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William J. Aceves

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ABSTRACT

This Article reviews U.S. compliance with the Vienna Convention on Consular Relations and the ability of foreign governments to seek redress for treaty violations in federal courts. The Vienna Convention requires signatory states to notify detained foreign nationals of their right to consular access. While the United States has sought to ensure that foreign governments comply with the provisions of the Vienna Convention when they detain U.S. citizens abroad, it has failed to ensure that foreign nationals are provided with comparable protection when they are detained in the United States.

The Author examines several cases in which both foreign nationals and foreign governments have sought redress for

* Associate Professor, California Western School of Law; M.A. Harvard University; LL.M UCLA School of Law; J.D./M.A. University of Southern California Law School. This Article is based upon a report prepared by the Author for the Human Rights Committee of the American Branch of the International Law Association. Portions of this Article appear in Volume 92 of the *American Journal of International Law* (1998). The Author would like to thank John Noyes, Charles Siegal, and John Sims for their comments. The Author would also like to thank Heather Zuber and Rehan Anwar for excellent research assistance. All errors and opinions remain the sole responsibility of the Author.

violations of the Vienna Convention in federal courts. Specifically, the Author focuses on the ability of foreign governments to enforce treaty obligations in U.S. courts. The Author considers when the United States is required to comply with treaty obligations, whether a foreign government can seek redress for treaty violations in federal courts, and what remedies are available for such violations. Finally, the Author makes several recommendations to improve U.S. compliance with the Vienna Convention as well as with other consular agreements.

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I. INTRODUCTION

The United States has long recognized the importance of diplomatic and consular relations. Indeed, as a victim of one of the most egregious violations of diplomatic and consular rights in recent memory, the United States has vigorously enforced these obligations on behalf of itself and U.S. citizens abroad.[1] Despite extensive efforts to enforce these rights abroad, the United States has failed to implement the obligations set forth in the Vienna Convention on Consular Relations (Vienna Convention) at home.

The Vienna Convention was adopted in 1963 to codify the rights and obligations of member states with respect to consular relations.[2] To facilitate the exercise of consular functions, the Vienna Convention provides that consular officials shall be free to communicate with, and have access to, their nationals at all times.[3] Similarly, foreign nationals shall have the same freedom to communicate and meet with consular officers.[4] A particularly sensitive issue arises when a foreign national is detained by law enforcement officials. Article 36(1)(b) of the Vienna Convention provides that the competent authorities shall, without delay, inform a detained national of his right to communicate with consular officials.[5] In addition, Article 36(1)(c) grants consular officials the right to visit, converse, and correspond with a detained national and to arrange for his legal representation.[6] Essentially, the Vienna Convention serves two functions. It serves the needs of foreign nationals by allowing them to communicate with consular officials when they are detained. Given the likelihood of culture and language differences, consular officials can provide critical information about the legal process and the rights of detained nationals. The Vienna Convention also serves the needs of signatory states by allowing them to monitor the fair treatment of their nationals abroad.

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1. On November 4, 1979, Iranian students occupied the U.S. Embassy in Tehran. GARY SICK, ALL FALL DOWN 195-96 (1985). United States diplomatic and consular officials were held hostage by Iran for 444 days before they were released on January 20, 1981. *Id.* at 341. *See generally* AMERICAN HOSTAGES IN IRAN (Paul Kreisberg ed., 1985).
2. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].
3. *Id.* art. 36, para. 1(a).
4. *Id.*
5. *Id.* art. 36, para. 1(b).
6. *Id.* art. 36, para. 1(c).

Despite the importance of the Vienna Convention and the right of consular access, the United States has failed to ensure that these obligations are fully implemented domestically. Specifically, the United States has failed to ensure that foreign nationals are notified of their right to consular access when detained by state and local officials. If consular officials are not promptly notified when foreign nationals are detained, they are unable to communicate with their nationals and provide them with effective assistance. On several occasions, foreign nationals have raised this treaty violation as a basis for challenging criminal proceedings. Courts, however, have routinely dismissed these claims on the grounds that the defendants were not prejudiced by the failure to adhere to the Vienna Convention or that they failed to raise the claim in a timely manner. Until recently, these cases did not receive significant attention, in part, because they were raised by foreign nationals in the course of criminal proceedings.

On September 12, 1996, the Republic of Paraguay, the Paraguayan Ambassador to the United States, and the Paraguayan Consul General filed an action against Virginia officials in U.S. District Court for the Eastern District of Virginia to seek redress for violations of the Vienna Convention and the Treaty of Friendship, Commerce and Navigation signed between the United States and Paraguay (Treaty of Friendship).[7] The case arose from the arrest and detention of Angel Breard, a citizen of Paraguay. Breard was subsequently convicted of murder and sentenced to death. Despite his detention, Breard was never notified of his right to consular access under the Vienna Convention. Similarly, Paraguay was never notified of Breard's detention under the Treaty of Friendship. Indeed, Paraguay did not become aware of Breard's detention until well after his conviction and sentence to death.[8] Paraguay subsequently filed its lawsuit to seek redress for these treaty violations. Specifically, Paraguay sought declaratory and injunctive relief including an order declaring Breard's conviction void. The district court

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7. The 1859 Treaty of Friendship, Commerce, and Navigation between the United States and Paraguay contains a most favored nation clause with respect to consular and diplomatic agents. Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., art. XII, 12 Stat. 1091 [hereinafter Treaty of Friendship].

8. The desire of the Paraguayan government to assist Breard in these criminal proceedings is made all the more significant because Paraguay has abolished the death penalty for all crimes except those committed during wartime or crimes under military law. AMNESTY INTERNATIONAL, THE DEATH PENALTY: LIST OF ABOLITIONIST AND RETENTIONIST COUNTRIES 3 (1995).

Ironically, U.S. courts have enforced international obligations against Paraguayan officials for events that took place in Paraguay. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (recognizing subject matter jurisdiction over alleged killing perpetrated by Paraguayan police official in Paraguay).

dismissed the lawsuit for lack of subject matter jurisdiction, and the decision was subsequently affirmed by the Fourth Circuit.[9] A similar lawsuit was also filed by the Mexican government against Arizona state officials, and a similar outcome was reached in the Ninth Circuit.[10]

These cases are unique in several respects. In contrast to other cases in which criminal defendants have raised violations of the Vienna Convention to challenge their underlying criminal convictions, Paraguay and Mexico petitioned the courts to redress their own rights under the Vienna Convention. While foreign governments have been granted access to U.S. courts in the past, these cases are, perhaps, the first in which foreign governments have sought to enforce treaty obligations in federal courts. These cases certainly represent the first time that foreign governments have petitioned U.S. courts to redress violations of the Vienna Convention.[11]

This Article provides an overview of these unique cases and the ability of foreign governments to raise treaty violations in federal courts. Part II examines the Vienna Convention and other consular agreements, focusing on the right of consular access. Part III reviews the application of the Vienna Convention by the United States both at home and abroad. Part IV examines several

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9. Paraguay v. Allen, 949 F. Supp. 1269, 1271 (E.D. Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir. 1998).

10. United Mexican States v. Woods, 126 F.3d 1220 (9th Cir. 1997).

11. The issue of whether foreign governments can seek to vindicate constitutional violations was addressed by Lori Fisler Damrosch. *See* Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483 (1987). She concluded that foreign sovereigns should be considered "persons" for most legal purposes. *Id.* at 557. Federal courts, however, should not extend the benefits of constitutional jurisprudence to foreign sovereigns when they address the explicit foreign policy power of the political branches. *Id.; see also* Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277 (1991).

Several articles have examined the right of consular access under the Vienna Convention. They focus almost exclusively, however, on the implications of these violations on criminal defendants. *See* Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565 (1997); Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 HOUS. J. INT'L L. 375 (1997); Ronan Doherty, Note, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 VA. L. REV. 1281 (1996); Robert F. Brooks & William H. Wright Jr., *States Deny Treaty Rights to Foreign Defendants*, NAT'L L.J., Nov. 4, 1996, at B8; S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to Consul*, 26 ST. MARY'S L.J. 719 (1995); Gregory Dean Gisvold, Note, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 MINN. L. REV. 771 (1994). In addition, the Canadian Section of Amnesty International prepared a report to assist U.S. attorneys in obtaining consular assistance in capital cases involving foreign nationals. *See* MARK WARREN, AMNESTY INTERNATIONAL, OBTAINING CONSULAR ASSISTANCE FOR DEATH-SENTENCED FOREIGN NATIONALS (1996).

cases in which foreign nationals have raised the failure of state officials to comply with the Vienna Convention as a basis for challenging criminal proceedings. Part V reviews two cases brought by foreign governments to seek redress for violations of the Vienna Convention: *Paraguay v. Allen*[12] and *United Mexican States v. Woods*.[13] Part VI then addresses three issues raised by these cases: (1) when is the United States required to comply with treaty obligations; (2) whether a foreign government can seek redress in U.S. courts for treaty violations; and (3) what remedies are available in U.S. courts for treaty violations. Finally, Part VII sets forth several recommendations to improve U.S. compliance with the Vienna Convention and other consular agreements.

II. THE VIENNA CONVENTION ON CONSULAR RELATIONS

The importance of consular relations has long been recognized.[14] Indeed, its roots can be traced to the city-states of ancient Greece.[15] The Greek prostates acted as intermediaries between Greek colonists and local governments.[16] As an effective political institution, however, the consul did not truly develop until the dawning of the commercial age during the early Middle Ages. According to one noted commentary:

> In the commercial towns of Italy, Spain, and France the merchants used to elect one or more of their fellow merchants as arbitrators in commercial disputes, and these were called *juges consuls* or *consuls marchands*. When, between and after the Crusades, Italian, Spanish, and French merchants established themselves in Near Eastern countries, they brought the institution of consuls with them, merchants from the same nation electing their own consul. The competence of these consuls became gradually enlarged through treaties, called "capitulations," between the home states of the merchants and the mohammedan monarchs in whose territories they had settled. The competence of consuls came to comprise all civil and criminal jurisdiction over, and protection of, the privileges, life, and property of their countrymen.[17]

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12. *Allen*, 134 F.3d 622.
13. *Woods*, 126 F.3d 1220.
14. *See* LUKE LEE, CONSULAR LAW AND PRACTICE 3-7 (2d ed., 1991); 1 OPPENHEIM'S INTERNATIONAL LAW 1132-34 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); Constantin Economidès, *Consuls*, *in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 770 (R. Bernhardt ed., 1992).
15. *See* Economidès, *supra* note 14, at 770.
16. LEE, *supra* note 14, at 4.
17. 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 14, at 1133.

Gradually, the consular institution spread to other countries.[18] By the twentieth century, consular agreements had been adopted by numerous countries.[19]

In 1949, the International Law Commission designated the subject of consular relations as an area ripe for codification.[20] However, it did not begin examining the issue until 1955. After several years of study, the International Law Commission adopted the Draft Articles on Consular Relations on July 7, 1961.[21] Subsequently, the General Assembly announced that it would convene a conference to prepare an international agreement on consular relations.[22] The United Nations Conference on Consular Relations met in Vienna, Austria, from March 4 until April 22, 1963.[23] Over ninety countries as well as several international organizations attended the Conference.[24] On April 24, 1963, the Conference adopted the Vienna Convention and two optional protocols.[25] The Vienna Convention entered into force on March 19, 1967.[26] To date, the Vienna Convention has been ratified by over 130 countries.[27] It has been referred to as "undoubtedly the single most important event in the entire history of the consular institution."[28]

The Vienna Convention defines and guarantees consular rights, privileges, and duties. Article 5 of the Convention lists a number of consular functions. These cover a wide variety of

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18. *See* GRAHAM H. STUART, AMERICAN DIPLOMATIC AND CONSULAR PRACTICE 292 (2d ed. 1952).

19. According to Stuart, approximately 200 treaties contained provisions concerning consular relations in 1900. *Id.* This number reached 900 treaties by 1933. *Id.* (citing 2 A.H. FELLER & MANLEY O. HUDSON, DIPLOMATIC AND CONSULAR LAWS AND REGULATIONS 1419-72 (1933)).

20. *See Report of the International Law Commission*, U.N. GAOR Int'l Law Comm'n, 4th Sess., Supp. No. 10, at paras. 16 & 20, U.N. Doc A/925 (1949). In 1949, U.N. Secretary-General Trygve Lie indicated that "in view of the continual expansion of international trade, the legal position and functions of consuls should be regulated on as universal a basis as possible." *U.N. Secretary General, Survey of International Law in Relation to the Work of Codification of the International Law Commission*, at 54-56 (1949).

21. *Report of the International Law Commission*, U.N Doc. A/4843 (1961).

22. Vienna Convention, *supra* note 2, 596 U.N.T.S. at 262 n.1.

23. *Id.*

24. *Id.*

25. The optional protocols were the Optional Protocol Concerning Acquisition of Nationality and the Optional Protocol Concerning Compulsory Settlement of Disputes. *Id.*

26. *Id.* Article 77 of the Vienna Convention provided that it shall enter into force "on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations." *Id.* art. 77, para. 1.

27. LOUIS HENKIN ET AL., THE BASIC DOCUMENT SUPPLEMENT TO INTERNATIONAL LAW: CASES AND MATERIALS (3d ed. 1993).

28. LEE, *supra* note 14, at 27.

responsibilities, including: furthering the development of commercial, economic, cultural, and scientific relations between the sending state and the receiving state; issuing passports and travel documents; serving as a notary and civil registrar; transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending state; and exercising rights of supervision and inspection of vessels and aircraft of the sending state.[29] One of the most important responsibilities of the consul is to protect the nationals of the sending state. Article 5(e) provides that consular functions include "helping and assisting nationals, both individuals and bodies corporate, of the sending State."[30]

The Vienna Convention recognizes that communication is essential for facilitating the exercise of consular functions relating to nationals of the sending state. Article 36(1)(a) provides that consular officials shall be free to communicate with, and have access to, nationals of the sending state.[31] Similarly, nationals of the sending state shall have the same freedom with respect to communication with and access to consular officers of the sending state.[32]

A sensitive issue arises when a foreign national is detained by the receiving state. Article 36(1)(b) provides that the competent authorities of the receiving state shall, without delay, inform a national of his right to notify the consular post that he has been detained:[33]

> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;[34]

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29. Vienna Convention, *supra* note 2, art. 5.
30. *Id.* art. 5, para. 8.
31. *Id.* art. 36, para. 1(a). The final text of Article 36 was the subject of extensive debate during the U.N. Conference. The International Law Commission originally proposed a provision that would require the receiving state to notify consular officials without undue delay that a national had been detained. Several countries, however, expressed concern over such an expansive provision and so it was not added to the text. As a result, the final version of Article 36 was not completed until two days before the Conference concluded. *See generally Information Series, United Nations Conference on Consular Relations*, U.N. GAOR, U.N. Doc. A/Conf.25/Inf.1 (1963).
32. Vienna Convention, *supra* note 2, art. 36, para. 1(a).
33. *Id.* art. 36, para. 1(b).
34. *Id.*

Article 36(1)(c) grants consular officers the right to visit, converse, and correspond with a national who is in detention and to arrange for his legal representation:[35]

> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.[36]

Finally, Article 36(2) provides that the laws and regulations of the receiving state must allow full effect to be given to these rights:[37]

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.[38]

This obligation is also found in Article 14 which declares that the receiving state shall "ensure that the necessary measures are taken to enable the head of a consular post to carry out the duties of his office and to have the benefit of the provisions of the present Convention."[39]

In addition to the Vienna Convention, numerous countries have entered bilateral agreements with respect to consular relations. For example, the United States and the Soviet Union signed a bilateral Consular Convention in 1964 to regulate consular relations between the two countries.[40] While the agreement mirrors the Vienna Convention in several respects, there are significant differences. In contrast to the Vienna Convention, the Consular Convention requires the receiving state

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35. *Id.* art. 36, para. 1(c).

36. *Id.*

37. *Id.* art. 36, para. 2; *see also* Report of the International Law Commission, U.N. GAOR Int'l Law Comm'n, 16th Sess., Supp. No. 9, at 24, U.N. Doc. A/4843 (1961).

38. Vienna Convention, *supra* note 2, art. 36, para. 2. Prior to the approval of Article 36(2), the Soviet Union proposed an amendment which would have permitted a country's domestic law to impair the rights set forth in Article 36(1). According to the Soviet delegate, Article 36(2) could force states to alter their criminal laws and allow consular officials to interfere with the legal process in order to protect aliens. The amendment was not approved. U.N. GAOR, Conference on Consular Relations, 12th plen. mtg., Agenda Item 10, para. 2-9, U.N Doc. A/CONF.25/SR.12, 17 (1963), at 1.

39. Vienna Convention, *supra* note 2, art. 14.

40. Consular Convention, June 1, 1964, U.S.-U.S.S.R., 19 U.S.T. 5018. The United States has entered similar agreements with several other countries including China and the United Kingdom. *See* Convention Regarding Consular Officers, June 6, 1951, U.S.-U.K., 3 U.S.T. 3426; Agreement on Consular Relations, Jan. 31, 1979, U.S.-P.R.C. 30 U.S.T. 17.

to notify consular officials regardless of the desires of the detained national. Article 12(2) provides that "[t]he appropriate authorities of the receiving state shall immediately inform a consular officer of the sending state about the arrest or detention in other form of a national of the sending state."[41] The Protocol to the Consular Convention adds that such notification must take place within one to three days from the time of arrest or detention depending on conditions of communication.[42] Article 12(3) provides that "[a] consular officer of the sending state shall have the right without delay to visit and communicate with a national of the sending state who is under arrest or otherwise detained in custody or is serving a sentence of imprisonment."[43] The Protocol adds that the right of the consular officer to visit and communicate with a national "shall be accorded within two to four days of the arrest or detention of such national depending upon his location."[44]

Countries have also signed supplementary agreements addressing consular relations. For example, the United States and Mexico signed a Memorandum of Understanding on Consular Protection of Mexican and United States Nationals on May 7, 1996.[45] The memorandum identified the need to foster and strengthen communication between consular officials and local authorities.[46] Accordingly, the memorandum provided that the United States and Mexico would adopt the following principles and measures:

> 1. To include within the mandate of the Working Group on Migration and Consular Affairs of the Binational Commission, the discussion and evaluation of issues, problems and trends related to the consular protection and human rights of nationals of both countries and the understandings expressed in this memorandum as regular matters on its agenda, in order to make recommendations to the respective Governments, if mutually agreed upon.
> 2. To provide any individual detained by migration authorities with notice of his/her legal rights and options, including the right to contact his/her consular representatives, and to facilitate

41. Consular Convention, *supra* note 40, art. 12.
42. *Id.* Protocol, cl. 1.
43. *Id.* art. 12.
44. *Id.* Protocol, cl. 2.
45. Memorandum of Understanding on Consular Protection of Mexican and United States Nationals, completed on May 7, 1996, Dept. of State File No. P96 0065-0984/0987 [hereinafter Memorandum on Consular Protection]. The memorandum was signed at the conclusion of the Binational Commission, an annual cabinet-level meeting between the United States and Mexico. Daniel Dombey, *Mexico-U.S. Accords Made,* FIN. TIMES, May 9, 1996, at 11. Along with the memorandum, several accords were signed on issues ranging from education and health to border control and the environment. Mark Fineman & Stanley Meisler, *U.S., Mexico Sign Pact on Migrants, Drugs, Pollution,* L.A. TIMES, May 8, 1996, at A1.
46. Memorandum on Consular Protection, *supra* note 45.

> communication between consular representatives and their nationals. Both Governments will endeavor, consistent with the relevant laws of each country, to ensure that specific notification to consular representatives is given in cases involving the detention of minors, pregnant women and people at risk.
> 3. To endeavor to provide settings conducive to full and free exchange between consular representatives and detained individuals in order to allow, consistent with the relevant laws of each country, consular officials to interview their respective nationals when they are detained, arrested, incarcerated or held in custody in accordance with Article VI, paragraph 2, section (c) of the Consular Convention between the United Mexican States and the United States of America of August 12, 1942, and in accordance with Article 36, first paragraph, of the Vienna Convention on Consular Relations of 1963.
> 4. To allow and to facilitate, consistent with the relevant laws of each country, consular officials to be present at all times at the trials or judicial procedures concerning their respective nationals, including those legal procedures relating to minors.[47]

Finally, the United States has also entered into agreements that contain a most favored nation clause with respect to consular and diplomatic agents. Most favored nation treatment is an obligation to treat a state no less favorably than any other state. Thus, these agreements require the United States to treat the consular officials of signatory countries no less favorably than consular officials from other countries. For example, the 1859 Treaty of Friendship between the United States and Paraguay contains a most favored nation clause with respect to consular and diplomatic agents.[48] Article XII provides that "the Diplomatic Agents and Consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions and immunities are, or may be, there granted to Agents of any other Nation whatever."[49] This obligation requires the United States to grant Paraguayan consular officials the same rights and privileges provided to consular officials from any other country.

While bilateral and supplementary agreements are important, the Vienna Convention remains the principal framework for consular relations between signatory states.

III. THE APPLICATION OF THE VIENNA CONVENTION BY THE UNITED STATES

On April 24, 1963, the United States signed the Vienna Convention.[50] The treaty was not immediately submitted to the

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47. *Id.*
48. Treaty of Friendship, *supra* note 7, art. XII.
49. *Id.*
50. Vienna Convention, *supra* note 2.

Senate for review, however, because the Executive Branch initially decided to use bilateral consular agreements rather than the multilateral Vienna Convention.[51] The Nixon Administration finally sought ratification of the Vienna Convention because it believed the agreement "constitutes an important contribution to the development and codification of international law and should contribute to the orderly and effective conduct of consular relations between States."[52]

The true impact of the Vienna Convention was revealed when the Nixon Administration formally submitted the treaty to the Senate for its advice and consent to ratification in May 1969. In hearings before the Senate Committee on Foreign Relations, J. Edward Lyerly, the Deputy Legal Adviser for the Nixon Administration, said the treaty was "entirely self-executive [sic] and does not require any implementing or complementing legislation."[53] Subsequently, Senator J. William Fulbright asked Deputy Legal Adviser Lyerly whether the Vienna Convention would affect federal legislation or state laws.[54] In response, the Deputy Legal Adviser stated that "[t]he Vienna Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions."[55] He added, however, that, "[t]o the extent that there are conflicts in Federal legislation or State laws [,] the Vienna Convention, after ratification, would govern as in the case of bilateral consular conventions."[56] Moreover, the Senate fully recognized that state and local jurisdictions were required to provide consular notification when a foreign national was detained.[57] The Senate requested the Nixon Administration to describe how the State Department notifies state and local jurisdictions about consular agreements.[58]

The Senate subsequently approved the Vienna Convention on October 22, 1969, and it was formally ratified by President Nixon on November 12, 1969.[59] The ratification was deposited on

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51. 115 CONG. REC. S30,953 (1969).
52. EX. E, 91st Cong., 1st Sess., at VII (Statement of Secretary of State William Rogers) (1969).
53. S. EXEC. REP. NO. 91-9, 91st Cong., 1st Sess. 2 & 5 (appendix) (statement by Deputy Legal Adviser J. Edward Lyerly) (1969).
54. *Id.* at 18.
55. *Id.*
56. *Id.*
57. *Id.* at 24.
58. *Id.*
59. *See* Vienna Convention, *supra* note 2; *see also Treaty Information: Current Actions*, 61 DEP'T ST. BULL. 574 (1969), *reprinted in Recent Actions Regarding Treaties to Which the United States is a Party*, 9 I.L.M. 222-24 (1970).

November 24, 1969, and it entered into force for the United States on December 24, 1969.[60]

The following sections examine the application of the Vienna Convention by the United States both abroad and at home.

A. *The Application of the Vienna Convention Abroad*

The United States has long recognized the importance of consular access abroad. Prior to the Vienna Convention, the United States submitted formal protests to foreign governments for their failure to allow consular access to detained U.S. nationals.[61] For example, in 1924, a U.S. consular official in Germany experienced difficulties in visiting a U.S. citizen in prison.[62] The State Department instructed the U.S. Embassy in Germany to communicate to German officials that:

> this Government considers that American Consular Officers in Germany should be granted, in accordance with what it believes to be the accepted international practice, the courtesy of conferring with American citizens in prison in that country in order that the Consular Officers may render them the assistance to which they may be entitled; that these Officers should be permitted in such cases to converse with the prisoners in the English language and without the presence of a German official; and that it is hoped that any German regulations placing restrictions upon persons visiting German prisons will not be construed as applying to American Consular Officers.[63]

The U.S. Ambassador to Germany subsequently notified the State Department that German authorities had been instructed "to grant consuls of the United States, when practicable, admittance to prisoners of their nationality, as well as interviews with such prisoners in the English language without the presence of a police official."[64]

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60. *See Recent Actions Regarding Treaties to Which the United States is a Party*, *supra* note 59, at 224.

61. For several examples of U.S. protests to foreign governments for their refusal to allow access to detained American nationals, see 4 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 830-37 (1942). For more recent examples, see Jim Wolf, *U.S. Says Iraq Denies Access to U.S. Prisoners*, REUTERS, Apr. 18, 1995, *available in* LEXIS, News Library, REUWLD File; Matthew Campbell, *American Pilot Might Be Tried in Nicaraguan War Crimes Court*, REUTERS, Dec. 11, 1987, *available in* LEXIS, News Library, REUWLD File.

62. 4 HACKWORTH, *supra* note 61, at 831.

63. Joseph Grew, The Under Secretary of State to the Chargé d'Affaires ad interim, no. 3523, Sept. 29, 1924, MS. Dep't of State, file 362.1121 Stroyman, David, *reprinted in* 4 HACKWORTH, *supra* note 61, at 831.

64. Jacob G. Schurman, Ambassador Schurman to Secretary Kellogg, no. 54, July 18, 1925, MS. Dep't of State, file 362.1121 Stroyman, David, *reprinted in* 4 HACKWORTH, *supra* note 61, at 831.

Following the ratification of the Vienna Convention by the United States, the State Department stressed the importance of consular access as codified in Article 36 of the Convention. In an October 1973 memorandum, the State Department noted that:

> [i]n the Department's view, Article 36 of the Vienna Convention contains obligations of the highest order and should not be dealt with lightly. Article 36, paragraph 1(b) requires the authorities of the receiving state to notify the consular post of the sending state without delay of the arrest or commitment of a national of the sending state, if that national so requests. While there is no precise definition of "without delay," it is the Department's view that such notification should take place as quickly as possible and, in any event, no later than the passage of a few days.[65]

Since the United States ratified the Vienna Convention, the State Department has regularly referred to Article 36 when discussing the right of consular access with foreign governments.[66] For example, in 1975, two American citizens were detained by Syrian security forces. Despite repeated requests, Syrian officials refused U.S. consular officials access to the detained nationals. The State Department notified the U.S. Embassy in Damascus to inform the Syrian government of the importance of consular access.[67] According to the State Department, the right of consular access is well established under the Vienna Convention, customary international law, bilateral agreements between the United States and Syria, and by humanitarian considerations.[68] The State Department added that:

> The recognition of these rights is prompted in part by considerations of reciprocity. States accord these rights to other states in the confident expectation that if the situation were to be reversed they would be accorded equivalent rights to protect their nationals. The Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to these nationals.[69]

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65. U.S. Dep't of State File L/M/SCA, *reprinted in* Arthur Rovine, U.S. Dep't of State, Digest of United States Practice in International Law 161 (1973).

66. *See also* U.S. Dep't of State File No. P77 0095-2225, *reprinted in* JOHN BOYD, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 290 (1977) (describing diplomatic correspondence between the U.S. Embassy in San Salvador and the El Salvadoran Ministry of Foreign Relations regarding compliance with Article 36 of the Vienna Convention).

67. U.S. Dep't of State telegram 40298 to Embassy Damascus, Feb. 21, 1975, *reprinted in* ELEANOR MCDOWELL, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 249 (1975).

68. *Id.* at 249-50.

69. *Id.*

Following its formal request to the Syrian government, American consular officials were granted proper access to the detained nationals.[70]

In November 1979, Iranian students occupied the U.S. Embassy in Tehran and detained a large number of U.S. citizens. During the crisis, U.S. consular and diplomatic officials were prevented from communicating with the detained U.S. nationals. The United States repeatedly referred to the Vienna Convention in condemning the Iranian actions and in requesting immediate access to the U.S. nationals. On November 29, 1979, the United States instituted proceedings against Iran in the International Court of Justice (ICJ).[71] In its application to the ICJ, the United States indicated that Iran's government had violated the Vienna Convention by failing to allow U.S. consular personnel to communicate with other U.S. nationals. In its Order of Provisional Measures of December 15, 1979, the ICJ acknowledged the importance of the Vienna Convention and the right of consular access. It stated that:

> [T]he unimpeded conduct of consular relations, which have also been established between peoples since ancient times, is no less important in the context of present-day international law, in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other States; and whereas therefore the privileges and immunities of consular officers and consular employees, and the inviolability of consular premises and archives, are similarly principles deep-rooted in international law.[72]

In its Final Judgment, the ICJ held that Iran had violated several international conventions, including the Vienna Convention, as well as customary international law.[73] It called upon Iran to make reparations to the United States for these violations.

To protect U.S. citizens abroad, the State Department has issued instructions to all Foreign Service posts regarding detained nationals and the right of consular access. Chapter 400 of the Foreign Affairs Manual concerns the arrest and detention of U.S. citizens abroad. The introduction notes "one of the basic functions of a consular officer is to provide a 'cultural bridge' between the host community and the officer's own compatriots traveling or residing abroad." "No one needs that cultural bridge

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70. MCDOWELL, *supra* note 67, at 251.

71. United States Application and Request for Interim Measures of Protection in Proceeding Against Iran (U.S. Diplomatic and Consular Staff in Tehran), *reprinted in* 18 I.L.M. 145-46 (1979).

72. Case Concerning United States Diplomatic and Consular Staff in Tehran (Request for the Indication of Provisional Measures), *reprinted in* 19 I.L.M. 139, 145-46 (1980).

73. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24).

more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail."[74] With respect to consular notification, the Foreign Affairs Manual provides: "In order for the consular official to perform the protective function in an efficient and timely manner, it is essential that the consul obtain prompt notification whenever a U.S. citizen is arrested. Prompt notification is necessary to assure early access to the arrestee."[75] Indeed, the Foreign Affairs Manual adds that U.S. consular officials should file a formal protest whenever a host government fails to inform consular officials within seventy-two hours of the arrest of a U.S. citizen.[76]

The Foreign Affairs Manual also describes the importance of prompt access to detained nationals.[77] Prompt access assures both the national and the host government of U.S. government interest in the case.[78] It allows consular officials to document potential instances of abuse.[79] It also permits consular officials to provide detained nationals with information pertaining to the legal system of the host government and with a list of lawyers.[80] Finally, it allows consular officials to ensure that detained nationals are treated fairly and without prejudice to their nationality.[81]

B. *The Application of the Vienna Convention in the United States*

While the U.S. government has consistently affirmed the importance of consular access abroad, the recent application of this treaty obligation in the United States has been sparse. This is surprising, given that the United States has long recognized a general obligation to provide consular access to detained nationals in the United States.[82]

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74. 7 U.S. Dep't of State, Foreign Affairs Manual § 491 (1984).
75. *Id.* § 411.
76. *Id.* § 415.4-1.
77. *Id.* § 412.
78. *Id.*
79. *Id.* § 414.2.
80. *Id.* § 412. According to the Manual, "[t]he purpose of this material is not to usurp the function of legal counsel or encourage a 'do it yourself' approach. Rather, it serves the purpose of helping arrestees understand what is happening to them and provides a yardstick against which they can measure an attorney's performance." *Id.* § 413.4.
81. *Id.* § 431.
82. In 1934, the State Department urged the governor of California to permit a Mexican consul to visit a Mexican citizen that was detained in a California jail. According to the State Department:

> Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world and it is believed that if [this] attitude [of the] District Attorney is maintained in the instant case there will be

In 1967, the United States promulgated regulations to establish a uniform procedure for consular notification when nationals of foreign countries are arrested by officers of the Department of Justice or the Immigration and Naturalization Service (INS).

With respect to the Department of Justice, the United States codified the obligation of consular access at 28 C.F.R. Section 50.5.[83] This section provides:

> (1) In every case in which a foreign national is arrested the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given. If the foreign national does not wish to have his consul notified, the arresting officer shall also inform him that in the event there is a treaty in force between the United States and his country which requires such notification, his consul must be notified regardless of his wishes and, if such is the case, he will be advised of such notification by the U.S. Attorney.
> (2) In all cases (including those where the foreign national has stated that he does not wish his consul to be notified) the local office of the Federal Bureau of Investigation or the local Marshal's office, as the case may be, shall inform the nearest U.S. Attorney of the arrest and of the arrested person's wishes regarding consular notification.
> (3) The U.S. Attorney shall then notify the appropriate consul except where he has been informed that the foreign national does not desire such notification to be made. However, if there is a treaty provision in effect which requires notification of consul, without reference to a demand or request of the arrested national, the consul shall be notified even if the arrested person has asked that he not be notified. In such case, the U.S. Attorney shall advise the foreign national that his consul has been notified and inform him that notification was necessary because of the treaty obligation.[84]

With respect to the INS, the United States codified the obligation of consular access at 8 C.F.R. Section 236.1(e). This regulation was originally promulgated in 1967[85] and was most recently amended in 1997.[86] It provides:

> Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States. Existing treaties with

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> repercussions in Mexico and perhaps other countries unfavorable to American citizens. It is earnestly requested that you take prompt action looking to reversal [sic] District Attorney's position.

Cordell Hull, Secretary of State to Governor Rolph, telegram of Apr. 10, 1934, MS. Dep't of State File 311.1221 Aragon, José/3, *reprinted in* 4 HACKWORTH, *supra* note 61, at 836-37.

83. Notification of Consular Officers Upon Arrest of Foreign Nationals, 32 Fed. Reg. 1040 (1967).

84. *Id.*

85. Proceedings to Determine Deportability of Aliens in the United States: Apprehension, Custody Hearing and Appeal, 32 Fed. Reg. 5619 (1967).

86. Apprehension and Detention of Inadmissable and Deportable Aliens; Removal of Aliens Ordered Removed, 62 Fed. Reg. 10312, 10360 (1997).

> the following countries require immediate communication with appropriate consular or diplomatic officers whenever nationals of the following countries are detained in removal proceedings, whether or not requested by the alien and even if the alien requests that no communication be undertaken in his or her behalf. When notifying consular or diplomatic officials, Service officers shall not reveal the fact that any detained alien has applied for asylum or withholding of removal.[87]

This section codifies two distinct obligations. First, INS officials are obligated to inform a detained alien of his right to communicate with consular or diplomatic officials.[88] By its terms, this provision applies to all detained aliens regardless of nationality. Thus, the provision complies with the obligation of consular access under Article 36(1)(b) of the Vienna Convention. Second, INS officials are required to notify consular officials when nationals from specified countries are detained in exclusion or expulsion proceedings even if the aliens request that no such notification take place.[89] In contrast to the previous obligation, this provision only applies to detained aliens from countries with which the United States has negotiated special arrangements on consular notification.

In cases where the INS has made an arrest for violations of the criminal provisions of the immigration laws, the U.S. Marshal, upon delivery of the foreign national into his custody, shall be responsible for informing the U.S. Attorney of the arrest in accordance with 28 C.F.R. Section 50.5(a)(2).

To promote compliance with the Vienna Convention by state and local governments, the State Department began issuing periodic notices on consular access to these agencies.[90] The notice is mailed to the governor and attorney general of each of

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87. *Id.* The following countries are listed: Albania, Antigua, Armenia, Azerbaijan, Bahamas, Barbados, Belarus, Belize, Brunei, Bulgaria, China (People's Republic of), Costa Rica, Cyprus, Czech Republic, Dominica, Fiji, Gambia, Georgia, Ghana, Grenada, Guyana, Hungary, Jamaica, Kazakhstan, Kiribati, Kuwait, Kyrgyzstan, Malaysia, Malta, Mauritius, Moldova, Mongolia, Nigeria, Philippines, Poland, Romania, Russian Federation, St. Kitts/Nevis, St. Lucia, St. Vincent/Grenadines, Seychelles, Sierra Leone, Singapore, Slovak Republic, South Korea, Tajikistan, Tanzania, Tonga, Trinidad/Tobago, Turkmenistan, Tuvalu, Ukraine, United Kingdom, U.S.S.R., Uzbekistan, Zambia.

Arrangements made with Albania provide that U.S. authorities shall notify responsible representatives within 72 hours of the arrest or detention of one of their nationals. When Taiwan nationals (who carry "Republic of China" passports) are detained, authorities should notify the nearest office of the Taiwan Economic and Cultural Representative's Office, the unofficial entity representing Taiwan's interests in the United States. *Id.*

88. *Id.*

89. *Id.*

90. U.S. Dep't of State, Notice for Law Enforcement Officials on Detention of Foreign Nationals (1993).

the fifty states as well as to the mayors of cities with populations exceeding 100,000 people. The notice provides:

> The U.S. Department of State wishes to remind all law enforcement personnel that, whenever they arrest or otherwise detain a foreign national in the United States, there may be a legal obligation to notify diplomatic or consular representatives of that person's government in this country. Compliance with the notification requirement is essential to ensure that similar notice is given to U.S. diplomatic and consular officers when U.S. citizens are arrested or detained abroad.[91]

The notice then sets forth the obligations for law enforcement officials with respect to the detention of foreign nationals. It provides that all detained nationals must be notified of their right to contact and communicate with consular officials. It indicates that this requirement is provided by the Vienna Convention and customary international law. In addition, the notice recognizes that the United States has entered bilateral agreements with certain countries requiring notification of consular officials even if the alien requests that no such notification take place. Finally, the notice provides a current list of embassies and consulates in the United States, including their addresses and telephone numbers.[92]

It should be noted, however, that the State Department notice itself is not binding upon state or local officials. Proper notification of the right of consular access by these government officials depends upon their individual application. Accordingly, notification is seldom provided at the state or local level. In response, several criminal defendants have challenged state criminal proceedings because of the failure of state and local officials to notify them of their right to consular access under the Vienna Convention.

IV. FOREIGN NATIONALS AND THE VIENNA CONVENTION

The following Part examines cases in which defendants have challenged legal proceedings because law enforcement officials failed to notify them of their right to consular access.

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91. *Id.* at 1.
92. *Id.* at Annex.

A. *Cases Brought Under Federal Regulations*

Several aliens have challenged immigration proceedings because INS officials failed to adhere to federal regulations on consular access.[93]

1. United States v. Calderon-Medina

In *United States v. Calderon-Medina*, an alien sought to dismiss an indictment for illegal entry after deportation, arguing that the INS had failed to advise him of his right to consult with Mexican consular authorities as required by INS regulations.[94] The Ninth Circuit indicated that the INS regulations were intended to ensure compliance with the Vienna Convention. It held that violation of the regulation "renders a deportation unlawful only if the violation prejudiced interests of the alien which were protected by the regulation."[95] The court determined that the alien had failed to demonstrate prejudice.

2. United States v. Rangel-Gonzales

In *United States v. Rangel-Gonzales*, a companion case to *Calderon-Medina*, an alien sought to dismiss his indictment for illegal entry after deportation arguing the INS had failed to advise him of his right to consult with Mexican consular authorities.[96] Applying the test set forth in *Calderon-Medina*, the Ninth Circuit found that the alien had made a credible showing of prejudice:

> The appellant showed he did not know of his right to contact the consular officials, that he would have done so had he known, and that such consultation may well have led not merely to appointment of counsel, but also to community assistance in creating a more favorable record to present to the immigration judge on the question of deportation.[97]

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93. *See, e.g.*, United States v. Ibarra, 3 F.3d 1333, 1335 (9th Cir. 1993); United States v. Zaleta-Sosa, 854 F.2d 48, 52 (5th Cir. 1988); United States v. Cerda-Pena, 799 F.2d 1374, 1379 (9th Cir. 1986); United States v. Arambula-Alvarado, 677 F.2d 51, 52 (9th Cir. 1982); Tejeda-Mata v. INS, 626 F.2d 721, 726 (9th Cir. 1980); United States v. Bejar-Matrecios, 618 F.2d 81, 82 (9th Cir. 1980); United States v. Hernandez-Rojas, 617 F.2d 533, 535 (9th Cir. 1980); United States v. Vega-Mejia, 611 F.2d 751, 752 (9th Cir. 1979); United States v. Arango-Chairez, 875 F. Supp. 609, 616 (D. Neb. 1994); United States v. Floulis, 457 F. Supp. 1350, 1355 (W.D. Pa 1978).

94. 591 F.2d 529 (9th Cir. 1979).

95. *Id.* at 531.

96. 617 F.2d 529, 530 (9th Cir. 1980).

97. *Id.* at 531.

Accordingly, the Ninth Circuit held that the indictment should be dismissed.

3. Waldron v. Immigration and Naturalization Service

In *Waldron v. Immigration and Naturalization Service*, an alien sought judicial review of a deportation order.[98] As a citizen of Trinidad, Waldron argued that the failure of the INS to notify him of his right to contact diplomatic officials pursuant to INS regulations was cause for reversal.[99] The Second Circuit established a two-part test concerning the consequences of INS failure to comply with its own regulations.

> [W]hen a regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute, and the INS fails to adhere to it, the challenged deportation proceeding is invalid and a remand to the agency is required. . . . On the other hand, where an INS regulation does not affect fundamental rights derived from the Constitution or a federal statute, we believe it is best to invalidate a challenged proceeding only upon a showing of prejudice to the rights sought to be protected by the subject regulation.[100]

Applying this framework, the court first determined that 8 C.F.R. Section 242.2(g) (predecessor regulation to 8 C.F.R. Section 236.1(e)) did not implicate fundamental rights of constitutional or federal statutory origins. The court recognized that Section 242.2(g) was adopted to ensure compliance with the Vienna Convention. It noted, however, that "[a]lthough compliance with our treaty obligations clearly is required, we decline to equate such a provision with fundamental rights, such as the right to counsel, which traces its origins to concepts of due process."[101] The court then determined that Waldron had failed to identify any prejudicial impact arising from the INS's failure to notify him of his right to consular access.

In sum, federal courts have determined that a violation of INS regulations with respect to consular access will invalidate challenged proceedings only if the defendant can show prejudice.[102] The courts have made this determination despite

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98. Waldron v. INS, 17 F.3d 511, 511 (2d Cir. 1993).
99. *Id.* at 514.
100. *Id.* at 518.
101. *Id.*
102. Compare these cases with the Italian case *In re Yater*, 77 INT'L L. REP. 541 (1988). In this 1973 case, a British national was arrested and brought to trial without the notification of British consular officials. The British national argued that the proceedings instituted against him were a nullity because of the failure to comply with the Vienna Convention. The Italian Court of Cassation found there was no violation. The court argued that consular notification and assistance at trial is a "complementary and subsidiary intervention which does not replace the

the fact that no such requirement is set forth in the Vienna Convention.

B. *Cases Brought Under the Vienna Convention*

In addition to cases involving federal regulations, defendants have challenged criminal proceedings because law enforcement officials failed to notify them of their right to consular access under the Vienna Convention.

1. Faulder v. Johnson

In *Faulder v. Johnson*, the defendant petitioned for a writ of habeas corpus following his conviction and sentence of death in Texas.[103] As a Canadian citizen, the defendant argued that his conviction should be reversed because Texas failed to adhere to the Vienna Convention. Specifically, state officials failed to notify the defendant of his right to consular access.[104] Indeed, the Canadian government did not learn of the defendant's incarceration for fifteen years.[105] The district court dismissed the habeas petition and the Fifth Circuit Court of Appeals affirmed. The Court of Appeals recognized that the Vienna Convention had been violated.[106] The court noted, however, that:

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accused's right to provide for himself a trusted legal representative for his defence." *Id.* at 542; *see also* 2 ITALIAN Y.B. OF INT'L L. 336 (1976) (discussing the *Yater* case).

103. 81 F.3d 515, 517 (5th Cir. 1996).

104. The Canadian government filed an amicus brief in federal court supporting Faulder's challenge to the state court proceedings. Amicus Brief of the Government of Canada, Faulder v. Collins (No. 95-40512) (E.D. Tex. 1993). According to the Canadian government, Faulder "was deprived of a right under international law that may have prejudiced his ability to receive a fair trial and sentencing hearing." *Id.* at 10. Specifically, it argued that:

> If Mr. Faulder had been given an opportunity to contact the Canadian Consulate General in Dallas, he would have been visited by a Canadian consul. The consul would have offered to contact Mr. Faulder's family in Canada and inform them of his situation. They in turn could have provided information concerning Mr. Faulder's medical and mental history that could have been material to his defense. The consul would also have been able to provide him with a list of local lawyers he could contact. During Mr. Faulder's incarceration, the consul would have provided Mr. Faulder with assistance on non-legal issues which he could not have received from his attorney. Consuls are specifically trained and instructed to provide such unique assistance to persons in Mr. Faulder's situation.

Id. at 9-10.

105. Brief Amicus Curiae of the Government of Canada in Support of an Application for the Writ of Habeas Corpus, *Ex Parte* Faulder, at 3 (Tex. Crim. App., May 23, 1997).

106. *Faulder*, 81 F.3d at 520.

> Faulder or Faulder's attorney had access to all of the information that could have been obtained by the Canadian government. While we in no way approve of Texas' failure to advise Faulder, the evidence that would have been obtained by the Canadian authorities is merely the same as or cumulative of evidence defense counsel had or could have obtained.[107]

Thus, the Court of Appeals held that the violation of the Vienna Convention did not merit reversal of the conviction.[108]

2. Murphy v. Netherland

In *Murphy v. Netherland*, Mario Murphy, a Mexican national, had been arrested and charged with murder in Virginia.[109] He subsequently pleaded guilty and was sentenced to death.[110] At no time was he notified of his right to consular access under the Vienna Convention.[111] After his state appeals were denied by the Supreme Court of Virginia, Murphy filed a petition for habeas corpus in federal district court alleging numerous challenges to his conviction including failure to comply with the Vienna Convention. The district court denied Murphy's claims and dismissed the petition. With respect to his claims arising under the Vienna Convention, the court first noted its concern over "what appears to be Virginia's defiant and continuing disregard for the Vienna Convention."[112] Yet, the court failed to find a violation that would permit habeas relief. Referring to the Fifth Circuit's opinion in *Faulder*, the district court said that Murphy failed to prove he had been prejudiced by Virginia's failure to comply with the provisions of the Vienna Convention. More significantly, the district court held that Murphy's claim was procedurally invalid since he had never raised the argument in the Virginia state courts.

On appeal, the Fourth Circuit denied the motion for a certificate of appealability and dismissed Murphy's petition.[113] Under the Antiterrorism and Effective Death Penalty Act of 1996, a petitioner whose habeas petition is denied by a district court must make "a substantial showing of the denial of a

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107. *Id.*

108. The Canadian government also filed an amicus brief in Faulder's state habeas appeal. Amicus Brief, *Faulder.*

109. Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997).

110. Murphy v. Commonwealth, 246 Va. 136 (1993).

111. Indeed, when Murphy petitioned Virginia authorities for communication with Mexican consular authorities, his request was denied. It was not until the Mexican consul learned of Murphy's detention on his own that he was able to communicate with Murphy. Amicus Brief of the United Mexican States, Murphy v. Netherland, Case No. 96-14, at 18-19 (4th Cir. Jan. 14, 1997).

112. Memorandum Opinion, Murphy v. Netherland (No. 3, 95-CV-856) at 7.

113. *Murphy,* 116 F.3d at 101.

constitutional right."[114] In dismissing the appeal, the court first determined that a violation of the Vienna Convention did not violate any constitutional right: "Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty."[115] Second, the court affirmed that Murphy's claim was procedurally barred because he did not raise it in state court, and he could not show cause for his default. According to the Court of Appeals, "[t]reaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national."[116] While Virginia officials had failed to notify Murphy of his rights under the Vienna Convention, such action did not prejudice Murphy from raising the claim on his own: "The legal basis for the Vienna Convention claim could, as noted above, have been discovered upon a reasonably diligent investigation by his attorney, and the factual predicate for that claim—that Murphy is a citizen of Mexico—was obviously within Murphy's knowledge."[117] Third, the court found that Murphy had failed to establish any prejudice arising from the alleged violation of the Vienna Convention. Specifically, Murphy had failed to prove that "the consulate could have helped him either obtain a plea bargain or obtain mitigating evidence for the sentencing hearing."[118] Finally, the court dismissed Murphy's claim that his guilty plea was involuntary because of the state's failure to advise him of his rights under the Vienna Convention. According to the court, this claim was not even raised in the federal habeas petition. Moreover, it did not constitute a claimed violation of a constitutional right. For these reasons, the Fourth Circuit refused to grant Murphy's motion for a certificate of appealability and, therefore, dismissed Murphy's appeal.

Following an unsuccessful petition to the U.S. Supreme Court and after his plea for clemency was denied by the governor of Virginia, Murphy was executed on September 17, 1997.

3. Breard v. Netherland

In *Breard v. Netherland*, Angel Breard, a Paraguayan national, was arrested and subsequently convicted and sentenced to death in Virginia.[119] Breard's conviction and sentence were affirmed by the Virginia Supreme Court. After exhausting his

114. 28 U.S.C.A. § 2253(c)(2) (West Supp. 1997).
115. *Murphy*, 116 F.3d at 100.
116. *Id.*
117. *Id.*
118. *Id.* at 100-101.
119. Breard v. Commonwealth, 248 Va. 68 (1994).

state appeals, Breard filed a federal habeas corpus petition challenging his conviction and death sentence. Breard argued that Virginia officials had never informed him of his right to consular access under the Vienna Convention.

As in the *Murphy* case, the district court denied Breard's claims and dismissed the petition.[120] While the district court expressed its concern over Virginia's persistent refusal to abide by the Vienna Convention, it held that a violation of these rights was insufficient to permit relief. In addition, the district court indicated that Breard had never raised the issue in state court and, therefore, he could not raise it in federal court. According to the district court:

> the Commonwealth's failure to comply with the Vienna Convention did not prevent Breard's counsel from raising the issue during state proceedings. The only predicate fact required to raise the claim was the knowledge of Breard's foreign nationality. The legal knowledge required to raise the claim is imputed to Breard through the various attorneys who represented him during the trial, direct appeal, and state habeas proceedings.[121]

On January 22, 1998, the Fourth Circuit affirmed the district court's ruling.[122] The court's decision was guided by its earlier ruling in *Murphy v. Netherland.* First, the court found that *Murphy* forecloses any argument that Breard could not have raised his Vienna Convention claim at the time he filed his initial state habeas petition in May 1995. "In reaching this conclusion, we noted that a reasonably diligent attorney would have discovered the applicability of the Vienna Convention to a foreign national defendant and that in previous cases claims under the Vienna Convention have been raised . . . ."[123] Second, the court determined that it could not address Breard's defaulted Vienna Convention claim unless he could "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice."[124] In order to demonstrate cause for the default, a petitioner must establish that some external factor impeded his ability to raise the claim during the state proceedings. Again, the court found that the *Murphy* decision precluded Breard from arguing that the basis of the Vienna Convention claim was unavailable to him when he filed his state habeas petition. Finally, the Court found that the Vienna Convention claim did not provide any basis for the

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120. Breard v. Netherland, 949 F. Supp. 1255 (E.D. Va. 1996).
121. *Id.* at 1263.
122. Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998).
123. *Id.* at 619-20.
124. *Id.* at 620.

miscarriage of justice exception to the procedural default doctrine. Accordingly, the Fourth Circuit affirmed the district court's ruling to dismiss Breard's writ of habeas corpus.

In a concurring opinion, Senior Circuit Judge Butzner wrote to emphasize the importance of the Vienna Convention. He noted that the agreement was clearly self-executing, and that the rights conferred by the agreement must be honored by the federal government as well as the individual states. Indeed, these rights must be implemented before trial, at a time when they can be appropriately addressed. "Collateral review is too limited to afford an adequate remedy."[125] More significantly, Judge Butzner emphasized the broad nature of such international obligations.

> The protections afforded by the Vienna Convention go far beyond Breard's case. United States citizens are scattered about the world as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that "international law is founded upon mutually and reciprocity. . . ."[126]

For these reasons, Judge Butzner concluded that the Vienna Convention "should be honored by all nations that have signed the treaty and all states of this nation."[127]

V. FOREIGN GOVERNMENTS AND THE VIENNA CONVENTION

Foreign governments have also sought to protect their rights under the Vienna Convention and other consular agreements. Both Paraguay and Mexico have filed separate lawsuits against state officials because of their failure to comply with the right of consular access.

A. *Republic of Paraguay v. Allen*

On September 12, 1996, the Republic of Paraguay, the Paraguayan Ambassador to the United States, and the Consul General of Paraguay filed an action against Virginia officials in the U.S. District Court for the Eastern District of Virginia.[128] The lawsuit was brought to seek redress for violations of the Vienna Convention as well as the Treaty of Friendship, stemming from

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125. *Id.* at 622.
126. *Id.* (citations omitted).
127. *Id.*
128. Complaint, Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1271 (E.D. Va. 1996) (No. 3, 96-CV-745).

Breard's arrest and detention.[129] Specifically, the plaintiffs argued that Virginia officials failed to notify Breard of his right to consular access under the Vienna Convention and that they failed to notify consular officials of Breard's arrest and detention as required by the Treaty of Friendship.[130] In addition, the Consul General argued that the defendants' inaction gave rise to a claim under 42 U.S.C. Section 1983. The plaintiffs requested several forms of declaratory and injunctive relief. Specifically, they requested that the district court: (1) declare that the defendants violated the Vienna Convention and the Treaty of Friendship; (2) declare that defendants continued to violate both treaties; (3) enjoin the defendants from taking any action based on Breard's conviction and declare any further action based on the conviction a violation of the treaties; (4) declare Breard's conviction void; and (5) grant an injunction vacating Breard's conviction and directing the defendants to abide by the treaties during any future proceedings against Breard.[131]

The defendants subsequently filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted.[132] On November 27, 1996, the district court dismissed the action for lack of subject matter jurisdiction.[133] The court divided its analysis into two sections: (1) subject matter jurisdiction; and (2) justiciability.

With respect to subject matter jurisdiction, the court focused on Eleventh Amendment immunity and district court review of state court proceedings. The district court noted that the Eleventh Amendment places constitutional limits on federal court jurisdiction: "In particular, the Eleventh Amendment bars suits by a foreign government against a state government in federal court."[134] The court also noted that the Eleventh Amendment bars suits against state officials that are really suits against the state. It recognized, however, the narrow exception set forth in *Ex Parte Young*. Under *Ex Parte Young*, a party at risk of suffering or presently suffering from a violation of federally protected rights may seek to enjoin the offending state officers.[135] In order to

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129. *Id.* at 2. Accordingly, jurisdiction was alleged under 28 U.S.C. § 1331. Under federal question jurisdiction, the district courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331 (1994).

130. Compl., *Allen*, at 2.

131. *Id.* at 19-21.

132. Motion to Dismiss, *Allen*, 949 F. Supp. at 1272 (E.D. Va. 1996) (Civil Action No. 3, 96-CV-745).

133. *Allen*, 949 F. Supp. at 1271.

134. *Id.* at 1272 (quoting Seminole Tribe of Florida v. Florida, 17 U.S. 44 (1996); Principality of Monaco v. Mississippi, 292 U.S. 313 (1934)).

135. *Ex Parte Young*, 209 U.S. 123 (1908).

grant an *Ex Parte Young* injunction, the court must determine that there is a continuing violation of federal law and that the requested relief is prospective. Applying these criteria, the district court concluded that Paraguay was not the victim of a continuing violation of federal law: "Although this Court is disenchanted by Virginia's failure to embrace and abide by the principles embodied in the Vienna Convention and Friendship Treaty, the Eleventh Amendment operates to bar retroactive relief."[136]

The district court also examined the ability of federal district courts to review state court decisions.[137] It noted that federal courts are courts of limited jurisdiction: "With the exception of federal habeas review, district courts do not have jurisdiction to review final decisions of a state court."[138] The court indicated that the power to review a state court ruling rests solely with the U.S. Supreme Court.

As a separate matter, the district court examined the issue of justiciability. First, the district court examined whether Paraguay had standing under the treaties. Specifically, it focused on whether Paraguay had suffered an injury and whether the injury was redressable by the court. The court recognized that Paraguay was a party to the treaties and although Paraguay's actions would benefit Breard, Paraguay was the real party in interest. The court also noted that treaties need not set forth all applicable remedies for potential violations, and that courts have the power to interpret treaties and fashion equitable remedies. For these reasons, the district court concluded that Paraguay had standing to seek redress for any violations. Second, the district court examined the separate claim brought by the Consul General of Paraguay under 42 U.S.C. Section 1983. The defendants argued that Section 1983 only applied to persons within the jurisdiction of the United States. While the Consul General was a person, the defendants argued he was not an intended beneficiary of the treaty obligations. The district court ruled, however, that a consular official is considered a person subject to the jurisdiction of the United States. Thus, the court determined that the Consul General was a proper plaintiff within the meaning of the statute. Third, the district court examined whether declaratory relief was an appropriate remedy. While the defendants had granted Paraguayan officials unfettered access to Breard since April 1996, this action did not render the case moot. The court found the defendants had failed to show that they would not repeat the

136. *Allen*, 949 F. Supp. at 1273 (citing Papasan v. Allain, 478 U.S. 265 (1986); Milliken v. Bradley, 433 U.S. 267 (1977)).

137. *Id.* (citing District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Preiser v. Rodriguez, 411 U.S. 475, 500 (1973)).

138. *Id.*

illegal conduct. Accordingly, the district court ruled that absent the jurisdictional limitations, the case would have been suitable for declaratory relief.

For these reasons, the court concluded that it lacked subject matter jurisdiction. It therefore granted the defendant's motion to dismiss.

On appeal to the Fourth Circuit, Paraguay argued that the Eleventh Amendment should not bar its claims for relief.[139] First, Paraguay argued that Virginia officials had not cured their treaty violations. Even if the violation of Paraguay's rights had ceased, *Ex Parte Young* still authorized suits against state officials for injunctive relief to remedy the continuing effects of past violations of federal law. These suits were valid as long as they did not seek retroactive relief. Paraguay was seeking only injunctive relief. For these reasons, Paraguay's suit fell within the parameters of *Ex Parte Young*. Second, Paraguay argued that it was not seeking the review of a final state court judgment. Since Paraguay had not been a party to the state proceedings, it had received no opportunity to litigate its claims at the state level or appeal from the state court decisions.

> Under no rationale can the state court judgment preclude Paraguay's claim here. The essence of Paraguay's claim is that it was deprived of its federally protected right to assist its citizen because it was never informed of the existence of the proceedings against him. By suggesting that the very proceeding from which Paraguay was unlawfully excluded could preclude Paraguay from asserting its right to assist in such proceedings, the District Court engaged in circular reasoning that finds no support in the authority on which it relied. The state court judgment is the event which gives rise to Paraguay's claim. It cannot at the same time pose a bar to that claim.[140]

Interestingly, the United States filed an amicus brief supporting the district court's judgment of dismissal.[141] However, the United States argued that the judgment should be affirmed without reaching the Eleventh Amendment issues addressed by the district court.[142] Rather, the political question doctrine barred adjudication and, therefore, the dispute was not justiciable in domestic courts. The United States argued that

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139. Brief for Appellant, Paraguay v. Allen, (4th Cir. 1996) (No. 96-2770).

140. *Id.* at 26.

141. Brief for Amicus Curiae United States, Paraguay v. Allen (4th Cir. 1996) (No. 96-2770).

142. *Id.* While the United States did not take a position on the applicability of the Eleventh Amendment, its brief suggests that the issue of Eleventh Amendment immunity in this area is not fully settled. *Id.* at 31. With respect to the *Ex Parte Young* issue, the United States indicated that Paraguay had raised questions about the district court's holding. *Id.* at 32.

disputes between nations over the meaning or application of a treaty are not cognizable in domestic courts:

> [I]t makes no sense under our constitutional scheme of separated powers for a foreign state to look to our Article III judiciary to tell the Executive and Legislative Branches that they have violated a treaty right owed to that foreign state, how such a violation should be remedied, and how those branches should be dealing with foreign governments.[143]

The United States added, however:

> We are not contending that foreign states can never sue in federal courts, or that the courts are prohibited from interpreting and enforcing treaty rights on behalf of private individuals in certain circumstances. Rather, we are arguing solely that the courts lack the power to rule on a suit brought by a foreign nation to enforce asserted treaty rights on its own behalf in order to overturn otherwise valid criminal justice proceedings.[144]

On January 22, 1998, the Fourth Circuit affirmed the lower court's ruling.[145] The court focused exclusively on the Eleventh Amendment because it found it dispositive.[146] While the court recognized the *Ex Parte Young* exception to the Eleventh Amendment, it simply found no ongoing violation of a federally protected right. Breard's incarceration could not be considered a presently experienced harmful consequence of past conduct. Moreover, "Paraguay's claim was not, as it could not be, that Commonwealth officials were continuing to prevent Paraguay, either by action or non-action, from providing aid and counseling to Breard at the time Paraguay filed its action."[147] In addition, the court found that Paraguay's request for relief was in no true sense prospective. "Paraguay bases its prospective-relief contention on the fact that the relief sought is formally couched in injunctive, declarative terms and on the basis, as if it were dispositive of the question, that no monetary damages are sought. But when the essence is considered, the only presently effective relief sought for the violations claimed and conceded its essentially retrospective: the voiding of a final state conviction and sentence."[148] While the court expressed disenchantment with Virginia's failure to comply with the Vienna Convention, it held that the Eleventh Amendment precluded relief for any violations.

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143. *Id.* at 12.
144. *Id.* at 9.
145. Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998).
146. Accordingly, it did not address the political question doctrine or the *Roocker-Feldman* doctrine regarding appeals of final state court judgments.
147. *Id.* at 628.
148. *Id.*

B. *United Mexican States v. Woods*

On May 15, 1997, the Mexican government filed a lawsuit against Arizona officials, challenging the pending execution of Ramon Martinez-Villareal, a Mexican national.[149] The complaint alleged that the defendants had violated the rights of the Mexican government under the Vienna Convention and the Consular Convention between Mexico and the United States. It also alleged that the planned execution of Martinez-Villareal would violate the International Covenant on Civil and Political Rights[150] and customary international law:

> In violation of treaty obligations and customary international law, binding on defendants as the law of the United States and owed directly to the United Mexican States and its consular officers, the defendants (1) failed to inform Mexican citizen, Ramon Martinez Villareal, during and after his arrest of his right to seek the assistance of Mexican consular officers, as required by article 36(1)(b) of the Vienna Convention, (2) failed to notify Mexican consular officers directly that a Mexican citizen had been arrested, as required by articles I and VI of the Bilateral Consular Convention, (3) failed to provide plaintiffs a meaningful opportunity to provide consular assistance to Mr. Martinez Villareal during the proceedings against him, as required by those two treaties, (4) failed to ensure that Mr. Martinez Villareal was represented by competent counsel at all stages of the proceedings; and (5) imposed and intend to carry out a sentence of death despite the fact that Mr. Martinez Villareal is mentally retarded.[151]

In addition, Luis Cabrera, the Consul General of Mexico in the State of Arizona, sought equitable relief under 42 U.S.C. Section 1983. The plaintiffs requested that the district court issue a temporary restraining order enjoining the defendants from executing Martinez-Villareal.

On May 19, 1997, the federal district court dismissed the complaint for lack of subject matter jurisdiction.[152] The district court determined that the Eleventh Amendment barred the suit. On appeal, the Ninth Circuit affirmed the district court's ruling.[153] The court found that the Eleventh Amendment provides immunity to states from lawsuits by foreign governments in federal court. Moreover, the *Ex Parte Young* exception was

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149. Complaint, United Mexican States v. Woods, (D.C. Ariz. 1997) (No. CV 97-1075-PHX SMM) (unpublished disposition).

150. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

151. Compl., *Woods*, at 2.

152. Order, *Woods* (No. CV 97-1075-PHX-SMM).

153. United Mexican States v. Woods, 126 F.3d 1220 (9th Cir. 1997).

inapplicable because there was no ongoing violation of a federal right. According to the court:

> A criminal proceeding can be roughly analogized to a series of videotaped scenes: the arrest, the interrogation, the trial, the sentencing, and the appeal. Each of these scenes is examined post hoc in state postconviction proceedings and federal habeas. In no event, however, can the conviction or sentence be considered as a dynamic event, to be examined in a prospective fashion.[154]

In the absence of a continuing violation of law, the court determined that prospective relief was unavailable.

VI. RIGHTS, WRONGS, AND REMEDIES: FOREIGN GOVERNMENTS, TREATY OBLIGATIONS, AND U.S. COURTS

These cases are unique for several reasons. While foreign governments have been granted access to U.S. courts in the past, these cases are, perhaps, the first in which foreign governments have sought to enforce treaty obligations in federal courts. They certainly represent the first time that foreign governments have petitioned U.S. courts to redress violations of the Vienna Convention.

This Part examines three issues raised by these cases: (1) when is the United States required to comply with treaty obligations; (2) whether a foreign government can seek redress in U.S. courts for treaty violations; and (3) what remedies are available in U.S. courts for treaty violations.

Throughout this analysis, it is essential to distinguish between the international and domestic obligations that flow from international agreements.[155] International agreements create international rights and obligations. These rights and obligations are between the United States and other countries, and they cannot be set aside by domestic law. International agreements can also create domestic rights and obligations. The nature and scope of these rights and obligations depends upon the status of the treaty in the United States.

A. *When is the United States Required to Comply with Treaty Obligations?*

It is well settled that international agreements are the law of the United States and supreme over the laws of the several states.

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154. *Id.* at 1223.

155. *See generally* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

Under the Supremacy Clause of the U.S. Constitution, "all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[156] The well-respected Restatement (Third) of the Foreign Relations Law of the United States reiterates this fundamental principle, adding that the Executive Branch has an obligation and the necessary authority to ensure that international agreements are faithfully executed.[157]

This straightforward summary of the Supremacy Clause does not end the analysis. The United States recognizes the doctrine of *lex posterior derogat priori*—the last-in-time doctrine.[158] Under this doctrine, a treaty may be superseded by a subsequent act of Congress. Similarly, an act of Congress may be superseded by a subsequent treaty. One of the first pronouncements of this doctrine was set forth by the Supreme Court in *The Head Money Cases*.[159] Several shipping companies challenged a federal statute that imposed a fee on each foreign passenger entering the United States.[160] The companies argued that the passenger fee was inconsistent with prior U.S. treaty obligations.[161] The Court indicated that a treaty is the "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."[162] It added, however, that subsequent federal legislation displaces any conflicting treaty provisions for purposes of domestic law:[163] "[W]e are of the opinion that, so far as a treaty made by the

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156. U.S. CONST. art. VI, cl. 2.

157. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. c (1987) [hereinafter RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW].

158. *See generally* Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393 (1988); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 878 (1987); Henkin, *supra* note 155, at 1565.

159. *The Head Money Cases*, 112 U.S. 580, 599 (1884).

160. *Id.* at 586. The fee was set at 50 cents per passenger. *Id.*

161. Counsel for the plaintiffs cited treaties with Belgium, Denmark, France, Great Britain, Netherlands, Norway, Prussia, and Sweden. *Id.* at 585.

162. *Id.* at 598-99.

163. The Court noted that this question had presumably been resolved in *The Cherokee Tobacco* case. *Id.* at 597. In *Cherokee Tobacco*, the Court stated:

> The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.

The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1801).

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."[164]

The Supreme Court reiterated this doctrine in *Whitney v. Robertson.*[165] In *Whitney,* several merchants challenged the imposition of customs duties on sugar products, arguing that they were contrary to the provisions of a treaty between the United States and the Dominican Republic.[166] In its opinion, the Court examined the relationship between treaties and federal legislation:

> By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other . . . .[167]

Because the "duty of the courts is to construe and give effect to the latest expression of the sovereign will," the Court ruled that the treaty had been superseded by the subsequent federal statute.[168]

Similarly, in *Diggs v. Shultz,* the Court of Appeals for the District of Columbia examined the 1972 Byrd Amendment which authorized the importation of chromite from Southern Rhodesia in violation of U.N. Security Council Resolution 232.[169] Resolution 232 was adopted by the Security Council in 1966 and imposed a trade embargo on Southern Rhodesia.[170] In 1971, Congress adopted the Byrd Amendment, which allowed the resumption of trade with Southern Rhodesia.[171] The court noted that the purpose of the Byrd Amendment was "to detach this country from the U.N. boycott of Southern Rhodesia in blatant disregard of our treaty undertakings."[172] Despite this, the court held that "under our constitutional scheme, Congress can

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164. *The Head Money Cases,* 112 U.S. at 599.

165. 124 U.S. 190, 194 (1887). *See also* The Chinese Exclusion Case, 130 U.S. 581, 600 (1889); Botiller v. Dominguez, 130 U.S. 238, 247 (1889).

166. *Whitney,* 124 U.S. at 191.

167. *Id.* at 194.

168. *Id.* at 195.

169. Diggs v. Shultz, 470 F.2d 461, 463 (D.C. Cir. 1972), *cert. denied,* 411 U.S. 931 (1973). *See also* Committee of United States Citizens in Nicar. v. Reagan, 859 F.2d 929 (D.C. Cir. 1988).

170. *Diggs,* 470 F.2d at 463.

171. *Id.*

172. *Id.* at 466.

denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it."[173]

The United States also recognizes the doctrine of self-executing treaties, which further limits the application of treaty provisions in the United States.[174] Under the principles first enunciated in *Foster v. Neilson*, unless a treaty provision indicates that it does not require further congressional action, or unless Congress enacts legislation implementing the treaty provision, the treaty is viewed as an interstate contract, unenforceable in U.S. courts.[175] In *Foster*, a dispute arose between landowners in Louisiana concerning title to property.[176] The property had been the subject of an 1819 treaty signed between the United States and Spain, which transferred title to a large tract of land, including the disputed property, to the United States.[177] The Supreme Court began by examining the status of treaties in the United States. The Court noted that the U.S. 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."[178] When a treaty indicates the need for legislative action to perform any obligations, however, "the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."[179] Examining the relevant articles of the 1819 treaty, the Court concluded that they were not self-executing and, therefore, they required legislative action before they could be applied by the courts.[180]

In *Saipan v. United States Dep't of Interior*, the Ninth Circuit Court of Appeals examined a Trusteeship Agreement in which the United Nations designated the United States as the administering

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173. *Id.*

174. *See generally* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627 (1986).

175. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1824).

176. *Id.* at 299-300.

177. *Id.* at 310. The main issue in the case was whether the United States acquired right to the disputed property under an 1803 treaty with France or under the 1819 treaty with Spain. *Id.*

178. *Id.* at 314.

179. *Id.*

180. *Id.* at 315-17. In *United States v. Percheman*, the Court reviewed the same treaty provisions although in this case it examined the Spanish language text of the treaty provisions. 32 U.S. (7 Pet.) 51, 87-89 (1833). Based upon this review, the Court reversed its earlier holding in *Foster* and concluded that the treaty was, in fact, self-executing. *Id.* at 89.

authority of the Trust Territory of the Pacific Islands.[181] Citizens of the Trust Territory had sued in federal district court, arguing that a proposed agreement between the High Commissioner of the Trust Territory and Continental Airlines violated the Trusteeship Agreement.[182] The Court of Appeals examined whether the agreement was self-executing and could be enforced by individual litigants in federal court. According to the court:

> The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution.[183]

Applying these criteria, the court concluded that the Trusteeship was self-executing because it established direct, affirmative, and judicially enforceable rights.[184] In contrast, other courts have held that provisions of other international agreements, such as the U.N. Charter, the Helsinki Accords, and the OAS Charter, are not self-executing and, therefore, do not provide judicially enforceable rights to private litigants.[185]

Thus, the status of international agreements in the United States turns in part upon whether they were intended to be self-executing. Absent implementing legislation, it is only when a treaty provision is self-executing, when it prescribes rules by which rights may be determined *ex proprio vigore*, that it may be relied upon for the enforcement of such rights.[186]

While these doctrines may limit the application of treaties in the United States, they do not obviate U.S. obligations under international law. The United States remains responsible to other countries for complying with its international obligations. As noted in the Restatement (Third), "[t]hat a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international

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181. Saipan v. United States Dep't of Interior, 502 F.2d 90, 95 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

182. *Id.* at 96.

183. *Id.* at 97.

184. *Id.* at 97-98. The court, however, also held that under the principle of comity these rights should be asserted first before the High Court of the Trust Territory. *Id.* at 99.

185. *See* Frolova v. U.S.S.R., 761 F.2d 370, 374 (7th Cir. 1985); United States v. Postal, 589 F.2d 862, 878 (5th Cir. 1979), *cert. denied*, 444 U.S. 832 (1979); Sei Fujii v. State, 38 Cal.2d 718, 722 (1952).

186. Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976).

obligation or of the consequences of a violation of that obligation."[187] This principle of international responsibility is codified in Article 27 of the Vienna Convention on the Law of Treaties which provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[188] More broadly, international law provides that a state is obligated to comply with a treaty that has been ratified and has entered into force. This obligation is codified in Article 26 of the Vienna Convention on the Law of Treaties which provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[189] Indeed, this principle represents one of the most important obligations in international law: *pacta sunt servanda*—treaties must be observed.[190] It is considered to be a jus cogens norm, a fundamental standard of conduct that cannot be set aside by treaty or acquiescence.

In sum, international agreements create both international and domestic obligations for the United States. This distinction is fundamental in determining the consequences of treaty violations in the United States.[191]

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187. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115.

188. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 27, 1155 U.N.T.S. 331, 339 (entered into force Jan. 27, 1980). *See also* Treatment of Polish Nationals and Other Persons of Polish Origin in the Danzig Territory, 1932 P.C.I.J. (ser. A/B) No. 44, at 24 (Feb. 4, 1932).

189. Vienna Convention on the Law of Treaties, *supra* note 188, art. 26.

190. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 321 cmt. a.

191. The Supreme Court recognized this distinction in one of the earliest cases addressing the application of international obligations in the United States. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 103 (1801). The Court examined the validity of the proposed condemnation and sale of the Peggy. Specifically, the Court examined whether the condemnation was in violation of a treaty between the United States and France. According to the Court:

> The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and, in the general, superintended by the executive of each nation, and therefore, whatever the decision of this court may be relative to the rights of parties litigating before it, the claim upon the nation if unsatisfied, may still be asserted. But yet 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; and although restoration may be an executive, when viewed as a substantive, act independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and of consequence, improper.

Id. at 109-10.

Treaty obligations are not limited to the federal government; they also apply to state and local governments.[192] The Constitution recognizes the primacy of treaty obligations, and this principle has been affirmed in numerous Supreme Court rulings.[193]

In *The Federalist No. 42*, James Madison emphasized the importance of federal supremacy over state and local governments, particularly in the realm of foreign affairs.[194] Madison argued that the power to make treaties and regulate commerce with foreign nations "forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations."[195] Indeed, one of the limitations of the Articles of Confederation was its inability to effectively regulate foreign commerce by the

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192. *See generally* Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, SUP. CT. REV., 1994 at 295, 296; Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441 (1994); Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 HARV. L. REV. 1269 (1991); Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832 (1989); Paul L. Hoffman, *The Application of International Human Rights Law in State Courts: A View from California*, 18 INT'L LAW. 61 (1984); Kathryn Burke et al., *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291 (1983).

193. It is important to distinguish between treaties, customary international law, and other forms of international behavior. State and local governments are bound by U.S. treaties. They are also bound by customary international law that is recognized by the United States. They are not bound, however, by other forms of international behavior. For example, states are not bound by the intrastate practice of foreign governments. Intrastate behavior includes the domestic practice of foreign governments. Thus, in *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court addressed whether executing a minor who was sixteen when he committed his crime was cruel and unusual punishment. *Id.* at 365. Writing for the majority, Justice Scalia rejected the use of international standards as binding norms on state courts:

> We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici*... that the sentencing practices of other countries are relevant. While "[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well" . . . they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.

Id. at 369 n.1 (quoting Thompson v. Oklahoma, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting)).

194. THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961).

195. *Id.*

individual states. This notion of federal supremacy was echoed by John Jay in *The Federalist No. 3*:

> It is of high importance to the peace of America that she observe the laws of nations towards all these powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies.[196]

This view of federal supremacy was placed in the text of the Constitution, where the Supremacy Clause recognizes that treaties are the supreme law of the land.

On several occasions, the Supreme Court has affirmed the primacy of treaty obligations over state law.[197] In *Ware v. Hylton*, the Court examined the relationship between a treaty and state law.[198] The 1783 Treaty of Peace between the United States and Great Britain provided that British creditors could recover debts previously owed to them by American citizens. The Court determined that the Treaty of Peace took precedence over inconsistent state law. According to Justice Chase, "[t]he treaty of 1783 has superior power to the Legislature of any State, because no Legislature of any State has any kind of power over the Constitution, which was its creator."[199] Justice Chase added that it was the responsibility of the judiciary to uphold the treaty over inconsistent state law.

In the seminal case of *Missouri v. Holland*, the Court examined the validity of a treaty and subsequent implementing legislation against charges by Missouri that these acts were "an unconstitutional interference with the rights reserved to the States by the Tenth Amendment," and that they threatened to "invade the sovereign right of the State and contravene its will manifested in statutes."[200] A 1916 treaty between the United States and Great Britain sought to protect migratory birds moving between the United States and Canada. Congress subsequently enacted legislation implementing the treaty, and the Secretary of Agriculture soon promulgated regulations pursuant to this legislation.[201] In a typically terse holding, Justice Holmes determined that the treaty and legislation were valid exercises of federal power. The opinion emphasized the important role played

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196. THE FEDERALIST No. 3, at 43 (John Jay) (Clinton Rossiter, ed., 1961).

197. In *United States v. Belmont*, 301 U.S. 324 (1937), the Supreme Court noted: "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear." *Id.* at 331. *See also* United States v. Pink, 315 U.S. 203, 231 (1942).

198. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 204 (1796).

199. *Id.* at 237.

200. Missouri v. Holland, 252 U.S. 416, 431 (1920).

201. *Id.* at 431-32.

by the federal government in regulating matters of national concern:

> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States.[202]

Indeed, the primacy of treaty obligations provides one possible basis for challenging state immunity from suit under the Eleventh Amendment.[203] It can be argued that a duly ratified treaty, adopted pursuant to the foreign affairs power, implicitly authorizes a foreign government to sue a state in order to enforce treaty provisions.[204] The Supreme Court has recognized the ability of Congress to abrogate state immunity. For example, the Court indicated in *Fitzpatrick v. Bitzer* that Section 5 of the Fourteenth Amendment allows Congress to abrogate state immunity from suit in federal court.[205]

While the Supreme Court held in *Principality of Monaco v. Mississippi* that the Eleventh Amendment provides states with immunity from lawsuits filed by foreign governments in federal courts, it did not fully address whether such immunity extends to lawsuits involving self-executing treaty obligations.[206] Unlike controversies that may involve purely international questions, self-executing treaty obligations have become the law of the land through their approval by the Senate and their ratification by the President.

The notion of federal dominance over state and local governments in the realm of foreign affairs is also consistent with international law. International law recognizes the liability of the central government for violations committed by any entity empowered to exercise governmental authority.[207] Thus, the

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202. *Id.* at 435.

203. It can also be argued that states had no sovereign immunity to cede in the area of foreign affairs. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-16 (1936).

204. The First Circuit has held that Congress has the power to abrogate Eleventh Amendment immunity when it acts pursuant to its War Powers. Diaz-Gandia v. Dapena-Thompson, 90 F.3d 609, 616 (1st Cir. 1996); Reopell v. Massachusetts, 936 F.2d 12, 16 (1st Cir. 1991).

205. 427 U.S. 445, 456 (1976).

206. 292 U.S. 313, 331-32 (1934).

207. According to McNair,

> [A] State has a right to delegate to its judicial department the application and interpretation of treaties. If, however, the courts commit errors in that

Restatement (Third) provides that "[a] state is responsible for carrying out the obligations of an international agreement. A federal state may leave implementation to its constituent units, but the state remains responsible for failure of compliance."[208] According to Sir Ian Brownlie, the law in this respect is well-settled:

> A state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law. The acts of the legislature and other sources of internal rules and decision-making are not to be regarded as acts of some third party for which the state is not responsible, and any other principle would facilitate evasion of obligations.[209]

B. *Can a Foreign Government Seek Redress for Treaty Violations in U.S. Courts?*

If the United States is required to comply with treaty obligations, it follows that the federal courts should have the authority to review compliance with these agreements and provide redress for violations thereof.[210]

This judicial power is explicitly set forth in the Constitution.[211] Article III of the Constitution provides that the federal judicial power extends to "all Cases, in Law and Equity, arising under . . . Treaties" of the United States; "to all Cases

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> task or decline to give effect to the treaty or are unable to do so because the necessary change in, or addition to, the national law has not been made, their judgments involve the State in a breach of treaty.

ARNOLD MCNAIR, THE LAW OF TREATIES 346 (1961).

For a recent example of federal liability for the actions of the individual states in the realm of international trade, see General Agreement on Tariffs and Trade: Panel Report—United States Measures Affecting Alcoholic and Malt Beverages, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 2-6 (1993).

208. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 321 cmt. b.

209. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 35 (4th ed. 1990).

210. As noted in *Marbury v. Madison*, one of the most significant functions of the judiciary is to "say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803).

211. The power of the judiciary to review and uphold international obligations was recognized during the ratification of the Constitution. As noted by one delegate, the judicial power over treaties "will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect. . ." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (Jonathan Elliot ed., 2d ed. 1987). Similarly, Alexander Hamilton noted in *The Federalist Papers* that "[t]he treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations." THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

affecting Ambassadors, other Public Ministers and Consuls;" and to "Controversies . . . between a State, or the Citizens thereof, and foreign States."[212] Article VI recognizes that treaties are "the supreme Law of the Land, and that "the Judges in every State shall be bound thereby. . . ."[213] Several statutory provisions further recognize the role of the judiciary in reviewing international agreements. For example, 28 U.S.C. Section 1331 provides that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[214] Similarly, 28 U.S.C. Section 1350 provides that "district courts shall have original jurisdiction of any civil action brought by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[215] The habeas corpus statutes, such as 28 U.S.C. Section 2254(a), provide that the federal courts "shall entertain an application for a writ of habeas corpus in [sic] behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."[216] It is not surprising, therefore, that the Supreme Court has noted that "[t]he construction of treaties is the peculiar province of the judiciary."[217]

While the federal courts have the authority to review U.S. treaty obligations, a more interesting question is whether a foreign government can seek redress for treaty violations in federal courts. It does not appear that federal courts have addressed this question. While foreign citizens and consular officials have sought to enforce treaty obligations in U.S. courts, it is somewhat unclear whether foreign governments have a comparable right of access.[218]

As a first step, courts have long recognized the right of access by foreign governments to U.S. courts.[219] In *Banco Nacional de Cuba v. Sabbatino*,[220] the Supreme Court examined whether an entity of the Cuban government could bring an action against a private party in U.S. courts. Writing for the Court, Justice Harlan

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212. U.S. CONST. art. III, § 2, cl. 1.
213. *Id.* art. VI, cl. 2.
214. 28 U.S.C. § 1331 (1994).
215. 28 U.S.C. § 1350 (1994). *See generally* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); Kenneth Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349 (1988).
216. 28 U.S.C. § 2254(a) (1994).
217. Jones v. Meehan, 175 U.S. 1, 32 (1899).
218 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 907(1).
219. According to the Restatement (Third), "foreign governments and officials are generally reluctant to resort to national courts of other states to vindicate rights under international law." *Id.* § 111, n.4.
220. 376 U.S. 398 (1964).

noted that, "[u]nder principles of comity governing this country's relations with other nations, sovereign states are allowed to sue in the courts of the United States."[221] Thus, the Supreme Court granted access to the Cuban government despite the fact that diplomatic relations had been severed, a commercial embargo existed between the two countries, and Cuban assets had been frozen in the United States. The Court noted that the right of access to U.S. courts applied regardless of reciprocity of treatment by Cuban courts. The Court held that "we are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States courts."[222]

The Court reached a similar conclusion in *Pfizer Inc. v. Gov't of India*, a case involving the right to sue in federal court under federal statutory provisions.[223] The Indian government, along with the governments of Iran and the Philippines, brought suit in federal court seeking treble damages against several pharmaceutical companies for alleged violations of U.S. antitrust laws. The pharmaceutical companies argued that foreign nations were not "persons" entitled to sue for treble damages under the Clayton Act.[224] The Court first noted that the term "person" as used in the Clayton Act was quite broad and, therefore, it did not exclude foreign governments from its ambit. The Court then stated that foreign governments are generally entitled to prosecute any civil claim in the courts of the United States on the same basis as a domestic corporation or an individual.[225] "To deny [a foreign sovereign] this privilege would manifest a want of comity and friendly feeling."[226] Thus, it held that

> a foreign nation otherwise entitled to sue in our courts is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff. Neither the fact that the respondents are foreign nor the fact that they are sovereign is reason to deny them the remedy of treble damages Congress afforded to 'any person' victimized by violations of the antitrust laws.[227]

The Court noted that this result was merely the specific application of a long-settled rule. Finally, the Court added that

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221. *Id.* at 408-09.
222. *Id.* at 410.
223. Pfizer Inc. v. Gov't of India, 434 U.S. 308, 309 (1978).
224. *Id.* at 311.
225. *Id.* at 318-19. *See also* Swiss Confederation v. United States, 70 F. Supp. 235, 236-37 (Ct. Cl. 1947); *Principality of Monaco*, 292 U.S. at 331; Russian Volunteer Fleet v. United States, 282 U.S. 481, 492 (1931); Colombia v. Cauca Co., 190 U.S. 524, 525 (1903).
226. *Pfizer Inc.*, 434 U.S. at 319 (quoting The Sapphire, 78 U.S. (11 Wallace) 164, 167 (1870)).
227. *Pfizer Inc.*, 434 U.S. at 320.

this result "does not require the Judiciary in any way to interfere in sensitive matters of foreign policy."[228]

Along with foreign governments, official representatives of foreign governments have been granted access to U.S. courts. For example, the courts have recognized the right of foreign consuls to challenge treaty violations in U.S. courts.[229] In *Wildenhus's Case*, the Supreme Court examined a claim brought by a Belgian consul pursuant to a treaty between the United States and Belgium.[230] The 1880 Convention between the United States and Belgium conferred authority upon Belgian consuls in the United States to maintain order upon Belgian crews and merchant vessels in U.S. ports. In this case, a Belgian national allegedly murdered a fellow crewman on board a Belgian steamship docked in Jersey City. He was subsequently arrested and charged with the murder by state officials. The Belgian consul argued that he had sole authority to examine the case under the 1880 Convention and, therefore, the State of New Jersey was without jurisdiction to prosecute the Belgian national. To pursue this claim, the Belgian consul filed a habeas corpus petition in federal court. The district court denied the petition. The Court indicated that the treaty governed the conduct of the United States and Belgium in this area: "If it gives the consul of Belgium exclusive jurisdiction over the offence which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of habeas corpus in any proper court of the United States."[231] After reviewing the scope of the treaty, however, the Court determined that it did not apply to the case.

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228. *Id.* at 319. The Court added that its holding did not qualify the established rule that the Executive Branch maintains the exclusive power to recognize foreign governments and, therefore, to determine which nations are entitled to access to U.S. courts. In addition, the Court cited a letter submitted by the Department of State to the Court of Appeals indicating that it did not anticipate any foreign policy problems arising if foreign governments were held to be persons within the meaning of the Clayton Act. *Id.* at 320.

229. *See, e.g.*, Santovincenzo v. Egan, 284 U.S. 30, 40-41 (1931) (consul general of Italy filing suit on behalf of Italy under 1878 Consular Convention); Kolovrat v. Oregon 366 U.S. 187, 194 (1961); Dallemagne v. Moisan, 197 U.S. 169, 177-78 (1905); Tucker v. Alexandroff, 183 U.S. 424, 429 (1902); *In re* Thomas Kaine, 55 U.S. (14 Howard) 103, 108 (1852); The Antelope, 23 U.S. (10 Wheat.) 66, 67 (1825); The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 284 (1822); The Arrogante Barcelones, 20 U.S. (7 Wheat.) 496, 496 (1822); Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6 (1794).

230. Wildenhus's Case, 120 U.S. 1, 17 (1886). The docket title of the case was: Charles Mali, Consul of His Majesty the King of the Belgians, and Joseph Wildenhus, Gionviennie Gobnbosich, and John J. Ostenmeyer v. The Keeper of the Common Jail of Hudson County, New Jersey.

231. *Id.* at 17.

On several occasions, state courts have recognized the right of foreign governments to litigate alleged violations of international law. In *Argentina v. New York*, the Republic of Argentina instituted an action against the city of New York seeking the return of property taxes collected on the property where the Argentine consulate was located.[232] Argentina argued that the property was exempt from such payments under customary international law. The New York court first recognized that the city was bound to comply with international law. After reviewing customary international law, the court concluded that consular property was immune from local property taxes.

In *Finland v. Pelham*, the Finnish government also challenged the imposition of municipal taxes on consular property, although this case involved a treaty obligation.[233] Specifically, the 1934 Treaty of Friendship, Commerce and Consular Rights between the United States and Finland provided that consular property was exempt from taxation of every kind.[234] The Finnish government argued that the treaty precluded the city of Pelham from taxing consular property.[235] Referring to the Supreme Court's warning in *Sabbatino* that rules of international law should not be left to divergent and parochial state interpretations, the New York court found that the treaty obligation took precedence over inconsistent municipal regulations.[236]

In addition to judicial recognition of this right, the past actions of the Executive Branch support the notion that foreign governments can litigate violations of international law in U.S. courts.[237] For example, the United States filed an amicus brief in support of Argentina's action in *Argentina v. City of New York*.[238] In its amicus brief, the United States acknowledged the importance of state compliance with international obligations. This principle compelled the United States to file the brief in support of Argentina.[239] In *Finland v. Pelham*, the United States intervened in the case to support the Finnish government.[240] United States government policy to intervene in such cases was

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232. Argentina v. New York, 25 N.Y.2d 252, 257 (N.Y. 1969).
233. Finland v. Pelham, 270 N.Y.S.2d 661, 661 (N.Y. App. Div. 1966).
234. Treaty of Friendship, Commerce, and Consular Rights, Feb. 13, 1934, U.S.-Fin., 49 Stat. 2659.
235. *Pelham*, 270 N.Y.S.2d at 663.
236. *Id.* at 664.
237. The Executive Branch has also used foreign courts to protect U.S. treaty rights abroad. *See* United States Gov't v. Bowe, 1990 App. Cas. 500 (Bahamas); United States v. Jennings, 1983 App. Cas. 624 (H. L. 1982).
238. Brief for the United States as Amicus Curiae, Argentina v. City of New York, 250 N.E.2d 698 (N.Y. 1969).
239. *Id.* at 1-2.
240. *Pelham*, 270 N.Y.S.2d at 663.

subsequently revised although it continued to recognize that foreign governments could litigate their cases in U.S. courts. In 1979, the Attorney General's office prepared a memorandum examining whether the United States should conduct litigation on behalf of the People's Republic of China in U.S. courts.[241] According to the memorandum, "the Executive Branch has strongly gone on record before the Congress and in communications to foreign states that it will no longer represent the interests of foreign states in domestic courts, but that it will expect foreign governments to protect their interests directly, through counsel of their choice."[242] The ability of foreign governments to protect their interests applied to both prosecuting and defending actions in U.S. courts.[243] As the recent amicus brief filed by the U.S. government in *Paraguay v. Allen* indicates, the U.S. government no longer believes that foreign governments may litigate treaty violations in federal court.

The preceding cases reveal that foreign governments clearly have a right of access to federal courts. Furthermore, these cases indicate that foreign governments can litigate alleged treaty violations in U.S. courts. Despite these findings, an important issue involves the question of standing—do foreign governments have standing to seek redress for treaty violations? To establish standing, a plaintiff must show that: (1) he has suffered an injury; (2) the defendant caused the injury; and (3) the injury is redressable by the court.[244] While an analysis of each of these requirements depends upon the particular facts of the case at hand, some general observations are possible. Courts have consistently found that treaties are contracts between governments.[245] They are "designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress."[246] As this contractual analogy suggests, the

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241. *See* Memorandum for the Attorney General, Jan. 18, 1979, *reprinted in* MARIAN LLOYD NASH, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 151 (1979).

242. *Id.* at 156.

243. *Id.*

244. Valley Forge Christian College v. Americans United For Separation of Church and State, 454 U.S. 464, 472 (1982). *See also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988).

245. *See* Tabion v. Mufti, 73 F.3d 535, 537 (4th Cir. 1996); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984); Charlton v. Kelly, 229 U.S. 447, 474 (1913); *Whitney*, 124 U.S. at 194; *The Head Money Cases*, 112 U.S. at 598 (supporting the proposition that treaties are contracts between nations).

246. United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988). For this reason, some federal courts have precluded individuals from asserting treaty violations if the relevant foreign government has not filed a protest alleging a treaty violation. *See* United States v. Noriega, 746 F. Supp. 1506, 1533 (S.D. Fla. 1990);

failure to comply with a treaty provision is considered a breach. In turn, a treaty breach is considered an injury, entitling the injured state to seek redress from the defaulting state.[247]

As to the redressability requirement, not all treaty violations are redressable in U.S. courts. As indicated, if a treaty provision is not self-executing (*i.e.*, it does not establish immediate rights and obligations) and no implementing legislation has been enacted by Congress, lawsuits seeking redress for treaty violations are unavailable in U.S. courts. On these occasions, courts can provide no redress and only nonjudicial remedies are available.[248] The Supreme Court reached this conclusion in *The Head Money Cases* where it held that:

> [a treaty] depends for the enforcement of its provisions on the interest and the 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.[249]

Similarly, in *Saipan v. United States Dep't of Interior*, Judge Trask noted in his concurring opinion that, "[u]nless a treaty is self-executing, in order to be cognizable before the courts it must be implemented by legislation. Otherwise it constitutes a compact between sovereign and independent nations dependent for its recognition and enforcement upon the honor and the continuing

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United States v. Hensel, 699 F.2d 18, 28 (1st Cir. 1983) *cert. denied*, 461 U.S. 958 (1983); Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990); United States v. Williams, 617 F.2d 1063, 1090 (5th Cir. 1980); United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir. 1975). *But cf.* Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (apparently Japan filed no protest). The Supreme Court's ruling in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), suggests that such a requirement is unnecessary. *Id.* at 667. There, the Court examined the Court of Appeals' assertion that there must be a formal protest from the offended government after a kidnapping in order for an individual defendant to assert a right under an extradition treaty. The Court found this assertion problematic. "The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation." *Id.* *See* Charles D. Siegal, *Individual Rights Under Self-Executing Extradition Treaties—Dr. Alvarez-Machain's Case*, 13 LOY. L.A. INT'L & COMP. L.J. 765, 798 (1991).

247. *See* Geoffrey R. Watson, *The Death of Treaty*, 55 OHIO ST. L.J. 781, 795 (1994). This analysis does not suggest, however, that individuals have no rights under treaties. Courts are increasingly recognizing the rights and obligations of non-state actors under international law. *See* Kadic v. Karadžić, 70 F.3d 232, 239-42 (2d Cir. 1995); *Filartiga*, 630 F.2d at 884.

248. *See* Canadian Transport Co. v. United States, 663 F.2d 1081, 1092 (D.C. Cir. 1980); Holmes v. Laird, 459 F.2d 1211, 1215, 1222-23 (D.C. Cir. 1972); Z. & F. Assets Realization Corp. v. Hull, 114 F.2d 464, 468-69 (D.C. Cir. 1940); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

249. *The Head Money Cases*, 112 U.S. at 598.

self-interest of the parties to it."[250] In contrast, courts are clearly empowered to adjudicate claims regarding self-executing treaties.[251] Indeed, "[i]n the domestic realm courts are not only equipped to enforce self-executing treaties affecting individual rights, but by virtue of the Supremacy Clause are required to do so."[252]

Alternatively, if Congress enacts legislation that is inconsistent with U.S. treaty obligations, actions seeking redress for violations of these treaty obligations are also unavailable in U.S. courts. This conclusion follows naturally from the doctrine of *lex posterior derogat priori.* Thus, in *Whitney,* the Court stated:

> If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance.[253]

It is important to distinguish these standing issues from the political question doctrine.[254] The political question doctrine was developed by the courts to recognize that the principle of separation of powers precludes judicial review of certain issues. In *Baker v. Carr,* Justice Brennan set forth the criteria for determining whether a particular issue involves a political question:[255]

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of

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250. *Saipan,* 502 F.2d at 101 (Trask, J., concurring).

251. *See The Head Money Cases,* 112 U.S. at 598-599 (explaining that a court may rely on a treaty as it would a statute for a rule of decision); *see also Whitney,* 124 U.S. at 194 (comparing the effect of a treaty to an act passed by Congress).

252. *Laird,* 459 F.2d at 1222.

253. *Whitney,* 124 U.S. at 194.

254. For commentary on the political question doctrine, see generally Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine,* 83 AM. J. INT'L L. 814 (1989); Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define . . . Offenses Against the Law of Nations,"* 21 VAND. J. TRANSNAT'L L. 865 (1988); Jonathan I. Charney, *Judicial Deference in Foreign Relations,* 83 AM. J. INT'L L. 805 (1989); Louis Henkin, *Is There a "Political Question" Doctrine?,* 85 YALE L.J. 597 (1976).

255. Baker v. Carr, 369 U.S. 186, 217 (1962). *See also* United States v. Munoz-Flores, 495 U.S. 385, 389-90 (1990).

> embarrassment from multifarious pronouncements by various departments on one question.[256]

With respect to foreign affairs, Justice Brennan recognized that such matters often involve issues that defy judicial application. He cautioned, however, that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[257]

Issues that have been deemed political questions include the status of military hostilities and the recognition of foreign governments.[258] In recent years, however, courts have been increasingly reluctant to dismiss cases solely on the basis of the political question doctrine.[259] By definition, treaties involve some element of foreign affairs, and yet courts routinely engage in treaty interpretation. For example, in *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, the Supreme Court examined whether a case involving the International Convention for the Regulation of Whaling and a subsequent executive agreement between the United States and Japan was nonjusticiable under the political question doctrine.[260] Writing for the majority, Justice White dismissed the contention that such matters are beyond the purview of the judiciary. With respect to treaty interpretation, Justice White stated, "the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts."[261]

It is essential, therefore, to distinguish between cases involving political questions, such as recognition of foreign governments, which the judiciary cannot address, and cases involving legal questions, such as treaty interpretation, which the judiciary is empowered to review. Heeding the words of Justice Brennan, courts have come to recognize that not every case

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256. *Baker*, 369 U.S. at 217. In *Goldwater v. Carter*, 444 U.S. 996 (1979), Justice Powell identified three principal questions underlying the doctrine: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" *Id.* at 998 (Powell, J., concurring).

257. *Baker*, 369 U.S. at 211.

258. *See* Crockett v. Reagan, 558 F. Supp. 893, 898 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983); Mitchell v. Laird, 488 F.2d 611, 614-16 (D.C. Cir. 1973); Atlee v. Laird, 347 F. Supp. 689, 705 (E.D. Pa. 1972), *aff'd sub nom.*, Atlee v. Richardson, 411 U.S. 911 (1973); United States v. Sisson, 294 F. Supp. 511, 515 (D. Mass. 1968).

259. *See Kadic*, 70 F.3d at 249-50; Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49-50 (2d Cir. 1991); Dellums v. Bush, 752 F. Supp. 1141, 1145-46 (D.D.C. 1990).

260. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986).

261. *Id.* at 230.

touching upon foreign relations is nonjusticiable. Moreover, simple assertions by the Executive Branch that certain issues are political questions and, therefore, beyond the scope of judicial review, are not viewed as dispositive by the courts.[262]

In sum, while foreign governments may seek redress for treaty violations in U.S. courts, the viability and success of these actions depend upon the status of the treaty provision in the United States.[263]

C. *What Remedies are Available for Treaty Violations in U.S. Courts?*

As discussed, courts in the United States have the authority to review U.S. treaty obligations. They are also empowered to develop appropriate remedies in the event of a violation. Indeed, the federal courts maintain inherent equitable powers that are available for the proper exercise of their jurisdiction.[264] For this reason, the Restatement (Third) indicates that "[c]ourts in the United States are bound to give effect to international law and to international agreements of the United States."[265]

In responding to a treaty violation, courts should provide a remedy that avoids or cures the violation by the United States.[266] For example, several cases have held that a treaty violation divests a court of jurisdiction over a criminal defendant when the defendant is captured in violation of a treaty. These cases recognize that a treaty violation may act to deprive courts of their jurisdiction over property and individuals that would otherwise be subject to that jurisdiction.[267]

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262. *See Dellums*, 752 F. Supp. at 1145.

263. Secretary of State Webster noted in correspondence to a Spanish minister that "[w]ith us a treaty is part of the supreme law of the land; as such, it influences and controls the decisions of all tribunals; and many instances might be quoted of decisions made in the Supreme Court of the United States, arising under their several treaties with Spain herself, as well as under treaties between the United States and other nations." 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 237 (1906).

264. *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 386-89 (1970); Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). This includes the power to enjoin the enforcement of a state court judgment rendered in violation of federal law. *See* French v. Hay, 89 U.S. (22 Wall.) 250, 252-53 (1874).

265. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(3).

266. *See* Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1161 (1992).

267. *See* United States v. Postal, 589 F.2d 862, 875 (5th Cir. 1979), *cert. denied*, 444 U.S. 832 (1979); Ford v. United States, 273 U.S. 593, 605-06 (1927); United States v. Schouweiler, 19 F.2d 387, 388 (S.D. Cal. 1927); United States v. Ferris, 19 F.2d 925, 926 (N.D. Cal. 1927) (explaining that a treaty which limits a party's jurisdiction will restrict a court's ability to enforce the treaty).

Similarly, a state court indicated that:

In *United States v. Rauscher*, the defendant was extradited from England to the United States for murder pursuant to the Ashburton Treaty of 1842, which governed extradition between the two countries.[268] The defendant was subsequently charged with a different crime before the Circuit Court for the Southern District of New York. Rauscher challenged his federal prosecution, arguing that the doctrine of specialty was a necessary and implied term of the treaty.[269] The doctrine of specialty provides that a person who has been extradited may not be tried for an offense other than the one for which he was extradited.[270] The Supreme Court examined the history and terms of the treaty, the practice of nations, case law from the states, and the writings of commentators and concluded that the doctrine of specialty was an implied term of the treaty.[271] Thus, the Court held that "[a] person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition. . . ."[272] The Court suggested that for the United States to act otherwise, in contravention of the treaty, would be in bad faith: "No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them."[273] Thus, the Court held that the Circuit Court lacked jurisdiction over the defendant.

> [w]hen it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."

Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702-03 (1878).

268. United States v. Rauscher, 119 U.S. 407 (1886).

269. *Id.*

270. *See generally* Kenneth E. Levitt, *International Extradition, the Principle of Specialty, and Effective Treaty Enforcement*, 76 MINN. L. REV. 1017 (1992); John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441 (1988); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (2d ed. 1987); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 311-60 (1974).

271. "That right . . . is that he shall be tried only for the offence with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition." *Rauscher*, 119 U.S. at 424.

272. *Id.* at 430.

273. *Id.* at 422.

In *Cook v. United* States, a British vessel was boarded by U.S. Coast Guard officers approximately twelve miles off the coast of Massachusetts.[274] After determining that the vessel contained contraband, the officers seized the vessel and delivered it to U.S. customs officials. The U.S. government then initiated libel proceedings in federal court against the vessel and its cargo. Cook, as master of the vessel, challenged the proceedings, arguing that the United States had no authority to seize the vessel since it was beyond the distance recognized by a treaty between the United States and Great Britain.[275] The treaty authorized American officials to board British ships to determine whether they were importing alcoholic beverages into the United States. It provided, however, that the boarding rights could not be exercised at a greater distance from the coast than the British ship could travel in one hour. The Supreme Court determined that the seizure was not authorized by the treaty:

> The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority. . . . To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.[276]

Thus, the Court held that U.S. courts lacked jurisdiction over the vessel.[277]

Treaty violations can also provide a defense against state court proceedings. In *Asakura v. City of Seattle*, a Japanese national operating a pawnshop in the city of Seattle was prosecuted for violating a city ordinance which prohibited foreign nationals from conducting such business.[278] Asakura brought an action against the city, its comptroller, and its chief of police to restrain them from enforcing the ordinance against him. He argued that the ordinance violated a treaty signed between the United States and Japan which provided that the citizens or subjects of each country had the right to carry on trade in the other country on the same terms as the citizens of the host country. The Superior Court of King County ruled in favor of Asakura. On appeal, however, the Washington Supreme Court held the ordinance to be valid and reversed the lower court

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274. Cook v. United States, 288 U.S. 102, 107 (1933). *See also* Felice Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT'L L. 265 (1952).

275. *Cook*, 288 U.S. at 108.

276. *Id.* at 121-22.

277. *Id.* at 122.

278. Asakura v. City of Seattle, 265 U.S. 332 (1924).

decree. The case was then appealed to the U.S. Supreme Court. After reviewing the treaty, the Court reaffirmed that treaty obligations take precedence over inconsistent state and local laws:

> The rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and the laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.[279]

Because the Seattle ordinance was inconsistent with the treaty obligation, the Court upheld Asakura's claim.

These cases are significant for two reasons. First, they recognize the ability of federal courts to review treaty compliance. In both *Rauscher* and *Cook*, the Court examined federal compliance with treaty obligations. In *Asakura*, the Court examined state compliance with treaty obligations. In each of these cases, the Court did not hesitate to examine the treaties and review compliance under these agreements. Second, these cases also recognize the ability of federal courts to craft remedies for treaty violations. The Court determined in both *Rauscher* and *Cook* that a treaty violation divested the federal courts of jurisdiction over the defendants.[280] In *Asakura*, the Court also found that a treaty violation could provide a defense in state court proceedings.[281] In short, these cases reveal that U.S. courts are empowered to review treaty obligations and provide remedies for any violations.

International law also recognizes that a breach of an international agreement creates an obligation to remedy the violation.[282] According to the Restatement (Third), "[u]nder

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279. *Id.* at 341.

280. Indeed, the Court's language in *Rauscher* is particularly striking in this regard. The Court recognized that the federal judiciary has the power to remedy treaty violations, thereby alleviating the potential difficulties that would arise if the Executive Branch were required to intervene in such matters before state courts, "a tension which has more than once become very delicate and troublesome." *Rauscher*, 119 U.S. at 430.

> The principle we have here laid down removes this difficulty, for under the doctrine that the treaty is the supreme law of the land, and is to be observed by all the courts, state and national, "anything in the laws of the states to the contrary notwithstanding," if the state court should fail to give due effect to the rights of the party under the treaty, a remedy is found in the judicial branch of the Federal government, which has been fully recognized.

Id. at 430-31.

281. *Asakura*, 265 U.S. at 341.

282. *See* 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 14, at 528-39; Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 184 (April 11).

international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury."[283] In short, "the principle is clear: out of an international wrong arises a right for the wronged state to request from the wrong-doing state the performance of such acts as are necessary for reparation of the wrong done. What kind of acts these are depends upon the merits of the case."[284]

As a first step, a country must cease its violation of international law.[285] For example, in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, the ICJ held that Iran must immediately take all steps to redress the situation.[286] This included the immediate release of all U.S. nationals and the return of U.S. property.

Once a violation has been terminated, the wronged state is entitled to seek reparations. The primary purpose of reparations is to reestablish the situation that would have existed if the wrongful act or omission had not taken place. This principle was set forth by the Permanent Court of International Justice in the seminal *Chorzow Factory* case:

> The essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[287]

Similarly, the commentary to Restatement (Third) Section 901 provides that, "[o]rdinarily, emphasis is on forms of redress that will undo the effect of the violation, such as restoration of the status quo ante, restitution, or specific performance of an undertaking."[288]

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283. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 901.

284. 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 14, at 528-29.

285. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 901, n.2.

286. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. R. 3, at 44-45 (May 24).

287. Chorzow Factory Case (F.R.G. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).

288. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 901 cmt. d. The Restatement (Third) adds: "The obligation of a state to terminate a violation of international law may include discontinuance, revocation, or cancellation of the act (whether legislative, administrative, or judicial) that caused the violation." *Id.* cmt. c. Similarly, Brownlie notes that "[t]o achieve the object of reparation

For several years, the International Law Commission has been developing a set of Draft Articles on State Responsibility which address the issue of state liability for violations of international obligations.[289] Part I of the Draft Articles concerns the origins of international responsibility.[290] It defines an internationally wrongful act as state conduct, fairly attributable to the state, which constitutes a breach of an international obligation.[291] The conduct of any government organ, whether executive, legislative, or judicial, shall be considered an act of the state under international law.[292] In addition, the conduct of a territorial governmental entity within a state is also considered an act of the state under international law.[293]

Part II of the Draft Articles concerns the content, forms, and degrees of international responsibility.[294] Article 6 of Part II provides that a state whose conduct constitutes an internationally wrongful act having a continuing character is under an obligation to cease such conduct.[295] For example, the release of an individual who has been wrongfully detained or imprisoned constitutes the cessation of an internationally wrongful act.[296]

The issue of reparations is addressed in Article 6 *bis*:

> 1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the

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tribunals may give 'legal restitution', in the form of a declaration that an offending treaty, or act of the executive, legislature, or judicature, is invalid." BROWNLIE, *supra* note 209, at 462.

289. *See* Sompong Sucharitkul, *State Responsibility and International Liability Under International Law*, 18 LOY. L.A. INT'L & COMP. L.J. 821, 822-28 (1996); Robert Rosenstock, *The Forty-Eighth Session of the International Law Commission*, 91 AM. J. INT'L L. 365, 370 (1997); Robert Rosenstock, *The Forty-Seventh Session of the International Law Commission*, 90 AM. J. INT'L L. 106 (1996); THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY: PART I, arts. 1-35 (Shabtai Rosenne ed., 1991).

290. *Report of the International Law Commission on the Work of Its Twenty-Fifth Session*, U.N. Doc. A/9010/Rev.1 (1973), *reprinted in* [1973] 2 Y.B. INT'L L. COMM'N 161, 165.

291. *Id.* at 179.

292. *Id.* at 191, 193.

293. *Report of the International Law Commission on the Work of Its Twenty-Sixth Session*, U.N. Doc. A/9610/Rev.1 (1974), *reprinted in* [1974] 2 Y.B. INT'L L. COMM'N, pt. 1, at 277.

294. The International Law Commission formally adopted the articles on cessation, reparation, restitution in kind, compensation, satisfaction and assurances, and guarantees of nonrepetition in 1993. Robert Rosenstock, *The Forty-Fifth Session of the International Law Commission*, 88 AM. J. INT'L L. 134, 135 (1994).

295. *Report of the International Law Commission on the Work of Its Forty-Fifth Session*, U.N. Doc A/48/10, *reprinted in* [1993] 2 Y.B. INT'L L. COMM'N, pt. 2, at 54.

296. "The fact that detained entities are human beings, injured by their unlawful treatment in their physical and psychic integrity, in their personal liberty and dignity (in addition to their mere economic, productive activity) makes their release morally and legally more evidently an urgent question of cessation of the violation." *Id.* at 56.

> form of restitution in kind, compensation, satisfaction and assurances and guarantees on non-repetition, as provided in articles 7, 8, 10 and 10 *bis*, either singly or in combination.
> 2. In the determination of reparation, account shall be taken of the negligence or the willful act or omission of:
> (a) the injured State; or
> (b) a national of that State on whose behalf the claim is brought which contributed to the damage.
> 3. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.[297]

Thus, the Draft Articles recognize four forms of reparation: restitution in kind, compensation, satisfaction, and assurances and guarantees of nonrepetition.[298] Restitution in kind is addressed in Article 7:

> The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation that existed before the wrongful act was committed, provided and to the extent that restitution in kind:
> (a) is not materially impossible;
> (b) would not involve a breach of an obligation arising from a peremptory norm of general international law;
> (c) would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or
> (d) would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.[299]

Article 8 addresses compensation:

> 1. The injured State is entitled to claim from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.
> 2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.[300]

In addition to restitution and compensation, reparation can include satisfaction as well as assurances and guarantees of non-repetition.[301] Satisfaction is appropriate for non-material damages or injury. It can include a formal apology, the punishment of the individuals responsible for the violation, and the taking of steps to prevent a recurrence of the violation.[302]

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297. *Id.*
298. *Id.*
299. *Id.* at 61-62.
300. *Id.* at 67.
301. Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 285, 287 (1978).
302. *See* BROWNLIE, *supra* note 209, at 458.

Article 10 of the Draft Articles addresses the issue of satisfaction as follows:

> 1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.
> 2. Satisfaction may take the form of one or more of the following:
> (a) an apology;
> (b) nominal damages;
> (c) in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;
> (d) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private individuals, disciplinary action against, or punishment of, those responsible.
> 3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.[303]

Finally, Article 10 *bis* addresses assurances and guarantees of nonrepetition: "The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act."[304]

While U.S. courts are not required to apply these Draft Articles, they may look to them for guidance in developing remedies for treaty violations.

VII. RECOMMENDATIONS

There are several reasons for ensuring that the United States complies with the obligations set forth in the Vienna Convention as well as those set forth in other consular agreements. Reciprocity plays an important role in international relations.[305] As the Supreme Court noted in *Hilton v. Guyot*, ". . . international law is founded upon mutuality and reciprocity."[306] In order to ensure proper treatment of U.S. nationals abroad, the United States must make comparable efforts at home. Otherwise, foreign governments will have little incentive to comply with these obligations.[307] Indeed, the Executive Branch has long noted the

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303. *Report of the International Law Commission, supra* note 295, at 54.
304. *Id.*
305. *See generally* Robert Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1 (Winter 1986) (arguing that institutional innovations in international trade reflect ways to capture the benefits of reciprocity).
306. 159 U.S. 113, 228 (1894).
307. On several occasions, the United States has referred to the reciprocity principle when other governments have failed to provide consular access to U.S. consular officials.

reciprocal nature of the Vienna Convention.[308] More broadly, failure to adhere to these obligations may lead to violations of other diplomatic and consular obligations, such as diplomatic immunity. Effective diplomatic and consular relations are imperative for stable relations between nations. Political and economic relations cannot fully develop without effective diplomatic and consular relations. Accordingly, proper compliance with the Vienna Convention as well as with other consular and diplomatic agreements is essential as a practical matter. Finally, it is axiomatic that the United States must comply with its treaty obligations. Quite simply, the United States signed and duly ratified the Vienna Convention. If the United States seeks to affirm the rule of law in both word and deed, it must comply with and fully implement its international obligations.

In order to improve U.S. compliance with its obligations under the Vienna Convention and other consular agreements, this Article sets forth the following recommendations.

First, the federal government should take steps to ensure that all federal, state, and local agencies comply with the provisions on consular access as set forth in the Vienna Convention and other consular agreements.

Greater efforts must be made to ensure that federal agencies are aware of these obligations and that they adhere to them. For example, the State Department should increase its monitoring of federal agencies to ensure compliance. It should send annual notices to federal agencies describing their obligations under the Vienna Convention. Furthermore, it should establish regular training programs for federal agencies to ensure that law enforcement officials are familiar with the right of consular access. Finally, federal agencies should be required to submit an annual report to the State Department describing their efforts to comply with these obligations.

With respect to state and local law enforcement agencies, the State Department currently sends a "periodic" notice regarding consular obligations to the governor and attorney general of each of the fifty states and to the mayors of cities with populations exceeding 100,000 people.[309] These notices should be sent annually rather than periodically.[310] The State Department

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308. S. EXEC. REP. No. 91-9, 91st Cong., 1st Sess. at 8 (1969).

309. The last such notice was issued by the State Department in 1993. *See* Daniel Sneider, *U.S. Death Penalty Stirs International Legal Controversy*, CHRISTIAN SCI. MONITOR, May 22, 1997, at 1.

310. The State Department recently announced that it had substantially revised its notice to law enforcement agencies. The new Consular Notification and Access Booklet now contains extensive instructions and guidance relating to the arrest and detention of foreign nationals. *See* U.S. Dep't of State,

should also establish regular training programs for state and local law enforcement agencies to ensure that law enforcement officials are familiar with consular notification.[311]

If these efforts fail, Congress should enact legislation that requires state and local law enforcement agencies to comply with the obligations set forth in the Vienna Convention.[312] While codification is not necessary to implement these obligations in the United States, it may be the most effective way of ensuring that all agencies are fully informed of such obligations and that they comply with them.

Second, the federal government should cooperate with foreign governments to establish procedures that improve compliance with the Vienna Convention and other consular agreements.[313] For example, the United States and foreign governments can develop procedures to facilitate communication between consular officials and law enforcement officials. Special liaison officers can be established whose primary responsibility is to communicate with consular officials. Procedures can be established for communication in particularly serious cases such as capital cases. Through regular contact with consular officials, these liaison officers can promote a constructive dialogue and reduce the likelihood of disputes.

Instructions for Federal, State and Other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them (1998).

311. Recently, the State Department began holding briefings with state and local law enforcement agencies concerning consular access. The State Department is also significantly revising its notice to law enforcement agencies regarding consular access. *See* Sam Howe Verhovek, *U.S. Renews Campaign to Safeguard Rights of Foreign Citizens*, N.Y. TIMES, Nov. 30, 1997, at A27.

312. Such legislation would appear to be constitutional under the Supreme Court's analysis in Missouri v. Holland, 252 U.S. 416 (1920). *But see* Printz v. United States, 117 S.Ct. 2365 (1997) (holding that the federal government may not order state or local officials to carry out federal regulatory schemes).

313. For example, the INS now requires consular notification when detained Mexican nationals seek interior repatriation. In September 1995, the United States and Mexico, through the Binational Commission Subgroup on Migration and Consular Affairs agreed to establish the voluntary interior repatriation program for Mexican nationals. *Fact Sheet: Cooperation With Mexico—in the National Interest*, U.S. DEP'T OF STATE DISPATCH, 257, Vol. 7 No. 21 ISSN: 1051-9693, May 20, 1996. Under the interior repatriation program, Mexican nationals caught multiple times trying to enter the United States illegally are offered the opportunity to be returned to the interior of Mexico, closer to their homes (and away from the border). To qualify for this program, detained nationals must be interviewed by Mexican consular officials prior to repatriation. Consular notification is also required when minor children are detained by INS officials. These INS programs, however, only apply to a small percentage of detained Mexican nationals. Telephone Interview with Mexican Consulate, San Diego, California (Apr. 15, 1997).

Third, law enforcement agencies can take several steps to facilitate compliance with consular notification obligations. One of the most significant impediments to proper compliance is the inability of state and local law enforcement agencies to identify foreign nationals in a timely fashion. This is not surprising given the large number of detainees currently being processed in the criminal justice system. One option is to require all detainees to identify their citizenship at the initial booking stage.[314] Once this information is acquired, it can then be distributed on a regular basis to special liaison officers responsible for communicating with consular officials.[315]

Procedures can be established to facilitate communication between consular officials and detained nationals. Consular information can be posted in detention facilities, listing the names, addresses, and telephone numbers of foreign consulates. Posted notices can also describe the provisions on consular access. When consular officials communicate with detained nationals, they should be provided access at detention facilities that is comparable to the access provided to attorneys.

Fourth, Congress should enact legislation that explicitly recognizes the right of foreign governments to seek redress for treaty violations in federal courts. At present, the Eleventh Amendment raises a potential obstacle to such actions filed in federal court against state governments and officials. The Supreme Court, however, has recognized the ability of Congress to abrogate state immunity from suit. To succeed, legislation must evince an unmistakably clear statement of congressional intent to abrogate state immunity under the Eleventh Amendment.[316]

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314. This system has been used in San Diego County, California for several years. Following the booking stage, two lists are distributed on a weekly basis. One list identifies all foreign nationals in custody. The other list identifies foreign nationals who reside in countries which require mandatory notification of detention. Telephone Interview with Sheriff's Department, County of San Diego (Apr. 28, 1997).

315. With respect to detained Mexican nationals, it appears that compliance with the consular notification procedures is higher in cities near the Mexican border and in cities where a Mexican consulate is located. *Id.*

316. Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1132-33 (1996). *See also* Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996).

Alternatively, Congress has the authority to provide for private suits against states. Such actions would be similar to *qui tam* actions. A *qui tam* action is a civil action brought by an individual on behalf of the individual and the government. Any potential recovery would be divided between the individual and the government. *See* Jonathan Siegel, *The Hidden Source of Congress' Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539, 551 (1995); Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 350-54 (1995); Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341,

Fifth, if necessary, the federal government should sue on behalf of foreign governments to challenge treaty violations committed by state or local governments.[317] The federal government has already done so on several occasions. In *United States v. City of Glen Cove*, the United States sought to enjoin Glen Cove from assessing property taxes on property owned by the Soviet Union.[318] The United States argued that the Soviet property was exempt from municipal taxes pursuant to the 1968 Consular Convention between the United States and the Soviet Union.[319] The district court acknowledged that the United States may sue to prevent state action that violates treaty obligations.[320] Such action was held to be consistent with the constitutional responsibility of the federal government in the realm of foreign affairs. "The conduct of foreign relations would be hampered and embarrassed if the United States Government were powerless to require units of local government to comply with treaty obligations, and if a treaty could be enforced only by the foreign government making itself a party to litigation before state or federal courts."[321] Thus, the district court granted an injunction against Glen Cove, enjoining it from assessing municipal taxes against the Soviet property. The Supreme Court has likewise recognized the right of the federal government to bring lawsuits that enjoin state violations of federal law, including treaty obligations.[322] Indeed, State Department officials have already suggested that such action may be warranted in some cases involving the Vienna Convention.[323]

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343 (1989). Here, Congress would need to adopt legislation authorizing actions in the name of the United States to enforce treaty obligations.

317. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 415 (1972); WILLIAM HOWARD TAFT, THE UNITED STATES AND PEACE 74 (1914). For an analysis of the ability of the United States to file an action in order to vindicate a foreign relations interest, see Memorandum for the Attorney General, Jan. 18, 1979, *supra* note 241.

318. 322 F. Supp. 149, 150 (E.D.N.Y.), *aff'd*, 450 F.2d 884 (2d Cir. 1971). *See also* United States v. County of Arlington, 669 F.2d 925 (4th Cir. 1982) (acknowledging the right of the United States to sue to enforce its policies and laws even when it has no pecuniary interest in the outcome).

319. *See Glen Cove*, 322 F. Supp. at 150.

320. *Id.* at 152.

321. *Id.*

322. *See* Sanitary Dist. v. United States, 266 U.S. 405, 425-26 (1925) ("The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction. It has standing in this suit not only to remove obstruction to interstate and foreign commerce, the main ground, which we will deal with last, but also to carry out treaty obligations to a foreign power . . . . The Attorney General by virtue of his office may bring this proceeding and no statute is necessary to authorize the suit."). *See also* United States v. Minnesota, 270 U.S. 181, 195-96 (1926); Baldwin v. Franks, 120 U.S. 678, 683 (1886).

323. Frank Green, *Treaty Enforcement Urged: Aliens Allege Right to Contact Consul Ignored*, RICHMOND TIMES, May 27, 1997, at B1.

VIII. CONCLUSION

In many respects, *Paraguay v. Allen* and *United Mexican States v. Woods* signal a unique moment in American jurisprudence. As indicated, these cases may be the first in which foreign governments have sought to enforce treaty obligations in federal courts.

More significantly, these cases may represent the face of future litigation in U.S. courts. Since 1945, the number of bilateral and multilateral treaties has increased significantly.[324] These agreements regulate a variety of subject matter, ranging from environmental obligations to human rights. By their nature, many of these agreements address issues that have traditionally fallen under the exclusive jurisdiction of national governments. If the U.S. government fails to ensure both federal and state compliance with international obligations, foreign governments may become increasingly frustrated at the limited application of these obligations in the United States. These lawsuits are but one manifestation of this frustration.[325]

Given the limitations of international tribunals, it is not surprising that foreign governments should seek to affirm treaty obligations in domestic courts. While some international tribunals are quite effective, the majority have limited powers and lack enforcement mechanisms.[326] In contrast, domestic courts

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324. Between 1946 and 1950, 5598 treaties entered into force. In contrast, 15,574 treaties entered into force between 1971 and 1975. WORLD TREATY INDEX, Ref. Vol., 124 (Peter Rohn ed. 1984).

325. Responses to U.S. noncompliance with the Vienna Convention can be found at both the domestic and international levels.

In May 1997, a group of American attorneys, representing foreign nationals who have been convicted or sentenced to death, submitted a joint letter to Secretary of State Madeleine Albright, urging the State Department to comply with the Vienna Convention. Letter to the Honorable Madeleine K. Albright, Secretary of State, Dep't of State (May 14, 1997).

At the international level, two complaints have been filed against the United States with the Inter-American Commission on Human Rights for violations of the Vienna Convention. *See* Individual Complaint to the Inter-American Commission on Human Rights Against the United States of America on Behalf of Carlos Santana, Case No. 11.130, Inter-Am. C.H.R. (Mar. 11, 1993). Individual Complaint to the Inter-American Commission on Human Rights Against the United States of America on Behalf of Cesar Fierro, Case No. 11.331, Inter-Am. C.H.R. (July 21, 1994). The complaints charge that the United States failed to provide these foreign nationals consular access pursuant to the Vienna Convention. *See, e.g.*, Santana v. State, 714 S.W.2d 1 (Tex. Crim. App. 1986); Fierro v. State, 706 S.W.2d 310 (Tex. Crim. App. 1986). Both complaints are currently pending before the Commission. For discussion of these cases, see Shank & Quigley, *supra* note 11, at 721-26.

326. The most notable exceptions are the European Court of Justice and the European Court of Human Rights. *See generally* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991) (outlining the role of the European Courts in

often provide a more effective claims process. This may explain the profound increase in the amount of international litigation that is currently taking place in U.S. courts.

In recent years, the United States has become a leader in affirming the law of nations in its courts. As a result, countries look to the United States for guidance in the development of their own legal systems.[327] For these reasons, the lessons of *Paraguay v. Allen* and *United Mexican States v. Woods* are twofold. They demonstrate the need to ensure that treaty obligations are strictly applied throughout our federal system, and that federal courts remain available to enforce these obligations.

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the transformation of Europe); Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981) (examining the role of the European Court of Justice in the development of the European legal system).

327. *See* Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?*, 88 AM. J. INT'L L. 427 (1996).

POSTSCRIPT

On the evening of April 14, 1998, the U.S. Supreme Court denied appeals filed in both the *Paraguay* and *Breard* cases.[1] Within a few hours of the Court's ruling, Angel Breard was executed by lethal injection. His execution culminated one of the most intriguing and yet troubling legal journeys in recent memory.

Prior to Breard's execution, Paraguay instituted proceedings against the United States before the International Court of Justice (ICJ) on April 3, 1998.[2] In its Application, Paraguay argued that the arrest and detention of Breard violated and continued to violate Paraguay's rights under the Vienna Convention. Because of Breard's pending execution, Paraguay requested the ICJ to issue provisional measures that would preserve the status quo pending a final ruling by the Court. Oral arguments were held before the ICJ on April 7.

On April 9, 1998, the ICJ issued an order on Paraguay's request for provisional measures. In a unanimous ruling, the ICJ determined that Breard's execution would cause irreparable harm to Paraguay's case and preclude any meaningful outcome from the Court's ruling on the merits. Accordingly, the ICJ held that "[t]he United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all measures which it has taken in implementation of this Order."[3] The ICJ also set an expedited briefing schedule for the parties.

Following the ICJ's ruling, the United States government pursued two quite inconsistent paths. In a brief filed with the Supreme Court, the United States urged the Court to deny the

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1. In addition to the pending certiorari petitions filed by Paraguay and Breard, the Supreme Court also dismissed two additional applications, a petition for an original writ of habeas corpus filed by Breard and a motion for leave to file a bill of complaint filed by Paraguay.

2. Case Concerning the Application of the Vienna Convention on Consular Relations (Paraguay v. United States of America) (Application Instituting Proceedings Submitted by the Government of the Republic of Paraguay) (Apr. 3, 1998). Paraguay instituted the proceedings pursuant to the Optional Protocol Concerning the Compulsory Settlement of Disputes which accompanies the Vienna Convention. 21 U.S.T. 325, T.I.A.S. No. 6820, 596 U.N.T.S. 487.

3. Case Concerning the Application of the Vienna Convention on Consular Relations (Paraguay v. United States of America) (Request for the Indication of Provisional Measures) (Order) (Apr. 9, 1998).

claims of both Paraguay and Breard.[4] Writing on behalf of the U.S. government, the Solicitor General argued that neither the Vienna Convention nor the Treaty of Friendship between the United States and Paraguay provided a cause of action for Paraguay or its official representatives to pursue a judicial remedy that would vacate a state criminal conviction. "It is most implausible that the contracting parties to the Convention intended such a remedy, and it is therefore not surprising that the decision below is not contrary to any decision of this Court, any federal court of appeals, any state supreme court, or (as far as we are aware) the court of any foreign nation."[5] Furthermore, the Solicitor General indicated that rules of procedural default barred Breard's claims under the Vienna Convention. Finally, the Solicitor General argued that the ICJ's order should not be considered binding by the Supreme Court.

At the same time, however, the State Department urged the Governor of Virginia to stay the execution pending final resolution of the case by the ICJ. In a letter to Governor James Gilmore of Virginia, Secretary of State Madeleine Albright indicated that in light of the ICJ's ruling and the unique and difficult issues raised by the case, the Governor should stay Breard's execution.[6] According to the Secretary of State, "[t]he execution of Mr. Breard in the present circumstances could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention."[7] Because of the reciprocal nature of the Vienna Convention, Secretary Albright expressed concern for "our ability to ensure that Americans are protected when living or traveling abroad."[8]

On April 14, 1998, the Supreme Court denied the petitions for certiorari and the accompanying applications for stays of execution filed in both the *Paraguay* and *Breard* cases.[9] In a per curiam ruling, the Court indicated that Breard's claim under the Vienna Convention was procedurally defaulted. The Court found that the treaty did not explicitly prohibit the use of such procedural rules. "[A]bsent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."[10] The Court also

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4. Brief for the United States as Amicus Curiae, Paraguay v. Gilmore, (No. 97-1390).
5. *Id.* at 28.
6. Letter from the Honorable Madeline Albright, Secretary of State, Dep't of State, to James Gilmore, Governor of Virginia (Apr. 13, 1998).
7. *Id.* at 1-2.
8. *Id.* at 2.
9. Paraguay v. Gilmore, No. 97-1390, slip op. (Supreme Court Apr. 14, 1998) (per curiam).
10. *Id.* at 5.

found that the Antiterrorism and Effective Death Penalty Act of 1996, which was enacted after the Vienna Convention, precluded habeas relief if a petitioner has failed to develop the factual basis of his claim in state court. Applying the last-in-time doctrine, the Court ruled that Breard was now procedurally barred from raising the Vienna Convention claim since he had failed to assert the claim in state court. With respect to Paraguay's claim, the Court found that "neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States' courts to set aside a criminal conviction and sentence for violation of consular notification provisions."[11] It also found that the Eleventh Amendment provided a separate basis for denying Paraguay's lawsuit. The Court found no continuing consequences arising from Virginia's failure to notify Paraguayan officials. Furthermore, the Court determined that neither Paraguay nor its Consul General could pursue any claims under 42 U.S.C. Section 1983.[12] Paraguay was not a "person" for purposes of Section 1983 nor was it "within the jurisdiction" of the United States. These restrictions also applied to the Consul General. Finally, the Court expressed regret that it had to consider these actions while proceedings were also pending before the ICJ. "Nonetheless, this Court must decide questions presented to it on the basis of law. . . . If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him."[13]

In dissent, Justice Stevens expressed concern with Virginia's decision to schedule the execution at such an early date. Under the Court's rules, a petition for writ of certiorari could have been filed as late as May 19, 1998.[14] By scheduling the execution for April 14, Virginia significantly reduced the time for argument and consideration established by the Court's standard review procedures. "There is no compelling reason for refusing to follow the procedures that we have adopted for the orderly disposition of noncapital cases. Indeed, the international aspects of this case provide an additional reason for adhering to our established Rules and procedures."[15] Justice Breyer echoed these concerns, arguing

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11. *Id.* at 6.

12. 42 U.S.C. Section 1983 provides a cause of action to any "person within the jurisdiction" of the United States for the deprivation of "any rights, privileges, or immunities secured by the Constitution and laws."

13. *Paraguay*, slip op. at 7-8.

14. Supreme Court Rule 13.1 provides that "a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment."

15. *Paraguay*, slip op. at 9.

that several issues, including the question of procedural default and the relevance of the ICJ's proceedings, merited more careful deliberations. Finally, Justice Ginsburg would also have granted the stay of execution in order for the Court to consider Breard's petition in accordance with its regular schedule and procedures.

Following the Supreme Court's ruling, the Governor of Virginia issued a statement indicating his refusal to grant Breard's request for clemency. After several last-minute petitions were denied by the Fourth Circuit, Breard was executed by lethal injection at the state prison in Jarratt, Virginia.

The consequences of the *Paraguay* and *Breard* cases extend far beyond Virginia's execution chamber and will have a profound impact on both the national and international levels.

At the national level, the Supreme Court's ruling further clarifies its position on treaty interpretation and the relationship between international law and domestic courts. The decision reiterates the Court's position that a treaty, through its text or history, must provide a clear and express statement in order for a particular right or obligation to be recognized by the federal courts. As a result, the Court refused to recognize Breard's claim that the rules of procedural default did not apply to treaty obligations. Similarly, the Court refused to recognize a private right of action for Paraguay arising from the Vienna Convention. The decision also emphasizes that treaty obligations must be viewed in the same light as any other federal right. As a result, the rules of procedural default applied with equal rigor to violations of the Vienna Convention. Finally, the Court's decision is significant because it suggests that the rulings of the ICJ are not binding in the United States.

The outcome of the Supreme Court's ruling will make it increasingly difficult for foreign governments to seek redress for treaty violations in federal courts. The Court suggests that a private right of action will only be recognized if the treaty text or its history provide clear support for such a determination. Otherwise, the Court will simply not infer that a treaty obligation carries a concomitant right to seek redress for violations thereof. In so ruling, the Court has emphasized the distinction between whether a treaty is self-executing and whether a treaty creates a private right of action to seek judicial remedies.[16]

Ironically, these cases have increased public awareness of consular notification and access in the United States. The State Department has begun to conduct briefings on consular notification and access for law enforcement officials throughout the country. It has developed a more comprehensive guide on

16. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111, cmt. h.

them issues for law enforcement agencies.[17] It has also produced a pocket-sized reference card for law enforcement officers to carry that describe the requirements of consular notification and access.

At the international level, however, the failure of the United States to prevent Breard's execution will undoubtedly have a negative impact on the relationship between the United States and other countries.[18] Some countries may simply refuse to provide U.S. nationals with consular notification and access when they are detained. Other countries will question the broader commitment of the United States to the rule of law. It has undoubtedly undermined the legitimacy of the ICJ and may embolden other countries to disregard the rulings of international tribunals.

As indicated earlier, cases involving international agreements and domestic obligations will become increasingly common in the coming years. It is imperative for the United States to develop more appropriate responses to treaty violations. Failure to develop effective procedures that protect the rights of both foreign sovereigns and their nationals will further erode the legitimacy of the U.S. commitment to the rule of law and may undermine the effectiveness of treaties worldwide.

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17. U.S. Dep't of State, Instructions for Federal, State, and Other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them (1998).

18. The governments of Argentina, Brazil, Ecuador, and Mexico submitted an amicus brief in support of Paraguay's petition for certiorari. Brief of Amici Curiae Republic of Argentina, Republic of Brazil, Republic of Ecuador, and Republic of Mexico in Support of Petition for a Writ of Certiorari, Paraguay v. Gilmore, (No. 97-1390).