No. 04-10566

IN THE

Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner,

—v.—

STATE OF OREGON,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OREGON

BRIEF FOR PETITIONER MOISES SANCHEZ-LLAMAS

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QUESTIONS PRESENTED

1. Does Article 36 of the Vienna Convention on Consular Relations confer on a foreign national detained in the United States individual rights of consular notification and access enforceable in the courts of the United States by that national?
2. Does the failure to advise a foreign national detained in the United States of his rights under the Vienna Convention result in the suppression of his statements to police?

PARTIES

All parties to the case in the Oregon Supreme Court are named in the caption.

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The Jackson County Circuit Court entered an unpublished criminal judgment against petitioner. The Court of Appeals of Oregon affirmed petitioner's conviction without opinion, and the result is reported in tabular form at 191 Or. App. 399, 84 P.3d 1133. The order of the Supreme Court of Oregon allowing review is reported in tabular form at 337 Or. 34, 93 P.3d 71. The Oregon Supreme Court opinion affirming petitioner's conviction is reported at 338 Or. 267, 108 P.3d 573.

JURISDICTION

The Supreme Court of Oregon issued its final judgment on March 10, 2005. Petitioner filed a timely petition for certiorari on June 7, 2005. This Court granted certiorari on November 7, 2005. This Court has jurisdiction pursuant to Article III, § 2, of the United States Constitution, and 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

Article VI of the United States Constitution is quoted in pertinent part at page 1 of the Petition. Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 100-101, T.I.A.S. No. 6820 [hereinafter "Vienna Convention"], is quoted in full at page 2 of the Petition.

STATEMENT OF THE CASE

In this case, Petitioner Moises Sanchez-Llamas, a national of Mexico, seeks judicial enforcement of his rights to consular notification and assistance under Article 36 of the Vienna Convention on Consular Relations. It is undisputed that authorities of the State of Oregon violated the Vienna Convention by failing to advise Mr. Sanchez-Llamas of his Article 36 rights in his criminal case.

A. The Vienna Convention on Consular Relations

The Vienna Convention, to which the United States is a party, "is widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention." U.S. Dep't of State, Telegram 40298 to the U.S. Embassy in Damascus (Feb. 21, 1975), *reprinted in* LUKE T. LEE, CONSULAR LAW AND PRACTICE 145 (2d ed. 1991). The

United States played a leading role at the 1963 diplomatic conference that produced the Vienna Convention. *Report of the United States Delegation to the United Nations Conference on Consular Relations*, *reprinted in* VIENNA CONVENTION ON CONSULAR RELATIONS AND OPTIONAL PROTOCOL, S. EXEC. DOC. E, 91-9, at 59-61 (1969) [hereinafter "*Report of the United States Delegation*"]. The United States signed the Vienna Convention on April 24, 1963, and with the unanimous advice and consent of the Senate, s*ee* 115 CONG. REC. 30,997 (Oct. 22, 1969), President Nixon ratified it on December 24, 1969. *See* 21 U.S.T. 77, 185.

Article 36 of the Vienna Convention establishes an interrelated regime of rights that enables consular officers to protect nationals who are detained in foreign countries. Article 36(1)(b) requires the authorities of the detaining state to notify "without delay" a detained foreign national of his right to request assistance from the consul of his own state and, if the national so requests, to inform the consular post of the arrest or detention, also "without delay." Article 36(1)(a) and (c) require the detaining country to permit the consular officers to render various forms of assistance. Finally, Article 36(2) requires that a country's "laws and regulations … enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

To date, 168 nations have ratified the Vienna Convention, making it one of the most widely ratified multilateral treaties in force.[1] The United States has described the rights and obligations set forth in Article 36 as "of the highest order," in large part because of the reciprocal nature of these obligations and the importance of these rights to United States citizens abroad. ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, at 161 (1973).

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[1] *See* Multilateral Treaties Deposited with the Secretary-General: Vienna Convention on Consular Relations, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp (last accessed December 22, 2005).

B. Petitioner's Arrest and Interrogation

According to testimony at trial, at some time after 3:00 a.m. on December 18, 1999, two roommates of respondent's girlfriend called the police, reporting that respondent had threatened them with a gun. (Tr. 338-49, 355-59, 390-98, 366, 453-54, 497.) Petitioner had consumed a large amount of alcohol and was heavily intoxicated. (Tr. 381-84, 594, 614, 692-94.) Officers Michael Strouse and Scott Clauson, who were among the officers responding to the call, approached petitioner, who was crouched behind a duplex with his back to the officers. (Tr. 456-57, 477, 764, 767-68, 483.) According to the officers' testimony, Officer Clauson shined his flashlight on defendant, saw a gun in his hand, identified himself as a police officer, and said, "Drop the weapon." (Tr. 460, 769.) After an exchange of gunfire lasting no more than 10 seconds, Officer Clauson was wounded in the leg. (Tr. 459-63, 465, 484-86, 499, 534-35, 550, 563-64, 571-72, 723-27, 732, 735, 769-70, 775.)

Shortly thereafter, petitioner was arrested. At least 10 officers were present at the arrest. (Tr. 33.) The officers told petitioner to show his hands and come out from behind the building. (Tr. 27-28, 30, 46-47, 68, 88, 90, 94, 104-105.) According to the officers, petitioner came out with his hands up, stopped, and turned around, but he did not go down on his knees when so instructed. (Tr. 47, 69-71, 90, 111-13.) One officer tackled petitioner, knocking him face-down to the ground, and three other officers joined in to subdue and handcuff him. (Tr. 34, 48, 71, 96-96, 106-07.) The officers punched petitioner and administered "focus blows" with a flashlight to his face, back, and arms. (Tr. 49, 91, 106.)

At 3:48 a.m., a paramedic examined petitioner in the police station and asked in English if he was in pain, if he wanted to go to the hospital, and if he wanted treatment. (Tr. 76-77.) Petitioner shook his head and said, "No," and told her, "Bang, Bang," while miming being hit on the head and chest. (Tr. 77, 81-82.)

At 4:36 a.m., Detective William Ford began interrogating petitioner, with "Community Service Officer" Arturo Vega acting as interpreter, and they quickly established that petitioner was a Mexican national who spoke little English.

(Tr. 76, 108, 118, 123, 136, 175.) Petitioner appeared "heavily intoxicated," but also "coherent" and able to communicate "effectively." (Tr. 124-25, 176.)

Police advised petitioner of the *Miranda* rights in Spanish and English, and he indicated that he understood. (Tr. 122-23.) Petitioner said that he was walking to his brother's house when he saw the police across the street and then running behind the duplexes. (Tr. 147, 150.) As he was crossing the street, he heard shooting, but did not think the police were shooting at him. (Tr. 150.) He got scared and got rid of a black gun. (Tr. 125, 150, 205.) Petitioner denied firing the gun or possessing a second gun. (Tr. 126, 148-49, 151.)

Detective Barthel joined Detective Ford and Officer Vega, and the interrogation resumed at 6:05 a.m. (Tr. 126-27.) Petitioner began to complain of being dizzy and in pain, and he wanted to lie down on the floor. (Tr. 128-29.) At 7:00 a.m., they took him to the hospital. (Tr. 129.) Nurse Beatrice Martinez, who is fluent in Spanish, testified that petitioner was "slurry," lethargic, and not "fully alert." (Tr. 162-65.)

Detective Ford, Officer Vega, and Detective Barthel resumed the interrogation at 7:33 a.m., while petitioner was lying on a bed waiting to be x-rayed. (Tr. 129-30.) Petitioner was re-advised of his *Miranda* rights in Spanish and English. (Tr. 129-30.) The interrogation continued with a few short breaks for medical attention, and petitioner continued to deny shooting at police. (Tr. 130-34.) The police maintained a constant presence at his side.

At 9:45 a.m., after taking petitioner back to the police station, the police resumed the interrogation. (Tr. 120, 135.) The officers told petitioner that he must be honest with them "because you are not going to have many chances to tell us." (Tr. 135, 152; Ex. 1, at 1.) Officer Vega added that it "is going to go a lot further being honest with [the police] than lying to [the police]" and that the "police are going to find out anyway, so it's better that you talk now. Better than ... later, they go after you more, ok?" (Tr. 179-80; Ex. 1, at 6.)

Petitioner said that "they" shot at him first, that he was not doing anything, and that he did not know why they were shooting. (Ex. 1, at 2, 7, 8, 15.) When he shot, he was shooting up in the air. (*Id.* at 3.) After being told it did not matter how

many guns he had, he said that he had a second gun, but he also said that he did not pull out the second gun until he left it on the ground, and that he had only fired one gun. (*Id.* at 4-5, 7, 8, 12.)

When challenged as to how he could hit an officer if he were only firing into the air, petitioner demonstrated firing as he brought up the gun. (*Id.* at 16-17.) The officers suggested that petitioner pulled out the black gun as he was firing the chrome gun in the air, and petitioner agreed but denied firing the black gun. (*Id.* at 20-21.) Petitioner said he only fired three or maybe four bullets. (*Id.* at 21, 24, 50.) Asked if he fired shots from the black gun straight ahead, petitioner first said yes, and then denied it. (*Id.* at 21-24.) At one point, he admitted firing both guns in his possession, but the evidence at trial established that only one of the two guns was fired. (Ex. 1, at 24, 50; Tr. 485, 584-85, 719-20, 730, 771.)

Near the end of this phase of the interrogation, the officers asked petitioner to describe his *Miranda* rights, and petitioner said, "that it would be better if I told the truth and everything." (Ex. 1, at 64.) When asked in the interrogation if the police had promised him anything, petitioner said, "No," and then that he did not remember. (*Id.* at 65-66.) When asked if the police had frightened him in any way, petitioner said he did not remember and then, "Yes, that, that, that, I was going to, to be, ah, locked up longer. That's what I remember that you told me, right? That, that, that I was going to have more, more trouble, that's all ... if, if, if I didn't tell the truth, you told me." (*Id.* at 66.) When asked if he was being honest with the police, petitioner said, "Yes, right now, right now, I have told you everything, I have, because you told me to, right?" (*Id.* at 69.) When asked if he had made his statements voluntarily and because he wanted to, petitioner said, "Yes, well, to you all, because you told me that if I didn't you-know-what, didn't you tell me that? I, I, that's why, that's why I told you the whole truth, better you told me. That's right, I, I better tell you everything right now." (*Id.* at 69-70.)

The interrogation stopped for lunch at 11:00 a.m., resumed at 11:45 a.m., and continued until 12:45 p.m. (Tr. 138-39.) Petitioner maintained that the police had fired first and that he was not trying to kill them, but he also stated both that he

knew that he was shooting at police and that he did not know. (Tr. 510-16, 522, 608, 610-16, 619, 622, 624, 627-29, 602-03, 630-72, 757-59; Exs. 41-45, 51, 62, 105.)

After the interrogation, Detective Ford and Officer Vega drove petitioner around town so that petitioner could point out his truck and his brother's house. (Tr. 139.) They had him sign a consent form to search his truck. (Tr. 139-40.) Petitioner was jailed at 2:30 p.m., eleven hours after his arrest. (Tr. 142, 155-56.) He had been in handcuffs the entire time. (Tr. 157.)

It is uncontested that the Oregon authorities became aware of petitioner's Mexican nationality shortly after his arrest, but they did not advise petitioner at that time, or at any time thereafter, that he had the right to contact and seek assistance from the Mexican Consulate. The Oregon authorities also did not notify the Mexican Consulate that a Mexican national was in custody.

C. Pre-Trial Proceedings and Trial

Prior to trial, petitioner moved to suppress his statements to police on the grounds that the statements were (1) made involuntarily, under both the United States and Oregon Constitutions, and (2) obtained in violation of the Vienna Convention and his right to due process. (Pet. App. 1-9.)

Defense expert witness Dr. Jose LaCalle, a clinical psychologist specializing in cross-cultural Hispanic forensic psychology, evaluated petitioner and found him to be "low average" in intelligence with poor language skills even in his native language, Spanish. (Tr. 191-96.) Dr. LaCalle noted that a Spanish speaker needed an 8th or 9th grade education to understand the construction of the Spanish sentences used in the *Miranda* rights. (Tr. 220-21.) He also explained that understanding the language of *Miranda* and understanding the concept were quite different, and that the concept is unknown in many rural Latin American areas, including petitioner's, where the population greatly fears the police. Petitioner's fear of the police was realized by the beating he received from the officers. (Tr. 196-98, 219-20.)

Dr. LaCalle opined that petitioner never understood that he could refuse to answer the police and that given his low intelligence, his fear of the police, his beating at arrest by the same people who interrogated him, his lack of sleep, his

earlier substance abuse, and the length of the interrogation, petitioner's ability to understand what the police were telling him was very limited. Dr. LaCalle believed that the officers used adept and suggestive questioning to manipulate petitioner into admitting untrue statements. (Tr. 206-11, 222-24.)

The trial court ruled that petitioner's statements were voluntary and advised defense counsel that it did not want to hear argument on the Vienna Convention issue. (Tr. 231-34.) The trial court entered an order denying the motion to suppress. (Pet. App. 10-11.)

After a jury trial, petitioner was convicted of attempted aggravated murder, attempted murder, assault in the first degree, burglary in the first degree, menacing, and several weapons offenses. He was sentenced to 20½ years in prison.

D. Petitioner's Case on Appeal

Petitioner argued on appeal that his statements should have been suppressed as involuntary under both the Oregon Constitution and the Fifth and Fourteenth Amendments to the United States Constitution and because they were obtained in violation of the Vienna Convention. The Court of Appeals affirmed petitioner's conviction without opinion.

Petitioner made the same arguments before the Oregon Supreme Court, which affirmed his conviction. Relying heavily on what it believed to be a presumption against privately enforceable treaty rights and the views that the State Department had previously expressed in *United States v. Li*, 206 F.3d 56 (1st Cir. 2000), the Oregon Supreme Court concluded that the Vienna Convention does not confer individually enforceable rights. (Pet. App. 16-22.) Having found that the Vienna Convention did not create judicially enforceable rights, the Oregon Supreme Court found that a suppression motion grounded in a Vienna Convention violation "was not well taken, and the trial court did not err in denying it." (Pet. App. 22-23.) It did not address the voluntariness and *Miranda* waiver claims. (Pet. App. 15.)

Petitioner filed a timely petition for a writ of certiorari, and this Court granted the writ on November 7, 2005, limited to the Vienna Convention issues.

SUMMARY OF ARGUMENT

I. In addressing whether Article 36 of the Vienna Convention creates individual rights, the opinion below conflated three separate questions: (A) whether the Vienna Convention is self-executing in the United States, in the sense that the United States intended to implement it directly rather than through separately enacted legislation; (B) whether Article 36 of the Vienna Convention, by its terms, confers rights on individual foreign nationals; and (C) whether there is a "private right of action" to sue to enforce the treaty.

The first question, as to self-execution, is a question of the intent of the United States at the time of ratification. It is undisputed and indisputable that the United States intended the treaty to be implemented directly rather than through separate legislation. The Executive Branch explicitly stated to the Senate at the time of ratification—and continues to state today—that the Vienna Convention is entirely self-executing.

The second question, as to individual rights, is a pure question of treaty interpretation, which is governed by principles of international law. The plain text of Article 36, which expressly and repeatedly refers to the "rights" of a detained foreign national, leaves no room for doubt that the treaty creates individual rights. The unambiguous ordinary meaning of the treaty's words obviates any need to resort to secondary means of interpretation. Moreover, the treaty makes clear that the foreign consulate need not be notified if the detained national objects to notification, belying any suggestion that the provision was intended solely for the benefit of the foreign state rather than the affected individual.

At the same time, granting individuals an individual right to consular notification and access is fully consistent with the treaty purpose of facilitating the core consular function of assisting a country's nationals in protecting their rights and interests on foreign soil. The statement in the preamble that the purpose of creating "consular ... privileges and immunities" was not to benefit individuals refers on its face to the privileges and immunities of consular officials, not the rights of detained nationals, and in any event, general language of purpose in a preamble cannot prevail over the specific operative provisions of the treaty.

If there were any ambiguity in the treaty language, it would be dispelled by the *travaux préparatoires*. The *travaux* show that the language of Article 36 was amended during the negotiation process for the specific purpose of creating individual rights of consular notification and access. Although the delegates to the conference that negotiated the Vienna Convention initially debated the appropriateness of including provisions creating individual rights, it was unquestioned that the creation of individual rights was the purpose and effect of the language that the parties ultimately agreed upon.

The practice of the United States demonstrates that it shared the understanding that Article 36 creates individual rights. In treaty negotiations, at the time of signature and ratification of the Vienna Convention, and in subsequent proceedings, the United States repeatedly took the position that Article 36 creates individual rights of consular notification and access. It is only in the last few years, in the context of litigation, that the United States has taken a contrary position.

The ICJ's decisions in the *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. No. 104 (June 27), and *Avena and Other Mexican Nationals (Mex. v. U.S.),* 2004 I.C.J. No. 128 (Mar. 31), also make clear that the plain-language reading that Article 36 creates individual rights is correct. Even apart from the fact that the *Avena* decision is binding on the United States by treaty in cases involving Mexican nationals such as Mr. Sanchez-Llamas, the *LaGrand* and *Avena* decisions are, at a minimum, entitled to respectful consideration. The meaning of a treaty is not a question of any one country's laws; a uniform interpretation is presumptively intended. The final judgment of an international judicial body designated by many of the parties to the treaty to resolve disputes over treaty interpretation and application, even if it were not directly binding, should receive especially great weight.

The third question, as to a "private right of action," would be a question of United States federal law, but it is irrelevant to this case. Mr. Sanchez-Llamas has not brought a private action. Rather, he has invoked the treaty as a defense to a criminal prosecution to which Oregon has made him a party.

As to all three of these questions, the Court is not writing on a blank slate. In case after case from the founding of the

nation to the present day, this Court has routinely enforced, at the behest of the affected individual, treaties addressing the treatment of foreign nationals in the United States. This Court has uniformly enforced such treaties regardless of whether they were raised in criminal prosecutions, in civil litigation with the state or federal government, or in civil litigation between private parties. Nothing is different about this case. If anything, Article 36 of the Vienna Convention is far more explicit about the creation of individual rights than the treaties that the Court has enforced in the past. Under this Court's longstanding precedents, Article 36 provides the rule of decision in Mr. Sanchez-Llamas's case in the same manner as would a federal statute.

II. It is fundamental that where a right exists, there is a remedy for its violation. If a statute provides a rule safeguarding or creating individual rights, courts will give a remedy for a violation of the statute in the course of a criminal proceeding. In particular, where a statute provides procedural safeguards protecting the integrity of the criminal proceeding, this Court has regularly applied the exclusionary rule to evidence obtained in violation of the statute. The Vienna Convention, as a duly ratified treaty, is of equal dignity with a statute and operates in the same manner. Moreover, the Vienna Convention itself requires the United States to provide a judicial remedy for violations of Article 36.

The rights guaranteed by Article 36 are precisely the kind of rights for which suppression of evidence is the appropriate remedy. *First*, failure to inform an arrested foreign national of his rights as required by Article 36 eliminates the benefits of early consular assistance contemplated by Article 36. Consular officials provide essential assistance to detained nationals of their country, including helping them to understand their rights in an unfamiliar legal system, arranging for their representation where appropriate, explaining to them the respective roles of the police and of the lawyer that the police have offered to provide, and otherwise translating often complex and unfamiliar legal concepts into terms the foreign national can readily understand. The failure of the police to abide by their obligation, under Article 36, to inform the petitioner of his right to seek consular assistance gave him a

misleadingly incomplete picture of his legal options, effectively misrepresenting his legal rights and preventing him from seeking any of the benefits of consular assistance before making incriminating statements to the police.

Second, despite efforts by the State Department to publicize the requirements of Article 36, state and local officials in the United States have a troubling and persistent record of noncompliance with those requirements. If Article 36 violations had no consequences in U.S. law, law-enforcement agencies would have no incentive to comply with the rights that Article 36 creates.

Finally, the rights of consular notification and access are instrumental in protecting the basic constitutional rights—including the right against self-incrimination—of foreign nationals, who are uniquely vulnerable in an unfamiliar foreign legal system. *Miranda* warnings alone are not enough to protect these rights. The notification required by Article 36 supplements the *Miranda* warnings by advising the class of individuals of their additional right to seek assistance from someone familiar with their language and culture. The delegates who negotiated the Vienna Convention, and the President and Senate in ratifying the Convention, made a policy determination that a particular notification mechanism was the way to address these issues. That policy determination is entitled to respect by the judiciary, no less than if it were embodied in a statute enacted by Congress.

As the plaintiff in a criminal case, the state has the burden of proving the admissibility of petitioner's statements. The state has not made any attempt to show that the failure to notify petitioner of his rights of consular access caused him no prejudice. His statements should have been suppressed.

ARGUMENT

I.
THE VIENNA CONVENTION CONFERS ON PETITIONER A JUDICIALLY ENFORCEABLE INDIVIDUAL RIGHT TO CONSULAR NOTIFICATION AND ACCESS.

A. The Vienna Convention Is Self-Executing.

Although the Oregon Supreme Court's opinion uses the term "self-executing" (Pet. App. 18), the state has not disputed

that the Vienna Convention is self-executing in the sense of being implemented directly in the United States rather than through separate legislation.

The Supremacy Clause of the Constitution provides that "*all* Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI (emphasis added). This represents a deliberate departure from the traditional British view that the legislature alone is responsible for implementing treaties in domestic law. Chief Justice Marshall, writing for the Court, described the difference as follows:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> *In the United States a different principle is established.* Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.

Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (emphasis added). Thus, a ratified treaty has a dual character: on the international plane, it is a compact between nations, while in United States domestic law, it is the equivalent of a statute. *See, e.g., United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) ("where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress").

The exception to the rule that treaties operate directly in U.S. domestic law occurs where a treaty calls for performance of a legislative act. In that case, there is nothing for the courts to enforce until Congress "execute[s]" the treaty by enacting the contemplated legislation. *Foster*, 27 U.S. (2 Pet.) at 314; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(4) (listing limited circumstances in which treaties are non-

self-executing). *See also Percheman v. United States*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (holding treaty at issue in *Foster* to be self-executing; overruling contrary conclusion in *Foster*). *See generally* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 697-704 (1995).

"Self-execution" or "non-self-execution" is a question of United States constitutional law, not international law, because treaties do not normally address how they will be implemented in each nation's domestic legal structure. *See, e.g.*, RESTATEMENT, *supra*, § 111 cmt. h. Whether a treaty will be applied directly, or, on the contrary, will be implemented through separate legislation enacted by Congress, is primarily a question of the intention of the United States at the time of ratification. *Id.* § 111 cmt. h & reporter's note 5; *see also, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (treaty explicitly declared non-self-executing at time of ratification "did not itself create obligations enforceable in the federal courts" though it "bind[s] the United States as a matter of international law"); *Percheman*, 32 U.S. (7 Pet.) at 88-89 (treaty was self-executing where treaty language did not indicate that legislation was contemplated).

It is undisputed that the United States understood that the Vienna Convention would be effective without implementing legislation. When presenting the Vienna Convention to the Senate for its advice and consent, the Executive Branch explicitly represented that the obligations imposed by the Convention were "entirely self-executive and do[] not require any implementing or complementing legislation." *See Vienna Convention on Consular Relations, Hearing Before Senate Committee on Foreign Relations*, S. EXEC. REP. NO. 91-9, at 5 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Dep't of State). In a booklet currently provided to state and local law-enforcement agencies, the State Department advises that "[i]mplementing legislation is not necessary (and the VCCR and bilateral agreements are thus "*self-executing*") because executive, law enforcement, and *judicial authorities* can implement these obligations through their existing powers." U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS 44 (emphasis added), *available at* http://travel.state.gov/pdf/CNA_book.pdf (last accessed

Dec. 20, 2005). Moreover, the rights conferred and obligations imposed by Article 36 of the Vienna Convention operate, by their nature, in the context of criminal proceedings, and thus are fully capable of judicial enforcement without separate legislation. *See, e.g., Percheman*, 32 U.S. (7 Pet.) at 88, 89.

For these reasons, it is indisputable that the Vienna Convention is self-executing in the sense that it does not require any separate act of Congress to be effective as United States law. *See, e.g., Jogi v. Voges*, 425 F.3d 367, 376-78 (7th Cir. 2005) (Vienna Convention is self-executing); Amicus Brief for United States at 26, *Medellín v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928) (it is "the accepted understanding that the Vienna Convention is self-executing").

B. Article 36 of the Vienna Convention Creates Individual Rights.

Because the Vienna Convention on Consular Relations is an agreement between sovereign nations, its interpretation is a question of international law.[2] Applying international-law principles of treaty interpretation, as recognized and adopted by this Court's prior decisions, it is clear that Article 36 creates individual rights.

1. The Ordinary Meaning of the Plain Terms of Article 36 Makes Clear That Article 36 Creates Individual Rights.

A treaty is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties ("VCLT"), May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340;[3]

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[2] *See, e.g., Nuru v. Gonzalez*, 404 F.3d 1207, 1221 n.9 (9th Cir. 2005); *Chubb & Son, Inc. v. Asiana*, 214 F.3d 301, 307 (2d Cir. 2000); RESTATEMENT, *supra*, § 301(1); *cf. Kansas v. Colorado*, 206 U.S. 46, 95 (1907) (in dispute between two states, neither can apply its own law).

[3] Although the United States has not ratified the VCLT, both the executive branch and the courts have accepted its provisions relating to treaty interpretation as a codification of customary international law. *See, e.g., Avero Belg. Ins. v. Am. Airlines*, 423 F.3d 73 (2d Cir. 2005); *Aquamar S.A. v. Del Monte Fresh Produce*, 179 F.3d 1279, 1296 n.40 (11th

(footnote continued)

accord RESTATEMENT, *supra*, § 325(1). As this Court has recognized, "[i]nterpretation of the ... Treaty ... must, of course, begin with the language of the Treaty itself. The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 180 (1982) (citation omitted). In considering the context in which the treaty is made, the Court should give due regard to its character as an agreement among nations, recognizing the "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France v. Saks*, 470 U.S. 392, 399 (1985).

The plain terms of Article 36 of the Vienna Convention provide for individual rights of consular notification and access. Paragraph 1 of that article provides, in part, that:

> The said authorities [of the country detaining a foreign national] shall inform the person concerned without delay of *his rights* under this sub-paragraph.

Vienna Convention art. 36(1)(b) (emphasis added). It also provides that:

> Nationals of the sending State shall have *the same freedom* with respect to communication with and access to consular officers of the sending State [as consular officers of the sending State have with respect to communication with their nationals].

Id. art. 36(1)(a) (emphasis added). Paragraph 2 of Article 36 provides that:

> *The rights* referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations

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Cir. 1999); U.S.'s Objection to Jurisdiction at 17 & n.86, *Tembec Inc. v. United States* (NAFTA Feb. 4, 2005), *available at* http://www.state.gov/s/l/c11070.htm (last accessed Dec. 20, 2005); Letter from Sec'y of State William P. Rogers to Pres. Richard M. Nixon, Oct. 18, 1971, reprinted in S. EXEC. DOC. L, 92nd Cong., 1st Sess., at 1 (1971); *see also Weinberger v. Rossi*, 456 U.S. 25, 30 n.5 (1982) (citing VCLT).

> must enable full effect to be given to the purposes for which *the rights* accorded under this Article are intended.

Id. art. 36(2) (emphasis added). Thus, as numerous courts in the United States have concluded, Article 36 of the Vienna Convention creates individual rights by its plain terms. *See, e.g.*, *Jogi*, 425 F.3d at 378-84; *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002); *Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001); *United States v. Superville*, 40 F. Supp. 2d 672, 677 (D.V.I. 1999); *United States v. Hongla-Yamche*, 55 F. Supp. 2d 74, 77-78 (D. Mass. 1999); *see also Breard v. Greene*, 523 U.S. 371, 376 (1998) (Article 36 "arguably" confers individual rights). Conversely, the suggestion in the opinion below that Article 36 may have used the term "rights" because it was "convenient" to use that term although the parties to the Vienna Convention really meant something else (Pet. App. 20-21) fails to comport with the requirement that the words of a treaty be interpreted in accordance with their ordinary meaning.

Article 36 contains yet another dispositive indication that the provision confers rights on the detained national as well as the sending State. Article 36(1)(b) requires consular notification only "if [the detained individual] so requests." In other words, by its terms, Article 36 allows a detained individual to decline consular notification—a provision that is inconsistent with the understanding that the rights in Article 36 are for the protection only of the foreign state and not the individual. *See, e.g., Jogi*, 425 F.3d at 382-83 ("This indicates that the right conferred by Article 36 belongs to the individual, not to the respective governments.").

2. The Vienna Convention's Purpose Confirms That Article 36 Creates Individual Rights.

The plain language of the Vienna Convention conferring these individual rights is fully consistent with the purpose of the Convention "to ensure the efficient performance of functions by consular posts on behalf of their respective States." Vienna Convention, preamble, para. 5. A nation's ability to provide effective consular assistance is impaired if its citizens are not informed of their right to consular access, are denied such access, or are not given an effective remedy for

violation of these rights. As this Court has recognized, "a treaty should generally be 'construe[d] ... liberally to give effect to the purpose which animates it' and ... '[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.'" *United States v. Stuart*, 489 U.S. 353, 368 (1989) (quoting *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940)); *accord Asakura v. Seattle*, 265 U.S. 332, 342 (1924); *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1880). Contrary to what the decision below suggests, there is no inconsistency between the Vienna Convention's goal of facilitating consular functions—which include providing assistance to nationals in protecting their rights and interests—and a provision conferring on those individual nationals a personal right to seek consular assistance as a means of achieving that goal.[4]

In its brief to the Oregon Supreme Court, the State contended that the preamble to the Vienna Convention negated the rights conferred by Article 36. (*See* Pet. App. 21 n.7 (stating that court was "unimpressed" by state's argument)). The language relied upon by the state refers to "*consular* ... privileges and immunities," and recites that "the purpose of *such* privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts." Vienna Convention, preamble, paras. 4-5 (emphasis added).[5] It says nothing about the rights of detained

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[4] *See, e.g.*, Vienna Convention art. 5(a) (consular function includes "protecting in the receiving State the interests of the sending State and of its nationals"); *id.* art. 5(e) (consular function includes "helping and assisting nationals … of the sending State").

[5] The preamble recites that the Convention was entered into "[b]elieving that an international convention on *consular relations, privileges and immunities* would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems," and "[r]ealizing that the purpose of *such* privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." Vienna Convention, preamble, paras. 4-5 (emphasis added). This language is taken almost verbatim from the earlier Vienna Convention on Diplomatic Relations, which contains

(footnote continued)

foreign nationals. The term "consular privileges and immunities" is widely understood to mean the special protections attaching to consular officials, their family members, and property of the consulate. *See* 1 OPPENHEIM'S INTERNATIONAL LAW 1143-51 (R. Jennings & A. Watts 9th ed. 1992). Such official consular privileges and immunities appear throughout the Vienna Convention. *See* Vienna Convention arts. 31, 32, 33, 35, 40, 41, 43, 44, 46, 47, 48, 49, 50, 51, 52. Indeed, every use of the phrase "privileges and immunities" in the operative provisions of the Convention unambiguously refers solely to the privileges and immunities of consular or diplomatic personnel and property. *Id.* arts. 15(4), 17(1), 24(1)(d), 45(1), 53(1)-(3), (5), 55(1), 57(2), 58(1)-(3), 69(2), 70(4) & 71(1)-(2). In contrast, Article 36 explicitly refers to "rights" of a detained foreign national. *Id.* art. 36.

A number of courts in the United States have recognized that the recital in the preamble does not override the plain language of Article 36, but merely "emphasiz[es] that the Convention is not designed to benefit [consular officials] in their individual capacity, but rather to protect them in their official capacity." *Jogi*, 425 F.3d at 381 (citing *United States v. Rodriguez*, 68 F. Supp. 2d 178, 182 (E.D.N.Y. 1999), and Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 594 (1997)); *accord Standt*, 153 F. Supp. 2d at 425 ("[T]he Preamble's reference to 'individuals' is best understood as referring to consular officials rather than civilian foreign nationals."); *see also* Pet. App. 21 n.7 ("It is at least arguable that the emphasized clause refers to privileges and immunities of individual consular officials and that, as such, it says nothing about the rights of individual foreign detainees."). The preamble makes clear that the purpose of consular privileges and immunities in the Vienna Convention was not to make foreign consular officials a privileged class, but it has no

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analogous provisions in regard to the privileges and immunities of diplomats. *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, preamble, paras. 3-4, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

bearing on the individual rights of detained persons as guaranteed by Article 36.

In any event, even if there were an inconsistency between Article 36 and the preamble, the specific language of Article 36, an operative provision that expressly recognizes individual rights, would prevail over the general statement of purpose in the preamble. In the context of statutory interpretation, this Court has made clear that statements of general purpose, as in a preamble or title, must give way to specific operative statutory text.[6] The same principle also applies to the interpretation of a treaty. *See, e.g., LaGrand* ¶ 77 (citing authority); RESTATEMENT, *supra*, § 325 reporter's note 4 ("object and purpose" of treaty does not trump intent as expressed in operative words of agreement); *see also Trans World Airlines Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984) (general canons of statutory and contractual interpretation may be useful in construing treaties). In accord with that general principle of interpretation, a number of courts in this country have independently recognized, in regard to Article 36, that "[i]t is a mistake ... to allow general language of a preamble to create an ambiguity in specific ... treaty text where none exists." *Jogi*, 425 F.3d at 381; *accord, e.g., Hongla-Yamche*, 55 F. Supp. 2d at 77 (Article 36 operative text is "a more persuasive source for determining the parties' intent" than preamble); *Superville*, 40 F. Supp. 2d at 677 ("[A]lthough the treaty ... was not specifically designed 'to benefit individuals,' ... the text of article 36 enshrines a personal right to consular access ....").

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[6] *See, e.g., Whitman v. American Trucking Ass'ns,* 531 U.S. 457, 483 (2001) (clear text "eliminates the interpretive role of the title, which may only shed light on some ambiguous word or phrase in the statute itself") (internal quotations omitted); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524-25 (1989) (specific statutory provision prevails over general provision); 2A STATUTES AND STATUTORY CONSTRUCTION § 47.04, at 221-22 (Norman J. Singer 6th ed. 2000) ("The preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.").

3. The Vienna Convention's *Travaux Préparatoires* Confirm That Article 36 Creates Individual Rights.

Article 32 of the VCLT states that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work [*travaux préparatoires*] of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) Leads to a result which is manifestly absurd or unreasonable.

1155 U.N.T.S. at 340. As this Court has recognized, "[s]hould the operative text present 'difficult or ambiguous passages,' the Court may '"look beyond the written words to the history of the treaty, the negotiations and the practical construction adopted by the parties."'" *Volkswagenwerk A.G. v. Schlunk,* 486 U.S. 694, 700 (1988) (quoting *Air France v. Saks,* 470 U.S. at 396 (1985), and *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943)); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (treaty "negotiating and drafting history (*travaux preparatoires*)" is "traditionally considered as aid[] to interpretation"); *see also Standt*, 153 F. Supp. 2d at 425 (even if preamble created ambiguity in Article 36, ambiguity could be resolved by resort to "outside interpretive sources such as the travaux preparatoires").

Article 36 of the Vienna Convention on Consular Relations contains no ambiguity that would require resort to the treaty's *travaux préparatoires*, but in any event, the *travaux* fully "confirm the meaning resulting from the application of" the treaty's plain language and purpose. VCLT, art. 32.

The Vienna Convention was the product of the United Nations Conference on Consular Relations, held in Vienna from March 4 through April 22, 1963. At the conference, representatives of the governments of 92 nations met to negotiate the Convention, a proposed draft of which had been prepared by the International Law Commission.

Although the Conference extensively debated various terms of Article 36, and the view that its language operated to confer rights on individual foreign nationals was widely voiced, that view went unchallenged. For example, Spain's delegate observed that "[t]he right of the nationals of a sending State to communicate with and have access to the consulate and consular officials of their own country ... [i]s one of the most *sacred rights of foreign residents* in a country." *Official Records*, vol. I, U.N. Conference on Consular Relations, 2d Comm., 15th mtg., at 332, ¶ 36, U.N. Doc. A/CONF.25/16 (Mar. 4-Apr. 22, 1963) (emphasis added) [hereinafter "Conf. I"]. The delegate from India emphasized that "the right given to consulates *implied a corresponding right for nationals*." *Id.* at 333, ¶ 50 (emphasis added). The South Korean delegate stated that "the receiving State's obligation under [Article 36(1)(b)] was extremely important, because it related to one of the *fundamental and indispensable rights of the individual*." *Id.* at 338, ¶ 11 (emphasis added).

At the conference, the Venezuelan delegate proposed deleting Article 36(1)'s reference to a foreign national's freedom to communicate with his consulate precisely because it created individual rights. *See* U.N. Doc. A/CONF.25/C.2/L.100 (proposed amendment), *Official Records,* vol. II, U.N. Conference on Consular Relations, at 84, U.N. Doc. A/CONF.25/16/Add.1 (Mar. 4-Apr. 22, 1963) [hereinafter "Conf. II"]. The countries supporting this amendment regarded it as inappropriate for a consular convention to "defin[e] *the rights of the nationals* of the sending States." Conf. I, 2d Comm., 15th mtg., at 332, ¶ 37 (comments of Kuwaiti delegate supporting Venezuela amendment); *see also* Conf. I, 2d Comm., 15th mtg., at 331, ¶ 32 (comments of Venezuelan delegate). Ultimately, Venezuela withdrew its proposal in the face of strong opposition from other nations. *See* Conf. I, 2d Comm., 15th mtg., at 333-34, ¶¶ 49-54 (objections to Venezuela's proposal); Conf. I, 2d Comm., 16th mtg., at 334, ¶ 2 (withdrawal of proposal).

The requirement that a detained foreign national be informed of his or her right to contact the consulate, which is at issue here, is the result of an amendment offered by the United Kingdom. U.N. Doc. A/CONF.25/L.50, *reprinted in*

Conf. II, at 171. The U.K delegate argued that failure to include such a provision:

> could well make the provisions of article 36 ineffective because the person arrested might not be aware of *his rights*.... For those reasons, ... it was essential to introduce a provision to the effect that the authorities of the receiving State should inform the person concerned without delay of *his rights*....

Conf. I, 20th plen. mtg., at 83-84, ¶ 73 (emphasis added). Ultimately, the U.K. amendment was adopted by a wide margin, with the United States voting in favor. Conf. I, 20th plen. mtg., at 86-87, ¶ 108.

The United Kingdom also proposed the language at the end of Article 36(2) that makes the enforcement of Article 36(1) under national laws "subject to the proviso ... that the laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended." U.N. Doc. A/CONF.25/C.2/L.107, *reprinted in* Conf. II, at 85. Some Soviet Bloc delegates complained that this amendment would interfere with each country's criminal process by conferring additional rights on foreign nationals accused of crimes. Conf. I, 2d Comm., 19th mtg., at 347-48, ¶¶ 3, 6-9 (comments of delegates of Romania, Ukraine, and U.S.S.R.). The U.K. delegate responded that that objection was not legitimate because "after all it was precisely with *aliens and their rights* that Article 36 was concerned." *Id.* at 348, ¶ 10 (emphasis added). The U.K. delegate later reiterated that the amendment was important because it was "essential that [Article 36] should lay down clear and unequivocal rights and obligations." Conf. I, 12th plen. mtg., at 40, ¶ 6. The U.K. amendment was adopted by a wide margin, without a roll-call vote. Conf. I, 2d Comm., 19th mtg., at 348, ¶ 10.

The United States offered an amendment of its own, which would have added language to Article 36(1)(b) providing that the consulate should be notified of a national's detention "at the request of [the] national." U.N. Doc. A/CONF.25/C.2/L.3, *reprinted in* Conf. II, at 73. The purpose of this amendment was "to protect the rights of the national concerned," Conf. I, 2d Comm., 16th mtg., at 337, ¶ 39, apparently out of concern that citizens of totalitarian countries might not want their

governments notified of their arrest or detention abroad. The United States also endorsed a similar amendment offered by another group of nations, praising it for "recogniz[ing] the freedom of action of the detained persons." Conf. I, 11th plen. mtg., at 38, ¶ 21. The final version of the language was adopted as part of a proposal offered by a different group of nations, with the United States voting in favor. *See* U.N. Doc. A/CONF.25/L.49, *reprinted in* Conf. II, at 171; Conf. I, 20th plen. mtg., at 87, ¶ 109. This history confirms that the United States fully shared the common understanding that Article 36 creates individual rights.

The *travaux* thus make clear that the signatories of the Vienna Convention were fully aware of the implications of the provisions that are at issue in this case, and were remarkably unanimous in their view that Article 36, as ultimately adopted, conferred rights on individual nationals of a sending State that could affect the criminal process. The view that prevailed was that Article 36 ought to define and protect "clear and unequivocal rights" of nationals of the sending State and articulate the "obligations" of the receiving State to protect those rights. Conf. I, 12th plen. mtg., at 40, ¶ 6 (statement of U.K. delegate); *see also Jogi*, 425 F.3d at 382 ("The negotiation history of Article 36 is replete with concern about the question of individual rights."); *Standt*, 153 F. Supp. 2d at 425 ("[D]ebates on the VCCR reflect widespread concern with the question of individual rights.").

4. The Contemporaneous View and Subsequent Practice of the United States Government Has Been That Article 36 Creates Individual Rights.

The report of the United States delegation to the Vienna conference was fully consistent with its position at the conference that Article 36 creates individual rights:

> The solution adopted by the Conference to the problem of adjusting the notification obligations of the receiving State to the *right* of the individual concerned to request notification lies in the final sentence of subparagraph 1(b). That sentence requires authorities of the receiving State to inform the person detained of his *right* to have the fact of his detention

> reported to the consular post concerned and of his *right* to communicate with that consular post.

Report of the United States Delegation, *supra*, at 61 (emphasis added). The letter of the Secretary of State transmitting the proposed convention to the President summarizes Article 36(1)(b) in the same terms:

> It requires that authorities of the receiving State inform the person detained of his *right* to have the fact of his detention reported to the consular post concerned and his *right* to communicate with that consular post. *If he so requests*, the consular post shall be notified without delay.

Letter from Secretary of State William P. Rogers to President Richard M. Nixon, Apr. 18, 1969, *reprinted in* S. EXEC. DOC. E, 91-9, 91st Cong., 1st Sess., at vi (1969) (emphasis added).

The United States unmistakably confirmed its understanding when it appeared before the ICJ in 1979 in response to the takeover of the United States embassy in Tehran and the ensuing hostage crisis. In the ICJ, the United States argued, among other things, that Iran had breached its duties under Article 36, which, according to the United States,

> *establishes rights* not only for the consular officer, but perhaps even more importantly, *for the nationals of the sending State* who are assured access to consular officers and through them to others.

Memorial of the United States, *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. Pleadings at 174 (emphasis added) [hereinafter "*Tehran Hostages*"].

The State Department has held that view to this day. In the Foreign Affairs Manual that it issues to United States diplomatic and consular officials abroad, the State Department advises that "Article 36 of the VCCR provides that the host government must notify a foreign national arrestee without delay of *the arrestee's right* to communicate with his or her consular officials." 7 FAM § 421.1-1 (2004) (emphasis added), available at http://www.foia.state.gov/REGS/Search.asp (last accessed Dec. 20, 2005). The State Department's manual for law enforcement officers in the United States also refers to a "right" of consular notification. *See* U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS, *supra*, at 2.

The Justice Department has expressed the same view. In 2004, the Attorney General represented to the Mexican Government, in the case of a detained Mexican national who had not yet been tried, that

> [c]onsistent with the opinion of the International Court of Justice in [*Avena*], [the individual] is free to argue in the trial court that his rights under Article 36 of the Vienna Convention were violated by a failure to inform him of his right to contact his consulate once it was realized that he was a foreign national or there were grounds to think that he was probably a foreign national and to argue that prejudice resulted....

Letter of Att'y Gen. John Ashcroft to Amb. Carlos de Icaza, June 3, 2004, at 2 (appended to Brief of Mexico as *Amicus Curiae*).

The United States departed from this long-held view in *United States v. Li*, 206 F.3d 56 (1st Cir. 2000), in which, as a litigant, it took the position that the Vienna Convention created no individual rights.[7] The unilateral view of the executive branch is not controlling in any case, because the interpretation of a treaty depends on the intent of the parties as expressed in the language of the treaty and not the later-adopted view of a single party to the treaty. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 602 (6th ed. 2003). Courts must "interpret treaties for themselves" and not simply rubber-stamp the interpretation proffered by

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[7] The *Li* court cites two earlier State Department statements, but those statements, as quoted by the *Li* court, say nothing about issues of individual rights. Rather, the quoted statements merely indicate the State Department's view that (1) the departures from existing practice required by the Vienna Convention are not "significant," and (2) a particular foreign national's conviction and sentence were not affected by the Vienna Convention violation in his case. *Li*, 206 F.3d at 63-64. The *Li* court's inference from these statements that the State Department's position on the individual-rights question dates back to the 1970s—and the Oregon Supreme Court's adoption of that inference—is plainly mistaken, as the U.S. brief in the *Tehran Hostages* case, among other sources, makes clear.

the government. *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961). Although the consistently held views of the federal executive branch on the proper interpretation of a treaty provision would normally be entitled to "great weight," *id.*, those views are not binding on the courts. *See, e.g., id.* (adopting government's interpretation after independent review of treaty); *Perkins v. Elg*, 307 U.S. 325 (1939) (rejecting government's interpretation of treaty); *Factor v. Laubenheimer*, 290 U.S. 276, 294 (1933) (adopting government's interpretation after independent review of treaty; government's construction was "of weight" but "not conclusive"); *Johnson v. Browne*, 205 U.S. 309, 318-20 (1907) (same). No weight at all is due here, however, because the government has simply repudiated its long-maintained understanding of the meaning of the relevant provision in order to bolster its current litigating position. *See* RESTATEMENT, *supra*, § 326 reporter's note 2.

5. The ICJ Has Concluded That Article 36 Creates Individual Rights.

In the *LaGrand Case*, the ICJ explicitly held that "Article 36, paragraph 1, creates individual rights." *LaGrand* ¶ 77. The *LaGrand* court relied on Article 36(1)(b) of the Vienna Convention, which refers to the obligation to notify "the person concerned without delay of *his rights* under this subparagraph" (emphasis added) and on Article 36(1)(c), which provides the national with the right to refuse consular assistance. *See id*. The ICJ found no need to turn to external sources, because "[t]he clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand." *Id*. In *Avena*, the ICJ reaffirmed *LaGrand*'s holding that Article 36 creates individual rights. *See Avena* ¶ 40.

In *Avena*, in response to Mexico's request for relief, the ICJ expressly ruled that its holdings would apply to future cases in which Mexican nationals were sentenced to severe penalties in proceedings in which their Article 36 rights had been violated. *Avena* ¶ 153(11). The final judgment in *Avena*, a case between the United States and Mexico in which both States fully participated, is—by treaty—a binding interpretation of the Vienna Convention insofar as it concerns nationals of

Mexico arrested or detained in the United States.[8] *See generally* Brief of Mexico as *Amicus Curiae*.

The Court need not, however, decide whether the *Avena* judgment is directly binding in this case. As discussed above, the ICJ's decision is fully supported by the plain language and purpose of the treaty, and at a minimum, courts in the United States should give "respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret [it]." *Breard*, 523 U.S. at 375; *see also Jogi*, 425 F.3d at 384 (quoting *Breard*; citing *LaGrand* and *Avena* as reinforcing conclusion that Article 36 creates individual rights). Moreover, "it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently." *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting); *see also id.* at 655 n.9 (majority opinion) (not disputing point, but distinguishing foreign cases). After all, "treaties are made, not by only one of the contracting parties, but by both," THE FEDERALIST No. 64, at 394 (John Jay) (Clinton Rossiter ed. 1961), or, in the case of a multilateral treaty, by all. Indeed, the Vienna Convention was adopted in order to "further friendly relations between nations through the orderly development of *uniform* standards of consular practice." S. EXEC. REP. No. 91-9, at 3 (1969) (report of Sen. Fulbright) (emphasis added); *see also Report of the United States Delegation* at 41.

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[8] *See* Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, art. 1, 21 U.S.T. 325, T.I.A.S. No. 6820, 596 U.N.T.S. 487 (giving ICJ jurisdiction over disputes arising under Vienna Convention); U.N. CHARTER, art. 94(1), 59 Stat. 1031 ("Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899) ("[A]n award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned ...."); *cf. Eastern Assoc. Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57, 62 (2000) (where parties agree to arbitrate contractual dispute, "the arbitrator's award [must be treated] as if it represented an agreement between [the parties] as to the proper meaning of the contract").

The presumption in favor of uniform treaty interpretation should apply with special force here, where some 46 nations party to the Convention, including the United States and Mexico, adopted the Optional Protocol to the Vienna Convention designating a single forum for binding resolution of disputes concerning the Vienna Convention's interpretation and application, and where the ICJ issued its interpretation in a case in which the United States was a party and fully participated. The ICJ itself recognized its responsibility to ensure the uniform interpretation of the Vienna Convention. In a concluding paragraph of its judgment in *Avena*, it stated that it had approached the case "from the viewpoint of the general application of the Vienna Convention" and advised that its interpretation and application of the Convention would apply in any future case between parties to the Convention. *Avena* ¶ 151. Courts of other nations that are parties to the Vienna Convention, even those that are not parties to the Optional Protocol, have followed *LaGrand* and *Avena* on the point that Article 36 creates individual rights. *See, e.g., Khadr v. Canada (Minister of Foreign Affairs)*, 123 C.R.R.(2d) 7, 23 (Fed. Ct. 2004) (Canada) (citing *LaGrand* for the point that "the VCCR does create individual rights" to consular assistance). And numerous foreign nations, in their filings as *amici curiae* in this case, have endorsed the position that the Vienna Convention creates individual rights.

C. The Existence of a "Private Right of Action" Is Not at Issue Here.

The opinion below confuses the existence of an individual right under the Vienna Convention with the existence of a "private right of action" under United States law. Recognizing that each country's domestic legal structure is distinct, treaties themselves rarely create explicit causes of action. Rather, treaty rights are routinely asserted in the context of legal proceedings that arise under a cause of action created by United States domestic law.

In particular, this Court has consistently enforced treaties that did not themselves create domestic judicial remedies, where either (1) the treaty right was raised as a matter of defense, or (2) the habeas corpus statute or other domestic law provided a right of action. *See e.g., Asakura*, 265 U.S. at 343-44

(equitable action for injunction); *Johnson v. Browne*, 205 U.S. 309, 320-22 (1907) (habeas corpus); *United States v. Rauscher*, 119 U.S. 407, 418-19 (1886) (defense to indictment). *See generally* Carlos M. Vazquez, *Treaty-Based Rights and Remedies of Individuals,* 92 COLUM. L. REV. 1082, 1143-50 (1992). Because the State of Oregon has brought this criminal prosecution to take away Mr. Sanchez-Llamas's liberty, he may assert as a defense any rights that he has under applicable law, including the Vienna Convention.[9] Conversely, whether the treaty creates a "private right of action" is irrelevant, because petitioner has not brought a private action. *See, e.g., Rauscher*, 119 U.S. at 419 (treaty creating individual rights implies judicial obligation to "enforce in any appropriate proceeding the rights of persons growing out of that treaty").

D. This Court Has Routinely Held That Treaties Addressing the Treatment of Foreign Nationals in the United States Create Judicially Enforceable Individual Rights.

Mr. Sanchez-Llamas may raise the Vienna Convention in this proceeding because (A) the Convention is self-executing; (B) it creates individual rights; and (C) those rights are at issue in a judicial proceeding to which he is a party. The Court need not start from first principles on those points, however, because it has from the beginnings of the Republic decided the same issues in favor of judicially enforceable individual rights.

"Treaties for the protection of citizens of one country residing in the territory of another are numerous and make for good understanding between nations." *Asakura*, 265 U.S. at

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[9] *Argentine Republic v. Amerada Hess Shipping*, 488 U.S. 428 (1989), cited by the Oregon Supreme Court, is inapposite. That case merely held that a treaty creating substantive obligations could not be construed as an express waiver of sovereign immunity, because the creation of a sovereign obligation does not necessarily imply the creation of a right to sue. *Id.* at 442-43. No such issue is present here, because Mr. Sanchez-Llamas has not sued the State of Oregon. *See Poindexter v. Greenhow*, 114 U.S. 270, 286 (1885) (although Eleventh Amendment would bar suit against state to enforce bond coupons, it does not bar individual from asserting, as defense to suit by state, that tax could be paid in coupons).

341.[10] This Court has regularly given effect to such treaties at the behest of the affected foreign nationals.[11] In effect, the

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[10] *See also, e.g., Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 185 n.13, 186 n.14 (1982) (listing examples of treaties protecting foreign citizens' rights beginning with 1778 treaty between United States and France); *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941) ("One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country.").

[11] *See, e.g., Kolovrat v. Oregon*, 366 U.S. 187 (1961) (enforcing Yugoslav citizens' right under U.S.-Serbia treaty to inherit personal property located in Oregon); *Clark v. Allen*, 331 U.S. 503, 507-08 (1947) (enforcing German citizens' right to inherit property under U.S.-Germany treaty despite existence of state of war); *Bacardi*, 311 U.S. at 161-62 (enforcing foreign trademark owner's rights under multilateral trademark treaty); *Cook v. United States*, 288 U.S. 102 (1933) (dismissing forfeiture proceeding brought in violation of U.S.-Great Britain treaty); *Nielsen v. Johnson*, 279 U.S. 47 (1929) (enforcing Danish citizen's right under U.S.-Denmark treaty to be free of discriminatory taxation); *Jordan v. Tashiro*, 278 U.S. 123 (1928) (enforcing U.S.-Japan treaty allowing Japanese citizens to conduct trade); *Cheung Sum Shee v. Nagle*, 268 U.S. 336 (1925) (holding that U.S.-China treaty prevented mandatory exclusion of wives and minor children of Chinese merchants under Immigration Act of 1924); *Asakura*, 265 U.S. at 341-42 (restraining city from applying law that noncitizens could not work as pawnbrokers to Japanese citizens because it would violate U.S.-Japan treaty); *Johnson v. Browne*, 205 U.S. 309, 320-22 (1907) (affirming grant of habeas corpus to individual imprisoned in violation of U.S.-Canada extradition treaty); *Geofroy v. Riggs*, 133 U.S. 295 (1890) (enforcing treaty granting French citizens right to own real property); *Rauscher*, 119 U.S. at 418-20 (holding that indictment violating U.S.-U.K. extradition treaty must be dismissed); *Chew Heong v. United States*, 112 U.S. 536 (1884) (granting habeas corpus to block deportation of Chinese laborer that would violate U.S.-China treaty); *Hauenstein v. Lynham*, 100 U.S. 483 (1880) (enforcing treaty assuring Swiss citizens' right to inherit property); *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489 (1824) (enforcing British land owner's rights under treaty); *Soc'y for Propagation of Gospel v. New-Haven*, 21 U.S. (8 Wheat.) 464 (1823) (same); *Craig v. Radford*, 16 U.S. (3 Wheat.) 594 (1818) (same); *Chirac v. Chirac's Lessee*, 15 U.S. (2 Wheat.) 259 (1817) (enforcing treaty granting French citizens right to hold real property); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (enforcing treaty protecting British property owners against Virginia forfeiture); *Higgonson v. Mein*, 8 U.S. (4 Cranch)

(footnote continued)

Court has recognized that a private person has a right to invoke a treaty whenever the treaty confers rights on an identifiable group or imposes an obligation on the government that benefits an identifiable group, and the party invoking the treaty belongs to that group. *See supra* note 11; *cf. Ass'n of Data Process Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (question of standing "concerns ... whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"). The language of Article 36 is no less explicit about the existence of individual rights than the treaty language that this Court has routinely found to confer judicially enforceable individual rights.[12]

The Oregon Supreme Court's contrary holding rests on the notion that treaties are presumed *not* to create judicially enforceable individual rights in the absence of a clear and explicit statement to the contrary. (Pet. App. 20-22.) There is no such presumption. Indeed, any such presumption would squarely contradict an unbroken line of cases from this Court enforcing individual rights whenever the text of the treaty provides a rule by which the rights of an individual may be

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415, 419 (1808) (enforcing treaty protecting British creditor from cancellation of lien by Georgia); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454 (1806) (enforcing treaty protecting British creditor from cancellation of debt by Virginia); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (enforcing treaty requiring return of ship to French owner); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (enforcing treaty protecting British creditor from cancellation of debt by Virginia).

[12] *See Medellín v. Dretke*, 125 S. Ct. 2088, 2104 (2005) (O'Connor, J., dissenting) (Article 36 is no less explicit about individual rights than the treaty in *Kolovrat*, 366 U.S. at 192 & n.6, or *Asakura*, 265 U.S. at 340; no "special magic words" have been required); *see also Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) (Vienna Convention "arguably confers" an individual right). For example, much like Article 36, the treaties that the Court enforced in *Kolovrat* and *Asakura* referred to "rights" or "liberty" without any specific reference to judicial enforcement. *See Kolovrat*, 366 U.S. at 192 & n.6 (Serbian citizens "shall enjoy the rights which the respective laws grant … to the subjects of the most favored nations"); *Asakura*, 265 U.S. at 340 (Japanese citizens "shall have liberty to … carry on trade, wholesale and retail," in the United States).

determined. *See, e.g., Kolovrat*, 366 U.S. at 196; *Bacardi*, 311 U.S. at 162-63; *Asakura*, 265 U.S. at 342; and other cases cited *supra* note 11.

In support of the proposed presumption against individual rights, the Oregon Supreme Court relied largely on a mistaken reading of the *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580 (1884). There, this Court addressed a congressional statute imposing a tax on immigration, which was alleged to conflict with a customs treaty between the United States and Russia. *Id.* at 597. The precise issue before the Court was whether the later-in-time federal statute prevailed over the earlier treaty. *Id.* at 599. Holding that it did, the Court first explained:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Id. at 598. At the same time, the Court also confirmed:

> *But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal* [meaning "domestic"] *law*, and which are capable of enforcement as between private parties in the courts of the country.... A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Id. at 598-99 (emphasis added). The Court observed, however, that nothing in the Constitution makes treaties irrepealable or unchangeable, or gives them superiority over federal statutes. *Id.* at 599. As a result, the Court concluded:

> [W]e are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.

112 U.S. at 599.

The Court thereby recognized two complementary principles. *First*, the Court recognized that all treaties establishing principles by which individual rights could be judged must be enforced without implementing legislation. It did not question that the treaty, without more, would be judicially enforceable. *See id.* at 598-99. *Second*, the Court recognized that even though the treaty was self-executing, its effect in domestic law could be abrogated by a later-adopted act of Congress, which would have equal status under the Supremacy Clause. *Id.* at 599. If the later federal statute caused the United States to breach the international obligations embodied in the earlier treaty, the courts' duty would remain clear—to enforce the later statute, regardless of the effect on the international plane. But where, as here, the treaty contained provisions "by which the rights of the private [foreign] citizen or subject may be determined," and there is no later, abrogating statute, the courts' duty remains equally clear—to apply the treaty as the "rule of decision" just as if it were a statute. *Id.* Thus, far from supporting the Oregon Supreme Court's presumption against individual rights, the quoted language from the *Head Money Cases* reaffirms this Court's consistent holding that United States courts will not hesitate to enforce a treaty containing provisions in the nature of individual legal rights.

Similarly, a long line of this Court's precedents makes clear that treaties are enforceable not only in purely private disputes, but equally in criminal cases and other cases to which the federal, state, or local government is a party.[13] In

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[13] *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (action to enjoin state official from enforcing regulation in violation of executive agreement); *Kolovrat*, 366 U.S. at 189, 198 (suit by state); *Clark*, 331 U.S. at 506-08 (suit by federal official); *Bacardi*, 311 U.S. at 161-63 (suit for injunction against territorial official); *Cook*, 288 U.S. at 121-22 (forfeiture

(footnote continued)

particular, treaties often limit the authority of the state and federal governments to prosecute crimes, and it has long been accepted that the individual charged with the crime is the appropriate party to raise the treaty limitation. For example, in *United States v. Rauscher*, 119 U.S. 407 (1886), the Court held that a criminal defendant extradited for one crime could invoke the protection of an extradition treaty that barred his prosecution for a different crime.[14] Indeed, courts in the United States have regularly applied the consular-immunity provisions of the Vienna Convention to decide consular

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proceeding by United States); *Nielsen*, 279 U.S. at 58 (proceeding between state tax collector and decedent's estate); *Jordan*, 278 U.S. at 125 (mandamus proceeding against state official); *Cheung Sum Shee*, 268 U.S. at 343, 345-46 (immigration case); *Asakura*, 265 U.S. at 340-42 (suit for injunction against municipality); *Johnson v. Browne*, 205 U.S. at 316, 320-22 (habeas corpus challenging federal criminal conviction); *Wildenhus's Case (Mali v. Keeper of Common Jail),* 120 U.S. 1, 17 (1887) (habeas corpus by foreign consul against local jailer in state criminal matter); *Rauscher*, 119 U.S. at 418-19 (federal criminal case); *Chew Heong*, 112 U.S. at 538-39 (immigration case); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 536, 561-62 (1832) (state criminal case); *Soc'y for Propagation*, 21 U.S. (8 Wheat.) at 489 (civil suit by municipality); *Schooner Peggy*, 5 U.S. (1 Cranch) at 110 (prize case by United States); *see also United States v. Alvarez-Machain*, 504 U.S. 655, 659-61 (1992) (discussion of application of treaty in federal criminal case); *Ware*, 3 U.S. (3 Dall.) at 244 (opinion of Chase, J.) (discussion of application of treaty to state criminal cases).

[14] *See also, e.g., Alvarez-Machain*, 504 U.S. at 659-61 (discussing application of *Rauscher*); *Johnson*, 205 U.S. at 320-22 (affirming grant of habeas corpus where prisoner was tried and convicted in violation of extradition treaty with Canada); *Worcester*, 31 U.S. (6 Pet.) at 561-62 (reversing Georgia state conviction that violated treaty with Cherokee Nation); *Ware*, 3 U.S. (3 Dall.) at 244 (opinion of Chase, J.) (noting that state courts were obligated to dismiss criminal cases under peace treaty with Great Britain, citing *Respublica v. Gordon*, 1 Dall. 233, 233 (Pa. 1788) (dismissing treason prosecution because "any proceedings against ... the Defendant, would contravene an express article in the treaty of peace and amity, entered into, between the United States of America and Great Britain")).

officials' and employees' claims of immunity from criminal prosecution.[15]

II.
THE APPROPRIATE REMEDY FOR THE VIOLATION OF MR. SANCHEZ-LLAMAS'S VIENNA CONVENTION RIGHTS IS THE SUPPRESSION OF HIS WRONGFULLY OBTAINED STATEMENTS.

Oregon admits that it did not notify petitioner of his Article 36 rights. In the United States criminal justice system, the government is denied the use of evidence that it obtains in violation of a constitutional provision, statute, or rule of procedure that defines or safeguards a critical legal right. *United States v. Blue*, 384 U.S. 251, 255 (1966). Because the state has made no showing that Mr. Sanchez-Llamas was not prejudiced by the violation, all evidence obtained in violation of Petitioner's Article 36 rights should be suppressed.

A. The State May Not Use Evidence That It Obtains by Violating a Law That Creates or Safeguards Individual Rights.

1. United States Law Requires the Provision of a Judicial Remedy for a Violation of a Treaty Right Asserted in a Criminal Proceeding.

It is one of the most basic principles of American law that legal rights are not merely precatory. That is, where there is a legal right, there must be a legal remedy. As Chief Justice Marshall wrote in *Marbury v. Madison*:

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[15] *See Commonwealth v. Jerez*, 457 N.E.2d 1105, 1105 (Mass. 1983) (state criminal complaint against foreign consular officer dismissed on grounds of immunity under Vienna Convention Article 43); *see also Risk v. Halvorsen*, 936 F.2d 393, 397-98 (9th Cir. 1991) (civil suit against consular officials dismissed on grounds of immunity under Vienna Convention Article 43); *United States v. Cole*, 717 F. Supp. 309, 321-25 (E.D. Pa. 1989) (Vienna Convention controls claim of consular immunity from criminal prosecution); *State v. Doering-Sachs*, 652 So. 2d 420, 422-24 (Fla. Dist. Ct. App. 1995) (same); *Illinois Commerce Comm'n v. Salamie*, 369 N.E.2d 235, 238-42 (Ill. Ct. App. 1977) (same); *Silva v. Superior Court*, 125 Cal. Rptr. 78, 86-87 (Ct. App. 1975) (same).

> [The United States] has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

5 U.S. (1 Cranch) 137, 163 (1803).[16]

Treaties can and do apply to criminal proceedings.[17] Like the treaty provisions at issue in *Rauscher* and *Asakura*, discussed *supra* in Part I.D, Article 36 rights apply in the criminal law context, specifically to a foreign national who "is arrested or committed to prison or to custody pending trial or is detained in any other manner." Vienna Convention art. 36(1)(b). In other words, it attaches upon a foreign national's arrest, and it continues from the initial seizure through trial and subsequent incarceration.

The treaty rights conferred by the Vienna Convention are on full parity with rights flowing from a Congressional statute. *See, e.g.*, *Head Money Cases*, 112 U.S. at 598-99 ("[A ratified treaty] is a law of the land as an act of Congress is,

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[16] *See also Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992) ("[It is] a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." (quoting 3 W. Blackstone, Commentaries 23 (1783))); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) ("Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, … we can no longer permit that right to remain an empty promise."); THE FEDERALIST No. 15, at 110 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation."). *See generally* Vazquez, *Treaty-Based Rights*, *supra*.

[17] *See supra* note 11 and accompanying text, and in particular, *Johnson*, 205 U.S. at 320-22 (affirming order to discharge prisoner held in violation of extradition treaty); *Rauscher*, 119 U.S. at 418-20 (dismissing indictment in violation of extradition treaty); *see also Valentine v. United States ex rel Neidecker*, 299 U.S. 5 (1936) (treaty with France did not authorize federal government to extradite native-born American citizens to France).

whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."). In effect, Article 36 functions in the United States in the same manner as a statute giving a detained foreign national the right to communicate with his or her consul, with specific direction to the states to give "full effect" to its provisions. *See Medellín v. Dretke,* 125 S. Ct. 2088, 2104 (2005) (O'Connor, J., dissenting) ("And if a statute were to provide, for example, that arresting authorities 'shall inform a detained person without delay of his right to counsel,' I question whether more would be required before a defendant could invoke that statute to complain in court if he had not been so informed."); *Li*, 206 F.3d at 71 (Torruella, C.J., dissenting in part) ("Were we dealing with such a text in a statute originally enacted by Congress rather than this species of 'Law of the Land,' is there any doubt as to how this provision would be interpreted?").

2. In the United States, Violations of Laws That Ensure the Basic Integrity of Criminal Proceedings Are Remedied Through the Exclusionary Rule.

This Court employs the exclusionary rule in the criminal law context "where evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure." *United States v. Blue*, 384 U.S. at 255 (citations omitted). In addition to restoring and giving effect to the individual's rights, suppression has the remedial value of deterring authorities from future illegalities, as well as preserving the integrity of the judicial system by closing the courtroom doors to illegally seized evidence and to evidence with questionable reliability. *See Elkins v. United States*, 364 U.S. 206, 217, 222 (1960).

This Court has not limited the use of the exclusionary rule to constitutional violations, but has suppressed confessions in circumstances where the integrity of the criminal proceeding was jeopardized.[18] For example, in *Miller v. United States*, 357

[18] Indeed, suppression of confessions has its roots in common law, not the Constitution. The exclusionary rule was first enunciated in *R. v. Warickshall*, 1 Leach 262, 168 Eng. Rep. 234, 235 (K.B. 1783), which held a coerced confession inadmissible in order to protect a defendant from an

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U.S. 310, 313 (1958), police had probable cause to arrest defendant, but officers entered his residence in violation of the common law "knock and announce rule" codified in 18 U.S.C. § 3109.[19] The Court reasoned that by codifying the common law rule, Congress "has declared in § 3109 the reverence of law for the individual's right of privacy in his house." *Id*. (footnote omitted). Though the statute did not expressly provide for suppression, the Court ordered the exclusion of marked currency seized from the residence, observing that "tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." *Id*.

In the *McNabb-Mallory* line of cases, federal authorities obtained statements from custodial suspects who were not brought "without unnecessary delay" before an appropriate judicial officer. The delay violated, respectively, 18 U.S.C. § 595 and Rule 5(a) of the Federal Rules of Criminal Procedure. *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957). The Court noted that the "history of liberty has largely been the history of observance of procedural safeguards," *McNabb,* 318 U.S. at 347, and that the statutes were "part of the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement," *Mallory*, 354 U.S. at 453. The purpose of the "impressively pervasive requirement of

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erroneous conviction based upon an unreliable confession. *See, e.g., Dickerson v. United States*, 530 U.S. 428, 433 (2000) (quoting *Warickshall*); *see also, e.g., Bram v. United States*, 168 U.S. 532, 542 (1897); *Hopt v. Utah*, 110 U.S. 574, 585 (1884). In the United States, confessions were suppressed under common-law principles when the circumstances surrounding a confession indicated that the confession "was [not] in fact, voluntarily made." *Ziang Sung Wan v. United States*, 266 U.S. 1, 14-15 (1924) (finding confession involuntary). Over time, this Court embraced the notion that the "voluntariness" requirement was also embodied in the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment. *See Dickerson*, 530 U.S. at 433 (discussing history); *see also* Brief of NACDL as *Amicus Curiae* (same).

[19] The Court subsequently recognized the constitutional underpinnings of the "knock and announce" rule in *Wilson v. Arkansas*, 514 U.S. 927 (1995).

criminal procedure" was to "avoid all the evil implications of secret interrogation of persons accused of crime." *McNabb,* 318 U.S. at 343, 344.

As to the remedy, the *McNabb* Court noted that 18 U.S.C. § 595 expressed a "general legislative policy to which courts should not be heedless when appropriate situations call for its application." *McNabb*, 318 U.S. at 344. Although the statute did not contain an express suppression remedy, the Court explained that by excluding the confession evidence under its supervisory authority, it was both giving effect to the Congressional policy driving the statutory scheme and refusing to allow the courts to be complicit with the illegal conduct:

> Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law.

Id. at 345.

3. Under International Law, the Vienna Convention Requires a Judicial Remedy for Violations of Article 36 Rights to Consular Notification and Access.

Under Article 36(2), the United States has an international obligation to ensure that it affords Mr. Sanchez-Llamas a remedy sufficient to give "full effect" to his Article 36(1) rights. The *travaux préparatoires* of the Vienna Convention make clear that the parties to the Convention understood "full effect" to mean that each signatory nation is bound to implement and enforce the provisions in Article 36(1) within its criminal justice system. Indeed, an earlier version of Article 36(2) that was intended to ensure that Article 36 would not require a change in domestic criminal laws and procedures was rejected in favor of the stronger "full effect" formulation to ensure that Article 36 rights were in no way impaired by domestic law. *See* Conf. I, 12th plen. mtg., at 40, ¶¶ 3-4

(statement of the U.S.S.R.) ("The ['full effect' language] might force States to alter their criminal laws and regulations and allow consuls to interfere with normal legal procedure in order to protect alien offenders[.]"); *id.* at 40, ¶ 9 (rejecting U.S.S.R. proposal to change formulation); Conf. I, 2d Comm., 19th mtg., at 348, ¶¶ 10, 13 (adopting "full effect" formulation).

The ICJ has similarly concluded that Article 36 has application to, and is to be given full effect in, the domestic criminal law context. In *Avena*, the ICJ held that in the event of a Vienna Convention breach, the United States was required to "provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention." *Avena* ¶ 153(11); *see also LaGrand* ¶ 128(7) (finding that should nationals of the Federal Republic of Germany be sentenced to severe penalties without the benefit of the Article 36 rights, the United States "shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention"). In so doing, the ICJ relied on the established principle that reparation for an illegal act "must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." *Avena* ¶ 119 (quoting *Factory at Chorzów*, 1928 P.C.I.J. (ser. A) no. 17, at 47 (decision on merits)). As the United States itself explained in the *Tehran Hostages* case,

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the [Vienna] Convention itself.

Memorial of the United States, *Tehran Hostages, supra*, 1980 I.C.J. Pleadings at 188 (quoting *Factory at Chorzów*, 1927 P.C.I.J. (ser. A) no. 9, at 21 (decision on jurisdiction)). Applying this long-established principle, the ICJ held that the Vienna Convention required the United States to provide a judicial remedy for violations of individuals' rights of consular access

and notification. *Avena* ¶¶ 121-22, 127, 140-41.[20] In other words, failure to provide a judicial remedy that attaches legal significance to the fact of an Article 36(1) violation would violate the treaty.

B. Article 36 Supplies a Right for Which Suppression Is the Appropriate Remedy.

In accordance with *Miller* and the *McNabb-Mallory* line of cases, suppression is the appropriate remedy for an Article 36 violation. *First*, suppression of an illegally obtained confession is necessary to restore to an arrested foreign national the rights that were taken from him in violation of Article 36. *Second*, suppression is necessary to put an end to the egregious and persistent pattern of disregard of Article 36 that state and local authorities in this country have demonstrated over the past four decades. *Finally*, suppression is necessary to ensure that Article 36 serves its function of protecting detained foreign nationals' substantive rights.

1. Suppression Is Appropriate Because the Failure to Inform an Arrested Foreign National of His Rights Eliminates the Benefits of Early Consular Assistance Contemplated by Article 36.

Suppression as a remedy is necessary to make petitioner's Article 36 rights effective. Whether the police refuse to allow a detained foreign national to contact his consulate on request, or fail to inform him of his right to contact his consulate, they violate the express requirements of Article 36. The foreign national suffers an injury to his legal rights whether government authorities refuse to perform a legal duty or fail to perform a legal duty. In both instances, the authorities deny the foreign national the intended benefits of Article 36.

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[20] The ICJ left to United States courts to determine whether the application of the exclusionary rule is required in certain cases involving violations of the Vienna Convention. It found that the exclusionary rule "relates to the question of what legal consequences flow" from the breach of Article 36 obligations, and that the United States courts should examine the appropriateness of suppression "under the concrete circumstances of each case" in "the process of their review and reconsideration." *Id*. ¶ 127.

Article 36 reflects the determination of the nations represented at the Vienna conference—ratified by the President and Senate of the United States—that, as a class, arrested foreign nationals are subject to particular disadvantages and are to be afforded rights above and beyond the rights held by citizens. It is not unusual for a treaty to provide to an alien legal protections that are unavailable to a citizen: "[T]reaties, in safeguarding important rights in the interest of reciprocal beneficial relations, may by their express terms afford a measure of protection to aliens which citizens of one or both of the parties may not be able to demand against their own government...." *Todok v. Union State Bank*, 281 U.S. 449, 454-55 (1930).

By not providing petitioner with the legally required notice of his Article 36 rights, the police gave petitioner a misleadingly incomplete picture of his legal options, in effect misrepresenting to him the legal rights that were available to him. Police may, to a point, misrepresent *facts* to induce a confession. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (police falsely tell defendant that companion had confessed). Police may not, however, misrepresent the *law* to induce a confession. *Lynumn v. Illinois,* 372 U.S. 528, 534 (1963) (confession involuntary where police told defendant that she would be deprived of state financial aid if she refused to cooperate with authorities); *see also Miranda v. Arizona*, 384 U.S. 436, 476 (1966) (police may not threaten, trick, or cajole a suspect into a waiver of rights).[21]

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[21] *Moran v. Burbine*, 475 U.S. 412 (1986), illustrates the point. In *Moran*, police arrested the defendant for burglary and suspected him in an unrelated murder. The defendant's sister contacted a public defender, who called the police station and was informed that the defendant would not be questioned until the following day. *Id.* at 416-17. However, the police questioned defendant that night and obtained incriminating statements related to the murder. *Id.* at 417. The Court held that the misinformation to the *attorney* did not affect *defendant's* exercise of choice; further, the failure to tell the defendant about *external facts* (that an attorney inquired about him) did not affect the questions that govern the validity of defendant's waiver (*i.e.*, did defendant know the rights, did he understand the consequences of waiver, and did he waive the rights voluntarily). *Id.* at 422-23. Again, police informed the defendant of

(footnote continued)

The police misconduct in this case effected both a misrepresentation of, and a reduction in, the legal options that, by law, must be made available to individuals in petitioner's position. The failure to inform the petitioner of *all* his rights denied him the benefits of his right to seek consular assistance.

One of the most important functions of a consul is to serve as "a cultural bridge for detained nationals who must otherwise navigate through an unfamiliar and often hostile legal system." *United States v. Chapparro-Alcantara*, 226 F.3d 616, 622 (7th Cir. 2000) (citation omitted). As the State Department has emphasized in regard to U.S. nationals detained abroad, "[f]ew of our citizens need [consular] assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail." 7 FAM, *supra*, § 412. Arrested foreign nationals in the United States are often isolated from family and friends, speak English only as a second language or not at all, and fail to understand their rights under the U.S. criminal justice system. They may also suffer from unwarranted fears about the consequences of asserting their legal rights. LUKE T. LEE, CONSULAR LAW AND PRACTICE 145 (2d ed. 1991).

Indeed, Article 5 of the Vienna Convention defines consular functions to include "protecting in the receiving State the interests of the sending State and of its nationals," "helping and assisting nationals … of the sending State," and "representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining … provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests." Vienna Convention art. 5(a), (e), (i). The *travaux* confirm that "safeguarding the interests of the sending State and its nationals is the most important of the many consular functions," Conf. II, at 7, ¶ 7, that the consulate's power to

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all his rights in *Moran*, *id.* at 420-21, while the police did not inform the petitioner of all his rights in the present case.

represent or arrange representation for a national applies when the individual is "detained or imprisoned," *id.* at 8, ¶ 17, and that this right "is absolutely essential to the exercise of consular functions which consist ... of protecting the interests of the sending State and of its nationals," *id.* at 8, ¶ 16. The state's failure to notify petitioner of his right to contact his consulate deprived him of the opportunity to seek any of the assistance that the consulate could have provided him under Article 5. Allowing his illegally obtained confession to be admitted would fail to give "full effect" to his rights of consular notification and access as required by Article 36(2).

2. Suppression Also Creates an Incentive for State and Local Authorities to Comply with Their Obligations Under Article 36.

Despite initial State Department assurances to Congress that every State is periodically notified of its duties under existing treaties, the 36-year history of Article 36 in this country has been a virtually unbroken pattern of noncompliance and nonenforcement by state and local authorities. "In this country, the individual States' (often confessed) noncompliance with the treaty has been a vexing problem." *Medellín,* 125 S. Ct. at 2096 (O'Connor, J., dissenting). As occurred under the Articles of Confederation, the States' noncompliance with Article 36 causes international disagreement and litigation between the United States and other signatory nations that expect and demand the United States to fulfill its obligations under the treaty. *See, e.g., Avena*; *LaGrand*.

The decades-old noncompliance by authorities in the United States with the "pervasive" procedural requirement of Article 36 has, to date, successfully "stultif[ied] the policy" underlying the law. *McNabb*, 318 U.S. at 343, 345. Despite the battles fought at the conference to ensure enforcement of Article 36 in each signatory nation's criminal justice system, the law has proved feeble domestically. Denying the prosecution the fruits of its illegal conduct restores the individual's rights, honors the policy choice made in the treaty, makes the executive accountable for its actions, preserves judicial integrity, promotes the rule of law, and, in

this instance, is necessary to satisfy the nation's international obligations.

3. Suppression Also Ensures that Article 36 Is Effective in Safeguarding the Underlying Rights It Protects.

Like any procedural protection, Article 36's requirement of consular notification and access serves a substantive goal. Though not a constitutional right itself, Article 36 functions to protect a foreign national's ability to exercise his constitutional rights effectively. Just as the procedural "knock and announce" statute in *Miller* safeguarded Fourth Amendment interests, and the statute and procedural rule at issue in *McNabb* and *Mallory*, respectively, served as procedural safeguards for the values underlying the Fifth Amendment right against self-incrimination, the rights and procedures in Article 36 both supplement and procedurally safeguard a foreign national's privilege against self-incrimination, among other rights.

The *Miranda* reasoning starts from the premise that a stationhouse custodial interrogation is inherently coercive, in large part because of the suspect's isolation from family and familiar surroundings. *Miranda,* 384 U.S. at 449 ("The officers are told … that the 'principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation'" (quoting INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS 1 (1962)). Accordingly, *Miranda* required that specific warnings be given to protect against coerced, and possibly unreliable confessions.

The Article 36 notification requirements provide an additional protection for detained foreign nationals, a protection that is particularly crucial for those who are unfamiliar with the United States legal system. The Vienna conference delegates recognized that detained foreign nationals were exceptionally vulnerable and disadvantaged and were, therefore, to receive a specially crafted right of communication that was tailored to meet their needs in those particular circumstances. Therefore, the treaty safeguarded the right to communicate with the consul through a specially crafted rule of procedure—notification of the foreign national of his rights to consular communication. Conf. I, 20th plen.

mtg., at 82, ¶ 59 (comments of French delegate) ("It would be inconceivable for the Conference to adopt a convention on consular relations which did not contain an article on the essential matter of the protection of nationals of the sending State and *in particular the protection of those who needed it most because they were in prison, custody or detention*.") (emphasis supplied).

Unlike other local participants in a state's criminal system, consular officers located in the detaining state are uniquely situated to translate the often complex and unfamiliar legal concepts into terms the foreign national can readily understand. Indeed, the U.S. State Department explains, in its instructions to U.S. consuls overseas, that "[a]rrested U.S. citizens or nationals often have an imperfect understanding of American criminal procedure and less or no understanding of the legal procedures of the country in which they are detained," and that a critical function of U.S. consuls abroad is to provide information to detained foreign nationals about their rights under the local legal system. 7 FAM, *supra*, § 415.3.

Contrary to what some courts have suggested, *Miranda* warnings are not an effective substitute for the notification of Article 36 rights. *First,* the operating premise of Article 36 is that, because of the inherent disadvantages that flow from being an alien in a foreign legal system, a foreign national is, as a rule, deserving of special assistance. The right to consular communication is *in addition to* the rights already provided to a citizen; in other words, Article 36 *supplements* whatever rights and protections already provided to detained citizens.[22]

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[22] In effect, this case is the inverse of *Dickerson*, 530 U.S. 428. Following the *Miranda* decision, Congress enacted 18 U.S.C. § 3501, which sought to restore the due process "voluntariness" test, *in lieu* of the *Miranda* warnings, as the sole basis for determining the admission of self-incriminating statements obtained during custodial interrogation. The Court held the statute unconstitutional, on the rationale that the *Miranda* decision was constitutionally based and Congress could not legislatively "supersede" the Court's interpretation of a constitutional provision. *Id.* at 437. While *Dickerson* involved a Congressional attempt to effectively *decrease* the procedures for safeguarding the Fifth Amendment privilege in the custodial setting, the present case concerns a treaty provision that *increases* the substantive and procedural

(footnote continued)

Again, the conference identified detained foreign nationals as a class deserving of special protection because of its particular vulnerability, and the President and Senate ratified this decision—a clear and valid policy choice that the judiciary should honor.

Second, the reasoning ignores the dynamics of a custodial setting and the operating premises of the policy makers who drafted and adopted Article 36. Just as the *Miranda* Court noted the psychologically coercive aspect of removing a suspect from familiar settings to the stationhouse, the conference delegates noted the particular pressures on a detained foreign national and fashioned a discrete notification mechanism designed to redress the particular coercive aspect unique to their situation—namely, the foreignness of the isolation. A consular officer's ability to enlighten the foreign national about the totality of the circumstances, render multiple forms of assistance, and bridge the cultural gap between the foreign national and the local authorities is precisely the kind of remedial assistance that the conference intended to be made available to the detained foreign national.

The policy choices that Article 36 represents are legitimate and commonsensical. For instance, it is fair to assume that an American college student arrested for a serious crime in Turkmenistan would more readily ask to speak with an American consulate official than with a lawyer promised by the detaining local authorities.

The conference recognized that a foreign national would uniquely benefit from contact with an official who both shared the national's language and culture and had working knowledge and familiarity with the local culture and legal system. As the Government of Canada has observed,

> [The typical] detained foreign national who is not relatively sophisticated, or who lacks strong

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protections for an identified class—a development that the *Miranda* Court anticipated: "We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." *Miranda*, 384 U.S. at 467.

> connections in the arresting community, is especially vulnerable to making dangerously uninformed choices in exercising even the rights of which the arresting authorities do inform him.… [W]ith no one to explain his predicament in the context of the more familiar system of his home country, a detained foreign national is at a considerable disadvantage in establishing a defense.

Amicus Brief of Canada at 10, *Ex Parte Faulder* (Tex. Crim. App. 1997) (No. 10,748-AA).

C. The State Has Not Met Its Burden of Proving the Admissibility of the Illegally Obtained Confession.

Unlike a *habeas* proceeding, the government as plaintiff bears the burden of persuasion in a criminal prosecution. *In re Winship*, 397 U.S. 358, 362-64 (1970). The prosecution has the burden of establishing the admissibility of a criminal defendant's out-of-court statements. *See Lego v. Twomey*, 404 U.S. 477, 489 (1972) (the prosecution must prove by a preponderance of the evidence that a confession was voluntary); *Colorado v. Connolly,* 479 U.S. 157, 187 (1986) (the prosecution must prove by a preponderance of evidence that defendant voluntarily waived the *Miranda* rights).

Just as the prosecution in *Miller* had to establish the admissibility of the evidence that was challenged under the statutory "knock and announce" rule, and the prosecution in the *McNabb-Mallory* line of cases had to establish the admissibility of the confessions in view of the prompt appearance statute and rule at issue in those cases, the prosecution in this case likewise had the burden of establishing the admissibility of petitioner's statements following the Article 36 violation. That is, the prosecution had to establish that interfering with petitioner's right to communicate with the consulate and to receive the multiple benefits of consular assistance did not taint petitioner's subsequent decisions to continue with the interrogations and give self-incriminating statements.

The state admitted violating Article 36 but produced no evidence to show that the violation did not prejudice petitioner. Article 36 creates the substantive right of an arrested foreign national to have the assistance of his

consulate, and it prescribes procedures for the detaining authorities to facilitate the foreign national's exercise of that right. The state did not attempt to show that, if petitioner had known of his right to contact the consulate, the consular officials would not have acted to "protect[] ... the interests of" petitioner, Vienna Convention art. 5(a), or "help[] and assist[]" him in understanding the criminal process, *id.* art. 5(e), including by "representing or arranging appropriate representation" for him, *id.* art. 5(i). Because the state has not met its burden, the confession should have been suppressed.

In this case, the evidence was uncontested that Oregon authorities failed to provide Mr. Sanchez-Llamas with notification of his Article 36 rights despite the fact that authorities established in the very first hour of arrest that petitioner was a Mexican foreign national with a wife and three children living in Mexico. (Tr. 124.) At the time of his eleven-hour interrogation, petitioner was operating under multiple impediments that could have been cured with consular assistance. He spoke very little English and was an undocumented foreign national who expressed clear confusion over his legal rights in the United States criminal justice system. He was not only physically incapacitated as a result of the beating he had received from the arresting officers, his lack of sleep and his consumption of alcohol, but he was culturally and linguistically impaired. Most significantly, petitioner had no context to understand the officers' rendition of Miranda rights, particularly the implications of making statements to the police under United States law which differ in substantive respects from Mexican criminal law. *See* Brief of Mexico as *Amicus Curiae*. The record is also replete with evidence that petitioner had no understanding of his right to stop talking to the police. Petitioner suffered from a culturally-rooted misconception about police officers using beatings in order to extract confessions. Indeed, after being beaten during his arrest by the officers who served as his interrogators, he made statements in the course of his confession that were affirmatively proven untrue at trial.

Nor can the state seriously argue that the admission of petitioner's statement had no effect on the jury's verdict. The

jury's primary task was to determine defendant's mental state when he shot at police. Was petitioner shooting reflexively or in self-defense? Was he a confused drunk recklessly shooting at a light that startled him? Or did he know that police were shining the lights on him, and was he trying to kill or seriously injure them? The state relied on petitioner's confession to prove *mens rea*. Under the circumstances, the state cannot possibly meet its burden of showing that the error caused no prejudice.

CONCLUSION

For these reasons, petitioner respectfully requests that the Court reverse the judgment of the Supreme Court of Oregon, set aside petitioner's conviction and sentence, order petitioner's confession suppressed, and remand the case for a new trial.

Respectfully submitted,

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