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The Vienna Convention on Consular Relations in the United States Courts

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TABLE OF CONTENTS

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I have been a stranger in a strange land.[1]

I. INTRODUCTION

We live in a world without true borders. Almost every facet of life crosses the geographical boundaries of nations with ease. With the creation of the Internet, communication across the world is easily accessible and instantaneous.[2] The

1. Exodus 2:22 (King James).

2. *See generally* Sean Selin, Comment, *Governing Cyberspace: The Need for an International Solution*, 32 GONZ. L. REV. 365 (1996-1997); *see also* Henry H. Perritt, Jr, *Cyberspace and State Sovereignty*, 3 J. INT'L. LEGAL STUD. 155 (1997); James Alexander French and Rafael X. Zahralddin, *The Difficulty of Enforcing Laws in the Extraterritorial Internet*, 1 NEXUS J. OP. 99 (1996); *see also* Timothy S. Wu, Note, *Cyberspace Sovereignty?—The Internet and the International System*, 10 HARV. J. L. & TECH. 647 (1997); *see also* Henry H. Perritt, Jr., *Symposium on the Internet and Legal Theory: The Internet is Changing International Law*, 73 CHI.-

pollution from one country effects the environment of the entire world.[3] The formation of the International Criminal Court will bring violations of international human rights laws to a new level.[4] Commerce crosses geographical borders like never before.[5] These societal changes bring our world closer together. However, there are prices to pay for this global community. One of the prices is that foreigners who can enter a nation with such ease, can also break the law of that nation.

When arrested in a foreign land, a foreign criminal is a stranger in a strange land. He is subject to the laws and customs of that nation. However, he is also protected by the customary principles of international law. One of these principles is the right of a foreign national to contact his consulate upon detention or arrest in a foreign land. As stated by the International Court of Justice, "the unimpeded conduct of consular relations, which have also been established between peoples since ancient times . . . [is important in] promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other states . . . ."[6] The Vienna Convention on Consular Relations outlines this principle in Article 36.[7]

KENT L. REV. 997 (1998).

3. *See generally* George Richards, *Environmental Labeling of Consumer Products: The Need for International Harmonization of Standards Governing Third-Party Certification Programs*, 7 GEO. INT'L ENVTL. L. REV. 235 (1994).

4. *See generally* Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73 (1995); *see also* Justice Richard Goldstone, 1998 Otto L. Walter Lecture: International Human Rights at a Century's End, *in* 15 N.Y.L. SCH. J. HUM. RTS. 241 (1999); Patricia A. McKeon, Note, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 St. JOHN'S J.L. COMM. 535 (1997); Christopher J. McGrath, *Today's Transnational Crime Epidemic: The Necessity of an International Criminal Court to Battle Misdeeds Which Transcend National Borders*, 6 D.C.L. J. INT'L L. & PRAC. 135 (1997).

5. *See generally* Elissa Safer, *Protecting Trade Secrets in a World Without Borders*, 27-APR COLO. LAW. 67 (1998).

6. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) Request for the Indication of Provisional Measures, *reprinted in* 19 I.L.M. 139 (1980) at 145-46.

7. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 UST 77, 596 UNTS 261, TIAS No. 6820 [hereinafter the Treaty, the Vienna Convention, or the Convention]. Article Thirty-Six states in full:

> Communication and Contact with Nationals of the Sending State
>
> 1. With a view to facilitating the exercise of consular functions relation to nationals of the sending State:
>
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal

A consul provides assistance to a foreign national that the arresting government could never offer. Consular officers provide understanding of the arresting government's laws and customs.[8]

As a party to the Vienna Convention, the United States has vigorously demanded enforcement of Article 36 when American citizens are detained abroad.[9] However, the United States has a less than perfect record when it comes to affording these rights to foreign nationals detained in America.[10] The United States has ignored rulings from the International Court of Justice concerning its gross violations of the Vienna Convention.[11] American courts have continually found ways to keep from affording foreign nationals their rights under the Vienna Convention. The Supreme Court has refused to rule on the matter, leaving the lower federal and the state courts confused and divided.[12] The United States has to recognize that its citizens are not superior to the rest of the world. The United States must fulfill its obligations under the Vienna Convention. To continue the violations of the Convention is not only ignoring the United States' international obligations, but is placing Americans at risk of the same violations when traveling abroad.

American attorneys must be aware of the applicability of the Vienna Convention when representing foreign defendants. The majority of American cases dealing with the Vienna Convention have been capital crimes,[13] immigration

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

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

8. *See* Mark J. Kaddish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 604-05 (1997); *see also* Brief Amicus Curiae of the Government of Canada in Support of an Application for the Writ of Habeas Corpus in the Case of Ex Parte Joseph Stanley Faulder [hereinafter Canadian Amicus]; John Cary Sims & Linda E. Carter, *Representing Foreign Nationals: Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool*, THE CHAMPION, Sept./Oct. 1998, at 28.

9. *See infra* Part II.A.2.a (discussing the adoption of the Vienna Convention in the United States); *see also infra* Part II.B (discussing the United States' use of the Vienna Convention in Syria and Iran).

10. *See infra* Part III, V (presenting the cases that apply the Vienna Convention).

11. *See, e.g.*, Breard v. Greene, 523 U.S. 371 (1998); LaGrand v. Stewart, 526 U.S. 111 (1999).

12. The Supreme Court denied certiorari for three foreign defendants. *See, e.g.*, LaGrand v. Stewart, 526 U.S. 111 (1999); Faulder v. Johnson, 519 U.S. 995 (1996); Breard v. Greene, 523 U.S. 371 (1998).

13. *See, e.g.*, LaGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998); Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997); Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996); Breard v. Commonwealth, 248 Va. 68, 445 S.E.2d 670 (1994); State v. Reyes, 740 A.2d 7 (Del.Super.Ct. 1999).

cases,[14] and narcotics cases.[15] Those cases have held that foreign defendants must meet a number of requirements to invoke the Vienna Convention. First, the foreign defendant must raise the issue in a timely manner.[16] Second, the foreign defendant must establish that the Vienna Convention establishes a private right for individuals to enforce.[17] Third, the defendant must prove that he suffered actual prejudice from the violation of his right to consular notification.[18] Finally, the defendant must ask for an appropriate remedy.[19]

This comment discusses the Vienna Convention on Consular Relations and the United States courts' interpretation of that treaty. Part II explains the history and formation of the Vienna Convention, its place in American law, and the United States' use of it. Part III provides a detailed look at five of the precedent setting cases dealing with the Vienna Convention in America. Part IV discusses the United States Department of State handbook regarding consular notification and access. Part V examines eight cases that began after the passage of the State Department handbook to see how the courts are applying the Vienna Convention.

II. BACKGROUND

A. History of the Vienna Convention on Consular Relations

1. Formation

Following the end of the Second World War, there was a growing realization that the newly formed United Nations should attempt to codify consular law.[20] In

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14. *See, e.g.*, Waldron v. Immigration and Naturalization Serv., 17 F.3d 511 (2d Cir. 1994); United States v. Rangel-Gonzales, 617 F.2d 529 (9th Cir. 1980); United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979); United States v. Chaparro-Alcantara, 37 F. Supp. 2d 1122 (C.D.Ill. 1999).

15. *See, e.g.*, United States v. Carrillo, 70 F. Supp. 2d 854 (N.D.Ill. 1999); United States v. Miranda, 65 F. Supp. 2d 1002 (D.Minn. 1999); United States v. Rodrigues, 68 F. Supp. 2d 178 (E.D.N.Y 1999).

16. *See* Breard v. Pruett, 134 F.3d. 615 (4th Cir. 1998) (finding that in order for a foreign defendant to raise the Vienna Convention on in a federal habeas corpus action, he must have first raised it in state court proceedings); *see also* Reyes, 740 A.2d at 14–15 (holding that evidence obtained in violation of Reyes' Vienna Convention right to consular notification will be suppressed because *inter alia* he asserted the violation in a timely manner).

17. *See infra* Part V.A.

18. *See infra* Part V.B.

19. *See infra* Part V.C.

20. *See* LUKE T. LEE, CONSULAR LAW AND PRACTICE 23 (2d ed. 1991) (discussing that the move to codify consular law was part of the effort of the United Nations to move "towards the progressive development of international law and its codification"). This is indicated in Article 13(1) of the Charter of the United Nations which reads: "The General Assembly shall initiate studies and make recommendations for the purpose of . . . encouraging the progressive development in international law and its codification." *Id.* at n.117; *see also* Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 933, 3 Bevans 1153, *entered into force*, Oct. 24, 1945.

1949, the International Law Commission (ILC)[21] determined that consular relations was an area ripe for codification.[22] In 1955, the ILC began examining the subject of consular relations.[23] Following the adoption of the Draft Articles on Consular Relations,[24] the General Assembly of the United Nations announced that they would convene a conference to form an international agreement on consular relations.[25] Ninety-two nations assembled in Vienna, Austria from March 4 ,1963 to April 22, 1963 for the United Nations conference.[26] The Vienna Convention on Consular Relations was created on April 24, 1963.[27] On March 19, 1967, the Vienna Convention entered into force.[28] To date, more than 160 countries have ratified the Treaty.[29] In addition to the Vienna Convention, many countries have entered into

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21. *See* International Law Commission (last modified Mar. 9, 2000) <http://www.un.org/law/ilc/introfra.htm>.

> The International Law Commission was established by the General Assembly [of the United Nations] in 1947 to promote the progressive development of international law and its codification. The Commission, which meets annually, is composed of 34 members who are elected by the General Assembly for five year terms and who serve in their individual capacity, not as representatives of their Governments.
>
> Most of the Commission's work involves the preparation of drafts on topics of international law. Some topics are chosen by the Commission and others referred to it by the General Assembly or the Economic and Social Council. When the Commission completes draft articles on a particular topic, the General Assembly usually convenes an international conference of plenipotentiaries to incorporate the draft articles into a convention which is then open to States to become parties.

22. *See* William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies.* 31 VAND. J. TRANSNAT'L L. 257, 263 (1998).

23. *See* Kaddish, *supra* note 8, at 567 (discussing that the ILC began the work on the first draft in 1955 and completed and sent it out for comment in 1960); *see also* LEE, *supra* note 20, at 24. For an explanation of the general purpose of consular relations; LEE, *supra* note 20, at 3 (discussing that consular institutions first "developed out of the necessities of international trade"). "By generating a sense of security and confidence conducive to trade, travel, and residence in foreign lands, the consul has grown in importance until today we find consuls in almost all major cities of the world." *Id.*; *see also* Vienna Convention, *supra* note 7, Preamble (recalling that "consular relations have been established between peoples since ancient times").

24. Aceves, *supra* note 22 at 257, 263.

25. Kaddish, *supra* note 8; *see also* LEE *supra* note 20, at 24 (discussing that the ILC completed the first draft on the subject of consular relations in 1960 and submitted it to the Member States for their comments). The ILC adopted the final draft in 1961 and the United Nations General Assembly decided the following year to convene a United Nations Conference on the subject in 1963. *Id.*

26. *See* LEE, *supra* note 20, at 24 (discussing that Vienna was chosen as the site for the convention because the city had a rich history of consular relations and was even home to the Konsular-Akademie, which was founded in 1754 with the purpose of training consuls).

27. *See* Vienna Convention, *supra* note 7; *see also* Kaddish, *supra* note 8, at 567.

28. Aceves, *supra* note 22, at 263.

29. *See* State Department, Pub. No. 10518, *Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them* (released Jan. 1998) at 42 [hereinafter *Consular Notification and Access* or *The Handbook*].

bilateral agreements dealing with consular relations to supplement the Vienna Convention.[30]

The purpose of the Treaty is to provide certain and consistent laws to govern consuls.[31] The Vienna Convention codifies the customary standards of international law.[32] The Treaty deals with various aspects of consular duties, including: the general details of setting up a consul, the duties and privileges of the consul staff, and the rights of the foreign nationals with respect to their consul.[33] A specific

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30. *Id.* (stating that one of the main purposes of the bilateral agreements is to mandate that the consulate is to be notified immediately upon the arrest of one of their citizens, regardless of the national's wishes). The handbook further states that the countries that have entered into bilateral agreements that require mandatory notification have signed one of three treaties. *Id.* Those three treaties may be found at TAIS 11083, 3 UST 3426, and 19 UST 5018. *Id.*; *see also* Aceves, *supra* note 22, at 266 (explaining that in addition to these bilateral agreements, "the United States has also entered into agreements that contain a most favored nation clause with respect to consular and diplomatic agents . . . [which] require the United States to treat the consular officials of signatory countries no less favorably than consular officials from other countries"); LEE, *supra* note 20, at 134 (stating that prior to the adoption of the Vienna Convention, the United States relied primarily on bilateral agreements and that twenty-eight of those agreements contained provisions guaranteeing the rights of detained nationals to contact their consulate). Those agreements were with Algeria, China, Costa Rica, Cyprus, Denmark, Ethiopia, France, Germany, Ghana, Iran, Ireland, Israel, Jamaica, Japan, Korea, Malaya, Muscat, The Netherlands, Nicaragua, Nigeria, Pakistan, the Phillippines, Sierra Leone, Tanganyika, Trinidad and Tobago, Uganda, the United Kingdom, and Vietnam. *Id. But see* Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 HOUS. J. INT'L L. 375, 384 (1997) (hypothesizing that the Vienna Convention is the most important instrument in the arena of consular relations); *see also* LEE, *supra* note 20, at 26 (stating that "the Vienna Convention on Consular Relations . . . was undoubtedly the single most important event in the entire history of the consular institution. Indeed, after 1963, there can be no settlement of consular disputes or regulation of consular relations . . . without reference or recourse to the Vienna Convention").

31. *See* Thomas Healy, Note: *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726, 1743 (1998) (explaining that the expansion of international trade following World War II led world leaders to convene to draft the Vienna Convention).

32. *Consular Notification and Access*, *supra* note 29, at 42; *see also* LEE, *supra* note 20, at 4–23 (tracing the history of consular relations back to the ancient Greek city-states, through the Roman Empire, the expansion of international trading following the Crusades, on into the Middle Ages, through the opening of Asia to Western trade during the nineteenth century, the bilateral agreements of the early twentieth century, and ending in the formation of the Vienna Convention); B. SEN, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 334–35 (3d rev. ed. 1988) (stating that one such provision of customary international law was the Doctrine of Minimum Standard of Treatment which was developed in the 19th and early 20th centuries).

> [It] was based on the principle that although a state was not obligated to admit foreign nationals into its territory, but once a state agreed to admit an alien ti was bound to accord him a certain standard of treatment which would be in keeping with the notions of justice, irrespective of the manner in which it treated its own nationals. It meant principally that in the matter of personal liberty and property rights of aliens, the receiving state was required to provide for certain minimum safeguards; and if it failed to do so it would be answerable to the home state of the aggrieved alien which could take up his cause in the exercise of its right of diplomatic protection.

Id.; Philippe J. Sands, *The Future of International Adjudication*, 14 CONN. J. INT'L L. 1, 6 (1999) (stating that "most of [the Vienna Convention's] provisions are generally considered to reflect customary international law").

33. *See generally* Vienna Convention, *supra* note 7.

privilege afforded to foreign nationals, detailed in Article 36 of the Treaty, is the right to contact one's consulate when arrested or detained by the local authorities.[34]

> A primary task of consuls is to render assistance to their citizens. Consular access and assistance become particularly indispensable when foreign nationals face prosecution, sentencing, incarceration, or death under local legal systems. '[F]reedom of communication between consuls and their nationals may be regarded as so essential to the exercise of consular functions that its absence would render meaningless the establishment of consular functions.'[35]

A national's communication with his consulate upon detention is "essential to guard against the possible mistreatment of prisoners, and to facilitate the presentation of an effective legal defense by those possibly facing serious charges in a language they do not understand under a legal system with which they are unfamiliar."[36] Consular officers provide various useful services for their detained nationals. Consuls contact the national's family to offer assistance and comfort.[37] Furthermore, versed with the national's language, consuls are better equipped to explain foreign legal systems as well as the statements and desires of the national to authorities.[38] What is more, the consul can better understand the cultural differences that exist between the two countries.[39] In short, a consular official

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34. *See* Vienna Convention, *supra* note 7, art. 36; *see also* Kaddish, *supra* note 8, at 569–71 (discussing the history of Article 36 and the meaning of terms used within it, such as "detained" and "arrest," that were not defined in the text of the Vienna Convention, but were defined by the Department of State's Foreign Affairs Manual); LEE, *supra* note 20, at 133 (recognizing that one of the chief functions of a consul is to communicate with their nationals when they have been detained in prison); Canadian Amicus, *supra* note 8, at 12 (discussing that Article 36 also confers a duty upon nations to protect their own citizens when problems arise in a foreign land).

35. Brief for the National Association of Criminal Defense Lawyers, Massachusetts Association of Criminal Defense Lawyers and Amnesty International as Amici Curiae In Support of Appellant, United States v. Ben Lin at 11 [hereinafter Ben Lin Amicus], *quoting* LEE, *supra* note 20 (stating further that there are numerous other sources of international law that reinforce a right to consular assistance such as the *UN Standard Minimum Rules for the Treatment of Prisoners* (ECOSOC res. 663 (1957)), The *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment* (U.N.G.A. 43/173 (1988)), *UN Rules for the Protection of Juveniles Deprived of Their Liberty*, (U.N.G.A. Res. 45/113 (1990)), *UN Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live* (U.N.G.A. Res. 40/144 (1985)), and *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M). *Id.* at 11–13.

36. *See* Sims and Carter, *supra* note 8, at 28, 30 (stating further that "[c]onsular officials have a strong interest in the well-being of their nationals who are visiting or living in a foreign country . . . . All governments want to monitor the criminal prosecutions of their nationals to ensure fair treatment").

37. *See id.* at 30.

38. *See id.*

39. *See id.*

provides assistance that can prove invaluable in understanding the judicial system and rights contained therein and in obtaining a proper defense.[40]

2. *The Vienna Convention in the United States*

a. Adoption

The United States signed the Vienna Convention on April 24, 1963,[41] the Senate approved membership on October 22, 1969,[42] and President Nixon ratified it on November 12, 1969.[43] The treaty officially entered into force in the United States on December 24, 1969.[44] The Vienna Convention was never codified by federal statute because it is a self-executing treaty.[45] In demonstrating the importance of the Vienna Convention, the United States Department of Justice and the Immigration and Naturalization Service (INS) codified the consular notification components of the Vienna Convention.[46]

b. Place of Treaties in the United States

i. Supremacy Clause

"A treaty is 'an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international

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40. *See* Canadian Amicus, *supra* note 8, at 10. Canada's Brief intimates that the typical situation involves a foreign national

> who is not relatively sophisticated, or who lacks strong connections in the arresting community, is especially vulnerable to making dangerously uninformed choices in exercising even the rights of which the arresting authorities do inform him. He is therefore almost certain to be unable to avail himself of rights of which the arresting authorities fail to inform him. Finally, with no one to explain his predicament in the context of the more familiar system of his home country, a detained foreign national is at a considerable disadvantage in establishing a defense.

Id.

41. Aceves, *supra* note 23, at 267.

42. *Id.* at 268.

43. *See id.* at 267–68 (noting that although the United States signed the Treaty in 1963, President Nixon did not automatically submit the Treaty to Congress for approval because he was originally intending to rely on bilateral consular agreements, but that the administration finally submitted it because the Vienna Convention "constitutes an important contribution on the development and codification of international law and should contribute to the orderly and effective conduct of consular relations between the States." (quoting Ex. E. 91st Cong., 1st Sess., at Vii (Statement of Secretary of State William Rogers)).

44. *Id.* at 269; *see also Consular Notification and Access*, *supra* note 29, at 42, (describing that prior to the adoption of the Vienna Convention, the United States was involved in consular relations with other nations).

45. *See infra* Part II.A.2.b.ii; *see also Consular Notification and Access*, *supra* note 29, at 42 (instructing that it is self-executing because the authorities can "implement these obligations through their existing powers").

46. *See infra* Part II.A.2.c.i. and Part II.A.2.c.ii.

law.'"[47] Article VI, section 2 of the United States Constitution provides that: "This Constitution, and the Laws of the United States . . . and all Treaties made, or which shall be made, . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound . . . ."[48] A treaty's authority is comparable in American law to a federal statute.[49] Like a federal statute, a treaty binds the individual states[50] and it may not contradict the Constitution.[51]

ii. Self-Executing

A treaty is self-executing in that it is effective immediately without the necessity of ancillary legislation, court action or any implementing action. Chief Justice Marshall in *Foster v. Neilson*[52] set out the original principle that

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47. *See* Louis Henkin, FOREIGN AFFAIRS AND THE US CONSTITUTION, 2D ED. (1996) at 184–85 & n.36 *quoting* RESTATEMENT (n.2 to Preface) § 301 adapting Article 1 of the Vienna Convention on the Law of Treaties. Treaty is defined as:

> A compact made between two or more independent nations with a view to the public welfare. An agreement, league, or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns or the supreme power of each state. A treaty is not only a law but also a contract between two nations and must, if possible, be so construed as to give full force and effect to all its parts. The term has a far more restricted meaning under U.S. Constitution than under international law.

BLACK'S LAW DICTIONARY 1502 (6th ed. 1990) (citations omitted); The Paquete Habana, 175 U.S. 677, 700 (1900) (stating that "[i]nternational law is part of our law").

48. U.S. CONST. art. VI, § 2; *see also* Sims & Carter, *supra* note 8, at 29 (declaring that "state officials are duty-bound to comply with the [Vienna Convention]").

49. *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. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.").

50. *See* Reid v. Covert, 354 U.S. 1, 16–18 (1957). There is nothing in the language of the Supremacy Clause

> which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result . . . . There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty. For example, in Geofroy v. Riggs, 133 U.S. 258, 267, 10 S.Ct. 295, 297, 33 L.Ed. 642, it declared: 'The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government or in that of one of the States, or a session of any portion of the territory of the latter, without its consent.'

Id. (internal footnotes omitted).

51. *But see* Molora Vadnais, *A Diplomatic Morass: An Argument Against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations*, 47 UCLA L. REV. 307, 322-32 (1999) (discussing whether actions of the federal government that would tend to force the states to comply with the consular notifications portions of Article 36 would be constitutional or not, under such precedence as *Missouri v. Holland*, 252 U.S. 416 (1920), *Reid v. Covert*, 354 U.S. 1 (1957), *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997)).

52. 27 U.S. 253 (1829).

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, or itself, the object to be accomplished, especially so are as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.[53]

In determining whether or not a treaty is self-executing, courts look to both the intent of the signatory parties, as evidenced by the language of the instrument and to the circumstances surrounding the execution of the treaty.[54]

However, some United States state officials have conveyed that they do not feel that the Vienna Convention binds them.[55]

c. Codification and Adoption by Federal Agencies and Departments

The right of foreign nationals to be informed of their right to consular assistance has been adopted or codified by many federal agencies and departments. For example, the United States Department of Justice and the Immigration and Naturalization Service have codified the provisions of Article 36.[56] In addition, the United States Department of State made a notable contribution by creating a manual outlining United States obligations under the Convention.[57]

i. United States Department of Justice

The United States Department of Justice codified the consular notification for arrests and detention in title twenty-eight of the Code of Federal Regulations Section 50.5. Under this rule, every time the Department of Justice detains or

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53. *Id.* at 314.

54. *Id.* at 310–16.

55. *See* Amnesty International, *United States of America: Violation of the Rights of Foreign Nationals Under Sentence of Death* (January 1998), *available in* AI Index: AMR 51/01/98 *and* <http://www.amnesty.it/ailib/aipub/1998/AMR/25100198.htm> (explaining that shortly before the execution of Irineo Tristan Montoya, a Mexican national who did not understand English and was admittedly not afforded his rights to consular assistance despite the fact that authorities knew he was Mexican, Texas officials responded to the U.S. State Department that Texas authorities would refuse to "investigate the violation or to assess its possible impact, on the grounds that Texas was not a signatory to the Vienna Convention").

56. *See infra* Part IV.

57. *Consular Notification and Access*, *supra* note 29, discussed *infra* at Part IV.

arrests a foreign national, the Department official must inform the foreign national of his right to contact his consulate.[58] Section 50.5 provides:

> (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 case, he will be advised of such notifications 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, will inform the nearest U.S. Attorney of the arrest and of the arrested person's wishes regarding consular notification.
>
> (3) The U.S. Attorney shall then notify the appropriate consul except where he has been informed that the foreign national does not desire such notification to be made. However, if there is a treaty provision in effect which requires notification of consul, without reference to a demand or request of the arrested national, the consul shall be notified even if the arrested person has asked that he not be notified. In such case, the U.S. Attorney shall advise the foreign national that his consul has been notified and inform him that notification was necessary because of the treaty obligation.[59]

ii. Immigration and Naturalization Service

The INS codified the consular notification requirement in 8 Code of Federal Regulations § 236.1(e):

> (e) Privilege of communication. Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States . . . . When notifying

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58. 28 C.F.R. Section 50.5.

59. *Id.*; *see also* Aceves, *supra* note 22, at 273–74 (discussing the adoption of the consular notification provisions of Article 36 by the Justice Department); Bennett v. U.S., 2000 WL 10213 at *1 (arguing that the Vienna Convention and 28 C.F.R. Section 50.5 were violated by the failure of the government to inform him of his right to consular assistance); U.S. v. Briscoe, 69 F. Supp. 2d 738, 741 (1999) (claiming that FBI agents violated 28 C.F.R. Section 50.5 by neglecting to inform him of his right of consular notification). *U.S. v. Carrillo* and *U.S. v. Superville, discussed supra* Part V.

consular or diplomatic officials, Service officers shall not reveal the fact that any detained alien has applied for asylum or withholding of removal.[60]

iii. United States Department of State

The United States Department of State has taken two major steps to inform local governments of the consular notification aspects of the Vienna Convention. First, the Department issued periodic notices to local governments explaining the requirements.[61] Second, the Department issued a handbook detailing the requirements of the Vienna Convention and answering questions that local authorities might have about the implementation of the Convention.[62] In addition to informing local authorities of the Vienna Convention requirements, the Department has also integrated the provisions in the manuals issued to American Diplomatic staff abroad.[63]

The Department of State outlined the provisions of Article 36 in its Foreign Affairs Manual which states in pertinent part, "Article 36 of the Vienna Consular Convention provides that the host government must notify the arrestee without delay of the arrestee's right to communicate with the American consul."[64] In 1986, the Department of State released a bulletin to law enforcement agencies that outlined those provisions of the Vienna Convention that the Department later incorporated into the Department of State handbook. That bulletin set forth the following instructions for government officials: "[t]he arresting official should in all cases immediately inform the foreign national of his right to have his government notified concerning the arrest/detention. If the foreign national asks that such notification be made, you should do so without delay by informing the nearest consulate or embassy."[65]

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60. *See* 8 C.F.R. § 236.1(e) (2000). The following countries are to be immediately notified (meaning within seventy-two hours of the arrest or detention) even if the alien does not request such notification: Albania, Antigua, Armenia, Azerbaijan, Bahamas, Barbados, Belarus, Belize, Brunei, Bulgaria, People's Republic of China (unless it's a Taiwan national carrying a Republic of China passport in which case, the office of the Taiwan Economic and Cultural Representative's Office), Costa Rica, Cyprus, Czech Republic, Dominica, Fiji, Gambia, Georgia, Ghana, Grenada, Guyana, Hungary, Jamaica, Kazakhstan, Kiribati, Kuwait, Kyrgyzstan, Malaysia, Malta, Mauritius, Moldova, Mongolia, Nigeria, Philippines, Poland, Romania, Russian Federation, St. Kitts/Nevis, St. Lucia, St. Vincent/Grenadines, Seychelles, Sierra Leone, Singapore, Slovak Republic, South Korea, Tajikistan, Tanzania, Tonga, Trinidad/Tobago, Turkmenistan, Tuvalu, Ukraine, United Kingdom (including British dependencies of Anguilla, British Virgin Islands, Hong Kong, Bermuda, Montserrat, and the Turks and Caicos Islands), U.S.S.R. (including U.S.S.R. successor states of Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan), Uzbekistan, Zambia). *Id.* § 236.1(c) n.1.

61. *See* Kaddish, *supra* note 8, at 599 (discussing United States Department of State Notice, October 1986).

62. *Consular Notification and Access*, *supra* note 29, *discussed infra* at Part IV.

63. *Id.*

64. U.S. Dep't. of State, 7 Foreign Affairs Manual § 411.1 (1984), *reprinted in* Kaddish, *supra* note 8, at 599.

65. *See* Kaddish, *supra* note 8, at 599 (discussing United States Department of State Notice, October 1986).

B. United States' Use of the Vienna Convention

In October of 1973, the United States Department of State clarified its position by stating that "in the Department's view, Article 36 of the Vienna Convention contains obligations of the highest order and should not be dealt with lightly."[66] The United States takes advantage of the Vienna Convention in securing the rights of and gaining access to detained American citizens abroad.[67] The treaty has also been used to resolve and seek redress for hostage situations.[68]

1. Syrian Case

In 1975, Syrian security forces detained two American citizens.[69] Syrian officials refused to give the United States consular officials access to the detained nationals.[70] The State Department notified the United States Embassy in Damascus of their responsibility to inform the Syrian government of the importance of consular access.[71] According to the State Department, the right of consular access is well established under the Vienna Convention, customary international law, bilateral agreements between the United States and Syria, and by humanitarian considerations.[72] The Department of State added that American authorities would immediately notify the Syrian consulate if the American government detained a Syrian national in the United States.[73] Following the formal request by the United

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66. Aceves *supra* note 22, at 270, *quoting* U.S. Dep't of State File L/M/SCA, *reprinted in* Arthur Rovine, U.S. Dep't of State, Digest of United States Practice in International Law 161 (1973); *see also* Uribe, *supra* note 30, at 387 (discussing that even prior to the adoption of the Vienna Convention, the United States would argue for consular officers to be given access to detained American citizens overseas). During a situation that arose in Germany prior to the Vienna Convention, "[t]he State Department instructed the United States Embassy to transmit to the German government its belief that the consul should be granted access to their nationals according to what the U.S. Government considered to be the accepted international practice, . . . in order that the Consular Officers may render them the assistance to which they by be entitled." *Id.* (internal quotations and citations omitted).

67. *See* Canadian Amicus, *supra* note 8, at 30 (stating that "the United States Department of State has instructed its consular posts around the world to file an *immediate protest* if another country fails to notify the United States consular post *within 12 hours* of the arrest of a United States citizen") (emphasis added), *quoting* United States Dep't of State File L.M.SCA; United States Dep't of State, *Digest*, 1973, p. 168; *see also* LEE, *supra* note 20, at 144. Before the Vienna Convention was even in effect, nations and nationals were using it to secure consular access to detained nationals. In 1964, a Harvard graduate student was arrested in Poland and he was allowed to contact the American Consulate and consuls were given permission to see him three days after his detention; Sims & Carter, *supra* note 8, at 30 (noting that "the United States has long been an aggressive user of, and advocate for, the Vienna Convention").

68. *See infra* Part II.B.1 and Part II.B.2.

69. Aceves *supra* note 22, at 270.

70. *Id.*

71. *Id.*

72. *Id.*; *see also* Uribe, *supra* note 20, at 395–98 (arguing that the Universal Declaration of Human Rights also serves as a basis for consular officials to complain when their foreign nationals are denied the right to consular assistance).

73. *Id.*

States, the Syrian government allowed the detained Americans to speak with their consul.[74]

2. *Iran Hostage Situation*

In November of 1979, Iranian students occupied the United States Embassy in Tehran and detained a large number of United States citizens.[75] The students, led by the Ayatollah Ruhollah Khomeini, demanded that the United States extradite the Shah of Iran back to Iran before the students would release the hostages.[76] In America's condemnation of Iran's refusal to allow consular access to the hostages, the United States continually referred to the Vienna Convention.[77]

The treaty was part of the groundwork for proceedings the United States brought in the International Court of Justice (ICJ) on November 29, 1979.[78] On December 15, 1979, the ICJ issued an Order of Provisional Measures which acknowledged the importance of the Vienna Convention and the right of consular access.[79] In its final decision, the ICJ stated in its decision that the hostages were not allowed to contact their government.[80] This was in violation of the Vienna Convention.[81]

III. PRE-HANDBOOK CASES

Although the United States strongly demanded access to American citizens detained abroad, its record under the Vienna Convention has been less than

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74. *Id.*

75. *See* Aceves, *supra* note 22, at 271; *see also* H. Lee Hetherington, *Negotiating Lessons From Iran: Synthesizing Langdell & MacCrate*, 44 CATH. U.L. REV. 675, 688–89 (1988); case concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) 1980 I.C.J. 3, 12.

76. *See* Hetherington, *supra* note 75, at 687–92 (explaining that the United States admitted the exiled Shah for cancer treatment). The Shah, a longtime ally of America, had targeted the Ayatollah Khomeini during the early 1960s while the Shah was still in power in Iran. *Id.* In 1964, the Shah had exiled Ayatollah Khomeini for speaking out against a one-sided agreement that granted American nationals sweeping immunity from Iranian law, yet made Iranians answerable to Americans for the slightest transgression . . . . Over this issue, Khomeini established himself as a critic of the Shah and the Shah's imperialistic coconspirator, the United States . . . . Over time, Khomeini became recognized as a major leader of the Shah's opposition. *Id.* at 692.

77. *Id.*; *see also* Aceves, *supra* note 22, at 271.

78. Case concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) Request for the Indication of Provisional Measures, 1979 I.C.J. 7, *reprinted in* 19 I.L.M. 139; *see also* 18 I.L.M. 1464 and 1482; *see also* Aceves, *supra* note 22, at 271.

79. *See* Aceves, *supra* note 22, at 271.

80. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) 1980 I.C.J. 3, 14.

81. *See id.* at 32.

perfect.[82] For example, in capital crimes, it is estimated that more than eighty foreign nationals from more than twenty countries have been arrested, tried, and convicted in the United States without being informed of their right to consular assistance.[83] In recent years, the United States' consistent violations have been throughly examined in both immigration and capital cases involving foreign nationals.[84]

A. *Immigration Cases*

1. United States v. Calderon-Medina

In *United States v. Calderon-Medina*,[85] the Ninth Circuit Court of Appeals heard appeals from the government regarding the dismissal of two indictments for illegal re-entry following deportation.[86] This district court found that the INS had violated title eight of the Code of Federal Regulations section 242.2(e) which codified the consular notification aspects of the Vienna Convention.[87] The court laid down the following test for determining whether or not a violation made a deportation unlawful: "[v]iolation of a regulation renders a deportation unlawful

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82. The Consular Notification stated:

> The obligations of consular notification and access apply to United States citizens in foreign countries just as they apply to foreign nationals in the United States. When U.S. citizens are arrested or detained abroad, the United States Department of State seeks to ensure that they are treated in a manner consistent with these instructions, and that U.S. consular officers can similarly assist them. It is therefore particularly important that federal, state, and local government officials in the United States comply with these obligations with respect to foreign nationals here.

Consular Notification and Access, *supra* note 29, at 13; *see also* U.S. Department of State Daily Press Briefing #46 of Wednesday, April 15, 1998 (stating that the United States was concerned that the execution of a Paraguayan national who was denied his rights under the Treaty, would lead the international community to feel that the United States did not hold the Treaty in high regard, since Secretary of State, Madeline Albright, is "concerned about making sure that American citizens get the consular notification they deserve because, in many parts of the world, that is particularly important").

83. *See* Death Penalty Information Center, *Foreign Nationals and the Death Penalty in the United States*, Information Provided by Mark Warren of Amnesty International, *available at* <http://www.essential.org/dpic/foreignnatl.html> (noting that as of January 1, 2000, the following countries had citizens on death row: Mexico, Argentina, Germany, Peru, Canada, Yugoslavia, Cuba, Lebanon, United Kingdom, France, Thailand, el Salvador, Vietnam, Cambodia, Honduras, Laos, Spain, Hong Kong, Bangladesh, Pakistan, Iraq, Estonia, Iran, Poland, Trinidad, Guyana, Philippines, Jamaica and Columbia). There are also unconfirmed reports of nationals from Guatemala and Costa Rica. *Id.* Those nationals are being held in the following jurisdictions: (total number of foreign nationals on death row in that jurisdiction are included in parentheses) Texas (24), California (23), Arizona (6), Florida (7), Ohio (4), Oklahoma (3), Nevada (2), Illinois (3), Washington (2), Arkansas (1), Delaware (1), Montana (1), Louisiana (1), Pennsylvania (1), Virginia (1), Oregon (1), Federal (1). *Id; see also* Amnesty International Report, AMR 51/01/98, *United States of America: Violation of Rights of Foreign Nationals Under Sentence of Death* (January 1998).

84. *See infra* Parts III.A.1; III.A.2; III.A.3; III.B.1; III.B.2; and III.B.3.

85. United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979).

86. *Id.* at 530.

87. *Id.*; *see also supra* Part II.A.2.c.ii (discussing the INS' codification of the Vienna Convention).

only if the violation prejudiced interests of the alien which were protected by the regulation."[88] The court remanded the case[89] so the two defendants would "be allowed the opportunity to demonstrate prejudice resulting from the INS regulation violations .... If either alien shows such prejudice, the indictment against him may be dismissed."[90]

2. United States v. Rangel-Gonzales

Following remand,[91] the trial court found that Rangel-Gonzales did not suffer prejudice by the INS's failure to advise him of his right to consular assistance.[92] On appeal, the Ninth Circuit applied the prejudice standard set forth in *Calderon-Medina.*[93]

The court noted that the defendants bear the burden of proving prejudice.[94] In his affidavit, the defendant indicated that he did not know of his right to contact his consulate and that he would have contacted them if he had known of this right.[95] The Mexican Consul General of Seattle stated that "his office would visit an alien who called for help, would help him contact friends and an attorney, and might even send a Consular representative to the deportation hearing."[96] The defendant also submitted an affidavit from an immigration attorney who stated that with proper assistance, Rangel-Gonzales could have obtained a voluntary departure.[97]

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88. *Calderon-Medina*, 591 F.2d. at 531 (remarking that the "regulation admittedly violated here was evidently intended to ensure compliance with the Vienna Convention on Consular Relations... [which] provides that aliens shall have freedom to communicate with consular officers of their nationality ....").

89. *Id.* at 530. *U.S. v. Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980), was the companion case of *Calderon-Medina.*

90. *Id.* at 532 (enunciating the standard of prejudice to be whether the violation "harmed the aliens' interests in such a way as to affect potentially the outcome of their deportation proceedings."). *But see Calderon-Medina*, 591 F.2d at 532 (Takasugi, J., dissenting).

> This nation must manifest integrity in our treaties with foreign countries. To honor the provisions of Article 36 of the Vienna Convention on Consular Relations, as noted in footnote 6 of the majority opinion, mandates a sense of justice and decency. To do anything less is a severe erosive compromise of our very essence equal if not greater than a Constitutional violation.
>
> For the foregoing reasons, I order an affirmance of the district court decision, or in the alternative, to remand the case to the district court imposing the burden on the government to establish the absence of prejudice.

91. *See Calderon-Medina*, 591 F.2d. at 532 (remanding the cases for further lower court proceedings to determine whether or not the defendants were prejudiced by the violation of their Vienna Convention rights).

92. United States v. Rangel-Gonzales, 617 F.2d 529, 530 (9th Cir. 1980).

93. *See supra* Part III.A.1.

94. *See Rangel-Gonzales*, 617 F.2d. at 530 (holding that the "initial burden of production is on the defendant"). The court stated that it was clear from the language of *Calderon–Medina*, which stated that "the *aliens* should be allowed the opportunity to demonstrate prejudice." (emphasis added).

95. *Id.* at 531.

96. *Id.*

97. *Id.*

"[V]arious family members and legal and social service groups stated that had they knew of the appellant's difficulties they would have been of assistance to him."[98]

The Ninth Circuit found that these affidavits "made a prima facie showing of prejudice within the meaning of *Calderon-Medina*."[99]

3. Waldron v. Immigration and Naturalization Service

In *Waldron v. Immigration and Naturalization Service*, the Second Circuit reviewed a decision of the Board of Immigration Appeals (BIA) that upheld an immigration judge's (IJ) finding of deportability.[100] In Waldron's second appeal to the BIA, he alleged, inter alia, "that the INS and the IJ abused their discretion by not notifying him of his right to contact diplomatic officials of his native Trinidad . . . ."[101]

The Second Circuit had previously instituted a no prejudice standard when the INS fails "to adhere to its own regulations regarding an alien's right to counsel in deportation hearings . . . ."[102] The court refused to extend the no prejudice standard to cases that did not involve "fundamental rights derived from the Constitution or federal statutes, such as the right to counsel."[103] The court established

> that when a regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute, and the INS fails to adhere to it, the challenged deportation proceeding is invalid and a remand to the agency is required . . . . On the other hand, where an INS regulation does not affect fundamental rights derived from the Constitution or federal statute, we believe it is best to invalidate a challenged proceeding only upon a showing of prejudice to the rights sought to be protected by the subject regulation.[104]

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98. *Id.*

99. *Id.* (finding that the "appellant did show some likelihood that had the regulation been followed his defense and the conduct of the hearing would have been materially affected").

100. Waldron v. Immigration and Naturalization Service, 17 F.3d 511, 512 (2d Cir.1994) (finding specifically that Waldron was deportable for two drug convictions).

101. *Id.* at 514. Waldron was served by the INS while he was serving a prison term in 1985 with an Order to Show Cause and Notice of Hearing that charged him as deportable. *Id* at 513. The IJ determined that Waldron was deportable because of his drug convictions and that he was unable to demonstrate good moral character that would have made him eligible for suspension of deportation. *Id.* Waldron appealed this finding to the BIA, who ordered a rehearing. *Id.* at 514. The first time Waldron asked for counsel was during his second deportation hearing. *Id.* at 513–14. The IJ again determined that Waldron was deportable for his drug convictions. *Id.* at 514. Waldron appealed this decision pro se and raised the issue of consular notification which is reviewed in this opinion. *Id.*

102. *Id.* at 517 (applying *Montilla v. INS*, 926 F.2d 162 (2d Cir. 1991)).

103. *Id.* at 518 (finding that the prejudice standard articulated in *Calderon-Medina* should apply in non fundamental rights cases only).

104. *Id.* (articulating the reason for the different treatment is that it would place too high of a "burden on the agency's adjudication of immigration cases").

The court went on to find that the right to consular notification did not "implicate fundamental rights with constitutional or federal statutory origins . . . ."[105] The court refused to equate a treaty obligation with fundamental rights, such as the right to counsel.[106] Because these rights did not implicate a fundamental right and Waldron could not demonstrate any prejudice caused by the violation, the Second Circuit upheld the deportation.[107]

B. Capital Cases

1. Angel Breard

In 1992, Angel Francisco Breard, a Paraguayan national, was arrested by Virginia authorities and charged with murder and attempted rape.[108] After refusing a plea bargain and testifying on his own behalf, Breard was convicted and sentenced to death.[109] The Virginia Supreme Court affirmed the conviction and the United States Supreme Court denied certiorari.[110] After seeking review of his conviction and sentence, Breard filed a federal habeas corpus petition alleging, among other things, that he had never been informed of his right to contact the Paraguayan consul.[111] This was the first time Breard raised this claim.[112]

The district court denied Breard's petition.[113] The court, although concerned with Virginia's refusal to abide by the Vienna Convention, found that Breard had procedurally defaulted his claim by not raising it in state court.[114] The Court of

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105. *Id.* (stating that the statutory provision in question, Section 242.2(g) was enacted to "ensure compliance with the Vienna Convention on Consular Relations" and specifically the rights recited in Article 36, "that aliens shall have the freedom to communicate with consular authorities of their native country").

106. *Id.* (stating that the right to counsel had its basis in the concept of due process).

107. *Id.* at 518–19.

108. *See* Breard v. Commonwealth, 248 Va. 68, 72–73, *cert. denied* 513 U.S. 971(1994) (recounting the specific facts of the crime); *see also* Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 532–38 (1999); Jonathan I. Charney and W. Michael Reisman, *Breard: The Facts*, 92 A.J.I.L. 666 (1998).

109. *See Breard*, 248 Va. at 73; *see also* Bradley, *supra* note 108, at 533 (commenting that *Breard* testified against the advice of his lawyers and that he "admitted to having committed the murder, for which he blamed a Satanic curse placed on him by his father-in-law").

110. *See* Breard, 248 Va. 68 (1994).

111. *See* Breard v. Netherland, 949 F. Supp. 1255, 1260 (E.D.Va. 1996).

112. *See id.* at 1263 (stating that "Petitioner never raised this issue in state court [and t]herefore, the claim is defaulted and federal review is barred").

113. *See id.* at 1269 (dismissing Breard's claims with prejudice).

114. *See id.* (stating that "Virginia's persistent refusal to abide by the Vienna Convention troubles the Court," but that the claim was procedurally defaulted). The court further stated that they felt a competent attorney should have discovered the violation of the Vienna Convention during the state proceedings. *Id.* "Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of any attorney error." Coleman v. Thompson, 501 U.S. 722, 753 (1991) (citations omitted).

Appeals for the Fourth Circuit affirmed.[115] One circuit court judge concurred in the judgment in order to emphasize the importance of the Vienna Convention.[116]

While Breard's appeals were pending, the Republic of Paraguay brought suit in federal district court against the Commonwealth of Virginia, alleging violations of the Vienna Convention and the Treaty of Friendship.[117] Paraguay argued that because of the treaty violations, the court should vacate Breard's conviction.[118]

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115. *See* Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998). The court explained that defendants must raise claims during state proceedings before they can be raised in federal proceedings because "the state courts [have] the first opportunity to consider alleged constitutional errors occurring in a state prisoner's trial and sentencing." *Id.* at 619. "To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court." *Id.* "Under Virginia law, 'a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available at the time of his original petition.' Hoke v. Netherland, 92 F.3d 1350, 1354 n.1 (4th Cir. 1996) (quotes omitted)." *Id.* Breard argued that he did not have a reasonable basis for raising the Vienna Convention claim until after the Fifth Circuit decided *Faulder v. Johnson*, and because the Virginia authorities did not inform him of his rights under the Convention. *Id.* The Fourth Circuit, however, was bound to follow *Murphy v. Netherland*, 116 F.3d 197 (1998), where the petitioner argued that the novelty of the Vienna Convention and the lack of notification justified his failure to raise the claim in state court. *Id.* In that case, the court

> noted that a reasonably diligent attorney would have discovered the applicability of the Vienna Convention to a foreign national defendant . . . [because the Vienna Convention] has been in effect since 1969 . . . . Treaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national. Counsel in other cases . . . apparently had and have had no difficulty whatsoever learning of the Convention.

Id. at 619–20. In order for Breard to raise the Vienna Convention claim in federal proceedings after procedurally defaulting, he would have to demonstrate cause for the default. *Id.* at 620. Cause is defined as "'some objective factor external to the defense [that] impeded counsel's efforts' to raise the claim in state court at the appropriate time.'" *Id.*, *citing* Murray v. Carrier, 477 U.S. 478, 488. The court determined that Breard could not establish cause. *Id.*

116. *See Breard v. Pruett*, 134 F.3d at 621–22 (Butzner, J., concurring) (emphasizing that the language of the Vienna Convention "is mandatory and unequivocal, evidencing the signatories' recognition of the importance of consular access for persons detailed by a foreign government"). The "Supremacy Clause mandates that rights conferred by a treaty be honored by the states . . . . The protections afforded by the Vienna Convention . . . cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation." *Id.*

117. *See* Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1271–72 (1996).

118. *Id.* at 1272. Paraguay asked for the following relief:

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

Id.

The district court, although troubled by the violation of the Vienna Convention, dismissed the case for lack of subject matter jurisdiction.[119] The Court of Appeals affirmed.[120] Paraguay and Breard both filed a writ of certiorari in the United States Supreme Court.[121]

Simultaneously, Paraguay filed suit against the United States in the ICJ.[122] The ICJ issued the following provisional measures: "The United States should take all measures at its disposal to that ensure the Angel Francisco Breard is not executed pending the final decision of these proceedings, and should inform the [ICJ] of all the measures which it has taken in the implementation of this Order."[123]

Meanwhile, the United States Supreme Court invited the United States Department of Justice to submit a brief to the Court expressing the views of the Department on the matter.[124] The Department of Justice conceded that a violation had occurred, but nonetheless, asked the Court to deny the certiorari motions because the United States had already administered the proper diplomatic remedy to Paraguay.[125] Secretary of State, Madeline Albright, in a letter to Virginia Governor, James Gilmore, requested that the Governor voluntarily stay the execution.[126]

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119. The district court held they did not have subject matter jurisdiction based on the Eleventh Amendment. "The text of the amendment divests this Court of jurisdiction over actions against a state by 'Citizens of another State or by Citizens or Subjects of any Foreign State.' U.S. Const. Amend XI. This language was soon interpreted to prohibit other actions against a state in federal court." *Paraguay v. Allen*, F. Supp. at 1271. "Although this Court is disenchanted by Virginia's failure to embrace and abide by the principles embodied in the Vienna Convention and Friendship Treaty, the Eleventh Amendment operates to bar retroactive relief." *Id.* at 1273.

120. *See Republic of Paraguay v. Allen*, 134 F.3d at 622.

121. *See* Breard v. Greene, 523 U.S. 371 (1998).

122. *See* Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), I.C.J. (Apr. 9, 1998), *available in* 37 I.L.M. 810 (1998). Paraguay asked the ICJ to declare that the United States has violated Article 36 of the Vienna Convention and to order the United States to vacate Breard's conviction. *Id.* Paraguay further requested that the ICJ indicate provisional measures directing the United States to ensure Virginia did not execute Breard pending the outcome of the case. *Id.*; *see also* Christopher E. van der Waerden, Note, *Death and Diplomacy: Paraguay v. United States and the Vienna Convention on Consular Relations*, 45 WAYNE L. REV. 1631, 1638 (1999).

> In its application to the ICJ, Paraguay asserted that without the aid of his consulate, Breard, "made a number of objectively unreasonable decision during the criminal proceedings against him, which were conducted without translation" and he "did not comprehend the fundamental differences between the criminal justice systems of the United States and Paraguay." *Id citing* Case Concerning the Vienna Convention on Consular Relations, Request for indication of Provisional Measures (Para. v. U.S.) (Order of Apr. 9, 1998).

Id.

123. Case Concerning the VCCR (Para. v. United States), I.C.J. (Apr. 9, 1998).

124. *See* Bradley, *supra* note 108, at 537.

125. *See* Brief for the United States as Amicus Curiae at 12, Breard v. Green, 118 S.Ct. 1352 (1998) (No. 97-1390). The Department of Justice further argued that the Vienna Convention did not provide a basis for vacating Breard's conviction and that the ICJ order was not binding on the United States. *Id.*

126. *See* Bradley, *supra* note 108, at 537–38 (stating safety of American citizens as a reason to stay the execution pending the outcome of the ICJ case).

Both the United States Supreme Court and the Governor of Virginia refused to stay the execution.[127] Virginia authorities executed Angel Francisco Breard at 10:39 p.m. on April 14, 1998.[128]

2. *Karl and Walter LaGrand*

Karl and Walter LaGrand were sentenced to death for fatally stabbing a bank manager during an attempted robbery.[129] Following their arrest in 1982, the Arizona authorities failed to inform the LaGrands, who were German nationals, of their right to contact the German Embassy.[130] A decade would pass until Germany learned of the LaGrand situation. By 1992, the Arizona Supreme Court had once affirmed their conviction[131] and later refused to review their denied post-conviction relief petitions.[132] In 1995, the LaGrands filed a petition for writ of habeas corpus, which the district court denied.[133] The Ninth Circuit Court of Appeals affirmed the denial[134] and the Supreme Court denied certiorari.[135]

Following the execution of Karl LaGrand on February 24, 1999, Germany, in an attempt to halt the execution of Walter LaGrand, requested provisional measures from the ICJ.[136] The ICJ issued its ruling which ordered the United States to take

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127. *Id. But see Breard v. Greene*, 523 U.S. at 1356–57 (Stevens, J., dissenting). Justice Stevens dissented from the denial of certiorari because he felt that it was a "decision to act hastily rather than with the deliberation that is appropriate in a case of this character." *Id* at 1357. *Cf. Bread v. Greene*, 523 U.S. at 1357 (Breyer, J., dissenting).

128. *See* Bradley, *supra* note 108, at 538.

129. *See* State v. LaGrand (Karl), 152 Ariz. 483, 484, 733 P.2d 1066, 1067 (1987); *see also* State v. LaGrand (Walter), 153 Ariz. 21, 734 P.2d 563 (1987).

130. *See* William J. Aceves, *INTERNATIONAL DECISION: Case Concerning the Vienna Convention on Consular Relations (Federal Republic of Germany v. United States)*, 93 A.J.I.L. 924 [hereinafter Aceves, *LaGrand*] (discussing that during the LaGrands' arrest and subsequent conviction, they were never informed of their right to consular assistance).

131. State v. LaGrand, 152 Ariz. 483, *cert. denied* 484 U.S. 872 (1987).

132. Lagrand v. Arizona, 501 U.S. 1259 (1991).

133. Lagrand v. Lewis, 883 F. Supp. 469 (1995); Lagrand v. Lewis, 883 F. Supp. 451 (1995).

134. Lagrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998).

135. Lagrand v. Stewart, 525 U.S. 971 (1998).

136. *See* Aceves, *LaGrand*, *supra* note 130 (noting further that prior to Karl's execution, the German government had attempted to obtain relief through customary diplomatic channels); *see also* case Concerning the Vienna Convention on Consular Relations (Germany v. U.S.) (Application Instituting Proceedings Submitted by the Government of the Federal Republic of Germany) (March 2, 1999), *available at* <http://www.icj-cij.org>. Germany based the ICJ's jurisdiction on the Optional Protocol Concerning the Compulsory Settlement of Disputes, 21 UST 325, 596 UNTS 487, which is a supplemental treaty to the Vienna Convention and which both the United States and Germany are signatories. *Id.* Germany requested the ICJ to adjudge and declare that the Untied States violated its legal obligations under the Vienna Convention. Germany further requested reparation, in the form of compensation and satisfaction, for the execution of Karl LaGrand. It also requested a restoration of the *status quo ante* in the case of Walter LaGrand; that is, to establish the situation that existed before his sentence and conviction. Aceves, *LaGrand*, *supra* note 130, at 924–25.

all measures at its disposal to ensure that Walter LaGrand was not executed so that the ICJ would have the opportunity to complete their proceedings.[137]

Germany, invoking the original jurisdiction of the United States Supreme Court, filed motions in the United States Supreme Court asking: (1) for leave to file a bill of complaint and (2) for preliminary injunctions against the United States and the governor of Arizona to enforce the order of the ICJ.[138] In a 7-2 decision, the Supreme Court denied the leave to file a bill of complaint and for preliminary injunctions.[139] Walter LaGrand was executed on March 2, 1999.[140]

3. Joseph Stanley Faulder

A Texas state court convicted Joseph Stanley Faulder, a Canadian citizen of robbery-murder and sentenced him to death.[141] Texas authorities did not inform Faulder of his right to contact the Canadian consul.[142] Faulder made no contacts in Canada in preparation for trial and presented no mitigating evidence at the penalty phase of his trial.[143]

It was nearly a decade after this second trial that an attorney from the Texas Resource Center, who was appointed to file Faulder's first habeas corpus petition,

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137. *See* Case Concerning the Vienna Convention on Consular Relations (Germany v. U.S.), *supra* note 136.

138. Federal Republic of Germany v. United States, 526 U.S. 111 (1999).

139. *Id.* (stating that the Supreme Court refused to exercise their original jurisdiction in this case because fo the "tardiness of the pleas and the jurisdictional barriers they implicate"). *But see* (Breyer, J., dissenting) (arguing that the Court should grant the preliminary stay because Germany's tardiness in filing was based on the fact that Arizona admitted only eight days prior that it knew of the LaGrands German nationality when they were arrested). The dissenting justices felt that the "stay would give use time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved, including further views of the Solicitor General, after time for study and appropriate consultation." *Id.*

140. *See* Aceves, *LaGrand*, *supra* note 130, at 928. Germany's case is still pending in the ICJ. *Id.* The German government submitted its Memorial to the Court on September 16, 1999, and the United States is scheduled to submits its Counter-Memorial on March 27, 2000. *Id.*

141. *See* Faulder v. State, 745 S.W.2d 327, 329–30 (1987) (en banc). This was Faulder's second conviction for the crime. The events that lead up to this conviction merit comment. Faulder originally confessed after four days of interrogation. Amnesty International, *United States of America: Adding Insult to Injury: the case of Joseph Stanley Faulder* [hereinafter *Adding Insult to Injury*] (November 1998), *available in* AI Index: AMR 51/86/98 *and* <http://www.amnesty.it/ailib/aipub/1998/AMR/25108698.htm> He signed a written statement confessing to the murder. *Id.* He further admitted he had an accomplice named Linda McCann. *Id.* In 1979, the Texas Court of Criminal Appeals overturned Faulder's conviction, finding that the confession was illegally obtained. *Id.* The state found without the confession, there was insufficient evidence to re-prosecute Faulder. *Id.* Jack Phillips, the brother of the victim, hired private prosecutors upon learning that the state was considering offering Faulder life imprisonment instead of the death penalty. *Id.* Even though Linda McCann was eligible for the death penalty under Texas law, the private prosecutors offered her immunity and $15,000 in exchange for her testimony. *Id.* Her husband was given $2000 to corroborate her testimony, as required by Texas law since McCann was an accomplice. *Id.* In Faulder's second trial, his court-appointed attorney did not call any witnesses and failed to investigate Faulder's background. During sentencing, Faulder's attorney did not attempt to rebut the testimony of the psychiatrist who claimed that Faulder was an untreatable sociopath who would certainly kill again. *Id.* In July 1981, Faulder was convicted for the second time and sentenced to death. *Id.*

142. Petition for Writ of Habeas Corpus at 88, Faulder v. Collins (No. C-92-CV755) (E.D.Tex. 1986).

143. *See Faulder*, 745 S.W.2d at 329–330; *see generally Adding Insult to Injury*, *supra* note 141.

learned of Faulder's citizenship and contacted the Canadian Consulate. Prior to this contact, the Canadian authorities never received any notice of Faulder's arrest and trial, nor had his family, who had not known where he was for a number of years. Once contacted, his family provided the attorney with medical records from Faulder's youth that evidenced that he had organic brain damage. This information, along with the support and resources of his family and native government, would have proved invaluable to Faulder at both of his trials. However, Faulder was deprived of these resources because of the failure of Texas officials to inform Faulder of his right to contact his consulate.[144]

On September 30, 1987, the Court of Criminal Appeals of Texas affirmed Faulder's conviction and death sentence following the submission of a brief asserting twenty-six grounds of error.[145] In April of 1996, after numerous complications and appeals,[146] the Fifth Circuit Court of Appeals dismissed Faulder's habeas corpus petition on all grounds.[147] On June 16, 1999, the Fifth Circuit denied Faulder's motion for a stay of execution and affirmed the district

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144. *See* Canadian Amicus, *supra* note 8, at 14–17 (outlining the duties that Canadian consular officials possess in protecting the rights of their citizens). Those duties include, contacting family members who often prove priceless in constructing a complete defense, assisting the prisoner's lawyer, ensuring that Canadian citizens receive equitable treatment from foreign tribunals, assuring that the prisoner has been fully informed of his rights, and providing a list of attorneys recommended by Canadian authorities to the prisoner. *Id.*; *see also Adding Insult to Injury, supra* note141. The report states that

> Canada's position was recently supported by the findings of a United Nations report. In a 1998 survey of death penalty procedures in the USA, the UN Special Rapporteur on extrajudicial, arbitrary and summary executions made specific reference to the Faulder case and the appellate courts' finding of "harmless error." The report determined that 'not informing the defendant of the right to contact his/her consulate for assistance may curtail the right to an adequate defence,' as provided for by the International Covenant on Civil and Political Rights.

Id., *citing* Report to the UN Commission on Human Rights (document E/CN.4/1998/68/Add.3), Findings of the Special Rapporteur, 117–121. *Id.*

145. Faulder v. State, 745 S.W.2d 327 (1987) (en banc).

146. *See Adding Insult to Injury, supra* note 141. Faulder first asserted his Vienna Convention rights at an evidentiary hearing in 1992. *Id.* In 1993, Faulder put forth evidence suggesting that McCann's husband was involved in the planning of the crime. *Id.* This would warrant him incompetent as a witness to corroborate his wife's testimony. *Id.* The United States District Court for the Eastern District of Texas granted a stay of execution and held an evidentiary hearing regarding the use of special prosecutors and the questionable testimony of McCann. *Id.* The Court denied Faulder's petition, but granted a certificate of probability cause of appeal. *Id.*

147. Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996). The court concluded that the admitted breach of the Vienna Convention was a harmless error.

> Faulder or Faulder's attorney had access to all of the information that could have been obtained by the Canadian government. While we in no way approve of Texas' failure to advise Faulder, the evidence that would have been obtained by the Canadian authorities is merely the same as or cumulative of evidence defense counsel had or could have obtained.

Id. at 520. *But see* Canadian Amicus, *supra* note 8 at 34, n.16 (stating that

> [t]he failure to notify Mr. Faulder of his rights prevented Canadian consular officers from taking appropriate action to ensure that he suffered no disadvantage in preparing and presenting his defense due to his status as a foreigner, ignorant of the Texas system of justice, deprived of access to mitigating evidence, and lacking experienced counsel).

court's dismissal of Faulder's motions for a stay of execution and temporary restraining order.[148] Faulder was executed on June 17, 1999.

Following the deaths of Breard, the LaGrands, and Faulder, the United States Department of State attempted to clarify some of the confusion surrounding the Vienna Convention and a foreign national's right to consular assistance.

IV. STATE DEPARTMENT HANDBOOK

In its attempt to inform local authorities of the importance of the Vienna Convention on Consular Relations, the State Department issued a handbook in January 1998 which sets out the procedures to follow when detaining a foreign national.[149] The Department distributed this handbook to all law enforcement agencies.[150] The handbook begins by summarizing the requirements when detaining a foreign national as:

1. When foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified.
2. In some cases, the nearest consular officials *must* be notified of the arrest or detention of a foreign national, **regardless of the national's wishes.**
3. Consular officials are entitled to access to their nationals in detention, and are entitled to provide consular assistance.
4. When a government official becomes aware of the death of a foreign national, consular officials must be notified.
5. When a guardianship or trusteeship is being considered with respect to a foreign national who is a minor or incompetent, consular officials must be notified.

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148. Faulder v. Johnson, 178 F.3d 741, 742 (5th Cir. 1999). The court listed the following reasons: (1) court has no appellate jurisdiction over the denial of temporary restraining orders and (2) federal courts lack jurisdiction to stay executions. *Id.*

149. *See Consular Notification and Access, supra* note 29; *see also* Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 92 A.J.I.L. 243, 247 (1998) (discussing the release of the State Department handbook).

150. *Consular Notification and Access, supra* note 29.

> This booklet is designed to help ensure that foreign governments can extend appropriate consular services to their nationals in the United States and that the United States complies with its legal obligations to such governments. The instructions and guidance herein should be followed by all federal, state, and local government officials, whether law enforcement, judicial, or other, insofar as they pertain to foreign nationals subject to such officials' authority or to matters within such officials' competence.

Id. at i.

6. When a foreign ship or aircraft wrecks or crashes, consular officials must be notified.[151]

Part One of the handbook also has a suggested statement for officials to use when informing the foreign detainee of their right to consular notification.[152]

Part Two of the handbook sets forth detailed instructions for authorities detaining foreign nationals.[153] This section explains the right to consular notification is mandatory.[154] Whether or not the foreign national wishes to exercise that right is immaterial.[155] Furthermore, the handbook informs the reader that it is the responsibility of the detaining officer to inform a consular official if a detained national requests consular notification.[156]

Part Three of the handbook answers some of the more common questions that arise in dealing with consular notification.[157] These range from defining a consular officer,[158] to explaining why state and local government officials are required to

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151. *Id.* at 13–15 (emphasis in original). Part One also has a list of four steps to follow when a foreign national is arrested or detained. *Id.* at 4. It also contains a list of those countries that have a mandatory notification provision in its bilateral agreement with the United States. *Id.* at 5.

152. *Id.* at 7. The suggested statement for nonmandatory consular notification is:

> 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 officials?

Id.

The suggested statement for mandatory consular notification is:

> Because of your nationality, we are required to notify your country's consular representatives here in the United States that you have been arrested or detained. After your consular officials are notified, they may call or visit you. You are not required to accept their assistance, but they may be able to help you obtain legal counsel and may contact your family and visit you in detention, among other things. We will be notifying your country's consular officials as soon as possible.

Id.

153. *Id.* at 14–15.

154. *Id.* at 14. "Whenever a foreign national is arrested or detained in the United States, there are legal requirements to ensure that the foreign national's government can offer him/her appropriate consular assistance. *In all cases, the foreign national must be told of the right of consular notification and access.*" *Id.* (emphasis in original).

155. *Id.* at 14 (clarifying that if the foreign national is from a country that has a bilateral agreement with the United States that contains provisions for mandatory notification to be made to the consulate, then the consul is to be immediately notified even if the foreign national does not request it). However, "*under no circumstances should any information indicating that a foreign national may have applied for asylum in the United States or elsewhere be disclosed to that person's government.*" *Id.* (emphasis in original).

156. *Id.* at 14–15.

157. *Id.* at 17–23.

158. *Id.* at 17 (defining a consular officer as

> a citizen of a foreign country employed by a foreign government and authorized to provide assistance on behalf of that government to that government's citizens in a foreign country. Consular officers are generally assigned to the consular section of a foreign government's embassy in Washington, D.C., or to consular offices maintained by the foreign government in locations in the United States outside

abide by the Vienna Convention provisions.[159] This section also reminds authorities that by giving foreign nationals their right to consular notification, they ensure that foreign governments will afford Americans traveling abroad the same right.[160] Part Four of the handbook provides translations of the suggested statements to detained foreign nationals provided in Part One of the handbook.[161]

Part Five of the handbook summarizes the legal authority of the consular notification requirements.[162] The handbook lists the Vienna Convention, bilateral agreements, and customary international law as the basis for consular notification.[163] Part Five includes the language of these documents that create legal obligations for the United States.[164]

Even with the distribution of this handbook, officers are still failing to inform foreign nationals of their right to consular assistance.[165] The Department of State issued the handbook with the hope that local authorities would begin upholding America's obligations under the Vienna Convention. However, a study of cases following publication of the handbook demonstrated that those hopes have yet to be fully realized.

V. POST-HANDBOOK CASES

The cases of Vienna Convention violations following the issuance of the State Department Handbook embody the handbook's guidelines, as well as the principles and tests laid down in earlier cases, in analyzing Article 36.[166] However, foreign

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of Washington, DC).

159. *Id.* at 19 (explaining that state and local governments must comply because the obligations are part of a treaty and as such they are part of the law of the land under the Supremacy Clause of the U.S. Constitution).

160. *Id.* at 21 (reminding officers that they

> should treat the foreign national as you would want an American citizen to be treated in a similar situation in a foreign country. This means prompt, courteous notification to the foreign national of the possibility of consular assistance, and prompt, courteous notification to the foreign national's nearest consular officials so that they can perform whatever consular services they deem appropriate).

161. *Id.* at 25–39. Translations are provided in the following languages: Arabic, Chinese, Farsi, French, German, Italian, Japanese, Korean, Polish, Portuguese, Russian, Spanish, and Vietnamese.

162. *Id.* at 41–58.

163. *Id.* at 42 (stating that the Vienna Convention "now establishes the baseline for most obligations with respect to the treatment of foreign nationals"). The stated purpose of the bilateral agreements is that there are some special circumstances that arise in the area of consular relations that are not dealt with fully by the Vienna Convention and so the bilateral agreements are used to supplement the Vienna Convention. *Id.* at 43. The handbook also reiterates the principle that because consular notification is based in customary international law, it is a "universally accepted, basic obligation that should be extended even to foreign nationals who do not benefit from the VCCR or from any other applicable bilateral agreement." *Id.* at 44.

164. *Id.* at 45–49. The handbook includes Articles 5, 36, and 37 of the Vienna Convention and excerpts from bilateral agreements.

165. *See infra* Part V.

166. This comment deals in large part only with cases that were entirely instigated after the publication of the State Department Handbook, i.e., those cases that began with an arrest after January of 1998. Those cases dealt with are: United States v. Carrillo, 70 F. Supp. 2d 854 (N.D. Ill. 1999); United States v. Chaparro-Alcantara, 37

defendants are still not being afforded their right to consular assistance.[167] The problem of procedural default that prevented Breard, Faulder and the LaGrands from enforcing their rights under the Vienna Convention has been replaced with new problems for foreign defendants.[168] These hurdles lie in the three part test that courts apply in these situations: the government will claim that (1) the Vienna Convention does not provide for a private right of action and therefore, defendants do not have standing to enforce the Vienna Convention;[169] (2) the defendants were not actually prejudiced by the violation;[170] or (3) even if they were prejudiced, a proper remedy has yet to be found.[171] Courts disagree as to the application of these principles.

A. *Private Right and Standing*

A foreign defendant must first prove that he has standing to enforce the Vienna Convention by demonstrating that the Treaty provides for a private right of action.[172] Historically, treaties could only be enforced by states, and if a violation against an individual occurred, the nation-state would bring the suit on the injured individual's behalf.[173] However, some treaties now include an individual right in their language.[174] The courts dealing with the Vienna Convention disagree as to whether or not the Vienna Convention conferred a private right. This comment will illustrate the division between the courts in interpreting this issue.

F. Supp. 2d 1122 (1999); United States v. Miranda, 65 F. Supp. 2d 1002 (D.Minn. 1999); State v. Reyes [hereinafter Reyes I], 740 A.2d 7 (Del. 1999); State v. Reyes [hereinafter Reyes II], 1999 WL 743598 (Del. Super. 1999); United States v. Rodrigues, 68 F. Supp. 2d 178 (E.D.N.Y. 1999); United States v. Superville, 40 F. Supp. 2d 672 (1999); United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250 (1999); and United States v. Torres-Del Muro, 58 F. Supp. 931 (1999).

167. *But see Reyes I*, 740 A.2d at 14–15 (finding that a defendant's Vienna Convention rights were violated and that the violation lead to a dismissal of the case).

168. *See supra* Part III.

169. *See infra* Part V.A.

170. *See infra* Part V.B.

171. *See infra* Part V.C.

172. *See* Molora Vadnais, *A Diplomatic Morass: An Argument Against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations*, 47 UCLA L. REV. 307, 315–16 (1999). The author explains that "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.' Invocability therefore is similar to standing." *Id.*, *citing* John H. Jackson, United States, in The Effect of Treaties in Domestic Law 141, 157 (Francis G. Jacobs & Shelley Roberts eds., 1987).

173. *See* Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992) (providing a discussion of the history of international individual rights).

174. *See* United States v. Noriega, 808 F. Supp. 791, 799 (1992) (discussing that while typically individuals do not have standing to invoke treaty-based rights, when a treaty "expressly or impliedly provides a private right of action, it is self-executing and can be invoked by an individual"); *see also* Head Money Cases, 112 U.S. 580, 598–99 (1884).

In *Chaparro-Alcantara*, the court held that the Vienna Convention confers a private right "to object to a violation of that provision."[175] In that case, the defendants, Mexican citizens, were arrested for transporting illegal aliens on October 21, 1998.[176] The court reached this conclusion because it felt the language of the Vienna Convention provided a private right of action,[177] and that the courts who had previously dealt with the Vienna Convention had found a private right.[178]

In *State v. Reyes*, the Delaware Superior Court found that the Vienna Convention confers a private right and so the defendant, a Guatemalan citizen charged with murder, had standing to enforce the Vienna Convention.[179] The court felt that the intent of the drafters of the Vienna Convention, as well as the language of Article 36, demonstrates that individuals have a private right to enforce the Vienna Convention.[180] The Delaware court also noted that "most courts facing the question of whether detained aliens have standing to raise claims under the Convention have conceded that they do."[181]

In *United States v. Superville*, defendant, a citizen of Trinidad and Tobago, was arrested and later indicted for falsely representing that he possessed a Social Security number not assigned to him.[182] In finding that the Vienna Convention confers a private right of action, the court stated that, "[t]he text of the Vienna Convention, the recorded intentions of its drafters, and the prevailing view among federal agencies and courts lead this Court to conclude that, as a detained alien, Superville has standing to seek relief for INS' alleged violation of the Vienna Convention . . . ."[183] "Article 36 [of the Vienna Convention] was adopted with the necessary safeguards to protect individual freedoms, including a requirement that

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175. *See* United States v. Chaparro-Alcantara, 37 F. Supp. 2d 1122, 1124 (C.D.Ill. 1999) (finding that the majority of cases have held that the Vienna Convention confers standing to individuals who have suffered a violation of the treaty).

176. *Id.* at 1123.

177. *Id.* at 1125 (discussing that "the actual text of Article 36, which is more persuasive as to the parties intent, suggests that persons have individual notification 'rights' under the sub-paragraph").

178. *Id.* (finding that even the U.S. Supreme Court in *Breard v. Greene* stated that the Vienna Convention arguably confers a private right of action).

179. *See Reyes I*, 70 A.2d at 14.

180. *See Reyes II*, 1999 WL 743598 (stating that the finding of an individual right in Reyes I was based the fact that the Vienna Convention, as a self-executing treaty, does confer private rights on individuals). The court went on to state that the majority of courts have agreed with this assertion. *Id.*

181. *Reyes I*, 70 A.2d at 9–10.

182. United States v. Superville, 40 F. Supp. 2d 672, 674 (1999).

183. *Id.* at 678; *see also* Consular Notification and Access, *supra* note 145, at 49 (indicating that as a citizen of Trinidad and Tobago, Superville was entitled to the following provision: "A consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district." However, in this case, it appears that the INS was not at fault because agents did provide Superville with an opportunity to speak with his consulate and he did not wish to avail himself of that right. *Superville*, 40 F. Supp. 2d at 678–79; *see also* United States v. Rodrigues, 68 F. Supp. 2d 178, 182-83 (E.D.N.Y. 1999) (explaining that it was clear from statements of the framers fo the Vienna Convention that they intended Article 36 to confer an individual right to consular assistance).

the foreign national be told of his right to request such notification and a prohibition on notification unless the foreign national requests it."[184]

However, while only a few courts have held that the Vienna Convention does not confer a private right, there are those who assume standing, but refuse to address the issue directly. For example, in *United States v. Tapia-Mendoza*,[185] the court assumes without deciding that the defendant has standing to enforce the treaty.[186] The court felt is it was unnecessary to decide the issue because they followed court opinions that found standing irrelevant because of problems with the other parts of the test, prejudice and remedy.[187]

In *United States v. Rodrigues*, a Guyanan citizen, was arrested on three counts of federal narcotics charges.[188] In discussing standing, the court recognized that the Vienna Convention most likely confers an individual right to consular assistance.[189] The court felt, however, that the Vienna Convention is ambiguous as to whether or not there is a private right to enforce the Treaty.[190] However, despite a finding that the majority of courts have found that the Convention does create a private right of action, the *Rodrigues* court only assumed standing.[191]

In *United States v. Miranda*, a Magistrate Judge believed that Miranda, a Mexican national charged with drug possession, had standing to enforce the Vienna Convention because "[t]he right conferred by an international treaty upon detained foreign nationals is not one that should be treated lightly or ignored by the United States' courts or criminal justice system."[192] However, upon review, the District Court chose not to decide the standing issue by merely assuming standing.[193] The

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184. *See* Bin Lin Amicus, *supra* note 35, at 19 (confirming that the legislative history of the Vienna Convention supports the finding that the Vienna Convention confers an individual right to foreign nationals). The authors make note that there were numerous amendments offered during the formation of Article 36 of the Vienna Convention that would have eliminated this private right and that none of these were accepted by the delegates. *Id.* at 16–19.

185. *Tapia-Mendoza*, 41 F. Supp. 2d at 1251.

186. *See id.* at 1253 (claiming that no court had found that the Convention provided an individual right and that they felt that it was unlikely that the Convention did confer a private right).

187. *See id.* at 1253–54 (supporting the reasoning set forth by the Fourth Circuit that held that the prejudice standard was necessary because the violation of a treaty did not rise to the level of a constitutional violation); *see also infra* Part V.B.1.c. (discussing the prejudice requirement in the *Tapia-Mendoza* case).

188. *Rodrigues*, 68 F. Supp. 2d at 180–81. On June 5, 1998, customs agents discovered two boxes full of cocaine that had been shipped from Guyana. *Id.* The agents removed the cocaine and placed a "sham load" in the boxes with a tracking device. *Id.* The boxes were then released from customs and sent to a storage facility in Brooklyn, New York, where they were removed on June 9, 1998 by Rodrigues. *Id.*

189. *See id.* at 182 (explaining that it is clear that the framers of the Vienna Convention intended Article 36 to confer an individual right to consular assistance, but that the framers did not discuss the appropriate remedy for a breach of this individual right).

190. *See id.* (discussing that the preamble to the Vienna Convention seems to indicate that the Vienna Convention was enacted for the protection of consular officials, and not foreign nationals). The court did find that the drafters of Article 36 intended to create a private right to be notified of the Convention's protections. *Id.*

191. *Id.* at 103.

192. *United States v. Miranda*, 65 F. Supp. 2d 1002, 1011 (D. Minn. 1999).

193. *Id.* at 1006.

Court felt it was proper not to decide standing because the question of whether or not the Vienna Convention confers a private right is an area that is "open to debate."[194]

Drug enforcement agents arrested Anselmo Carrillo, a Mexican national, for "knowingly and intentionally possessing with intent to distribute 48 kilograms of cocaine."[195] The Illinois court put forth a lengthy discussion on the issue of standing. The Court first noted that the Seventh Circuit has yet to rule on the matter and that other circuit decisions do not bind this Court's decision.[196] Then, the Court discussed notes the division in the courts that have dealt with the issue. In the end, the Court found that it is unnecessary to determine the issue of standing to determine the outcome of this case and so it left the issue unresolved.[197]

It is clear from the language of the Vienna Convention that the drafters' intent of Article 36 and the interpretation of the United States courts that the Vienna Convention confers a private right upon the individual. The language of Article 36(b) of the Vienna Convention provides: "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State... [that] a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner."[198] The Vienna Convention demands that the detaining officials inform the individual of his right. When the individual is not given consular notification, the individual suffers. 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.[199] To argue

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194. *Id.* at 1005.

195. *Carrillo*, 70 F. Supp. 2d at 855–56. The details leading to the arrest were that the Drug Enforcement Agency (DEA) had received information that a red Mercury automobile had the sort of trap compartment in it that drug traffickers use to transport narcotics. *Id.* On the date of the arrest, DEA agents located the Mercury in Addison Illinois at the Belmont Address. *Id.* While the Mercury was parked in the driveway, a red Toyota truck drove up with three Hispanic males in it. *Id.* One got out and drove the Mercury away with the Toyota following. *Id.* The DEA agents followed the two automobiles to a second location, the Clarendon address, and parked it inside a garage. *Id.* Two hours later, the two automobiles and the three men left again. *Id.* The DEA agents were unable to keep up with them and lost them for about 20 minutes at which time the found the Toyota in a cinema parking lot with all three men in it. *Id.* The Mercury was also parked in the lot. *Id.* The Toyota drove around for about 10 minutes and then returned to the parking lot. *Id.* At this time, the DEA agents stopped the Toyota and arrested the men. *Id.* The agents found the keys for the Mercury and a garage door opener for the Clarendon address on Carrillo's person. *Id.* Carrillo signed a waiver of rights and consent to search the Mercury. *Id.* The DEA agents found the trap compartment which contained 48 one kilogram bricks of cocaine. *Id.*

196. *Id.* at 858.

197. *Id.* at 858–59 (citing cases from various courts, including the Supreme Court, who have generally held that they assume without deciding that the foreign defendant has standing to enforce the Treaty). Although the majority of the cases cited were of this type, the Court was able to find cases that held that the defendants did have standing to enforce it and one that held they did not. *Id.*

198. Vienna Convention, *supra* note 8, art. 36.

199. *See* United States v. Lombera-Camorlinga, 170 F.3d 1241, 1243 (9th Cir. 1999). The court responded to the argument that even if the Treaty confers private rights, that defendants still do not have standing. "It has long been recognized that where a treaty's provisions establish individual rights, these rights must be enforced by the courts of the United States at the behest of the individual." The Court is referring to United States v. Rasher,

that an individual does not have standing to enforce Article 36 is to ignore the language of the Treaty.

Arguing that an individual does not have standing also ignores the intent of the Vienna Convention's drafters. As evidenced by the discussions in *Chaparro-Alcantara*, *Reyes*, *Superville*, *Rodrigues*, and *Carrillo*, the majority of courts recognize that the drafters of the Vienna Convention intended to bestow a private right upon the individual to sue.

B. Actual Prejudice

After establishing standing to sue under the Vienna Convention, a foreign defendant must next demonstrate that he suffered actual prejudice from the denial of his Vienna Convention rights.[200] The Ninth Circuit in *Calderon-Medina*, determined that prejudice exists when the violation harms "the aliens interests in such a way as to affect potentially the outcome of their deportation proceedings."[201] The prejudice requirement does not originate in the text of the Vienna Convention, but rather from American judicial construction.[202] The courts require a defendant to demonstrate prejudice because a violation of the Vienna Convention does not rise to the level of a constitutional violation of rights.[203]

The majority of defendants have been unable to satisfy the criteria the courts use for determining if the defendant were prejudiced by the violation.[204] This comment will discuss three of the standards courts use in determining whether or not a foreign defendant suffered prejudice.

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119 U.S. 407, 418–19 (1886), *citing* Head Money Cases, 112 U.S. 580 (1884); *see also* United States v. Alvarez-Machain, 504 U.S. 655, 659–60 (1992) (recognizing the continuing authority of *Rasher*). Because Article 36(1)(b) establishes individual rights, these rights must be enforced by our courts. *Id.*; Ben Lin Amicus, *supra* note 35, at 15–19.

200. *See* Kaddish, *supra* note 8, at 603 (explaining that the prejudice standard was first articulated in *Calderon-Medina* and *Waldron*, although the two courts adopted different standards of prejudice). Kaddish goes on to argue that under the Miranda doctrine, individuals have a right to be informed of certain fundamental rights. *Id.* He explains that consular notification is a fundamental right and so under the Miranda principle, individuals have a right to be notified of it. *Id.* at 603–04. Kaddish further argues that "Article 36 embodies a presumption of prejudice when a foreign national is arrested." *Id.* at 604.

201. *See Calderon-Medina*, 591 F.2d at 532.

202. *See Superville*, 40 F. Supp. 2d at 678 (stating that the Vienna Convention does not contain a prejudice requirement, but that "the few federal courts that have considered this subject have required claimants to show prejudice from violations of the treaty").

203. *See Rodrigues*, 68 F. Supp. 2d at 183 (stating that "foreign nationals asserting Convention violations must show prejudice, since their right to consular notification is derived from a treaty that does not implicate fundamental rights and, therefore, must be treated the same as a violation of any other non-constitutional right"). *see also United States v. Miranda*, 65 F. Supp. 2d 1002, 1006 (D.Minn. 1999) (finding that since the Supremacy Clause provides that a treaty is not at the same level of law as the Constitution, a "criminal defendant must establish prejudice resulting from a violation of his or her rights under the Convention").

204. *See infra* Parts V.B.1.a.–V.B.1.c.

1. Unable to Prove Prejudice

There are three reasons that lead courts to determine that the foreign defendant failed to establish prejudice. First, there are cases that determined the foreign defendant actually received consular notification. Secondly, there are those defendants that were unable to show prejudice because they could not establish that their consulate would have provided information that was different from the information the foreign national had already received. Finally, there are those courts that feel that when authorities issue Miranda rights to the foreign national, he can never establish prejudice for a violation of the Vienna Convention.

a. Defendant Received Vienna Convention Notification

Two of the cases discussed in this comment involve foreign defendants who received notification of their right to contact their consulate. In *United States v. Superville*, the record indicated that the INS informed Superville of his right to contact his consulate. As there was nothing in the record to dispute this, the court ruled that Superville could not have suffered prejudice from a denial of Vienna Convention rights.

The defendant in *United States v. Miranda* was also informed of his right to consular notification. However, notification came two days after Miranda had been arrested and after he was interrogated. The Miranda court recognized that "a period of two days constitutes a 'delay' within the meaning of the Convention when . . . the record is devoid of evidence demonstrating that earlier notification would not have been reasonably possible."[205] However, the court felt that Miranda could not establish prejudice because once informed of his right to contact his consulate, he did not choose to exercise that right.

b. Miranda *Warning Was Given*

The court in *United States v. Rodrigues* found that statements by Rodrigues that he would have invoked his right to counsel and would not have made any statements are an inadequate demonstration of prejudice.[206] The court went on,

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205. *Miranda*, 65 F. Supp. 2d at 1005. The Court further expressed the view that when arresting officers had a sufficient amount of time to issue the proper Miranda warnings, there was also time to issue the consular notification. *Id. But see* Consular Notification and Access, *supra* note 29, at 20 (requiring that "[o]nce foreign nationality is known, advising the national of the right to consular notification should follow promptly"). In the case of an arrest followed by a detention, the Department of State would ordinarily expect the foreign national to have been advised of the possibility of consular notification by the time the foreign national is booked for detention." *Id.*

206. *See Rodrigues*, 68 F. Supp. 2d at 183–84. The court doubted Rodrigues' contention that he would have remained silence and found that "there 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." *Id.* at 184. They stated that the

stating that "[p]rejudice has never been—nor could reasonably be—found in a case where a foreign national was given, understood, and waived his or her Miranda rights."[207]

In *United States v. Carrillo*, the Government argued that the defendants were absolutely given their Miranda rights.[208]

> Thus, the Government argues, any consultation from the Mexican consulate would have been merely repetitive. Further, the Government argues that the Vienna Convention does not require that a detained foreign national be allowed to speak to his consulate before interrogation commences.[209]

The defendants did not challenge these positions, but rather requested a hearing to demonstrate prejudice.[210] The court denied the request and, in doing so, appears to accept the position of the Government.[211]

c. *Information Provided by Consul*

The *Tapia-Mendoza* court required the foreign defendant to prove that he would have acquired different information from the consul. That court adopted a test set forth by the Ninth Circuit for establishing prejudice.[212]

"without delay" requirement had been interpreted by the State Department to mean compliance within 24 to 72 hours of the request. *Id.* Therefore, the court reasoned that even if Rodrigues was informed of and then requested consular assistance, agents still could have questioned him and obtained the rightful waiver of his Miranda rights. *Id. But see* Consular Notification and Access, *supra* note 29, at 20 (proscribing the time limit as "within 24 hours, and *certainly* within 72 hours." (emphasis added)).

207. *Id. But see* Consular Notification and Access, *supra* note 29, at 19–20. In response to the question of whether a foreign national must be given consular notification, even if the Miranda warning was given, the handbook directs that:

> Consular notification should not be confused with the Miranda warning, which is given regardless of nationality to protect the individual's constitutional rights against self-incrimination and to the assistance of legal counsel. Consular notification is given as a result of international legal requirements, so that a foreign government can provide its nationals with whatever consular assistance is deemed appropriate. You should follow consular notification procedures with respect to detained foreign nationals in addition to providing Miranda or other warnings required.

Id.; *see also* Canadian Amicus, *supra* note 8, at 25–26 (concluding that "article 36 imposes an *additional* obligation of consular access for foreign prisoners . . . . Thus failure to comply with article 36 cannot be excused as harmless on the ground that the receiving State provided other rights to the foreign defendant." (emphasis in original)).

208. United States v. Carrillo, 70 F. Supp. 2d 854, 860 (N.D.Ill. 1999).

209. *Id.*

210. *Id.* at 860 (stating that the [d]efendants' failure to respond arguably forfeits their opportunity to show prejudice).

211. *Id.*

212. *See Tapia-Mendoza*, 41 F. Supp. 2d at 1254. The test is set forth in the Ninth Circuit opinion in United States v. Villa-Fabela, 882 F.2d 434, 440 (1989) *overruled on other grounds by* U.S. v. Proa-Tovar, 975 F.2d 592 (1992).

> To establish prejudice, the defendant must produce evidence that 1) He did not know of his right [to consult the Mexican Consulate]; 2) he would have availed himself of the right had he known of it; and 3) there was a likelihood that contact [with the consul] would have resulted in assistance to him.[213]

The *Tapia-Mendoza* court determined that the defendant met the requirements of this test. They reasoned that the affidavit from the Consul of Mexico and the defendant's own statement (that he would have utilized his right to consular assistance) were not enough to establish prejudice.[214] "Defendant failed to produce evidence that such contact [with the Mexican Consul] would have resulting in assistance to him beyond his existing knowledge of Miranda warnings and rights."[215]

The defendants in *Chaparro-Alcantara* offered affidavits from themselves and the Mexican consul in St. Louis as proof of prejudice.[216] The court, however, felt that the foreign defendants would not have been able to procure information from the Mexican Consulate that was in anyway different from the information the INS provided them.[217] The court further felt that even if the defendants had exercised their right to consular assistance, it is not certain that they would have stopped answering questions until the consul arrived.[218] For these reasons, the court determined that the foreign defendants were unable to establish prejudice.

Of the cases examined in this comment, only *State v. Reyes* has concluded that the foreign defendant suffered prejudice.[219] The court finds that the failure of the officers to inform the foreign national of his right to consular assistance prejudiced

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213. *See id.* (applying the Villa-Fabela test).

214. *Id.* at 1254–55. The court reasoned that the defendant could not have been prejudiced because he had been deported before and so he was familiar with immigration laws and procedures. *Id.* The defendant stated at a hearing that "he would have liked to contact the Mexican Consul because he 'hoped [the Consul] could have made [him] more aware of the [sic] certain rights that [he] may have had.'" *Id.* The Affidavit from the Consul of Mexico stated that "a representative of the Consulate would visit the citizen and provide advice concerning each of her Miranda rights, and that such a defendant would be advised that such rights should be asserted." *Id.*

215. *Id.* at 1255.

216. *See United States v.* Chaparro-Alcantara, 37 F. Supp. 2d 1122, 1125-27 (1999) (indicating that the court felt an affidavit from the Mexican Consul in St. Louis stating that he would have fully informed the defendants of their rights under Miranda and made certain that they understood them and the importance of invoking them and affidavits that the defendants filed stating that they would have sought out the assistance of the Mexican consulate if they had known that they were entitled to it and furthermore, that they would have followed whatever advice the consulate provided).

217. *Id.* at 1126–27.

218. *Id.* at 1126 (holding that "in order for Chaparro-Alcantara and Romero-Bautistato establish prejudice, they must show that had they been advised of their right to speak with the Consulate, they would have not waived their Fifth Amendment rights until they spoke to their Consulate").

219. State v. Reyes I, 740 A.2d 7, 13-15 (Del. 1999).

the national.[220] The court further held that a foreign defendant is not required to prove that he would have contacted his consulate or that the consulate would have changed his decision to speak to the police.[221] The Court intimates that "[i]t suffices to state that the issue in this case is not whether Defendant would have asserted his Article 36 consular notification rights, but whether or not, following his arrest, Defendant was informed of his consular notification rights."[222] The Court goes on to clarify that it "is not holding that a violation of the Vienna Convention is prejudice per se. It is merely stating that in this case, the Court has made a specific finding of prejudice."[223]

With the exception of *Reyes*, these cases have held that a foreign defendant is only prejudiced when he can prove that his consul would have offered information different from what the law enforcement officers provided or when the foreign national was not given his Miranda rights. These opinions overlook that a foreign defendant is prejudiced simply by being foreign.[224] Assistance from his consul puts a foreign defendant on a more equal footing with non-foreign defendants.

A foreign defendant is prejudiced because he is unfamiliar with the American legal system. A foreign defendant is prejudiced when English is not his first language. A foreign defendant is prejudiced because he may be unfamiliar with the "'nation's customs, police policies, or criminal proceedings,' and may be unable to defend himself due to ignorance, lack of resources, and discrimination based on his national origin."[225]

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220. *Id.* at 13 (discussing that the state attempted to persuade the Court that in order to prove prejudice, the Court should find that the Defendant

> 'would have to argue that he would have contacted the Guatemalan consul had he known of his right to do so' and that Defendant has 'the burden of showing how contacting the Guatemalan Consulate would have changed his position by presenting evidence that the consul's [sic] would have changed his decision to speak to the police.').

221. *Id.*

222. *Id.*

223. *Id.* at 14, *citing* Bryan v. State, 571 A.2d 170, 175 (1990) (emphasizing that "[i]t is well-established in Delaware and in our national that a suspect may be interrogated only if he makes a voluntary, knowing, and intelligent waiver of his rights"); *see also* Miranda v. Arizona 384 U.S. 436 (1966).

224. *See generally* Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971). These cases indicate that American courts have a history of recognizing the foreigners are discriminated against because of their ancestry. Because of this, the Supreme Court has found that aliens are a suspect class under the Equal Protection Clause of the United States Constitution. The Court has routinely invalidated statutes discriminating against foreign nationals.

225. *See* Kaddish, *supra* note 8, at 605, *quoting* Brief Amicus Curiae of the United Mexican States, Ohio v. Loza (Ohio Ct. App., 12th Dist., Butler County 1997) (no. CA96-10-0214) at 9; *see also* Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1113 (1994) (stating one of the reasons to recognize cultural differences is that "[c]ultural factors can be relevant to the defendant's motivations, premeditation or deliberation, provocation or heat of passion, and to the defendant's understanding and perception of the circumstances leading up to and immediately following the charged crime").

Consular assistance considerably alleviates this prejudice. Foreign consular officials state that part of their role is to come to the aid of their citizens when detained by local authorities.[226]

C. Proper Remedy

The Vienna Convention does not provide a remedy for a violation of Article 36.[227] However, foreign defendants generally seek to invoke the exclusionary rule to remedy the Vienna Convention violation. Some of the courts examined in this comment discussed other remedies, such as diplomatic channels and monetary relief.

1. Exclusionary Rule

Foreign defendants request suppression of the evidence obtained against them in violation of their Vienna Convention rights. "In short, Defendants seek to invoke the exclusionary rule as a remedy for a treaty violation."[228] The exclusionary rule was designed to "safeguard against future violations of [constitutional] rights through the rule's general deterrent effect."[229]

a. Majority View

The majority of courts examined in this comment have found that the exclusionary rule is not available as a remedy for a treaty violation. They have held that the exclusionary rule is only available if the violation rises to the level of an

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226. *See* LEE, *supra* note 20, at 127. The Mexican government has identified protection of Mexican nationals as one fo the most important roles of Mexican consuls by including in their duties the following provisions: "1. to assist and advise Mexicans in their dealings with local authorities; 2. to visit Mexicans in detention, in prison, in hospitals, or in any other difficult situation . . . ; and 3. to represent Mexicans who are absent or otherwise incapable of handling their own affairs." *Id.*; *see also* Canadian Amicus, *supra* note 8, at 13. The usual functions performed for a detained national by a Canadian consular official as being:

> communicating with and visiting the prisoner; explaining the rudiments of his situation; explaining that the is fully subject to the arresting country's judicial system; verifying that he prisoner receives adequate treatment while detained; taking steps to see that the prisoner has appropriate local legal representation; and monitoring proceedings to ensure that the accused receives a trial that accords with generally recognized principles of justice, within a reasonable time.

Id. (citations omitted).

227. *See* Article 36 of the Vienna Convention, *supra* note 7.

228. United States v. Carrillo, 70 F. Supp. 2d 854, 861-62.

229. Arizona v. Evans, 514 U.S. 1, 10 (1995); *see also* Elkins v. United States, 364 U.S. 206 (1960) (finding that the rule's purpose is to deter police officers from violating individuals's constitutional rights); Miranda v. Arizona, 384 U.S. 436 (1966) (discussing the applicability of the exclusionary rule for a violation of Fifth Amendment rights); Massiah v. United States, 377 U.S. 201 (1964) (applying the exclusionary rule to police violations of the Sixth Amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (recognizing the applicability of the exclusionary rule to state violations of the Fourth Amendment).

infringement on Constitutional or fundamental rights. Furthermore, the one court that discussed the exclusionary rule in connection with the concepts of international law found that it was unavailable as a remedy.

i. Exclusionary Rule is Available if the Treaty Violation Rises to the Level of Violations of Constitutional or Fundamental Rights

In declining to apply the exclusionary rule as a remedy for a violation of the Vienna Convention, the court in *United States v. Rodrigues* stated that "[e]xclusion as a remedy was established to deter governmental actors from impinging on fundamental rights and 'should only be employed when those values are implicated.'"[230] The court felt that the exclusionary rule was an improper remedy because a violation of the Vienna Convention does not rise to the level of a Constitutional violation.[231] Furthermore, the court found that the justification of the exclusionary rule—"to reduce governmental infringement on fundamental constitutional rights—is not implicated when Article 36 of the Convention is violated."[232] The majority of other courts concurred with the analysis put forth by the Rodrigues court and have found that the exclusionary rule is not available for a treaty violation.[233]

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230. United States v. Rodrigues, 68 F. Supp. 2d 178, 185, *citing* $69,530.00 in United States Currency, 22 F. Supp. 2d 593, 595 (W.D.Tex. 1998). *But see* Kaddish, *supra* note 8, at 604, *quoting* Reply Brief of Amicus Curiae United Mexican States, Murphy v. Netherland (4th Cir. 1996) (No. 96-14) at 5: "It is Mexico's understanding that the courts of the United States consider a right fundamental when it protects a basic human right, such as the right to life or liberty, and when its observance or denial impacts the overall fairness of the proceedings. The right to of a foreign national to contact his consul is such a right. Its denial is a fundamental defect int eh proceedings against a foreign national."

231. *Rodrigues*, 68 F. Supp. 2d at 185 (quoting *Murphy v. Netherland*, as stating: "Just as a [government actor] does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty").

232. *Id.* The court finds the basis for this argument in $69,530.00 in *United States Currency*, which states:

> A convention or treaty signed by the United States does not alter or add to our Constitution. Such international agreements are important and are entitled to enforcement, as written, but they are not the bedrock and foundation of our essential liberties and accordingly should not be cloaked with the . . . [exclusionary remedy] that protects those liberties.

Id. (footnotes omitted). The Rodrigues court further states that "Consular notification is not a fundamental right derived from the Constitution, nor is it, in the words of Justice Cardozo, 'the very essence of a scheme of ordered liberty.' Palko v. Connecticut, 302 U.S. 319, 325 (1937)."

233. *See Carrillo*, 70 F. Supp. 2d at 861–62 (discussing that the court could not locate a case that held that the exclusionary rule was a proper remedy for a violation of the Vienna Convention because the violation did not rise to a fundamental, constitutional violation); *see also Miranda*, 65 F. Supp. 2d at 1006 (indicating that the exclusionary rule is an improper remedy because the right of consular notification does not rise to the level of a constitutional right and that the majority of courts have reached this same conclusion); United States v. Torres-Del Muro, 58 F. Supp. 2d 931, 934 (1999) (concluding that "the failure to notify the foreign national of his right to speak with his consul, per se, does not implicate constitutional rights); United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1255 (D. Utah 1999) (holding that Tapia-Mendoza "has not presented any authority or precedent for imposing the remedy ro suppression of his statements even if, arguendo, his alleged right to consular assistance was violated"); United States v. Chaparro-Alcantara, 37 F. Supp. 2d 1122, 1125 (1999) (adopting the position that

ii. Exclusionary Rule is Available if the Text of the Treaty Provides for It.

Courts who have found the exclusionary rule applies only if a treaty right is at the same level as a Constitutional violation have also held that suppression would be proper if the text of the Vienna Convention provided for that remedy.[234] As stated by the *Chaparro-Alcantara* court, "in order for Chaparro-Alcantara and Romero-Bautista to invoke the exclusionary rule in this case, the Vienna Convention must explicitly provide for that remedy, or the violation of the treaty must rise to a level of a constitutional violation."[235] As discussed, the courts have found that the Treaty does not rise to a level of a constitutional violation and "[t]hus, the suppression remedy must be available, if at all, from the Vienna Convention itself. The Court, however, found that nothing in the Vienna Convention that provides for the exclusionary rule as a remedy for violation of its provisions."[236] The majority of courts have also agreed with the holding of the *Chapparo-Alcantara* court.[237]

iii. Customary International Law and the Exclusionary Rule

Torres-Del Muro asserted that international law should govern his trial.[238] The defendant claimed that international law's customary remedy would be to restore the status quo ante by invoking the exclusionary rule and returning the defendant to the position he was in before the violation of his Vienna Convention rights occurred.[239] The court found that it was "questionable whether international law

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"Article 36 does not create a 'fundamental' right, such as the Sixth Amendment right to counsel, or the Fifth Amendment right against self-incrimination which originates from concepts of due process").

234. *See Chaparro-Alcantara*, 37 F. Supp. 2d at 1125.

235. *Id.*

236. *Id.* at 1125–26.

237. *See* United States v. Torres-Del Muro, 58 F. Supp. 2d 931, 933–94 (1999) (asserting that "in order for Defendant to invoke the judicially created exclusionary rule in this case, the Vienna Convention must explicitly provide for that remedy. . . . The Court finds nothing in the text of the Vienna Convention nor its history which manifests the signatory nations' intent to remedy violations through the exclusionary rule."); *see also Tapia-Mendoza*, 41 F. Supp. 2d at 1255 (holding:

> [the] Vienna Convention does not expressly or impliedly provide for the remedy of suppression of statements of confessions where an arresting government fails to notify a foreign national of her right to contact the Consulate. This court declines to imply the existence of such remedy, and rules that the remedy of suppression is not available under the Vienna Convention.

238. *See Torres-Del Muro*, 58 F. Supp. 2d at 934.

239. *See id.* (basing defendant's argument on the Restatement (Third) of Foreign Relations Law § 901 cmt. D (1987): "[o]rdinarily, emphasis is on forms of redress [for violations of treaties] that will undo the effect of the violation, such as restoration of the status quo ante, restitution, or specific performance of an undertaking."); *see also* BLACK'S LAW DICTIONARY 1410 (6th ed.1990) (defining *status quo* as "the existing state of things at any given date"); *see also id.* at 92 (defining *ante* as "before").

should govern this case."[240] The court further reasoned that even if international law governed the case, the return to status quo ante did not necessarily have to be via suppression.[241]

b. State v. Reyes

The *Reyes* court is the only American court to find that suppression is a valid remedy for a violation of the Vienna Convention.[242] The court declares that evidence will be suppressed for the following reasons:

> (1) the Vienna Convention is the law of the land under Article IV, Section 2 of the United States Constitution; (2) the police conduct in this case violated Article 36 of the Convention; (3) Defendant, a Guatemalan citizen has asserted a Vienna Convention violation in a timely manner; (4) Defendant has shown adequate prejudice to exist; and (5) a violation of Article 36 is ground for suppressing incriminating statements made by foreign nationals while in police or government custody.[243]

The *Reyes* court reaffirmed their position in responding to the State's motion for Reargument.[244] The court stated that

> the failure to inform a foreign national of his right under the Vienna Convention does not automatically require that his statements be suppressed; rather, the foreign national must demonstrate that he has suffered some kind of cognizable prejudice .... The Court found prejudice to exist where (1) the State conceded that Defendant was not informed of his consular notification rights; (2) the Defendant made incriminating statements which, (3) the State sought to introduce in its case-in-chief.[245]

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240. *Torres-Del Muro*, 58 F. Supp. 2d at 934. *But see* Vazquez, *supra* note 173, at 1157–58 (declaring that when a treaty does "not specify a remedy for failure to comply with the obligation, the default rules of customary international law dictate"). "When a state is internationally responsible for a wrongful act, it is under an obligation to discontinue the act and to prevent the continuing effects of the act. It is also normally under a duty to restore the situation as it existed before the breach ...." *Id.*

241. *Torres-Del Muro*, 58 F. Supp. 2d at 934.

242. State v. Reyes I, 740 A.2d 7, 14-15 (Del. 1999).

243. *Id.*

244. Reyes II, 1999 WL 743598 at *3.

245. *Id.*

2. *Other Remedies*

a. Diplomatic Channels

The *Rodrigues* court maintains that the exclusionary rule is unavailable in a non-constitutional matter.[246] The court defends its position by stating that the State Department has found that the signatory countries to the Vienna Convention have found traditional diplomatic, not judicial, channels to be the proper remedy.[247] The court also emphasizes that it would be unprecedented in both the United States and the International Community to hold that the exclusionary rule is the proper remedy for a consular violation.[248]

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246. *See* United States v. Rodrigues, 68 F. Supp. 2d 178, 185 (E.D.N.Y. 1999).

247. *See id.* at 186 (paraphrasing the Verbatim Transcript of Oral Argument before the International Court of Justice in the case concerning the Application of the Vienna Convention on Consular Relations (Para. v. U.S.) ¶ 2.15 (Apr. 7, 1998)). The court went on to state that the proper remedy would be for a letter of protest to be sent by the consular post who did not receive the proper notification and that the most significant action to be taken in return is a formal apology and assurances to improve the system to prevent future violations from occurring. *Id.*

248. *See id.* at 186–88 (emphasizing that the United States would be the first and only nation to hold that suppression of incriminating statements is the proper remedy for the violation). The Court also analyzed the effect this decision could have in other countries. Beginning with the accepted notion that American courts are "precluded from drawing any negative inferences from a criminal defendant's silence at trial," the court explains that this precept would not be found in other countries—even those with a similar protection against self-incrimination. Even in Great Britain, "the country from whom we derive the privilege" allows its judges to make statements concerning the defendant's silence. In Germany, a defendant's silence at trial may be considered an aggravating factor at sentencing. In the Netherlands, the silence is considered in the factual evaluation and by commented on by the judge and prosecutor. *Id. But see* Mark Warren, *Two precedent cases from the United Kingdom: a breach of consular obligations warrants a judicial remedy* (document on file with *The Transnational Lawyer*) (discussing that two British courts have excluded evidence obtained in violation of the Vienna Convention's provisions on consular notification).

> Cases that warrant exclusion are those in which the defendants' personal background might reasonably indicate an unfamiliarity with British legal procedures and hence a perceived inability to comprehend and act on their available legal rights. Those factors might include the defendants' command of English, their length of stay in the United Kingdom and their familiarity with the criminal justice system. No showing of actual prejudice was required by the courts, nor did the court appear to seek or rely on affidavits from the consulates in question. There is no indication that the Crown appealed these trial court decisions; they are therefore uncontested and would have precedent value.

*Id.*The first case, *R. v. Bassil and Mouffareg* (1990) 28 July, Acton Crown Court, HHJ Sich [His Honour Judge Sich], *in Legal Action* 23, December 1990, involved two Lebanese nationals who were arrested for importing cannabis resin from Lebanon. *Id.* In addition to the defendants' lack of knowledge of the British criminal justice system and their limited English language skills, the defendants are from a country where "an arrested suspect is perceived to have no rights, or at least that it is dangerous to insist on any rights." As the arresting authorities failed to inform the two foreign defendants of their right to consular notification and assistance, "the evidence fo the interview should be excluded." The court noted that if officers had given the notification, a French or Arabic speaking official would have been able to visit them and help "them to reach an informed decision about their position, and might well have advised them to obtain the services of a solicitor and an interpreter before being interviewed." In the second case, *R. v. Van Axel and Wezer* (1991) 31 May, Snaresbrook Crown Court, HHJ Sich. Reported in *Legal Action* 12, September 1991, two Dutch women were arrested for importing heroin and amphetamine sulfate from Holland. *Id.* The defendants were interviewed without being informed of their right to contact their consulate. The judge, finding "that the defendants' English was reasonably good but that his might

e. Monetary Relief

In its discussion of international remedies, the *Torres-Del Muro* court stated that suppression of evidence was not the only way to return the defendant to status quo ante.[249] "Defendant might theoretically be able to seek monetary damages for the violation of his notification rights through a Bivens action."[250] A Bivens action is an action for damages to "vindicate constitutional right when a federal government official has violated such right."[251]

The Restatement (Third) of Foreign Relations Law provides that "[u]nder international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury."[252] The comments to this statement reflect the generally accepted means of redress as being status quo ante, restitution, or specific performance.[253] According to one commentator, "[c]ustomary international law should guide the courts in determining a remedy."[254]

Returning the status quo ante via the exclusionary rule is the appropriate remedy for a violation of the Vienna Convention because "the purpose behind the Article 36 notification requirement, like that of Miranda, is to make a suspect aware

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be deceptive, especially since they were young people who might wish to appear more sophisticated and worldly wise than they really were," excluded the interviews. *Id.*

249. *Torres-Del Muro*, 58 F. Supp. 2d at 934.

250. *Id.*; *see also id.* at n.3 ("The Court does not hold as a matter of law that the violation of the Vienna Convention is de facto actionable under Bivens. The Court uses the Bivens action merely as an example of an alternate remedial scheme.").

251. *See* BLACK'S LAW DICTIONARY 169 (6th ed. 1990) (stating that "Action is available if no equally effective remedy is available, no explicit congressional declaration precludes recovery, and no 'special factors counsel hesitation.' Rauschenberg v. Williamson, C.A.Ga., 785 F.2d 985, 987"). The action originated in *Bivens v. Six Unknown Named Defendants*, 403 U.S. 388 (1999).

252. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 901.

253. *Id.* Comment d specifically provides that:

> All forms of reparation are designed to provide redress for the breach of the international obligation that gave rise to the claim. Ordinarily, emphasis is on forms of redress that will undo the effect of the violation, such as restoration of the status quo ante, restitution, or specific performance of an undertaking. For instance, if a foreign embassy has been occupied by a mob, there is an obligation to remove the mob and to return the embassy to its diplomatic staff; there may also be an obligation to pay compensation for the damage to the building and to its contents, and for the injuries and indignities suffered by the embassy's staff. Compensation is a common remedy for monetary damage, Comment e, and in some instances compensation may be required even though no monetary damage had occurred. Acknowledgment of a violation and an apology are common forms of redress, sometimes supplemented by compensation. There is variety also in the remedies that may be ordered by a third party to which a claim has been presented for resolution. Principles of international law concerning remedies are not rigid or formalistic and give an international tribunal wide latitude to develop and shape remedies, but the tribunal is usually restricted to measures proposed by the parties.

Id.

254. *See* Kaddish, *supra* note 8, at 609.

of his rights before he unknowingly waives those rights."[255] When a defendant properly raises the Vienna Convention violation, as Reyes did, the court should suppress the evidence because not doing so will harm the defendant's trial.[256]

VI. CONCLUSION

With all of the division in the lower federal courts and state courts as to how to properly apply the Vienna Convention, a United States Supreme Court ruling is needed to finally set forth the place of the Vienna Convention in American jurisprudence. It is time that the United States started fulfilling its international obligations.[257]

The language of the Vienna Convention, along with the intent of the drafters, demonstrates that the Vienna Convention confers a private right of action upon individuals. When a foreign defendant meets the requirements set forth by the American courts—timely invocation of the Vienna Convention and a demonstration of prejudice—the Courts should suppress the evidence and return the defendant to status quo ante as demanded by international law.

One of the largest consequences of the United States' failure to abide by their treaty obligations is that it puts Americans at risk. The American government can no longer continue to violate international law and expect its nationals to be protected overseas. Furthermore, its actions condone violations by other countries. As stated by the Canadian amicus brief in the Stanley Faulder case:

> Because it forms part of the body of legal precedent on the point, the denial of notification and of an effective remedy in this case undermine the sovereign power of all parties to the Vienna Convention—including the United States—to invoke the Convention to protect their nationals who are arrested or detained abroad. Worse, it condones noncompliance. The failure of the United States to honor its obligations under article 36 may be cited by other countries as evidence of accepted international practice when such states are faced with deciding whether to give notice, or provide a remedy

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255. *Id.* at 611 (finding that because of this, "full effect cannot be given to the Article once a foreign national has been convicted in violation of its provision unless a new trial is granted").

256. *See* Canadian Amicus, *supra* note 8, at 54–56 (arguing that in a case like Faulder's, where the defendant has gone through a trial already, the harm inflicted by the failure to provide consular assistance "in the early stages of a prisoner's arrest infects the process that follows, destroying the fundamental fairness and truth-seeking function of the subsequent trial").

257. *See* David Cole, *The U.S. Plays by its Own Rules: As a Nation, We View International Law in Wholly Instrumental Terms*, Tex. Law., May 11, 1998, at 28. "When it comes to Cuba's record on human rights, Japan's trade practices or Iraq's compliance with treaties on chemical weapons, the United States is a staunch proponent of international law. But when the tables are turned and we're accused of violating international law, we couldn't care less." *Id.*

> for non-notification, in cases involving detention of foreign nationals within their jurisdiction.[258]

This concern is echoed in the words of Justice Butzner,

> United States citizens are scattered about the world - as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that 'international law is founded upon mutuality and reciprocity . . . .'"[259]

Mexico has taken preventive measures to protect Mexican nationals in the United States. The Consul for the United Mexican States created a wallet sized card that contains the rights embodied in the Vienna Convention as well as those contained in American jurisprudence such as the right to an attorney and the right to remain silent. Hopefully, this will prevent further violations of the rights of Mexican nationals in the United States.

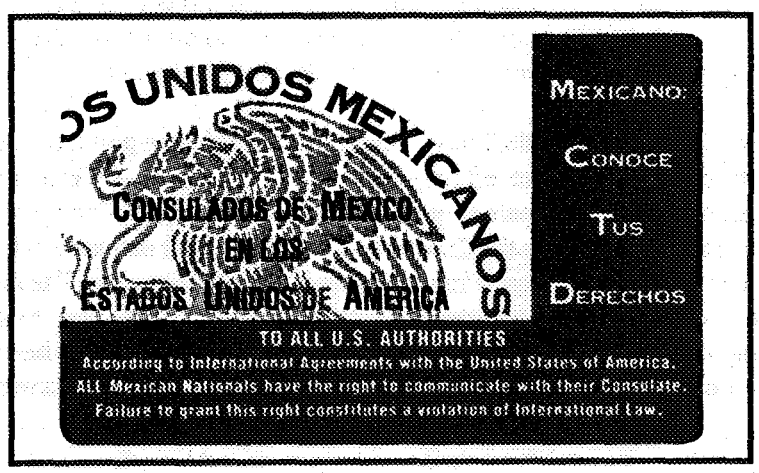

Figure 1 (Frontside of Card)

258. Canadian Amicus, *supra* note 8, at 31.

259. *See* Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring), *quoting* Hilton v. Guyot, 159 U.S. 113, 228 (1895).

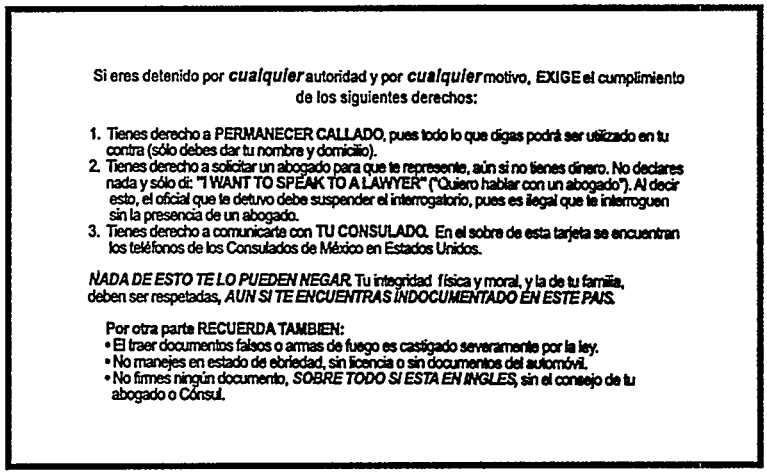

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Figure 2 (Backside of Card)

It is unfortunate that Mexico had to resort to these measures to ensure that their citizens are protected because Mexico cannot rely on the United States to uphold their treaty obligations.

Until the time comes when America fulfills their international obligations, the best weapon to combating the violation of the Vienna Convention is awareness. Hopefully, other nations will follow Mexico's lead in informing their nationals of their rights under the Vienna Convention. Here in America, while the rights of foreign defendants are still violated, it is the role of the defense attorney to ensure that their foreign clients were informed of their right to contact their consulate.

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260. Translation of Card by author:
If you are detained for any reason, know the follow rights:
1. You have the right to remain silent, anything you say can and will be used against you (just give your name and address).
2. You have the right to request an attorney to represent you, even if you do not have the money. Only say "I want to speak to a lawyer." When you say this, the official that has detained you must stop the interrogation, because it is illegal to continue without your lawyer.
3. You have the right to contact your consulate. On this card, you will find the phone numbers for the Mexican Consulates in the United States.

None of these rights can be denied. Your mental and physical integrity and that of your family should be respected, even if you do not have papers.
Also remember:
- If you have illegal documents or weapons, you may face serious penalty through the law.
- Do not drive in the U.S. without a license or documents for your automobile.
- Do not sign anything in English without consulting your lawyer or consulate.