"If You Are Not a United States Citizen . . .": International Requirements in the Arrest of Foreigners

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I. Overview

Recent litigation in the Supreme Court of the United States has highlighted the obligations owed to foreign nationals when they are arrested on a criminal charge. By treaty, foreign nationals must be advised following arrest that they may contact a consulate of their home country.[1] The litigation has involved situations in which this advice is not given, but the foreign national is then interrogated and makes a statement, which his or her attorney then seeks to suppress. Or the foreign national is prosecuted and convicted without having contacted a consul, and then seeks to overturn the conviction, or the sentence, for not having had contact with a consul.

The United States Supreme Court has been unreceptive to claims by foreign nationals for a remedy in such situations. Unlike many other criminal law issues, this one has implications beyond the U.S. system of criminal justice. The rights that these foreign nationals assert are arguably valid under consular relations treaties of the United States.[2] Many other countries read these treaties to provide these rights.[3] Those countries are under the obligations found in the same treaties when they arrest foreign nationals, including those from the United States. The United States, as a capital exporting country, has a large number of its citizens residing abroad. The Department of State has expressed concern that U.S. citizens who are arrested abroad may be disadvantaged if the United States is perceived as failing to afford consular access rights to foreigners arrested here.[4]

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[1] Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

[2] *Id.*

[3] Brief for the European Union and Members of the International Community as Amici Curiae Supporting Petitioner, Medellin v. Texas, 128 S.Ct. 1346 (2008) (No. 06-984).

[4] U.S. Department of State, Consular Notification and Access, http://travel.state.gov/law/consular/consular_753.html (last visited November 28, 2008) ("All levels of law enforcement must ensure that foreign governments can extend appropriate consular services to their nationals in the U.S. and that the U.S. complies with its legal obligations to such governments.

To make the matter more complicated, there are international procedures available to foreigners turned down by U.S. courts to seek redress. Three countries—Paraguay, Germany, and Mexico—have sued the United States in the International Court of Justice (ICJ), a court established under a treaty appended to the Charter of the United Nations. These three countries sought remission of convictions or death sentences entered against their nationals to whom the requisite advice was not given. The ICJ has said that such persons are entitled to review of a conviction or sentence in light of a consular access violation.[5]

To date, the U.S. Supreme Court has declined to require such a review, or indeed any remedy. Over the past decade, four foreign nationals, all under sentence of death, have had their cases heard by the U.S. Supreme Court.[6] None has been provided a remedy for the consular violation. The Supreme Court reads the Constitution not to require conformity to the decisions of international tribunals. The absence of a remedy is significant because many foreign nationals are found on death rows in the states that most frequently employ the death penalty.

The Supreme Court was supported in its anti-remedy position by President Bush and his Department of State. The executive branch has argued, when hauled before international tribunals, that no judicial remedy is required for failure to advise about consular access. The Department of State has taken this position, even while expressing concern that a perception of U.S. non-compliance with consular access rights may jeopardize U.S. nationals abroad. This Commentary suggests that legal and policy considerations call for a revision of the current approach of the United States Supreme Court and of the Department of State.

II. PARAMETERS OF THE OBLIGATION

Consular access enjoys a certain pedigree as a legal institution. Nations have long dispatched officials to aid their nationals in the territory of other nations. One way in which consuls aid their nationals is in the context of arrest. It has come to be recognized in international law that the authorities of the host state, which is termed the "receiving state" in consular law, must let a consul of the "sending state" visit a national under arrest and communicate by other means.[7] The precise aid a consul provides depends on the needs of a case. The assistance may involve

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It is essential that U.S. citizens be offered the same consular services when they are detained abroad. To require that of other countries, we must be certain we provide this courtesy here.").

[5] LaGrand Case (Germany v. United States), 2001 I.C.J. 466, 516 (June 27); Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), 2004 I.C.J. 12, 73 (Mar. 24).

[6] Breard v. Greene, 523 U.S. 371 (1998); Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) (consolidating two separate cases, the second being *Bustillo v. Johnson*); Medellin v. Texas, 128 S.Ct. 1346 (2008).

[7] LUKE T. LEE & JOHN QUIGLEY, CONSULAR LAW AND PRACTICE chs. 8, 9 (2008).

explaining rights in a manner more comprehensible than the explanations given by the police or even by local defense counsel. The aid may involve locating a defense attorney who has represented nationals of the particular sending state in the past, or who at least speaks the language of the sending state. The aid may involve arranging for a translator for police interrogations or for court proceedings. It may involve ensuring that the national is properly fed while in custody and afforded reasonable hygiene opportunities. Or, the assistance may involve investigating a national's complaint of abuse or other physical mistreatment while in custody. And, finally, the aid may involve assisting defense counsel in locating witnesses or documentary information relevant to guilt or sentence, in particular information about the person's education or physical or mental health.

While a receiving state's consular access obligation prevails under what is called general, or customary, international law, it is also found in treaties. Many states, including the United States, have bilateral consular treaties with other states. In these treaties, the United States agrees to consular access for foreign nationals arrested in the United States, and in turn receives the right of consular access for its own nationals abroad. Thus, one significant aspect of consular access obligations towards foreign nationals arrested in the United States is that observance of those obligations is a necessary element in enforcing the same obligation on foreign governments when U.S. nationals are arrested.

In addition to bilateral treaties, one finds a multilateral treaty, now widely ratified, that calls for consular access. The Vienna Convention on Consular Relations[8] (VCCR) regulates all phases of activity of consuls, including the various functions they perform, and sets out a series of immunities from local jurisdiction to which they are entitled. Concluded in 1963, the VCCR went into force for the United States in 1969, following ratification by the President. One provision of the VCCR, Article 36, addresses a receiving state's obligation to allow consular access.[9]

This Article, headed "Communication and contact with nationals of the sending State," requires a receiving state to facilitate communication between a sending state consul and an arrested national of the sending state.[10] The receiving state must inform the foreign national of the right of contact. If the foreign national so requests, it must inform a consul of the arrest or let the foreign national do so. Article 36 puts the foreign national, as an individual, in a central role. It lets the foreign national decide whether to take advantage of consular access. If, and only if, the foreign national desires such access is the receiving state required to contact the relevant consulate, or to allow the foreign national to do so. The receiving state is required to allow a consul to visit, but only if the foreign national wants a visit.

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[8] Vienna Convention, *supra* note 1, art. 36.

[9] *Id.*

[10] *Id.*

III. DIFFICULTIES OF COMPLIANCE

In most countries, the United States included, authorities allow a foreign national who so requests to contact a consul. Similarly, if a consul approaches the authorities and seeks a visit, it is usually arranged, at least if the foreign national does not object. What has caused great difficulty, in particular in the United States, is the obligation to inform the foreign national about consular access. Statistics have not been compiled in the United States or elsewhere, hence the precise level of compliance remains a matter of speculation.

Article 36 does not specify which officials must inform the foreign national about the right of consular contact. In theory this could be done by any official of the receiving state, but since it is the police who arrest and hold the person, they are the officials expected to carry out this obligation. The U.S. Department of State, which is attentive to the need to preserve consular access rights for U.S. nationals abroad, encourages compliance by U.S. police agencies by informing police departments of the obligation, and in particular by posting on its website contact information for all foreign consular posts in the United States.[11]

There is reason to believe in the United States that non-compliance is more typical than compliance. In many instances when foreign nationals raise the matter in criminal courts, the government acknowledges that the arresting officers did not advise the arrestee about consular access. When, as will be seen below, Mexico sued the United States over non-compliance, it appeared that very few Mexican nationals arrested for murder, and convicted and sentenced to death in the United States, had been advised following arrest about consular access. In that litigation, the United States conceded non-compliance for the vast majority of the fifty-one Mexican nationals named by Mexico.[12]

A perception abroad of a low level of compliance in the United States is reflected in instructions that the Department of State has issued to its consuls abroad. In advising consuls to seek access to U.S. nationals under arrest, the Department provides guidelines on how to respond if foreign police, when asked to facilitate access, object that police in the United States do not similarly comply. U.S. consuls are instructed to explain that "two wrongs do not make a right"; namely, that the receiving state is required to comply even if our own compliance is spotty. They are instructed to explain further that the multiplicity of law enforcement agencies in the United States makes it difficult to inform every arresting official about consular access obligations.[13]

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[11] U.S. Department of State, Part Six: Foreign Embassies and Consulates in the United States, http://travel.state.gov/law/consular/consular_745.html (last visited November 28, 2008).

[12] Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), 2004 I.C.J. 12, 46 (Mar. 24).

[13] U.S. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 421.2–3 (2002).

In the United States, the states are required to comply with consular access because international law is considered part of our law,[14] and treaties are binding on states under the Supremacy Clause[15] of the U.S. Constitution. There is no federal legislation that calls on states to comply, but the Supremacy Clause suffices in this regard. Nonetheless, action has been taken by some states to ensure that authorities comply. In some states, the state Attorney General has posted information electronically directed to police agencies. Statutes requiring police departments to provide information about consular access and to facilitate contact between an arrested foreign national and a consulate have been adopted in Oregon[16] and California.[17] Such legislation is aimed at increasing the level of compliance.

Police training programs in some municipal police departments include training on the subject. In some county and municipal police departments, regulations have been issued. In Prince George's County, Maryland, for example, General Order Manual, Section 4/254.10, titled "Notifying Legation," instructs officers on how to comply. In some jurisdictions, information about consular access is given by magistrates at an initial court appearance.

Compliance is not particularly onerous. Police departments could, if they chose, add advice about consular access to the information they give every arrestee. The Department of State has suggested language such as: "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."[18]

The reasons for non-compliance are varied and are, to some degree, a matter of surmise. Many line officers, despite whatever training they receive, remain unaware of the obligation, or do not remember it when they place a foreign national under arrest. Identifying information is normally gathered upon arrest, and that may show that there is doubt as to whether the person is a U.S. citizen. Other officers may be aware of the obligation to advise foreign nationals about consular access but nonetheless not know immediately how they are supposed to handle the situation.

Of course, less excusable are those instances in which arresting officers are aware of the obligation but avoid advising about consular access because they fear it may inhibit interrogation. A foreign national arrestee who is told of the opportunity to establish contact with a consul may feel less isolated, less vulnerable, and therefore less likely to make a statement. Foreign nationals as a group are probably more inclined than the average arrestee to confess, regardless of their guilt. They may think that confessing will get them deported.

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[14] The Paquete Habana, 175 U.S. 677, 700 (1900).

[15] U.S. CONST. art. VI, § 2.

[16] OR. REV. STAT. § 181.642 (1995).

[17] CAL. PENAL CODE § 834c(a)(1) (2000).

[18] U.S. Dep't of State, Consular Notification and Access, Part One: Basic Instructions, http://travel.state.gov/law/consular/consular_737.html#statements (last visited November 28, 2008).

The multiplicity of police agencies in the United States—the explanation offered by the Department of State in its instructions to U.S. consuls abroad—doubtlessly *does* complicate compliance. In most countries of the world, police agencies are far more centralized than in the United States. It is therefore easier to communicate legal requirements from the center to local police posts. As well, in most countries of the world, criminal legislation is more centralized than in the United States. Even in countries organized, like the United States, as federations, criminal laws and procedure are typically a federal function. In Australia, for example, legislation requires the police to comply with consular access obligations.[19] This legislation is effective nationally, even though Australia is a federation. In the United States, regulations have been adopted for the Federal Bureau of Investigation, instructing its agents how to comply with consular access obligations when they make an arrest on federal criminal charges.[20] But there is no national-level regulation in the United States applicable to state and local police agencies.

Another possible explanation for the low level of compliance in the United States concerns the identity of those responsible for criminal investigation. In civil law (continental European) jurisdictions, crime investigation involves the police, but also, and quite centrally, an investigative judge. One thus has a law-trained official involved in the criminal investigation process soon after arrest.

Another aspect of consular access that enhances the difficulty of compliance is that the consular access obligation runs to any foreign national, including even a foreign national who is a permanent resident in the United States, who may have resided in the United States from an early age, and who may not outwardly appear to be a foreign national. Thus, the number of persons required to be advised about consular access if arrested is substantial.

IV. ACTION BY FOREIGN GOVERNMENTS TO SEEK REDRESS

Uneven compliance in the United States has led foreign governments to raise the issue in a variety of ways. Under consular law, a sending state whose rights are infringed may protest to the authorities of the receiving state.[21] Many foreign governments have protested—a formal written note from one government to another—to the U.S. Department of State when their nationals have been convicted and sentenced without being advised about consular access.

Foreign government concern has been heightened because capital punishment is imposed in the United States, whereas it is not used in many other countries. The most vociferous protests have come in cases in which the foreign national has been sentenced to death, and the protests are from the governments of states that

[19] Crimes Act, 1914, c. 23P.

[20] FBI Notification of Consular Officers upon the arrest of foreign nationals, 28 C.F.R. § 50.5 (2009).

[21] Vienna Convention, *supra* note 1, art. 38.

have abolished capital punishment. The European Union, whose member states are abolitionist, has protested in regard to particular cases in several states of the United States. Public opinion in many countries strongly opposes the death penalty.[22] When a national whose consular access rights have not been respected faces execution in the United States, the foreign government typically protests both the failure of consular access and the prospective execution.

Some foreign governments have gone a step beyond the traditional form of diplomatic protest and have made representations directly to the governors of states where foreign nationals face execution. They have also filed amicus curiae briefs in criminal court when their nationals challenge non-compliance. Several governments have sued civilly in federal court against the state in which a foreign national was sentenced, but these suits have been rejected based on the Eleventh Amendment restriction on suits against a state.[23]

By the mid-1990s, there were significant numbers of foreign nationals facing execution who were not advised of their right to consular access. At that time, defense attorneys began to raise the issue in regard to foreign nationals already sentenced to death.[24] It was also at this point that foreign governments became more active in support of their nationals. Foreign nationals sought review of their convictions, and particularly of their death sentences. Their claim was that sentencing hearings were conducted without providing the fact-finder with critical information regarding the foreign national's background, including medical conditions relevant to culpability. The foreign nationals argued that a consul might have been able to gain access to such information from home-country sources.

State and federal courts have typically rejected these claims. The posture of the cases has been one critical factor. The defense bar was not, in general, aware of the access requirement prior to the mid-1990s. As a result, this access issue was not presented at trial or even on direct appeal or in filing for state post-conviction relief. Therefore, foreign nationals convicted and sentenced to death in the 1980s had their claims rejected on traditional grounds of procedural default.[25]

Thereafter, defense attorneys began to raise absence-of-consular-access-notification claims in new cases. They filed pre-trial motions to suppress statements made by their clients who were not advised. They called consuls to testify in the trial court about the aid they might have provided had they been contacted. They called expert witnesses to explain the treaty requirements. In

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[22] *See, e.g.*, Press Release, Council of the European Union, Declaration by the Presidency on behalf of the European Union on the 400th Execution in Texas, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=PESC/07/70&format=HTML&aged=1&language=EN&guiLanguage=en (last visited November 29, 2008).

[23] Federal Republic of Germany v. United States, 526 U.S. 111, 112 (1999) (Breyer, J., dissenting).

[24] S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L.J. 719, 720–21 (1995).

[25] *See, e.g.*, LaGrand v. Stewart, 133 F.3d 1253, 1261 (9th Cir. 1998).

turn, prosecuting attorneys, at times assisted by the Department of State, opposed these motions. Trial court judges, for whom arguments about treaties came as a novelty, typically overruled the foreign nationals' motions. Judges often reflected the view that, as the foreign national was afforded protections due to arrested persons generally, they did not require an extra "advantage" of assistance from a consul.

Appellate courts also typically rejected consular access claims. Some courts said that VCCR Article 36, even though it envisaged a role for the foreign national as an individual, remained a set of obligations running from one government to another and hence, did not establish a right that would attach to the individual foreign national. Other courts focused on the remedy aspect, stating that even if VCCR Article 36 gives an individual an enforceable right, no remedy is available. Some courts have stated that a treaty-based right is comparable to a statutory, rather than a constitutional, right, and thus is not a matter cognizable for the first time in habeas corpus or other post-conviction proceedings.

V. INTERNATIONAL LITIGATION

With United States courts rejecting claims, foreign nationals and their governments turned to international legal institutions, beginning with the Inter-American Commission on Human Rights (IACHR). It is an agency of the Organization of American States (OAS), a hemispheric inter-governmental association that dates back to the Pan-American Union. By way of implementation of the Charter of the OAS (a treaty to which the United States is a party), the Commission is authorized to hear complaints against any OAS member state for violation of human rights.[26]

In 1993, a Dominican Republic national faced imminent execution in Texas. The Dominican ambassador had flown to Austin, Texas to talk to the governor, but she declined to see him. A complaint was filed on his behalf in the IACHR, which asked the governor to delay the execution while the complaint was under consideration. The governor, however, allowed the execution to proceed on schedule.

A complaint was filed the same year for a Mexican national, also on death row in Texas, but whose execution was not imminent. New proceedings in the case were commenced, however, which led the Commission to postpone consideration.[27] Under most international procedures, one must exhaust national judicial remedies before filing.

In 1998, a Paraguayan national faced imminent execution in Virginia. Paraguay instituted legal action against the United States in the ICJ. Both Paraguay and the United States were parties to the VCCR, and to a separate

[26] Garza v. Lappin, 253 F.3d 918, 920 (7th Cir. 2001).

[27] Fierro v. United States, Case 11.331, Inter-Am. C.H.R., Report No. 99/03, OEA/Ser.L/V/II.114, doc. 70 rev. 1 (2003).

protocol to the VCCR under which states agree to jurisdiction in the ICJ on a complaint filed by another state that is party both to the VCCR and to the protocol.

The ICJ issued an injunctive order asking the United States to delay the execution while Paraguay's case was pending.[28] Seeking to enforce this order, Paraguay sued Virginia in the U.S. Supreme Court and managed to get a motion to delay the execution before the Supreme Court. The Supreme Court dismissed Paraguay's suit, however, on Eleventh Amendment grounds. As to the Paraguayan national's claim, the Supreme Court did not regard the ICJ injunctive order as binding and found that his consular access claim was barred because he had not raised it in state court. Additionally, the Court said that, even assuming that the VCCR gave the man an individual right to be advised about consular access, he had not suffered prejudice.[29] Secretary of State Madeline Albright asked the governor of Virginia to delay the execution on grounds that such action would help in protecting U.S. nationals arrested abroad, but making clear her position that the governor was not legally required to act according to her wishes. The execution was carried out on schedule. The case continued in the ICJ, even after the execution, but was dismissed some months later by Paraguay.

By 1998, Mexico had about fifty nationals on death rows in the United States. Few had received consular access notice. Mexico filed in the Inter-American Court of Human Rights, which, like the IACHR, is part of the OAS. This court has a procedure for issuing advisory opinions on human rights issues. Mexico asked for an advisory opinion on whether the execution of a foreign national whose consular access right had not been observed would constitute an unlawful deprivation of life. The court, in an advisory opinion issued in 1999, said that it would.[30]

By the time the Inter-American court acted, a second case had been filed against the United States in the ICJ, this time by Germany. Two brothers, German nationals who were long-time U.S. residents, had been sentenced to death in Arizona on murder convictions. One had just been executed, and the other was scheduled imminently. As acknowledged by Arizona and by the United States, they had not been advised about consular access. As in the Paraguay case, the ICJ issued an injunctive order. Germany sued both the United States and Arizona in the U.S. Supreme Court, but the Court rejected the claim on the grounds that the constitutional clause providing for original jurisdiction in the Supreme Court in cases "affecting ambassadors" did not apply, and that as to Arizona, the claim was

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[28] Vienna Convention on Consular Relations (Paraguay v. United States), 1998 I.C.J. 248, 258 (Apr. 9).

[29] Breard v. Greene, 523 U.S. 371, 377 (1998).

[30] The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Op. OC-16-99, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, at para. 137 (Oct. 1, 1999).

barred by the Eleventh Amendment.[31] A separate request by the second brother for a stay of execution was rejected by the Supreme Court, and he was executed.

Germany's case continued, however, in the ICJ, which ruled that the United States had violated VCCR Article 36 by failing to provide what it termed "review and reconsideration" of the convictions and sentences in light of the consular access violation. The ICJ said that procedural default rules may not be used to bar consideration of a consular access claim, in light of the obligation under international law to provide a remedy for any internationally wrongful act.[32] The ICJ read VCCR Article 36 as affording a right to an individual foreign national, in addition to the rights it recognized for a sending state. The ICJ further ruled that the injunctive order it had issued carried a legal obligation, and that the United States was in violation for having allowed the execution of the second brother to proceed in violation of the injunction.[33]

In 2002 and 2003, two consular access cases proceeded to decision in the IACHR, one being the case of the Mexican national filed in 1994, and the second the case of another Mexican national. Each was on death row, the first in Texas, the second in Arizona. The Commission decided, consistent with the advisory opinion of the Inter-American Court of Human Rights, that the rights of the two had been violated for failure of U.S. courts to provide a remedy. It ruled that the United States must reverse the nationals' convictions.[34] No action was taken in the United States to carry out these decisions. One federal circuit has ruled that decisions of the Inter-American Commission are not binding.[35]

Later in 2003, Mexico filed against the United States in the ICJ, on behalf of the Mexican nationals under sentence of death in the United States. The ICJ ruled, consistent with its decision in Germany's case, that the United States was under an obligation to provide "review and reconsideration" of these convictions and sentences in light of the consular access violations it found. Clarifying a point it had not made in Germany's case, the ICJ said that this "review and reconsideration" needed to be done in a judicial forum, rather than being left, as the United States argued before the ICJ, to the clemency process.[36]

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[31] Federal Republic of Germany v. United States, 526 U.S. 111, 112 (1999).

[32] LaGrand Case (Germany v. United States), 2001 I.C.J. 466, 498 (June 27).

[33] *Id.* at 516.

[34] Martinez Villareal v. United States., Case 11.753, Inter-Am. C.H.R., Report No. 52/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2003); Fierro v. United States*,* Case 11.331, Inter-Am. C.H.R., Report No. 99/03, OEA/Ser.L/V/II.114, doc. 70 rev. 1 (2003).

[35] Garza v. Lappin, 253 F.3d 918, 925–26 (7th Cir. 2001).

[36] Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), 2004 I.C.J. 12, 66 (Mar. 24).

VI. RECENT SUPREME COURT LITIGATION

In the three ICJ cases, and in a memorandum it filed before the Inter-American Court of Human Rights, the United States argued that VCCR Article 36 gives a foreign national no rights as an individual that can be asserted before the courts of the receiving state, and that a conviction or sentence gained after non-compliance with consular access rights need not be re-examined. Consistent with those positions, the Department of State issued opinions that the Department of Justice used in cases in the federal appellate courts, explaining that the United States construed the VCCR as providing no individual rights, and thus requiring no judicial remedy.[37]

In 2005, one of the Mexican nationals named by Mexico in its ICJ case was granted a hearing by the Supreme Court. Jose Medellin had been denied consideration of his consular access claim by Texas courts and by the federal courts on grounds of procedural default. While his case was pending, President George Bush issued a memorandum to the U.S. Attorney General on February 28, 2005, indicating that the United States sought to comply with the ICJ decision in the *Case Concerning Avena and Other Mexican Nationals* (*Mexico v. United States*),[38] and that the "review and reconsideration" that the ICJ ordered should be carried out by the courts of the states where the convictions and sentences had been entered.[39] On the strength of this memorandum, Medellin filed a new habeas corpus petition in Texas, requesting a "review and reconsideration" of his conviction and sentence in light of the consular access violation.

On the same day that President Bush issued the memorandum, the United States filed an amicus curiae brief, obviously written prior to issuance of the President's memorandum, in which it asked the Supreme Court to decide, based on the memorandum, that certiorari had been improvidently granted.[40] On the strength of the memorandum and Medellin's filing, the Supreme Court decided to await results in Texas. Over four dissents, it dismissed, determining that certiorari had been improvidently granted.[41]

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[37] Letter from David Andrews, Legal Adviser, Dep't of State, to James K. Robinson, Assistant Att'y Gen., (Oct. 15, 1999), Attachment A at A-3, A-4 (Dep't of State Answers to the Questions Posed by the First Circuit in United States v. Nai Fook Li), *available at* http://www.state.gov/documents/organization/7111.doc.

[38] 2004 I.C.J. 12, 73 (Mar. 24).

[39] Medellin v. Texas, 128 S.Ct. 1346, 1355 (2008).

[40] Brief for the United States as Amicus Curiae Supporting Respondent at 8, Medellin v. Dretke, 544 U.S. 660 (2005) (No. 04-5928).

[41] Medellin v. Dretke, 544 U.S. 660, 667 (2005).

The President's memorandum was based on U.N. Charter Article 94, which requires a state that is a party to a case in the ICJ to comply with the decision.[42] Thus, President Bush determined that the United States was under an obligation to comply with the decision in Mexico's case against it, that the decision called for judicial "review and reconsideration," and that the courts in the states involved were best positioned to do that.

At the same time as he issued the memorandum, President Bush withdrew the United States' ratification of the VCCR optional protocol, with the aim of protecting the United States from future filings in the ICJ. This withdrawal from the optional protocol did not negate the U.S. obligation to comply with the ICJ decision already entered in Mexico's case, but it did leave the President's motivation unclear, as the memorandum seemed to bespeak a desire to comply with international obligations, whereas the withdrawal aimed at avoiding such obligations in the future. Administration spokespersons explained that the United States sought to comply with its obligation contained in U.N. Charter Article 94 to comply with the decision in Mexico's case, but that the Administration hoped to resolve other consular access controversies by non-judicial means.[43]

The four Supreme Court justices who dissented in *Medellin* issued statements from which it appeared that, had the case gone to decision, they might have ruled in favor of Medellin. Had any one of the other five justices taken this position, Medellin would have prevailed. Thus, the issuance of the Bush memorandum may have had less to do with complying with the U.N. Charter than with avoiding an unfavorable Supreme Court decision on consular access. Moreover, as the *Avena* decision was handed down in March 2004, President Bush could have issued his memorandum much sooner had the aim been to comply. Most U.S. courts, in line with the Supreme Court in the Paraguayan's case, were making it difficult to show prejudice from a VCCR Article 36 violation; hence, the likelihood was that courts undertaking the review would readily decide against any prejudice. The memorandum thus offered the prospect of preserving the executive branch's restrictive interpretation of consular access requirements in domestic law, while allowing for compliance with the U.N. Charter obligation to review the convictions, but without losing the convictions or sentences.

In any event, before the Texas courts could act on Medellin's new habeas petition, the Supreme Court granted certiorari in two other consular access cases, each a non-capital murder case.[44] One was an Oregon case in which a Mexican national who had not been advised about consular access sought to suppress an incriminating statement made to police. The other from Virginia involved consideration of a Honduran national's consular access claim that had been denied

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[42] U.N. Charter art. 94, para. 1.

[43] J. Adam Ereli, Deputy Spokesperson, Dep't of State, Daily Press Briefing (Mar. 10, 2005) (transcript available at http://2001-2009.state.gov/r/pa/prs/dpb/2005/43225.htm).

[44] Sanchez-Llamas v. Oregon, 546 U.S. 1001 (2005); Bustillo v. Johnson, 546 U.S. 1002 (2005).

on grounds of procedural default. Both litigants argued that the remedies they sought were required by the VCCR, as interpreted by the ICJ.

In the Virginia case, the Supreme Court said that it was not obliged to follow the ICJ's interpretation of VCCR obligations, and that consular access claims had to be made within the framework of domestic laws, including laws relating to the orderly presentation of claims. Therefore, Virginia could invoke the doctrine of procedural default to deny consideration of the consular access claim. In the Oregon case, the Supreme Court said that suppression was a remedy unique to U.S. law, that suppression was not contemplated by the states drafting the VCCR as a remedy for a VCCR Article 36 violation, and that only such remedies are required under a treaty as are specified in the treaty itself. On the strength of these positions, the Supreme Court narrowly affirmed the convictions in both cases.[45]

Meanwhile, in 2007, the Texas Court of Criminal Appeals rendered its decision on Medellin's successor habeas petition. It declined to perform the review sought by President Bush. It stated that the President had no authority, by unilateral directive, to require Texas to forego its procedural default rules, on the basis of the *Avena* decision. Citing Supreme Court case law on presidential power, it suggested that the President could, by an executive agreement with another country, override state law and policy. But here, it said, the President had not concluded an executive agreement with Mexico; rather, he was acting on his own and therefore could not order a state to forego its own procedures.[46]

Medellin sought certiorari, which was granted. He principally challenged the Texas court's rejection of the President's power to order Texas to comply with *Avena*. He also raised again his prior question as to whether a review of his conviction was required on the basis of the ICJ decision in Mexico's favor.

Medellin's new case before the Supreme Court was unusual in two respects. First, the Texas Attorney General, seeking affirmance of the Texas Court of Criminal Appeals, pressed a position that had seen only marginal treatment in that court. He argued that U.N. Charter Article 94 is not self-executing, hence that even if the ICJ decision is binding on the United States at the international level, it is not binding on the courts of Texas as a matter of domestic law. On the other side of the case, Medellin, whose arguments throughout his litigation had been at odds with those of the United States, now found himself allied with the federal government. Although the Solicitor General had filed as amicus curiae against Medellin in the earlier case, now it filed as amicus curiae in his support. Both Medellin and the Solicitor General argued that the President's memorandum was binding on Texas, as a means to implement the obligation that the U.S. has under U.N. Charter Article 94 to comply with a decision of the ICJ.

The Supreme Court accepted the Texas Attorney General's mode of analysis. Instead of approaching the case from the standpoint of the presidential power, it approached from the standpoint of the treaty obligation the President sought to

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[45] Sanchez-Llamas v. Oregon, 548 U.S. 331, 360 (2006).

[46] *Ex parte* Medellin, 223 S.W.3d 315, 348 (Tex. Crim. App. 2007).

implement. The Court stated that U.N. Charter Article 94, whereby the United States undertakes to comply with an ICJ decision, was not self-executing, hence not binding on Texas under the Supremacy Clause of the U.S. Constitution, which treats treaties as "the law of the land." For that reason, the Court continued, President Bush could not require Texas to comply with it.[47]

The self-execution concept is one that the Supreme Court had developed in the nineteenth century in the context of efforts by private individuals to invoke a treaty provision in their favor. As elaborated by the Supreme Court in a series of cases, the issue is whether a category of individuals identified in a treaty as possessing some entitlement should be permitted to invoke the treaty provision in a court of law, or whether, to the contrary, the treaty merely obligates the United States to benefit them by future legislative action. If the latter is found to be the case, then the individual must await the legislative action, and may not invoke the treaty provision in a court of law.[48]

Applying the self-execution concept to U.N. Charter Article 94, the Supreme Court said that it was not self-executing. Having reached that conclusion, it then considered whether the President could require Texas to comply with it. It ruled that since U.N. Charter Article 94 was not self-executing, the President could not compel Texas to comply.

In the few cases in which the federal government has sought to require a state to comply with a treaty provision, which is what the President was doing here, the President had prevailed, and the courts had not inquired whether the treaty provision in question was self-executing. The Supreme Court did not mention those cases. Its resort to self-execution analysis was questionable, as I have explained elsewhere.[49] Following the Supreme Court's decision, the Department of State urged Texas authorities to review Medellin's conviction and sentence, but they declined. Medellin was executed August 5, 2008.

VII. FAILINGS OF LEGAL ANALYSIS

The low level of compliance in the United States with the obligation to inform foreigners about consular access is a serious, continuing problem. The Department of State urges police departments to comply. Yet by asserting that no right attaches to an individual foreign national and that no judicial remedy need be provided in cases of violation, the Department gives police little incentive to comply. The U.S. Supreme Court, similarly, has made clear that convictions will stand, and pre-trial statements can still be used even absent compliance. Non-compliance may lead to litigation, domestic and even international, and to

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[47] Medellin v. Texas, 128 S.Ct. 1346, 1371 (2008).

[48] Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

[49] *See* John Quigley, *President Bush's Directive on Foreigners Under Arrest: A Critique of* Medellin v. Texas, 22 EMORY INT'L L. REV. 423 (2009) [hereinafter Quigley, *Directive*].

diplomatic protest, but police and prosecutors are unlikely to lose convictions. The deterrent value of a sanction is absent.

The Department of State's insistence on a restrictive view of consular access obligations, moreover, is widely viewed as ill-founded, even disingenuous. VCCR Article 36 by its terms grants an individual right to a foreign national to be advised about consular access upon arrest. International law calls for a remedy when an international obligation is violated.

It should be kept in mind that when U.S. consulates were occupied in Iran in 1979, and consuls were taken hostage, the United States sued Iran for VCCR Article 36 violations. One of its arguments was that the kidnapping of consuls deprived U.S. citizens in Iran of access to them. In a brief filed in the ICJ, it argued that U.S. citizens had a right of access: "Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others."[50] That position is at odds with the position the Department of State has asserted over the past decade. The Department argued, for example, to the Inter-American Court of Human Rights that no individual right is contemplated by VCCR Article 36, and that no judicial remedy is required in case of breach.[51] The inconsistency between that assertion and the U.S. argument in the Iran case was not lost on the Inter-American Court, which went on to rule that consular access is an individual right, and that a judicial remedy is required in case of breach.

One of the Department's most insistent arguments for its claim that VCCR Article 36 does not give a foreign national a personal right is based on a preamble phrase in the VCCR that reads: "Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States."[52] Citing that language, the Department of State argues: "The right of an individual to communicate with his consular officials is derivative of the sending state's right to extend consular protection to its nationals . . . ," and therefore the VCCR does not establish "rights of individuals."[53]

The preamble language, however, is a reference to consular officers, since they are the ones who enjoy privileges and immunities. When the VCCR was submitted to the U.S. Senate for advice and consent to ratification, the Department of State delegation that represented the United States at the drafting convention explained to the Senate that the preamble referred to "officers, members of

[50] Memorial of the Government of the United States of America, United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. Pleadings 174 (Jan. 12, 1980).

[51] The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Op. OC-16-99, 1999 Inter-Am. Ct. H.R. (ser.A) No. 16 at para. 26 (Oct. 1, 1999) (summarizing the original briefs of participating states).

[52] Vienna Convention, *supra* note 1, pmbl.

[53] Letter from David Andrews, *supra* note 37, at A-4.

families, and employees" of consulates.[54] The Inter-American court rejected, therefore, the Department's preamble argument.[55]

The change in U.S. position and the resulting inconsistencies are, in part, explained by historical circumstance. When the VCCR was being drafted in the 1960s, the United States wanted to secure strict compliance with consular access, because of previous instances of U.S. citizens arrested in East-bloc countries in which U.S. officials were left unaware for substantial periods of time. By the mid-1990s, however, the Cold War was a historical memory. Moreover, over time, the United States found itself isolated in its use of capital punishment, with foreign nationals sentenced to death with some frequency. The treaty the United States had fostered to serve its earlier interests now threatened it.

At the drafting conference in 1963, the U.S. was a prime proponent of the submission of consular law disputes to the ICJ. At the conference, it pushed for remedies in criminal court for consular access claims over strenuous objection from the USSR, which said that this aspect of VCCR Article 36 threatened state sovereignty. Now the United States views VCCR Article 36 as providing for no individual rights, and as calling for no judicial remedies in the event of breach.

The Supreme Court has yet to render a decision on the issue of individual rights under VCCR Article 36. In the four cases in which it has ruled to date, it has assumed arguendo that there is such a right and has then decided against a remedy on other grounds. Lower federal courts are split on the issue. If the Court continues to deny remedies, however, the issue of an individual right may be moot. Another issue the Supreme Court has yet to resolve is that of a prejudice standard for providing a remedy. Again, if the Court takes a blanket position against remedies, it may never need to address the prejudice standard.

On the issues on which it has ruled, the Supreme Court's decisions reflect serious errors of analysis. In the Oregon case, it suggested that a state court must provide a remedy for a treaty violation only if a remedy is specified within the four corners of the treaty.[56] Yet, that position is at odds with two hundred years of Supreme Court case law.[57] Starting in 1796, the Supreme Court has provided remedies for treaty violations without such a requirement.[58] Moreover, treaties rarely specify remedies. Like contracts in domestic law, they specify obligations. Just as in domestic law one finds a body of law on remedies, so in international

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[54] Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963, *in* Vienna Convention on Consular Relations with Optional Protocol, 91st Cong., 1st Sess., Executive E (U.S. Government Printing Office, Washington 1969) 41, 46.

[55] The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Op. OC-16-99, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16 at para. 74 (Oct. 1, 1999).

[56] Sanchez-Llamas v. Oregon, 548 U.S. 331, 346–47 (2006).

[57] *Id*. at 374–75 (Breyer, J., dissenting).

[58] Ware v. Hylton, 3 U.S. (3 Dall.) 199, 285 (1796).

law one finds a body of law, termed "the law of state responsibility," that provides remedies.[59] In international law, the principle that there is no right without a remedy is just as solid as in domestic law.

In the Virginia case, the Supreme Court held Virginia's procedural default rules superior to U.S. treaty obligations in the face of the clear requirement of a remedy.[60] It did so without engaging in any analysis of the rationale for the procedural default rule and why it should prevail over the international obligation.

In *Medellin*, the Supreme Court found U.N. Charter Article 94 non-self-executing only by making three implausible references to the U.N. Charter and to the accompanying statute of the ICJ.[61] It focused on the verb "undertakes" in U.N. Charter Article 94, suggesting that this word implies only a commitment to take future action rather than an obligation of direct compliance. The Court also said that a provision in U.N. Charter Article 94 for enforcement by the U.N. Security Council against states that refuse to comply with the ICJ decision means that domestic courts need not enforce them. Finally, it interpreted ICJ Statute Article 59, which says merely that ICJ decisions are not stare decisis in future ICJ cases, to mean that an ICJ decision need not be enforced by domestic courts.[62]

VIII. LEGAL POLICY CONSIDERATIONS

Some consular access cases have involved serious miscarriages of justice, a circumstance that has heightened the attention these cases receive in the individual's home country.[63] For example, one case decided by the Inter-American Commission on Human Rights involved a Mexican national (Martinez Villareal) with such serious mental disability that he seemed not to have understood that the persons sitting in the jury box were the ones who would decide on a verdict. Another case involved a Mexican national (Fierro) who was coerced, as the Texas Court of Criminal Appeals later determined, into confessing to a murder to which he had previously denied guilt. Specifically, El Paso police arranged with police in Ciudad Juarez, Mexico for the arrest there, for no apparent valid reason, of the man's mother. El Paso police then let Fierro speak by telephone with his mother, after which he immediately confessed, apparently concerned that his mother would also be jailed until he confessed. The Texas Court of Criminal Appeals ultimately threw out the confession but sustained the conviction on the evidence of an eye

[59] John Quigley, *Must Treaty Violations Be Remedied?: A Critique of* Sanchez-Llamas v. Oregon, 36 GA. J. INT'L & COMP. L. 355, 364–69 (2008).

[60] *Sanchez-Llamas*, 548 U.S. at 360.

[61] Medellin v. Texas, 128 S.Ct. 1346, 1357–61 (2008).

[62] Quigley, *Directive*, *supra* note 49.

[63] Martinez Villareal v. United States, Case 11.753, Inter-Am. C.H.R., Report No. 52/02, OEA/Ser.L/V/II.117, doc. 1, rev. 1 (2003); Fierro v. United States, Case 11.331, Inter-Am. C.H.R., Report No. 99/03, OEA/Ser.L/V/II.114, doc. 70 rev. 1 (2003).

witness. The prosecutor who tried the case executed an affidavit in which he said that he would not have taken the case to trial without the confession.[64]

Consular access is increasingly viewed internationally as an element of due process of law. The Inter-American Court of Human Rights has so viewed it. One also finds a right of consular access for foreigners under arrest in a variety of human rights treaties that touch on the legal position of foreigners. A migrant worker treaty, for example, requires a state in which a migrant (non-national) worker is arrested to observe consular access rights.[65]

The U.S. position in opposition to rights or remedies for consular access violations puts it at odds with the other nations of the world. No other nation backs the United States on these points. In one amicus curiae brief filed in the Supreme Court, forty-six European nations expressed their opposition to the U.S. positions. Other nations provide remedies. The Constitutional Court of Germany in 2006 issued a decision that runs directly contrary to those of the U.S. Supreme Court.[66] The German court stated that consular access is an individual right, and that a violation requires a court to consider whether a remedy is appropriate.[67] Several appellate courts in Australia, as well, have suppressed confessions or material evidence seized from foreign nationals who had not been advised about consular access.[68]

A few federal and state court judges have determined that remedies are in order for consular access violations. Some have found consular access to be an individual right. Some have elaborated a prejudice standard that reflects a presumption that consular access is significant to a foreign national's defense. An Ohio Supreme Court judge who dissented when her colleagues, on procedural grounds, rejected a consular access claim, wrote:

> If the United States fails in its responsibilities under the convention, then other member countries may choose to do unto us as we have done unto them. Oliver Wendell Holmes said, "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." If we are to expect that our nationals will be afforded the

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[64] John Quigley, *International Attention to the Death Penalty: Texas as a Lightning Rod*, 8 TEX. F. ON C.L. & C.R. 175, 183 (2003) (citing *Ex parte* Fierro, 934 S.W.2d 370, 390–391 (Tex. Crim. App. 1996) (Maloney, J. dissenting)).

[65] International Convention on the Protection of the Rights of All Migrant Workers and Their Families, G.A. Res. 45/158, art. 16(7), U.N. GAOR, 69th plen. mtg., U.N. Doc A/RES/45/158 (Dec. 18, 1990) (entered into force July 1, 2003).

[66] Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Sept. 19, 2006, 2 BvR 2115/01 (F.R.G), *available at* http://www.bverfg.de/entscheidungen/rk20060919_2bvr211501.html.

[67] *Id.* at paras. 65, 68.

[68] Tan Seng Kiah v. Queen (2001) 160 F.L.R. (Ct. Crim. App. N. Terr.) (Austl.); Queen v. Tan (2001) W.A.S.C. 275 (Sup. Ct. W. Austl.).

> rights guaranteed them under the treaty, we must guard the rights of foreign nationals in our country as well.[69]

The negative implications of the position taken by the Supreme Court and by the Department of State on consular access are alarming. We have placed ourselves in a minority of one in the international community. Governments of other countries read in dismay the Supreme Court rulings in this area. We have made it more difficult for U.S. consuls to protect U.S. citizens arrested abroad. If the Supreme Court or the Department of State had plausible arguments for their position, their stance might be defensible. Their arguments are, however, implausible.

A fundamental re-thinking is needed, both by the Department of State and by the Supreme Court. VCCR Article 36, as the ICJ has said, grants a right to a foreign national under arrest. Under the Supremacy Clause of the U.S. Constitution, that right is invocable by a foreign national to whom advice about consular access was not given. When a treaty provision is violated, a remedy is required. Consular access is a significant right to a foreign national; violation of that right should presumptively invalidate a conviction or require suppression of an incriminating statement.

Exclusion of incriminating statements and reversal of convictions might have a salutary effect on the practice of police officers in the United States. A few lost convictions might go a long way towards enhancing compliance. At low cost to itself, the United States could bring itself into conformity with world opinion and begin to implement rights it has promised.

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[69] State v. Issa, 93 Ohio St. 3d 49, 81, 752 N.E.2d 904, 935 (2001) (Lundberg-Stratton, J., dissenting) (citation omitted).