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# Beyond Breard

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## I.
## INTRODUCTION

Angel Francisco Breard was no angel. Seven years after coming to the United States on a student visa,[1] the Paraguayan citizen was arrested and tried for the murder of Ruth Dickie. Forensic evidence at the scene of the crime undeniably pointed towards Breard's guilt.[2] The most damning evidence, however, came from the defendant's own mouth. On the stand, Breard admitted that he had armed himself on the night of the crime because he "wanted to use the knife to force a woman to have sex with [him]."[3] He engaged Dickie in a conversation on the street and followed her home. Breard then forced his way into the woman's apartment and brutally murdered her.[4]

Breard's only defense at trial was that he acted under a Satanic curse placed upon him by his former father-in-law.[5] As one might expect, the jury spurned this defense and convicted Breard on all counts. During the subsequent penalty phase of the trial, the twelve-person panel learned that the defendant had previously attempted to abduct one woman at knifepoint and had sexually assaulted another female victim. Based on his "future dangerousness" to society and the "vileness" of the murder, Breard was sentenced to death.[6] After numerous state and federal appeals, the thirty-two year-old convicted murderer was executed by lethal injection on April 14, 1998.[7]

Without more, the *Breard* case was destined to be a mere footnote in the annals of death penalty jurisprudence. The actions of defense counsel, the court's rulings, and the macabre evidence were largely unremarkable for a capi-

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1. *See* Paraguay v. Allen, 949 F. Supp. 1269, 1271 (E.D. Va. 1996).
2. *See* Breard v. Greene, 118 S. Ct. 1352, 1353 (1998) (holding that "the State presented overwhelming evidence of guilt"). Breard's semen was found on Dickie's pubic hair and inner thigh; moreover, the hairs found on the victim's body and clutched in her bloodstained hands belonged to Breard. *See id.* at 1353.
3. Breard v. Commonwealth, 445 S.E.2d 670, 674 (Va. 1994).
4. *Id.*
5. *See* Breard v. Greene, 118 S. Ct. at 1353.
6. Breard v. Commonwealth, 445 S.E. 2d at 673, 680.
7. *See* Norman Kempster, *Despite Warnings, Virginia Executes Paraguayan Citizen*, L.A. TIMES, Apr. 15, 1998, at A6.

tal case. No palatable claim of actual or legal innocence could be made. Angel Breard fit squarely within the definition of individuals who merit the ultimate penalty.

What set this case apart was Breard's citizenship. As a native of Paraguay living in the United States, Breard was guaranteed various rights under the Vienna Convention on Consular Relations.[8] Pursuant to this treaty, a foreign citizen detained abroad must be advised of the right to contact his[9] embassy. Likewise, consuls of the foreign state[10] have the right to visit, converse, and correspond with the detainee and to arrange for his legal representation.[11] As described by one senior U.S. State Department official, these rights serve as "a diplomatic Miranda warning."[12]

But in this case, State law enforcement neither informed Breard of his rights under the Vienna Convention nor notified Paraguay of his detention. In fact, the Paraguayan government only found out about Breard's predicament from members of his family – three years *after* he had entered death row.[13] Lawyers for Breard and Paraguay attacked the conviction and sentence in a series of federal appeals. But for the treaty violation, they argued, foreign officials would have advised Breard to accept a plea bargain sparing his life.[14] One federal judge acknowledged that the death sentence may have been "a tragic consequence of Virginia's failure to abide by the law," and was "disenchanted" by the State's refusal "to embrace and abide by the [treaty] principles."[15] Nonetheless, the federal judiciary rejected Breard's claim for failing to raise it in the State proceedings.

With the clock ticking, Breard petitioned the U.S. Supreme Court for a stay of execution. In a per curiam opinion issued hours before the execution, the Supreme Court refused to intervene. The Supreme Court agreed with the lower courts' decisions that, by not asserting his Vienna Convention claim in State court, Breard defaulted his opportunity to raise the issue in federal habeas

8. *See, e.g.*, Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 500 U.N.T.S. 95 (entered into force with respect to the United States of America, Dec. 24, 1969) [hereinafter Vienna Convention].

9. Because the Convention refers to the detainee as "him," we have adopted similar pronoun usage.

10. We employ the following conventions throughout this article: "State" refers to one of the fifty United States while "state" designates a foreign nation.

11. *See infra* Part IV.C.3.

12. *All Things Considered* (N.P.R. Radio broadcast, Apr. 4, 1998) (statement of Kathy Peterson, Managing Director for Overseas Citizens Services and Crisis Management, U.S. State Department), *available in* Westlaw, 1998 WL 3644532.

13. *See* Anne-Marie Slaughter, *On a Foreign Death Row*, WASH. POST, Apr. 14, 1998, at A15 ("The Paraguayan government found out from family members three years later that he was in a U.S. prison awaiting execution"). *See also* Paraguay v. Allen, 134 F.3d 622, 625 (4th Cir. 1998).

14. *See* Breard v. Greene, 118 S. Ct. at 1355, 1357 (Breyer, J., dissenting)("Virginia's violation of the convention 'prejudiced' him by isolating him at a critical moment from Consular Officials who might have advised him to try to avoid the death penalty by pleading guilty"); Paraguay v. Allen, 949 F. Supp. at 1273.

15. Paraguay v. Allen, 949 F. Supp. at 1273. *See also* Paraguay v. Allen, 134 F.3d at 629 ("We share the district court's 'disenchantment' with the Commonwealth's conceded past violation of Paraguay's treaty rights").

corpus. In *dicta*, the Supreme Court also approved a "harmless error" standard for violations of the Vienna Convention and questioned the viability of Breard's claim under that standard.[16] Sidestepping sensitive political questions, the Court, despite acknowledging the treaty violation, could find no legal reason to intervene and declared that "[i]f the Governor [of Virginia] wishes to wait . . . that is his prerogative. But nothing in our existing case law allows us to make that choice for him."[17]

Minutes after the decision was issued, Governor Gilmore rejected the Supreme Court's invitation to give diplomacy a chance and refused to postpone Breard's meeting with his maker. As governor of Virginia, Gilmore declared, "my first duty is to ensure that those who reside within our borders . . . may conduct their lives free from the fear of crime."[18] About a half-hour after the Governor's statement, the entire case was mooted by lethal injection.[19]

In the wake of the Supreme Court's only opinion addressing the Vienna Convention, many scholars and civil libertarians have assailed the *Breard* decision as unprincipled and unprecedented. The legally correct decision, some have argued, would have required the reversal of Angel Breard's conviction and the formulation of a *Miranda*-type exclusionary rule for violations of international rights. " '[H]ow can you get local law enforcement to shape up and do right unless you start overturning convictions?,' " Professor Detlev Vagts rhetorically questioned.[20]

As a political matter, the opponents of *Breard* appear correct. 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. This concern is larger than one case and is not spurred by sympathy for the likes of Angel Breard. Would the Vienna Convention rights have made a difference to Angel Breard? Probably not. But will these same guarantees make a difference to Americans detained abroad? You can bet their lives on it.[21]

Where the detractors go wrong, however, is in conflating the politically appropriate resolution with a legally sensible and consistent decision. *Breard* was neither unprecedented nor illogical; it was firmly grounded in the Court's international law and criminal procedure doctrines. This is not to say that the opinion represents a normatively preferred posture for the judiciary. There is, we admit, much to dislike about *Breard*. But as a descriptive matter, a question of consistency with precedents from the past, the decision was preordained. In

16. Breard v. Greene, 118 S. Ct. at 1355-56 (citing Arizona v. Fulminante, 499 U.S. 279 (1991)).

17. *Id.* at 1356.

18. Brooke A. Masters & Joan Biskupic, *Killer Executed Despite Pleas*, WASH. POST, Apr. 15, 1998, at B1.

19. *Id.*

20. Noah Isackson, *Polish Man's Death Penalty Case Challenged Over Foreigners' Rights*, HOUSTON CHRON., Dec. 20, 1998, at A8.

21. In the words of Professor Harold Hongju Koh, "What goes around comes around." Masters & Biskupic, *supra* note 18.

fact, it would have been a spectacular change of course for the Court to interfere with Breard's conviction and sentence.

So although our sympathies lie with the anti-*Breard* scholars, we recognize that this battle was lost well before it began. The Court would not, did not, and will not break from its jurisprudence and elevate treaty rights to the status of constitutional liberties. If change is to come, it will be by political action rather than judicial activism.

In Part I, we examine the source, status, and judicial remedies of the Vienna Convention. In Part II, we place these treatments within the broader context of international individual rights claims in general. In this context, we conclude that the treatment of consular rights claims is consistent with American courts' international law jurisprudence of the last thirty years. In Part III, we place Vienna Convention claims within the narrower context of criminal procedure doctrine and again demonstrate that the treatment of such claims is entirely consistent with prior case law. Despite our general rejection of scholarly criticism of *Breard*-qua-judicial precedent, Part IV makes the claim that the decision poses grave dangers for individual American citizens. Finally, Part V offers some modest changes that could ease these effects without re-working the American system of criminal justice.

## II.
## JUDICIAL DOCTRINE ON THE VIENNA CONVENTION

Despite the important policy considerations inherent in cases involving foreign nationals, the issue in *Breard* is a legal one. Like all case-based disputes, there are rights, obligations, and remedies that courts must consider. As this section shows, jurists almost universally agree on the basics. The right to consular notification is seldom questioned, its violations are easily identified and often admitted, and the remedies fit squarely within traditional American international law and criminal procedure doctrines. The scholars' cries for courts to reinterpret these doctrines, or to reassign them to a higher place in American law, have so far gone unheeded. In our opinion, the courts' rejections of these "reinterpretations" are legally correct and, as we demonstrate more fully in Parts II and III, consistent with the Court's jurisprudence of the last thirty years.

### *A. The Right*

The enforcement of consular rights has been and is likely to remain problematic. Widespread ignorance of the right's existence at the State and local level,[22] haphazard enforcement by federal actors[23] and apparent confusion in

22. The State Department has often blamed violations of consular rights on the ignorance of the arresting parties. According to Peter Romero, Acting Assistant Secretary of State for the Western Hemisphere, "If you analyze some of these cases, you find that it was largely due to ignorance on the part of the arresting officials as to this obligation . . . ." Verbatim Transcript of Peter Romero's Briefing on U.S. relations with Latin America, Jan. 12, 1999, 1999 WL 11464, at *9 (F.D.C.H.). *See also* Breard v. Netherlands, 949 F. Supp. 1255-61; Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998) (E.D. Va. 1996); LaGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998); Ohio v.

some judicial bodies[24] are but a few of the plaguing deficiencies. Yet the problems of enforcement are not caused by confusion over the specifics of the right itself.

Put simply, a detained foreign national has the right under federal and international law to contact and meet with his consulate. This right is most specifically embodied in Article 36 of the Vienna Convention on Consular Relations:

> (a) Consular officials shall be free to communicate with nationals of [their home country] and to have access to them. [Foreign] Nationals . . . shall have the same freedom to communicate with and access to consular officers of [their home country].
>
> (b) If [the foreign national] so requests, the competent authorities of the [arresting] state shall, without delay, inform the consular post if . . . a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner . . . The [arresting] authorities shall inform the person concerned without delay of his rights under this subparagraph . . . ."[25]

The Vienna Convention makes clear that the right to access implicates a corollary obligation: the arresting state has the affirmative *duty* to inform the detainee of his consular rights. As in *Miranda,*[26] the detainee has the option of exercising these rights premised on the arresting authorities' duty to inform. Federal law enforcement should be well aware of this duty. The State Department has issued numerous guidelines directing that "[w]hen foreign nationals are arrested or detained, they *must* be advised of the right to have their consular officials notified."[27]

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Loza, No. CA 96-10-214, 1997 WL 634348 (Ohio Ct. App. 1997); Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996); in each of these State cases, the violation was committed by State actors allegedly ignorant of the right's existence.

23. Many cases involving violations of consular rights implicate federal agents. *See, e.g.,* United States v. Ademaj, 170 F.3d 58 (1st Cir. 1999); United States v. Esparza-Ponce, 7 F. Supp. 2d 1084 (S.D. Cal. 1998); Waldron v. INS, 994 F.2d 71 (2d Cir. 1993); United States v. $69,530.00, 22 F. Supp. 2d 593 (2d Cir. 1998); United States v. Alvarado-Torres, 45 F. Supp. 2d 986 (S.D. Cal. 1999); United States v. Maldonado-Vences, 168 F.3d 484, 1998 WL 911711 (4th Cir. 1998); United States v. Salas, 168 F.3d 484, 1998 WL 911731 (4th Cir. 1999); United States v. Kevin, No. 97CR. 763JGK, 1999 WL 194749 (S.D.N.Y. 1999); in each of the federal cases, the violation was committed by federal authorities allegedly ignorant of the rights' existence.

24. For instance, some courts have taken the untenable position that rights under the Vienna Convention are not enforceable by individuals. *See* Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997). *See also* Ohio v. Loza, 1997 WL 634348 (Ohio Ct. App. 1997) (State court holding the same). Other courts continue to mention the issue, but none since *Breard* have attempted to rule that individuals have no standing to raise these claims. *See* United States v. Salamah, __ F. Supp. 2d __, 1999 WL 418035, at *30 (S.D.N.Y. 1999) (holding "as a preliminary matter, it is unclear whether Abouhalima even has standing to assert a private right of action for a violation of the Convention. As a general rule, treaties of the United States do not create rights that are privately enforceable in courts . . . .").

25. The Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1)(b), 21 U.S.T. 77, 101.

26. As noted at the beginning of this article, many defendants have attempted to link Vienna Convention rights with the protections offered under *Miranda. See, e.g.,* United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1253 (D. Utah 1999)("Defendant argues that the Convention provisions are analogous to Miranda rights . . . .").

27. Consular Notification and Access, January 1988: Basic Instructions: Summary of Requirements Pertaining to Foreign Nationals <http://www.state.gov./www/global/legal_affairs/ca_notification/part1.html>. This duty is considered to be without exception: *"in all cases, the foreign*

The duty to inform, therefore, is akin to the *Miranda* prophylactic against coercive sequestration. Under *Miranda*, arresting officials are directed to inform detainees of their applicable rights prior to interrogation.[28] Similarly, the Vienna Convention's duty to inform must be carried out in a timely manner to protect the accused *ex ante*. But in contrast to *Miranda*, Article 36(b) of the Vienna Convention only requires that notification to consul and detainee be given "*without delay*." Despite State Department declarations that "no deliberate delay" is permitted, notification may nonetheless "occur as soon as reasonably possible under the circumstances." So, although withholding notification after detainee identification constitutes a clear violation of individual treaty guarantees and the concomitant duties of the arresting state, Vienna Convention rights apparently lack the procedural urgency of *Miranda* warnings.

Timing is important in both contexts, as detainees are presumptively unaware of the existence or scope of their rights. It does little good for an individual to have assertable rights if they are unknown at crucial moments. In *Miranda* cases, it is essential that a defendant understand the right to remain silent before being "coerced" into confession. In Vienna Convention cases, defendants often claim that had they known of their right to speak to their consulate, they would have chosen *not* to cooperate with arresting authorities.[29]

Despite these substantive similarities, their legal and practical distinctions are far more important. For instance, the Vienna Convention allows the arresting state twenty-four to seventy-two hours to contact the consulate *even after* the detainee has requested notification.[30] This temporal latitude seriously undercuts claims that consular presence is a prerequisite to continued interrogation. Second, there is no evidence that other signatory nations intended to include a right to "silence," much less one that is implicated by failure to inform a detainee of

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*national must be told of the right of consular notification and access.*" *Id.* at Part 2: Detailed Instructions (emphasis in original).

28. Miranda v. Arizona, 384 U.S. 436 (1966) (requiring express waiver of right to remain silent and right to counsel prior to custodial interrogation). *See also* Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Rights: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 612 (1997); William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 237, 309-11 (1998).

29. For instance, William Aceves recounts the tale of Jose Loza. Loza claims he confessed to a crime because he feared for the safety of his family. *See* William J. Aceves, *Application of the Vienna Convention on Consular Relations*, 92 AM. J. INT'L L. 517, 523 (1998). *See also* Breard v. Netherlands, 949 F. Supp. at 1264 (claiming that unfamiliarity with the judicial system played a role in deciding to reject a plea-bargain). The Court in *Miranda* was concerned with more than just a defendant's failure to know of the right's existence. The Court was concerned with the coercive power that interrogators could use over individuals who are unfamiliar with and afraid of the legal process. The Court was concerned with cases where "the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." Miranda, 384 U.S. at 457. The notification of the right to silence and the right to presence of counsel was a direct attempt to control situations of unfamiliarity and fear. The *Miranda* "warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." *Id.* at 469.

30. The State Department has interpreted the Vienna Convention to require that "within 24 hours and certainly within 72 hours" notification must be given. Consular Notification and Access, January 1988: Basic Instructions: Detailed Instruction on the Treatment of Foreign Nationals<http://www.state.gov./www/global/legal_affairs/ca notification/part2.html>.

his consular rights. These distinctions aside, however, the most important difference between consular and *Miranda* rights is their sources. *Miranda* rights are attributed directly to the Constitution, while consular rights are derived from a treaty. This difference in sources, as we will see, makes all the difference to judicial construction of otherwise analogous rights.

### *B. The Source of Consular Rights in the United States*

Despite the inclusion of consular rights in various federal regulations[31] and their possible status as customary international law,[32] the Convention remains the primary source in federal court cases. Originally promulgated in 1963,[33] the Vienna Convention was not ratified until 1969.[34] The six-year delay in ratification stemmed from American concerns that the Convention did not provide sufficient guarantees of consular rights. According to one Senator, "the delay was largely due to a . . . basic characteristic of the Vienna Convention. It embodies those standards upon which the 92 nations could agree. In many ways, these are

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31. *See* 28 C.F.R. § 50.5 (1999) (regulations directing Department of Justice officials to recognize and honor the commitments of the Vienna Convention). In pertinent part, the regulations read:

> (1) In every case in which a foreign national is arrested the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given. . . .
>
> (2) In all cases . . . the local office of the Federal Bureau of Investigations or the local Marshall's office . . . shall inform the nearest U.S. Attorney of the arrest and of the arrested person's wishes regarding consular notification.
>
> (3) The U.S. Attorney shall then notify the appropriate consul . . . .

*See also* 8 C.F.R. § 236.1(e) (1999) (regulations of the Immigration and Naturalization Service, declaring, "[e]very detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States").

32. The State Department believes that historically consular access and notification were customary international law, *see* Consular Notification and Access, January 1998, Part 5: Legal Materials <http://www.state.gov./www/global/legal_affairs/ca_notification/part3.html> ("[t]he performance of such consular functions was originally a subject of customary international law"), and continues to believe that customary international law embodies the same rights as those in the Vienna Convention. *See id.* ("while these obligations are in part matters of 'customary international law,' most of them are set forth in the Vienna Convention"). The State Department has also declared that, "the United States still looks to customary international law as a basis for insisting upon adherence to the right of consular notification, even in the case of countries not a party to the VCCR or any relevant bilateral agreement." *Id.* Because of the Vienna Convention, the United States now asserts that the right to notification is now embodied in customary international law:

> While the field of consular relations is now largely occupied by the treaties discussed above, the United States still looks to customary international law as a basis for insisting upon adherence to the right of consular notification, even in the case of countries not party to the VCCR or any relevant bilateral agreement. Consular notification is in our view a universally accepted, basic obligation that should be extended even to foreign nationals who do not benefit from the VCCR or from any other applicable bilateral agreement. Thus, in all cases, the minimum requirements are to notify a foreign national who is arrested or detained that the national's consular officials may be notified upon request; to so notify consular officials if requested; and to permit consular officials to provide consular assistance if they wish to do so.

<http://www.state.gov/www/global/legal_affairs/ca_notification/part5.html>.

33. The United Nations Conference on Consular Relations, 1963 U.N.Y.B. 510, U.N. Sales No. 64.I.1. *See also* Luke T. Lee, *Vienna Convention on Consular Relations* 25 GA. J. INT'L & COMP. L. 16-17 (1966).

34. *See* 115 Cong. Rec. S30997 (daily ed. Oct. 22, 1969).

minimum standards—not as high as those embodied in our bilateral treaties."[35] Nonetheless, national lawmakers eventually recognized that the Vienna Convention "constitutes an important contribution to the development and codification of international law and should contribute to the orderly and effective conduct of consular relations between states.[36] Today, over 165 countries are signatories.[37]

The ratification of the Vienna Convention has two important legal ramifications. First, the duty of the arresting state to inform the detainee of his rights became part of formalized law. Although prior customary international law embodied many of the rights included in the Vienna Convention, there is little evidence that the duty to inform was among them.[38] The second and more important consequence was the ability to force State compliance with consular rights in federal courts. Pursuant to the Supremacy Clause, treaty-based rights are superior to State laws or policies and even trump earlier inconsistent federal legislation.[39] As noted by the State Department in 1969, "to the extent that there are conflicts in Federal legislation or State laws, the Vienna Convention" governs.[40] The adoption of the Vienna Convention, therefore, has formally entrenched consular rights as a part of federal law, co-equal with federal statutes and regulations and supreme to State law.[41]

So consular notification is a "right" under federal law, and the failure of a State official to notify a detainee violates federal law. But who brings the claim? The aggrieved right-holder seems to be the obvious answer. Yet the

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35. *See id.* at 16 (Statement of Senator Fulbright).

36. EXEC. DOC. 91-E., at VII (1969) (Statement of Secretary of State William Rogers).

37. According to the United States brief before the ICJ in the *Breard* case:

> Roughly 165 States are parties to the Vienna Convention. Paraguay has not identified one that provides such a status quo ante remedy of vacating a criminal conviction for a failure of consular notification. Neither has Paraguay identified any country that has an established judicial remedy whereby a foreign government can seek to undo a conviction in its domestic courts based on a failure of notification.

International Court of Justice Verbatim Record, Vienna Convention on Consular Relations (Para. v. U.S.), Concerning the Application of the Vienna Convention on Consular Relations (Paraguay v. U.S.), 1998 Hearing on Request for Provisional Measures, I.C.J. DOC. CR 98/7, at 25-26 (Apr. 7. 1998). *See also* MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL: STATUS AS AT DECEMBER 31, 1997, U.N. DOC. ST/LEG/SER.E/15, AT 54-55, U.N. SALES NO. E.97.V5 (1998) (hereinafter MULTILATERAL TREATIES).

38. GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW, 836-37(1942). In response to a request from the Italian consulate concerning the United States' failure to notify it of the detention of an Italian citizen, the United States responded that "while it is not the general practice to notify the consular representatives of a foreigner who is placed under arrest, such notification would promptly be made upon request therefor by the arrested person." *Id.* at 837. This response, made in the early 20th century, reveals that at that time, there was no right to be notified, much less a right to be informed.

39. U.S. CONST. art. VI, cl. 2. "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 (1987).

40. S. EXEC. REP. Nos. 91-99, at 2, 5 (appendix) (Statement by Deputy Legal Advisor J. Edward Lyerly).

41. *But see* Carlos Manuel Vasquez, *Breard, Printz and the Treaty Power*, 70 COLO. L. REV. 1361 (1999) (pointing out that the anticommandeering principle in constitutional law may prohibit the use of treaties to create affirmative obligations on State officers, including duties such as those contained in the Vienna Convention).

ability of an individual to bring a treaty-based claim in federal court is constrained by several judicial doctrines. These doctrines contain a strong presumption against allowing individual enforcement of treaty-based norms. Specifically, an individual's ability to bring a claim is subject to two stringent considerations.[42] First, the treaty must not require implementing legislation to take effect. The obligations of the United States as a signatory must be couched in mandatory and immediate terms, rather than forward-looking promises. Where such language is present, the courts conclude the treaty is "in force" domestically and may automatically vest rights in interested parties.[43] The second limit concerns the enumeration of interested parties. Under international law, there is a basic assumption that treaties do not confer individual rights. Rather, they are intended solely for the benefit of the signatory nations because, "treaties are contracts between sovereigns."[44] Generally, courts will only allow individuals to bring claims where the language of the treaty specifically and directly evinces an intent to "confer[ ] rights on individuals."[45] It is only in those rare situations where both prongs are met that courts consider treaties "self-executing" and will allow individuals to bring claims under them.[46]

In the case of the Vienna Convention, the evidence is overwhelming that its obligations require no implementing domestic legislation. According to a White House official in 1969, the Convention is "entirely self-executive [*sic*] and does not require any implementing or complementing legislation."[47] Moreover, most courts have not even considered the question, apparently assuming the answer to be self-evident. Those that have explicitly responded to this issue have concluded that no implementing legislation was intended or required.[48]

The seemingly more difficult question is whether the treaty confers enforceable rights on individuals. As noted before, courts have generally concluded that "claims for violation of an international obligation may be made

42. *See* Kadish, *supra* note 28, at 586; More v. Intelcom Support Servs., Inc. 960 F.2d 466, 469 (5th Cir. 1992).

43. *See* Whitney v. Robertson, 124 U.S. 190 (1888):

> When the [treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect . . . . If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.

*Id.* at 194. *See generally* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129 (1999).

44. Tabion v. Mufti, 73 F.3d 535, 537 (4th Cir. 1996).

45. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989).

46. *See, e.g.*, Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992) (noting "intent to provide a private right of action" or to provide "a privately enforceable cause of action"); United States v. Davis, 767 F.2d 1025, 1030 n.9 (2nd Cir. 1985) (noting intent to confer "judicially enforceable rights on individuals"); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809 (Bork, J., concurring) (noting "inten[t] to be judicially enforceable at the behest of individuals" and "inten[t] to give individuals the right to enforce [the treaty] in municipal courts"); United States v. Noriega, 808 F. Supp. 791, 799 (S.D. Fla. 1992) (noting "inten[t] to impart on an individual the right to bring a legal action to force compliance with the treaty"). *See generally* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

47. S. EXEC. REP. NO. 91-9, at 2, 5 (1969) (appendix) (statement by Deputy Legal Advisor J. Edward Lyerly).

48. *But see* Paraguay v. Allen, 949 F. Supp. 1269, 1274 (E.D. Va. 1996).

only by the state to whom the obligation is owed."[49] There is no individual standing "absent protest or objection by the offended sovereign."[50] The central question in interpreting the Vienna Convention, then, is whether Article 36 was intended to confer rights on individuals or merely protect the rights of consuls for the benefit of their sovereigns.

The United States has expressed its belief that the treaty bestows individual rights; the State Department's manual on the treatment of foreign nationals, for example, explicitly asserts that arresting officials *must* inform detainees of their rights in order to comply with the treaty.[51] The wording of the Convention and the directives of the political branches have led one court to conclude that

> three factors indicate that Article 36 seeks to benefit individuals. First, the history of the Convention indicates the drafters intended to create rights for individuals. . . . . Second, some foreign nations and United States agencies have interpreted the Convention as protecting individual rights. . . . Third, case law indicates that individuals can enforce the Convention.[52]

Some courts, however, have expressed doubts about individual standing. The district court in *Paraguay v. Allen* concluded that "the Vienna Convention . . . [is] not 'self-executing' in [the] sense" of granting rights to individuals.[53] State courts have also rejected claims that the Convention grants standing to individuals.[54] In 1998, the Virginia Supreme Court even concluded that "Article 36 merely deals with notice to be furnished to the consular post of a national's state when the national is arrested or taken into custody in a foreign state," and that "no reported authority [holds] that a violation of the treaty creates any legally enforceable individual rights."[55]

Nonetheless, overwhelming authority is in favor of granting individual standing. To date, both district courts[56] and circuit courts[57] have overwhelm-

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49. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 902 cmt. a (1987); *see also id.* § 906, cmt. a.

50. Reed v. Parley, 512 U.S. 339 (1994). *See also* United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980) (holding that individual rights are derived through the states); Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990) (In response to an allegation that abduction violated an extradition treaty the court held that "[i]t is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved."); United States v. Cordero, 668 F.2d 32, 38 (1st Cir. 1981) (holding that "it is the contracting foreign government, not the defendant, that would have the right to complain about a violation").

51. *See* Kadish, *supra* note 28, at 599 (quoting U.S. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 411.1(1994)).

52. United States v. Esparza-Ponce, 7 F. Supp. 2d 1084, 1095-96 (S.D. Cal. 1998).

53. Paraguay v. Allen, 949 F. Supp. at 1274. *See also* Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir. 1997) ("even if the Vienna Convention on Consular Relations could be said to create individual rights. . . ."). United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1253 (D. Utah 1999) ("No federal court has ruled that the Vienna Convention confers on individuals such a private enforceable right. It is doubtful that such a private right exists . . . .").

54. *See* Ohio v. Loza, 1997 WL 634348, at *2 (Ohio Ct. App. 1997) (doubting the Convention creates individuals rights).

55. Kasi v. Virginia, 508 S.E.2d 57, 64 (Va. 1998).

56. *See, e.g.*, United States v. $69,530, 22 F. Supp. 2d 593, 594 (W.D. Tex. 1998) ("it appears to this Court that Claimant does indeed have a right to be informed that he could communicate with the Nigerian consulate and that this right was violated"); Esparza-Ponce, 7 F. Supp. 2d at 1095; United States v. Alvarado-Torres, 45 F. Supp. 2d 986 (S.D. Cal. 1999).

ingly allowed individual claims. Other scholars have exhaustively and definitively shown that the Vienna Convention confers standing[58] on individuals, an opinion apparently shared by the Supreme Court.[59] As a result, it appears to be settled doctrine that "should the United States fail to inform a foreign national of his rights under Article 36, that national has standing to enforce those rights in federal court."[60]

### C. *Treaty-Based Rights and Their Status in American Law*

But merely noting that the treaty is self-executing does not result in automatic vindication for its violation. The embodiment of consular rights in an international instrument accounts for this seeming anomaly. Historically, United States courts have accorded treaty-based rights claims a lower status in domestic law than those proceeding from the Constitution.

This feature of American jurisprudence has created a hierarchy of rights. At the top are claims of constitutional violations, for which courts often craft decisive remedial regimes. In contrast, rights derived from other sources, such as federal statute or treaty, are lower in stature, and hence remedies are often minimally coercive or non-existent.

This traditional division of rights has not prevented some litigants from arguing that Vienna Convention violations should be accorded the same review as constitutional deprivations. Nonetheless, reliance on the Supremacy Clause is apparently foreclosed. "[A]lthough States may have an obligation under the Supremacy Clause to comply with provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty violations . . . into violations of constitutional rights."[61]

Others have made more equitable or substantive pleas for designating Vienna Convention rights as legally fundamental and therefore akin to constitutional rights. In making this argument, claimants have equated the denial of Vienna Convention rights to a "fundamental defect" in the proceedings; much as the denial of trial counsel is equated with a *per se* determination of an unfair trial.[62] Mexico's amicus brief in one case provides a good example:

> that the courts of the United States consider a right fundamental when it protects a basic right . . . when it [*sic*] denial or observance impacts the overall fairness of the proceedings. The right of a foreign national to contact his consul is such a right. Its denial is a fundamental defect in the proceedings . . . ."[63]

This approach has been decisively rejected. Courts refuse to compare the protections offered by specific rights or the underlying intent behind their creation. Instead, the dispositive factor in each case is no more than the right's source.

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57. *See, e.g.*, United States v. Lombera-Camorlinga, 170 F.3d 1241 (9th Cir. 1999).
58. *See* Kadish, *supra* note 28.
59. *See* Breard v. Greene, 523 U.S. at 371. *See also* LaGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998).
60. Alvarado-Torres, 45 F. Supp. 2d at 989.
61. Murphy v. Netherland, 116 F.3d at 100.
62. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).
63. Kadish, *supra* note 28, at 601 (citing Murphy Amicus Brief).

The source-based hierarchy ensures that only those rights directly traceable to the Constitution receive heightened scrutiny. For example, one court held that "our treaty obligations [do not] equate such a provision with fundamental rights, such as the right to counsel, which traces its origin to concepts of due process."[64] In another case, a federal trial court declared that "[i]t is clear that Article 36 does not create a 'fundamental' right, such as the Sixth Amendment right to counsel, or the Fifth Amendment right against self-incrimination which originates from concepts of due process."[65] A recent decision of the Southern District of New York is particularly instructive: "A convention or treaty signed by the United States does not alter or add to our Constitution. Such international agreements are important and are entitled to enforcement, as written, but they are not the bedrock and foundation of our essential liberties."[66]

With this limited review, courts will continue to hold that "a treaty [is] the substantial equivalent of a federal statute . . . not the equivalent of a constitutional right,"[67] and "the failure to inform [the detainee] of his rights under the treaty is not a denial of his constitutional rights."[68] With treaty-based rights consigned to non-fundamental status, Vienna Convention claims are subject to the full panoply of procedural limitations, including considerations of waiver, default, exhaustion, cause and prejudice. As the next section demonstrates, legal restrictions on the assertion of treaty-based rights all but deny an effective remedy.

### *D. Case Law on the Vienna Convention*

Violations of the Vienna Convention have been raised in a variety of proceedings since the late 1970's, with the greatest action occurring in the past few years. For our purposes, the reported criminal cases[69] can be roughly separated into two categories: (1) trial motions and direct appeals, and (2) state and federal habeas corpus proceedings.

#### *1. Trial Motions and Direct Appeals*

The Convention has been forwarded as grounds for relief in a variety of criminal cases: narcotics offenses,[70] racketeering, kidnapping,[71] alien smug-

64. Waldron v. INS, 17 F.3d 511, 518 (2d Cir. 1994).

65. United States v. Chaparro-Alcantara, 37 F. Supp. 2d 1122, 1125 (D.C.D. Ill. 1999).

66. Alvarado-Torres, 45 F. Supp. 2d at 994 (quoting United States v. $69,530.00, 22 F. Supp. 2d 593, 595 (W.D. Tex. 1998)).

67. Ohio v. Loza, 1997 WL 634348, at *2 (Ohio Ct. App. 1997).

68. United States v. Maldonado-Vences, 1998 WL 911711, at *2 (4th Cir. 1998). *See also* Cardona v. Texas, 973 S.W.2d 412, 418 (Tex. Ct. App. 1998) (noting that violations of Vienna Convention do not affect "substantial rights").

69. Although not discussed here, defendants in civil actions have also raised the Vienna Convention. *See* Waldron, 17 F.3d 511 (civil deportation hearing); United States v. $69,530.00, 22 F. Supp. 2d 593 (civil forfeiture proceeding).

70. *See, e.g.*, United States v. Camorlinga, 1999 WL 160848 (9th Cir. 1999); Alvarado-Torres, 45 F. Supp. 2d 986; United States v. Tapia-Mendoza, 41 F.Supp.2d 1250 (D. Utah 1999); Alcozer v. State, 1999 WL 118657 (Tex. Ct. App. 1999); United States v. Ademaj, 170 F.3d 58 (1st Cir. 1999); United States v. Salas, 1998 WL 911731 (4th Cir. 1999).

71. *See, e.g.*, United States v. Kevin, 1999 WL 194749 (S.D.N.Y. 1999).

gling,[72] false documentary claims,[73] illegal reentry after deportation,[74] and murder.[75] Most defendants have raised their consular rights as a vehicle for suppressing incriminating statements,[76] but some have argued that a violation demands the dismissal of an indictment[77] or a new trial.[78]

Despite initial confusion over the appropriate standard for assessing timely objections pursuant to the Vienna Convention, courts appear to have settled on a three-prong test: "To establish prejudice, the defendant must produce evidence that (1) he did not know of his right; (2) he would have availed himself of the right had he known of it; and (3) there was a likelihood that the contact [with the consul] would have resulted in assistance to him."[79] The burden is on the defendant rather than the government to affirmatively establish prejudice. Unless the accused can demonstrate that the alleged violation meets this standard, he is without a remedy. But "if the defendant meets that burden, it is up to the government to rebut the showing of prejudice."[80]

Two case examples illustrate the potential difficulties of this standard. In *United States v. Alvarado-Torres*,[81] the defendant was caught attempting to smuggle more than one hundred pounds of marijuana into California. Customs agents placed her under arrest, read the defendant her *Miranda* warnings, but failed to inform her of the right to consular notification and access. The defendant waived her rights under *Miranda*, proceeded to make some incriminating statements, and was later indicted for importing marijuana. Before trial, she moved to suppress her inculpatory admissions and dismiss the indictment based on Article 36 of the Vienna Convention. In support of this motion, the defendant submitted an affidavit alleging that she would have invoked her right to contact the Mexican consulate if so informed and would have remained silent if the consul had advised her not to answer questions. Moreover, she offered two affidavits from the Mexican consulate claiming that they would have assisted the defendant if notified and would have instructed her not to submit to interrogation.

Nonetheless, the district court held that this documentary evidence did not meet the legal burden:

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72. *See, e.g.*, United States v. Orpeza-Flores, 1999 WL 195621 (9th Cir. 1999); Chaparro-Alcantara, 37 F. Supp. 2d 1122.

73. *See, e.g.*, United States v. Superville, 40 F. Supp. 2d 672 (D.V.I. 1999) (defendant falsely claimed possession of a Social Security number).

74. *See, e.g.*, Maldonado-Vences, 1998 WL 911711; United States v. Esparaza-Ponce, 7 F. Supp. 2d 1084 (S.D. Cal. 1998); United States v. Villa-Fabela, 882 F.2d 434 (9th Cir. 1989); United States v. Rangel-Gonzales, 617 F.2d 529 (9th Cir. 1980); United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979).

75. *See, e.g.*, Kasi v. Virginia, 508 S.E.2d 57 (Va. 1998); Cardona, 973 S.W.2d 412.

76. *See, e.g.*, Alvarado-Torres, 45 F. Supp. 2d 986; Orpeza-Flores, 1999 WL 195621; United States v. Lombera-Camorlinga, 170 F.3d 1241 (9th Cir. 1999).

77. *See, e.g.*, Kevin, 1999 WL 194749.

78. *See, e.g.*, Alcozer, 1999 WL 118657.

79. Alvarado-Torres, 45 F. Supp. 2d at 990 (quoting Villa-Fabella, 882 F.2d at 440).

80. Lombera-Camorlinga, 170 F.3d at 1244.

81. 1999 WL 236197 (S.D. Cal.).

> Defendant has not demonstrated that she was prejudiced by the agents' failure to inform her of her right to contact the consul. Rather, in attempting to satisfy her burden, Defendant has relied upon a chain of faulty and insupportable premises. . . . [A]gents adequately informed Defendant of her Miranda rights, which she waived. Moreover, even assuming that the Miranda advisal was not sufficient to convey her rights, the Convention did not require agents to delay their questioning until a representative from the consulate arrived. Furthermore, even assuming that the Convention did require the agents to delay their interrogation, a consular representative could not have rendered any legal assistance to Defendant. Thus, Defendant has not demonstrated that the agents' failure to inform her of her Article 36 rights caused her any prejudice.[82]

The trial court, therefore, denied the defendant's motions to suppress her incriminatory statement and to dismiss the indictment.

In *United States v. Rangel-Gonzales,*[83] the defendant had been previously deported to Mexico, once again crossed into the United States, and was charged with illegal re-entry following deportation.[84] The defendant challenged the underlying deportation as an element of his current offense, alleging that INS agents failed to inform him of his rights under the Vienna Convention.[85] To support his claim of prejudice, the defendant offered an affidavit claiming that he did not know of his consular rights and that he would have invoked them if he had been so informed. He also presented an affidavit from the Mexican Consul General noting that his office would have provided substantial assistance upon request, an affidavit from an experienced immigration attorney stating that defendant could have obtained voluntary departure rather than deportation with appropriate legal aid, and affidavits from various family members and public service groups claiming that they would have helped the defendant if they had known of his predicament.[86] The appellate court found that the defendant carried his initial burden, the government failed to rebut that showing of prejudice, and dismissed the indictment.[87]

One could try to harmonize or distinguish these two cases, but such an effort would probably be in vain. To date, *Rangel-Gonzales* is the only reported case finding that the defendant had demonstrated prejudice and ordering some form of relief. All other precedents from trial or appellate courts have found insufficient prejudice from the Convention violation or have deemed the error waived for failure to raise an appropriate or timely objection.[88]

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82. *Id.* at *6.

83. 617 F.2d 529 (9th Cir. 1980).

84. These facts are derived from an earlier appellate decision in this case. *See* Calderon-Medina, 591 F.2d at 530.

85. *See* Rangel-Gonzales, 617 F.2d at 530.

86. *See id.* at 531.

87. *See id.* at 533.

88. *See* Alcozer, 1999 WL 118657 (Vienna Convention claim procedurally barred for failure to make a timely objection at trial); Maldonado-Vences, 1998 WL 911711 (no plain error where defendant failed to raise claim at trial).

*2. State and Federal Habeas Corpus*

The burden on the defendant in raising a violation of consular rights becomes significantly more difficult when his case moves to collateral review. In a recent Oklahoma State habeas proceeding, for example, a defendant argued that his attorney's failure to raise a Vienna Convention claim on direct appeal constituted ineffective assistance of counsel.[89] The habeas panel rejected this argument as procedurally barred by State law, noting that the defendant had "failed to meet the pre-conditions for review of his claims on the merits."[90] Likewise, an Ohio State habeas panel rejected a defendant's claim that he was entitled to collateral relief because officials had failed to inform him of his consular rights.[91] "Although the police should have complied with the Vienna Convention and informed [defendant] that he had the right to contact the Mexican Consul, [his] rights under the treaty are not constitutional in dimension. Accordingly, the [lower habeas court] properly found that [his] claim did not constitute a substantive ground that entitled him to postconviction relief. . . ."[92]

Defendants asserting violations of their consular rights have fared no better in federal habeas corpus proceedings. As noted earlier, the Supreme Court's decision in *Breard v. Greene*[93] held such rights subject to State procedural default rules. "By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia. Having failed to do so, he cannot raise a claim of violation of those rights now on federal habeas corpus."[94] And even if this claim had been "properly raised and proven," the Court asserted in *dicta* that the violation would be subject to harmless error review.[95] The *Breard* decision is consistent with lower court precedents on consular rights raised for the first time on federal habeas corpus. Both the Fourth and Ninth Circuits have found such claims to be procedurally defaulted if not raised in State court.[96]

Even if a habeas petitioner has not defaulted his Convention claim, the federal judiciary appears loathe to overturn an otherwise valid State conviction based on a violation of consular rights. In *Faulder v. Johnson*,[97] the Fifth Circuit denied a Convention claim in two paragraphs, despite the fact that "Texas admit[ted] that the Vienna Convention was violated."[98] It found that the defendant's attorney "had access to all of the information that could have been

89. *See* Al-Mosawi v. State, 956 P.2d 906, 909 (Okla. Ct. App. 1998).
90. *Id.* at 910.
91. Ohio v. Loza, 1997 WL 634348 (Ohio Ct. App. 1997).
92. *Id.* at *2.
93. 118 S. Ct. 1352.
94. *Id.* at 1355.
95. *See id.*
96. *See, e.g.*, LaGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998); Villafuerte v. Steward, 142 F.3d 1124 (9th Cir. 1998); Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997).
97. 81 F.3d 515 (5th Cir. 1996).
98. *Id.* at 520.

obtained by the Canadian government," and therefore any assistance by the Canadian Consulate would have been cumulative.[99]

### *E. A Remedy-less Right?*

As noted previously, most courts have recognized that a detained foreigner may raise claims under the Vienna Convention.[100] But the question that naturally follows—whether the concomitant remedy is bona fide or illusory—is a matter of both judicial and scholarly dispute. Most international law scholars agree with Blackstone's old saw: "Where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded."[101] Likewise, a number of American courts have been "gravely trouble[d]"[102] by violations of consular rights, expressing "disenchantment"[103] with State officials who ignore their treaty obligations.

Yet, the current state of affairs for official derogation of consular rights is "no effective remedy for these violations."[104] As non-constitutional guarantees, rights under the Convention will only result in the suppression of evidence, the dismissal of an indictment, or some other potential relief if the defendant proves that he was prejudiced by the failure to abide by treaty obligations. This hurdle is not insurmountable in theory, but it is fatal in fact. As noted above, only one published opinion found that a defendant met his burden of establishing prejudice.

This is not to say that defendants have not presented convincing arguments of "prejudice" as the term is commonly understood. Consider the case of Jose Loza, a Mexican citizen sentenced to death for the murder of his girlfriend's family:

> Loza confessed to the murders after it was "suggested [by police officers] that Loza's girlfriend . . . and their unborn child might be electrocuted unless Mr. Loza took the blame for the murder." No physical evidence tied him to the crime scene; therefore, the confession was crucial to the State's case. In fact, the State relied solely upon Loza's confession and the testimony of his girlfriend to obtain the conviction. Although the police officers, who arrested Loza and took his confession, knew that he was a Mexican citizen, they never informed him that he could contact the Mexican consul for assistance.[105]

Loza argued that his unfamiliarity with the American legal process led him to erroneously conclude that his wife and unborn child's lives were in danger. According to Loza, this mistaken belief would have been corrected if he had been in contact with his consulate.

This claim generalizes; some commentators have argued that a foreign detainee is inherently prejudiced without the assistance of his consulate. He may

99. *Id.*
100. *See, e.g.*, United States v. Superville, 40 F. Supp. 2d 672 (D.V.I. 1999).
101. Marbury v. Madison, 4 U.S. 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).
102. United States v. Esparza-Ponce, 7 F. Supp. 2d, 1089, 1098 n.10 (S.D. Cal. 1998).
103. Paraguay v. Allen, 134 F.3d at 629.
104. Aceves, *supra* note 29, at 523.
105. Kadish, *supra* note 28, at 584-85.

be ignorant about the American criminal justice system, the practices of and limitations on police activity, the rights accorded the accused, and the basic legal framework for ascertaining guilt. There may be barriers in language and culture which severely disadvantage and confuse an alien defendant.[106] Angel Breard, for example, may have rejected a potential plea bargain based on "his fundamental misconception of the North American legal system,"[107] and took the stand against his attorney's advice, believing that repentance before the jury would be his best defense. Breard, of course, was gravely mistaken.[108]

But despite many compelling cases involving deprivations of consular rights that substantially injure an alien's defense, the courts have uniformly found no prejudice from violations of the Vienna Convention. It is, in fact, difficult to imagine factual circumstances that could spur a judicial finding of prejudice, given the precedents that have denied relief. Moreover, many Convention violations may never be considered on the merits. As previously noted, cases both before and after *Breard* have barred defendants from alleging a consular rights claim unless it was raised at the appropriate time and in the appropriate venue, usually the State trial court. A defendant cannot seek relief in federal habeas corpus, for example, absent a timely objection or motion.[109] And even if properly raised by pretrial motion, violations of the Vienna Convention are apparently subject to harmless error review.[110] If defendants are largely impotent to establish prejudice from a deprivation of consular right, their claims will invariably be denied on appeal and in habeas as causing no harm to their defense. So under current American jurisprudence, the only "remedy" for a violation of the Convention is an official apology by the responsible government.

## III.
## INTERNATIONAL INDIVIDUAL RIGHTS CLAIMS IN AMERICAN COURTS

The academy's response to *Breard*, its antecedents and progeny, has been predictably critical. Yet, there would seem to be little to complain about in terms of judicial acknowledgement of consular rights, given treaty. The courts did recognize the existence of the right language that could foreclose that con-

106. Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994); Deirdre Evans-Pritchard & Alison Dundes Renetln, *The Interpretation and Distortion of Culture: A Hmong "Marriage By Capture" Case in Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1(1994); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986).

107. Breard v. Netherlands, 949 F. Supp. 1255, 1264 (E.D. Va. 1996).

108. Paraguay argued "that but for Virginia's alleged violations of the treaties, Mr. Breard would not be on death row today." Paraguay v. Allen, 949 F. Supp. 1269, 1273 (E.D. Va. 1996). "Assuming the validity of this assertion," the habeas court argued, "it is a tragic consequence of Virginia's failure to abide by the law." *Id.*

109. *See* Breard v. Greene, 118 S. Ct. 1352, 1355 (1998).

110. *See id.* at 1355 (citing Arizona v. Fulminante, 499 U.S. 279 (1991), and its harmless error standard).

clusion,[111] and a case with highly unsympathetic procedural and factual postures, broadly construing the Vienna Convention to include a duty of arresting nations to inform detainees of their rights. Moreover, the decisions are nearly unanimous that the rights contained in the Vienna Convention are *individual* self-executing rights—an approach often rejected in other contexts.

International law scholars are still unhappy, however, raising a general hue and cry because Breard's claims were not *completely* vindicated. They anticipated victory for Breard—a permanent stay of execution, if not a reversal of conviction—and no other result would do. The academic displeasure is apparently both normative and positive. The former complaint attacks *Breard* for failing to recognize the importance of international individual rights claims. Rather than quibbling over doctrine, it focuses on the ultimate desirability of the decision instead of any perceived mistakes in the process. The next section focuses on this argument. The more descriptive claim, which focuses on the specific use of the "cause and prejudice" standard, is examined in Part III.

### *A. The Academy's Response*

Academic criticism of *Breard* seems somewhat schizophrenic. On one side, scholars argue that *Breard* is a betrayal of American human rights jurisprudence. The refusal to fully vindicate Vienna Convention rights, according to this argument, belies the United States' overall position as "a leader in affirming the law of nations in its courts."[112] Another commentator echoed this complaint stating that the United States is "one of the main actors in the international human rights arena" and "has the duty to assure that human rights of foreign nationals are observed"[113] in its courts. To these scholars, *Breard* has an aberrant quality, misperceiving a growing and persuasive trend towards vindicating international individual rights claims.[114]

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111. As many courts have noted, and as discussed above, the Vienna Convention's preamble explicitly declares that "nothing in this convention is intended to convey any enforceable right on behalf of the individual." Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 500 U.N.T.S. 95. Of course, as noted earlier, we are in complete agreement with those courts that have found an enforceable individual right. *See supra* note 8.

112. Aceves, *supra* note 29, at 318. *Compare* Jordan J. Paust, *Breard and Treaty-Based Rights Under the Consular Convention*, 92 AM. J. INT'L L. 691, 692 (1998) (characterizing federal judges who do not apply treaty law as going against "predominant trends in judicial decisions"), *with* William J. Aceves, *International Decision*, 92 AM. J. INT'L L. 517, 522 (1998) (characterizing the decision as "troubling but not too surprising").

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

> [Requiring a showing of prejudice] would seem too strict to comply with Article 36, which specifies that the right of consular access is an absolute right. Nothing in the text of Article 36 suggests that relief for a foreign detainee should depend on whether he can show prejudice. Moreover, requiring a showing of prejudice would often defeat the right.

*Id.* at 751.

114. For instance, Jordan Paust believes the Court should have interpreted the AEDPA's waiver provisions, and the cause and prejudice standard, to be in conformity with international law via *The Charming Betsy* canon. *See generally* Paust, *supra* note 112.

In contrast, some have argued that *Breard* represents not a break from the past, but a reminder of how far the United States has to go. Thomas Franck, for instance, has pointed to *Breard* as an example of the American refusal to incorporate international law into domestic jurisprudence. "[B]y inventing such doctrines such as the 'non-self-execution' of treaties and the 'last in time' doctrine, courts have made Swiss cheese of the notion that international law is part of the law of the United States."[115] One commentator argues that *Breard* is the culmination of a "decade of disrespect for international law" and believes "nothing less than a new generation of judges may be needed to restore" respect for international law in United States courts.[116] To these scholars, American judges are singularly hostile to international law in general, ensuring that it never provides the rule of decision in a case.[117]

Those who have criticized *Breard* as an aberration have a point, given the rising importance of international individual rights in United States law. The general trend in the federal judiciary, especially in the lower courts, is towards expanding domestic recognition of international law in general and international individual rights in certain circumstances. Under this view, *Breard* appears to be a step back in the march towards international law's ultimate incorporation. Yet, this story sweeps too broadly and fails to consider the different contexts in which claims of international individual rights have arisen.

Ultimately, a review of cases involving such claims over the last few decades reveals a consistent two-track treatment. Outside of the criminal justice context, courts *have* taken a pro-active stance in affirming international individual rights claims. But, within the criminal justice context, or where jurisdiction is not explicitly provided by law, the courts have been miserly in their approach and seldom vindicate such claims.

### *B. Non-Criminal Justice Cases*

For the last twenty years, international individual rights claims have enjoyed a rise in application and acceptance in United States courts. In these cases, the judiciary enthusiastically supports international law, not only accepting it into the domestic system, but constantly expanding its scope and im-

115. Thomas M. Franck, *Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh's Optimism*, 35 HOUS. L. REV. 683, 688 (1998).

116. Douglas W. Cassell, Jr., *Supreme Law of the Land*, 144 CHI. DAILY L. BULL 6 (Oct. 30, 1998).

117. *Cf.* Henry J. Richardson III, *The Execution of Angel Breard by the United States: Violating an Order of the International Court of Justice*, 12 TEMP. INT'L & COMP L.J. 121 (1998) (discussing the United States "dualist" conception as it pertained to the refusal to honor the ICJ's order). For an interesting discussion of the many ways that judges manifest this "deeply rooted provincialism" see Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4 (1995). McFadden argues:

> United States judges have developed a series of rules and practices that minimize the role of international law in domestic litigation. Considered collectively, these rules and practices embody a thoroughgoing, deeply rooted provincialism—an institutional, almost reflexive, animosity toward the application of international law in U.S. courts.

*Id.* at 5.

pact. Many factors may account for this phenomenon. Perhaps firm legislative establishment of jurisdiction proves dispositive; the courts are free to fashion remedies via international law with the same enthusiasm shown towards *Bivens* and § 1983 actions. Concerns of justice through compensation also seem relevant. Victims of torture, genocide or systematic rape are inherently sympathetic plaintiffs and courts are naturally inclined to fashion broad remedies to satisfy their claims.

### *1. The Alien Tort Claims Act*

The most important element in the success of international individual rights claims over the past two decades is the existence of the Alien Tort Claims Act (ATCA).[118] Originally passed as part of the Judiciary Act of 1789, the ATCA provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[119]

Until 1980, the ATCA had all the appearances of a legislative derelict, serving as a tenuous reed for federal court jurisdiction in only a handful of cases.[120] It was first meaningfully interpreted in *Filartiga v. Pena,* a seminal American precedent on domestic incorporation of international individual rights.[121] In that case, the Second Circuit vindicated a family's claim against Paraguayan authorities for the torture and murder of a Paraguayan national.[122] The court was confronted with traditional international and domestic principles against individual standing and in favor of sovereign immunity for foreign states.[123] Despite virtually non-existent precedent and a history of denying judicial relief for international individual rights claims in other contexts,[124] the court upheld its jurisdiction and the standing of individuals to raise these claims. "[I]n the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest."[125] As a result of these "humanitarian considerations," the court concluded that individuals do possess rights under international law that they may raise against their own government.

The *Filartiga* court firmly rejected the defense of sovereign immunity for the misdeeds of foreign leaders, noting that torture conducted by an individual in

118. 28 U.S.C. § 1350 (1991).

119. *Id.*

120. *See, e.g.,* Huynh thi Anh v. Levi., 586 F.2d 625 (6th Cir. 1978) (child custody claim); Dreyfus v. von Finck, 534 F.2d 24 (2d Cir. 1976) (noting forgery not covered by ATCA); IIT v. Vencap, 519 F.2d 1001, 1015 (2d Cir. 1975) (noting fraud, conversion and corporate waste are not cognizable under ATCA).

121. 630 F.2d 876 (2d Cir. 1980).

122. *See id.*

123. On appeal, Pena argued that "if the conduct complained of is alleged to be the act of the Paraguayan government, the suit is barred by the Act of State doctrine." *Id.* at 889. The Act of State doctrine, simultaneously derived from both international and domestic legal principles has traditionally mandated that courts of one nation will not sit in judgment against the actions of a foreign nation. *See id.*

124. *See* Filartiga, 630 F.2d at 876.

125. *Id.* at 890.

his official capacity "does not strip the tort of its character as an international law violation . . . ."[126] Ultimately, the court's rationale was motivated by an interpretation of international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[127] Succinctly stated, individuals have rights enforceable against their own governments under modern international law, and violations of these rights are cognizable under the ATCA.

Many other claims soon followed and, despite some initial skepticism and attempts to limit the reach of international individual rights claims,[128] expansive federal jurisdiction and ever-increasing causes of action have become the rule. The ATCA has now opened up federal courts to claims of murder, war crimes (including genocide), rape, forced labor or slavery, and arbitrary detentions.[129] Post-*Filartiga* decisions initially required highly egregious or tortuous conduct by the defendant.[130] But, recent decisions have apparently relaxed this standard; in one case, for example, a ten-day arbitrary imprisonment without any claim of egregious conduct was allowed to proceed to trial.[131]

Moreover, a 1998 decision applied the ATCA to actions taken by United States officials.[132] After referring to *Filartiga* as a "sound" decision, the federal trial court relied on various international treaties[133] and domestic precedents to determine that "[t]he mental and physical abuses which are alleged to have been inflicted upon plaintiffs violate the international human rights norm of the right

126. *Id.*

127. *Id.* at 881.

128. *Filartiga's* robustness is indicated by how quickly courts backpedaled away from it. In 1984, the Court of Appeals for the D.C. Circuit, rejected a claim by victims of a bus attack in Israel committed by a Palestinian terrorist group. Tel-Oren, 726 F.2d at 776. The court refused to extend the ATCA to include modern notions of international individual rights. Judge Bork explicitly rejected the rationale of *Filartiga:* "The phrase 'law of nations' has meant various things over time. It is important to remember that in 1789 there was no concept of international human rights; neither was there, under the traditional version of customary international law, any recognition of a right of private parties to recover." *Id.* at 813 (Bork, J., concurring). By looking at the ATCA as it stood in 1789, Bork repudiated the central holding of *Filartiga.*

Other early decisions interpreting *Filartiga* attempted to limit the ATCA's jurisdictional grant, including decisions even by the Second Circuit. Despite these initial setbacks, however, the caselaw of the last 25 years reveals a steady expansion in the number of "wrongs" that allow for recovery and the scope of possible defendants. *See generally* Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983) (noting ATCA "applies only to shockingly egregious violations of universally recognized principles of international law"); De Wit v. KLM, 570 F. Supp. 613, 618 (S.D.N.Y. 1983) (noting "this statute is only invoked in extraordinary circumstances").

129. *See, e.g.,* Kadic v. Karadzic, 70 F.3d 232, 241-44 (2d Cir. 1995) (finding that ATCA allows suits for genocide, murder, rape, forced impregnation, torture, war crimes—encompassing the previously mentioned violations, and summary execution); Doe v. Islamic Salvation Front (FIS), 993 F. Supp. 3 (D.C.D.C. 1998) (noting allegations of murder, torture, sexual slavery and genocide are actionable under ATCA); Doe v. Unocal Co., 963 F. Supp. 880 (C.D. Cal. 1997) (use of forced laborers in building of gas pipeline held actionable).

130. *See, e.g.,* Karadzic, 70 F.3d at 243.

131. *See* Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078 (S.D. Fla. 1997) (employee of Kodak falsely imprisoned in Bolivia for ten days to force favorable settlement of business relationship between defendant's company and Kodak).

132. *See* Jama v. INS, 22 F. Supp. 2d 353 (D.N.J. 1998).

133. For example: the European Convention on the Protection of Human Rights and Fundamental Freedoms T.S. 5, 213 U.N.T.S. 221, 224 (1956).

to be free from cruel, unhuman and degrading treatment."[134] The court also noted "there is no absolute preclusion of international law claims by the availability of domestic remedies for the same alleged harm."[135] This decision exemplifies the depth with which international individual rights claims have become entrenched in the American psyche. The court explicitly chose international standards in imposing liability against United States officials *even though* these same actors were fully amenable to domestic remedies.

Courts have not only expanded the number of allowable claims, they have recently expanded cognizable claims to include suits against non-governmental actors.[136] In *Kadic v. Karadzic,* for example, the Second Circuit held that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[137]

### 2. *The Torture Victim Protections Act*

Commentators have not only criticized the courts for their hostility towards international law. They have also singled out the political branches, particularly Congress, as being inhospitable towards international law.[138] Yet, in the area of international torts, federal legislators have enacted domestic legislation intended to entrench the application and enforceability of international law in American tribunals. In 1991, for instance, Congress passed the Torture Victim Protections Act (TVPA).[139] The purposes of the TVPA were two-fold: (1) reaffirming the holding of *Filartiga* that *modern* notions of international law should govern questions of redressability,[140] and (2) expanding the scope of those protections to include American citizens. Under the ATCA, only aliens could bring suit in United States courts for vindication of international individual rights claims. In contrast, the TVPA embodies the conclusion that violations of international law should be redressable in United States courts and, by implication, that such international norms inhere in individuals.[141]

As with ATCA claims, courts applying the TVPA have read it expansively to vindicate various international rights. In general, specific jurisdictional questions have been broadly construed to uphold the courts' jurisdiction. Issues of standing, forum, statutes of limitations and parties in interest have each been

134. Jama, 22 F. Supp. 2d at 363.

135. *Id.* at 364.

136. *See* Karadzic, 70 F.3d at 243.

137. *Id.* at 239.

138. *See* McFadden *supra* note 117.

139. *See* 28 U.S.C. § 1350, S. REP. No. 249, 102d Cong., 1st Sess., at 3-5 (1991); H.R. REP. No. 367, 102d Cong., 1st Sess., at 3-4 (1991) (enacted Mar. 12, 1992).

140. *See* Karadzic, 70 F.3d at 241("[t]he scope of the Alien Tort Act remains undiminished."). *See also* Doe I v. Islamic Salvation Front (FIS), 993 F. Supp. 3 (D.D.C. 1998) (holding that terrorist organization could be sued under ATCA and TVPA despite status as "non-state" actor for "crimes against humanity").

141. Karadzic, 70 F.3d at 241 ("Congress enacted the TVPA to codify the cause of action recognized . . . in *Filartiga*, and to further extend that cause of action to . . . U.S. citizens"). *See also* Doe I v. Islamic Salvation Front (FIS), 993 F. Supp 3 (D.D.C. 1998).

interpreted to allow for the most extensive recovery.[142] In *Kadic v. Karadzic*, the Second Circuit even allowed a suit for an individual against another individual, thereby thus denying even the nominal significance of the term "inter-national law."

*3. The Amended Foreign Sovereign Immunities Act*

Federal lawmakers have expanded cognizable claims under international law in other areas as well. In 1996, Congress passed an amendment[143] to the Foreign Sovereign Immunities Act (FSIA)[144] allowing United States citizens to sue foreign states that commit acts of terrorism. Specifically, the Amendment granted jurisdiction for claims

> in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment or agency.[145]

The Amendment has additional prerequisites: (1) the defendant country must be designated as a sponsor of terrorism; (2) the terrorist act must not have occurred within the defendant state's territory; and (3) the victims and claimants must all be United States nationals.[146]

In *Alejandre v. Cuba*,[147] the amendment was first applied to the Cuban military's downing of civilian American pilots over international waters. Denoting the crimes as "summary executions," the district court had no difficulty finding Cuba in violation of international law. "Like the torture in *Filartiga*, the practice of summary execution has been consistently condemned by the world community. A multitude of international agreements and declarations proclaim every individual's right not to be deprived of life wantonly and arbitrarily."[148]

142. *See generally* Kadic v. Karadzic, 70 F.3d 232, 243 (2nd Cir. 1995)(the district court has jurisdiction . . . over appellants' claims of war crimes and other violations of international humanitarian law"); Alvarez-Machain v. United States, 96 F.3d 1246 (9th Cir. 1996)(liberally construing statute of limitations to allow for claim to go forward); Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996)(construing statute of limitations requirements to allow for claims more than ten years old).

143. Pub. L. 104-132, 110 Stat. 1214 (part of the Anti-terrorism and Effective Death Penalty Act (AEDPA)).

144. 28 U.S.C. §§ 1602-11.

145. 28 U.S.C.A. § 1605(a)(7).

146. *Id.* at § 1605(a)(7)(A)-(B).

147. 996 F. Supp. 1239 (S.D. Fla. 1997). *But see* Maria Ermolaeva, *Crimes Without Punishment*, 23 S. ILL. U. L.J. 755, 762 (1999) (arguing that AEDPA only allows suits for terroristic crimes and disallows suits for "heinous violations of international law as genocide, apartheid, war crimes and racial discrimination"). In other contexts, the courts have adopted a restrictive view towards sovereign immunity, requiring that immunity be explicitly waived by statute or implicitly by entering into a written agreement that envisions using U.S. courts as adjudicative forums. *See, e.g.*, Argentine Republic v. Amarada-Hess, 488 U.S. 428 (1989). *See also* Prinz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994); Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992); Nelson v. Saudi Arabia, 507 U.S. 349 (1993); Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994).

148. Alejandre, 996 F. Supp. at 1252.

Because the "extrajudicial killings . . . violated clearly established principles of international law,"[149] the district court awarded substantial punitive damages against the government of Cuba and sent a not-so-tacit message that such actions will not be tolerated.[150]

*4. Conclusion*

Courts are continually confronted by defendants raising international individual rights claims in civil cases. In one recent case, a court extended international individual rights protections to an area outside of suits for civil torts. In that case, the Third Circuit decided that "torture committed by a state official against one held in detention violates established norms of international law of human rights and hence the law of nations."[151] In the context of an alien seeking political asylum, the court concluded that under international law, the presence of these conditions created a presumption of asylum regardless of domestic regulations mandating a different course.[152]

Yet, outside of the ATCA, TVPA or FSIA, courts have been reluctant to allow claims sounding in international law.[153] Not every claim of an individual right under international law should be vindicated,[154] and the number of cases denying plaintiffs a cause of action is greater than the number that are allowed to proceed. Nonetheless, there does not appear to be any widespread hostility towards international individual rights in either the judiciary or the legislature. The courts have taken a broad view of international law, though certainly not as broad as they could. The legislature has also shown a willingness to allow suits under international law in order to redress international wrongs. Reports of American animosity towards all aspects of international law, therefore, seem overbroad. Where a court's jurisdiction is clearly granted, as it has been in the ATCA, TVPA and FSIA, courts have incorporated international individual

149. *Id.*

150. "Part of the reason why punitive damages have been extensively awarded in cases brought under the ATCA is that they serve to redress conduct so heinous that it has been condemned by the world community. Punitive damages help reinforce 'the consensus of the community of humankind . . . .' " *Id.* (quoting Filartiga, 577 F. Supp. at 863).

151. Filartiga, 577 F. Supp. at 863.

152. *See* Senathirajah v. INS, 157 F.3d 210 (3d Cir. 1998). *See also* Fernandez v. Wilkinson, 654 F.2d 1382, 1390 (10th Cir. 1981). *Fernandez* is more fully discussed at note 177, *infra.*

153. The closest that any claimant seems to have come is in *White v. Paulsen,* 997 F. Supp. 1380 (E.D. Wash. 1998). In that case, various plaintiffs sued a physician for allegedly subjecting them to illegal medical experiments while they were in custody of the State of Washington. *See id.* at 1380. As part of their claims, plaintiffs alleged that the medical experiments were violations of international law, in contravention to the International Covenant on Civil and Political Rights (ICCPR) and the Torture Convention. *See id.* The court accepted that it had jurisdiction and recognized that a cause of action could be palpably claimed. *See id.* However, citing domestic remedies for the identical wrong, the court chose not to create a "new" cause of action for them. *See id.*

154. *See, e.g.,* Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 670-71 (S.D.N.Y. 1991) (refusing to allow a suit under the ATCA for environmental and economic damage resulting from the delivery of contaminated materials); American Baptist Churches v. Meese, 712 F. Supp. 756 (N.D. Cal. 1989) (holding Geneva Convention on Refugees and customary international law provided no relief for individual Guatemalans and Nicaraguans fighting deportation proceedings; Congress' passage of 1980 Immigration and Nationality Act 8 U.S.C.A. § 1324(a)(1980) superseded attempts to rely on international individual rights predicated on customary international law).

rights into domestic law. We take no position on the doctrinal or even normative superiority of the *Filartiga* line of cases. Critics may indeed be correct, that these cases are historically flawed, doctrinally unsound, normatively misguided or even unconstitutional.[155] Our point is simple: it is untenable to claim that American judges and legislators are necessarily averse to claims predicated on international law. The judiciary, for example, has had ample precedent and opportunity to reject these claims altogether under theories of domestic and international law. Despite these opportunities, courts have not only allowed these claims to proceed but have demonstrated a willingness to expand the number and scope of cognizable cases.

### C. *Criminal Justice Cases*

International law claims raised by criminal defendants stand in stark contrast to the relative success of such claims in civil suits. Indeed, no final judgment in the past three decades has affirmed international law claims or provided an effective remedy for any criminal defendant. The reasons for this dichotomy are not easily identified. In the civil context, courts have been adamant that 19th century constructions of international law—that it inures solely to the benefit of states or provides no individual remedies for its violations—must be discarded. Yet, these judicial limitations continue to frustrate international individual rights claims in the criminal justice context.

#### *1. Forcible Abductions*

For a century, the United States has forcibly kidnapped indicted criminals residing in foreign countries and returned them to the United States for trial. American courts, in turn, have been particularly reluctant to interfere with these government practices, despite acknowledging that they violate international law.[156] Nonetheless, abducted defendants continue to raise objections to their presence in court and have relied on international law in attempting to dismiss indictments,[157] overturn convictions,[158] or suppress evidence.[159] Despite novel arguments, courts have stubbornly refused to allow considerations of international law to interfere with their jurisdiction. In so doing, they have erected a number of doctrinal barriers to the future success of international individual

155. *See generally* Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 357-63 (1997); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995).

156. *See* Douglas J. Sylvester, *Customary International Law, Forcible Abductions and America's Return to the "Savage State,"* 42 BUFF. L. REV. 555 (1994).

157. *See, e.g.*, United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990).

158. *See, e.g.*, United States v. Alvarez-Machain, 504 U.S. 655 (1992).

159. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259 (1989) (holding that if Fourth Amendment extended to foreign territories it would greatly impede legislative branch initiatives in those countries); Johnson v. Eisentrager, 339 U.S. 763 (1950) (holding that Fifth Amendment not applicable to aliens outside of United States territory).

rights in these cases. In particular, the long-standing *Ker-Frisbie*[160] doctrine precludes courts from examining the manner in which indicted individuals come before them.

Despite this general rule of non-inquiry, a 1974 Second Circuit case interjected considerations of human rights into the forcible abduction issue. In *United States v. Toscanino*,[161] an Italian national was kidnapped by American officials and returned to the United States to face charges of distributing narcotics. During his return to the United States, however, the defendant was allegedly subject to gruesome torture and mistreatment either supervised or participated in by United States authorities.[162]

The Second Circuit felt compelled to overturn Toscanino's conviction. Although the basis of the reversal sounded in due process, the court was motivated by its desire to restrain government misconduct that violated, among other things, international law. Part of its decision was concerned with seeing "that international engagements are faithfully kept and observed" and "ensur[ing] that the Executive lives up to our international obligations."[163]

Although *Toscanino* supported international law as a basis for invalidating egregious governmental conduct, the decision has been cabined, if not ignored, in the intervening quarter century. In *United States ex rel. Lujan v. Gengler*,[164] for example, the Second Circuit reconsidered the protection accorded international rights in domestic criminal cases. The defendant sought reversal of conviction because his "mere abduction" without torture or gross mistreatment violated postulates of international law codified in numerous treaties. In rejecting this claim, the federal appellate panel declared that "abduction from another country violates international law only when the offended state objects to the conduct."[165] "Individual rights," the court declared, "are only derivative through the states."[166] In *Lujan*, the Second Circuit espoused a rule, that has stood in the way of successful invocation of international individual rights in many subsequent criminal cases. The espoused rule, that only states have rights under international law and individuals may only raise such claims where a state has made a prior objection, has almost become an aphorism in American international law jurisprudence. It has been invoked in numerous cases since *Lujan* and has effectively foreclosed international law as a source of right in criminal justice cases.

In *Matta-Ballesteros v. Henman*, for example, the Seventh Circuit repudiated *Toscanino's* narrow holding that "shocking" governmental misbehavior is redressable by the courts. Instead, the *Matta* court rejected individual standing to raise violations of international law. "Without an official protest, we cannot

160. This name arises from two cases, *Ker v. Illinois*, 119 U.S. 436 (1886) and *Frisbie v. Collins*, 352 U.S. 519 (1952).
161. 500 F.2d 267 (2d Cir. 1974).
162. *See id.*
163. *Id.* at 278-79 (citing Shapiro v. Fernandina, 478 F.2d 894, 906 n.10 (2d Cir. 1973)).
164. 510 F.2d 62 (2d Cir. 1974).
165. *Id.* at 68.
166. *Id.* at 67.

conclude that Honduras has objected to Matta's arrest. Therefore, Matta's claims of violations of international law do not entitle him to relief."[167] The court also held that torture, even when committed by American officials, would not result in the dismissal of the indictment: "While we do not condone government misconduct such as Matta alleges, we cannot create an exclusionary rule for the person of the defendant in light of our analysis . . . that *Toscanino*, at least as far as it creates an exclusionary rule, no longer retains vitality and therefore [we] decline to adopt it . . . ."[168]

This interpretation has been firmly entrenched by the Supreme Court in *Alvarez-Machain v. United States*.[169] This controversial 1992 case asked whether forcible abductions violated pre-existing extradition treaties between the United States and Mexico. The Court admitted that if "the [e]xtradition [t]reaty has the force of law . . . 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."[170] Yet, the Supreme Court refused to fashion a remedy if the cause of action was grounded in a violation of customary international law. It concluded that remedies for violations of customary international law are "a matter for the executive branch."[171] Since *Machain* numerous federal and state decisions have concluded either that no right exists absent official protest, or that the courts are powerless to fashion an effective remedy.[172]

### 2. *Prolonged Detention of Aliens*

As a consequence of various refugee movements in the 1970s and 80s, thousands of aliens entered the United States without the possibility of returning to their countries. These groups included individuals with criminal histories who were excluded from entering American soil by law. Without the possibility of acceptance into the United States or the ability to return to their home countries, most of these "excludable aliens" were held in federal detention centers for extended periods of time—without any foreseeable release date.

Beginning in the 1980s, many of these aliens turned to international law for relief. International law forbids "arbitrary detentions" and, they argued, the United States policy of detaining the excludable aliens violated their human rights. These claims, with one exception,[173] have been rejected. Courts recog-

167. Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990).

168. *Id.* at 263.

169. 504 U.S. 655 (1992).

170. *Id.* at 667. Subsequent courts have noted this comment by the Court and in so doing have relaxed, somewhat, the rule that treaties act only for the benefit of states. *See, e.g.*, United States v. Puentes, 50 F.3d 1567, 1574 (11th Cir. 1995) (noting that some "courts . . . consider the requested state's objection to be a condition precedent to the individual's ability to raise the claim . . . ." and declaring that the "Supreme Court's recent opinion in United States v. Alvarez-Machain . . . seriously undermines any vitality that approach may have once possessed").

171. *Id.* at 669.

172. *See also* United States v. Mitchell, 957 F.2d 465 (7th Cir. 1992).

173. In *Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981), the Tenth Circuit utilized international individual rights to uphold a decision releasing individuals from arbitrary detention. Although substantially grounded in due process considerations, international law played an important role in the interpretation of relevant federal law. According to the court, "[i]t seems proper . . .

nize that arbitrary detention is prohibited by international law—indeed, after *Filartiga* and its progeny, it would have been impossible to hold differently. Yet, despite this recognition,[174] various judicial doctrines have been asserted to preclude substantive review of such claims.

*Dicta* from *The Paquete Habana*, for example, declares that international law is trumped "where there is [a] . . . controlling executive or legislative act or judicial decision."[175] Pursuant to this language, courts have consistently held that the mere existence of regulations promulgated by the Attorney General negates claims of international law. According to one court, "[w]hile public international law is part of the common law of the United States," where there is *any* "controlling domestic authority . . . reference to international law is not appropriate . . . [and] is unnecessary and improper . . . ."[176] Therefore, the majority of courts have refused to look to international law in determining the legality of indefinite detention.[177] Attempts to raise international individual rights claims to end prolonged detentions have been summarily dismissed as "misplaced"[178] or "irrelevant."[179]

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to consider international law principles for notions of fairness as to propriety of holding aliens in detention. No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." *Id.* at 1388. In making this claim, the court reviewed the Universal Declaration of Human Rights, arts. 3 and 9, U.N.Doc. A/801 (1948), and the American Convention on Human Rights, Part I, ch. II, art. 7, 77 DEP'T. ST. BULL. 28 (July 4, 1977). *See id.* After noting these principles, the court construed federal law to require the release of the plaintiffs, declaring in part that "[t]his construction is consistent with accepted international law principles that individuals are entitled to be free of arbitrary imprisonment." *Id.* at 1389-90.

174. "Even the government admits that customary international law of human rights contains a general principle prohibiting prolonged arbitrary detention." Fernandez-Roque v. Smith, 622 F. Supp. 887, 903 (N.D. Ga. 1985) (noting "the indefinite detention of plaintiffs without periodic hearings establishing that the continued detention is reasonably necessary . . . appears to violate customary international law").

175. 175 U.S. 677 (1900). We are not taking a position on the correctness of this interpretation of the Court's dicta. But, courts have consistently read the Court's language to hold that in any case where such a "controlling" act exists, it trumps international law as a possible rule of decision.

176. Rodriguez-Safonts v. Thornburgh, 1993 WL 455287, at *4 (D. Kan. 1993). *See also* Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1448 (5th Cir. 1993) (noting "international law does not require the release [of detained aliens] where . . . legislative, executive or judicial decisions exist to the contrary"); Fernandez-Roque, 622 F. Supp. at 902 (noting "the President has the authority to ignore our country's obligations arising under customary international law . . . . [C]ustomary international law offers plaintiffs no relief . . . .").

177. *See, e.g.*, Fernandez-Luiz v. Luttrell, 46 F. Supp. 2d 754, 757 (W.D. Tenn. 1999) (noting "the Court finds the cases permitting the indefinite detention of excludable aliens . . . persuasive"); Barerra-Echavarria v. Rison, 44 F.3d 1441, 1451 (9th Cir. 1995) (noting "international law controls only 'where there is no treaty, and no controlling executive or legislative act or judicial decision' . . . the Attorney General's authority under 8 U.S.C. § 1226(e) . . . displaced any possible contrary rule of international law . . . .") (quoting Paquete Habana, 175 U.S. at 700); Gisbert, 988 F.2d at 1447 (noting "we . . . hold that international law does not require the release of [detainees] where . . . legislative, executive, or judicial decisions exist to the contrary"); Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986); Alvarez-Mendez v. Stock, 941 F.2d 956 (9th Cir. 1991) (noting "we are bound by a properly enacted statute, provided it be constitutional, even if that statute violates international law").

178. Fernadez-Luiz, 46 F. Supp. at 758.

179. *Id.*

*3. Extradition*

Extradition actions often spur international individual rights claims. In particular, international law has been invoked against extradition because: (1) the criminal justice system of the requesting nation is somehow corrupt or untrustworthy, or (2) the individual faces invidious persecution upon return.

The primary obstacle is the judicial rule of "non-inquiry." This rule requires courts in the extraditing country to refrain from examining the circumstances that await the extraditee upon his return to the requesting country. This prohibition precludes a review of either the nature of the criminal justice system of the requesting nation or even claims of tenable human rights violations at the hands of the requesting country. Judicial reluctance stems at least in part from relative institutional competence at evaluating the judicial process in foreign countries—particularly where the executive branch has already signed an extradition treaty pursuant to a thorough assessment of the foreign nation's criminal justice system. As summed up by the Ninth Circuit, "Undergirding this principle is the notion that courts are ill equipped as institutions and ill-advised as a matter of separation of powers and foreign relations policy to make inquiries into and pronouncements about the workings of foreign countries' justice systems."[180]

Other than a few cases where inquiry was mandated by treaty or statute,[181] no decision has abrogated the rule of non-inquiry in extradition cases. Many courts have been troubled by this, finding that in fact the extraditee will most likely suffer human rights abuses upon his return.[182] Nevertheless, courts have

180. *In re* Smyth, 61 F.3d 711, 714 (9th Cir. 1995). *See also* Michael P. Scharf, *Foreign Courts on Trial: Why the U.S. Courts Should Avoid Applying the Inquiry Provision of the Supplementary U.S.—U.K. Extradition Treaty*, 25 STAN. J. INT'L L. 257, 269 (1988) ("The State Department is in a superior position to consider the consequences of a nonextradition decision upon foreign relations than the courts and it has diplomatic tools, not available to the judiciary, which it can use to insure the requesting state provides a fair trial").

181. The most prevalent of these are the United States—United Kingdom Extradition Treaty, June 8, 1972, 28 U.S.T. 227, and the Supplementary Extradition Treaty, June 25, 1985, art 1, reprinted in S. EXEC. REP. No. 17, 99th Cong., 2nd Sess. 15-17 (1986). Under the 1972 treaty, the United States refused extradition if the charged offense was "of a political character." United States—United Kingdom Extradition Treaty, *supra*, art. V(c)(i), 28 U.S.T. 227. As a result of this provision, numerous courts refused to order the extradition of suspected IRA members. *See, e.g., In re* Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984). In 1985, the treaty was amended to withdraw the "political offense" exception for certain violent crimes. *See* Supplementary Extradition Treaty, *supra*, art 1, reprinted in S. EXEC. REP. No. 17, 99th Cong., 2nd Sess. 15-17. However, a further provision was added which held that the United States would not extradite individuals who may be "prejudiced at his trial or punished, detained or restricted in his personal liberty by reasons of his race, religion, nationality, or political opinions." *Id.* at art. 3(a). As a result of this relaxation of the traditional rule of non-inquiry, courts have begun to examine the possible treatment of extraditees. *See generally, In re* Smyth, 61 F.3d at 711 (entering into a limited inquiry and finding no bar to extradition).

182. In the most interesting of these cases, *In re* Sandhu, 1996 WL 469290 (S.D.N.Y. 1996), the court specifically found that the requesting country, India, engaged in government sponsored human rights abuses against Sikh minorities, to which the extraditees belonged. The court specifically rejected the "institutional" argument usually put forward, declaring, "I cannot be so sanguine about the fate of the respondents here. The United States Department of State has apparently declined to seek any guarantees from the Indian governments concerning the treatment of the respondents . . . ." *Id.* at *4. Nonetheless, the court felt "reluctantly" compelled to adhere to the rule of

not expanded individual rights via application of international individual right standards.[183] Despite troubling implications, the "institutional" infirmity argument has effectively closed judicial scrutiny of extradition cases pursuant to claims of international individual rights.

*4. Conclusion*

As this section reveals, United States courts will go to great lengths to avoid deciding international individual rights claims against criminal prosecution. Contrasted with their approach in civil contexts, their criminal justice decisions seem highly provincial. Various rules have been erected to avoid even the consideration of these claims—rules that seem starkly opposed to the expansionist view in ATCA cases. Even more striking are those instances where international individual rights claims are admittedly meritorious, but courts merely invoke prudential or institutional considerations to avoid remedying them.

In describing the courts' varying approaches to international individual rights claims within the civil and criminal contexts, we take no normative position. It would seem equally injudicious for us to attempt any synthetic account of the differing perspectives of courts in criminal versus non-criminal contexts. Instead, we merely point out how starkly opposed the approaches are. This opposition compels the conclusion that context matters. The courts are more concerned about the type of cases in which these claims are made—not, it would seem, on the implicated legal sources.

## IV.
## INTERNATIONAL INDIVIDUAL RIGHTS & CRIMINAL PROCEDURE DOCTRINE

So what does all this mean for American jurisprudence? As noted earlier, there is a near unanimous opinion among scholars that the American judiciary's interpretation of the Vienna Convention is fundamentally flawed. Rights under the Convention should be treated as analogous to the individual guarantees announced in *Miranda*,[184] these commentators claim. In other words, a denial of consular rights should be irrefutably prejudicial to a detained foreigner, requiring "reversal of a conviction and a new trial, or, at least, exclusion of tainted

non-inquiry and order the extradition. In doing so, the court also noted the tension between the *Filartiga* line of cases and the rule of non-inquiry. *Id.* at *4-5 ("if the respondents were extradited and were subsequently tortured, they could then sue [in the United States]. Inquiry into the human rights abuses . . . would only have been delayed . . . . Nevertheless, this does not alter the fact that the . . . non-inquiry doctrine [is] absolute"). *See also* In re Cheung, 968 F. Supp. 791, 809 (D. Conn. 1997) (noting "the Government's request for extradition is hereby granted, albeit reluctantly").

183. *See, e.g.,* United States v. Kin-Hong, 110 F.3d 103 (1st Cir. 1997) (extradition statutes to be read liberally in favor of extradition); Martin v. Warden, 993 F.2d 824 (11th Cir. 1993) (upholding rule of non-inquiry); Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986) (same); In re Cheung, 968 F. Supp. 791 (various international law bases for refusal of extradition rejected in favor thereof). *But see* United States v. Puentes, 50 F.3d 1567 (11th Cir. 1995) (noting an individual has standing to assert violations of an extradition treaty even absent the country's objection, although these rights may be affirmatively waived by the requesting nation).

184. 384 U.S. 436.

evidence."[185] The virtual constitutionalization of the Vienna Convention is mandated by the intent of the treaty to create a "fundamental and indispensable right[ ] of the individual,"[186] these scholars claim, placing consular guarantees on par with the constitutional rights to counsel and against self-incrimination.

Many commentators view *Breard* as an outright breaking from judicial doctrine; it allegedly exemplifies the second-class status of international rights in American courts. But as the previous section demonstrated, the Supreme Court's treatment of guarantees under the Vienna Convention is wholly consistent with an evolving two-track approach to international rights: (1) a preferred position for tort claims by civil litigants, and (2) an inferior status for international rights claims by criminal defendants. This is not to suggest that the distinction can be normatively justified, but rather that it exists in fact. Those scholars who argue that *Breard* is a jurisprudential derelict have failed to recognize the case-based dichotomy.

But this misunderstanding goes beyond the realm of international law and into the arena of domestic criminal procedure. Those who claim that the Vienna Convention creates a constitutional right buttressed by a powerful remedy make two assumptions: (1) the international signatories envisioned an exclusionary-type rule for violations of the Vienna Convention, and (2) the failure to provide a remedy in *Breard* broke from the Court's modern criminal procedure doctrine. Both assumptions prove false upon examination.

### *A. Criminal Procedure Remedies in Other Nations*

It is fair to say that no other nation has adopted the intricate web of criminal procedure doctrine found in the United States. Even countries which are also founded on the English common law have avoided the proliferation of seemingly hypertechnical rules which now govern American criminal trials and appeals. This is not to say that there are no similarities between legal systems. Every nation has some form of procedural default or waiver rules for legal claims not raised at the appropriate time or in the appropriate forum. Similarly, international standards generally require *Miranda*-type warnings upon arrest, informing an arrestee of the reasons for his detention and the charges against him.[187]

But international bodies "do not interpret these requirements as technically as U.S. courts, and the standards themselves are much more general than the precise information which must be communicated to suspects under *Miranda*."[188] More importantly, however, foreign nations have largely rejected the predominant American remedy for constitutional violations. Legal rules sup-

185. Kadish, *supra* note 28, at 612. *See also* Aceves, *supra* note 28, at 309-11; Paust, *supra* note 112, at 692 (noting "[i]n my opinion, application of both the procedural 'default' doctrine and the subsequent statute to defeat treaty-based rights of the individual was inappropriate").

186. 1 UNITED NATIONS CONFERENCE ON CONSULAR RELATIONS: OFFICIAL RECORDS 338 (1963) (statement of Korean delegate).

187. *See* HURST HANNUM, MATERIALS ON INTERNATIONAL HUMAN RIGHTS AND U.S. CRIMINAL LAW AND PROCEDURE 25 (1989).

188. *Id.*

pressing relevant, probative evidence from criminal trials are far and few between outside of the United States.[189] Continental legal systems are generally silent as to the admissibility of evidence obtained by improper police techniques.[190] The exclusionary rule is not merely an "American peculiarity" vis-à-vis Continental legal systems, "but also in [comparison to] England and the Commonwealth systems."[191]

The American scheme has often been derided by legal commentators, both here and abroad, noting that other nations have been equally successful at preventing official abuses without resorting to evidentiary suppression.[192] According to one jurist, "proof of the irrationality of the exclusionary rule is that no other civilized nation in the world has adopted it."[193] The late Professor John Kaplan agreed, noting that "leading legal representatives [of other nations] express in private, and occasionally in public, a complete mystification that the United States would adopt a rule which deprives the prosecution of reliable evidence of guilt."[194] "In other words," Kaplan concluded, "the exclusionary rule is hardly a facet of American jurisprudence which has aroused admiration the world over."[195]

In general, international law, treaties, and norms do not require the exclusion of improperly obtained evidence. "The European Commission and Court of Human Rights have . . . adopt[ed] a standard of harmless error and rarely find a violation of a right to a fair trial if sufficient evidence of an accused's guilt exists in addition to that which is being challenged."[196] Individual nations have likewise spurned the American per se exclusionary rule, opting instead for legal standards that assess the reliability of evidence regardless of official misconduct. In England, for example, violations of search and seizure rules will not lead to evidentiary suppression, and confessions will only be inadmissible in court if deemed involuntary.[197] The Canadian legal system analyzes illegally obtained evidence under a three-part balancing test, assessing the overall fairness of the trial, the seriousness of the official transgression, and the broad social effects

189. "Of all the major civil and common law countries, the United States is the only nation that has developed a comprehensive exclusionary rule." United States v. Enger, 472 F. Supp. 490, 545 n.26 (D.N.J. 1978).

190. *See* Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 522 (1973).

191. JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 69 (1977).

192. *See, e.g.*, John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1031 (1974) (noting "there are many other countries which do not have a mandatory exclusionary rule but which seem to be at least as able as we to prevent their police from intruding upon the rights of citizens").

193. Malcolm Richard Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215, 216 (1978).

194. Kaplan, *supra* note 192, at 1032.

195. *Id.*

196. HANNUM, *supra* note 187, at 96.

197. *See* Claude R. Sowle, *The Exclusionary Rule Under Foreign Law*, 52 J. CRIM. L., C. & P.S. 271, 272-75 (1961); *See generally* Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1 (1986).

from suppressing otherwise probative evidence.[198] In Germany, confessions obtained through brutality and deception are excluded from trial; all other challenged evidence is reviewed by balancing the individual's privacy interests versus society's interest in crime detection and punishment.[199] But evidence derived from an illegal search and seizure is, for the most part, admissible before the German judiciary.[200] And in France, evidence obtained through police misconduct may generally be introduced in court.[201]

Most nations do have "remedies" for police misconduct, including criminal and civil liability for offending officials, prosecutorial oversight, and strict internal discipline.[202] What they fail to provide, however, is relief for the aggrieved defendant in his subsequent trial. Outside of the United States, few motions are made to suppress illegally obtained evidence in a criminal prosecution, and "[e]ven where such motions are made on the [European] Continent, the preliminary issue of whether illegalities occurred is determined in a somewhat cavalier manner by American standards."[203] Foreign appellate tribunals rarely consider police misconduct and there is no strong analog to the American institution of collateral review.[204]

It would take an enormous leap in logic, therefore, to argue that the signatories to the Vienna Convention intended for violations to be cured by the exclusion of evidence or the dismissal of charges. And, in fact, such remedies were expressly rejected in the one reported foreign case that considered a Vienna Convention violation. That decision, *In re Yater*,[205] involved a British national who had been arrested in Italy for certain criminal offenses. Italian officials, however, brought the defendant to trial without informing the British Consulate of his arrest or the filing of criminal charges. The defendant's counsel argued that his consular rights had been violated and that the proceedings were thereby a nullity. The Italian Court of Cassation denied this claim, finding that consular access and notification were "complementary and subsidiary interventions which do[ ] not replace the accused's right to provide for himself a trusted legal representative in his defence."[206] Because the defendant had obtained satisfactory legal counsel, "there can be no violation of the procedural rules regarding the accused's defence as a result of failure to inform the said authority."[207]

198. *See* Antonio Lamer, *Protecting the Administration of Justice from Disrepute: The Admissibility of Unconstitutionally Obtained Evidence in Canada*, 42 ST. LOUIS U.L.J. 345, 355-56 (1998). *See also* Sowle, *supra* note 197, at 271-72.

199. *See* Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1034 (1983).

200. *See* 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 538 (Mark J. Kadish ed., 1983).

201. *See id. See also id.* at 538-39 (discussing control of police misconduct in Japan and Spain); Van Kessel, *supra* note 197, at 282-84 (same for Israel); *id.* at 284-86 (same for Japan); *id.* at 287-92 (same for Norway).

202. *See* Kadish, *supra* note 28, at 538-39.

203. Damaska, *supra* note 190, at 524.

204. *See* HANNUM, *supra* note 187, at 99-102.

205. 77 INT'L L. REP. 541 (1973).

206. *Id.* at 542.

207. *Id.*

### B. Criminal Procedure Rights and Remedies

The first, and arguably dispositive step in analyzing an alleged rights violation, is the source of the claim. As suggested earlier, the judiciary recognizes two rough categories—rights grounded in the Constitution and rights created by statute or its equivalent—and all subsequent analysis flows from this initial categorization. Although many scholars believe that rights under the Vienna Convention should be labeled constitutional, this argument has been justifiably rejected by the courts. First, constitutional rights must be grounded in the text or context of specific provisions of the Constitution. Although previously discussed in Part I, it bears repeating that this conclusion is preferable to those proposals offered by the academy. The constitutional power to enter into international obligations does not incorporate a treaty into the Constitution, just as the power to pass federal statutes pursuant to the commerce clause does not transform such laws into constitutional provisions. A contrary interpretation would gravely alter the balance of powers envisioned by the Framers. Constitutional rights cannot be repealed nor new rights added except by the purposely frustrating process of Article IV amendment. Treaties, however, can be unilaterally rescinded by executive decree or congressional statute. Constitutional rights are self-executing and remedies for their violation are invariably implied by the courts; treaties are not necessarily self-executing and the legal presumption is that they require enabling legislation to have any effect. Moreover, an interpretation that equated treaty rights with constitutional liberties, would fly in the face of nearly two hundred years of American case law.[208]

Treaty-based rights, as noted in Section II, have historically been considered the equivalent of those found in federal statutes. Once this is conceded, the judiciary's interpretation of rights under the Vienna Convention is wholly consistent with criminal procedure jurisprudence. Unless a statute provides otherwise, the denial of a non-constitutional right is typically analyzed by the trial court under the rubric of prejudice–whether the violation has a substantial and injurious effect on a defendant's case. For example, violations of non-constitutional rules restricting searches and seizures will only merit suppression of evidence if "there was prejudice in the sense that the search might not have occurred or would not have been so abrasive if the rule had been followed."[209]

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208. Justice Field's pronouncement in *DeGeofrey v. Riggs*, 133 U.S. 258 (1890), provides a good example of this judicial sentiment:

> The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government, or of its departments, and those arising from the nature of the government itself, and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent.

*Id.* at 267.

209. United States v. Pangburn, 983 F.2d 449, 455 (2d Cir. 1993) (quoting United States v. Burke, 517 F.2d 377, 386-87 (2d Cir. 1975)). *See also* United States v. Porter, 1993 WL 276958 (W.D.N.Y.) (refusing to suppress evidence from a search which violated statutory "knock and announce" rules). Likewise, prosecutorial misconduct before a grand jury that is not of a constitutional

On appeal, non-constitutional violations are subject to two standards depending on whether an appropriate objection was made at trial. If a contemporaneous objection was lodged before the trial judge, the reviewing tribunal will examine the violation for "harmless error."[210] A conviction will not be overturned unless "the error had substantial and injurious effect or influence in determining the jury's verdict."[211] But, if the reviewing court "has grave doubt about whether an error affected a jury in this way, the judge must treat the error as if it did so."[212] Nonetheless, an appellate court will affirm the judgment below if it is more probable than not that the error was immaterial to the verdict.[213]

In cases where a trial objection is not made, courts examine the case for "plain error."[214] There are three prerequisites to a finding of plain error permitting reversal of an adverse verdict: (1) there must be a violation of a legal rule; (2) the error must be "plain" in the sense that it is obvious or clear; and (3) the error must affect the substantial rights of the defendant by negatively prejudicing the outcome of his case.[215] Moreover, a court will only consider the error if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[216] The defendant bears the burden of proving that the error was prejudicial and, even when a court finds all of these elements, reversal of a conviction is permissive rather than mandatory. "If the forfeited error is 'plain' and 'affect[s] substantial rights,' the court of appeals has authority to order correction, *but is not required to do so*."[217]

A non-constitutional violation of federal law will only merit relief on habeas review if it produced a "fundamental defect which inherently results in a complete miscarriage of justice . . . ."[218] In other words, the deprivation of a federal statutory right cannot be remedied by writ of habeas corpus unless it also rises to the level of a due process violation.

As fashioned by the lower federal courts, the tests of prejudice and default for violations of the Vienna Convention are consistent with this jurisprudence. As with other statutory-type rights, a defendant must demonstrate prejudice to his case from the treaty violation to merit relief; if he fails to raise the claim at

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dimension will be deemed prejudicial and therefore warrant dismissal of an indictment "only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988) (quoting United States v. Mechanik, 475 U.S. 66, 78 (1986)). *See also* United States v. Hart, 779 F. Supp. 883 (E.D. Mich. 1991) (requiring a showing of prejudice to dismiss grand jury indictment based on prosecutor's alleged conflict of interest).

210. *See* Fed R. Cr. Pro. 52(a) ("Any error, defect, or irregularity which does not affect substantial rights shall be disregarded").

211. Kotteakos v. United States, 328 U.S. 750, 776 (1946).

212. O'Neal v. McAninch, 513 U.S. 432, 438 (1995) (quoting Kotteakos, 328 U.S. at 764-65).

213. *See* United States v. Dixon, 562 F.2d 1138, 1143 (9th Cir. 1977).

214. *See* Fed. R. Cr. Pro. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court").

215. *See* United States v. Olano, 507 U.S. 725, 732-34 (1993).

216. *Id.*

217. *Id.* at 735.

218. Reed v. Parley, 512 U.S. 339, 348 (1994).

the earliest possible instance, even a showing of prejudice will likely be deemed insufficient. Scholars can quibble about the true nature of this judicial analysis, that the test is no test at all, but they cannot argue that the current approach is unprecedented or an aberration. Like it or not, *Breard*, its antecedents, and its progeny are in harmony with judicial doctrine.

## V.
## *BREARD'S* POLITICAL REPERCUSSIONS

Yet, many do not like *Breard*, and their objections often have little to do with legal doctrine. Although scholars have raised numerous political and institutional objections to *Breard*, we will examine only three of these and only to the extent they relate to *Breard* rather than international law as a whole. Although we remain skeptical of the substance of these claims, we are ultimately persuaded that concerns for American citizens abroad obligate a new solution. If this solution is to happen, however, the political branches are the most likely institutional actors to bring it about.

### *A. Judicial Harms*

A common complaint of the academy is that the judiciary's failure to remedy violations of international law injures courts as institutions. This objection is aptly captured by one commentator:

> The value of courts *as courts* lies precisely in their dedication to the rule of law. They find their primary justification as a separate institution in their willingness to support law and the lawful resolution of disputes. When, instead, they countenance illegality, when they approach the resolution of disputes with the same casualness about the rule of law that sometimes marks other political institutions, they fail in the very duty that distinguishes them from others.[219]

This cannot mean that courts are inherently injured whenever they fail to apply a source of a law in a given dispute. Principles of equity and fairness have always tempered strict applications of legal doctrines. Likewise, the judiciary has crafted a variety of doctrines that favor one law over another or simply sidestep certain issues as non-justiciable. Not even the strongest proponents of this claim would insist, for example, that State courts must apply international or federal law in every case in which it is available. There are other important institutional concerns that guide courts in determining when to apply laws and when to disregard them. Stability, restraint, and minimalism are integral to the continued institutional legitimacy of courts.

All of these concerns are indicated in *Breard*. The courts did apply international law—broadly construing its reach to encompass individual causes of action. So the problem is not that courts ignored or even sidestepped international law. Instead, the judiciary has limited the effectiveness of international law by imposing a rather toothless remedy. But, as we have shown, imposition of a more stringent standard would have required the reworking of settled precedent

219. McFadden, *supra* note 117, at 33.

and the use of a remedy not envisioned even by international standards. In *Breard*, therefore, the judiciary's institutional legitimacy was arguably best served by the chosen course.

### *B. National Harms*

Scholars have also claimed that the United States' own self-interest is at stake because failure to abide by international law harms the nation in its attempts to foster diplomatic relations with other countries. This general claim stems from a simple supposition—that states generally do not enter into contracts with countries who have broken similar obligations in the past. Every time the United States ignores its international duties, it is argued, the nation's bargaining position is undermined. Foreign nations are less likely to sign treaties with the United States if it has a track record of breaching its "international contracts."

This broad and diffuse concern for America's continuing international relationships can easily be rejected as a "parade of horribles." The United States, after all, is the proverbial thousand-pound gorilla with the power to beat other nations into submission. Few countries, it can be argued, would forego fruitful relationships with the last superpower based on the execution of an admitted murderer. Indeed, the clearest lesson we have from *Breard* and similar legal disputes is that the failure to adequately protect consular rights has not hurt the United States. A State Department official has noted that *Breard* has not "been an irritant in our relationships with countries in the hemisphere."[220] After the execution of Angel Breard, for instance, Paraguay voluntarily withdrew its case pending before the International Court of Justice.[221] Other countries, although actively protesting the violations at the time they occurred, have proven unwilling to make waves for the United States in its foreign policy.[222] Under the current regime, the United States has assuaged these nations merely by offering an apology[223] and pledging to correct the problems of enforcement. The pursuit of U.S. foreign policy interests are safe from the effects of these disputes.

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220. Verbatim Transcript of Peter Romero's Briefing on U.S. Relations with Latin America, 1999 WL 11464, at *9 (F.D.C.H. Jan. 12, 1999).

221. *See* Aceves, *supra* note 28.

222. For instance, Mexico and the United States have recently issued a Progress Report to the Presidents on the Initiative to Implement a New Border Vision, on June 10, 1998 <http://www.state.gov/www/regions/wha/980610_border_vision.html>. In that report it was noted that:

> on March 1998, under the auspices of the U.S.-Mexico Border Liaison Mechanism, State Department and Secretariat of Foreign Relations (SRE) officials jointly participated in consular notification seminars in Brownsville-Matamoros and Laredo - Nuevo Laredo. In each case, the target audience was federal, state and local law enforcement officials. State Department and SRE officials are contemplating additional activities for the coming months, including seminars in Tijuana-San Diego and Ciudad Juarez-El Paso.

*Id.* These seminars were created in direct response to the execution of a Mexican citizen following a denial of his consular rights. *See* Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997).

223. The United States issued a formal apology to Paraguay on Nov. 4, 1998:

> That failure to notify Mr. Breard was unquestionably a violation of an obligation owed to the Government of Paraguay. The Government of the United States of

### C. Consular Rights and Protecting American Citizens

Any ambivalence to the above concerns is balanced by our conviction that decisions such as *Breard* pose dangers for individual American citizens. The failure to support the rights of foreign nationals in our criminal justice system has profound implications for U.S. citizens abroad. They are "scattered about the world—as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example."[224] Unlike the concerns discussed in the previous sections, time has shown that the danger to American citizens is not idle speculation but international reality.

Each year, about 3,000 Americans are arrested in foreign countries.[225] In the twelve months preceding *Breard*, the public had witnessed two American businessman unjustly detained abroad and erroneously charged with espionage. One was incarcerated in a South Korean jail for three months before being released;[226] the other spent twelve harrowing days in a Russian detention center and weeks under de facto house arrest before being freed.[227] And four years ago, an American attorney representing two U.S. citizens imprisoned in Peru, was herself taken into custody by Peruvian police, "and while in custody was raped and assaulted."[228] These cases are, in fact, the *success* stories. "Representatives of the U.S. Embassy came to the police station and rescued me," recounted the rape victim. "If those Peruvian authorities had failed to notify the United States embassy, I would not be alive today."[229] Other U.S. citizens are incarcerated *incommunicado* and receive a rough form of justice unknown to our

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> America fully recognizes the violation of the Vienna Convention in this case, and conveys its apologies to the Government and people of Paraguay.
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> * * *
>
> Recognizing that United States compliance with the requirements of the Vienna Convention must improve, the Government of the United States has undertaken efforts to better educate officials throughout the United States of the consular notification requirements . . . . Consular notification is no less important to Paraguayan and other foreign nationals in the United States than to U.S. nationals outside the United States . . . . We cannot have a double standard . . . ."

DEP'T ST. PRESS RELEASES, Nov. 4, 1998 (James Rubin) (visited Nov. 4, 1998) <http://secretary.state.gov/www/briefings/statements/1998/ps981104.html>.

224. Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring).

225. *See All Things Considered, supra* note 12 (statement of U.S. State Department official).

226. *See* Penni Crabtree, *Business Goes Global and Often Off Guard*, SAN DIEGO UNION-TRIBUNE, Dec. 7, 1997, at I1.

227. *See* Elizabeth Douglass, *Russia Holds Qualcomm Employee On Spy Charges: Company Claims It's All A Big Misunderstanding*, SAN DIEGO UNION-TRIBUNE, Dec. 2, 1997, at A1; Frank Green, *CIA Uses Travelers To Spy, Ex-Agent Says*, SAN DIEGO UNION-TRIBUNE, Dec. 6, 1997, at A16; Elizabeth Douglass, *Spy Charges Formally Filed By Russians; U.S. Protests Allegations Against Qualcomm Worker*, SAN DIEGO UNION-TRIBUNE, Dec. 6, 1997, at A1; Elizabeth Douglass, *Russians Give Accused Spy A Christmas Break*, SAN DIEGO UNION-TRIBUNE, Dec. 24, 1997, at A1; Elizabeth Douglass, *Bliss To Stay: Russians Drop Saturday Deadline For Qualcomm Employee's Return*, SAN DIEGO UNION-TRIBUNE, Jan. 8, 1998, at A1.

228. Henry Weinstein, *Foreigners on Death Rows Denied Rights*, L.A. TIMES, Dec. 10, 1998, at A1.

229. *Id.*

judicial system. "Many Americans are particularly vulnerable to foreign arrest," argued Professor Anne-Marie Slaughter, "sometimes for crimes they commit and sometimes for the crime of being American. To hold other countries to honor their obligation to notify the American consulate under such circumstances, the United States must demonstrate that it is prepared to offer the same treatment to their nationals."[230] The response of specific government institutions to the *Breard* incident demonstrates that some have forgotten this important aspect of international protection—that what goes around comes around.

*1. Role of the State Department*

A first step in recognizing where the United States went wrong in *Breard* is to focus on the role of the State Department. This executive agency acts as the President's "principal foreign policy advisor," and in that role, must take positions on what is best for the country.[231] However, a principle goal of the State Department is to "[p]rotect and[ ] assist[ ] American citizens living or traveling abroad."[232] Where the goals of foreign policy advisor and protector of American citizens can be harmonized, the State Department should formulate its positions accordingly.

The State Department designates consular offices as the most effective means for ensuring citizens' safety in foreign countries. Consular officers' right to prompt visitation is central to this mission. In past controversies, the State Department posited that "even in the absence of an applicable treaty, the U.S. government had always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world."[233] During the *Breard* controversy, the State Department, in accordance with its view that "the safety of American citizens . . . is our highest priority," pledged to "do what [it] can to make sure that nothing happens [that] in any way limits the ability of American citizens around the world to get an opportunity to meet with American consular officers . . . ."[234]

But, despite these guarantees, the State Department's position in *Breard* had little to do with protecting American citizens. Instead, the State Department acted as an arm of the Justice Department, framing its position not on the best interests of its citizens, but on the perceived guilt of the accused.

In *Breard,* the State Department joined the Justice Department's brief before the Supreme Court. The State Department's position was predicated on a "painstaking review" of the case and its belief that Breard had "not been prejudiced."[235] That the State Department formulated its policy on the guilt of Breard, rather than with an eye towards protecting American citizens' right to

230. Slaughter, *supra* note 13, at A15.

231. OVERVIEW OF THE DEPARTMENT OF STATE <http://www.state.gov/www/dept/dept_mission.html>.

232. *Id.*

233. HACKWORTH, *supra* note 38, at 836-37.

234. DEP'T ST. PRESS RELEASES, Apr. 13, 1998, 1998 WL 168357 (F.D.C.H.) (James Rubin).

235. DEP'T ST. PRESS RELEASES, Apr. 15, 1998 <http://secretary.state.gov/www/briefings/9804/980415db.html http://secretary.state.gov/www/briefings/9804/980415db.html>.

consular access, is problematic. Perhaps the Department is correct that "there's no reason to believe" that consular notification "would have changed the verdict"[236] in Breard's case, but this hardly seems like its mission.[237]

### 2. *Past Violations of Consular Rights*

The failure of the State Department to adequately account for the rights of citizens abroad has consequences. Foreign nations continue to frustrate the rights of consular notification and such cases are not new. In the 1940s, the United States was involved in a number of incidents with the Chinese government over its refusal to allow consular access to various detained Americans.[238] In those incidents, the United States deplored the Chinese refusal to allow consular access, arguing that such refusal was "in contravention of all accepted principles and practices of international behavior."[239] In the 1950's, a similar incident involving Hungary motivated the State Department to decry the blatant "disregard [for] general international practice with respect to consular rights."[240] In just the last few months the State Department has issued statements about American citizens in Burma,[241] Syria,[242] Belarus,[243] and Russia.[244] In each of

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236. DEP'T ST. PRESS RELEASES, April 13, 1998, 1998 WL 168357 (F.D.C.H.)(James Rubin).

237. DEP'T ST. PRESS RELEASES, Apr. 15, 1998 <http://secretary.state.gov/www/briefings/9804/980415db.html> ("What I can say is that, in this case, we do not believe that the failure to notify had any material impact on the trial and that a guilty man was executed"). *See also* Verbatim Transcript of Peter Romero's Briefing on U.S. relations with Latin America, Jan. 12, 1999, 1999 WL 11464, at *9 (F.D.C.H.). According to Assistant Secretary Romero:

> Certainly in most cases that I have seen, the simple fact of the matter is that a consular notification would not have made a material difference in the verdict of the juries at the end of the day. But certainly, we respect the right of all accused to be able to notify their various consular officials, along with their Miranda rights that we provide in this country.

*Id.*

238. *See* Herbert W. Briggs, *American Consular Rights in Communist China*, 44 AM. J. INT'L L. 243 (1950) (detailing a number of consular violations by the Chinese government).

239. *Id.* at 247.

240. DEP'T STATE BULL., Vol. XXII, No. 548, at p. 21-22 (Jan. 2, 1950).

241. *See* DEP'T ST. PRESS RELEASES, Aug. 11, 1998, 1998 WL 465052 (F.D.C.H.) ("Yesterday I noted the lack of consulary access . . . our embassy [has now been] able to meet with all six . . . . Our consular officer will request another visit tomorrow . . . and intend to visit them regularly as long as they are in custody. . . . We're thankful that we had consular access. We're going to seek consular access regularly and hope that [they] would be released promptly").

242. The United States has noted that Syrian authorities seldom follow the Vienna Convention:

> Although Syria is a signatory to the Vienna Convention, consular notification and access to arrested Americans are problematic. Syrian officials *generally* do not notify the American Embassy when American citizens are arrested. When the American Embassy learns of arrests of Americans and requests consular access, individual police officials have, on their own initiative, responded promptly and allowed consular officers to visit the prisoners. However, security officials have also in the past denied Embassy requests for consular access.

*Syria-Consular Information Sheet*, (visited Apr. 2. 1999) at <http://travel.state.gov/syria.html>.

243. The State Department has issued this statement on Belarus:

> In recent weeks, the Government of Belarus has used increasingly violent and dictatorial tactics to suppress legitimate protests. Demonstrators and bystanders have been assaulted and detained without charges. In the case of American citizens caught up in the violence, they have been denied access to consular officials. These steps are a

these cases, the arresting state initially refused consular access and/or failed to inform the detained citizen of his or her rights. Only after strong protests from the United States was access finally granted, underscoring the dangers American citizens face abroad. Consular rights' lack of consistent protection reinforces the need for the U.S. to carefully formulate its policies to best serve those rights.

*3. Reciprocity*

Consular access to Americans detained abroad is intimately connected to the consular access granted to foreign detainees in this country. In making this point, we are not telling the State Department something it does not already know. It has long recognized that "reciprocity" plays a role in the protection of consular rights. Thus, American officials are urged to "see to it that foreigners here receive the same treatment that we expect and demand for Americans overseas."[245] The "mutual obligations" that form the basis of consular rights requires the same access to a foreign national that an American consular officer expects when an American citizen is detained in a foreign country.[246] However, mere reciprocity is often not enough. Countries have used lesser violations of the Vienna Convention as a pretext for justifying their refusal to allow consular access.

In 1995, Harry Wu was arrested in China and accused of spying. He was held incommunicado for over a week. State Department attempts to gain access were rebuffed by the Chinese government on the pretext that, on at least two occasions, United States authorities had failed to live up to far less important aspects of the treaty. Specifically, the Vienna Convention requires a nation to report the death of any foreign nationals to the deceased's consulate.[247] Apparently, Chinese nationals had been killed in New York and Philadelphia without notification to the Chinese consulate. That the Chinese government would use

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clear violation of internationally accepted principles of human rights . . . . <http://secretary.state.gov/www/briefings/9703/970324.html>.

244. Richard Bliss was arrested in Russia in December of 1997 and accused of spying. Bliss was denied consular access for six days, causing the "Consul General in Moscow" to protest "this lack of timely access . . . . As of the briefing there is no response to our protest." DEP'T ST. PRESS RELEASES, Dec. 2 & 4, 1997, 1997 WL 749187 (F.D.C.H.) (James Rubin).

245. DEP'T ST. PRESS RELEASES, Apr. 15, 1998 <http://secretary.state.gov/www/briefings/9804/980415db.html>.

246. *See* Consular Notification and Access, January 1988: Basic Instructions: Summary of Requirements Pertaining to Foreign Nationals<http://www.state.gov./www/global/legal_affairs/ca_notification/part1.html>.

247. *See* Vienna Convention on Consular Relations, Apr. 24, 1963, art. 37, 21 U.S.T. 77, 500 U.N.T.S. 95. According to the State Department:

> If federal, state, or local government officials become aware of the death of a foreign national in the United States, they must ensure that the nearest consulate of that national's country is notified of the death. This will permit the foreign government to make an official record of the death for its own legal purposes. For example, such notice will help ensure that passports and other legal documentation issued by that country are canceled and not reissued to fraudulent claimants. In addition, it may help ensure that the foreign national's family and legal heirs, if any, in the foreign country are aware of the death and that the death is known for estate purposes in the foreign national's country.

<http://www.state.gov/www/global/legal_affairs/ca_notification/part2.html>.

these violations to justify the far more egregious action of refused consular access may be, as the State Department noted, "a game of words."[248] But in foreign relations, words do matter and violations of "unimportant" provisions may be used to justify violations on a much larger scale. Recognizing this, the United States must do all it can to ensure that *all* provisions of the Vienna Convention are respected, regardless of their perceived substantive importance.

Although the United States believed that as of Wu's 1995 detention "we have honored the Consular Convention in the past [and] are not aware of any violations, by the United States, of this convention in the past,"[249] the government has been on notice of grave and pressing enforcement problems. This sense of urgency, however, should have risen earlier. Cases involving violations of the Vienna Convention *had* come before federal courts since at least the late 1970s. After each instance, the State Department pledged to ensure compliance through increased awareness and education. These promises were reiterated in Harry Wu's case and have formed the core of the State Department's responses in the current controversies.[250] As part of a "massive effort" in 1998 to increase awareness,[251] the State Department promulgated a handbook detailing the treatment detained foreign nationals should receive under the Vienna Convention. The handbook has been mailed to local law enforcement and the State Department has held numerous seminars intended to correct the errors of the past. Internationally, the United States has undertaken further treaty obligations with countries like Mexico, promising to correct past mistakes through increased education of law enforcement.

These steps are laudable, but such actions have been insufficient in the past and offer little reason to believe they will suffice in the future. Put simply, there is little incentive under the current remedial scheme for State and local authorities to comply with provisions of the Vienna Convention. Whether willfully or through ignorance, violations of the Vienna Convention are currently underdeterred and will continue to be so until a remedy with teeth is adopted and enforced.

## VI.
## A MODEST PROPOSAL

As the previous section demonstrated—and as one court has opined—the remedies for violations of the Vienna Convention are "obviously insuffi-

248. DEP'T ST. PRESS RELEASES, July 6, 1995, 1995 WL 407848, at *12-14 (F.D.C.H.) (Nicholas Burns).

249. *Id.*

250. In response to Wu's predicament, the State Department made the following statement: "We make every effort to make sure that local authorities in the United States are aware of the requirement of our own consular agreements, in this case the U.S.-China consular convention . . . ." DEP'T ST. PRESS RELEASES, July 6, 1995, 1995 WL 407848, at *12-14 (F.D.C.H.)(Nicholas Burns).

251. According to Peter Romero, "we have acknowledged the fact that we have not provided the kind of consular notifications that are called for in the Vienna Convention. We have undertaken massive efforts in the State Department to correct that." Verbatim Transcript of Peter Romero's Briefing on U.S. Relations with Latin America, Jan. 12, 1999, 1999 WL 11464, at *9 (F.D.C.H.).

cient."[252] And yet, as we have argued, courts are not the most likely or proper institutions to bring about change. The current approach has been approved by the lower courts and implicitly sanctioned by the Supreme Court in *Breard.* Although the judiciary has shown some sympathy for civil tort claims under international law, it has rendered toothless criminal justice rights founded on treaty obligations or other international sources. This is consistent with the larger trend in the Burger and Rehnquist Courts of severely curtailing both constitutional and statutory rights for criminal defendants.[253] Although some scholars view the judicial stance on Vienna Convention violations as wrong or shortsighted, it is hard to argue that the approach is doctrinally inconsistent with established jurisprudence. More importantly, the courts are extremely unlikely to alter their course regardless of academic argument or lamentation. The Supreme Court has spoken in *Breard* and the lower courts will toe the line.

Change will come, if at all, through the political branches. While doctrinal shifts in the judiciary are glacial at best, Congress and the President can add legal bite to treaty obligations at will. Whether or not legislative or executive action is forthcoming is beyond the scope of this article. Nonetheless, we would like to suggest two moderate legislative changes to the current status quo. They offer temperate means for the United States to comply with its treaty obligations in the current legal milieu.

First, a violation of the Vienna Convention should be presumptively prejudicial to the defendant and must be met with affirmative government evidence to the contrary. Once a violation has been established, therefore, the burden should be placed on the government to demonstrate that no prejudice has accrued to the defendant's case.[254] As a pragmatic matter, this makes a good deal of sense; officials continue to ignore their treaty obligations despite high profile cases like *Breard.*

Placing the initial burden on the government when a right appears to have been violated would not be a groundbreaking move. After a defendant makes a *prima facie* showing that a particular search was warrantless, for example, the prosecution bears the burden of proving that any evidence gathered is otherwise

252. Esparaza-Ponce, 7 F. Supp. 2d 1084, 1098 n.10 (S.D. Cal. 1998).

253. For example, the Supreme Court has cabined defense claims under the Fourth, Fifth, and Sixth Amendments through the creation of what Professor Carol Steiker calls "inclusionary rules—rules that permit the use at trial of admittedly unconstitutionally obtained evidence or that let stand convictions based on such evidence." Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2469 (1996). Such inclusionary rules would include limitations on standing, the good-faith exception to the warrant requirement, and the harmless error doctrine.

254. There have been occasional judicial suggestions that presumptive prejudice might be the appropriate legal standard. A dissenting judge in one of the early INS cases argued that a violation of the Convention mandates "imposing the burden on the government to establish the absence of prejudice." United States v. Calderon-Medina, 591 F.2d 529, 532 (9th Cir. 1979)(Takasugi, J., dissenting). And recently, the Ninth Circuit hinted that it might switch the burden to the offending agency if the current scheme "proves ineffective in inducing compliance with the Vienna Convention." United States v. Lombera-Camorlinga, 170 F.3d, 1241, 1244 n.3 (9th Cir. 1999). Nonetheless, these suggestions are outliers; all other decisions have assumed without question that the defendant must bear the burden of establishing prejudice.

admissible.[255] Similarly, once a detained foreigner presents sufficient evidence that he was not accorded his Vienna Convention rights, the burden could easily be placed on the government to demonstrate that the violation did not prejudice the defendant. Putting the burden on the government to establish the absence of prejudice, we believe, is a modest method of encouraging compliance on the part of officials.

The second change is somewhat unique. Put simply, capital punishment should be foreclosed where any part of the underlying conviction is infected by a denial of consular rights. For example, Angel Breard admittedly was denied both notification of his treaty rights and access to the Paraguayan consulate. The subsequent conviction and death sentence were thereby in contravention to international treaty. Per our proposed statutory scheme, two options would be open to the courts. The judiciary could strike the death sentence and remand the case for re-sentencing without capital punishment as an alternative, or the reviewing court could overturn the conviction and send the case back for retrial. Under the second option, the government might still pursue the death penalty—but only if the taint from the original violation was remedied by, for example, suppressing any evidence derived from the violation and providing immediate notice and access to the appropriate consulate.

Some critics might find it strange that we draw the line at capital punishment—acquiescing to a term of life despite a clear denial of consular rights, for example, but balking at a sentence of death grounded in a similar treaty violation. As a matter of law, the divide is not irrational; as the Court has repeatedly noted, "death is a different kind of punishment from any other which may be imposed in this country."[256] Capital punishment, once imposed, is irreversible and unremediable. A mistake that results in an erroneous prison sentence is oppressive, but at least the wrongfully convicted inmate is alive. The legal system may have excised years from his life, denied his freedom and dignity, yet some kind of compensation can be made. Death, of course, is wholly different; it's all over except the official apologies.

The line drawn under our proposal, however, is not primarily based on the Court's jurisprudence. Instead, it presents a pragmatic solution to one of the most highly charged issues in international relations. According to a United Nations report, a majority of nation-states have abolished the death penalty,[257] with more and more countries being bound to abolition through international human rights treaties.[258] "The picture that emerges," argues one criminologist, "is that an unprecedented number of countries have abolished or suspended the use of the death penalty."[259] Those nations that continue the practice of state

255. *See* United States v. Bayless, 921 F. Supp. 211, 213 (S.D.N.Y. 1996). Generally, the prosecution must satisfy this burden of proof by a preponderance of the evidence. *See* United States v. Matlock, 415 U.S. 164 (1974); Lego v. Twomey, 404 U.S. 477 (1972).

256. Ohio Adult Parole Authority v. Woodard, 118 S. Ct. 1244, 1256 (1998) (citations omitted).

257. *See* William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 798-99 (1998).

258. *See id.* at 798, nn.6-8.

259. *Id.* at 845 (quoting English criminologist Roger Hood).

executions remain under constant pressure from the international community to adopt a more enlightened position towards permissible punishment.

The United States, as the last superpower, is not particularly influenced by international distaste for its capital punishment scheme—at least when American citizens go to the gallows. But when a foreign citizen is to be executed within the United States, the interests and pressures change dramatically. Mexico, for example, has adopted a strong policy of political and legal intervention when their citizens are charged or sentenced to death within the United States.[260] Likewise, Canada and a number of Western European nations have frustrated attempts to extradite suspects to an American State if they would face capital charges. While the propriety of the death penalty can be debated in the abstract, the government should nonetheless be cognizant of the revulsion felt by foreign nations and their citizens towards the practice of capital punishment within the borders of the United States. It is this disgust, which generalizes to all things American, that has potentially explosive effects on diplomatic relations.[261]

In fact, many nations view the continued use of state-imposed death as a violation of international human rights.[262] A 1997 report to the United Nations Commission on Human Rights included the United States as a nation whose death penalty practices fail to meet basic standards:

> [The Special Rapporteur] remains deeply concerned that death sentences continue to be handed down after trial which allegedly fall short of international guarantees for a fair trial, including lack of adequate defence during the trials and appeals procedures. An issue of special concern to the Special Rapporteur remains the imposition and application of the death penalty on persons [considered] to be mentally retarded or mentally ill. Moreover, the Special Rapporteur continues to be concerned about those cases which were allegedly tainted by racial bias on the part of the judges or prosecution and about the non-mandatory nature of appeals procedure in capital cases in some states after conviction.[263]

Along with capital punishment for the mentally incompetent, the possibility of juvenile executions in the United States acts as a lightning rod for anti-American

260. *See* Kadish, *supra* note 28, at 607 n.260.

261. *See* Masters, *supra* note 18, at B1 ("For the government of Mexico, [the right to speak to a consular officer] is of the highest importance," said [the] minister of information for the Mexican Embassy in Washington"); Kempster, *supra* note 7, at A6 ("Paraguay's state prosecutor's office issued a statement saying the [*Breard*] case does not only affect a Paraguayan citizen but the fundamental right to life held by every human being"); Weinstein, *supra* note 230, at A1(similar concern stated by Mexican consul general in Los Angeles). The potential for this rhetoric to be translated into action is particularly likely when the death penalty is at issue. Many nations have banned capital punishment, including America's top trading partners and geographic neighbors, Canada and Mexico. Although foreign tempers have been bottled to date, formal action in the future could be spurred by a heinous (in the eyes of the foreign nation) flash point. For example, "the U.S. has been one of only six countries in the world known to have executed juveniles. . . . Further, [the U.S. has] execut[ed] . . . 30 mentally impaired people in the past decade, including [a] convicted murderer . . . who had a mental age of 7." Terry Atlas, *Rights Group Starts Campaign Against U.S. Abuses*, NEW ORLEANS TIMES-PICAYUNE, Oct. 5, 1998, at E14.

262. *See* Shank, *supra* note 113, at 589-90.

263. Schabas, *supra* note 257, at 824-25 (quoting *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, U.N. ESCOR, Comm'n on Human Rights, 53d Sess., Agenda item 10, 79, at 22, U.N. Doc. E/CN.4/1997/60 (1996)).

sentiment.[264] Some day a juvenile foreign citizen will enter death row somewhere within the United States and, given that the number of foreign nationals facing execution in America is neither trifling nor diminishing,[265] the *Breard* debate may come to be viewed as relatively petty. Without change of some sort, it is there and then that the United States may regret its current stand on this issue.

## VII.
## CONCLUSION

Our proposed remedy does not transform the current judicial system nor does it revolutionize our federal government. The scheme will not result in mass reversals of otherwise fair convictions; only defendants genuinely prejudiced by Vienna Convention violations will merit judicial relief. Moreover, burden shifting has long been recognized as a legitimate incentive to urge compliance with both constitutional and statutory rights.

Although the current regime is not wrong in doctrine, it is wrong-headed in principle. There is little countervailing policy against stricter enforcement of these rights. Indeed, as we have shown, it is clearly the policy that serves the best interests of American citizens abroad. And until such time as other, more effective schemes are adopted, our remedy is an important first-step.

264. *See* HANNUM, *supra* note 187. *See also* Stanford v. Kentucky, 492 U.S. 361 (1989) (holding that the execution of an individual for a crime committed at age 16 or 17 years of age does not constitute cruel and unusual punishment).

265. There are currently sixty to seventy foreign nationals on American death rows. *See* Shank, *supra* note 113, at 590.