁴⁶

Specifically, the court rejected the contention that defendant was prejudiced because had he been assisted by consular officials, he "would have somehow changed his decision to waive his right to a trial by jury."¹⁴⁷ The court found that defendant had been represented by an experienced criminal lawyer and assisted by interpreters throughout the proceedings.¹⁴⁸ Furthermore, defendant had not explained how the advice consular officials would have provided to him regarding the consequences of a jury waiver would have been better or different from that given by his counsel, nor had defendant identified other areas where consular assistance would have significantly affected the manner in which the defense was conducted.¹⁴⁹ In light of all of these circumstances, the district court ruled that the defendant

¹⁴⁰ *Polanco v. United States*, No. 95 Civ. 3779, 2000 WL 1072303 (S.D.N.Y. Aug. 3, 2000).

¹⁴¹ *Id.* at *1.

¹⁴² *Id.*

¹⁴³ *Id.* at *2.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at *6 (quoting *United States v. Bokun*, 73 F.3d 8, 12 (2nd Cir. 1995) (internal quotation omitted)).

¹⁴⁶ *Id.* at *6-*8; see *United States v. Frady*, 456 U.S. 152, 167-69 (1982).

¹⁴⁷ *Polanco*, 2000 WL 1072303, at *7.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

had not shown any prejudice and denied the petition.¹⁵⁰

C. *Synthesis of Federal Criminal Cases Addressing Article 36 Violations*

The evolving federal case law makes clear that a challenge to a prosecution by a defendant (who is a foreign national) on the grounds that the government violated the consular notification provision found in Article 36 will be unavailing. Before identifying some principles which have emerged from the cases, it is useful to recognize two general points relating to the nature an Article 36 violation.

First, courts have explicitly¹⁵¹ and implicitly¹⁵² rejected the argument that the failure to advise a foreign national that he has the right to have consul notified of the arrest and to communicate with consul, amounts to a fundamental defect in the conduct of the proceedings.¹⁵³ Specifically, the

¹⁵⁰ *Id.* at *8; *see also* Gomez v. United States, 100 F. Supp. 2d 1038, 1049 (D.S.D. 2000) (defendant failed to establish the requisite cause and prejudice to excuse his procedural default but even if claim was reviewable, he failed to demonstrate how any alleged violation of the Vienna Convention prejudiced him). Ineffective assistance of counsel claims based on counsel's failure to file a motion to suppress based on an alleged violation of Article 36, or counsel's failure to request that U.S. government officials inform consul of the defendant's arrest, or to advise the client of the right to consular notification, have fared no better in collateral attack. *See, e.g.*, Gregory v. United States, 109 F. Supp. 2d 441, 450-51 (E.D. Va. 2000); Hurtado v. United States, No. Civ. 409, 2000 WL 890189 at *3-*5 (S.D.N.Y. July 20, 2000); Bennett v. United States, No. 99 Civ. 4481, 2000 WL 10213 at *1-*2 (S.D.N.Y. Jan. 5, 2000); United States v. Arango, No. 99 Civ. 3726, 1999 WL 1495422 at *3-*4 (E.D.N.Y. Dec. 29, 1999).

¹⁵¹ *See Santos*, 235 F.3d at 1108 (In rejecting defendant's contention that the four-day delay was a "structural defect" analogous to the right to counsel in *Gideon*, the court found that "[e]ven if the Vienna Convention creates an enforceable right to consular participation in his trial, five months was more than enough for [defendant] to exercise it, and his own failure to do so [ould] not fairly be charged to the government's four-day delay."); Polanco, 2000 WL 1072303, at *3; *see also supra* note 134.

¹⁵² *See supra* notes 77 & 92 (identifying cases rejecting dismissal of indictment as appropriate remedy for Article 36 violation).

¹⁵³ As discussed previously, the Supreme Court has described such fundamental defects as the right to counsel at trial, *Gideon*, 372 U.S. at 335; a biased judge, *Tumey*, 273 U.S. at 510; unlawful exclusion of members of a defendant's race from the grand jury, *Vasquez*, 474 U.S. at 254; the right to a public trial, *Waller*, 467 U.S. at 49 n.9; and the right to represent oneself at trial, *McKaskle*, 465 U.S. at 168. One commentator has noted:

A judicial posture that holds that a criminal defendant can receive due process even though provisions of the Vienna Convention concerning his arrest are violated presumably views any rights that a defendant may have under the treaty as special rights, not as fundamental rights of constitutional importance. Such a posture may make sense, considering that the Vienna Convention would create "rights" for aliens above and beyond the constitutional safeguards afforded to citizens.

contention that the right to consular notification is analogous to the Constitutional right to counsel has been rebuffed, in part because Article 36(1)(c) alludes only to the right of the consular officer “to arrange for [the] legal representation,” of the defendant and not to render legal advice.¹⁵⁴

The second general point is that there is no requirement under Article 36 of the Vienna Convention that a “detained foreign national be allowed to speak to his consulate before interrogation commences.”¹⁵⁵ Indeed, even if a defendant requests that his consul be notified, “[t]here is no prohibition anywhere in the Convention against continuing to question a foreign national while awaiting consular contact.”¹⁵⁶ With this background in mind, what are some of the legal principles relating to the assertion of an Article 36 violation as a defense to a criminal prosecution which have emerged from the cases?

First, it is not at all apparent that a foreign national has standing to raise Article 36 defensively in a federal criminal prosecution.¹⁵⁷ But even if

fair trial, and may be implied from the right not to be deprived of liberty except under due process of law.”) (footnotes omitted).

¹⁵⁴ *Alvarado-Torres*, 45 F. Supp. 2d at 993; see CONSULAR NOTIFICATION AND ACCESS, *supra* note 17, at 22 (noting that while a consular official is permitted to assist in arranging counsel, he “may or may not actually choose to take such action” and also, that such an official is “not permitted to practice law in the United States.”)

¹⁵⁵ *Carrillo*, 70 F. Supp. 2d at 860; see *Lombera-Camorlinga*, 206 F.3d at 886 (“[T]he treaty does not link the required consular notification in any way to the commencement of police interrogation.”); *Jimenez-Nava*, 243 F.3d at 199 (same); *Page*, 232 F.3d at 541 (same); *Ore-Irawa*, 78 F. Supp. 2d at 613 (nothing in the Vienna Convention requires advice “immediately upon arrest or before requesting consent to search.”); *Alvarado-Torres*, 45 F. Supp. 2d at 991 (the treaty establishes “[n]o right to speak with counsel before agents begin interrogation.”). As to the point that prompt consular notification is critical so that the foreign national can be advised of his constitutional rights, one commentator has observed:

[A]liens already receive such notification of their rights as part of their *Miranda* warnings. Also, an argument could be made that since aliens are presumably less familiar with the legal system in this country, it is necessary for someone of their own country to explain the importance of any constitutional right that they may waive. However, *Miranda* is sufficient to provide this type of protection. *Miranda* holds that any waiver of constitutional rights must be done not only voluntarily, but “knowingly and intelligently” as well. Thus, if a consulate makes contact with an arrested alien of his country after questioning, it is hard to see how the alien is prejudiced, since *Miranda* lays down broad, sweeping protections that all individuals in custody enjoy.

Deeken, *supra* note 56, at 1028-29 (footnotes omitted).

¹⁵⁶ *Rodrigues*, 68 F. Supp. 2d at 184; see *Lombera-Camorlinga*, 206 F.3d at 886 (“Nor does the treaty, as *Miranda*, require law enforcement officials to cease interrogation once the arrestee invokes his right.”); *Jimenez-Nava*, 243 F.3d at 199 (same); *Page*, 232 F.3d at 541 (same); *Alvarado-Torres*, 45 F. Supp. 2d at 993 (“[N]othing in the Convention requires officers to delay an interrogation even if a foreign national requests that officers notify the consul of his arrest.”)

¹⁵⁷ See, e.g., *Emueghunam*, 268 F.3d at 394 (violation of Article 36 does not create a judicially
<https://researchrepository.wvu.edu/wvlr/vol105/iss1/7>

he does, the overwhelming majority of the courts consider dismissal of the indictment or suppression of evidence (for example, a defendant's statement) inappropriate remedies for an Article 36 violation.¹⁵⁸ Second, to the extent a few courts have left open the possibility of suppression of evidence as a remedy for a violation of Article 36, the burden is on the defendant to establish prejudice.¹⁵⁹ And when a foreign national has knowingly and voluntarily waived his *Miranda* rights, it is highly improbable that such a burden could be met.¹⁶⁰ Third, a defendant who does not raise an Article 36 violation directly in his or her prosecution will face a grave challenge in meeting the procedural default standard on collateral attack.¹⁶¹ Finally, the standard

enforceable right; therefore, vacation of conviction is not an appropriate remedy); *Jimenez-Nava*, 243 F.3d at 198 (Vienna Convention does not create "judicially enforceable rights of consultation between a detained foreign national and his consular officer."); see also *Minjares-Alvarez*, 264 F.3d at 986 ("It remains an open question whether the Vienna Convention gives rise to any individually enforceable right."); *Li*, 206 F.3d at 62 ("[I]t is far from clear that the Vienna Convention confers any rights upon criminal defendants.")

¹⁵⁸ See *supra* notes 77 & 91.

¹⁵⁹ See *supra* note 89. As noted by two commentators:

Treaty-based rights . . . have historically been considered the equivalent of those found in federal statutes. Once this is conceded, the judiciary's interpretation of rights under the Vienna Convention is wholly consistent with criminal procedure jurisprudence. Unless a statute provides otherwise, the denial of a non-constitutional right is typically analyzed by the trial court under the rubric of prejudice – whether the violation has a substantial and injurious effect on a defendant's case.

Luna & Sylvester, *supra* note 28, at 180.

¹⁶⁰ See, e.g., *Ore-Irawa*, 78 F. Supp. 2d at 613 ("[T]he fact that the defendant was advised of his rights under *Miranda* before consent to search was requested of him seriously undermines any claim of prejudice."); *Rodriguez*, 68 F. Supp. 2d at 184 ("Prejudice has never been – nor could reasonably be – found where a foreign national was given, understood, and waived his or her *Miranda* rights. Courts have uniformly found that no prejudice can exist in that situation, because the advice a consular official would give would simply augment the content of *Miranda*, which the foreign national has already waived."); *Alvarado-Torres*, 45 F. Supp. 2d at 990 ("[B]ecause agents informed Defendant of her *Miranda* rights, which she understood, Defendant cannot establish prejudice on the grounds that the consul did not readvertise her of virtually the same rights.") (footnote omitted); see also *Jimenez-Nava*, 243 F.3d at 199 ("[W]here *Miranda* warnings have been given, three times no less, we will not create a rule that increases the risk that a guilty defendant, who is aware of his rights under the U.S. Constitution and as articulated by the Supreme Court, go free."); *Ediale*, 201 F.3d at 438. ("[Defendant] concedes that the FBI agents advised him of his rights under *Miranda* . . . and that he signed a waiver stating that he understood those rights. [Defendant] does not demonstrate how assistance from the Nigerian Consulate would have affected the outcome of his trial.")

¹⁶¹ In *Breard*, the Supreme Court pointed out how under the Antiterrorism and Effective Death Penalty Act, enacted in 1996, "a habeas petitioner alleging that he is held in violation of 'treaties of the United States' will, as a general rule, not be afforded an evidentiary hearing if he 'has failed to develop the factual basis of [the] claim in State court proceedings.'" 523 U.S. at 376 (quoting 28 U.S.C. § 2254(a) & (e)(2)).

of appellate review governing a conviction where the defendant raised the issue of an Article 36 violation below would appear to be the one found in *Kotteakos*, which applies to non-constitutional error.¹⁶²

VI. CONCLUSION

Under Article 36 of the Vienna Convention, the United States is obligated to advise foreign nationals who are detained or arrested that they have the right to have their consul notified of this event and also to communicate with the consul. Enforcement of this obligation is called for by the plain terms of the treaty¹⁶³ and makes the case stronger for the United States when it seeks to obtain access to its nationals abroad when they become entangled in criminal matters.¹⁶⁴

The State Department's 1998 publication regarding consular notification and access, and the Department of Justice regulations relating to the same, demonstrate a commitment on the part of the United States government to abide by its obligations under Article 36. Indeed, the State Department has published a card captioned "Consular Notification and Access Reference Card: Instructions for Arrests and Detention of Foreign Nationals" which summarizes the basic consular notification procedures.¹⁶⁵ The card provides suggested statements to be read to arrested or detained foreign nationals regarding consular notification, depending upon whether such notification is or is not mandatory.¹⁶⁶ Nonetheless, there will be numerous in-

¹⁶² A defendant could make the argument that one of the factors to consider in assessing the voluntariness of a confession under 18 U.S.C. § 3501(b) is whether he was advised of his right to have consul notified of his arrest and to contact consul. *See United States v. Cebreros-Barraza*, 4 Fed. Appx. 492, 492 (9th Cir. 2001). If a court on appeal were to rule, or assume for purposes of argument, that failure to advise a defendant of his right to consular notification rendered his confession involuntary, such error would be analyzed under the *Chapman* standard of review. *See Santos*, 235 F.3d at 1107-08.

¹⁶³ *See Aceves, supra* note 10, at 314 ("[T]he United States must comply with its treaty obligations. Quite simply, the United States signed and duly ratified the Vienna Convention. If the United States seeks to affirm the rule of law in both word and deed, it must comply with and fully implement its international obligations.")

¹⁶⁴ *See generally Hanna, supra* note 3, at 177 ("If the United States wishes foreign countries to honor the rights of its citizens under the Vienna Convention, it must honor the rights of foreign nationals in the American judicial system as well."); *Schiffman, supra* note 11, at 60 ("On the international plane, the U.S. is likely to incur a reciprocal loss of protection for its own nationals abroad as well as liability before international tribunals unless its compliance with Article 36 improves.")

¹⁶⁵ *See Consular Notification and Access Reference Card: Instructions for Arrests and Detention of Foreign Nationals* (Feb. 1998).

¹⁶⁶ *See Vienna Convention, supra* note 1. For example, with respect to cases where consular notification is at the foreign national's option, the card suggests the following statement:

stances where foreign nationals who are criminally prosecuted are advised of their right to consular notification, if at all, only after the prosecution is underway or perhaps even completed. As the evolving federal criminal law makes clear, the remedy for an Article 36 violation does not appear to include any action that would affect the validity of the prosecution and conviction of a defendant.¹⁶⁷ Instead, the remedy is confined to diplomatic and political interaction, or other action under international law, between the United States and the country of the foreign national.¹⁶⁸

As a non-U.S. citizen who is being arrested or detained, you are entitled to have us notify your country's consular representatives here in the United States. A consular official from your country may be able to help you obtain legal counsel and may contact your family and visit you in detention, among other things. If you want us to notify your country's consular officials, you can request this notification now, or at any time in the future. After your consular officials are notified, they may call or visit you. Do you want us to notify your country's consular official?

Supra note 165.

¹⁶⁷ See *United States v. Rodrigues*, 68 F. Supp. 2d 178, 186 (E.D.N.Y. 1999) ("None of the almost 200 signatory states allows an Article 36 failure to affect their criminal proceedings in any way whatsoever. This practice is consistent with the fact and common international understanding that consular assistance is not essential to the criminal proceeding against the foreign national.") (quotation omitted).

¹⁶⁸ See *Emuegbunam*, 268 F.3d at 392; *Page*, 232 F.3d at 541; *Li*, 206 F.3d at 63; *Rodrigues*, 68 F. Supp. 2d at 186.

