ISSN:1692-8156

# INTERNATIONAL *V.* UNITED STATES COURTS: IN SEARCH OF A RIGHT AND A REMEDY IN ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

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*Fecha de recepción:* 10 de marzo de 2006
*Fecha de aceptación:* 31 demarzo de 2006

## ABSTRACT

This paper seeks to analyze whether Article 36 (1) (b) of the Vienna Convention on Consular Relations (1963) confers an individual right to consular notification upon detained foreign nationals under international and U.S. courts decisions, and if such right is to be considered a human right in the current state of international law. This paper will further analyze whether

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characterizing consular notification as a fundamental human right would make a difference regarding the remedies that should be available for its violation, since U.S. courts have generally denied remedies for clear violations of the right to consular notification or have required a showing of prejudice to the outcome of the trial in order to trigger judicial remedies. The Inter-American Court's Advisory Opinion OC-16/99 and the *LaGrand* and *Avena* judgments of the International Court of Justice (ICJ) are studied, which specifically interpreted Article 36 of the Vienna Convention and addressed the issue of the remedies that should be available in U.S. courts in order to give full effect to the right to consular notification. Finally, this paper explores how U.S. courts have interpreted Article 36 of the Vienna Convention before and after the aforementioned international judicial decisions on the matter. It is concluded that a growing international consensus considers the right to consular notification a human right pertaining to the minimum guarantees of due process, given the fact that the right to a fair trial of foreign defendants is in jeopardy if Article 36 of the Vienna Convention is not enforced effectively by the authorities of the receiving State. However, the U.S. jurisprudence regarding the right to information on consular assistance remains unsettled even after the ICJ's judgments in *LaGrand* and *Avena*, because most U.S. courts are not likely to find an individual enforceable right in Article 36 of the Vienna Convention.

Descriptors: right to consular notification, Vienna Convention on Consular Relations, remedies, Inter-American Court of Human Rights, International Court of Justice, U.S. courts.

# *TRIBUNALES INTERNACIONALES VS. TRIBUNALES ESTADOUNIDENSES: EN BÚSQUEDA DE UN DERECHO Y UNA REPARACIÓN EN EL ARTÍCULO 36 DE LA CONVENCIÓN DE VIENA SOBRE RELACIONES CONSULARES*

*RESUMEN*

*Este trabajo pretende analizar si el artículo 36 (1) (b) de la Convención de Viena sobre relaciones consulares (1963) confiere un derecho individual a la notificación consular a las personas detenidas en el extranjero, de conformidad con la jurisprudencia internacional y estadounidense, y si ese derecho puede ser considerado un derecho humano en el estado actual del derecho internacional. El trabajo también se propone explorar si la caracterización del derecho a la notificación consular como derecho humano fundamental trae consigo el reconocimiento de la reparación como consecuencia de su violación, siendo que la mayoría de los tribunales estadounidenses han negado la posibilidad de reparación en casos de clara violación del derecho a la notificación consular, o han requerido que se demuestre el perjuicio de la víctima a los fines de considerar factible la reparación judicial. Se estudian la Opinión Consultiva OC-16/99 de la Corte Interamericana de Derechos Humanos, así como las decisiones de la Corte Internacional de Justicia en los casos LaGrand y Avena, las cuales interpretaron el artículo 36 de la Convención de Viena y abordaron el asunto de la reparación judicial a los fines de la garantía efectiva del derecho a la notificación consular en los tribunales estadounidenses. Finalmente, el trabajo explora cómo los tribunales estadounidenses han interpretado el artículo 36 de la Convención de Viena, antes y después de las mencionadas decisiones internacionales. Se concluye que un creciente consenso internacional considera el derecho a la notificación*

*consular como un derecho humano dentro de las garantías del debido proceso, dado que el derecho a un juicio justo de las personas detenidas en el extranjero está en peligro si el artículo 36 de la Convención de Viena no es garantizado efectivamente por las autoridades del Estado receptor. No obstante ello, la mayoría de los tribunales estadounidenses se niegan a encontrar un derecho y una reparación en el artículo 36 de la Convención de Viena.*

*Palabras clave: derecho a la notificación consular, Convención de Viena sobre Relaciones Consulares, reparación, Corte Interamericana de Derechos Humanos, Corte Internacional de Justicia, tribunales estadounidenses.*

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## INTRODUCTION

The death row population in the United States (U.S.) currently has 117 foreign nationals from 32 countries[1]. Since 1976, a total of 21

1 See International Justice Project, *Statistics on Foreign Nationals as of September 8, 2004, available at*: http://www.internationaljusticeproject.org/nationalsStats.cfm. These 117 inmates are nationals from the following countries: Mexico (53); Jamaica (6); El Salvador (5); Colombia (4); Cuba (4); Cambodia (3); Germany (3); Estonia

foreign nationals have been executed[2], the majority without being informed by the arresting authorities of their right to consular access and assistance under Article 36 of the Vienna Convention on Consular Relations[3]. The U.S. ratified the Vienna Convention in 1969, and in so doing it undertook the obligation to promptly inform

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(2); Honduras (2); Thailand (2); United Kingdom (2); Vietnam (2); Argentina (1); Bahamas (1); Bangladesh (1); Canada (1); Croatia (1); Egypt (1); France (1); Guatemala (1); Haiti (1); Iran (1); Jordan (1); Laos (1); Lebanon (1); Nicaragua (1); Pakistan (1); Peru (1); Philippines (1); Spain (1); Tonga (1); Trinidad (1); unknown nationality (9).

2 *Id*. They were nationals of the following countries: Vietnam (2); Pakistan (1); Cuba (2); Mexico (5); Iraq (1); South Africa (1); Canada (1); Philippines (1); Germany (2); Thailand (1); Honduras (1); Paraguay (1); Dominican Republic (1); Guyana (1).

3 Vienna Convention on Consular Relations, April 24, 1963, 21 UST 77, TIAS n° 6820, 596 UNTS 261 [hereinafter the Vienna Convention]. Article 36 of the Vienna Convention reads:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

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

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

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

all foreign nationals arrested within its territory of their right to have communication with and access to their country's consular officers in order to arrange for their legal representation, if they so request.

The importance of this obligation is more than evident: when foreign nationals face judicial proceedings in a strange country, several fundamental human rights are implicated, including the rights to due process, adequate counsel, and an interpreter[4]. Moreover, even the right to life can be at a stake when the receiving State has not abolished the death penalty, like the U.S. Indeed, Article 36 ensures that all arrested foreigners have the means at their disposal to prepare an adequate defense and to receive the same treatment before the law as domestic citizens. Consuls are uniquely placed to provide a wide range of essential services to their nationals, including legal advice and assistance, translation, notification of family members, the transferring of documentation from the native country and observing court hearings[5].

In 1998, the international community became aware of the systematic U.S.'s noncompliance with Article 36 of the Vienna Convention. That year, a Paraguayan national, ANGEL FRANCISCO BREARD, was executed on April 14, 1998 by lethal injection in the State of Virginia, notwithstanding that Paraguay had instituted proceedings against the U.S. before the International Court of Justice (ICJ) and that the Court, at the request of Paraguay, had indicated provisional measures ordering the U.S. to take all measures at its disposal to ensure that Breard was not executed pending the final decision in the proceedings in The Hague[6].

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4 See VICTOR M. URIBE, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 Hous. J. Int'l L. 375, 378 (1997).

5 See Amnesty International, *United States of America. Violation of the Rights of Foreign Nationals Under Sentence of Death*, January, 1998, at 1, *available at*: http://www.web.amnesty.org/library/pdf/AMR510011998ENGLISH/$File/AMR5100198.pdf

6 See International Court of Justice, *Vienna Convention on Consular Relations (Paraguay v. United States of America), Request for the Indication of Provisional Measures, Order, April 9, 1998*, at para. 41, *available at*: http://www.icj-cij.org/

Hours before Breard's execution and despite the provisional measures indicated by the ICJ, the U.S. Supreme Court denied the petition for *certiorari*, stating that the Consular Convention did not trump the procedural default doctrine, which applied to Breard for failing to raise the treaty claim in Virginia state courts. Also, the Court found that the Convention was superceded in time by the Antiterrorism and Effective Death Penalty Act (AEDPA)[7], which provides that a habeas petitioner held in violation of U.S. treaties will not be afforded an evidentiary hearing if he has failed to develop the factual basis of the claim in state court proceedings[8].

Importantly, the Supreme Court left the door opened regarding the question of whether Article 36 of the Vienna Convention confers rights upon individuals, stating that such Convention

> "arguably confers on an individual the right to consular assistance following arrest"[9].

Moreover, the Court seemed to require that prejudice or harm to the defendant need to be shown in order to remedy violations of the Vienna Convention, noting that

> "Even were Breard's Vienna Convention claim properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial"[10].

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icjwww/idocket/ipaus/ipausframe.htm. However, on November 2, 1998, the Government of Paraguay informed the Court that it did not wish to go on with the proceedings and requested that the case be removed from the Court's List.

7 28 U.S.C. A §§ 2254 (a), (e) (2) (Supp. 1998).

8 See KAREN A. GLASGOW, *What we need to know about Article 36 of the Consular Convention*, 6 New Eng. Int'l & Comp. L. Ann. 117, 133 (2000).

9 Breard *v.* Greene, 523 U.S. 371, 376 (1998).

10 *Id*., at 377.

This paper will analyze whether Article 36 (1)(b) of the Vienna Convention indeed confers an individual right upon detained foreign nationals under international and U.S. courts decisions, and if such right is to be considered a human right in the current state of international law. The paper will further analyze whether characterizing consular notification as a fundamental human right would make a difference regarding the remedies that should be available for its violation, since U.S. courts have generally denied remedies for clear violations of the Vienna Convention or have required a showing of prejudice to the outcome of the trial in order to trigger judicial remedies.

Indeed, if the right to consular notice were considered a fundamental human right, both U.S. and international law suggest that judicial remedies should be available and that no showing of prejudice to the defendant should be needed. Indeed, in U.S. law violations of fundamental rights may suffice to trigger judicial remedies with no showing of prejudice[11]. Also, international human rights law recognizes a general principle that human rights' violations shall have an effective remedy.

To that end, Part I of this paper analyzes whether the right to consular notification is to be considered a human right, based on the language and history of the Vienna Convention as well as the nature and importance of complying with consular notification in order to ensure a fair trial to any foreign national facing criminal proceedings in a strange land. Part II introduces an important number of international human rights instruments that expressly recognize the right to consular notification as a human right. Part III studies the Inter-American Court's Advisory Opinion OC-16/99 and the *LaGrand* and *Avena* judgments of the International Court of Justice (ICJ), which specifically interpreted Article 36 of the Vienna Convention and addressed the issue of the remedies that should be

11 See DOUGLASS CASSEL, *International Remedies in National Criminal Cases: ICJ Judgment in Germany v. United States*, 15 Leiden J. Int'l. L.,69,84 (2002).

available in U.S. courts in order to give full effect to the right to consular notification. Finally, Part IV explores how U.S. courts have interpreted Article 36 of the Vienna Convention and the question of remedies before and after the aforementioned international judicial decisions on the matter.

## I. ARTICLE 36 OF THE VIENNA CONVENTION AS A PROVISION CONCERNING THE HUMAN RIGHT TO CONSULAR NOTIFICATION

The right to consular notification represents a fusion of two somewhat contradictory trends of international law: the traditional functions of consular officers as representatives of a sovereign state, and the growing emphasis of the international community on the respect of human rights[12]. Despite the fact that the title of the Vienna Convention does not suggest it is a treaty concerning human rights, its Article 36 enshrines not only the rights of consuls to communicate with and assist the detained foreign nationals of the sending State, but also the rights of all foreign detainees and prisoners to be informed without delay that they have the right to communicate with their respective consulates and receive their assistance if they so request.

Article 36 is directly related with one of the principal consular functions recognized in Article 5 (i) of the Vienna Convention, regarding the arrangement of appropriate representation for the nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, when such nationals are unable to assume the defense of their rights and interests.

12 URIBE, *supra* note 4, at 424.

Article 36 has the purpose to give full effect to this consular function, conferring foreign nationals specific rights: the right to be informed without delay by the arresting authority of the right to consular communication; to choose whether or not to have the consulate contacted; to have the consulate contacted promptly by the arresting authority; to communicate freely with the consulate; and to accept or decline any offered consular assistance[13]. Although the Vienna Convention may seem to be an awkward place to enumerate such individual rights, Article 36 (1) (b) unequivocally states that the rights enumerated in this subparagraph belong to the foreign national[14], stating that

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

Professor KADISH explains that Article 36 and particularly subparagraph (b) were subject to an intensive debate during the Vienna Conference. He notes that although numerous amendments were submitted by States' delegates regarding the pertinence of establishing individual rights in a treaty concerning consular relations, the final draft demonstrated that Article 36 was created in order to confer individual rights on detained foreign nationals in order to ensure them a fair trial[15]. However, although many countries insisted

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13 See International Justice Project, *Equal Protection: Consular Assistance and Criminal Justice Procedures in the USA, An Introductory Guide for Consulates*, at 7, *available at*: http://www.internationaljusticeproject.org/pdfs/VCCRguide.pdf

14 See MARK J. KADISH, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 Mich. J. Int'l L. 565, 593.

15 *Id*., at 596. Professor KADISH explains that one particular amendment, submitted by Venezuela, was intended to completely eliminate reference to the foreign national's

upon automatic notification to consular officers when foreign nationals were detained or arrested in the receiving State in order to ensure due process safeguards for them, concerns for the free will of the affected foreign national prevailed and ultimately the Convention adopted language that prohibits consular notification unless it is requested by him[16].

This means that not only the plain language of the Vienna Convention, but also the purport of the *travaux preparatoires*, which include both the discussion by the International Law Commission's drafters and the record of speeches by delegates to the Vienna Conference, could not be clearer in their intent to confer individual rights on detained foreign nationals[17]. Consequently, the right to consular notification becomes particularly indispensable to a fair trial when foreign nationals face prosecution, sentencing, and incarceration abroad. Few nationals require consular assistance more urgently than those who are arrested and face prosecution in a foreign country, because they are "strangers in a strange land", confronted by an unfamiliar legal system, far from home, and frequently at the mercy of the local authorities[18].

Through consular notification, foreign nationals are in equal-footing as domestic citizens of the receiving State regarding the minimum guarantees of due process. Indeed, consular notification

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right to consular notification. However, the amendment received strong opposition and it was withdrawn. For example, the Spanish delegate stated that: "The right of the nationals of a sending State to communicate with and have access to the consulate and consular officials of their own country is one of the most sacred rights of foreign residents in a country. The fact that it was established under national law in no way conflicted with the need to establish it under international law".

16 *Id*., at 597-598. Professor KADISH notes that this rule was particularly criticized by the delegation of the United Kingdom, because it "could give rise to abuses and misunderstanding. It could well make the provisions of Article 36 ineffective because the person arrested might not be aware of his rights".

17 See VALERIE EPPS, *Violations of the Vienna Convention on Consular Relations: Time for Remedies*, 11 Willamette J. Int'l L. & Dispute Res., 1, 20 (2004).

18 International Justice Project, *supra* note 13, at 9.

is vital in order to assure their adequate defense in situations involving criminal procedures, where human rights violations are likely to occur due to the lack of familiarity with a particular legal system and the inability of some foreign nationals to communicate in the local language[19]. Arrested foreign nationals face a multitude of linguistic, cultural and conceptual barriers that frequently hinder their ability to fully understand and act on their due process rights[20].

In this sense, the right to consular notification must be considered a minimum guarantee of the due process of foreign defendants, since because of those barriers they may be seriously disadvantaged from the moment of their detention and discriminated by the local legal system. Consular notification assures that foreign nationals are equal before the courts and tribunals of the host State, as provided for in Article 14 of the International Covenant on Civil and Political Rights[21]. For example, the right to have legal assistance in the context of criminal procedures is fundamental to the concept of fair trial. One of the first inquires after a consul has been notified of the detention of a co-national is to find out whether he has had proper legal advice. Consequently, failure to comply with consular notification may be considered a violation of the right to counsel, in detriment of the due process guarantees of the foreign national[22].

Also, recognizing consular notification as a human right pertaining to foreign nationals facing criminal proceedings abroad, means that its violation must have an effective remedy even without a showing of prejudice in the outcome of the trial. Remedies are the appropriate consequence of human rights violations, aimed at restoring the *status quo ante*, which in the context of a criminal case

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19 URIBE, *supra* note 4, at 424.

20 See International Justice Project, *Bridging the Gap: Effective Representation of Foreign Nationals in US Criminal Cases, An Introductory Guide for Attorneys*, at 8, *available at:* http://www.internationaljusticeproject.org/pdfs/BridgingtheGap9final.pdf

21 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR].

22 URIBE, *supra* note 4, at 405-406.

would require either the exclusion of the incriminating evidence obtained in violation of the treaty or a new trial[23]. The purpose of consular notification, like that of Miranda rights, is to make a foreign suspect aware of his rights before he unknowingly waives those rights. Consequently, a correct remedy necessarily demands a new trial in which the foreign national has full access to an adequate defense and a fair trial[24].

Although international human rights treaties have not yet recognized the human right character of consular notification, recent international declarations and resolutions have expressly recognized such character, as well as judicial decisions of international tribunals such as the Inter-American Court of Human Rights. These instruments may become, in the near future, a very important contribution to the reform of international human rights treaties in light of the dynamic nature of the due process of law, which demands the incorporation of consular notification as a minimum guarantee of due process in order to prevent the discrimination that foreign nationals often encounter in the preparation of their defense in a strange legal system.

## II. INTERNATIONAL INSTRUMENTS RECOGNIZING THE RIGHT TO CONSULAR NOTIFICATION AS A HUMAN RIGHT

A number of important international instruments recognize the right to consular notification as a human right of aliens arrested abroad. These instruments, however, are not treaties that impose international legal obligations upon States, but are declarations or resolutions of bodies of the United Nations (UN) that can be viewed as expressing a growing international consensus toward considering the right to consular notification as a part of the minimum guarantees for a fair trial of detained foreign nationals.

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23 KADISH, *supra* note 14, at 610.

24 *Id*., at 611.

### A. THE 1979 CODE OF CONDUCT FOR LAW ENFORCEMENT OFFICIALS

The Code of Conduct for Law Enforcement Officials was adopted on December 17, 1979 by the UN General Assembly[25], and was drafted by the Working Group on Detention[26] created by the Sub-Commission on the Promotion and Protection of Human Rights (formerly called the Sub-Commission on Prevention of Discrimination and Protection of Minorities), a functional Commission of the Economic and Social Council of the UN.

Article 2 of the Code establishes that

> "in the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons"[27],

although the Code does not expressly recognize the right to information on consular assistance as a human right, but it does consider the Vienna Convention as an instrument concerning human rights. Thus, the Commentary attached to each article, which provides information to facilitate the use of the Code within the framework of national legislation or practice, expressly states that the human rights in question are identified and protected by national and international law, including the Vienna Convention on Consular Relations.

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25 UN General Asembly, Res. 34/169, 106th Plenary Meeting, UN Doc. A/RES/34/169 (1979), *available at*: http://www.un.org/documents/ga/res/34/a34res169.pdf.

26 This Working Group was created by Resolution 7 (XXVII) of 20 August 1974. In 1994, the Sub-Commission changed its name to the Working Group on the Administration of Justice and the Question of Compensation, and in 1997 to the Working Group on the Administration of Justice. This Working Group initially focused on reviewing trends in the area of human rights aspects of persons subjected to any form of detention or imprisonment, but it ultimately extended the scope of its activities to include, for instance, the further examination and elaboration of the Basic Principles and Guidelines Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms.

27 UN General Assembly, *supra* note 25, at 2.

Undoubtedly, the Code is referring to Article 36 of the Vienna Convention, which is the only provision of the treaty that confers human rights upon foreign nationals that happen to be detained abroad.

### B. THE 1985 DECLARATION ON THE HUMAN RIGHTS OF INDIVIDUALS WHO ARE NOT NATIONALS OF THE COUNTRY IN WHICH THEY LIVE

The Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live, adopted by consensus by the UN General Assembly on December 13, 1985[28], seeks to recognize that the human rights and fundamental freedoms provided for in international instruments should also be secured for individuals who are not nationals of the country in which they live. Article 10 of the Declaration addresses the right to consular notification as follows:

> "Any alien shall be free to communicate at any time with the consulate or diplomatic mission of the State of which he or she is a national or, in their absence with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides"[29].

It is very significant that in a catalog of only 10 articles, this UN Declaration recognizes the right to consular notification as such fundamental human rights pertaining to foreign nationals as the rights to life, to be equal before the courts, to freedom of expression, to peaceful assembly, to not be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and even socioeconomic rights such as the right to equal remuneration, to join trade unions, or to health protection.

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28 UN General Assembly, Res. 40/144, 116th Plenary Meeting, UN Doc. A/RES/40/144 (1985), *available at*: http://www.un.org/documents/ga/res/40/a40r144.htm.

29 *Id*., at 4.

### C. THE 1988 BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT

This Body of Principles was also adopted by consensus by the UN General Assembly on December 9, 1988[30], and although its title does not suggest that it is an instrument concerning human rights, its Preamble expressly states that the General Assembly

> "is convinced that the adoption of the draft Body of Principles would make an important contribution to the *protection of human rights*" (emphasis added)[31],

Principle 16 recognizes the right to consular notification in the following terms:

> "2. If a detained or imprisoned person is a foreigner, *he shall also be promptly* informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law, or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization"[32].

### D. THE RULES OF DETENTION OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The Rules governing the detention of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the International Criminal Tribunal for the Former Yugoslavia, as

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30 UN General Assembly, Res. 43/173, 76th Plenary Meeting, UN Doc. A/RES/43/173 (1988), *available at*: http://www.un.org/documents/ga/res/43/a43r173.htm

31 *Id.*, at 1.

32 *Id.*, at 4.

amended on November 29, 1999[33], recognize the right to consular notification of the persons being prosecuted by such international criminal Court.

Indeed, Rule 65, included under the Title "Rights of Detainees", reads:

> "Detainees shall be allowed to communicate with and receive visits from the diplomatic and consular representative accredited to the Host State of the State to which they belong or, in the case of detainees who are without diplomatic or consular representation in the Host State and refugees or stateless persons, with the diplomatic representative accredited to the Host State of the State which takes charge of their interests or of a national or international authority whose task it is to serve the interests of such persons"[34].

### E. INTERNATIONAL INSTRUMENTS CONCERNING THE DEATH PENALTY

Various Resolutions of the UN Commission on Human Rights have dealt with the importance of complying with the right to consular notification when the detained foreign national is facing the death penalty. These instruments introduce the important relationship between such right and the right life and to a due process. Particularly, in Resolution 2000/65, the Commission urged all States that still maintain the death penalty

> "(*d*) To observe the Safeguards guaranteeing protection of the rights of those facing the death penalty and to comply fully with their international

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33 International Criminal Tribunal for the Former Yugoslavia, *Rules governing the detention of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the Tribunal ("Rules of Detention")*, as amended on 29 November 1999, (IT/38/REV.8), *available at:* http://www.un.org/icty/legaldoc/index.htm.

34 *Id*., at 15.

obligations, in particular with those under the Vienna Convention on Consular Relations"[35].

Most recently, in its 2004 Session, the Commission urged States

"*(h)*…to comply fully with their international obligations, in particular with those under article 36 of the 1963 Vienna Convention on Consular Relations, particularly the right to receive information on consular assistance within the context of a legal procedure, as affirmed by the jurisprudence of the International Court of Justice and confirmed in recent relevant judgments"[36].

The Commission's Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr. BACRE WALY NDIAYE, submitted a Special Report on his Mission to the U.S. The Rapporteur found as an "issue of concern" the execution of foreign nationals in the U.S., and commented as follows:

"the lack of awareness on the part of judicial authorities about the Vienna Convention, makes it difficult for lawyers to raise violations of this treaty. During the trial of VIRGINIO MALDONADO, a 31 year-old Mexican national, the defense lawyer claimed a violation of the rights of his client under this treaty. According to the information received, the trial judge stated, referring to the Vienna Convention on Consular Relations: 'I don't know that it exists ... I am not an international law expert'. Further, the prosecutor in the case argued the law was irrelevant because it was not a Texas law"[37].

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35 UN Commission on Human Rights, *The Question of the Death Penalty*, 56th Session, Resolution 2000/65, UN Doc. E/CN.4/RES/2000/65 (2000), at 2, *available at:* http://www.ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2000-65.doc

36 UN Commission on Human Rights, *The Question of the Death Penalty*, 60th Session, Resolution 2004/67, UN Doc. E/CN.4/RES/2004/67 (2004), at 3, *available at*: http://www.ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2004-67.doc

37 UN Commission on Human Rights, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. BACRE WALY NDIAYE, submitted pursuant to Commission resolution 1997/61, Addendum, Mission to the United States of America*, 54th Session, UN Doc. E/CN.4/1998/68/Add.3 (1998), at para. 120, *available at*: http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.1998.68.Add.3.En?Opendocument

Importantly, the Special Rapporteur was of the view that not informing foreign nationals of their right to contact their consulate for assistance may curtail the right to an adequate defense, as provided for in the ICCPR, thus suggesting that consular notification is to be considered a minimum guarantee of due process of foreign defendants.

The international instruments introduced in this Part undoubtedly consider that Article 36 of the Vienna Convention is a provision concerning human rights of foreign defendants. They also recognize consular notification as an indispensable guarantee of due process in order to ensure a fair trial to foreign nationals facing criminal proceedings abroad, because it is an effective tool in order to prevent discrimination and alleviate the barriers that typically face arrested foreigners in a strange legal system.

## III. INTERNATIONAL JUDICIAL DECISIONS EXPLAINING WHETHER THE RIGHT TO INFORMATION ON CONSULAR ASSISTANCE IS TO BE CONSIDERED A HUMAN RIGHT

This Part will analyze three decisions of international tribunals that have interpreted Article 36 of the Vienna Convention as conferring individual rights to detained foreign nationals. Those international judicial decisions are the Inter-American Court of Human Rights Advisory Opinion OC-16/99 and the judgments of the International Court of Justice (ICJ) in two contentious cases regarding the U.S. non-compliance with Article 36 of the Vienna Convention. The first one, the *LaGrand* case, was brought to the ICJ by Germany in 1999, while the second one, the *Avena* case, was brought by Mexico in 2001.

## A. THE ADVISORY OPINION OC-16/99 OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The first international judicial decision regarding the U.S. noncompliance with Article 36 of the Vienna Convention was issued by the Inter-American Court of Human Rights[38] in exercise of its broad advisory jurisdiction established in Article 64 of the American Convention on Human Rights[39]. The Advisory Opinion issued on October 1, 1999 and entitled

> "The right to information on consular assistance in the framework of the guarantees of the due process of law"[40],

interpreted the scope of Article 36 of the Vienna Convention at the request of Mexico[41], in order to clarify the rights and obligations

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38 The Inter-American Court of Human Rights is the judicial body of the Inter-American System of Human Rights created by the American Convention on Human Rights (1969). On July 1, 1978, the OAS General Assembly recommended to approve the Costa Rican Government's formal offer to establish the seat of the Court in the capital city of this country and on May 22, 1979, the States Parties to the Convention elected, at the Seventh Special Session of the OAS General Assembly, the first judges to sit on the Court.

39 The American Convention on Human Rights [hereinafter the American Convention] was adopted on November 22, 1969 in the framework of the Inter-American Specialized Conference on Human Rights of the Organization of American States (OAS) that was held in San José, Costa Rica. The Convention entered into force on July 18, 1978, with the deposit of the 11th instrument of ratification, in accordance with Article 74.2 of the Convention. To this date, twenty four American nations are parties to the Convention: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Dominican Republic, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.

40 See Inter-American Court of Human Rights, *Advisory Opinion OC-16/99 of October 1, 1999, "The right to information on consular assistance in the framework of the guarantees of the due process of law", available at*: http://www.corteidh.or.cr/seriea_ing/Seriea_16_ing.doc

41 Twelve questions (divided into three sections) were raised by Mexico, described by the Court as below:

established by the Vienna Convention with particular attention to its application in death penalty cases in the U.S.[42].

According to Mexico, the request concerned the issue of minimum judicial guarantees and the requirement of the due process when a court sentences to death foreign nationals whom the host State has not informed of their right to communicate with and seek assistance from the consular authorities of the State of which they are nationals[43]. Mexico made the request as a result of bilateral representations that the Government of Mexico had made on behalf of some of its nationals, whom the U.S. had allegedly not informed of their right to communicate with Mexican consular authorities and who had been sentenced to death in ten states of the U.S.[44]. Because the U.S. is not a State party to the American Convention and thus has not accepted the contentious jurisdiction of the Inter-American Court, Mexico chose to request an advisory opinion pursuant to Article 64 of the American Convention.

Article 64 of the American Convention establishes that the member States of the OAS may consult the Court regarding the interpretation of the Convention or of

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a. questions one to four make up the first group. In the first question, the Court is asked to interpret whether, under Article 64(1) of the American Convention, Article 36 of the Vienna Convention on Consular Relations should be interpreted as containing provisions "concerning the protection of human rights in the American States"; b. questions five to ten comprise the middle group, which begins with an inquiry as to whether, in connection with Article 64(1) of the American Convention, Articles 2, 6, 14 and 50 of the International Covenant on Civil and Political Rights are to be interpreted as containing provisions "concerning the protection of human rights in the American States"; and, c. questions eleven and twelve comprise the last group and concern the interpretation of the American Declaration and the OAS Charter and their relationship to Article 36 of the Vienna Convention on Consular Relations.

42 See WILLIAM J. ACEVES, *International decision: The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16/99. Inter-American Court of Human Rights, October 1, 1999*, 94 Am. J. Int'l. L. 555, 555 (2000).

43 Inter-American Court of Human Rights, Advisory Opinion OC-16/99, *supra* note 40, at 1, para. 1.

44 *Id*., at 1-2, para. 2.

> "other treaties concerning the protection of human rights in the American states"[45].

The Inter-American Court has interpreted the expression "other treaties" as referring

> "to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the Inter-American System are or have the right to become parties thereto"[46].

That means that the scope of the Inter-American Court's advisory jurisdiction is very broad, because it has jurisdiction to interpret treaties outside of those of the Inter-American System itself, if those treaties concern the protection of human rights in the American States. Finally, it is important to recall that although the Inter-American Court made its pronouncement in an advisory opinion rather than in a contentious case, that fact does not diminish the legitimacy or authoritative character of the legal principle enunciated by it, because advisory opinions are judicial pronouncements and not mere academic exercises[47], aimed at shedding light on the meaning, object and purpose of international human rights norms.

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45 American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS 123.

46 See Inter-American Court of Human Rights, *Advisory Opinion OC-1/82 of September 24, 1982, "Other treaties" subjected to the consultative jurisdiction of the Court"*, at 12, para. 52, *available at*: http://www.corteidh.or.cr/seriea_ing/seriea_01_ing.doc

47 See THOMAS BUERGENTHAL, *International Human Rights in a Nutshell*, 220 (2d. ed. 1995).

### 1. ARTICLE 36 OF THE VIENNA CONVENTION AS A PROVISION CONCERNING HUMAN RIGHTS

Because the advisory function assigned to the Inter-American Court by the American Convention is multilateral rather than litigious in nature[48], Article 62(1) of the Rules of Procedure of the Court establishes that a request for an advisory opinion shall be transmitted to all the member States, the Inter-American Commission on Human Rights and other competent bodies of the Organization of American States (OAS), which may submit their comments on the request and participate in the public hearing on the matter. Interestingly, the Inter-American Commission on Human Rights held on its written observations submitted to the Court that in fact

> "the Vienna Convention on Consular Relations is a treaty in the meaning given to this term in Article 64 of the American Convention. Its Article 36 concerns protection of human rights in the American States because it establishes individual rights —not just the duties of States— and because consular access can afford additional protection to a foreign national who may be encountering difficulties in receiving equal treatment during the criminal proceedings"[49].

Six Latin American countries also submitted written observations to the Inter-American Court: El Salvador, Guatemala, Dominican Republic, Honduras, Paraguay and Costa Rica, all agreeing that failure to comply with Article 36 of the Vienna Convention is a violation of the human right of the accused foreign national to a due process[50]. In contrast, the U.S. argued that the Vienna Convention is

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48 See Inter-American Court of Human Rights, *Advisory Opinion OC-15/97 of November 14, 1997, "Reports of the Inter-American Commission on Human Rights (Art. 51 of the American Convention on Human Rights)"*, at 7, para. 26, *available at*: http://www.corteidh.or.cr/seriea_ing/seriea_15_ing.doc

49 Inter-American Court of Human Rights, Advisory Opinion OC-16/99, *supra* note 40, at 20, para. 26.

50 See MONICA FERIA TINTA, *Due Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the LaGrand Case*, 12 EJIL n°2, 1, 24 (2001), *available at*: http://www.ejil.org/journal/Vol12/No2.

neither a human rights treaty nor a treaty concerning the protection of human rights. In support of its argument, the U.S. asserted that the purpose of the Vienna Convention was to establish legal rules governing relations between States, not to create rules that operate between States and individuals[51].

Furthermore, the Inter-American Court pointed out that the request from Mexico concerned the "protection of human rights in the American States," as stated in Article 64 of the American Convention, and with respect to which there was a general interest in the Court's opinion, as evidenced by the unprecedented participation in these proceedings of eight member States, the Inter-American Commission and twenty-two individuals and institutions as *amici curiae*[52]. The Court accordingly affirmed its jurisdiction over this matter, being mindful of the broad scope of its advisory function, unique in contemporary international law, which enables it

> "to perform a service for all of the members of the Inter-American System and is designed to assist them in fulfilling their international human rights obligations"[53].

In considering the merits of the request, the Inter-American Court examined whether Article 36 of the Vienna Convention confers rights upon individuals and, if so, whether such rights carry with them correlative obligations for the host State[54]. The Court held that Article 36 of the Vienna Convention serves a dual purpose: that of recognizing the sending State's right to assist its nationals through the consular officer's actions and, correspondingly, that of

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51 Inter-American Court of Human Rights, Advisory Opinion OC-16/99, *supra* note 40, at 15, para. 26.

52 *Id*., at 44, para. 62.

53 Inter-American Court of Human Rights, Advisory Opinion OC-1/82, *supra* note 46, at 9, para. 39.

54 ACEVES, *supra* note 42, at 557-558.

recognizing the correlative right of the national of the sending State to contact the consular officer to obtain that assistance[55].

The Court also distinguished between "the right to information on consular assistance" and the "right of consular assistance". Whereas the former was defined by the Court as

> "The right of a national of the sending State who is arrested or committed to prison or to custody pending trial or is detained in any other manner, to be informed 'without delay' that he has the following rights: the right to have the consular post informed, and the right to have any communication addressed to the consular post forwarded without delay",

the latter was defined as

> "The right of the consular authorities of the sending State to provide assistance to their nationals"[56].

The Inter-American Court found that the right to seek consular assistance as set forth in Article 36 of the Vienna Convention is part of the *corpus iuris* of contemporary international human rights law, because it endows a detained foreign national with individual rights that are the counterpart to the host State's correlative duties[57]. The Court concluded that consular notification in Article 36 of the Vienna Convention does concern the protection of the rights of the national of the sending State and may be of benefit to him. This is the proper interpretation of the functions of the consular officers explained in Article 5 of the Vienna Convention[58], which recognizes as one of the paramount functions of consular officers the legal assistance of foreign nationals before the authorities of the host State[59]. Indeed,

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55 Inter-American Court of Human Rights, Advisory Opinion OC-16/99, *supra* note 40, at 48, para. 80.

56 *Id.*, at 3, para. 5.

57 *Id.*, at 50, para. 84.

58 *Id.*, at 50, para. 87.

59 *Id.*, at 48, para. 80.

consular officers may assist the detainee with various defense measures, such as providing or retaining legal representation, obtaining evidence in the country of origin, verifying the conditions under which the legal assistance is provided and observing the conditions under which the accused foreign national is being held while in prison[60].

In his Concurring Opinion, Judge CANCADO TRINDADE stated that it is in the context of the evolution of international human rights law and in function of new needs of protection of the human being, that the insertion of the right to consular notification into the conceptual universe of human rights ought to be appreciated. Indeed, he noted that Article 36 of the Vienna Convention, despite having preceded in time the general international human rights treaties (referring to the two 1966 Covenants on Human Rights of the United Nations and the 1969 American Convention on Human Rights),

> "…nowadays can no longer be dissociated from the international norms on human rights concerning the guarantees of the due process of law. The evolution of the international norms of protection has been, in its turn, fostered by new and constant valuations which emerge and flourish from the basis of human society, and which are naturally reflected in the process of the evolutive interpretation of human rights treaties"[61].

The Inter-American Court's most important contribution to the interpretation of Article 36 of the Vienna Convention was its opinion regarding the relationship between the right to information on consular assistance and the right to due process. Based on the questions posed by Mexico, particularly the ones related to Article 14 of the ICCPR[62] which establishes the minimum guarantees of due process of law, the Inter-American Court held that the individual's

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60 *Id.*, at 50, para. 86.

61 *Id*., Concurring Opinion of Judge CANCADO TRINDADE, at 5-6, para. 15.

62 With respect to Article 14 of the ICCPR, Mexico asked the Inter-American Court the three following questions (numbers 6 to 8):

right to information on consular assistance, as conferred by Article 36(1)(b) of the Vienna Convention, makes it possible for the right to due process upheld in Article 14 of the ICCPR, to have practical effects in tangible cases. Indeed, the Court stated that the minimum guarantees established in Article 14 of the International Covenant can be amplified in the light of other international instruments like the Vienna Convention, which broadens the scope of the protection afforded to those facing criminal proceedings abroad[63].

At this point, the Inter-American Court cited the ICJ's *Namibia* Advisory Opinion[64], which established

> "that an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation",

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6. In connection with Article 14 of the Covenant, should it be applied and interpreted in the light of the expression "all possible safeguards to ensure a fair trial" contained in paragraph 5 of the United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty, and that concerning foreign defendants or persons convicted of crimes subject to capital punishment that expression includes immediate notification of the detainee or defendant, on the part of the host State, of rights conferred on him by Article 36(1)(b) of the Vienna Convention [on Consular Relations]?.

7. As regards aliens accused of or charged with crimes subject to the death penalty, is the host State's failure to notify the person involved as required by Article 36(1)(b) of the Vienna Convention in keeping with their rights to "adequate time and facilities for the preparation of his defense", pursuant to Article 14(3)(b) of the Covenant?.

8. As regards aliens accused of or charged with crimes subject to the death penalty, should the term "minimum guarantees" contained in Article 14.3 of the Covenant, and the term "at least equal" contained in paragraph 5 of the corresponding United Nations Safeguards be interpreted as exempting the host State from immediate compliance with the provisions of Article 36(1)(b) of the Vienna Convention [on Consular Relations] on behalf of the detained person or defendant?.

63 Inter-American Court of Human Rights, Advisory Opinion OC-16/99, *supra* note 40, at 60, para. 124.

64 See International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, ICJ Reports (1971), at 16, para. 31, as quoted by the Inter-American Court.

and held that this guidance is particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments for the protection of the human being according with the general rules of treaty interpretation established in the 1969 Vienna Convention on the Law of Treaties[65]. In this regard, the Court held that

> "the body of judicial guarantees given in Article 14 of the International Covenant on Civil and Political Rights has evolved gradually. It is a body of judicial guarantees to which others of the same character, conferred by various instruments of international law, can and should be added"[66].

The Inter-American Court included in this group the right to information on consular assistance established in Article 36 of the Vienna Convention, stating that the real situation of the foreign nationals facing criminal proceedings must be considered, mostly because their most precious juridical rights, perhaps even their lives, hang in the balance. In such circumstances, it is obvious that notification of their right to contact their consular agent will considerably enhance their chances of defending themselves and the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried out in accord with the law and with respect for the dignity of the human person[67]. Therefore, the Court concluded that the right to consular notification must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial[68].

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65 Inter-American Court of Human Rights, Advisory Opinion OC-16/99, *supra* note 40, at 58, para. 114.

66 *Id*., at 59, para. 117.

67 *Id*., at 60, para. 121.

68 *Id*., at 60, para. 122.

## 2. CONSEQUENCES OF THE FAILURE TO COMPLY WITH ARTICLE 36 OF THE VIENNA CONVENTION IN DEATH PENALTY CASES

With respect to the legal consequences of imposition of the death penalty in cases in which the right to information on consular assistance was not respected[69], the Inter-American Court noted that States have a general obligation to perform treaties in good faith (*pacta sunt servanda*), which is recognized in Article 26 of the Vienna Convention on the Law of Treaties. For that reason, the Court held that

> "because the right to information is an element of Article 36(1)(b) of the Vienna Convention, the detained foreign national must have the opportunity to avail himself of this right in his own defense. Non-observance or impairment of the detainee's right to information is prejudicial to the judicial guarantees"[70].

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69 Responding Mexico's following questions:

- In relation to the Vienna Convention on Consular Relations:

4. From the point of view of international law and with regard to aliens, what should be the juridical consequences of the imposition and application of the death penalty in the light of failure to give the notification referred to in Article 36(1)(b) of the Vienna Convention [on Consular Relations]?.

- With regard to the International Covenant on Civil and Political Rights:

10. In connection with the Covenant and with regard to persons of foreign nationality, what should be the juridical consequences of the imposition and application of the death penalty in the light of failure to give the notification referred to in Article 36(1)(b) of the Vienna Convention [on Consular Relations]?.

- With regard to the OAS Charter and the American Declaration of the Rights and Duties of States:

12. With regard to aliens in the framework of Article 3(1) of the OAS Charter and Articles I, II and XXVI of the Declaration, what should be the juridical consequences of the imposition and execution of the death penalty when there has been a failure to make the notification referred to in Article 36(1)(b) of the Vienna Convention [on Consular Relations]?.

70 Inter-American Court of Human Rights, Advisory Opinion OC-16/99, *supra* note 40, at 61, paras. 128-129.

Here, the Inter-American Court recalled another of its earlier Advisory Opinions regarding the death penalty[71], when the Court observed that the application and imposition of capital punishment are governed by the principle that "no one shall be arbitrarily deprived of his life", under both Article 6 of the ICCPR and Article 4 of the American Convention on Human Rights. The Court held that those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases, among which the right to information on consular assistance should be counted. Indeed, the Court noted that

> "it is obvious that the obligation to observe the right to information becomes all the more imperative here, given the exceptionally grave and irreparable nature of the penalty that one sentenced to death could receive. If the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life"[72].

At this point, the Inter-American Court examined the relationship among the right to consular assistance, the guarantees of due process and the right to life under the ICCPR. It compared the situation of a foreign national facing capital punishment whose right to information on consular assistance has been denied, with cases before the United Nations Human Rights Committee in which the Committee observed that if the guarantees of the due process established in Article 14 of the ICCPR were violated, then Article 6.2 of the Covenant[73] would

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71 See Inter-American Court of Human Rights, *Advisory Opinion OC-3/83 of September 8, 1983, "Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)", available at*: http://www.corteidh.or.cr/seriea_ing/seriea_03_ing.doc.

72 Inter-American Court of Human Rights, Advisory Opinion OC-16/99, *supra* note 40, at 63, para. 135.

73 Article 6.2 of the ICCPR reads: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not

be violated as well if sentence was carried out. Particularly, the Inter-American Court cited Communications of the Human Rights Committee in two cases: *Mbenge v. Zaire* (16/1977[74], and *Reid v. Jamaica* (250/1987)[75], in which the Human Rights Committee held that death penalty sentences should be imposed in accordance with the law and the guarantees of due process of law as set forth in Article 14 of the ICCPR. If not, imposition of the death penalty would violate the right not to be arbitrarily deprived of one's life.

Consistent with its previous assertion that the right to information on consular assistance should now be associated with the basic guarantees of due process of law that permeate international human rights norms[76], the Inter-American Court concluded that

> "nonobservance of a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right

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contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court".

74 As cited by the Inter-American Court of Human Rights, Advisory Opinion OC-16/99, *supra* note 40, at 62, para. 131, the Committee determined that under Article 6.2 of the ICCPR:

"…the failure of the State party to respect the relevant requirements of article 14 (3) leads to the conclusion that the death sentences pronounced against the author of the communication were imposed contrary to the provisions of the Covenant, and therefore in violation of article 6 (2)".

75 As cited by the Inter-American Court of Human Rights, Advisory Opinion OC-16/99, *supra* note 40, at 62, para. 132, the Committee in this case stated that:

"The imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes…a violation of article 6 of the Covenant. As the Committee noted in its general comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review by a higher tribunal'.

76 ACEVES, *supra* note 42, at 560.

> not to be 'arbitrarily' deprived of one's life, in the terms of the relevant provisions of the human rights treaties"[77].

This last point is very important because the Inter-American Court is admitting that, at least in death penalty cases, consular rights are human rights[78] and, thus, their violation always triggers the international responsibility of the receiving State and its obligation to provide judicial remedies in the domestic criminal system, even when prejudice to the foreign national has not been shown. The Court rejected the U.S. position that

> "there is nothing to suggest that failure to give consular notification invalidates the convictions of a state criminal justice system; any such interpretation would be completely at odds with the Vienna Convention on Consular Relations and the practice of States"[79].

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77 Inter-American Court of Human Rights, Advisory Opinion OC-16/99, *supra* note 40, at 63, para. 137. Judge OLIVER JACKMAN focused his partially dissenting opinion precisely on this approach taken by the Court, pointing out that it appears to be based on what might be called "an immaculate conception of the due process". In this regard, he admitted that "…it is clear that States which maintain the death penalty on their law books have a particularly heavy duty to ensure the most scrupulous observance of due process requirements in cases in which this penalty may be imposed. Nevertheless, I find it difficult to accept that, in international law, in every possible case where an accused person has not had the benefit of consular assistance, the judicial procedure leading to a capital conviction must, *per se*, be considered to be arbitrary, for the purposes and in the terms of, for example, Article 6 of the International Covenant on Civil and Political Rights". *Id*., Partially Dissenting Opinion of Judge OLIVER JACKMAN, at 1, paras. 3-4.

However, as FERIA TINTA points out, the position of Judge JACKMAN seems to be inconsistent with his concurrent view with the majority in holding that Article 36 is a minimum guarantee of due process and, therefore, with the Human Rights Committee case law cited by the Court which shows that "…*any* violation of a minimum guarantee to which an individual is entitled would deprive the application of capital punishment of its lawfulness". See FERIA TINTA, *supra* note 50, at 30.

78 CASSEL, *supra* note 11, at 84.

79 Inter-American Court of Human Rights, Advisory Opinion OC-16/99, *supra* note 40, at 18, para. 26.

Indeed, the finding that the right to consular notification is part of the minimum guarantees of the due process of law prescribed by Article 14 of the ICCPR establishes that the violation of such right must have an effective remedy under Article 2.3 of the ICCPR. The Concurring Opinion of Judge GARCIA RAMIREZ emphasized this point, stating that if the right to information on consular assistance

> "…is already part of the body of rights and guarantees that constitute due process, then violation of that right has the same consequences that unlawful conduct of that kind invariably has: nullification and responsibility. This does not mean impunity, as a new procedure can be ordered and carried out properly"[80].

The Inter-American Court finally analyzed whether the States of a federal country like the U.S. have the obligation to enforce Article 36 of the Vienna Convention[81] as a minimum guarantee of due process for foreign nationals. The Court noted that, although the Vienna Convention does not contain any clause addressing federal States' fulfillment of obligations (such as those contained in the ICCPR and the American Convention on Human Rights), Article 29 of the Vienna Convention on the Law of Treaties provides that

> "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory"[82].

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80 *Id*., Concurring Opinion of Judge GARCIA RAMIREZ, at 3.

81 *Id*., at 63, para. 138. In this respect, the question raised by Mexico was the following: "With regard to American countries constituted as federal States which are Parties to the Covenant on Civil and Political Rights, and within the framework of Articles 2, 6, 14 and 50 of the Covenant, are those States obliged to ensure the timely notification referred to in Article 36(1)(b) to every individual of foreign nationality who is arrested, detained or indicted in its territory for crimes subject to the death penalty; and to adopt provisions in keeping with their domestic law to give effect in such cases to the timely notification referred to in this article in all its component parts, if this was not guaranteed by legislative or other provisions, in order to give full effect to the corresponding rights and guarantees enshrined in the Covenant?".

82 *Id*., at 63-64, paras. 139-140.

In light of that provision, the Court held that neither the letter nor the spirit of the Vienna Convention could be read to establish an exception to this provision. Therefore, the Court concluded that

> "international provisions that concern the protection of human rights in the American States, including the one recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, must be respected by the American States party to the respective conventions, regardless of whether theirs is a federal or unitary structure"[83].

As discussed in the next part, the Inter-American Court's Advisory Opinion formed a key aspect of Germany's position in the *LaGrand* case, which drew upon it while advocating for the human right character of the right to consular notification.

Indeed, one of Germany's main arguments before the ICJ was precisely that the criminal justice system provides a full panoply of rights to individuals facing criminal prosecution, and foreign nationals must be allowed the opportunity to exercise these rights in an effective manner through consular assistance, giving their unfamiliarity with the law and legal process of the receiving State.

### B. THE *LAGRAND* JUDGMENT OF THE INTERNATIONAL COURT OF JUSTICE

The *LaGrand* judgment (2001) differs from the decision of the Inter-American Court because it was a contentious case brought by Germany against the U.S., based on Article 1 of the Optional Protocol to the Vienna Convention which gives the ICJ jurisdiction in litigation between States concerning the application and interpretation of the Convention. On March 2, 1999, Germany instituted proceedings in the ICJ against the U.S. for violation of

83 *Id.*, at 64, para. 140.

Article 36 of the Vienna Convention[84] in detriment of two German nationals, KARL and WALTER LAGRAND, who were sentenced to death and finally executed in the State of Arizona without having been informed of their right to consular assistance under that provision. Germany alleged that failure to comply with the required notification precluded it from protecting its nationals' interests in the U.S., as

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84 See International Court of Justice, *The LaGrand Case (Germany v. United States of America), Summary of the Order of Provisional Measures, March 5, 1999*, at 1-2, *available at*: http://www.icj-cij.org/icjwww/idocket/igus/iGUS_summaries/iGUSsummary19990305.htm

Specifically, Germany asked the Court to adjudge and declare:

"(1) that the United States, in arresting, detaining, trying, convicting and sentencing KARL and WALTER LAGRAND, as described in the preceding statement of facts, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, as provided by Articles 5 and 36 of the Vienna Convention,

(2) that Germany is therefore entitled to reparation,

(3) that the United States is under an international legal obligation not to apply the doctrine of 'procedural default' or any other doctrine of national law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and

(4) that the United States is under an international obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against any other German national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character; and that, pursuant to the foregoing international legal obligations,

(1) the criminal liability imposed on KARL and WALTER LAGRAND in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should provide reparation, in the form of compensation and satisfaction, for the execution of KARL LAGRAND on 24 February 1999;

(3) the United States should restore the *status quo ante* in the case of WALTER LAGRAND, that is re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of that German national in violation of the United States' international legal obligation took place; and

(4) the United States should provide Germany a guarantee of the non-repetition of the illegal acts".

provided for in Articles 5 and 36 of the Vienna Convention at both the trial and the appeal level in U.S. courts[85].

### 1. GERMANY: THE RIGHT TO INFORMATION ON CONSULAR ASSISTANCE IS A HUMAN RIGHT

Germany's defense in the *LaGrand* case was based mainly on the argument made by Professor BRUNO SIMMA that the right to information on consular assistance under Article 36 of the Vienna Convention "constitutes an individual, indeed, a human right"[86], opposing to the U.S. argument that consular notification is a right of States because the Vienna Convention's role is not to confer rights to individuals[87]. Germany pointed out that the right to information contained in Article 36 (1)(b), constitutes an individual right of the foreign national detained abroad, although it agreed that Article 36 also establishes a right for a State party to the Convention to see this provision respected[88].

In order to clarify its argument before the Court, Germany relied on the rules for the interpretation of treaties set forth in Article 31 of the Vienna Convention on the Law of Treaties. First, Professor SIMMA noted that the "ordinary meaning" of the words "his rights" used in Article 36 (1) (b), refers to an individual person. Secondly, he recalled that the objective of Article 36 relates to both the concerns of sending and receiving States and those of individuals. Then, he concluded stating that

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85 *Id*., at 1.

86 See International Court of Justice, *Verbatim Record 2000/26- Public Hearing held on Monday 13 November 2000 at 10 a.m., at the Peace Palace*, at Part VI, para. 1, *available at*: http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm.

87 See International Court of Justice, *Counter-Memorial submitted by the United States of America, 27 March 2000*, at para. 97, *available at*: http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm.

88 International Court of Justice, *supra* note 86, at para. 2.

> "it is individuals who are accorded freedom with respect to communication in subparagraph 1 *(a)*, it is individuals who have the right to request or not request the notification of the consulate pursuant to subparagraph 1 *(b)*, it is individuals who are to be informed of that right and, lastly, it is individuals who have the right to oppose a prison visit according to subparagraph 1 *(c)*"[89].

The U.S. contended that nothing in the text of Article 36, its negotiating history, and the practice of other States Party to the Convention indicated that the Vienna Convention required States parties to accord individual foreign nationals judicially enforceable remedies in their criminal justice systems[90]. The US relied primarily on the Preamble of the Convention, which declares that the purpose of privileges and immunities under the Convention

> "is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States ...".

In response, Germany argued that this paragraph deals with the privileges and immunities of consular officers, since it was intended to ensure that consular personnel would observe their duties towards the receiving State and that, if necessary, those privileges and immunities could be waived by the sending State[91]. By contrast, Germany contended that the drafting history of the Vienna Convention reveals that participants of the Vienna Conference intended Article 36 to establish the individual right to information on consular assistance, which clearly requires the ability of foreign nationals to seek remedies for the violations of the Vienna Convention. Furthermore, Article 36 obliges receiving States to refrain from imposing any procedural bar or penalty for the failure to assert such a right prior to the time they provided the required notification[92].

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89 *Id*., at para. 3.

90 International Court of Justice, *supra* note 87, at para. 101.

91 International Court of Justice, *supra* note 86, at para. 3.

92 *Id*., at para. 6.

Germany's most important argument in defense of the human right character of the right to information on consular assistance was based on the same argument used by the Inter-American Court of Human Rights: the principle of dynamic treaty interpretation as pronounced by the ICJ in its *Namibia* Advisory Opinion. To that end, Germany relied heavily on the Inter-American Court's Advisory Opinion OC-16/99. In effect, Professor SIMMA pointed out that the Vienna Convention is a living instrument, which must be interpreted in the light of the subsequent developments of international law, especially when human rights are at stake. Thus, said SIMMA, the subsequent development of international human rights norms pertaining to foreigners further strengthens the character of Article 36 as establishing an individual human right[93].

Interestingly, Germany recalled in its oral pleadings before the ICJ the relationship introduced by the Inter-American Court among Article 36 of the Vienna Convention, the due process of law and the right to life under the ICCPR. As Professor SIMMA pointed out, in this case the ICCPR was undoubtedly the most important source of the human rights of foreign nationals in domestic trials. Both Germany and the U.S. are parties to the Covenant, and it constitutes a set of rules "of international law applicable in the relations between the parties" for the purpose of the interpretation of Article 36 of the Vienna Convention[94]. Indeed, Germany noted that Article 6 of the ICCPR requires special procedural guarantees in cases involving the death penalty, and Article 14 sets the standards for the due process of law. Also, it recalled that the Human Rights Committee of the United Nations has emphasized in several cases that "the law in force" referred to in Article 6.2 on the right to life, includes not only substantive but also procedural guarantees. Finally, Article 2 of the

93 *Id*., at paras. 9-10.

94 See International Court of Justice, *Verbatim Record 2000/27- Public Hearing held on Monday 13 November 2000 at 3 p.m., at the Peace Palace*, at Part III, para. 16, *available at*: http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm.

Covenant is designed to render its rights effective within the legal systems of States parties[95].

Germany then turned to the question of the death penalty. Germany made clear that, although the *LaGrand* case did not concern the international legality of the death penalty, that fact does not mean that the death penalty is of no significance to violations of Article 36 by the U.S. authorities in the case. Germany observed that the Inter-American Court had held that the character of Article 36 as a guarantee of due process means that, if followed by an execution, a violation of Article 36 will also amount to a violation of the right to life enshrined in Article 6 of the ICCPR. Germany therefore concluded that the human rights aspects of Article 36 were threefold:

> "first, since the breach of Article 36 by the United States did not only infringe upon the rights of Germany as a State party to the Convention but also entailed a violation of the individual rights of the LaGrand brothers, Germany is entitled to bring a claim in pursuance of diplomatic protection of its nationals. Second, the character of the right under Article 36 as a human right renders the effectiveness of this provision even more imperative. Thus, and third, effective enforcement of Article 36 before domestic courts requires that the United States recognize the right of foreigners to seek remedies for violations of the Vienna Convention and that United States law refrain from imposing any procedural bar or penalty for the failure to assert such a right prior to the time the United States provided the required notification[96].

### 2. The ICJ: Article 36 creates individual enforceable rights

The ICJ in the *LaGrand* judgment was emphatic in finding that Article 36 of the Vienna Convention

95 *Id*., at para. 17.

96 *Id*., at para. 23.

"confers judicially enforceable rights on foreign nationals detained for prolonged periods or sentenced to severe penalties without being given prompt notice of their right to communicate with their consulates"[97].

Indeed, when the Court examined the preliminary question of its jurisdiction with respect to the first submission of Germany, the ICJ made clear that it

"…cannot accept the contention of the United States that Germany's claim based on the individual rights of the LAGRAND brothers is beyond the Court's jurisdiction because diplomatic protection is a concept of customary international law. This fact does not prevent a State party to a treaty, *which creates individual rights*, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national, on the basis of a general jurisdictional clause in such a treaty…"[98] (emphasis added).

Then, when examining the merits of the first submission of Germany, the Court explained

"…that Article 36, paragraph 1 *(b)*, spells out the obligations the receiving State has towards the detained person and the sending State. It provides that, at the request of the detained person, the receiving State must inform the consular post of the sending State of the individual's detention "without delay". It provides further that any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State "without delay". Significantly, this subparagraph ends with the following language: "The said authorities shall inform the person concerned without delay of *his rights* under this subparagraph"... Moreover, under Article 36, paragraph 1 *(c)*, the sending State's right to provide consular assistance to the detained person may not be exercised "if he expressly opposes such action". The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they

97 CASSEL, *supra* note 11, at 69.

98 See International Court of Justice, LaGrand Case (Germany v. United States of America), Judgment of 27 June 2001, n° 104, at para. 42, *available at*: http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm.

> stand…*Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person. These rights were violated in the present case* (emphasis added)[99].

Subsequently, the ICJ referred to Germany's contention that the right of the individual to be informed without delay under Article 36 (1) of the Vienna Convention has today assumed the character of a human right, which renders the effectiveness of this provision even more imperative. In this regard, the Court showed itself very cautious, arguing that

> "having found that the United States violated the rights accorded by Article 36, paragraph 1, to the LAGRAND brothers, it does not appear necessary to it to consider the additional argument developed by Germany in this regard"[100].

The "additional argument" referred to by the ICJ was precisely that the right to information on consular assistance was not only an individual right, but also a human right in the current state of international human rights law.

This curiously diffident position of the ICJ on the question of whether the right to consular notification and access is a human right[101] could have been due to various reasons. As pointed out by Professor SIMMA, human rights issues are controversial in some countries and, thus, affirming the human right character of Article 36 of the Vienna Convention could have split the Court[102]. In fact,

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99 *Id*., at para. 77.

100 *Id*., para. 78.

101 See JOAN FITZPATRICK, *The Unreality of International Law in the United States and the LaGrand Case*, 27 Yale J. Int'l. L., 427, 429 (2002).

102 Remarks of Professor BRUNO SIMMA as a guest speaker in the framework of the Seminar "International Human Rights in the U.S.", University of Michigan Law School. October 7, 2004.

two ICJ's Judges even rejected the Court's finding that Article 36 creates individual rights upon detained foreign nationals[103]. Additionally, Professor CASSEL points out that the Court could not go further than justified by the facts of the case, addressing the issues of individual rights and procedural default squarely raised by it, without venturing into other issues not directly presented[104].

Despite the fact that the ICJ refused to deal with the human right character of Article 36 of the Vienna Convention, the *LaGrand* judgment represents a significant step forward in recognizing that violation of the individual rights set forth in such provision requires judicial remedies, and thus a mere apology from the receiving State

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103 First, in his Dissenting Opinion Judge ODA stated that "I am not convinced of the correctness of the Court's holding that the Vienna Convention on Consular Relations grants to foreign individuals any rights beyond those which might necessarily be implied by the obligations imposed on States under that Convention. In addition, I cannot but think that the Court holds the view that the Vienna Convention on Consular Relations grants more extensive protection and greater or broader individual rights to *foreign* nationals (in this case, German nationals in the United States) than would be enjoyed by nationals in their home countries (in this case, Americans in the United States). If the Vienna Convention on Consular Rights is to be interpreted as granting rights to individuals, those rights are strictly limited to those corresponding to the obligations borne by the States under the Convention and do not include substantive rights of the individual, such as the rights to life, property, etc". International Court of Justice, *supra* note 98, Dissenting Opinion of Judge ODA, at para. 27.

Secondly, in his Separate Opinion Judge Shi noted that the Court's view that Article 36 (1)(b) creates individual rights "is at the very least a questionable one", based mainly on a detailed analysis of the text of the Vienna Convention and the history of the negotiating sessions of the Vienna Conference. However, it should be noted that Judge Shi voted in favor that the U.S. shall allow, by means of its own choosing, "the review and reconsideration of the conviction and sentence by taking account of *the violation of the rights set forth in that Convention*" (emphasis added). In this regard, Judge Shi pointed out in his Opinion that "this operative paragraph is of particular significance in a case where a sentence of death is imposed, which is not only a punishment of a severe nature, but also one of an irreversible nature. Every possible measure should therefore be taken to prevent injustice or an error in conviction or sentencing". This statement undoubtedly recognizes the important human rights implications that derive from the failure to comply with Article 36 of the Vienna Convention. *Id*., Separate Opinion of Vice-President Shi, at para. 16.

104 CASSEL, *supra* note 11, at 85.

would not suffice. In that view, the Court ruled that not only in future cases of foreign nationals facing the death penalty, but also in any other case where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties, the U.S. should

> "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention",

though leaving the choice of means to the U.S.[105] Therefore, the Court rejected the U.S.'s argument that the Vienna Convention does not require States Party to create a domestic law remedy permitting individuals to assert claims involving the Convention in criminal proceedings[106].

Importantly, if the *LaGrand* judgment establishes the availability of remedies at the national level to enforce the substance of the individual rights set forth in Article 36 of the Vienna Convention, it is admitting that the violation of those rights carries out the same obligations than the violation of other human rights, like the rights recognized in the ICCPR, the European Convention for the Protection of Human Rights and Fundamental Freedoms, or the American Convention on Human Rights. Indeed, the violation of such rights shall have an "effective remedy" before the competent national authorities[107]. The difference in the case of U.S.'s violation of the

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105 International Court of Justice, *supra* note 98, at para. 125.

106 *Id*., at para. 85.

107 Article 2(3) of the ICCPR reads: "Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

right to consular notification is that the ICJ in the *LaGrand* judgment left the choice of such remedies to the U.S.

However, in terms of securing the implementation of the judgment within the U.S., a clear statement by the ICJ prescribing the means by which the U.S. should "allow review and reconsideration" might have been preferable, given the fact that the U.S. courts, including the Supreme Court, have been reluctant to grant meaningful remedies for those claiming a violation of Article 36 of the Vienna Convention[108]. Indeed, U.S. courts have mistakenly ruled that dismissing indictments, suppressing statements made by foreign nationals not advised by their consular rights, or finding ineffective assistance of counsel where defense lawyers failed to advise them on the rights under the Convention, are not appropriate remedies. As Professor CASSEL points out,

> "reviewing courts could reverse convictions or sentences, and remand for either a new trial or a new hearing on the punishment. But what if one or more of these remedies, too, are ruled inappropriate by U.S. courts? Or what if U.S. courts allow them, but set the bar so high for claimants- for example by requiring unrealistic showings of prejudice- that the remedies are effectively unavailable?"[109].

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Article 13 of the European Convention reads: "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Finally, Article 63 (1) of the American Convention is the broadest provision and reads: "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party".

108 See CHRISTIAN J. TAMS, *Recognizing Guarantees and Assurances of Non-Repetition: LaGrand and the Law of State Responsibility*, 27 Yale J. Int'l. L., 441, 442 (2002).

109 CASSEL, *supra* note 11, at 81.

Another important step forward in the ICJ's judgment regarding remedies involves the procedural default rule that bars the federal habeas corpus relief. The Court expressly rejected the U.S. contention that if there is no obligation under the Convention to create such individual remedies in criminal proceedings, the rule of procedural default could not violate the Convention[110]. The ICJ held that the procedural default rule prevented the U.S. courts from attaching any legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36 (1) prevented Germany, in a timely fashion, from retaining private counsel for the LAGRAND brothers and otherwise assisting in their defense as provided for in the Convention. Thus, the Court concluded that the U.S. violated Article 36 (2) of the Convention because the procedural default rule prevented "full effect" from being given to the purposes for which the consular rights are intended[111].

### 3. PREJUDICE

Germany contended that its inability to render prompt consular assistance to the LAGRAND brothers prevented it from presenting a "persuasive mitigation case" which "likely would have saved" the lives of the brothers[112]. The U.S. responded that the Germany's arguments on this matter were

> "suppositions about what might have occurred had the LAGRAND brothers been properly informed of the possibility of consular notification"[113].

The ICJ settled this dispute by concluding that

110 International Court of Justice, *supra* note 98, at para. 85.

111 *Id.*, at para. 91.

112 *Id.*, at para. 71.

113 *Id.*, at para. 72.

> "it is immaterial for the purposes of the present case 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 these 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"[114].

With this assertion, the ICJ seems to admit that prejudice or harm to the defendant need not be shown in order to establish a violation of the Vienna Convention and to trigger judicial remedies at the U.S. domestic courts, which would lead to the conclusion that the right to information on consular assistance is indeed a fundamental human right.

However, commentators disagree on this point. Professor CASSEL argues that the aforementioned paragraph of the *LaGrand* judgment is not free from ambiguity, because of the Court's use of the phrase "for the purposes of the present case". Indeed, he notes that

> "…since LAGRAND was already executed and Germany did not request rehearing of his conviction or sentence, the 'present case' raised no issue of conditioning his rehearing on a showing of prejudice. Moreover, the passage on prejudice is not repeated or referenced in the Court's subsequent discussion of remedies, which leaves the choice of means to national authorities. The passage thus appears to mean only that prejudice need not be shown in order to establish a violation"[115].

Other commentators draw another conclusion from the aforementioned paragraph. They contend that the ICJ's statement that

> "it is immaterial…whether a different verdict would have been rendered"

if the LAGRAND brothers had received consular assistance, should be understood to mean that the remedy is required even when it cannot

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114 *Id*., at para. 74.

115 CASSEL, *supra* note 11, at 83.

be demonstrated that consular assistance would have changed the trial result. This is a right conclusion since the individual right is to information or notification but not always to the consular assistance itself, so the harm caused by the treaty violation in any particular case is often indeterminable[116].

Therefore, these commentators agree that requiring a showing of specific harm would be tantamount to rejecting most Article 36 claims. As Professor QUIGLEY aptly points out, whenever there is

> "…a failure to notify, a conviction must be reversed. This is a straightforward application of the requirement, in the law of state responsibility, of restoring the *status quo* before a violation. When the ICJ requires 'the review and reconsideration' of a conviction and sentence, it is requiring reversal, without regard to whether consular assistance would have affected the result in the trial court"[117].

Unfortunately, the ICJ's judgment in *Avena* reached the opposite conclusion.

### C. THE *AVENA* JUDGMENT OF THE INTERNATIONAL COURT OF JUSTICE

In the *Avena* judgment (2004), the ICJ had the opportunity to revisit the issue of whether the right to information on consular assistance as set forth in Article 36 of the Vienna Convention is a human right and the question of what remedies must be available in U.S. courts for breach of the treaty provision. The case concerning Avena and other 51 Mexican nationals was brought by Mexico against the U.S. again for the breach of Article 36 of the Vienna Convention[118].

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116 FITZPATRICK, *supra* note 101, at 431.

117 See JOHN QUIGLEY, *LaGrand: A Challenge to the U.S. Judiciary*, 27 Yale J. Int'l. L., 435, 437 (2002).

118 See International Court of Justice, *Case concerning Avena and other Mexican nationals (Mexico v. United States of America), Judgment of 31 March 2004*, n° 128, at 10-11, para. 12, *available at:* http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.

However, *Avena* differs in scope from the prior cases before the ICJ, because *Breard* and *LaGrand* concerned just a few foreign nationals arrested in the U.S., who had already been executed at the time the

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Specifically, the Government of Mexico requested the Court to adjudge and declare:

"(1) That the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) *(a)* and *(c)* of the Convention;

(2) That the obligation in Article 36 (1) of the Vienna Convention requires notification of consular rights and a reasonable opportunity for consular access before the competent authorities of the receiving State take any action potentially detrimental to the foreign national's rights;

(3) That the United States of America violated its obligations under Article 36 (2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36 (1); by substituting for such review and reconsideration clemency proceedings; and by applying the "procedural default" doctrine and other municipal law doctrines that fail to attach legal significance to an Article 36 (1) violation on its own terms;

(4) That pursuant to the injuries suffered by Mexico in its own right and in the exercise of diplomatic protection of its nationals, Mexico is entitled to full reparation for those injuries in the form of *restitutio in integrum*;

(5) That this restitution consists of the obligation to restore the *status quo ante* by annulling or otherwise depriving of full force or effect the convictions and sentences of all 52 Mexican nationals;

(6) That this restitution also includes the obligation to take all measures necessary to ensure that a prior violation of Article 36 shall not affect the subsequent proceedings;

(7) That to the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the 52 nationals, and that this obligation cannot be satisfied by means of clemency proceedings or if any municipal law rule or doctrine inconsistent with paragraph (3) above is applied; and

(8) That the United States of America shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals and shall provide appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36 (1) and to ensure compliance with Article 36 (2)".

Court ruled, while *Avena* concerned all Mexicans currently sentenced to death across the U.S.[119].

In *Avena*, the ICJ recalled that the *LaGrand* judgment recognized that Article 36, paragraph 1 creates individual rights for the foreign national concerned, which may be invoked in the Court by the national State of the detained person[120]. It further analyzed the interdependence of the individual and sending State's rights as set forth in Article 36, stating 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. In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 (b)"[121].

Nevertheless, the ICJ again refused to consider whether Article 36 of the Vienna Convention recognizes human rights of detained foreign nationals. Moreover, in *Avena* the Court showed itself even more skeptical on this point than in *LaGrand*. The Court was emphatic stating that neither the purpose nor the negotiating history of the Vienna Convention suggest that consular rights are human rights. Indeed, on this point the ICJ explained:

> "Mexico has further contended that the right to consular notification and consular communication under the Vienna Convention is a fundamental right that constitutes part of due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Vienna Convention; according to Mexico, this right, as such, is so fundamental that its infringement will *ipso facto* produce the effect of

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119 See ALAN MACINA, *Avena & other Mexican nationals: The litmus for LaGrand & the future of consular rights in the United States*, 34 Cal. W. Int'l. L. J., 115, 136 (2003).

120 International Court of Justice, *supra* note 118, at 26, para. 40.

121 *Id*.

> vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right. *Whether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the travaux preparatoires, support the conclusion that Mexico draws from its contention in that regard* (emphasis added)"[122].

In this paragraph, the Court explicitly rejects the Mexico's contention that the Vienna Convention should be considered as a treaty concerning the human rights of detained foreign nationals and that the right to consular notification constitutes a minimum guarantee of due process. Moreover, when the Court dealt with the issue of remedies, it also seemed to reject that consular rights can be considered as a part of due process under the U.S. Constitution, approach that the Court did not even attempt in *LaGrand.* Indeed, the ICJ held that

> "in a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of 'harm to a particular right essential to a fair trial' —a concept relevant to the enjoyment of due process rights under the United States Constitution— but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law"[123].

In another step backward in the *Avena* judgment, the ICJ expressly held that prejudice to the defendant needs to be shown in order to afford remedies for the breach of the rights set forth in the Convention. This means that the Court expressly closed the door to Mexico's contention that the restitution to which it was entitled consisted in the U.S.

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122 *Id*., at 49, para. 124.

123 *Id*., at 53, para. 139.

> "obligation to restore the *status quo ante* by annulling or otherwise depriving of full force or effect the conviction and sentences of all 52 Mexican nationals"[124].

Moreover, Mexico rightly argued that leaving the choice of means for the review and reconsideration of convictions and sentences to the U.S. courts had proved to be ineffective after the *LaGrand* judgment, therefore it requested that the convictions and sentences of the 52 Mexican nationals be annulled, and also that in any future criminal proceedings against these 52 Mexican nationals, evidence obtained in breach of Article 36 of the Vienna Convention be excluded[125].

On this question, the Court was emphatic in stating that partial or total annulment of the conviction or sentence cannot be deemed as the necessary and sole remedy[126], thus admitting its view that the Convention does not support Mexico's conclusion that consular rights are indeed human rights. The Court went on to note that

> "the question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, *it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention* (emphasis added)"[127].

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124 *Id*., at 47, para. 116. Mexico was alleging that it was entitled to full reparation in the form of *restitutio in integrum*, relying on the general principle stated by the Permanent Court of Justice in the *Factory at Chorzow Case* (1928), that the breach of a treaty provision involves an obligation to make reparation in an adequate form, and that such reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.

125 *Id*., at 47, para. 117.

126 *Id*., at 49, para. 123.

127 *Id*., at 48, para. 122.

Leaving the margin of appreciation to U.S. authorities to provide for "review and reconsideration" of the Mexican nationals' cases when they are still are pending (which was not the case of the *LAGRAND* brothers), has not given "full effect" to the consular rights set forth in the Convention, even when the Court in *Avena* noted that "such review and reconsideration is not without qualification", because it has to be carried out

> "by taking account of the violation of the rights set forth in the Convention"[128].

On the other hand, according to the Court "review and reconsideration" by means of U.S.'s own choosing is sufficient because the issue is not the correctness of any conviction or sentence imposed to Mexican foreign nationals, but, rather, the casual connection between the violations committed and the conviction or sentence. Thus, the ICJ seemingly approved the judicial doctrine of "harmless error"[129] or cause and prejudice applied by U.S. courts when dealing with claims regarding violations of the Vienna Convention[130].

Requiring a determination whether the violation of Article 36 caused actual prejudice to the defendant in the process of administration of criminal justice, is tantamount to upholding the practice of U.S. courts that have failed to provide any adequate means of review and reconsideration on the grounds that prejudice must be shown to trigger judicial remedies. This view is totally counter-productive for consular claims in the U.S., because when the U.S. courts have required a showing of prejudice

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128 *Id*., at 51, para. 131.

129 The harmless error doctrine is governed by the *Federal Rule of Criminal Procedure 52 (a*), which provides that "any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded".

130 See DINAH L. SHELTON, *International Decision: Case concerning Avena and other Mexican nationals (Mexico v. United States*), 98 Am. J. Int'l L., 559, 566 (2004).

> "…they typically place the burden on the foreign national to show that if notified of his rights, he would have contacted his consul and, if so, the consul would have assisted him and, if so, the assistance would have changed the outcome…placing the burden on the individual (or anyone) to make such showings is unrealistic; if prejudice is relevant at all, the burden ought to be on the state to demonstrate that there was no credible likelihood of prejudice"[131].

Thus, in *Avena* the Court was far from clearing the doubts that arose from the *LaGrand* judgment on the issue of remedies available for the violation of the rights set forth in the Vienna Convention. The ICJ rejected Mexico's claim, based on the law of State responsibility, that it should determine the legal consequences that arise from the U.S.'s international wrongful act and indicate the specific measures to be undertaken in order to find the reparation sought by Mexico. As Judge *Ad Hoc* SEPULVEDA stated in his Separate Opinion,

> "In the present Judgment, it is difficult to find any clarifying statements as to how these obligations are to be implemented and what are the precise conditions that are to be applied in order to ensure that the process of review and reconsideration will be effective and meaningful. Such statements and conditions should be an integral part of the Judgment, particularly in its operative part, as an essential determination of the remedial measures that are being required by the Court"[132].

The only issue that the Court did clarify in *Avena* was whether clemency procedures are appropriate to fulfill the review and reconsideration of convictions and sentences of foreign nationals, as the U.S. contended before the Court. The ICJ recalled that the process of "review and reconsideration" prescribed by it in the *LaGrand* judgment should be effective, thus, it should occur within the overall judicial proceedings relating to the individual defendant

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131 CASSEL, *supra* note 11, at 83.

132 International Court of Justice, *supra* note 118, Separate Opinion of Judge *Ad Hoc* SEPULVEDA, at 18, para. 64.

concerned[133]. Therefore, the Court concluded that clemency process, as currently practiced within the United States criminal justice system, is not sufficient in itself to serve as an appropriate means of "review and reconsideration" of convictions and sentences[134]. However, as CASSEL points out, even this conclusion could be draw from the *LaGrand* judgment because of the Court's rejection of the application of procedural default, which precludes only judicial remedies, and also because executive clemency is not generally an adequate remedy for failures of consular notification since it may relieve the individual from serving the sentence but cannot undo the underlying conviction[135].

The three judicial decisions studied in this Part made clear that Article 36 of the Vienna Convention confers individual rights upon detained foreign nationals, although the ICJ rejected in both the *LaGrand* and *Avena* judgments that such rights deserve the character of fundamental human rights, as stated by the Inter-American Court of Human Rights in its Advisory Opinion. However, the ICJ's judgments established that violations of the right to consular notification require an effective judicial remedy, beyond the clemency proceedings and the mere apologies of the receiving State.

## IV. U.S. COURTS: NEITHER A RIGHT NOR A REMEDY IN ARTICLE 36 OF THE VIENNA CONVENTION

Although the ICJ rulings in both *LaGrand* and *Avena* have rejected the mistaken view of U.S. authorities that the Convention does not confer judicially enforceable individual rights, most U.S. courts continue to find that any right created under Article 36 of the Vienna

133 International Court of Justice, *supra* note 118, at 54, para. 141.

134 *Id*., at 54, para. 143.

135 CASSEL, *supra* note 11, at 77.

Convention accrue not to the individual, but rather to the signatory nation and, therefore, violations are only enforceable by and among States. A few courts have determined that the treaty does create an individual right, but that it is not a right on par with fundamental rights such as the Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination. These courts have stated that, absent some showing by the individual of prejudice to the outcome of the trial, no plausible criminal remedy exists for a violation of Article 36 of the Vienna Convention[136].

The Supremacy Clause of the U.S. Constitution[137] declares international treaties to be "the supreme Law of the Land". In declaring treaties to be the law of the land, it was the Framers' intent to afford individuals a domestic legal sanction, making treaties operative on individuals and enforceable in the courts by individuals[138]. Although the doctrine of self-executing treaties has limited the application of the aforementioned principle[139], the Vienna Convention has been interpreted as being self-executing[140]. Also, the U.S. Supreme Court made clear in *Breard* that

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136 See EMILY DECK HARRILL, *Exorcising the Ghost: Finding a Right and a Remedy in Article 36 of the Vienna Convention on Consular Relations*, 55 S. C. L. Rev. 569, 570 (2004).

137 U.S. Const., art. VI, cl. 2.

138 See CARLOS MANUEL VAZQUEZ, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1097-1110 (1992).

139 See GREGORY DEAN GISVOLD, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 Minn. L. Rev. 771, 785 (1994). The self-execution doctrine was first enunciated by Chief Justice JOHN Marshall in 1829 in Foster *v.* Neilson, 27 U.S. (2 Pet.) at 314, stating: "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as an equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the treaty import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the courts".

140 *Id.*, at 782. He cites the statement made by Mr. J. EDWARD LYERLY, Deputy Legal Advisor of the U.S. State Department, when submitting the Convention to the Senate

> "we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such"[141].

Similarly, the Restatement (Third) of the Foreign Relations Law of the U.S. states that

> "to the extent that decisions of international tribunals adjudicate questions of international law, they are persuasive evidence of what the law is. The judgment and opinions of the International Court of Justice are accorded great weight"[142].

Accordingly, the ICJ's judgments in *LaGrand* and *Avena*[143] should be implemented by U.S. courts, since under the Optional Protocol of the Vienna Convention the ICJ is the authoritative interpreter of the Convention. The ICJ has undoubtedly stated that the Vienna Convention does create individual enforceable rights on foreign nationals subjected to prolonged detention or convicted and sentenced to severe penalties in the U.S. Also, the ICJ has established that if the U.S. has failed to notify a detained foreign national of his

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for advice and consent, noting that the U.S. considered the Vienna Convention to be entirely self-executing, requiring no congressional implementing legislation (Sen. Exec. Rep. n° 9, 91st Cong., 1st Sess., app., at 5 (1969)).

141 *Breard*, 523 U.S. at 376.

142 Restatement (Third) of the Foreign Relations Law of the U.S. 103 cmt. b (1987).

143 Regarding the Inter-American Court's Advisory Opinion, U.S. courts have stated that the U.S. is not bound by it. Indeed, in United States *v.* Li, the U.S. Court of Appeals for the First Circuit noted that: "The United States is not a party to the treaty that formed the IACtHR, and is not bound by that court's conclusions. Nonetheless, as a member of the Organization of American States ("OAS"), the United States may participate in the IACtHR's advisory proceedings". See United States *v.* Li, 206 F. 3d 56, 64 (1st Cir. 2000). However, it should be a persuasive authority in U.S. courts because, according to the Restatement (Third), "to the extent that decisions of international tribunals adjudicate questions of international law, they are persuasive evidence of what the law is".

right to information on consular assistance, it may not invoke the procedural default rule to bar the detainee from judicial relief. Both *Breard* and *LaGrand* were "procedurally defaulted" cases, in the sense that the defendants had not raised the Vienna Convention's claim at trial, and in fact, only raised the argument for the first time when seeking collateral review after exhausting all other direct appellate review[144]. In *Avena*, this was the case of at least three Mexican nationals for whom Mexico requested provisional measures to the ICJ[145].

Despite the aforementioned considerations, the U.S. jurisprudence regarding the right to information on consular assistance remains unsettled even after the ICJ's judgments in *LaGrand* and *Avena*, as will be explained in this Part of the paper.

### A. THE ISSUE OF WHETHER THE VIENNA CONVENTION CONFERS INDIVIDUAL ENFORCEABLE RIGHTS AS CONSIDERED BY U.S. COURTS

Before the *LaGrand* and *Avena* judgments of the ICJ, the majority of U.S. courts that have addressed whether the Vienna Convention confers individual enforceable rights have refused to rule on the question, perhaps because they recognize the complexity of the topic[146]. Some courts have given ample consideration to the U.S. Supreme Court's dicta in *Breard* that the Vienna Convention "arguably" creates individual rights and, hesitating in the face of this language, have neatly sidestepped the issue. Other courts have disposed of the cases in an "assuming but not deciding" posture, by

144 EPPS, *supra* note 17, at 5.

145 They were CESAR FIERRO, ROBERTO MORENO and OSVALDO TORRES. See International Court of Justice, *Case concerning Avena and other Mexican nationals (Mexico v. United States of America), Order of Provisional Measures, February 5, 2003*, available at: http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iorder_20030205.PDF.

146 EPPS, *supra* note 17, at 21.

accepting for argument's sake that a right exists and proceeding directly to whether the particular remedy sought by the foreign national is available[147].

However, some courts have expressly denied that the Vienna Convention confers individual rights upon foreign nationals. The Court of Appeals for the Fifth Circuit held in *U.S. v. Jimenez-Nava* that

> "treaties are contracts between or among independent nations…they do not generally create rights that are enforceable in the courts"[148].

Others, like the Court of Appeals for the First Circuit in *U.S. v. Li,* have held that Article 36 of the Vienna Convention does not create, explicitly or otherwise, fundamental rights on par with the right to be free from unreasonable searches, the privilege against self-incrimination, or the right to counsel[149].

Despite the ICJ's judgments, the majority of U.S. courts have continued to avoid the issue. In *U.S. v. Emuegbunam*, decided a few months after the *LaGrand* case, the Court of Appeals for the Sixth Circuit, without even mentioning the international decision, stated that although

> "the Supreme Court has recognized that…treaties can create individually enforceable rights in some circumstances…absent express language in a treaty providing for particular judicial remedies, the federal courts will not vindicate private rights unless a treaty creates fundamental rights on a par with those protected by the Constitution"[150].

It relied on the U.S. Supreme Court decision in *Breard*, noting that the Supreme Court had left open the question of whether the Vienna Convention creates an individual right enforceable by the

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147 HARRILL, *supra* note 136, at 582.

148 United States *v.* Jimenez-Nava, 243 F.3d 192, 195 (5th Cir. 2001).

149 United States *v.* Li, *supra* note 143, 206 F. 3d, at 61.

150 United States *v.* Emuegbunam, 268 F.3d 377, 390 (6th Cir. 2001).

federal courts[151]. Similarly, another federal circuit decision completely ignored the *LaGrand* judgment, in stating that the purpose of the Vienna Convention is to protect a *state's right* to care for its nationals, and that the consular-notification provision of the Convention and its related regulations do not create any "fundamental rights" for a foreign national[152].

However, a few lower federal courts decisions have found individual enforceable rights arising under the Vienna Convention. In *Standt v. City of New York*, a U.S. district court held that

> "the language of the VCCR, coupled with its 'legislative history' and subsequent operation, suggest that Article 36 of the Vienna Convention was intended to provide a private right of action to individuals detained by foreign officials"[153].

Another decision, relying on the ICJ's judgment in *LaGrand*, held that the ICJ's ruling conclusively determined that Article 36 of the Vienna Convention creates individually enforceable rights, and thus resolved the question most American courts (including the Seventh Circuit) have left open. The district court held that it could not rely upon procedural default rules to circumvent a review of petitioner's Vienna Convention claim, and granted his motion to alter or amend judgment on the basis that because the trial counsel failed completely to undertake any investigation of the client's life, character, and background in preparation for the sentencing phase, the participation of the Polish Consulate could possibly have made a difference in the outcome of his trial[154].

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151 *Id.*

152 United States *v.* Bustos de la Pava, 268 F.3d 157, 165 (2nd Cir. 2001).

153 Standt *v.* City of New York, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001).

154 United States ex rel. Madej *v.* Schomig, 223 F. Supp. 2d 968, 979-980 (N.D. Ill. 2002).

The majority of state courts have also declined to decide whether the Vienna Convention creates individual enforceable rights. For example, before the ICJ's judgment in *LaGrand,* the Supreme Court of Iowa[155] recognized that U.S. courts that have addressed the issue of consular notification are split on whether Article 36 actually creates an individual right. Some courts have interpreted the language "of his rights" to impliedly create a private enforceable right of action in an individual[156]. At least one other court has cited two additional factors supporting the creation of a private enforceable right: (1) pre-adoption statements by conference participants expressing the desire to safeguard a foreign national's individual right to notification; and (2) other signatory nations recognizing individual notification rights, such as Mexico, Argentina, Canada, and Paraguay[157]. However, the Court recognized that the majority of the courts have found the Vienna Convention's preamble to indicate the drafters' intent not to provide an individual right, as the preamble explicitly states the Vienna Convention does not intend to benefit individuals[158].

After the *LaGrand* decision, the Iowa Supreme Court, although mentioning the ICJ's judgment, expressly declined to decide that Article 36 creates an individually enforceable right of notification[159], thus rejecting the ICJ ruling that made clear that the Convention creates such a right. In *State v. Lopez,* another case decided more than one year after *LaGrand,* the Court of Appeals of South Carolina ignored the international judgment, holding that the Vienna

155 Ledezma *v.* State, 626 N.W.2d 134, 150-151 (S. Ct. Iowa 2001).

156 Referring to United States *v.* Carrillo, 70 F. Supp. 2d 854, 859 (N.D. Ill. 1999); and United States *v.* Hongla-Yamche, 55 F. Supp. 2d 74, 77-78 (D. Mass. 1999).

157 Referring to United States *v.* Rodrigues, 68 F. Supp. 2d 178, 182-83 (E.D.N.Y. 1999).

158 Referring to United States *v.* Lombera-Camorlinga, 206 F.3d 882, 885 (9th Cir. 2000); United States *v.* Li, 206 F.3d 56, 62 (1st Cir. 2000); Carrillo, 70 F. Supp. 2d at 859; and Hongla-Yamche, 55 F. Supp. 2d at 77.

159 State *v.* Lopez, 633 N.W.2d 774, 783 (S. Ct. Iowa 2001).

Convention, like any other treaty, does not create individual rights equivalent to constitutional rights[160]. Similarly, the Supreme Court of Ohio decided a case involving the Vienna Convention, and mentioned the *LaGrand* judgment only in a strong dissenting opinion that accompanied the decision[161].

Although there are some exceptions, the majority of lower U.S. courts are not likely to give any authority to the ICJ's judgments and will continue to avoid the issue of whether the Vienna Convention creates individual enforceable rights[162], at least until the U.S. Supreme Court decides the issue. Regarding remedies, those courts that have "assumed without deciding" that an individual right exists in Article 36 of the Vienna Convention, have held that this right is not a fundamental right, relegating these cases to review under the "harmless error" standard, and thus requiring that the affected foreign national makes a showing of prejudice to the outcome of his trial to overcome the violation of the Vienna Convention[163].

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160 State *v.* Lopez, 574 S.E.2d 210, 214-215 (Ct. App. 2002).

161 State *v.* Issa, 752 N.E.2d 904, 935 (S. Ct. Ohio, 2001). Indeed, in his dissenting opinion Judge LUNDBERG STRATTON interestingly noted that "The Vienna Convention offers Americans abroad the comfort of reciprocity. Under starkly different legal systems, where rights we take for granted, such as the right to counsel, a jury, discovery, cross-examination, and open trials, are routinely not afforded by other countries, how could our nationals possibly prove that they did not waive their consulate rights? With the closed trials and secrecy of many legal systems, how could our nationals overcome foreign legal barriers to prove that the failure to provide access to a consul resulted in an error at trial? Our best way to ensure that other nations honor the treaty by providing consular access to our nationals is to demand strict adherence to the right to consular access for foreigners in *our* country. In that way, our nationals will be provided an advocate to try to safeguard the minimal protections we take for granted in the United States".

162 However, EPPS cites a few lower federal courts decisions finding individual rights under the Vienna Convention. See Standt *v.* City of New York, 153 F. Supp. 2d 417 (S.D.N.Y. 2001); United States *v.* Hongla-Yamche, 55 F. Supp. 2d 74 (D. Mass. 1999); United States *v.* Alvarado-TORRES, 45 F. Supp. 2d 986 (S.D. Cal. 1999); and State *v.* Reyes, 740 A.2d 7 (Del. 1999).

163 HARRILL, *supra* note 136, at 585.

### B. THE REMEDIES AVAILABLE IN U.S. COURTS FOR VIOLATIONS OF ARTICLE 36 OF THE VIENNA CONVENTION

According to Professor VAZQUEZ, the Supremacy Clause should be read to require the courts to afford individuals such remedies as would avoid or cure a violation of international law by the U.S. against the state of the individuals' nationality[164]. Since the Vienna Convention is silent as to a remedy for a violation of Article 36, he proposes that a private right of action should be "implied" when failure of the courts to afford such a remedy would produce (or exacerbate) the international responsibility of the United States to the state of the individual's nationality. If it would, a private right of action to obtain that remedy under domestic law should be considered to be implicit in the treaty[165].

The U.S. Supreme Court has long supported this view. For example, in the *Head Money Cases* it stated that a treaty, in addition to being an agreement between sovereign states, may also contain

> "provisions which confer rights upon citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of other countries"[166].

Similarly, in United States *v.* Alvarez-Machain, the U.S. Supreme Court held that if a treaty

> "…is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation"[167].

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164 VÁZQUEZ, *supra* note 138, at 1157.

165 *Id*., at 1158-1161.

166 112 U.S. 580, 598-599 (1884), (quoted in EPPS, *supra* note 17, at 23-24).

167 United States *v.* Alvarez-Machain, 504 U.S. 655, 667 (1992).

However, this has not been the case of the Vienna Convention because U.S. courts have been generally reluctant to fashion a remedy for violations of consular notification. Even when assuming, without deciding, that Article 36 creates individual rights upon foreign nationals, courts have not reached the conclusion that the defendant is entitled to judicial relief. Indeed, U.S. courts have typically ignored that the second paragraph of Article 36 of the Vienna Convention is directed at courts, demanding the judicial enforcement of the right to information on consular assistance[168].

The majority of U.S. courts have denied relief in criminal cases on the ground that particular remedies such as suppression of incriminating statements, dismissal of indictments, or relief from ineffective assistance of counsel, are unavailable under the Vienna Convention. Others have denied remedies unless violations of consular rights are shown to prejudice the outcome of the trial[169], based on their belief that the right to information on consular assistance is not a right on par with U.S. Constitution's fundamental rights such as the Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination. In these cases, when U.S. courts relegate the review of Vienna Convention's claims to the "harmless error" standard, requiring that the affected individual make a showing of prejudice to the outcome of his case, Article 36 violations seem insurmountable in the criminal arena[170].

As discussed earlier in this paper, most commentators agree that the requirement of identifying prejudice to the outcome of the trial is tantamount to rejecting most Article 36 claims. Furthermore, they argue that the necessity for a showing of prejudice in order to be granted a remedy for violations of the Vienna Convention, or in other words, applying the "harmless error" doctrine, is a standard too strict to comply with Article 36 which recognizes an absolute

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168 See JOHN QUIGLEY, *The Law of State Responsibility and the Right to Consular Access*, 11 Willamette J. Int'l L. & Dispute Res., 39, 46 (2004).

169 CASSEL, *supra* note 11, at 72-73.

170 HARRILL, *supra* note 136, at 585-586.

right. Indeed, they argue that nothing in the text of Article 36 suggests relief for a foreign detainee should depend on whether he can show prejudice[171].

Unfortunately, the ICJ's judgments, particularly in *Avena,* were not clear enough on the issue of remedies and prejudice. In *Avena,* the ICJ rejected Mexico's claim that the appropriate remedy for a treaty violation under international law is to restore the *status quo ante.* Also, the ICJ seemed to approve the "harmless error" standard applied by U.S. courts, when stating that in the process of review and reconsideration of the convictions and sentences,

> "…it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention"[172].

However, the ICJ expressly rejected the application of procedural default to bar late claims presented by foreign nationals subjected to prolonged detention or severe penalties and who were not timely notified of their rights under Article 36 of the Vienna Convention. Also, the ICJ rejected clemency proceedings as a means of "review and reconsideration of the conviction and sentence" of foreign nationals in the U.S. This is important because even after the *LaGrand* judgment, U.S. courts continued to deny remedies for clear violations of the Vienna Convention, relying on the U.S. Department of State's view that, in death penalty cases, the ICJ's *LaGrand* requirement of "review and reconsideration" could be satisfied by a variety of administrative boards, generally known as "clemency boards", to review the convictions in light of the Vienna Convention violations[173].

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171 See ADELE SHANK & JOHN QUIGLEY, *Foreigners on Texas's Death Row and the Right of Access to a Consul,* 26 St. Mary's L. J. 722, 751 (1995).

172 International Court of Justice, *supra* note 118, at 48, para. 122.

173 EPPS, *supra* note 17, at 31.

Although the majority of U.S. courts are not likely to apply the extraordinary judicial remedies available for violations of fundamental rights, one can find some courts that have crafted remedies for violations of the Vienna Convention. For example, in *State v. Reyes,* the Superior Court of Delaware ordered inculpatory evidence suppressed after violation of foreign national's Convention rights despite the fact that the defendant had been given MIRANDA warnings[174]. Also, in Standt *v.* City of New York, the federal district court held that a GERMAN citizen denied consular access after arrest could bring a civil rights action against the municipality and police officers[175].

After the ICJ's judgments in *LaGrand* and *Avena*, some state courts also granted foreign nationals' applications for post-conviction relief and remanded their cases for re-sentencing because of violations of the Vienna Convention even though their claims were procedurally defaulted. Indeed, in Valdez *v.* Oklahoma, the Court of Criminal Appeals granted post-conviction relief on the ground that the trial counsel and state's authorities failed in their duties to inform petitioner of his right to contact the Mexican consulate, and that it could have provided financial, legal and investigative assistance to him. Therefore, the Court held that

> "it is difficult to assess the effect consular assistance, a thorough background investigation and adequate legal representation would have had. However, this Court cannot have confidence in the jury's sentencing determination and affirm its assessment of a death sentence where the jury was not presented with very significant and important evidence bearing upon Petitioner's mental status and psyche at the time of the crime. Absent the presentation of this evidence, we find there is a reasonable probability that the sentencer might have concluded that the balance of aggravating and mitigating circumstances did not warrant death"[176].

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174 State *v.* Reyes, 740 A.2d 7 (Del. 1999) (quoted in EPPS, *supra* note 17, at 29).

175 Standt *v.* City of New York, *supra* note 154, 153 F. Supp. 2d, at 427.

176 Valdez *v.* Oklahoma, 46 P.3d 703, 710 (Okla. Crim. App. 2002).

Also, in TORRES *v.* Oklahoma, the Oklahoma Court of Criminal Appeals implemented the *Avena* judgment, ordering indefinite stay of the execution of one of the Mexican nationals included in Mexico's application to the ICJ, and granting his request for an evidentiary hearing on the issues of whether he was prejudiced by the violation of his right to information on consular assistance and the ineffective assistance of counsel[177]. In a lengthy Concurring Opinion, Judge CHAPEL stated that the Court was bound by the Vienna Convention and the *Avena* judgment, which mandated the review and reconsideration of TORRES' conviction and sentence in light of the consequences of the violation of his rights under the Vienna Convention[178].

## CONCLUSION

A growing international consensus considers the right to consular notification a human right pertaining to the minimum guarantees of due process, given the fact that the right to a fair trial of foreign defendants is in jeopardy if Article 36 of the Vienna Convention is not enforced effectively by the authorities of the receiving State.

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177 Following the recommendation of the Board of Pardon and Paroles, Governor BRAD HENRY commuted the death sentence of OSVALDO TORRES to life without possibility of parole. Interestingly, the press release issued by the Governor's office on May 13, 2004, stated: "The International Court of Justice ruled on March 31 that TORRES' rights were violated because he had not been told about his rights guaranteed by the 1963 Vienna Convention. Under agreements entered into by the United States, the ruling of the ICJ is binding on U.S. courts. 'I took into account the fact that the U.S. signed the 1963 Vienna Convention and is part of that treaty,' the Governor said. 'In addition, the U.S. State Department contacted my office and urged us to give 'careful consideration' to that fact'." *Available at:* http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1.

178 Torres *v.* Oklahoma (Chapel, J., concurring). (Okla. Crim. App. May 13, 2004 ) (quoted by SEAN D. MURPHY, *Contemporary Practice of the United States relating to International Law: State Diplomatice and Consular Relations: Implementation of Avena Decision by Oklahoma Court*, 98 Am. J. Int'l L., 581, 584 (2004)).

Although the ICJ has twice declined to rule on whether or not consular notification is indeed a human right, it made clear that Article 36 confers individual enforceable rights upon foreign nationals and that its violation obligates the U.S. to review and reconsider convictions and sentences. However, most U.S. courts are not likely to find an individual enforceable right in Article 36 of the Vienna Convention, nor are they likely to apply the extraordinary judicial remedies available for violations of fundamental rights, at least until the U.S. Supreme Court decides the matter.

The U.S. Supreme Court had the opportunity to revisit the issue in 2005 because it granted the petition for a writ of certiorari in the case of Jose Ernesto Medellin, one of the Mexican nationals included in the *Avena*'s application to the ICJ. This case provided a unique opportunity for the Supreme Court to abandon its position in *Breard* that the Vienna Convention "arguably" creates individual rights. However, the US Supreme Court rejected to "give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such", as the same Court had stated in *Breard.*

In so doing, the U.S. Supreme Court failed to provide guidance to federal and state courts making clear that Article 36 of the Vienna Convention does create individual enforceable rights. It also failed to ensure that U.S. courts abide by the World Court's authoritative interpretation of the Vienna Convention, crafting a remedy that the ICJ chose to leave to the U.S. judicial system. In international law, a State can be held accountable for violating its international obligations regardless of whether the organ involved exercises legislative, executive or judicial functions. Today more than ever, the U.S. is urged by the international community to make a diligent effort to ensure nationwide compliance with Article 36 of the Vienna Convention on Consular Relations.

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