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NOTES

Article 36 of the Vienna Convention on Consular Relations: Private Enforcement in American Courts After *LaGrand*

Cara Drinan*

INTRODUCTION

On June 27, 2001, the International Court of Justice (ICJ) held in the case of *Germany v. United States of America (LaGrand)* that Article 36 of the Vienna Convention on Consular Relations ("VCCR") affords an individually enforceable right to consular access upon arrest or detention in a foreign country.¹ In the United States, death penalty opponents applauded the ICJ's finding for its promise of greater due process protection, while states' rights advocates criticized the decision as an unlawful exercise of criminal appellate jurisdiction. *LaGrand*, in theory, resolves many questions that have plagued American courts: whether Article 36 rights are vested in an individual or a signatory state; whether the right may be privately enforced; whether domestic procedural rules may bar Article 36 claims in certain circumstances; and whether the ICJ's provisional measures are binding upon member states.

The *LaGrand* opinion, however, leaves unclear as many issues as it clarifies. Procedurally, *LaGrand* has enormous implications for American criminal courts if taken at its word. Yet it remains to be seen how, and if, the American courts will incorporate the ICJ's decision in *LaGrand* into their jurisprudence. The United States Supreme Court has yet to address the *LaGrand* issues in a comprehensive manner.² As a result, courts vary widely in

* J.D., Stanford Law School, 2002; B.A., University of Oxford, First Class Honors, Politics, Philosophy, and Economics, 1999; B.A., Bowdoin College, summa cum laude, Economics, 1996. Special thanks to Margaret Pfeiffer and Sandra Babcock for introducing me to this area of the law, and to Professor Abraham Sofaer for his guidance in my research.

1. See *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 104 (June 27), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>.

2. The Court's most recent examination of related Article 36 issues was one in which

their willingness to defer to ICJ opinions, and in many cases they have avoided incorporation of ICJ law altogether by deferring to the political branches in high-profile cases involving foreign national defendants.³

Even those courts that recognize ICJ opinions as contributing to American common law are left with a critical gap in the *LaGrand* opinion: where a court determines that there has been an Article 36 violation, what is the appropriate remedy? Should the court treat an Article 36 violation as comparable to a Fourth Amendment violation, thereby triggering a form of the exclusionary rule? Should the court view Article 36 as akin to the effective counsel guarantees of the Sixth Amendment? Or should the court defer to the United States Department of State, allowing an infringement to be resolved politically, perhaps only with an apology and a promise to be more vigilant in guarding consular access in the future?

In this Note, I explore the potential impact of *LaGrand* upon domestic American criminal jurisprudence with an eye toward what the case demonstrates for America as a member of international institutions more generally. In Part I, I describe the central holdings of the ICJ in *LaGrand*, noting how dramatically *LaGrand* departs from what American courts have previously interpreted the VCCR to require. Having demonstrated the enormity of *LaGrand*'s procedural implications, I examine early cases after *LaGrand* and what they suggest about the American judicial response to the ICJ decision in Part II. I argue that American courts err to the extent that they recognize little shift in law after *LaGrand*. The ICJ directed the American courts to craft a remedy in future cases that provides "effective review of and remedies for criminal convictions impaired by the violation of the rights under Article 36."⁴ These words are not an escape hatch for American courts, but rather an instruction to be respectful of the ICJ opinion in the context of domestic criminal cases.

Finally, in Part III, I argue that American courts are well-equipped to heed this instruction, for they are experienced in balancing rights and employing prejudice analysis where the criminal adjudicative process has been tainted.

the Court lacked full briefing and argumentation. See *Breard v. Greene*, 523 U.S. 371, 380-81 (1998) (Breyer, J., dissenting) ("I cannot say, without examining the record more fully, that these [Article 36] arguments are *obviously without merit*. Nor am I willing to accept without fuller briefing and consideration the positions taken by the majority More time would likely mean additional briefing and argument, perhaps, for example, on the potential relevance of proceedings in an international forum.").

3. See, e.g., *Breard*, 523 U.S. at 378 (deferring to the Executive Branch on the decision to stay the execution of *Breard*, a Paraguayan citizen: "The Executive Branch . . . in exercising its authority over foreign relations may . . . utilize diplomatic discussion with Paraguay. Last night the Secretary of State sent a letter to the Governor of Virginia requesting that he stay *Breard*'s execution. If the Governor wishes to wait for the decision of the ICJ, that is his prerogative."); see also *Faulder v. Johnson*, 178 F.3d 741, 742 (5th Cir. 1999) (declining jurisdiction over defendant *Faulder*'s "last-minute assertions" regarding Article 36).

4. *LaGrand*, 2001 I.C.J. 104 at ¶ 125.

These models should be a template for the similar treatment of Article 36 violations. Such a model allows the courts to factually distinguish between various Article 36 claims and to tailor narrow remedies on a case-by-case basis. In fact, meaningful application of the *LaGrand* opinion in the United States may enhance our own constitutional principles of due process while simultaneously enhancing our role as a member of international institutions.

I. *LAGRAND*

Historically, American courts have minimized the importance of Article 36 rights, often incorrectly interpreting the obligations created by the VCCR altogether.⁵ First, courts have treated the rights as belonging to VCCR signatory states, rather than to individual defendants whose consular access has been denied.⁶ Declining to clarify this issue, the United States Supreme Court has conceded only that Article 36 “arguably” confers an individual right of some kind.⁷ Second, courts have treated an Article 36 violation as one best remedied through political means.⁸ Therefore, before *LaGrand*, Article 36 rights in practice posed little disruption to the standard adjudication of domestic criminal cases.

In light of this historical treatment of Article 36, *LaGrand* represents a mandate for significant change in the adjudication of cases involving foreign nationals. Five holdings of the *LaGrand* decision deserve particular attention.

1. Article 36 “creates *individual* rights” for detained foreign nationals to be informed “without delay” that they are entitled to receive consular assistance if they choose.⁹

2. Article 36 stands for rights of the foreign national and the sending state that are *distinct from* rights accorded to the foreign defendant under domestic criminal law, such as the right to effective counsel. Article 36 may assist the foreign national in securing private rather than court-appointed counsel, and this distinction may be outcome-determinative.¹⁰

5. See, e.g., *United States v. Emuegbunam*, 268 F.3d 377, 386 (6th Cir. 2001) (wrongly describing Article 36 as requiring “notification of the diplomatic representatives,” rather than notification and the option of consular access for the detained foreign national himself).

6. See *United States v. Li*, 206 F.3d 56, 63-64 (1st Cir. 2000) (following the State Department’s position that the VCCR does not create individual rights); see also *Breard*, 523 U.S. at 376.

7. See *Breard*, 523 U.S. at 376.

8. See *Li*, 206 F.3d at 63 (deferring to State Department conclusion that “‘the [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law.’”).

9. *LaGrand*, 2001 I.C.J. 104 at ¶ 77 (emphasis added).

10. *Id.* at ¶ 91.

3. A showing of prejudice to the foreign defendant is not required to establish an Article 36 violation.¹¹

4. Where a state violates Article 36 by failing to inform a foreign national of his right to consular assistance, that state cannot then invoke waiver as a defense to a challenge based on that very same violation.¹²

5. Courts addressing an Article 36 violation may not invoke procedural default rules to dismiss the case where the default itself is caused by an Article 36 violation.¹³

Each of these holdings requires American judicial and executive agents to modify their treatment of foreign nationals in the future.

First, the ICJ's determination that Article 36 creates an individually enforceable right settles a long-standing question for American courts. While this piece of the ICJ decision may have rung hollow in the *LaGrand* case, since both of the *LaGrand* brothers had already been executed at the time of the decision, the holding will have more significance in the future. No longer may courts equivocate on this point. Now, when the American government deprives a foreign national of his right to consular assistance, the foreign defendant has standing to raise an Article 36 claim in a criminal trial.

Second, the ICJ's description of the right to consular access as distinct from, and not cumulative of, rights accorded under domestic law such as that of effective counsel requires greater diligence on the part of both executive and judicial agents. Neither arresting officers nor judges may devalue the role of the consular official on the rationale that counsel and *consul* provide effectively the same resources.¹⁴

Third, the issue of prejudice analysis requires great judicial attention. The ICJ opinion makes clear that a showing of prejudice is not required to establish an Article 36 violation.¹⁵ However, it is my contention, as discussed below, that compliance with the ICJ opinion is not feasible for American courts without employing some type of prejudice analysis, at least in terms of damages or impact assessment. The task remains, then, for the courts to

11. *Id.* at ¶ 74.

12. *Id.* at ¶ 60.

13. *Id.*

14. *But cf. Breard*, 523 U.S. at 377 (dismissing any impact consular assistance would have had upon the quality of *Breard*'s defense, since *Breard*'s attorneys were "likely far better able to explain the United States legal system to him than any consular official would have been").

15. *LaGrand*, 2001 I.C.J. 104 at ¶ 74.

reconcile the finding of a violation without a showing of prejudice and the crafting of an appropriate remedy with such prejudice analysis.

Fourth, the ICJ's determination that a receiving state that fails to notify the foreign national of his right to consular assistance may not invoke waiver or procedural default creates an opportunity to bolster domestic safeguards of due process. The ICJ was careful to state that procedural default per se has not been called into question, but rather "its specific application in the present case."¹⁶ Thus, the ICJ condemned American refusal to entertain a claim where the very reason for the tardy nature of the claim was intertwined with the alleged violation of the defendant's rights. This notion is no different from the domestic principles underlying *Miranda* warnings and the Fourth Amendment exclusionary doctrine: Government violation of a defendant's rights may not generate a windfall for the government's case against the defendant.

II. COMPLACENCE VERSUS COMPLIANCE

Theoretically, the ICJ's opinion in *LaGrand* requires dramatic change in the law of consular access, but the question remains whether American courts will comply with such mandates in practice. In the six months since *LaGrand*, a handful of federal courts have rendered decisions in which defendants raised the issue of the government's failure to comply with Article 36.¹⁷ These cases suggest that the *LaGrand* decision—in particular its holding that Article 36 *does* create individual, legally enforceable rights—will not alter domestic law as dramatically as the ICJ may have anticipated with its decision.

A. American Courts Have Failed to Correctly Interpret and Announce the *LaGrand* Decision

First, there has been a collective judicial failure to explicitly address *LaGrand*, let alone incorporate its holdings into domestic law under the Supremacy Clause.¹⁸ The one case that does mention *LaGrand* summarily dismisses the import of the ICJ's decision by focusing on what the Court did *not* decide explicitly—the issue of remedy. Declining to "decide" whether or not Article 36 creates individually enforceable rights, the Tenth Circuit in

16. *Id.* at ¶ 90.

17. *United States v. Carrillo*, 269 F.3d 761 (7th Cir. 2001); *United States v. De La Pava*, 268 F.3d 157 (2d Cir. 2001); *United States v. Emuegbunam*, 268 F.3d 377 (6th Cir. 2001); *United States v. Felix-Felix*, 275 F.3d 627 (7th Cir. 2001); *United States v. Minjarez-Alvarez*, No. 90-1380-T, 2001 WL 848611 (10th Cir. Jul. 27, 2001); *United States v. Cowo*, 208 F.3d 207 (1st Cir. Nov. 20, 2001). This is not an exhaustive list, but these cases capture the flavor of what lower courts are doing for the most part as well.

18. D.W. Cassell, *Ignoring the World Court*, CHI. DAILY L. BULL., Jan. 1, 2002. ("In the six months since the [LaGrand] ruling, 17 of 20 reported U.S. court decisions on consular rights do not even mention the World Court judgment. None rely on it.")

Minjarez-Alvarez referred to the *LaGrand* decision in only a brief footnote. The Court justified its decision to deny a motion for suppression of statements made in the absence of consular assistance, noting simply that "it does not appear that the (ICJ) considered the applicability of the exclusionary rule to violations of the Vienna Convention."¹⁹ Thus, the Tenth Circuit not only focuses wrongly upon what the ICJ left open to domestic tailoring—the issue of specific remedy—but also, the court refuses to be bound by the ICJ's holding regarding the individual nature and scope of Article 36.

Second, courts have failed to treat *LaGrand* as the authoritative source of law on the interpretation of Article 36, adhering instead to earlier domestic law on point.²⁰ In most cases, courts persist in following law as set forth by the Supreme Court in *Breard*, and more recently by the First Circuit in *United States v. Li*. For example, affirming the district court's refusal to apply the exclusionary rule in light of an Article 36 violation, the First Circuit referred to its own statements in *Li*, without mention of the ICJ, as recently as November 20, 2001.²¹ Similarly, the Second Circuit in its *De La Pava* decision wrongly cited the issue of Article 36 enforcement as "left open" under *Breard*.²² Deferring to the *Li* opinion, the Court instead maintained that "the Convention created no judicially enforceable individual rights."²³ Thus, *LaGrand*'s announcement regarding Article 36 has yet to impact American courts in a significant manner. The federal cases at issue here demonstrate a tenacious attachment to the notion that Article 36 protects the interests of a signatory state and is thereby best addressed in a political context.

Third, courts continually err by collapsing the distinct issues of consular access and effective counsel and by invoking procedural default rules to bar Article 36 claims. Both of these practices are in direct conflict with the mandates of *LaGrand*. For example, refusing an ineffective assistance of counsel claim, the Second Circuit emphasized that since an Article 36 violation putatively was not a basis for dismissal of an indictment, defense could not prevail on an ineffective counsel claim by arguing that counsel failed to raise the Article 36 argument.²⁴ In doing so, the court condensed its inquiry of the Article 36 issue into that of a *Strickland* analysis: Since the Article 36 claim was deemed an inadequate basis for dismissal, the Court found no outcome-determinative effect of counsel's failure to make an Article 36 argument.²⁵

19. *Minjarez-Alvarez*, 2001 WL 848611 at *7.

20. See *Cowo*, 208 F.3d at 208; *De La Pava*, 268 F.3d 157; *Emuegbunam*, 268 F.3d 377; *Carrillo*, 269 F.3d 761; *Felix-Felix*, 275 F.3d 627; *Minjarez-Alvarez*, 2001 WL 848611 at *7 n.4.

21. *Cowo*, 208 F.3d at 208.

22. *De La Pava*, 268 F.3d at 164.

23. *Id.*; see also *Emuegbunam*, 268 F.3d at 388-91 (following the general principle that treaties do not create privately enforceable rights and adhering to *Breard*).

24. *De La Pava*, 268 F.3d at 163.

25. *Id.* Cf. *Gibson v. United States*, 98 CR 1428 (JSM), 2001 WL 1246574 (S.D.N.Y.

This analysis dilutes the importance of consular assistance, for never does the Court reach the potentially determinant nature of consular assistance in its own right.²⁶

Last, courts frustrate the goals of the VCCR, as articulated by the ICJ, in their disregard for a meaningful remedy in cases where the government fails to comply with Article 36. In many instances, there is no dispute as to whether the government was remiss in its handling of a foreign national, for the government concedes that law enforcement officials neglected to notify the detained foreign national of his right to consular assistance.²⁷ Even in such cases, courts frequently dismiss requests for exclusion on the grounds that Article 36—for whatever benefits it may offer—does not trigger application of the exclusionary doctrine.²⁸

Indeed, the ICJ did not specify that exclusion of evidence, suppression of statements, or dismissal of indictments was the appropriate remedy in cases where the court finds an Article 36 violation. Nor are these judicially created mechanisms necessarily appropriate in cases where the government fails to comply with the VCCR. However, the ICJ left it to the United States to determine an appropriate remedy that would give “full effect” to the meaning of Article 36.²⁹ The present trend of perfunctory evaluation of Article 36 claims and summary dismissal of traditional remedies does not meet the ICJ’s mandate in *LaGrand*. Courts must demand more from themselves by forming creative and compliant remedies.

It is important to note that recently some courts have rendered decisions at least in keeping with the spirit of *LaGrand* if not in explicit deference to it. For example, in *Standt*, the court not only recognized the individual nature of the Article 36 right, but it held that a claim of a VCCR violation could be brought under 42 U.S.C. § 1983.³⁰ Rather than treating *Breard* as preclusive of the Article 36 issue, the *Standt* court correctly noted that the Court had not determined the nature of the right on its own accord.³¹ While this is a more accurate reading of *Breard* than other courts have employed, the *Standt* court still did not note that *LaGrand* *did* decisively resolve the nature and scope of Article 36. Notwithstanding this oversight, the *Standt* opinion is encouraging, for the case echoes the sentiments of *LaGrand*, even if it does so through its

Oct. 18, 2001) (minimizing the value of consular assistance and describing strategic benefit from such assistance as “highly speculative”).

26. Notably, there are many tangible benefits to consular access which are distinct from those secured by the Sixth Amendment. See notes 69-71 *infra* and accompanying text.

27. *Felix-Felix*, 275 F.3d 627; *Emuegbunam*, 268 F.3d at 387.

28. *Emuegbunam*, 268 F.3d at 390-91; *Cowo*, 208 F.3d at 208; *Minjarez-Alvarez*, 2001 WL 848611, at *4-5 (holding that “since the Vienna Convention does not create fundamental rights on par with those set forth in the Bill of Rights, we are unwilling to enforce Article 36 with the judicially created remedy of suppression.” (citations omitted)).

29. *LaGrand*, 2001 I.C.J. 104 at ¶ 91.

30. *Standt v. United States*, 153 F. Supp. 2d 417, 423 (S.D.N.Y. 2001).

31. *Id.*

own textual and historical analysis.³² Moreover, state courts have occasionally indicated greater respect for the mandates of Article 36.³³ Thus, there are some indications that American courts can incorporate the obligations of the VCCR in a meaningful manner.

B. *Why Are the Courts "Getting it Wrong?"*

Before exploring what steps are available and prudent for American courts addressing Article 36 claims, there must be an explanation for the collective judicial silence on the *LaGrand* decision. Why have so many courts failed to heed the holdings of the ICJ, rather than treating the case as binding under the Supremacy Clause? More curiously, why do many of them not even mention the case by name? Some explanations are more generous than others.

Beginning with the most cynical, it is possible that these cases reflect a conscious disregard for the ICJ decision rooted in either ideological opposition to the role of the ICJ or fear of the practical impact which *LaGrand* threatens to have. Ideological opposition, if it explains the absence of *LaGrand* references, is misguided. Once the United States has ratified a self-executing treaty without reservation, as is the case with the VCCR,³⁴ it is not for judges to enforce the treaty on a discretionary basis; such treaties are the supreme law of the land.³⁵

As for fear of the practical fallout from *LaGrand*, this explanation for judicial silence is equally unacceptable, even if based in reality. Indeed, as of December 12, 2001, 118 foreign nationals from thirty-three different countries faced a death sentence in the United States. Further, as the Death Penalty Information Center has noted, Article 36 violations have been rampant in prior capital cases:

Even applying the less stringent definition of prompt notification used by the State Department, only 4 cases of complete compliance with Article 36 requirements have been identified to date, out of 131 total reported death sentences (including those executed, reversed on appeal or released). In most of the remaining cases, detained nationals learned of their consular rights weeks, months or even years after their arrest, typically from attorneys or other prisoners and not from the local authorities. As a consequence, consular officials were often unable to provide crucial assistance to their nationals

32. *Standt*, 153 F. Supp. 2d at 422-427.

33. See *Ledezma v. State*, 626 N.W.2d 134, 152 (Iowa 2001) (noting the importance of consular assistance for detained foreign nationals).

34. Note that courts accept the VCCR as self-executing. See *Standt*, 153 F. Supp. 2d at 423 n.3 for a discussion of the VCCR's self-executing nature.

35. U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

when it would be most beneficial: at the arrest and pre-trial stage of capital cases.³⁶

If this empirical data is an indication of the scope of Article 36 claims that may be brought in the future, then courts have reason to dread the caseload that may ensue should *LaGrand* be incorporated into American law. Nonetheless, courts are bound to decide cases based upon legal doctrine and precedent, not “floodgate fears” which may govern any number of legal issues.

There are less pessimistic, very sound explanations for the judicial reluctance to incorporate *LaGrand*'s holdings into domestic criminal law. First, many courts correctly note that legislators in 1963 did not intend for the VCCR to alter domestic criminal procedure in the dramatic fashion that *LaGrand* suggests.³⁷ Second, there is a longstanding judicial tradition of deference to the relevant political branch where international and policy questions are implicated.³⁸

Related to this issue of agency deference, the United States State Department has taken differing positions on the issue of Article 36.³⁹ This variance may be attributed to the different strategic interests in cases where the State Department is a party to the litigation and those in which the Department offers an advisory opinion only.⁴⁰ Whatever the motivation for this shifting State Department position, it does compromise the courts' ability to render consistent decisions regarding Article 36.

Finally, two pragmatic factors may justify the courts' reluctance to address the *LaGrand* decision. Courts are only required to address the issues that are brought before them by the facts of a case and the advocates of each party. To the extent that lawyers may be ill-informed regarding the VCCR and the ICJ's interpretive authority over it, courts, in turn, do not confront the issue of incorporation as frequently as they otherwise would. Moreover, district court judges, with an eye toward insulating themselves from appellate review, may opt not to include the ICJ opinion, even as persuasive authority. Judges have little to gain by referring to the ICJ if they can dispose of a case on alternative

36. Regularly updated statistics from the Death Penalty Information Center are available at <http://www.deathpenaltyinfo.org>.

37. *Li*, 206 F.3d at 65-66 (citing Senate Committee on Foreign Relations Report from 1969 and the Committee's belief that “[t]he [Vienna] Convention does not change or affect present U.S. laws or practice.”); *but see Standt*, 153 F. Supp. 2d at 425-26 (emphasizing the plenary and committee debates on the VCCR and their emphasis upon *individual* rights).

38. *Li*, 206 F.3d at 63 (“Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.”) (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999)).

39. *Standt*, 153 F. Supp. 2d at 426 (noting State Department's communication of treaty obligations to state and local officials, but also official denial that the treaty creates individual rights).

40. *Id.* at 426 n.6.

grounds, and they may fear the attention and concern that an ICJ reference would elicit from an appellate court.⁴¹

C. *Despite Judicial Treatment of LaGrand to Date, the ICJ Decision Is Binding upon U.S. Courts*

Although U.S. courts have been silent regarding *LaGrand*, the ICJ opinion is the current authority on the interpretation of Article 36. It is binding upon domestic courts for a number of reasons. First, the United States consented to the interpretive authority of the ICJ when it signed and ratified the Optional Protocol of the Vienna Convention.⁴² Second, according to the American law principle of *stare decisis*,⁴³ the United States may neither re-litigate nor disregard the ICJ's determination of the scope and meaning of Article 36. Third, as a "Treaty," the VCCR constitutes the law of the land, binding upon the federal courts and states by virtue of the Supremacy Clause.⁴⁴ Thus, it is imperative for American courts to ensure uniform compliance with the VCCR as articulated by the ICJ, particularly with respect to Article 36.

III. A REMEDY COMPROMISE

The remainder of this Note focuses on the appropriate remedy for cases in which the government fails to comply with the requirements of Article 36. Notwithstanding the State Department's notification program,⁴⁵ state and federal officials continue to be inadequately informed regarding Article 36 protocol.⁴⁶ Consequently, courts will continue to confront Article 36 claims, at

41. I am indebted to Professor Pam Karlan for this more generous and practical reading of the courts after *LaGrand*.

42. *LaGrand*, 2001 I.C.J. 104 at ¶ 15, 42, 48.

43. For a discussion of the *stare decisis* doctrine generally, see *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

44. U.S. CONST. art. VI, § 2. For a more lengthy discussion of Article 36 in American courts see Linda Jane Springrose, *Strangers in a Strange Land: The Rights of Non-Citizens Under Article 36 of the Vienna Convention on Consular Relations*, 14 GEO. IMMIGR. L. J. 185 (1999).

45. The State Department posts on its web site "Basic Instructions" and "Detailed Instructions on the Treatment of Foreign Nationals," both of which are largely consistent with the mandates of Article 36 as articulated by the ICJ. See Basic Instructions and Detailed Instructions, available at <http://www.travel.state.gov>. Further, the Department "sends regular notices to state and local officials reminding them of their notification obligations under the Treaty." *Standt v. United States*, 153 F. Supp. 2d 417, 426 (S.D.N.Y. 2001) (citing 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, 599 & nn. 211-14 (1997)).

46. See generally Violation of the Rights of Foreign Nationals Under Sentence of Death, available at <http://www.ai.org> ("Despite sporadic advisory notices from the State Department, most state and local authorities remain ignorant of their Article 36 responsibilities. Gerald Arenberg, Executive Director of the National Association of Retired Police Chiefs, was recently quoted as stating that: 'In my 47 years in law enforcement, I

least in the foreseeable future, where the remedy is the only issue. Moreover, the remedy issue deserves particular attention because persistent non-compliance with Article 36 is not a pattern by which the United States wants to be recognized abroad.⁴⁷ The United States already confronts international objection to its death penalty practices, particularly with respect to juveniles. Moreover, in the current political climate, a perceived American hypocrisy regarding Article 36 creates a very real potential for international backlash. Thus, there is a new degree of urgency in the resolution of Article 36 legal issues.

Having noted that the ICJ's interpretation of Article 36 is binding upon the United States, the appropriate starting point for remedy analysis is the *LaGrand* opinion itself. In *LaGrand*, Germany did not seek "material reparation for [the] injury to itself and to the LaGrand brothers," but it did request "a general assurance of non-repetition."⁴⁸ Moreover, Germany sought "assurances . . . that in any future cases of detention or of criminal proceedings against German nationals, the United States will ensure in law and practice the *effective exercise of the rights under Article 36* of the Vienna Convention on Consular Relations, and that in particular in cases involving the death penalty, this requires the United States to provide effective *review* of and *remedies* for criminal convictions impaired by the violation of the rights under Article 36."⁴⁹ Despite the United States' apology for the execution of the LaGrand brothers in the absence of consular assistance, Germany sought more: It wanted a guarantee that compliance measures would improve, and that if they did not, criminal courts would account for the Article 36 violation.

In response to this request from Germany, the ICJ was vague—for better or worse. The Court noted that if the United States should fail to provide consular access in future cases of "prolonged detention" or "severe penalties," "an apology [will] not suffice."⁵⁰ Rather, if there were a conviction or sentence in such cases, the United States would be required to "review and [reconsider] the conviction and sentence by taking account of the violation of the rights set forth in the Convention."⁵¹ How exactly the United States should "take account" of the violation was left open. As the ICJ stated, "[T]his obligation can be carried out in a number of ways. The choice of means must be left to the United States."⁵² Thus, the ICJ rebuked the United States for its mere issuance of apologies in the wake of executions tainted by Article 36

have never seen anything from the State Department or FBI about this."').

47. See Erik G. Luna, *Beyond Breard*, 17 BERKELEY J. INT'L L. 147, 149 (1999) ("Individual American citizens are placed in harm's way when the government fails to adequately protect the rights of foreign citizens in the United States.").

48. *LaGrand*, 2001 I.C.J. 104 at ¶ 124, 125.

49. *Id.* at ¶ 125 (emphasis added) (internal quotation marks omitted).

50. *Id.*

51. *Id.*

52. *Id.*

violations, and yet the Court conceded that the precise steps for guaranteeing future effective remedies must be left to the United States.

The ICJ's invitation for the United States to craft a remedy for an Article 36 violation on its own initiative allows the United States to do so in a way that comports with the requirements of its own system, while also protecting the integrity of its reputation in international organizations. One can imagine the appropriate remedy as somewhere in the middle of two unacceptable extremes. The extreme ends of the remedy spectrum include: 1) exclusively diplomatic and political resolutions, such as an apology; and 2) a version of an exclusionary doctrine, where a violation triggers a remedy irrespective of a prejudice inquiry. For reasons discussed below, I maintain that these extremes are neither appropriate nor feasible. As such, I suggest a compromise that is consistent with the goals of the VCCR, the ICJ's present interpretation of Article 36, and the American criminal justice system.

A. *Extreme Ends of the Remedy Spectrum*

1. *The diplomatic apology.*

Before exploring the compromise model for an Article 36 remedy, one must understand why neither of the extremes is an option worth pursuing. With respect to the apology end of the spectrum—the status quo—both political and philosophical rationales justify the eradication of this remedy. The American justice system is predicated upon equal treatment before the law and consistency in legal decisions for similarly situated parties. This same concept should govern American legal actions in the context of international institutions, particularly where, as here, the United States has formalized its submission to the ICJ's jurisdiction. Moreover, as a matter of realpolitik, the United States cannot enforce Article 36 on behalf of its nationals—as it did in Iran in 1979 and Nicaragua in 1986—without recognizing that other signatory states will expect reciprocal treatment where their nationals are concerned.⁵³ Thus, in the interest of both institution-building and the principle of "*pacta sunt servanda*," which states that treaties must be observed,⁵⁴ the United States must demand more from its government than mere apologies for VCCR violations.

53. See *Standt*, 153 F. Supp. 2d at 427 ("Reciprocity is the foundation of international law.") (citing *United States v. Superville*, 40 F. Supp. 2d 672, 676 & n.3 (D.V.I. 1999)).

54. *Superville*, 40 F. Supp. 2d at 676.

2. *The exclusionary model alternative.*

Perhaps, then, the appropriate remedy lies at the other end of the spectrum—something closer to an exclusionary rule for Article 36 violations. Intuitively, this holds some appeal. The Supreme Court has determined that the purpose of the exclusionary rule is not to *compensate* the victim of a Fourth Amendment violation, but rather to *deter* the misconduct of law enforcement officers: “[T]he purpose of the exclusionary rule is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”⁵⁵ Further, the *Mapp* Court noted the practical dangers of not creating a remedy for the violation of fundamental rights: “Nothing can destroy a government more quickly than its failure to observe its own laws.”⁵⁶ As Justice Brandeis had warned earlier, “Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”⁵⁷

These principles resonate in the context of Article 36 violations. Just as the United States should fear the reaction of its own citizens when it disregards constitutional guarantees, the United States should also fear the reaction of other nations when it fails to comply with its treaty obligations. In addition, the United States may be seen as the “teacher” to which Justice Brandeis referred in the international arena, and it should not take that role lightly. When the world’s leading democracy opts to selectively honor its obligations under international law, it erodes its reputation as the democratic model in the eyes of the world.

However, a pure exclusionary rule as applied in American courts under *Mapp* is not necessarily the appropriate remedy in cases of American violations of Article 36. This is true for a number of reasons. First, the *Mapp* Court, which extended the federal exclusionary rule to apply to the states, rendered its decision nearly sixty years after the Supreme Court first considered the question of judicial remedies for unreasonable searches and seizures.⁵⁸ In

55. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

56. *Mapp*, 367 U.S. at 659.

57. *Id.* (citing *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

58. See *Mapp v. Ohio*, 367 U.S. 643 (1961) (overruling *Wolf v. Colorado* on the basis of changed factual circumstances among the states; now all states must enforce the exclusionary rule with regard to unreasonable searches and seizures); *Wolf v. Colorado*, 338 U.S. 25, 30 (1949) (holding that states may comply with the Due Process Clause by means other than the *Weeks* exclusionary rule if consistent and effective); *Weeks v. United States*, 232 U.S. 383 (1914) (holding that the exclusionary rule pertains to federal agents); *Adams v. New York*, 192 U.S. 585, 594 (1904) (holding that the “courts [should] not stop to inquire as to the means by which the evidence was obtained”).

contrast, the VCCR was ratified in 1963; litigation strategies based on Article 36 violations are still quite novel;⁵⁹ and the ICJ decision defining the scope of Article 36 in *LaGrand* is less than a year old. Thus, American courts lack Article 36 experience and data comparable to that which the Supreme Court had at its disposal when it rendered its monumental decision in *Mapp*. Enforcing any type of exclusionary rule in the Article 36 context would be a drastic departure from current practice, and it is a course of action better pursued, if ever, with greater knowledge and judicial experience.

Second—and related to the first point regarding the newness of Article 36 claims—is the gravity of enforcing an exclusionary rule in the Article 36 context. As the Court noted in *Rakas*, “[E]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights.”⁶⁰ Likely bearing this social cost in mind, the Court was careful not to extend the exclusionary rule until it had been empirically shown that unlawful searches and seizures were a widespread phenomenon, effectively leaving no deterrent option other than the deprivation of evidence. American courts should be similarly cautious before implementing the exclusionary model in Article 36 cases.

3. *The middle of the remedy spectrum?*

For the reasons discussed above, courts need to find an alternative remedy to the two extreme options of apology and exclusion. I suggest that when the government deprives foreign nationals of their right to consular access, courts should entertain civil rights claims made by the foreign defendants under 42 U.S.C. § 1983.⁶¹ This approach has several benefits, enabling a compromise between the advocates of a diplomatic remedy for Article 36 violations and those arguing for more extreme remedies such as exclusion.

First, a § 1983 action is appropriate in cases where the government deprives a foreign national of his right to consular access because it serves the purposes for which the statute was designed. A foreign national who has suffered as the result of being deprived of consular access may wish to hold the state authorities accountable. However, the Eleventh Amendment bars such a

59. See Jean Guccione, *New Weapon in Defense: Foreign Consulates and Citizens of Other Countries Detained in the U.S. Can Seek Help from Their Homelands, but the Results Have Been Mixed*, L.A. TIMES, Nov. 16, 2001 (noting that defense attorney Sandra Babcock made prominent the VCCR violation argument in a 1996 death penalty appeal).

60. *Rakas v. Illinois*, 439 U.S. 128, 137 (1978).

61. See, e.g., *Standt*, 153 F. Supp. 2d at 427-28 (holding that the VCCR provides a private cause of action for individuals and that as such a § 1983 claim should lie for the defendant). But cf. *Breard v. Greene*, 523 U.S. 371 (1998) (rejecting a § 1983 claim by the Consul General of Paraguay because he was not a “person within the jurisdiction” of the United States within the meaning of § 1983); *Faulder v. Johnson*, 178 F.3d 741, 742 (5th Cir. 1999) (rejecting defendant petitioner’s request for § 1983 injunctive relief where the § 1983 action would effectively circumvent habeas procedure).

defendant from suing the state directly for its failure to comply with VCCR treaty obligations.⁶²

The fact that Article 36 rights are not equivalent to fundamental or Constitutional rights—an argument courts often use to dismiss the remedy of exclusion in such cases—does not pertain in the § 1983 context. Courts have recognized that § 1983 “provides a cause of action to redress the deprivation ‘of any rights . . . secured by the Constitution and the laws’ of the United States, not only fundamental or Constitutional rights.”⁶³

Moreover, § 1983 actions are consistent with the *LaGrand* opinion to the extent that they do not require a showing of prejudice, but rather one of injury, before an action may be possible.⁶⁴ While “the prejudice requirement was developed in the criminal and immigration contexts, . . . as in other § 1983 contexts, a plaintiff bringing suit under the VCCR need only show that the violation injured him.”⁶⁵

Prejudice analysis may play an important role in judicial calculation of damages for an Article 36 violation. At that stage, the extent to which consular access would have changed the outcome of a defendant’s case becomes critical, and courts will need a mechanism for categorizing violations as either harmless or outcome-determinative.⁶⁶ While no violation is harmless in a pure sense, for the signatory state and the foreign national are wronged whenever treaty requirements are not met, factual differences may render some cases more appropriate for § 1983 relief than others. Specifically, in a case where consular notification is only minimally delayed, a damage award seems less likely than one in which the defendant is executed never having had the benefit of consular advice.

Ironically, the *LaGrand* case may not best demonstrate how an Article 36 violation can fundamentally compromise the quality of a foreign national’s defense. As the United States pointed out before the ICJ, the *LaGrand* brothers, while technically German nationals, had lived in the United States since early childhood and had returned to Germany only once for a period of six months.⁶⁷ They spoke no German, but rather only English, and they “appeared in all respects to be native citizens of the United States.”⁶⁸

In contrast, the current death penalty appeal on behalf of Gerardo Valdez, a Mexican citizen, highlights how helpful consular access can be to a foreign

62. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

63. *Standt*, 153 F. Supp. 2d at 428-29 (quoting *Blessing v. Freestone*, 520 U.S. 329, 340 (1997)).

64. *LaGrand*, 2001 I.C.J. 104 at ¶ 74.

65. *Standt*, 153 F. Supp. 2d at 430.

66. See generally *Strickland v. Washington*, 466 U.S. 668 (1984).

67. *LaGrand*, 2001 I.C.J. 104 at ¶ 13.

68. *Id.*

national uninformed about the American criminal process.⁶⁹ In Valdez's case, Oklahoma officials neglected to notify Valdez of his Article 36 rights and the Mexican consulate of Valdez's arrest and detainment; the consulate did not discover Valdez's situation until two months before his scheduled execution date. Valdez presents the quintessential case where consular assistance is outcome-determinative. Valdez speaks only broken English; he clearly misunderstood the concept of waiver based upon statements to the arresting police; and immediately upon notification of Valdez's status, the Mexican government formed a legal team that has been appealing his case since April 2001.⁷⁰ A comparison of these two cases demonstrates that while prejudice may not be essential to the threshold determination of an Article 36 *violation*, a prejudice inquiry is paramount where a court seeks to determine the appropriate remedy, even in the civil damage context.

There is, of course, the argument that a civil damages remedy is an insulting suggestion given the binding nature of the VCCR and the potentially decisive impact consular assistance may have in any given case. Yet the remedy is not a vacuous one, for it may act as a deterrent in the future. If the government learns that continued Article 36 violations generate expensive litigation and damages awards, even if only in the form of attorneys' fees, then the government will have a clear incentive to improve its Article 36 compliance. Moreover, since § 1983 claims often entail qualified immunity, such suits may facilitate the announcement of new rights—rights that can be more fully vindicated by future defendants whose Article 36 rights are violated.⁷¹ Clearly, these justifications offer little comfort to Gerardo Valdez and those in his position, for he seeks restoration of his rights where his life is at stake rather than principles of international reciprocity. However, the possibility of a remedy under § 1983 and other more revolutionary litigation strategies are not mutually exclusive. Rather, civil rights damages claims may offer some substantive relief unless and until American courts alter their treatment of Article 36, by either applying the exclusionary doctrine in appropriate cases or preventing procedural default in the habeas context.

CONCLUSION

In this Note, I have attempted to demonstrate both the importance of the ICJ's decision in *LaGrand* and the bases upon which *LaGrand* should bind American courts deciding Article 36 cases. Moreover, I have evaluated federal cases following *LaGrand* in an attempt to determine what the American

69. See generally United States of America: A Time for Action—Protecting the consular rights of foreign nationals facing the death penalty, at <http://www.ai.org> (AI Index: AMR 51/106/2001).

70. *Id.*

71. See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999).

judicial response to the ICJ opinion may be in the future. I have argued that these courts have erred in their treatment of Article 36 post-*LaGrand*, and that courts need to consider the question of an appropriate remedy for Article 36 violations. Finally, I have advocated that rather than pursuing the extreme measures of either mere apology or exclusion, foreign nationals should be able to vindicate their Article 36 rights by pursuing a claim under § 1983. This type of remedy, while perhaps not ideal in the long run, creates an immediate incentive for better compliance with Article 36, and it honors the sentiments of the ICJ decision in *LaGrand*. In addition, nothing about this civil remedy precludes defense counsel from simultaneously pursuing more aggressive, and therefore less obtainable, remedies such as exclusion or dismissal.

Greater protection for foreign nationals in the criminal system is a hard sell today. As the United States continues its war upon terrorism, there is the danger that xenophobia will infect not only our society, but also our legal system. The government and the courts bear a special responsibility to ensure that such prejudice does not prevail. As Justice Brandeis noted, the government "teaches the whole people by example."⁷² In this case, the lesson should be that when the United States commits itself to an international treaty such as the VCCR, it vows to ensure compliance with the treaty at all levels of government. Now, more than ever, if the government "becomes a lawbreaker . . . it invites anarchy."⁷³

72. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (citing *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

73. *Id.*