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THE VIENNA CONVENTION AND THE DEFENSE OF NONCITIZENS IN NEW YORK: A MATTER OF FORM AND SUBSTANCE

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I. INTRODUCTION

An often overlooked yet potentially fruitful area of litigation for the New York criminal defense attorney concerns utilizing the Vienna Convention on Consular Relations (the "Vienna Convention")[1] in the representation of foreign nationals. The criminal defense attorney should thus have a familiarity with both the legal and factual issues involved in the interplay between state law and the rights of the noncitizen criminal defendant to consular notification and access derived under the

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

Vienna Convention.[2] The Vienna Convention has received increasing attention in the context of criminal litigation in the United States, due in part to the expanding influence of international law in domestic courts generally and in part to the extent that it has been successfully used as a vehicle in the litigation of death penalty cases.[3] The Vienna Convention however, transcends capital cases[4] and applies in any instance in which a foreign national has been detained, arrested or imprisoned.[5] This express reference to matters bearing squarely upon fundamental issues of domestic criminal procedure has also contributed to the burgeoning of litigation in this area for well over a decade.[6] Somewhat surprisingly, litigation under the Vienna Convention in New York state practice has been remarkably sparse in light of the relatively steady maintenance of a noncitizen prison population of better than ten percent since at least 2002.[7] Given its broad application however, the Vienna Convention is extremely valuable to defense attorneys and should always be considered in the defense of foreign nationals.

This article discusses the litigation of Vienna Convention claims in the context of New York state criminal proceedings. Parts II and III provide a review of both the background and the obligations arising under the Convention. Thereafter, the article is divided principally into two substantive sections. The

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[2] Article 36 provides in part that "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." *Id.* art. 36, 21 U.S.T. at 100, 596 U.N.T.S. at 292.

[3] *See infra* pp. 10-11 and note 36 (providing U.S. cases that involve issues arising under the Vienna Convention).

[4] *See* Kelly Trainer, *The Vienna Convention on Consular Relations in the United States Courts*, 13 TRANSNAT'L LAW. 227, 230-31 (2000) (noting, in addition to capital cases, several cases involving immigration and narcotics raising Article 36 violations).

[5] *See* Vienna Convention, *supra* note 1, art. 36(1)(b), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

[6] *See* cases cited *infra* note 36.

[7] Three reports published by the U.S. Department of Justice indicate that noncitizen prisoners accounted for over ten-percent of New York State's prison population. *See* Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2004*, Bulletin No. NCJ 208801; Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2003*, Bulletin No. NCJ 203947; Bureau of Justice Statistics *Prison and Jail Inmates at Midyear 2002*, Bulletin No. NCJ 198877. These three reports are all available at http://www.ojp.usdoj.gov/bjs/pubalp2.htm.

first section, Part IV (divided into subparts 'A', 'B' and 'C') addresses matters concerning the general application of the Vienna Convention and attendant issues. Subpart A discusses the question of whether, by its terms, the Convention gives rise to an individually enforceable right to consular notification and access and, will suggest that an examination of the legislative history and circumstances underlying the adoption of the Convention lends clear support to the existence of an individual right of detained foreign nationals to be promptly informed of their right to consular notification and that the breach of this obligation by the authorities may be properly vindicated in the courts. To the extent that the relevant provisions of the Convention are well recognized as self-executing, they are entitled to judicial enforcement without the need for any implementing legislation and should thus be fully enforced in state courts as a matter of federal law and through the application of principles of customary international law.[8] Subpart 'B' discusses the application of the Convention in the context of the state statutory scheme concerning the suppression of evidence, specifically statements. Here, this article will argue that, assuming the conferral of an individual right of enforcement by the Convention, the absence of a textual reference as to precisely when the required notice must be given cannot alone foreclose the issue as to the voluntariness of the statement obtained. To the extent that advisement of the right to consular notification is required to be given under international law where it becomes apparent that an individual detainee might be a foreign national, a factual issue as to whether such notice must precede an official interrogation or a subsequently obtained statement pursuant to the terms of the Convention is clearly raised. Accordingly, since the particular circumstances of a case may give rise to the right to consular notification well in advance of an interrogation or statement, the failure of the State to abide by its obligation under the Convention directly impacts upon the question of voluntariness in the traditional sense. Subpart C discusses the courts' varied treatment of Article 36 claims and remedies and will argue that substantive breaches of the Convention warrant the imposition of meaningful judicial sanctions and remedies in state court in contemplation of the significance, uniformity of

[8] *See infra* note 41 and accompanying text.

application and intended purpose of the treaty amongst the states parties. Ultimately, the second section, Part V discusses the practical implications and considerations in raising Vienna Convention claims. Here, the article will argue that raising Vienna Convention claims serves several important and potentially beneficial functions in the representation of noncitizens, ranging from assistance in garnering evidence abroad, to facilitating communication, to advising a given defendant early in the process about the nuances of a system in which they often find themselves at a distinct disadvantage. This article concludes, recognizing that whether treaty rights are interposed as a means of involving the foreign consulate as a bridge to facilitate the relationship between attorney and client; as a tool to demand or acquire useful pretrial discovery and preserve issues for appellate review; to simply assert factual grounds potentially leading to the expansion of hearing or trial issues; or more hopefully, to obtain a meaningful remedy in the case of their breach—a fundamental understanding of Article 36 of the Convention is essential to the representation of foreign nationals in state proceedings.

II. BACKGROUND

The Vienna Convention is a seventy-nine article multilateral treaty to which there are currently 167 parties, including the United States.[9] Primarily, the Convention expresses universally recognized consular norms as derived from principles of customary international law.[10] Article 36 of the Convention is entitled "Communication and Contact with Nationals of the

[9] *See* The International Justice Report, *The Vienna Convention on Consular Relations*, *available at* http://www.internationaljusticeproject.org/nationalsinstruments.cfm (last visited Feb. 22, 2006).

[10] *See* Mark J. Kadish, *Article 36 Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 568 (1997) (for a detailed exposition of the history of the Vienna Convention); *see also* 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); *see also* Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, G.A. Res. 40/144, Annex, 40 U.N. GAOR, 40th Sess., Supp. No. 53, at 252, U.N. Doc. A/40/53 (1985) (recognizing the fundamental nature of the consular institution and providing that "[a]ny alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national"). *Id.* art. 10.

Sending State" and is principally concerned with the discharge of consular functions regarding the nationals of States Parties that have been ". . . arrested or committed to prison or to custody pending trial or [have been] detained in any other manner."[11] Under such circumstances, Article 36 generally obligates the host State to advise the foreign national of his right to have his consul notified.[12] The substance of these provisions are held to be so fundamental as to apply in one form or another to even to those countries that have not yet ratified the Convention.[13] The United States however, ratified the Convention, together with its Optional Protocol[14] (a treaty in its own right) in 1969,[15] rendering them part of the supreme law of the land under the Supremacy Clause of the federal Constitution.[16]

In the intervening thirty-six years the United States has submitted itself to the compulsory jurisdiction of the Interna-

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[11] *See* Vienna Convention, *supra* note 1, art. 36(1)(b), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

[12] *See* Roberto Iraola, *Federal Criminal Prosecutions and the Right to Consular Notification Under Article 36 of the Vienna Convention*, 105 W. VA. L. REV. 179, 184 (2002).

[13] *See* U.S. Department of State, 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, PART 5: LEGAL MATERIAL (Jan., 1998), *available at* http://travel.state.gov/pdf/CNA_book.pdf (providing that the U.S. State Department considers consular notification to be required under customary international law in all cases, even if the detainee's home country has not signed the Convention). *See also* Cara S. O'Driscoll, Comment, *The Execution of Foreign Nationals in Arizona: Violations of the Vienna Convention on Consular Relations,* 32 ARIZ. ST. L.J. 323, 340 (2000) (noting that the U.S. regards "[a]rticle 36 obligations [as] of the highest order and should not be dealt with lightly").

[14] *See* Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. I, 21 U.S.T. 325, 326, 596 U.N.T.S. 487, 488 [hereinafter Optional Protocol]. The Optional Protocol was proposed by United States in 1963 and ratified together with the Convention in 1969. In 1979, the United States became the first country to invoke the protocol. *See* Sean D. Murphy, ed., *Implementation of Avena Decision by Oklahoma Court*, 98 AM. J. INT'L L. 581 (2004); *see also* United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 64, ¶¶ 45-46 (May).

[15] *See* 115 CONG. REC. 30997 (Oct. 22, 1969) (reflecting the unanimous advice and consent of the U.S. Senate in the ratification of the Convention); *see also* Kadish, *supra* note 10, at 568.

[16] U.S. CONST. art. VI, cl. 2 (providing in part that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding"); *see also* Asakura v. Seattle, 265 U.S. 332, 341 (1924).

tional Court of Justice ("ICJ") under the terms of the Optional Protocol, which confers upon the ICJ the power to adjudicate "disputes arising out of the interpretation or application of the [Convention],"[17] providing for what is in essence, a binding process of arbitration.[18] In March of 2005 however, the United States signaled its intention to withdraw from the Optional Protocol.[19] With regard to the Convention itself, no similar action has as yet been undertaken. On the contrary, the United States has continued to reaffirm its commitment to the Convention.[20] While the current posture of the United States (assuming the effectiveness of the intended withdrawal) may raise substantial and novel questions as to whether the prior adjudications of the ICJ in matters having arisen under the Optional Protocol are prospectively binding, the resulting status of the obligations under the Convention itself remain substantively unchanged.[21] In this respect the United States is not *sui generis*.[22] Several other countries remain fully bound to the provisions of the Convention while simultaneously declaring themselves free of the Optional Protocol.[23]

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[17] *See* Optional Protocol, *supra* note 14, art. I (providing that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice").

[18] *See, e.g.*, Case Concerning Avena & Other Mexican Nationals (Mexico v. U.S.) 2004 I.C.J. 128 (Mar. 31, 2004), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.

[19] *See* Charles Lane, *U.S. Quits Pact Used in Capital Cases: Foes of Death Penalty Cite Access to Envoys*, WASH. POST, Mar. 10, 2005, at A1 (quoting U.S. Secretary of State, Condoleeza Rice's letter to the U.N. Secretary General, Kofi Annan which provided in part that "the United States of America . . . hereby withdraws from the Optional Protocol." As a consequence, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol).

[20] *See* U.S. STATE DEPARTMENT, BUREAU OF CONSULAR AFFAIRS, ANNOUNCEMENT: ALL CONSULAR NOTIFICATION AND ACCESS REMAIN IN EFFECT (2005) *available at* http://travel.state.gov/news/news_2155.html. (providing with regard to the March 7, 2005, withdrawal from the Optional Protocol, "[t]he United States has not withdrawn from the Vienna Consular Convention and remains committed to its principles and provisions").

[21] *See id.* ("[t]he obligations of American law enforcement personnel regarding consular notification and access for arrested or detained foreign nationals are unchanged" following the withdrawal from the Optional Protocol).

[22] The term is Latin for "of its own kind." BLACK'S LAW DICTIONARY 1164-65 (7th ed. 2000) (other definitions of the term include "its own class," unique, peculiar). *Id.*

[23] Currently, only around twenty seven percent of states parties to the Convention are also parties to the Optional Protocol. *See*, United Nations, *Optional*

While the question of whether the Convention itself creates a private right to relief has not yet been resolved by the U.S. Supreme Court[24] or for that matter, addressed by the New York Court of Appeals, litigation in this area on the state level may be nonetheless beneficial. Recognizing that there remains a split as to whether the Convention may be invoked in an individual capacity, "only a few courts have actually held that the Vienna Convention does not confer a private right."[25] Thus, the litigation of Article 36 may be advantageous in the absence of a definitive determination as to the status of the rights created by the Convention.

Regardless of the extent to which the substantive provisions of the Convention are implemented prospectively through either direct judicial enforcement of the ICJ's decisions rendered under the aegis of the Optional Protocol or through the Convention itself (as a rule of decision); or whether they are given effect by domestic courts on their own accord as a matter of comity of sorts or in applying an independent interpretation of the treaty provisions, it is particularly important that such litigation be undertaken in an effort to secure an effective remedy for the client.

III. ARTICLE 36 OBLIGATIONS

Article 36 (1) of the Vienna Convention imposes several specific obligations upon the receiving state: First, subparagraph (a) requires the host country to permit consular officers unfettered communication with and access to nationals of the

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Protocol to the Vienna Convention on Consular Relations (providing that only 45 countries are parties to the Optional Protocol), (on file with author).

[24] For the most part, federal courts have, in the absence of guidance from the United States Supreme Court, continued to dodge the question of whether Article 36 creates individual rights. *See* Medellin v. Dretke, 125 S. Ct. 2088, 2102 (2005) (citing Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam) remarking that Article 36 "arguably confers on an individual the right to consular assistance following arrest"). *See e.g.,* United States v. Emuegbunam, 268 F.3d 377, 391 (6th Cir. 2001), *reh'g en banc denied*, (Dec. 5, 2001); Emuegbunam v. United States, 535 U.S. 977 (2002); United States v. Lombera-Camorlinga, 206 F.3d 882, 885 (9th Cir. 2000); United States v. Li, 206 F.3d 56, 66 (1st Cir. 2000).

[25] *See* Trainer, *supra* note 4, at 256 (noting that most courts "assume standing"); *see also* United States v. Chaparro-Alcantara, 37 F. Supp. 2d 1122, 1124 (C.D. Ill. 1999) (noting that the plurality of cases on the issue hold that the Convention confers individually enforceable rights).

sending state, conferring upon such nationals a correlative reciprocal entitlement.[26] Second, under subparagraph (b) the competent authorities of the host country are required upon request of the foreign national to notify the appropriate consular offices of the arrest, detention, custody, or imprisonment *"without delay."*[27] Third, subparagraph (b) similarly requires the authorities to forward any communication from the detained person to their consulate.[28] Fourth, the authorities must ". . .*inform the person concerned without delay of his rights* under [subparagraph b]."[29] Subparagraph (c) permits consular officers contact with a national in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation.[30] Though a given defendant's immigration status may justifiably influence counsel's decision as to whether or not to pursue an Article 36 claim, it is immaterial to the protection afforded under the Convention and the duties it imposes upon domestic authorities.

Ordinarily, Convention violations occur in the context of prosecutions or interrogations carried out against a foreign defendant in derogation of Article 36. Thus, Article 36 claims are generally advanced in at least two significant ways: First, as a non-derivative or privately enforceable right emanating from a 'treaty' within the contemplation of the Supremacy Clause;[31] and second, as a factor indicating the state statutory scheme concerning evidentiary suppression, typically of statements as discussed below.[32]

IV. THE CONVENTION APPLIED

Although there is really no disagreement as to the binding nature of the Convention, there remains a clear split on the issue of whether Article 36 confers rights that may be asserted by

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[26] *See* Vienna Convention, *supra* note 1, art. 36(1)(a), 21 U.S.T. 77, 100-01, 596 U.N.T.S. 261, 292-93.

[27] *Id.* art. 36(1)(b) (requiring that the receiving state "*shall*, without delay" inform the consulate of the sending State if its national is arrested or detained (emphasis added)).

[28] *Id.*

[29] *Id.* (emphasis added).

[30] *Id.* art. 36(1)(c), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

[31] *See* discussion *supra* Part II; *infra* Part IV.A.

[32] *See* discussion *infra* Parts IV.B-C.

a foreign national individually rather than by her government.[33] The courts have generally shown a reluctance to squarely address the issue.[34] However, those courts that have addressed Article 36 have treated it as either establishing individual rights but without warranting any meaningful remedy in the absence of a showing of prejudice; as subject to a harmless error analysis assuming the conferral of such rights; or as not creating judicially enforceable rights at all.[35] Still, most courts have either assumed or implied the existence of judicially enforceable rights under the convention.[36]

New York courts have similarly treated Article 36 claims.[37] However, there appears to be no state appellate authority de-

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[33] *See, e.g., infra* note 36 (noting the split between U.S. courts as to whether Article 36 of the Vienna Convention confers individuals rights on foreign nationals).

[34] *See infra* note 36.

[35] *See* Mark J. Kadish, *Article 36 Of The Vienna Convention on Consular Relations: The International Court of Justice in Mexico v. United States (Avena) Speaks Emphatically To The Supreme Court of the United States About the Fundamental Nature of the Right to Consul*, 36 GEO. J. INT'L L. 1, 9 (2004).

[36] *See* Breard v. Greene, 523 U.S. 371, 376 (1998); United States v. Torres-Del Muro, 58 F. Supp. 2d 931, 932-33 (C.D. Ill. 1999); United States v. Hongla-Yamche, 55 F. Supp. 2d 74, 77-78 (D. Mass. 1999); United States v. Alvarado-Torres, 45 F. Supp. 2d 986, 989 (S.D. Cal. 1999); United States v. Superville, 40 F. Supp. 2d 672, 678 (D. Va. 1999); United States v. Chaparro-Alcantara, 37 F. Supp. 2d at 1125; United States v. Briscoe, 69 F. Supp. 2d 738, 745 (D. Va. 1999), *aff'd without published opinion*, 234 F.3d 1266 (3d Cir. 2000) (all recognizing that Article 36 confers standing on individuals to challenge violations of the terms of the Convention); *see also* United States v. Oropeza-Flores, 173 F.3d 862, at *2, 1999 WL 195261 (9th Cir. 1999) (unpublished opinion); United States v. $69,530.00 in U.S. Currency, 22 F. Supp. 2d 593, 594 (W.D. Tex.1998) (both cases holding that foreign nationals have standing to enforce their Article 36 rights in U.S. courts); *compare* United States v. Salameh, 54 F.Supp.2d 236, 279-80 (S.D.N.Y. 1999) (refusing to "wade into the morass over the existence of [ ] a private right of action"), *with* Standt v. City of New York, 153 F. Supp. 2d 417, 425 (S.D.N.Y. 2001) (noting that "language that more unequivocally establishe[d] that the protections of Article 36(1)(b) belong to the individual national" would be "difficult to imagine" and recognizing the Convention's creation of a private right of action enforceable pursuant to 42 U.S.C. § 1983); *but see* United States v. Jimenez-Nava, 243 F.3d 192, 198 (5th Cir. 2001) (providing that the Convention confers no individual right in relying on the language of its preamble indicating that it is 'not to benefit individuals' and its primary purpose being to facilitate consular relations).

[37] People v. McLeod, 2004 WL 3078697, at *1 (2004) (impliedly finding the creation of private rights but holding that suppression is not an appropriate remedy for violations of Convention); People v. Alvarez Hernandez, 2002 WL 31109621, at *11 (N.Y. Crim. Ct.) (noting that a Convention violation is not a ground for finding inapplicable the state death penalty statute or dismissing the indictment); People v. Litarov, 727 N.Y.S.2d 293, 297 (N.Y. Crim. Ct. 2001) (declin-

claring the unavailability of privately enforceable rights under Article 36. To the contrary, the Appellate Division has in ancillary consideration of the issue either assumed or implied the existence of such rights.[38] In addition, both the application of customary international law as well as the Supremacy Clause may otherwise compel state courts to recognize judicially enforceable rights under the Convention.

A. *Privately Enforceable Rights*

As a party to the Vienna Convention as well as the Optional Protocol, the United States undertook substantive obligations toward foreign nationals and to give such obligations legal effect.[39] Because the Convention as well as its Optional Protocol are fully ratified treaties they are on par vis à vis the states with constitutional and federal statutory law.[40] The Vienna Convention is also well recognized as self-executing.[41] As such, it may be judicially enforced without the need for implementing

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ing to impose a remedy for the violation of Article 36 on the grounds that "invocation of the right to consular notification under Article 36 would essentially exempt foreign nationals from taking a breathalyzer test since it could take days, not less than two hours, before a consular official would be available to consult with a defendant"). Notice, however, that this holding seems to be predicated upon an implicit recognition that the right of consular notification really requires an effective ability of the foreign national to seek the advice of his consul prior to the waiver of rights.

[38] *See* People v. Ortiz, 795 N.Y.S.2d 182, 191 (App. Div. 2005) (noting in dicta that suppression is not an appropriate remedy for a convention violation "assuming that the treaty confers such individual rights"); Howithi v. Travis, 796 N.Y.S.2d 195, 196 (App. Div. 2005) (denying the assertion of Vienna Convention claims as not properly before the court in an Article 78 proceeding without addressing the status of treaty rights); People v. Elkady, 731 N.Y.S.2d 472, 473 (App. Div. 2001) (denying an Article 36 claim on grounds of procedural default and noting that the absence of prejudice "to the extent that the treaty does confer any individually enforceable rights"); Walker v. Pataki, 698 N.Y.S.2d 624, 625 (App. Div. 1999) (impliedly recognizing a private right of enforcement in noting that the Convention "does not require that [an application for post conviction relief] be entertained outside the context of the Criminal Procedure Law").

[39] By ratifying the Vienna Convention, the United States gave legal effect to its contents pursuant to the Supremacy Clause. *See generally supra* notes 20-23 and accompanying text.

[40] *See* Reid v. Covert, 354 U.S. 1, 18 (1957) (noting that "Act of Congress . . . is on a full parity with a treaty"); *see also* Breard, 523 U.S. at 376.

[41] *See* S. REP. NO. 91-9, app., at 5 (1969) (statement of State Department Deputy Legal Adviser J. Edward Lyerly) (testifying at a Senate hearing prior to ratification that the treaty is 'entirely self-executive[sic] and does not require any implementing or complementing legislation').

legislation.[42] While individual rights arising out of treaties are generally "derivative through the states"[43] as a matter of international law, the U.S. Supreme Court has recognized that a treaty may, in certain instances create privately enforceable rights.[44] Indeed, the Court has "repeatedly enforced treaty-based rights of individual foreigners"[45] including provisions of the Vienna Convention relating to consular privileges and immunities.[46] Though a self-executing treaty does not necessarily create a private right of enforcement by virtue of that fact alone,[47] such a right may be determined through an analysis of its text,[48] an examination of the travaux préparatoire[49] and by resorting to customary international law. Accordingly, where a

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[42] *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) ("no domestic legislation is required to give [it] the force of law in the United States"); United States v. Postal, 589 F.2d 862, 875 (5th Cir. 1979); *see also* Whitney v. Robertson, 8 S. Ct. 456, 458 (1888) (providing that treaties affect domestic law only if they are self-executing or given such effect by legislation); Foster & Elam v. Nielson, 27 U.S. 253, 314 (1829) (self-executing treaty is "equivalent to an act of the legislature").

[43] *See* United States v. De La Pava, 268 F.3d 157, 164 (2d Cir. 2001) (quoting United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir. 1975)); United States v. Li, 206 F.3d 56, 60 (1st Cir. 2000); Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 907, cmt. a (1987) [hereinafter RESTATEMENT (THIRD)] (providing that "international agreements . . . generally do not create private rights or provide for a cause of action in domestic courts").

[44] *See* Edye v. Robertson, 112 U.S. 580, 598 (1884) ("Head Money Cases"); *see also* Al Odah v. United States, 321 F.3d 1134, 1146 (D.C. Cir. 2003) (recognizing that "individuals may sue for treaty violations only if the treaty is self-executing") (Randolph, J., concurring).

[45] Medellin v. Dretke, 125 S. Ct. 2088, 2104 (2005).

[46] *Id.*

[47] *See* Stefan R. Riesenfeld, *The Doctrine of Self-Executing Treaties and* U.S. v. Postal*: Win At Any Price?*, 74 AM. J. INT'L. L. 892, 896-97 (1980) (noting that whether a treaty requires legislative implementation raises a separate issue than whether it establishes norms to which the government is ultimately bound under domestic law); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111, cmt. h (1987) ("[w]hether a treaty is self-executing is . . . distinct from whether the treaty creates private rights or remedies").

[48] *See* United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992).

[49] *See* Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996) (noting that since a treaty is "an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux preparatoires*)").

treaty "expressly *or by implication* provides for a private right of action," an individual may seek redress.[50]

To the extent that an examination of the legislative history of a multilateral treaty is necessarily informed by the principle that "the parties. . . inten[ded] that their respective courts strive to interpret the treaty consistently," the court must "look to decisions of other signatories . . . [as] evidence of the original shared understanding of the contracting parties."[51] Thus, the interpretation of international agreements by international tribunals is properly entitled to "respectful consideration" by the courts.[52] Similarly, under state law, a treaty is to be "liberal[ly] interpret[ed] to give effect to its apparent purposes."[53]

Some commentators have pointed out that in the case of the Convention, the traveaux preparatoires clearly demonstrate the intention of the drafters to confer individual rights under Article 36.[54] This is supported by the independent evaluation of the legislative history and text by the Inter-American Court of Human Rights ("IACHR") which has separately determined

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[50] Columbia Marine Services, Inc. v. Reffet Ltd., 861 F.2d 18, 21 (2d Cir. 1988) (emphasis added).

[51] Olympic Airways v. Husain, 540 U.S. 644, 660 (2004) (Scalia, J., O'Connor, J., dissenting); *see also* United States v. Jimenez-Nava, 243 F.3d at 195 ("international agreements should be consistently interpreted among the signatories"); Day v. Trans World Airlines, 528 F.2d 31, 35 (2d Cir. 1975), *cert. denied* 429 U.S. 890 (1976); Reed v. Wiser, 555 F.2d 1079, 1090 (2d Cir. 1976), *cert. denied,* 434 U.S. 922 (1977) (recognizing that multilateral treaties should be given a meaning consistent with the shared expectations of the contracting parties).

[52] *See* Breard v. Greene, 523 U.S. 371, 375 (1998).

[53] *See* Rosman v. Trans World Airlines, Inc., 314 N.E.2d 848, 854 (N.Y. 1974) (internal citations omitted); *see* Matter of Zalewski, 292 N.Y. 332, 336 (1944) (noting that the words of a treaty are to be "taken liberally in the light of [its] evident purposes"); *see also* Factor v. Laubenheimer, 290 U.S. 276, 293 (1933) (noting that a narrow and restricted construction of a treaty obligation should be avoided when deciding between competing interpretations as not consonant with the principles concerning the interpretation of international agreements).

[54] *See* Anthony N. Bishop, *The Unenforceable Rights To Consular Notification and Access in the United States: What's Changed Since the LaGrand Case?*, 25 HOUS. J. INT'L L. 1, 45, n.259 (2002) ("the United States submitted an amendment to Article 36(1)(b) proposing notification to the consul of a national's arrest or detention be made at the request of the foreign national in order to protect the rights of the foreign national") (internal citations omitted); *see also* U.S. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL, § 411.1 (1984), *reprinted in* Kadish, *supra* note 10, at 599 (stating that "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") (emphasis added).

that Article 36 "endows a detained foreign national with individual rights that are the counterpart to the host State's correlative duties."[55] It is also worth noting that at the Vienna Conference itself, the U.S. delegation, aware of the issue concerning the creation of private rights, proposed that the obligation of consular notification should depend upon the request of the arrested or detained national in order "to protect *the rights of the national* concerned."[56] In the *Case Concerning LaGrand (Germany v. United States)*,[57] the ICJ determined that given its history and the context in which it was adopted, Article 36(1)(b) undoubtedly confers a right of enforcement upon an individual detained or arrested.[58] The *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*[59] reiterated this position, recognizing the complementarity and interdependence of the provisions of Article 36 in relation to the rights of the sending state and those of the individual.[60]

Insofar as the question of whether the Convention confers judicially enforceable rights has been answered in the affirma-

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[55] *See* The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process Law, Advisory Opinion OC-16/99, Inter-Am. C.H.R. 487, OEA/ser. L./V./III.47, doc. 6, ¶ 137 (2000) (noting that "nonobservance of a detained foreign national's right to information recognized in Article 36(1)(b) of the [Convention], is prejudicial to the guarantees of the due process of law") [hereinafter Advisory Opinion OC-16/99]. For a more extensive analysis see William J. Aceves, *International Decision: The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Advisory Opinion OC-16/99,* 94 AM. J. INT'L L. 555 (2000).

[56] *See* Conference on Consular Relations, Mar. 4-Apr. 22, 1963, ¶337, UN Doc. A/Conf.25/6(1963) (emphasis added).

[57] Case Concerning LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27, 2001), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm (last visited Feb. 22, 2006).

[58] *See id.* ¶ 77 (noting that "the clarity of [Article 36(1)(b) and (c)], viewed in their context, admits of no doubt" that "Article 36, paragraph 1, creates individual rights").

[59] Case Concerning Avena & Other Mexican Nationals (Mexico v. U.S.) 2004 I.C.J. 128 (Mar. 31, 2004), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.

[60] Indeed, the court expressly recognized that Article 36 confers rights upon both the sending state as well as the individual. *See Avena*, 2004 I.C.J. 128, ¶ 40 (noting that "violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual"); *see also* Bishop, *supra* note 54, at 30 (recognizing in Article 36 the "correlative right of the [foreign national]. . . to contact the consular officer to obtain that assistance"); *supra* note 54 and accompanying text.

tive by the ICJ as the result of a treaty based arbitral process to which the United States agreed to be bound, it has been argued that the resultant decisions should be no less binding than the substantive provisions of the treaty itself.[61] By this reasoning the decisions of the ICJ in *Avena* and *LaGrand* should be given direct effect in the state courts as a 'rule of decision'—having arisen pursuant to the arbitral process under the Optional Protocol. At least one court has so held since *LaGrand* was decided.[62] Likewise, because the history of the Convention itself as well as its textual interpretation by international courts in a manner consistent with its 'apparent purpose' clearly support an intention to create a private right of enforcement it is entitled to judicial enforcement[63] and separately provides for a rule of decision.

Certainly, even if *LaGrand* and *Avena* are not resorted to as rules of decision, the United States nonetheless would seem bound to these decisions under the United Nations Charter[64] (the U.N. Charter)—a treaty duly ratified by the United States in 1945.[65] Under Article 94(1) of the U.N. Charter, member states are obligated to comply with ICJ decisions in matters to which they were parties.[66] This arguably compels the enforcement of ICJ judgments in State courts.[67] Insofar as the ICJ

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[61] *See* Medellin v. Dretke, 125 S. Ct. 2088, 2102 (2005).

[62] *See* United States *ex rel.* Madej v. Schomig, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002) (granting relief on Sixth Amendment grounds but noting that the decision of the ICJ interpreting Article 36 is binding as a matter of federal law in that it "conclusively . . . creates individually enforceable rights, resolving the question most American courts. . . have left open").

[63] *See* Iannone v. Radory Const. Corp., 141 N.Y.S.2d 311, 315 (App. Div. 1955), *aff'd* 1 N.Y.2d 671 (recognizing that a self-executing treaty "must be applied and given authoritative effect by the courts of this State"); *see also* Head Money Cases, Edye v. Robertson, 112 U.S. 580, 588-99 (1884) (a court should "resort to [a self-executing] treaty for a rule of decision . . . as it would to a statute").

[64] *See* Charter of the United Nations, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (Oct. 24, 1945) [hereinafter U.N. Charter].

[65] As the third nation to join the United Nations, the United States ratified the U.N. Charter on July 28, 1945.

[66] *See* U.N. CHARTER, *supra* note 64, art. 94, ¶ 1 (providing in part that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party).

[67] There are inherent difficulties in obtaining private state enforcement of Article 94(1) to the extent that the U.N. Charter does not provide for a self-executing remedy. *See* Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 937 (1988). However, since the Charter mandates U.S. 'compliance' with ICJ determinations, it is arguably nonetheless binding upon state courts as a matter of cus-

would doubtlessly interpret Convention rights uniformly in any given case, such judgments ought not be confined in application to the factual peculiarities of the specific decisions.

Whether or not the ICJ judgments in *LaGrand* or *Avena* are directly enforceable as rules of decision they are, together with the interpretation of the IACHR, declarative of binding substantive rights and obligations under the Convention as a matter of customary international law.[68] Minimally, these interpretations evidence an international consensus as to "an agreed principle."[69] As such, *Breard v. Greene,*[70] in which the Supreme Court remarked that Article 36 "arguably confers on an individual the rights,"[71] is hardly inconsistent with the holdings of *LaGrand* and *Avena*, as well as the tenets of customary international law on this issue.[72] To the extent that there is an inconsistency as to whether a remedy for the breach the Convention may be precluded by state procedural default rules, it is significant that *Breard* was decided well before *Avena* became a

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tomary international law. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 460, n.61 (1972)(recognizing that the "violation of a treaty is essentially a violation of the principle of customary international law that treaties be observed"); *see* The Paquete Habana, 175 U.S. 677, 700 (1900) (providing that "international law is part of our law, and must be ascertained and administered by the courts"); *see also* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 877 (1987) (arguing that [t]he framers of the Constitution respected the law of nations, and . . . expected . . . the courts to give effect to that law").

[68] *See* Philippe J. Sands, *The Future of International Adjudication*, 14 CONN. J. INT'L L. 1, 6 (1999) (noting that the Convention's "provisions are generally considered to reflect customary international law"); *see also* RESTATEMENT (THIRD), *supra* note 43, § 702(g) (providing that customary international law is binding on federal and state governments); *see also* North Sea Continental Shelf Cases, 1969 I.C.J. 3 (Feb. 20, 1969) (recognizing that provisions of multilateral conventions may be applied as binding customary law where it is widely adopted and the practice is uniform and recognized as a legal obligation), *available at* http://www.icj-cij.org/icjwww/idecisions/isummaries/icssummary690220.htm (last visited Feb. 22, 2006).

[69] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

[70] *See* Breard v. Greene, 523 U.S. 371 (1998).

[71] *See id.* at 376.

[72] *See* Case Concerning Avena & Other Mexican Nationals (Mexico v. U.S.) 2004 I.C.J. 128, ¶ 84 (Mar. 31, 2004); Case Concerning LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 ¶ 97 (June 27, 2001) .

final judgment.[73] The Supreme Court has not since revisited the issue on this precise question.

While it is true that in the absence of a specific designation, procedural rules implementing substantive treaty provisions are considered a matter domestic law;[74] there is little, if any, disagreement that the consular notification provisions of Article 36(1)(b) are substantive. Even if the notification requirements of Article 36(1)(b) may be characterized as purely procedural to the extent that they relate to the timing of the required notice?without delay, state procedural rules must "*enable full effect* to be given to the purposes for which the rights accorded under [Article 36] are intended"[75]—a different result would undoubtedly promote disharmony in the interpretation of multilateral agreements contrary to U.S. foreign relations law[76] and undermine the fundamental principle of customary international law requiring the discharge of treaty obligations in good faith.[77]

B. *Statutory Implications: CPL § 60.45*[78] *and Involuntariness*

Though New York court's have not often adjudicated claims involving violations of Article 36, recently in *People v. Ortiz*,[79]

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[73] *Breard* was decided in 1998 whereas *LaGrand* was not decided until 2001 and *Avena* not until 2004.

[74] *See Breard*, 523 U.S. at 375 (recognizing that in international law "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State").

[75] *See* Vienna Convention, *supra* note 1, art. 36(2), 21 U.S.T. at 101, 596 U.N.T.S. at 292, 294. (emphasis added).

[76] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 325, cmt. d (1987) (providing that "treaties that lay down rules to be enforced by parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between international legal systems").

[77] The principle of good faith (*pacta sunt servanda*) is a well established principle of customary international law. *See* U.N. Charter, *supra* note 64, art. 2(2) (requiring all member states to "fulfill in good faith the obligations assumed by them in accordance with the present charter"); *see also* Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339 *reprinted in* 8 I.L.M. 679, 690 [hereinafter VCLT] (providing that "[e]very treaty in force . . . must be performed by [the parties] in good faith"). While the United States has not ratified this treaty, it is nonetheless considered an authoritative declaration of the norms of customary international law.

[78] N.Y. CRIM. PROC. LAW § 60.45 (McKinney 2004).

[79] People v. Ortiz, 795 N.Y.S.2d 182 (App. Div. 2005).

the Appellate Division, First Department, visited the issue of whether a statement obtained in violation of Article 36 warranted an instruction pursuant to New York Criminal Procedure Law ("CPL") § 710.70[80] permitting a jury to consider whether the statement was involuntarily made. The court held that, even assuming the Convention creates privately enforceable rights,[81] the question of involuntariness within the meaning of CPL § 60.45 is not implicated as a result of by the violation of Article 36 to the extent that the Convention itself does not establish when the defendant must be informed of the right to consular notification.[82] To some extent this position is consonant with the view of the ICJ which determined in *Avena*, that the term 'without delay' does not necessarily require notification immediately upon arrest and prior to interrogation.[83] This is because the notification provisions of Article 36, unlike 5th and 6th Amendment[84] concerns, turn upon the *detention* of the individual as distinguished from his *interrogation*.[85]

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[80] N.Y. CRIM. PROC. LAW § 710.70 (McKinney 2004) states in relevant part: "Nothing contained in this article [ ] precludes a defendant from attempting to establish at a trial that evidence . . . of a pre-trial statement made by him should be disregarded . . . on the ground that [it] was involuntarily made within the meaning of section 60.45 . . . [i]n the case of a jury trial, the court must submit such issue to the jury under instructions to disregard such evidence upon a finding that the statement was involuntarily made."

[81] *See* Breard v. Greene, 523 U.S. 371, 375 (1998) (leaving the question of whether the Convention confers individually enforceable rights unresolved, the U.S. Supreme Court recognized that "[it] should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such"). Of note, is that the ICJ has since issued advisory opinions indicating that Article 36 of the VCCR does in fact create substantive personal rights. *See* Case Concerning Avena & Other Mexican Nationals (Mexico v. U.S.) 2004 I.C.J. 128, (Mar. 31, 2004, 2004 I.C.J. 128; Case Concerning LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27, 2001).

[82] *See Ortiz,* 795 N.Y.S.2d at 183 (noting that "the treaty provision contains no language requiring that a foreign national be advised, prior to police questioning, of his or her right to consular notification").

[83] *See Avena,* 2004 I.C.J. 128, ¶ 87.

[84] U.S. CONST. amend. V ("no person . . . shall be compelled in any criminal case to be a witness against himself"), U.S. CONST. amend.VI ("[i]n all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense").

[85] *See* Lombera-Camorlinga, 206 F.3d 882, 886 (9th Cir. 2000)(noting "the [Convention] does not link the required consular notification in any way to the commencement of police interrogation. Nor does the treaty, as Miranda does, require law enforcement officials to cease interrogation once the arrestee invokes his right").

In *Avena*, the ICJ interpreted the term 'without delay' as to require advisement of the right to consular notification "as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national,"[86] which for all practical purposes would likely precede the initiation of police interrogation. Thus, whether the right to consular notification under Article 36 may be triggered *prior* to interrogation,[87] is not an issue necessary foreclosed by the absence of definitive language contained within the text of the Convention itself as *Ortiz* seems to suggest. Significantly, the IACHR has interpreted the term "without delay" as obtaining "at the moment [foreign nationals] are deprived of liberty and, in any case, before they make their first statements to the authorities."[88] As a signatory to the American Convention on Human Rights ("ACHR"),[89] although not bound by its terms as a party, the United States is nonetheless obligated to accord it respect in good faith.[90]

Minimally therefore, the question of precisely when the right arises and its impact on the voluntariness of the subsequent statement under C.P.L. § 60.45(2)(b)(ii) would seem to devolve upon a question of fact. Insofar as a claim of traditional 'involuntariness' will ultimately rest upon a factual showing, it

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[86] *See Avena*, 2004 I.C.J. 128, ¶ 88.

[87] *See id.* ¶ 63 (recognizing that "precisely when this may occur will vary with circumstances"); *see also* United States v. Alvarado-Torres, 45 F. Supp. 2d at 991 (suggesting that notification should occur before a suspect is booked).

[88] *See* Advisory Opinion OC-16/99, *supra* note 55, ¶¶ 106, 108, 110 (providing that a failure to advise foreign nationals of their rights under Article 36 "at the time the accused is deprived of his freedom, or at least before he makes his first statements before the authorities" constitutes a violation of the Convention and in the context of capital cases, amounts to a deprivation of due process).

[89] American Convention on Human Rights, art. 33, Nov. 22, 1969, 1144 U.N.T.S. 123, 153.

[90] The U.S. is a charter member of the Organization of American States ("OAS") and a signatory to the American Convention on Human Rights ("ACHR"). To the extent that the Inter-American Court of Human Rights ("IACHR") is vested with the authority to implement the ACHR and is also possessed of the complementary capacity to issue advisory opinions as the judicial arm of the OAS, the United States may not engage in conduct intended to defeat its object or purpose. It is well established that a treaty signatory (subject to ratification) is required to refrain from such acts. *See* VCLT, *supra* note 77, art. 18. Though the United States is not a party to the VCLT it is nonetheless regarded as binding, though not in its entirety, upon non-parties to the extent it is "declaratory of existing [international] law." *See* Henkin, Pugh, Schachter, & Smit, INTERNATIONAL LAW 387 (2d ed. 1987).

is important for the practitioner to frame the Article 36 claim factually in terms of its impact upon the decision of the accused to make a statement to the authorities and not merely as derivative of a breach of the Convention.

Preliminarily, in the context of a statement elicited from a defendant, it will be necessary to demonstrate that the right to consular notification under the Convention arose *before* the interrogation took place and the resulting statement was given. For instance, one might allege simply that the defendant did not speak any English or was born abroad—which ought to provide a reasonable law enforcement officer with some basis to think that the person is '*probably* a foreign national.' Similarly, it is useful to identify the specific breach in the protocol to have been accorded the noncitizen upon arrest or detention, such as those required under New York City Police Department guidelines or those recommended specifically to state law enforcement agencies by the U.S. Department of State.[91] To the extent however, that the Convention (even where complied with) does not require that an interrogation be delayed until communication between the national and his consulate has actually occurred, a broader foundation should be set forth. Thus, the practitioner should seek to allege facts demonstrating that the statement would not have been made by the defendant had the state authorities complied with the terms of the Convention—this directly responds to a prejudice analysis[92] that has been employed in determining the appropriate measure of redress under the auspices of the Convention, more fully addressed below (as distinguished from one derivative of constitutional authority).[93] For example, the practice of the relevant consulate

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[91] *See* U.S. DEP'T OF STATE, PUB. NO. 10518, *supra* note 13, at 13.

[92] *See* United States v. Ore-Irawa, 78 F. Supp. 2d 610, 613 (E.D. Mich. 1999); *see* United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1254 (D. Utah 1999); United States v. Briscoe, 69 F. Supp. 2d 738, 747 (D. Va. 1999), *aff'd without published opinion*, 234 F.3d 1266 (3d Cir. 2000); Alvarado-Torres, 45 F. Supp. 2d at 989-90; United States v. Esparza-Ponce, 7 F. Supp. 2d 1084, 1097 (S.D. Cal. 1998). *See also* Rangel-Gonzales, 617 F.2d 529, 533 (9th Cir. 1980) (applying a tripartite test of prejudice requiring that the defendant demonstrate: (1) that he did not know of his right to consular notification; (2) that he would have availed himself of that right; and (3) that there was a likelihood that contact with the consul would have resulted in assistance to him).

[93] *See* John Cary Sims & Linda E. Carter, *Representing Foreign Nationals: Emerging Importance of the Vienna Convention on Consular Relations as a Defense*

in rendering assistance should be documented, significantly addressing whether it advises its nationals and explains to them their right not to make statements;[94] whether it actively instructs nationals not to make such statements to the police and prosecutors in the absence of counsel; or whether it assists in the procurement or immediate retention of counsel for the benefit of a national.[95] In fact, consular officers have the right to arrange for the legal representation of a national under the Convention[96] and to the extent this may be interfered with by law enforcement officials may figure into the question of voluntariness with regard to a subsequently obtained statement.

It is well recognized that "[d]etained foreign nationals are inevitably distressed by the prospect of securing and preserving their rights in a legal system with whose institutions and rules they are not familiar."[97] This is not a condition necessarily assuaged by representation of local counsel, thus interference with the ability of the consulate to secure counsel for a national may have serious implications on the question of voluntariness.

C. *Remedies*

There has been considerable debate on the question of what remedy one should obtain in the face of a violation of the Convention. A few things however are clear. In principle at least, it is well recognized that a violation of international law requires a substantive remedy. In this situation "[t]he objective of *resti-*

Tool, THE CHAMPION, Sept./Oct. 1998, *available at* http://www.nacdl.org/CHAMPION/Articles/98sep01.htm; *see also* Waldron v. Immigration and Naturalization Serv., 17 F.3d 511, 518 (2d Cir. 1993), *cert. denied*, 513 U.S. 1014 (1994) (noting that while no showing of prejudice needs to be made to warrant a remedy of a constitutionally-based violation, prejudice must be demonstrated to warrant a remedy for a violation of a non-fundamental right).

[94] United States v. Rodrigues, 68 F. Supp. 2d 178, 184-85 (E.D.N.Y. 1999) (providing that prejudice may be shown by demonstrating that "the local consular official's regular practice is to appear immediately after a national's arrest and advise him or her not to submit to questioning").

[95] *See* Sandra L. Babcock, *Vienna Convention On Consular Relations: Litigation Strategies*, Apr. 15, 2005, http://www.capdefnet.org/fdprc/contents/relevant_reading/101001-01.htm#2 (last visited Mar. 25, 2006).

[96] *See* Vienna Convention, *supra* note 1, art. 36(1)(c).

[97] Memorandum from Lawyers Committee for Human Rights on Consular Notification and Access to All Interested Persons (Nov. 29, 2001), http://www.cdt.org/security/011129Lchr.pdf (last visited Feb. 16, 2006) (citing Telegram 40298 from Department of State to Embassy Damascus (Feb. 21, 1975)).

tutio in integrum (a principle of reparation) is [applied] to bring the legal situation in question to its *status quo ante*, that is to the state that existed before the illegal act was committed."[98] The ICJ has thus determined that "a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention"[99] should be applied in review and reconsideration of the conviction and sentence proceedings.[100] In particular, this process of 'review and reconsideration' should be undertaken "with a view to ascertaining whether . . . the violation of Article 36 . . . caused actual prejudice to the defendant."[101] How this precisely translates in the context of state criminal procedural rules is as yet unclear, though courts have, with near uniformity, rejected the notion that a violation of the consular notification provisions may implicate the exclusionary rule, normally reserved for constitutional violations.[102] In *Waldron v. INS,*[103] the Second Circuit adopted the position taken by the Immigration and Naturalization Service (INS) that failure of the authorities to inform the defendant of his Convention rights did not constitute a violation of fundamental

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[98] *See* Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place* 11 EUR. J. INT'L L. 763, 768 (2000), *available at* http://www.ejil.org/journal/Vol11/No4/110763.pdf; *see also* Babcock, *supra* note 95 (noting that "[u]nder international law, the recognized remedy for a treaty violation is to restore the *status quo ante*. . .").

[99] *See* Case Concerning Avena & Other Mexican Nationals (Mexico v. U.S.) 2004 I.C.J. 128, ¶ 139 (Mar. 31, 2004.

[100] *Id.* ¶ 129; *see also* Case Concerning LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 ¶ 125 (June 27, 2001).

[101] *See Avena*, 2004 I.C.J. 128, ¶ 121.

[102] *See* Lombera-Camorlinga, 206 F.3d 882, 886 (9th Cir. 2000)(noting that "an exclusionary rule is typically only available for constitutional violations, not for statutory or treaty violations"); United States v. Martinez-Villava, 80 F. Supp. 2d 1152, 1155-56 (D. Colo. 1999); United States v. Orelrawa, 78 F. Supp. 2d 610, 613-14 (E.D. Mich. 1999); United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1253-55 (D. Utah 1999); United States v. Salameh, 54 F.Supp.2d 236, 279 (S.D.N.Y. 1999); *cf.* Delaware v. Reyes, 740 A.2d 7, 14 (Del. Super. Ct. 1999) (suppressing statements taken by police prior to the administration of Article 36 rights, relying on Article 36(2) which prohibits the application of procedures failing to accord full effect to treaty rights) (The Reyes decision was subsequently overruled. *See* State v. Vasquez, 2001 WL 755930 (Del. Super. Ct. 2001)).

[103] Waldron v. Immigration and Naturalization Serv., 17 F.3d 511 (2d Cir. 1993).

rights toward which the remedy of exclusion is aimed.[104] This position has been followed by many courts, which hierarchically distinguish between constitutional and treaty violations in terms of their 'fundamental' character, thus reserving the application of the exclusionary rule to conduct in dereliction of "those paramount protections secured by the Fourth, Fifth, and Sixth Amendments."[105] While the exclusionary rule may not be applied as a matter of law, the underlying factual basis that might otherwise indicate its application may still be explored as a factor in a traditional involuntariness analysis. Though evidentiary suppression as derived under the 'exclusionary rule' has been largely interdicted as an available remedy for treaty violations, it is unclear that a procedural rule of preclusion could not otherwise be applied in furtherance of the State's obligation under principles of customary international law[106] to act in conformity with normative expectations regarding rights expressed in Article 36 and to engage the principle of *pacta sunt servanda.*

In New York for example, the receipt of evidence at trial may be precluded as a result of the violation of a variety of procedural rules, among them CPL § 710.30 which requires the prosecution to give notice of an intention to introduce statement or identification evidence at trial.[107] In addition, under CPL § 240.70, the state's evidence may be precluded as a sanction for the failure to abide by pretrial discovery rules.[108] Evidence of a

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[104] *See id.* at 518 (noting that "although compliance with our treaty obligations clearly is required, we decline to equate such a provision with fundamental rights").

[105] *See* United States v. Li, 206 F.3d 56, 61 (1st Cir. 2000).

[106] *See* Julian Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 463 (2004) (pointing out that "states have played a central role in compliance with treaty and customary international law obligations affecting probate proceedings, local property and gasoline tax immunities, injuries to alien residents, notaries, family law, commercial law, and other areas" and also noting that they continue to "play a much more significant and substantial role in the implementation of international law obligations than most commentators have recognized").

[107] *See* N.Y. CRIM. PROC. LAW § 710.30(3) (McKinney 2006) (providing, in relevant part, that "[i]n the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in subdivision one may be received against him upon trial. . .").

[108] *Id.* § 240.70(1) (providing that "[i]f, during the course of discovery proceedings, the court finds that a party has failed to comply with any of the provisions of this article, the court may . . . prohibit the introduction of certain evidence or the calling of certain witnesses. . .").

defense may similarly be barred where an accused fails to abide by the provisions of CPL §§ 250.20 or 250.10 requiring notice of alibi or of an intention to offer psychiatric evidence, respectively.[109] In federal court, the McNabb-Mallory rule provides for suppression of confessions that are obtained following a violation of Federal Rule of Criminal Procedure 5(a) concerning unnecessary delays in arraignment.[110] Evidentiary preclusion is thus commonly applied in the case of procedural violations even where they manifestly fail to rise to a level impacting upon fundamental rights or otherwise affecting the reliability of the evidence.

Some courts have rationalized the inapplicability of the exclusionary rule to Convention violations on the ground that it would be "self limiting"—that is, "no country which has ratified the treaty has applied such a remedy."[111] Of course, the accuracy of this assessment was tested by at least two English decisions, *R. v. Bassil and Mouffareg*[112] and *R. v. van Axel*[113] both of which resulted in the exclusion of statements obtained in viola-

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[109] *Id.* § 250.20(3) (providing in relevant part that "[i]f at the trial the defendant calls . . . an alibi witness without having served the demanded notice of alibi [on the prosecution] . . . the court may exclude any testimony of such witness relating to the alibi defense"); *see id.* § 250.10(2) (providing in relevant part that "[p]sychiatric evidence is not admissible upon a trial unless the defendant serves upon the people and files with the court a written notice of his intention to present psychiatric evidence"); *see also* People v. Almonor, 715 N.E.2d 1054, 1060 (1999) (noting that the absence of timely notice results in an evidentiary bar to the introduction of a psychiatric defense).

[110] *See* Mallory v. United States, 354 U.S. 449, 455-56 (1957); McNabb v. United States, 318 U.S. 332, 341-42 (1943); Upshaw v. United States, 335 U.S. 410, 414 (1948) (all holding inadmissible confessions obtained during an unnecessary delay in arraignment); *see also* United States v. Alvarez-Sanchez, 975 F.2d 1396, 1400-01 (9th Cir. 1992), *rev'd on other grounds*, 511 U.S. 3500 (1994) (remarking that "there must be circumstances in which delay in arraignment will require suppression of a confession regardless of the voluntariness of the confession"); FED. R. CRIM. P. 5(a) (providing in relevant part that an arrested person be brought before a magistrate "without unnecessary delay").

[111] *See* United States v. Rodrigues, 68 F. Supp. 2d 178, 186 (E.D.N.Y. 1999) ; *but see* R. v. Bassil and Mouffareg, (1990) 28 July, Acton Crown Court, HHJ Sich, reported in Legal Action 23, December 1990; *see also* R. v. VanAxel and Wezer (1991) 31 May, Snaresbrook Crown Court, HHJ Sich, reported in Legal Action 12, September 1991.

[112] [1990] 28 July, Acton Crown Court, HHJ Sich, *reported in* LEGAL ACTION 23, Dec. 1990.

[113] [1991] 31 May, Snaresbrook Crown Court, HHJ Sich, *reported in* LEGAL ACTION 12, Sept. 1991.

tion of consular notification requirements. While the decisions hinged on parallel requirements under the relevant domestic procedural codes,[114] the courts considered the following factors significant: the defendants relative unfamiliarity with the British legal system; their lack of sophistication and; in *Bassil*, the defendants' language difficulties and the fact that they hailed from a country where the assertion of rights by criminal defendants is minimally considered ill advised.[115] The *Bassil* court determined that the failure to advise the defendants of their right to consular notification effectively prevented the entrance of an official who spoke the defendants' language from assisting them in "reaching an informed decision about their position, and [whom] might well have advised them to obtain the services of a solicitor and interpreter before being interviewed."[116]

These cases illustrate the application of both aspects of the enforcement of consular rights raised in this article to the extent that they implicitly recognize the enforceability of such rights (albeit as a matter domestic police procedure) and demonstrate the relationship of those rights to the concept of voluntariness as it relates to statements. Accordingly, there is some basis for the position that the application of the exclusionary rule is, in fact, not "self-limiting" but entirely consonant with the interpretation of the treaty as well as the practice of its members as a matter of customary international law.

Legislation codifying Convention rights and attendant procedures in the United States has thus far been slow and insular, having been adopted in only a handful of states.[117] How future

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[114] *See* Police and Criminal Evidence Act of 1984, c. 60, § 66 (Eng.) (revised as of August 2004) Code C, sec. 7, *available at* http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/Previous_Codes_2004/ (providing for the right of a detained foreign national to be informed "as soon as practicable" of his right to communicate with the appropriate high commission, embassy or consulate).

[115] *See* R. v. Bassil & Mouffareg, [1990] 28 July, Acton Crown Court, HHJ Sich, *reported in* LEGAL ACTION 23, Dec. 1990; R. v. van Axel, [1991] 31 May, Snaresbrook Crown Court, HHJ Sich, *reported in* LEGAL ACTION 12, Sept. 1991.

[116] *See* Trainer, *supra* note 4, at 267, n.248 (internal citations omitted).

[117] For an extensive discussion, see Mark Warren, *Consular Notification: Statutory and Regulatory Provisions*, (Nov. 2005), http://www3.sympatico.ca/aiwarren/compliance.htm (last visited Feb. 22, 2006); *see also* CAL. PENAL CODE § 834c(a)(1) (2000) (mandating notification of the right to communicate with a consular official upon "arrest and booking or detention for more than two hours or a known or suspected foreign national"). The code further requires such notification to occur

breaches of these provisions will be treated in state courts however remains to be seen. Though many courts have determined that remedial action is appropriate for Article 36 breaches,[118] those courts have conditioned redress upon a showing of prejudice.[119] This standard however, is not coextensive with the requirement of "review and reconsideration" as set forth in *LaGrand*. On the contrary, it imposes upon the defendant the obligation to demonstrate prejudice as a result of the failure of consular notice[120] rather than upon the state to demonstrate the lack thereof in full consideration of the trial and sentencing process.[121] Nonetheless, even where the domestic standard is met the extent of any consequent remedy remains elusive. Though some courts have expressed "doubt" that without demonstrating a direct effect on the trial a Convention violation could not result in the overturning of a verdict[122] or the dismis-

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"without delay," specifically incorporating the Vienna Convention. *Id.* § 834(b). *See also* FLA. STAT. ch. 288.816(2) (2005) (implicitly requiring Florida authorities to notify the embassy or consulate upon the arrest a foreign national in compliance with the Vienna Convention), *available at* http://www.flsenate.gov (follow "Statutes & Constitution" hyperlink: then follow " View Statutes" hyperlink); OR. REV. STAT. § 426.228(9)(a) (2003) (requiring consular notification when an officer "reasonably suspects that the person is a foreign national"), *available at* http://www.oregonlawyer.com (follow "Oregon Revised Statutes hyperlink).

[118] The First, Ninth, and Eleventh Circuits have found that judicial remedies exist, with respect to a violation of Article 36. *See* United States v. Li, 206 F.3d 56, 62 (1st Cir. 2000); Lombera-Camorlinga, 206 F.3d 882, 891 (9th Cir. 2000); United States v. Cordoba-Mosquera, 212 F.3d 1194, 1196 (11th Cir. 2000).

[119] *See id.*

[120] *See* United States v. Proa-Tovar, 975 F.2d 592, 594-95 (9th Cir. 1992) (creating a tripartite test to ascertain prejudice).

[121] *See* Case Concerning LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 ¶ 74 (June 27, 2001)(holding as to the issue of prejudice that "[i]t is immaterial . . . whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred [Article 36] rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen"); *cf.* Hernandez v. United States, 280 F. Supp. 2d 118, 124-25 (S.D.N.Y. 2003) (noting that the defendant must adduce evidence that consultation with the consulate would have changed the actions he undertook in the case, or altered its outcome). *See also supra* note 91, and accompanying text.

[122] *See* Breard v. Greene, 523 U.S. 371, 371 (1998).

sal of an indictment,[123] lesser effective sanctions may exist to be pursued to the benefit of a client.[124]

In *Delaware v. Reyes*,[125] for example, the court determined that an exclusionary sanction was appropriate where the defendant had timely and adequately demonstrated a cognizable prejudice.[126] In *Yater*,[127] a British national was brought to trial in Italy and convicted of certain offenses in the absence of consular notification.[128] The Italian Supreme Court (*Corte Suprema di Cassazione*) addressed the specific issue of whether Yater had been effectively deprived of his right to legal representation to the extent that Article 36(c) provides that the consulate may assist in the securing of counsel. The Court determined that the rights to consular notification were "complementary and subsidiary intervention[s] which do[ ] not replace the accused's right to provide for himself a trusted legal representative for his defence."[129] Since the defendant was represented by counsel of his own choosing, the Court determined that there was "no violation of the procedural rules regarding the accused's defence as a result of failure to inform the said authority."[130] The decision did not address the situation wherein the defendant is represented by counsel other than his own choosing. Unless *Yater* is erroneously read to mean that an Article 36(c) claim is negatived where a foreign national simply

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[123] *See* United States v. Awadullah, 202 F. Supp. 2d 17, 40 (S.D.N.Y.2002); United States v. Duarte-Acera, 132 F. Supp. 2d 1036, 1038 (S.D. Fla. 2002) (both cases denying a motion to dismiss the indictment); *see also* United States v. Cowo, 2004 WL 1474774 (1st Cir. 2001) (unpublished disposition) (internal citations omitted) (holding that dismissal of the indictment is not an appropriate remedy for Article 36 violations); United States v. De La Pava, 268 F.3d 157, 163 (2d Cir. 2001)(finding that Article 36 violations does not require the court to dismiss the indictments).

[124] *See* United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1255 n.2 (D. Utah 1999)(holding suppression unavailable as a remedy for Convention violations while expressly "not foreclose[ing] the possibility that other remedies may be available").

[125] Delaware v. Reyes, 740 A.2d 7 (Del. Super. Ct. 1999) (The Reyes decision was subsequently overruled. *See* State v. Vasquez, 2001 WL 755930 (Del. Super. Ct. 2001)).

[126] *See id.* at 14-15.

[127] *In re* Yater, 77 INT'L L. REP. 541 (Italy, Court of Cassation 1973).

[128] *See id.*

[129] *Id.* at 542.

[130] *Id.* at 541.

has a lawyer, which is clearly not the case,[131] the Court's holding necessarily implies that where the Convention breach circumvents the ability of the defendant to obtain counsel of his *own choosing*, prejudice arguably remains. Accordingly, it is a tack that ought to be pursued, particularly where the defendant is or has been represented by appointed counsel.

In *Torres v. Oklahoma*,[132] the defendant was granted an evidentiary hearing as to whether he was prejudiced by the State's violation of the Convention and the extent of the remedy to be provided as a result. In remanding the matter to the lower court, the Oklahoma Court of Criminal Appeals applied *Avena*, recognizing it as binding authority.[133] Indeed, the concurrence of Judge Charles S. Chapel argued that courts are bound to give full faith and credit to *Avena*.[134] Moreover, to the extent that there exists an obligation to review and reconsider the conviction and sentence in light of the violation of the rights of an accused under the Convention, this carries with it correlative obligation to "fulfill the goal of a fair and just review."[135] On remand however, the lower court never reached the issue of determining the appropriate remedy for the demonstrable prejudice proffered by Torres before the Court. Instead, the matter was resolved shortly after the appellate decision, with the commutation of Torres' death sentence to one of life imprisonment by the Oklahoma governor.[136] The accompanying press release remarked that the granting of the clemency petition was predicated in part upon the view that the ICJ's ruling in *Avena* was binding on U.S. courts and that account should be taken of the fact that the United States is a party to the Convention.[137] The significance of *Torres* in terms of the scope of potential rem-

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[131] *See*, John Quigley, *Suppressing the Incriminating Statements of Foreigners*, 13 WM. & MARY BILL RTS. J. 339, 359 (2004) (internal citations omitted).

[132] Torres v. Oklahoma, No. PCD-04-422 (Okla. Crim. App. 2004) (unpublished opinion). *See also* Torres v. State, 120 P.2d 1184, 1186-88 (Okla. Crim. App. 2005) (discussing the lower court's decision).

[133] *See* Murphy, *supra* note 14, at 583 (internal citations omitted).

[134] *Id.*

[135] *Id.*

[136] Press Release, Office of Governor Brad Henry, Governor Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), *available at* http://www.governor.state.ok.us (follow "News & Info" hyperlink; then follow "2004 Press Releases" hyperlink; then follow "May" hyperlink)).

[137] *Id.*

edies for Convention violations is encouraging and suggests that a genuinely meaningful review of the merits of such claims is both warranted and required of state courts.

V. Practical Indications

Defense counsel often ascertains at arraignment the nationality and immigration status of a client with an eye towards potential collateral consequences. It is equally important for defense counsel to consider seeking consular involvement in the case of a foreign national at the earliest possible stage in the process. There are of course several factors outside the scope of this article worthy of consideration in the context of asserting a claim under the Convention, among them: the ramifications of notifying the sending state of the particulars of the arrest or detention; the risk of drawing attention to the defendant's immigration status and the possibility of the initiation of deportation proceedings; the policies of the sending state and any potential action it may undertake against a national having been arrested and charged with a crime in the United States; and perhaps most importantly, the severity of the charges. As with any choice in legal advocacy, this article does not posit a definitive approach that is appropriate in all circumstances—invariably counsel must balance the possible negative consequences of making the country in question aware of the incident, the severity of the charges and value of consular assistance in view of advancing a claim under the Convention.

Where defense counsel does determine that an Article 36 claim may be advantageous in a particular case, a motion requesting that the state both formally advise the defendant of the right to consular notification as well as notify the consulate of the defendant's status should be filed as soon as possible. This will potentially involve the consulate in the assistance of the client as well as create and preserve a record for an appeal.[138] The benefits of consular involvement may include help that the detained person might not otherwise receive. For instance, the consulate may be able to facilitate the relationship and communication between counsel and client, assist with language barriers, provide access to material records, make provi-

[138] *See generally* Sims & Carter, *supra* note 93.

sions for the retention of supplementary counsel, as well as aid in the location and procurement of mitigating evidence abroad, often critical to the disposition of a case. The consulate may also be in a better position to explain the functioning and the nuances of the state criminal justice system to the client and in particular, to communicate the role of the defense attorney as a trusted advocate for the client rather than an arm of the state—a factor at times presenting a formidable obstacle to an effective defense strategy.

A review of the procedure and any paperwork generated with regard to the arrest of a noncitizen may also be useful to defense counsel in building an appellate record[139] and in including fact specific additions to a request for a bill of particulars and demand for discovery. It is important for counsel to familiarize herself with the particulars of any law enforcement protocols or procedures in place regarding consular notification upon the arrest or detention of a foreign national. For example, Procedure No. 208-56 of the New York City Police Department Patrol Guide mandates the observance of a very specific protocol regarding such arrests or detentions.[140] Minimally, an awareness of the applicable procedures may prove useful at the hearing or trial stages for purposes of expanding the scope of discovery and cross-examination.

VI. CONCLUSION

At least one court perceives the right to consular access as conferring upon foreign nationals extra-constitutional protections unavailable to citizens.[141] Apart from elucidating this un-

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139 The importance of developing a thorough record at the state level cannot be overstated. *See* Wainwright v. Sykes, 433 U.S. 72, 86 (1977) (providing that claims of error must first be raised in state court before it they be asserted as the basis of federal habeas relief); *see also*, the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(a), (e)(2) (providing that a habeas petitioner claiming to be held in violation of "treaties of the United States" is not entitled to an evidentiary hearing where there has been a "fail[ure] to develop the factual basis of [the] claim in the State court proceedings").

140 *See* New York City Police Department Patrol Guide, Procedure 208-56 (Feb. 28, 2001) (requiring among several procedures attendant to noncitizen arrests that an arresting officer inform an alien "prisoner of right to have embassy or consulate notified.").

141 *See* Waldron v. Immigration and Naturalization Serv., 17 F.3d 511, 517 (2d Cir. 1993), *cert. denied*, 513 U.S. 1014 (1994). *See also* James A. Deeken, *A New*

fortunate irony, it is important for counsel to emphasize to the court that the purpose of the right is "[t]o minimize the disadvantages experienced by accused foreigners"[142] whether here or elsewhere. Thus, it is the vigorous protection of consular rights that reciprocally advances the interests of American nationals that are detained abroad.[143] Conversely, the continued failure to recognize or enforce these rights at home seriously imperils the future viability of the Convention's framework, upon which the United States depends in the extraterritorial protection of its nationals.

While the case law is as yet unsettled, an analysis of the legislative history of the Vienna Conference clearly points toward a well considered multilateral intention to confer privately enforceable rights upon foreign nationals under the Convention. There are avenues that a given defendant may pursue to her advantage in the litigation of Article 36 claims, whether it be in the form of a direct remedy for a breach of the attendant obligations or through advancing the issue as a factor in the context of an involuntariness claim as to statements or their fruits, as a matter of law. As this issue is addressed by courts in the future, it is imperative that criminal defense attorneys in New York raise the issues concerned for a myriad of reasons to the potential benefit of clients, not the least of which is the preservation of an adequate appellate record for the future decisions that will ultimately define state law with regard to the enforcement of consular notification rights.

Furthermore, the continued litigation of these issues may bring to fruition positive legislation in New York as it has in others, recognizing the significance of Article 36 rights and taking substantial steps toward its implementing its enforcement. Though "[p]rosecutors and defense attorneys alike should be

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Miranda For Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations on State Governments in the Wake of Printz v. United States, 31 VAND. J. TRANSNAT'L L. 997, 1025 (1998).

142 *See* S.A. Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L.J. 719, 721 (1995).

143 *See* ELEANOR MCDOWELL, DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 249-50 (1975) (providing that "[s]tates accord these rights to other states in the confident expectation that if the situation were to be reversed they would be accorded equivalent rights to protect their nationals") (quoting Department of State, Telegram 40298 to Embassy Damascus, Feb. 21, 1975).

aware of the rights conferred by the treaty and their responsibilities under it,"[144] it is the obligation of defense counsel to ensure that the courts are not excepted.

[144] *See* Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring).