

**RECIPROCITY UNMASKED: THE ROLE OF THE MEXICAN
GOVERNMENT IN DEFENSE OF ITS FOREIGN NATIONALS IN
UNITED STATES DEATH PENALTY CASES**

Michael Fleishman *

*Whoever discovers the who of me will find out the who of you,
and the why, and the where.*

–Pablo Neruda

PROLOGUE

The Mexican government has spent unprecedented effort and resources on behalf of Mexican nationals facing death sentences in the United States. This commitment reflects a long-standing moral indignation of the death penalty in Mexico. Drawing on the strength of this commitment, the Mexican government has successfully intervened both diplomatically and judicially to preserve the rights, and often the lives of Mexican nationals facing death sentences. The Mexican government has been instrumental in raising international awareness regarding repeated violations of the consular notification provisions of the Vienna Convention by the United States. Its determined intervention may prove to be the necessary impetus to push the United States toward the process of internalizing its treaty obligations under the Vienna Convention.

Currently, the United States remains relatively impervious to international pressure concerning abuses of the Vienna Convention. This resistance has been bolstered by the combined force of: unabated freedom of individual states to uphold their criminal laws; the federal government's impotence to control state action; and the judiciary's unwillingness to recognize the force of international treaty obligations. While the efforts of the Mexican government to remedy continued treaty violations by the United States is laudable, the unrelenting commitment to the humanistic goal of providing support to its condemned nationals is most praiseworthy.

This Note seeks to provide a broad perspective on the unparalleled work of the Mexican government on behalf of its foreign nationals facing death

* Candidate for J.D., University of Arizona James E. Rogers College of Law, 2004. I would like to thank Jesus Christ who makes all things possible. I would especially like to thank my wife, Tracy, for patiently allowing me to disappear so often to write away. Love and thanks to my Mom, my Dad, Bill and Elaine. Special thanks to Sandra Babcock and Mark Warren for their invaluable insight and resources in helping me bring this Note together; Sylvia Lett for her editing suggestions; Leticia Marquez for her insight; Greg Kuykendall for the interview, and all those on the *Journal* for making the necessary edits.

sentences in the United States. Part I begins with a discussion of the consular institution and the concept of reciprocity and its importance in international law. The Note then provides foundational material regarding the Vienna Convention on Consular Relations. It then focuses on the Article 36 of the Vienna Convention, a key provision that provides the basis for further discussion regarding the Mexican government's intervention in United States capital cases.

Part II surveys the progression of the Mexican government's efforts to provide assistance to foreign nationals facing death sentences in the United States. It discusses three cases in which the Mexican government's efforts helped thwart death sentences. The Note then considers the first three executions of Mexican nationals by the United States, and then how the Mexican government and the people of Mexico responded. It further addresses some of the early decisions by United States courts in interpreting the provisions of the Vienna Convention.

Part III discusses recent international developments regarding the Vienna Convention and continued violations of its provisions. It details the cases of Ángel Breard, Karl and Walter LaGrand, and the Advisory Opinion of the Inter-American Court of Human Rights sought by Mexico. These decisions form the basis for much of the current litigation regarding the Vienna Convention and are imperative for understanding the current efforts of the Mexican government to avert future death sentences.

Part IV provides an overview of the Mexican Capital Legal Assistance Program (MCLAP), an unprecedented program funded by the Mexican government, which serves to increase the quality of the defense provided to its nationals facing the death penalty throughout the United States. This section also discusses many of the contributions the MCLAP has made in averting death sentences. The discussion of the MCLAP serves to highlight the importance of early intervention in capital cases and the MCLAP's efficacy in this regard.

Part V concludes by reexamining the issue of reciprocity and the reasons why nation-states obey international law. It discusses the possible reasons why the United States has failed to internalize its treaty obligations under the Vienna Convention, and how the Mexican government has made an impact in pushing the United States toward compliance and obedience. This section also discusses briefly the latest actions of the Mexican government in defense of its nationals. The Note concludes by emphasizing that the Mexican government's continued persistence is succeeding in forcing the United States to internalize its obligations under the Vienna Convention and pursuing its humanistic goal of providing consummate assistance to its foreign nationals.

I. RECIPROCITY AND THE CONSULAR INSTITUTION

Mirroring the development of international law, the rise of the consular institution was essentially a functional outgrowth of international trade.¹ Increased commercial activity led individual nations to permit foreign representatives, often referred to as consuls or consulates, to establish permanent consular posts.² Among the leading maritime nations, consulates were often chosen among the merchants themselves, providing a sense of security and confidence for those eager to establish trade in foreign countries.³ As an agent of the sending government, a consul's role was traditionally to promote and protect the nation's commercial interests.⁴ To achieve these interests, a consul was employed to oversee a diverse range of duties, which often included: overseeing imports and exports of the sending state; economic investigation; protection of the shipping interests of the sending nation; development of commercial intercourse with the receiving state; and rendering services to nationals.⁵ While the historical functions of a consulate were largely defined by custom between nations, the scope of a consulate's modern duties are not amenable to precise definition. These duties depend on the economic objectives of each nation, the political stature of the host and receiving nation, and inevitably, geographic factors.⁶

The conduct of individual nations is not confined by the contrived borders separating it from another. Permission to establish consular posts was, and continues to be, based on mutual consent and international notions of reciprocity.⁷ Reciprocity demands moving beyond self-interest to an internalization of the

1. See LUKE T. LEE, *CONSULAR LAW AND PRACTICE* 3 (1961). Consular institutions have a long and varied history that is largely beyond the scope of this piece. The term consul or consulate is used somewhat generically throughout this Note because it reflects an inability to uniformly define it. Historically, the term had significantly different meanings, and even today, a uniform description is difficult because of the varying practices of individual nations. Lee's book provides an exhaustive treatment of the many nuances of the modern consular institution and should be read for a greater understanding of its history and function.

2. See N.A. MARYAN GREEN, *INTERNATIONAL LAW: LAW OF PEACE* 126 (1973) (providing an exposition of the main rules of the law of peace and a good foundation of the basis of international law).

3. LEE, *supra* note 1, at 3-5.

4. *Id.* at 5, 65.

5. See *id.* at 64-70.

6. See *id.* at 59-63 (finding that the role of a consul often overlapped with that of a diplomat. In time, the need to regulate both the diplomatic and consular institution arose. Many of these diplomatic issues were finally addressed at The United Nations Conference on Diplomatic Intercourse and Immunities held from March 2, 1961, to April 14, 1961). The United Nations General Assembly adopted Resolution 1450 (XIV) on December 7, 1959 and the Final Act (U.N. Doc. A/CONF.20/10) was adopted on April 15, 1961.

7. See GREEN, *supra* note 2, at 126.

foundational subtleties of international law.⁸ Reciprocity effectively ensures “the observance of justice and good faith, in [the] intercourse [that] frequently occur[s] between two or more independent states, and the individuals belonging to each.”⁹ Reciprocity is the cornerstone of what William Blackstone referred to as the “law of nations.”¹⁰ The fledgling United States was founded on principles of the law of nations;¹¹ its very success as a concept and nation depended on reciprocity with other nations. The same is true with the consular institution.

A. The Vienna Convention on Consular Relations¹²

In an attempt to bring uniformity to the developing consular institution, the United Nations convened the Conference on Consular Relations (The Vienna Convention) on April 24, 1963, which was attended by a remarkable ninety-two nations.¹³ The Vienna Convention was an ambitious undertaking that broke new ground in the development of an international consular institution.¹⁴ The treaty that followed the Convention standardized the lexicon of consular law. It defined consular rights, privileges, and duties among signatory nations. Most importantly, the treaty created order where “chaotic disunity” previously ruled.¹⁵ Ultimately, it succeeded in bringing together a contingent of distinct ideologies, resulting in the broadest agreement on consular relations in history.¹⁶

8. See Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1109 (2002).

9. *Id.* at 1088 (referring to the Commentaries of William Blackstone).

10. See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2351-53 (1991).

11. Koh, *supra* note 8, at 1087-88.

12. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

13. LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 15 (1966).

14. *Id.* at 16. The attending nations benefited from the foundational work of the International Law Commission, which supplied an initial draft that served as the basis for the Convention. In fact, many of the articles were adopted verbatim.

15. See *id.* at 19. Much focus centered on the word “consul” itself. Whereas previous bilateral consular agreements adopted the terms “consul,” “consular agent,” “consular authority,” or “consular representative,” the Convention adopted “consular officer.” The convention likewise chose the term “consular post” over “consulate,” which was easily confused with a specific class of consular office. *Id.* at 20; see also Gregory Dean Gisvold, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 MINN. L. REV. 771, 780 (1994).

16. 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, 568 (1997). The Vienna Convention was subsequently adopted by the 92 attending nations on April 24, 1963. See

The United States Senate, without dissent, ratified both the Vienna Convention and the Optional Protocol Concerning the Compulsory Settlement of Disputes in 1969.¹⁷ The delay in ratifying the Vienna Convention was due to disagreement within the Executive Branch concerning the need for the United States to enter into multilateral treaties or just continue to negotiate bilateral agreements.¹⁸ The Nixon administration saw the provisions of the Vienna Convention as deficient because they only met “minimum standards,” which were less than many of the bilateral agreements already in effect.¹⁹ Despite President Nixon’s initial reservations about straying from a system of bilateral negotiation, the United States officially ratified the Vienna Convention on November 12, 1969.²⁰

B. Article 36 of the Vienna Convention

While the Vienna Convention succeeded in bringing together disparate ideologies, one provision, Article 36, carried a “tortured and checkered background.”²¹ Article 36 deals with communication and contact with foreign nationals in the receiving state, and is arguably the most important provision

Final Act of the United Nations Conference on Consular Relations, Apr. 24, 1963, art. 14, 596 U.N.T.S. 458, 464.

17. Molora Vadnais, *A Diplomatic Morass: An Argument Against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations*, 47 UCLA L. REV. 307, 314 (1999); see also 115 CONG. REC. 23; S30953; S30997 (1969).

18. Kadish, *supra* note 16, at 568.

19. *Id.* at 568-69.

20. William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT’L L. 257, 267-68 (1998).

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.’ Subsequently, Senator J. William Fulbright asked Deputy Legal Adviser Lyerly whether the Vienna Convention would affect federal legislation or state laws. 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.’ 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.’ Moreover, the Senate fully recognized that state and local jurisdictions were required to provide consular notification when a foreign national was detained. The Senate requested the Nixon Administration to describe how the State Department notifies state and local jurisdictions about consular agreements.

Id. at 268.

21. LEE, *supra* note 13, at 107.

adopted by the Convention.²² Article 36 was passed in the waning hours of the Convention, amid much contentious debate.²³ At the heart of the issue was the need to clearly define the duties of a receiving state in a consular relationship.²⁴

Much of the debate centered on whether: (1) a sending state should be informed of the arrest of one of its nationals, irrespective of the individual's wishes; (2) as a matter of principle, when an alien enters a country, she has accepted its jurisdiction and cannot then claim a greater degree of protection than nationals of the host nation; and (3) notification would create an excessive administrative burden upon those countries with a great deal of alien immigration.²⁵ The United States delegation specifically noted that "no country

22. See Vienna Convention, *supra* note 12, 21 U.S.T. at 100-01, 596 U.N.T.S. at 292, 294; see also LEE, *supra* note 13, at 107.

23. LEE, *supra* note 13, at 107. Article 36, in fact, was originally eliminated altogether. At the 13th plenary meeting, Article 36 failed to obtain the necessary two-thirds majority needed for adoption, but its inclusion into the Convention was resurrected at the last moment.

24. See *id.*; see also Vienna Convention, *supra* note 12, 21 U.S.T. at 100-01, 596 U.N.T.S. at 292, 294. Article 36 states:

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

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

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

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

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

25. LEE, *supra* note 13, at 110 (indicating that it was the Thai, Canadian, Philippine, Malayan, and New Zealand delegations that lodged concern over the administrative burdens of complying with the provisions of Article 36).

could disregard its obligation in certain circumstances to inform consuls of the sending state of the arrest of its nationals.²⁶

In the end, the adopted consular notification requirement was a compromise between strict mandatory notification and no notification.²⁷ The measure required that the receiving state notify a detained or imprisoned foreign national of his right to contact his consular post without delay.²⁸ The last minute adoption of Article 36 helped solidify one of the most basic functions of a consulate – the protection of the host country’s nationals.²⁹ The notification requirement of Article 36 has since become one of the most overtly violated provisions by the United States and hotly litigated issues in capital cases.

II. MEXICAN INTERVENTION IN UNITED STATES CAPITAL CASES

While Mexican consular involvement in the United States dates to the turn of the century, it was not until 1942 that the United States and Mexico signed a bilateral consular agreement.³⁰ The purpose of the bilateral agreement was to define the duties, rights, privileges, exemptions, and immunities of the consular officers in each country.³¹ Article VI of the agreement specifically delineated the rights and duties with respect to foreign nationals detained in the receiving country.³²

26. *Id.* at 111; *see also* U.N. Doc. A/CONF.25/C.2/SR.16, at 10 (1963).

27. *See* LEE, *supra* note 13, at 111-14.

28. *See id.* at 114; *see also* Vienna Convention, *supra* note 12, 21 U.S.T. at 101, 369 U.N.T.S. at 292. The consular notification amendment was introduced by the United States, Canada, Japan, Kuwait, Thailand, and the United Arab Republic, which read:

A consular official shall be informed without delay by the competent authorities of the receiving state if a national of the sending state who is arrested, committed to prison or detained in any other manner so requests. Any communications addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay.

LEE, *supra* note 13, at 111.

29. *See* LEE, *supra* note 1, at 116.

30. Consular Convention, Aug. 12, 1942, U.S.-Mex., 57 Stat. 1751 [hereinafter U.S.-Mexico Convention].

31. *Id.*

32. Article VI of the U.S.-Mexico Convention provides:

(1) Consular officers of either High Contracting Party may, within their respective consular districts, address the authorities, National, State, Provincial or Municipal, for the purpose of protecting the nationals of the State by which they were appointed in the enjoyment of rights accruing by treaty or otherwise. Complaint may be made for the infraction of those rights. Failure upon the part of the proper authorities to grant redress or to accord protection may justify interposition through the diplomatic channel, and in the absence of a diplomatic

Mexico has an extensive and increasingly sophisticated program of consular assistance to Mexican nationals residing in the United States.³³ While Mexico has a long-standing tradition of assisting foreign nationals in the United States, it was not until the early 1980s that the Mexican government, primarily through its consular officers, stepped up its efforts to provide protection to these nationals.³⁴ Transcending the traditional commercial-based consular functions, the Mexican government focused a great deal of resources on the protection of its foreign nationals. This was due, in no small part, to the increased number of Mexican nationals facing death sentences in the United States.

In 1981, the Mexican Foreign Ministry created a category of consular officers (known as consular protection officers) whose sole purpose was to protect the rights of Mexican nationals abroad.³⁵ In 1982, the Mexican government moved to realize this purpose by enacting the Governing Law of the Mexican Foreign Service, key legislation governing the actions of consular officers in foreign nations.³⁶

The Governing Law encompasses a wide range of duties for the heads of consular missions, the most important being the obligation to protect the rights of Mexican nationals.³⁷ As the cases discussed below will demonstrate, the failure of

representative a consul general or the consular officer stationed at the capital may apply directly to the Government of the country.

(2) Consular officers shall, within their respective consular districts, have the right: (a) to interview and communicate with the nationals of the State which appointed them; (b) to inquire into any incidents which have occurred affecting the interests of the nationals of the state which appointed them; (c) upon notification to the appropriate authority, to visit any of the nationals of the State which appointed them who are imprisoned or detained by authorities of the State; and (d) to assist the nationals of the State which appointed them in proceedings before or relations with authorities of the State.

(3) Nationals of either High Contracting Party shall have the right at all times to communicate with the consular officers of their country.

Id. art. VI.

33. Aff. Juan Miguel Gómez-Robledo, provided by Sandra Babcock (Aug. 10, 2001), ¶ 6 (on file with the author) [hereinafter Gómez-Robledo Aff.]. Juan Manuel Gómez-Robledo is the legal advisor to Mexican Foreign Secretary Jorge Castañeda, under the presidency of Vicente Fox Quesada. Mr. Gómez-Robledo is a career foreign service officer with the rank of ambassador. This affidavit was submitted in the case of Gerardo Valdez Maltos discussed *infra* Part IV.

34. See *id.* ¶¶ 9-14.

35. See *id.* ¶ 11.

36. See *id.* ¶ 9 (explaining, “*Ley Orgánica del Servicio Exterior Mexicano*,” D.O., (1982), which translated means “Governing Law of the Mexican Foreign Service” [hereinafter Governing Law]).

37. See Gómez-Robledo Aff., *supra* note 33 (referring to Article 86, which establishes the “primary importance” of protecting the rights of Mexican nationals). Article 47(a) of the Governing Law further requires the heads of consular missions to protect the

the United States to follow the precepts of the Vienna Convention has severely hampered the Mexican government's ability to provide immediate and adequate assistance to its nationals.³⁸ This issue is most acute in capital cases, where early intervention can literally mean the difference between life and death. Under the Governing Law, consular officials are required to: assist Mexican nationals in their relations with local authorities; advise nationals of their rights and obligations in the foreign state; visit Mexicans who are detained in prisons; and represent those Mexicans who cannot defend their own interests.³⁹ These obligations are only the baseline for consular officials, and demonstrate the Mexican government's commitment to defend the rights of Mexican nationals in the United States.

Principles of international law also play an important role in Mexico's involvement in capital cases. Beyond the duties prescribed in the Governing Law, every consular officer is obligated "to protect the dignity and fundamental rights of all Mexicans abroad, in accordance with principles of international law."⁴⁰ The Governing Law specifically authorizes Mexican mission chiefs to visit any foreign government that is violating international law or its obligations to Mexico.⁴¹

Sensing the increased importance of understanding the nuances of the American legal system, the Mexican Foreign Ministry established a Program of Legal Consultation and Defense in 1986.⁴² This program sent selected career foreign service officers to American law schools to better assist attorneys representing Mexican foreign nationals, specifically capital defendants.⁴³ Mexico's longstanding opposition to the death penalty has solidified its commitment to providing Mexican citizens with the highest level of consular assistance available.⁴⁴ It is crucial to the success of this objective that each Mexican national facing capital charges be informed of his or her right to contact the consular post, a right guaranteed under Article 36 of the Vienna Convention.

rights of the Mexican nationals. In 2002, Mexico enacted the new Governing Law of the Mexican Foreign Service.

38. See E-mail from Mark Warren, consultant to Amnesty Int'l, to Michael Fleishman (Oct. 6, 2002) (on file with author) (explaining that while Mexico is a signatory to the Vienna Convention, under Mexican law, federal police officers and federal prosecutors are obligated to inform both the corresponding Embassy and the Office of International Affairs of the Attorney General Office Mexico about any arrest of a foreign national. This obligation was established under Decree No. 2/90 by the Attorney General of Mexico and published in the Official Gazette (*Diario Oficial de la Federación*) on March 5, 1990. This is a unique requirement, one the United States has not adopted domestically).

39. *Gómez-Robledo Aff.*, *supra* note 33, ¶ 10 (discussing art. 88 of the Governing Law).

40. *Id.* (discussing art. 3(c) of the Governing Law).

41. *Id.* (discussing art. 46(f) of the Governing Law).

42. *Id.* ¶ 12.

43. *Id.*

44. *Id.* ¶ 32.

Absent notification, Mexican consular officers have often been left to learn of capital cases from defense attorneys, other prisoners, a national's family, or in some cases, the national himself.

A. Successful Mexican Intervention

The heightened activism of the Mexican consular posts in the United States was a necessary corollary of consular notification abuses, and mirrored the increase in Mexican nationals facing death sentences. One of the early capital cases to benefit from the increased resources committed to foreign nationals was that of Francisco Cárdenas Arreola.

1. The Case of Francisco Cárdenas Arreola

Cárdenas was charged with the murder of a police officer in Ford Bend County, Texas.⁴⁵ He was never informed of his right to contact the Mexican consular post, and it was only weeks before trial that the Mexican consulate learned of his arrest.⁴⁶ Unable to adequately assist trial counsel in preventing a death sentence, the consular officers worked with Cárdenas' appellate counsel.⁴⁷

In an effort to gather mitigating evidence concerning Cárdenas' mental capacity, a consular officer traveled to Cárdenas' hometown to interview potential witnesses.⁴⁸ Mexico also financed the expense of hiring a San Diego attorney who testified regarding the issue of consular protection.⁴⁹ In June 1993, the Texas Court of Criminal Appeals ordered a new sentencing proceeding and Cárdenas was sentenced to life in prison.⁵⁰ Stephen Doggett, Cárdenas' defense counsel, noted that the consulate's work was "critical" to the outcome of the case.⁵¹

2. The Case of Hector Morales Villa and Omar Ayala Mendoza

In the aftermath of the highly publicized 1985 slaying of United States Drug Enforcement Agent Enrique Camarena Salazar, the practice of abducting suspected criminals and returning them to the United States became more

45. Gómez-Robledo Aff., *supra* note 33, at Ex. A.

46. *Id.* It was almost one year after his arrest that the consular post learned of Arreola's arrest.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Gómez-Robledo Aff., *supra* note 33.

commonplace.⁵² In June 1989, Texas police officers purportedly kidnapped Hector Morales Villa and Omar Ayala Mendoza in Mexico and brought them to the United States to face capital charges.⁵³ Both men were Mexican nationals accused of murdering Lillie Beckom Pierce, a seventy-nine year-old Port Arthur, Texas woman.⁵⁴ Neither one was advised of his Article 36 right to contact the Mexican consular post.⁵⁵

Despite not being informed of their right to contact the consular post, the Mexican consular post in Houston learned of the case shortly after they were arrested.⁵⁶ The consulate assisted the defense attorney in preparing a writ of *habeas corpus*, claiming that their confinement violated the Mexico-United States Extradition Treaty.⁵⁷ Paul McWilliams, Assistant Jefferson County District Attorney, claimed that local officers did nothing to violate the Treaty and the Mexican police simply contacted them to pick both men up at the border.⁵⁸ The consulate informed defense counsel that under the Treaty of Extradition, Mexico would refuse to extradite without an assurance from prosecutors that the death penalty would not be sought.⁵⁹

In an attempt to increase the pressure on the United States, the Mexican government used formal diplomatic channels, issuing a diplomatic note to the U.S. Department of State demonstrating violations of the Treaty of Extradition, as well

52. Ed Timms & Steve McGonigle, *U.S. Officials Flout Extradition Treaties*, DALLAS MORNING NEWS, Aug. 19, 1990, at 1A. Camarena Salazar and his Mexican pilot Alfredo Zavala Avelar were both found brutally murdered six months after disappearing. In what was one of Mexico's most celebrated criminal cases, Rafael Caro Quintero, the former head of the Sonora drug cartel, was convicted of the murders. His sentence was later overturned amid allegations of bribery and death threats. *Id.*; see also *Judicial Corruption Often Hinders Criminal Prosecution*, SAN ANTONIO EXPRESS NEWS, Dec. 15, 1997, at 15A [hereinafter *Judicial Corruption*].

53. *Gómez-Robledo Aff.*, *supra* note 33, at Ex. A; *Judicial Corruption*, *supra* note 52; Timms & McGonigle, *supra* note 52.

54. Timms & McGonigle, *supra* note 52, at 1A.

55. *Gómez-Robledo Aff.*, *supra* note 33, at Ex. A.

56. *Id.*

57. *Id.*; see also Treaty of Extradition, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059 [hereinafter Treaty of Extradition].

58. Richard Stewart, *Man Pleads Guilty to Murder, Claims Police Kidnapped Him*, HOUS. CHRON., Mar. 11, 1992, at A18.

59. See *Gómez-Robledo Aff.*, *supra* note 33, at Ex. A. Article 8 of the Treaty of Extradition entitled, Capital Punishment provides:

When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting Party furnishes such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

Treaty of Extradition, *supra* note 57, art. 8.

as Mexican sovereignty.⁶⁰ The Mexican government also initiated criminal charges against two Coahuila police officials for kidnapping, and a Mexican judge issued warrants for Port Arthur police officer Luis Collazo and Jefferson County District Attorney investigator Mitch Woods.⁶¹

In support of the defense counsel's motion for *habeas corpus*, the Legal Advisor to the Mexican Minister of Foreign Relations filed a letter emphasizing the illegality of the kidnapping of the Mexican nationals.⁶² Just prior to the start of Morales' trial in 1990, the District Attorney offered life in prison in exchange for a guilty plea.⁶³

Proceedings in Ayala's case continued and the Consular General in Houston sent letters to the court expressing Mexico's view of the violations of the Treaty of Extradition and petitioned for a sentence less than death.⁶⁴ Consular officials continued trial preparations, visited with Ayala in prison, and even arranged for his parents to be at the penalty stage of the trial.⁶⁵ Just before trial was set to begin, Ayala was offered a sixty-year sentence, in exchange for a guilty plea.⁶⁶

3. The Case of Ricardo Aldape Guerra

The case of Ricardo Aldape Guerra is essential for understanding the tremendous effort the Mexican government has given to capital cases involving its own citizens. Aldape was accused of shooting Houston police officer J.D. Harris after the officer approached his stalled car.⁶⁷ Moments before the stop, a pedestrian informed Officer Harris that a black Buick tried to run him over.⁶⁸ As Officer Harris approached the suspect's car, Aldape and passenger Roberto Carrasco Angel, both undocumented workers living in the neighborhood, got out of the car and walked towards the officer.⁶⁹ Eyewitness testimony varied significantly as to the ensuing events, but it was undisputed that Officer Harris was gunned down and killed.⁷⁰ As Aldape and Carrasco fled the scene, shots were also fired at a car carrying Jose Armijo and his two children, aged two and ten.⁷¹

60. Gómez-Robledo Aff., *supra* note 33, at Ex. A.

61. Stewart, *supra* note 58.

62. Gómez-Robledo Aff., *supra* note 33, at Ex. A.

63. *Id.*

64. *Id.*

65. *Id.*

66. Stewart, *supra* note 58.

67. Guerra v. State, 771 S.W.2d 453, 457 (Tex. Crim. App. 1988).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

Upon hearing the shots, Armijo attempted to reverse his car, but was killed by a fatal shot fired from the north end of the street as Aldape and Carrasco fled.⁷²

An immediate manhunt began for Aldape and Carrasco, and less than an hour and a half later, they were found at Aldape's home.⁷³ As two police officers shined flashlights into the garage of Aldape's home, gunfire erupted and Officer Larry Trepagnier was wounded.⁷⁴ Additional police officers came to Trepagnier's aid and killed Carrasco as he attempted to flee.⁷⁵ Under Carrasco's body, police officers found Officer Harris' revolver tucked into Carrasco's pants and also found the nine-millimeter gun used to kill Armijo.⁷⁶ Ballistics tests were unable to determine with certainty whether the same nine-millimeter was used to kill Officer Harris.⁷⁷

Aldape was later found hiding under a nearby horse trailer with a .45 caliber pistol wrapped in a bandana near him.⁷⁸ Aldape was arrested and his gun was also tested, but the tests did not conclusively link Officer Harris' death to Aldape's gun.⁷⁹ Despite strong indications that Carrasco had actually killed Harris, Aldape was charged with capital murder and sentenced to death.⁸⁰

The Mexican consular post in Houston provided substantial financial assistance, obtained affidavits from witnesses in Mexico, and provided funding to allow Aldape's family to visit him in prison.⁸¹ Despite the resources of the Mexican government and the work of Aldape's defense counsel, his conviction was upheld on appeal, and the United States Supreme Court denied his writ for *certiorari*.⁸²

The Mexican consular post in Houston continued to work with two of Aldape's lawyers to obtain previously undiscovered evidence and was instrumental in securing what few capital defendants will ever receive, the *pro bono* efforts of a powerful law firm.⁸³ Supported by the resources of an influential advocate, Aldape filed a federal writ of *habeas corpus* alleging multiple constitutional due process violations and an indefinite stay was granted.⁸⁴ In a

72. *Id.*

73. *Guerra*, 771 S.W.2d at 457.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Guerra*, 771 S.W.2d at 457.

80. *Id.*

81. *Gómez-Robledo Aff.*, *supra* note 33, at Ex. A.

82. *Guerra v. Texas*, 492 U.S. 925 (1989).

83. *Gómez-Robledo Aff.*, *supra* note 33, at Ex. A.

84. *Guerra v. Collins*, 916 F.Supp. 620, 623 (S.D. Tex. 1995). The claims included that Aldape was denied a fair and impartial trial because of: (a) pretrial intimidation of witnesses; (b) an improper identification procedure; (c) the prosecutors' failure to disclose materially exculpatory evidence; (d) the prosecutor's use of known false evidence and

rare decision, the federal district court concurred with Aldape's due process arguments and granted his petition.⁸⁵ The district court lambasted the police and prosecutors in the case for successfully intimidating and manipulating unsophisticated witnesses "solely to vindicate the death of Officer Harris and for personal aggrandizement."⁸⁶ The court concluded:

These men and women, sworn to uphold the law, abandoned their charge and became merchants of chaos. It is these type flag-festooned police and law-and-order prosecutors who bring cases of this nature, giving the public the unwarranted notion that the justice system has failed when a conviction is not obtained or a conviction is reversed. Their misconduct was designed and calculated to obtain a conviction and another 'notch in their guns' despite the overwhelming evidence that Carrasco was the killer and the lack of evidence pointing to Guerra.⁸⁷

The Court of Appeals for the Fifth Circuit affirmed the district court decision and with the prosecution decision to not retry the case, Ricardo Aldape Guerra was released.⁸⁸

Aldape's case was given extensive media coverage in Mexico. He returned to Mexico receiving a "hero's welcome" and was cheered as he refused to answer reporters' questions in English.⁸⁹ Not long after Aldape's release, he was asked to portray himself in the Television Azteca soap opera, "Al Norte del Corazón" (North of the Heart).⁹⁰ The soap opera quickly became the top-rated show in the network lineup as viewers "were hooked with commercials" asking them to "learn about the life of a man whom the United States stole fifteen years of his life."⁹¹ Aldape became an instant celebrity, but his status was short-lived

known illegitimate arguments to the jury; and (e) the cumulative effect of prosecutorial error. *Id.*

85. *Id.* at 624.

86. *Id.* at 637.

87. *Id.* at 637-38.

88. Armando Villafranca, *Life and Death Chasm: Executing Mexican Citizens in the U.S. Magnified Differences of Culture and the Grudges that Exist Between the Two Nations*, HOUS. CHRON., Sep. 28, 1997, at 1, available at 1997 WL 13064063 (discussing Aldape's release on April 15, 1997).

89. *Id.*; see also Louis Sahagun & Juanita Darling, *Unexpected Friend on Death Row, Mexico is Giving Money, Legal Aid to Help Defend its Citizens Facing Execution in U.S.*, L.A. TIMES, Jan. 2, 1994, at A, available at 1994 WL 2120325 (explaining how "Aldape's name is now sung in sad Mexican ballads on both sides of the border and his picture is emblazoned on T-shirts that say: 'Soy Inocente' [I am Innocent]").

90. Sahagun & Darling, *supra* note 89.

91. *Id.*

as he was killed in an auto accident less than five months after being released from death row in Texas.⁹²

The Aldape case emphasized several underlying themes in capital cases involving Mexican nationals. Foremost, the case highlighted the divergent views of the death penalty in Mexico and the United States. Mexico, a principally Catholic nation, has long opposed the use of the death penalty. The last legal execution took place in 1937, and the country has consistently voiced opposition to the use of the death penalty.⁹³ The death penalty is viewed by many as a barbaric practice and counter to the historic and religious roots of the Mexican people.⁹⁴ The Aldape case reinforced this belief because “it showed that someone conceivably could be executed for a crime he didn’t commit.”⁹⁵

Perhaps the most pervasive theme underlying the cultural divide on capital punishment is a prevailing sentiment that the use of the death penalty in the United States against Mexicans is symbolic of “Yankee imperialism” and the historic “upper hand of Norte Americanos against Mexicanos.”⁹⁶ This theme is deeply rooted in the historic relationship between the United States and Mexico. The passage of California’s Proposition 187 in 1994 barring undocumented immigrants from receiving government services, ongoing North American Free Trade Agreement (NAFTA) disputes, and the rising anti-immigrant sentiment in the United States have all contributed to the pervasive view that the death penalty is a tool of the bully to the north.⁹⁷

The third theme emerging from the Aldape case is the impact of the Mexican government’s assistance. The Mexican consular office in Houston helped secure the assistance of Houston’s Vinson and Elkins, a well-known Houston law firm, which took on the Aldape case *pro bono*, and spent over \$2.5 million in his defense.⁹⁸ Scott Atlas, the attorney that handled the case, noted that

92. Villafranca, *supra* note 88.

93. *Id.*

94. *Id.* Mexican capital punishment was derived from the practices of the Aztecs, who decapitated or stoned those convicted of robbery, murder, or adultery. In the case of adultery, the convicted was only executed if he could not support his mistress. A 1991 public opinion poll by the Mexican Institute of Public Opinion showed opposition to the death penalty at 84%. Katherine Ellison, *Mexico Pressing U.S. to Bar Executions of 17; First Set to Die Today*, L.A. DAILY NEWS, Sept. 17, 1992, at N19, available at 1992 WL 8190940.

95. Villafranca, *supra* note 88 (citing comments of Texas Secretary of State Tony Garza, who believes that demonstrations in Mexico and finger-pointing at the United States are the by-product of more immediate concerns).

96. *Id.* (citing comments of Tony Zavaleta, University of Texas-Brownsville social anthropologist).

97. *Id.*

98. Mary Ann Roser, *Vinson & Elkins Takes Hopwood Personally, Elite Law Firm on a Mission in Hopwood Case, UT Race Issue Has a Special Place on Busy Pro Bono Calendar of Vinson & Elkins*, AUSTIN AM.-STATESMAN, July 5, 1998, at A1, available at 1998 WL 3617025.

“[w]ithout the Mexican consul’s involvement, I have no doubt that he would never have been released.”⁹⁹

B. The Wake-Up Call

Despite several notable successes the Mexican government achieved intervening on behalf of its citizens facing capital sentences, the case of Ramón Montoya Facundo dramatically altered the landscape of capital cases involving Mexican nationals. Montoya’s case eliminated any doubt about the earnestness of the American criminal justice system to impose the death penalty.

1. The Case of Ramón Montoya Facundo

Ramón Montoya Facundo was convicted of capital murder for the death of a Dallas police officer in 1983.¹⁰⁰ Most likely, Montoya was never informed of his right to contact a Mexican consular post. Nonetheless, the Mexican Foreign Ministry (SRE) learned of the case early on and aided his defense through a network of consular posts in Dallas, Austin, and Houston.¹⁰¹ Montoya appealed his conviction to the Court of Criminal Appeals of Texas, but his conviction was affirmed in 1987.¹⁰² Montoya then filed a writ of *habeas corpus* in the Federal District Court.¹⁰³ He was denied relief and the United States Court of Appeals for the Fifth Circuit considered, but ultimately denied, his *habeas* petition.¹⁰⁴

99. Margaret A. Jacobs, *Foreigners’ Convictions Raise Rights Issue*, WALL ST. J., Nov. 4, 1997, available at <http://www.cesarferro.com/clips.htm>.

100. *Montoya v. State*, 744 S.W.2d 15 (Tex. Crim. App. 1987). While the facts of the shooting are disputed, it appears that Officer John Pasco was shot and killed while attempting to apprehend Montoya. Montoya had been with a group of people in a park when Officer Pasco approached. Montoya backed away from the group and then ran away. Officer Pasco pursued, and during the chase, it is alleged that Montoya attempted to throw away the gun he was carrying. It discharged, killing the officer. After his arrest Montoya executed a written confession in Spanish giving a different set of circumstances for the officer’s death than what eventually was elicited during trial. A jury in the 282nd Judicial District Court of Dallas County, Texas later convicted Montoya of capital murder. He was sentenced to death on May 5, 1983. *Id.*

101. *Mexico Makes Last Minute Appeal to Stop U.S. Execution*, LAT. AM. BUS. NEWS WIRE (NOTIMEX), Jan. 26, 1993 [hereinafter *Mexico Makes Last Minute Appeal*].

102. *Id.*

103. *Montoya v. Collins*, 955 F.2d 279, 280 (5th Cir. 1992).

104. *Id.* Finding no constitutional errors in Montoya’s conviction or sentence, the Fifth Circuit affirmed Montoya’s death sentence. The Fifth Circuit subsequently denied Montoya’s Motion for Rehearing *en banc*. See *Montoya v. Collins*, 959 F.2d 969 (5th Cir. 1992).

Montoya's petition for writ of *certiorari* to the United States Supreme Court was likewise denied.¹⁰⁵

Montoya's impending execution increased the Mexican government's diplomatic and legal efforts to stop his execution. The Mexican government, aided by Mexico's National Human Rights Commission (CNDH) and Montoya's home state of San Luis Potosí, collectively appealed to Governor Ann Richards seeking clemency.¹⁰⁶

Pending a new round of appeals in the state courts, the United States Supreme Court stayed Montoya's execution, which had been set for January 26, 1993.¹⁰⁷ Montoya unsuccessfully petitioned the state courts, and his execution date was rescheduled for March 25, 1993.¹⁰⁸ The Fifth Circuit later denied his successive petition for *habeas* relief, ruling that his petition was not reviewable on the merits and was, thus, an abuse of the writ.¹⁰⁹ The United States Supreme Court denied Montoya's last minute application for stay of execution, and thirty-eight year-old Ramón Montoya Facundo was executed by lethal injection in the Huntsville death chamber.¹¹⁰

Montoya was the first Mexican national executed in the United States since the United States reinstated the death penalty in 1976.¹¹¹ Montoya's

105. *Montoya v. Collins*, 506 U.S. 1036 (1992) (mem.).

106. *Commission Asks Texas Gov. to Grant Clemency to Death Row Inmate*, LAT. AM. BUS. NEWS WIRE (NOTIMEX), Jan. 26, 1993 (finding that in a letter to then Governor Ann Richards seeking clemency for Montoya, Jorge Madrazo Cuello, the human rights official that reported directly to President Salinas wrote: "It has been demonstrated that serious crimes do not increase where capital punishment is eliminated."). Alvaro Hernández Luna, director of the National La Raza Movement, also sent a telegram to the Vatican seeking solidarity in the fight against Montoya's execution. Further attempting to show support for the condemned Montoya, a Houston immigrant-rights group marched 160 miles from Houston to the Capitol in Austin to protest Montoya's execution. See James E. Garcia, *Executions in U.S. Become Human Rights Issue in Mexico*, AUSTIN AM.-STATESMAN, Mar. 13, 1993, at B1.

107. *Montoya v. Collins*, 988 F.2d 11, 12 (5th Cir. 1993).

108. *Id.*

109. *Id.* at 13 (ruling on March 24, 1993 by the Fifth Circuit, finding that Montoya's petition was not reviewable because he raised only a variant of previous claims rejected by both the state and federal courts. Without a showing of cause and prejudice to reach the merits, the court lacked jurisdiction and denied the petition).

110. *Montoya v. Collins*, 507 U.S. 1002 (1993). Montoya was the third Mexican national executed by the United States. The two other Mexican nationals were executed in the 1920s and 1940s. Montoya was executed on March 25, 1993. See *Mexico Makes Last Minute Appeal*, *supra* note 101.

111. See *Gregg v. Georgia*, 428 U.S. 153 (1976). This landmark decision upheld the newly written death penalty statutes of Florida, Texas, and Georgia, ruling that the punishment of death for murder was not a sentence that could never be imposed, but must be suitably directed and limited to minimize risk of the penalty's arbitrary use. The *Gregg* decision was the anticipated corollary to the Court's 1972 decision in *Furman v. Georgia*, which effectively outlawed all 40 death penalty statutes on the books. 408 U.S. 238 (1972).

execution sent shock waves throughout Mexico, creating a new barrier to United States–Mexico relations. Mexican President Carlos Salinas de Gortari criticized the United States stating, “In Mexico, we are in favor of life. In Mexico, we are against the application of the death penalty because we consider rehabilitation the most important thing.”¹¹² Fearing Mexican reprisals, United States prisoners were quarantined and riot police guarded the United States Embassy in Mexico City.¹¹³

Montoya’s execution was a watershed moment for the Mexican government, and in an effort to defend the rights of Mexicans on death row in the United States, it increased its efforts considerably from the standpoint of consular involvement and judicial intervention.¹¹⁴ Frustrated at the impact of its efforts in the Montoya case, the Mexican government quickly dispatched foreign-service officers to the United States to defend the rights of Mexican foreign nationals detained in the United States.¹¹⁵ Furthermore, the head of Mexico’s National Commission of Human Rights, Jorge Madrazo, visited eight Mexican nationals on Texas’ Death Row in an effort to provide further legal assistance and moral support.¹¹⁶ Only a few months after Madrazo’s visit to Texas, the Mexican government, as part of a protest campaign against executions in the United States, sent two high-ranking government officials to San Quentin Prison to offer support to eight condemned Mexican nationals on California’s death row.¹¹⁷

The *Furman* court held that the death penalty as applied was, “cruel and unusual punishment” because, in contrast to later enactments, it was applied in an arbitrary and capricious manner. *Id.*

112. *Texas Execution Angers Mexico’s President*, CHIC. TRIB., Mar. 26, 1993.

113. *Mexico Braces for Reaction After Texas Executes Mexican Citizen*, DALLAS MORNING NEWS, Mar. 26, 1993. “In Montoya’s home state of San Luis Potosi, prison officials said they isolated 21 American inmates who reported threats from other convicts if Montoya died.” *Mexican Officials Denounce U.S. Execution*, ASSOCIATED PRESS, Mar. 25, 1993.

114. Michael Phillips, *On Death Row Through its Consulate in Utah, Mexico Fights for its Citizens’ Lives*, SALT LAKE TRIB., Nov. 17, 1993, at A1.

115. *Id.* Juan Carlos Cue Vega, director of the Mexican Nationals Protection Program, during a visit to the Mexican consular post in Salt Lake City, commented: “The people [of Mexico] demanded we do something. . . . We do not question the legality of the death sentence imposed on Mexicans here. But no matter what your high court says, our people consider the death penalty inhuman. It takes away a prisoner’s ultimate right: his life.” *Id.*

116. Dudley Althaus, *Mexico Fights Texas Death Penalty: Human Rights Leader to Visit Condemned Countrymen in Huntsville*, HOUS. CHRON., Apr. 22, 1993. Jorge Madrazo, the human rights official who reported directly to President Carlos Salinas de Gortari, was the first visit to a United States prison by the head of the Mexican Human Rights Commission.

117. Suzanne Espinosa & Elise Ackerman, *Mexico to Fight California Executions*, SAN FRANCISCO CHRON., Aug. 5, 1993, at A15. The Mexican government sent Juan Carlos Cue, the Protection Director for Consulate Affairs for the Mexican Foreign Ministry, and Luis de la Barreda, General Visitor for Penitentiary Affairs for the Mexican National Commission of Human Rights. *Id.*

Despite decades of denouncements by the United States for Mexico's alleged human rights abuses, the Mexican government turned the tables by denouncing the United States' "barbarous practice" of imposing the death penalty.¹¹⁸ After Montoya's execution, the National Commission of Human Rights was charged with expanding its scope of simply documenting human rights abuses in Mexico, to now reviewing all death sentences involving Mexican nationals in the United States.¹¹⁹

2. The Case of Irineo Tristán Montoya

Irineo Tristán Montoya and Juan Fernando Villavicencio were convicted of murdering John E. Kilheffer, a Port Isabel, Texas man.¹²⁰ The basis for Tristán's conviction was a signed confession in which he detailed the events leading up to the death of John Kilheffer.¹²¹ While Tristán confessed to robbing Kilheffer, he denied throughout his oral confession that he was the one who stabbed the victim.¹²² In affirming his conviction, the Texas Court of Criminal Appeals found the evidence sufficient to show that while Tristán may not have stabbed the victim, he aided Fernando in murdering the victim and later robbing him.¹²³

It became clear that neither man was afforded his right to contact consular officers. Attorneys for Tristán filed Texas Open Records requests for

118. *Id.* (providing commentary of a Northern Mexican newspaper after Montoya's execution).

119. *Id.*

120. *Montoya v. State*, 810 S.W.2d 160, 161-62 (Tex. Crim. App. 1989).

121. *Id.* at 173. Tristán argued on appeal that his confession was coerced due to his previous intoxication; the fact that he spent a night in solitary confinement; did not speak English; and was not taken before a magistrate until after he had confessed. The Court of Criminal Appeals of Texas found no abuse of discretion on the part of the trial court concerning the voluntariness of Tristán's confession. *Id.*

122. *Id.* at 162 (transcribing the confession as follows:

I then grabbed the Gringo [Kilheffer], by the neck and went with him to the back seat. 'El Piolin,' [Juan Fernando Villavicencio] . . . started to stab the gringo with the kinife [*sic*] . . . But he was cutting him all over on the legs and body, but the Gringo kept fighting us. I than [*sic*] took out a gun that I had with me but I did not have any bullets inside as the gun did not work. I then begin [*sic*] to hit the Gringo with the gun, . . . 'El Piolin' then drove tp [*sic*] the river levee near the Rio Grande River by Southmost Area where we drove to some torronjaes (Grapefruit trees) where we stoped [*sic*] in the trees and took out the Gringo, who was all bloody [*sic*], he was still alive when we dragged the Gringo to some trees . . .)

Id.

123. *Id.*; see also *Case of Irineo Tristán Montoya*, at <http://www.agitator.com/dp/97/irinmont.html> (last visited Oct. 28, 2002) (asserting that Villavicencio avoided a death sentence by testifying against Tristán).

Article 36 advisories from the State Department, the governor's office, the state attorney general's office and the Brownsville police, but no record of advisories was found.¹²⁴ Significant to future litigation, Tristán's attorneys asked the State Department to investigate charges that Texas had violated his treaty rights.¹²⁵ Furthermore, Mexico filed a diplomatic protest with the State Department, but received no response.¹²⁶ The State Department maintains that it never received the protest letter.¹²⁷ Ward Tisdale, a spokesman for the attorney general's office noted, "[e]ven if you were not given a chance to contact your consulate, that does not override your conviction – that was the position we took and the courts agreed."¹²⁸ Miguel Angel Gonzalez Felix, the legal advisor for the Mexican Secretariat of Foreign Relations, countered this stating, "I can assure you that the State Department would never accept another country not notifying them when an American is detained."¹²⁹

While the courts prior to the Tristán case addressed Article 36 violations, the issue was limited to the immigration context, whereas in the capital context, violations were often only addressed through diplomatic channels.¹³⁰ The State Department itself claimed that the courts were not the place to address violations.¹³¹ Interestingly, the Mexican government was accused by some of not moving quickly enough on behalf of its citizens.¹³² Sergio Agueyo, a human rights activist and professor at Colegio de Mexico, commented that "[e]very time something happens, [the Mexican consulate] protests and sends formal notes, but my feeling is that they have not made the defense of Mexicans their main priority...[because] they are so worried about United States investment in Mexico that they don't want to antagonize the United States government."¹³³ Prior to the execution of Tristán, this statement may have held some weight, but the subsequent efforts of the Mexican government on behalf of Mexican nationals on death row has proven this statement to be untrue.

After exhausting his state appeals, Tristán petitioned for federal *habeas* relief. The federal district court stayed Tristán's execution, conditionally granting his petition on two claims, while denying twenty-five others.¹³⁴ The State

124. Villafranca, *supra* note 88.

125. *Id.*

126. E-mail from Mark Warren, consultant to Amnesty International, to Michael Fleishman (October 3, 2002) [hereinafter Mark Warren E-mail] (on file with author).

127. *Id.*

128. Villafranca, *supra* note 88.

129. *Id.*

130. *See generally* Waldron v. Immigration and Naturalization Serv., 17 F.3d 511 (2d Cir. 1994); United States v. Rangel-Gonzales, 617 F.2d 529 (9th Cir. 1980); United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979).

131. Villafranca, *supra* note 88.

132. *Id.*

133. *Id.*

134. Montoya v. Scott, 65 F.3d 405, 408-16 (5th Cir. 1995).

appealed the conditional grant, and Tristán cross-appealed the denial of six claims.¹³⁵ The Fifth Circuit reversed the district court's conditional grant of *habeas* relief and remanded with instructions to deny relief.¹³⁶ Tristán's petition for writ of *certiorari* to the United States Supreme Court was denied, and his execution date was set for June 18, 1997.¹³⁷ As the execution date approached, Mexico again protested the Vienna Convention violation. Tristán's attorney gathered information in support of a successor claim based on the Vienna Convention violation, including documentation establishing that state and local authorities had done nothing to implement State Department advisories on consular notification.¹³⁸ In a preventive move aimed at educating Mexicans in the United States, the Mexican consular office in Houston printed 30,000 cards in Spanish that read: "Mexican: know your rights," which listed a twenty-four hour toll-free number to call for future assistance.¹³⁹

Shortly thereafter, the State Department responded by asking Texas if a violation had occurred.¹⁴⁰ Texas authorities responded that since Texas was not a signatory to the Vienna Convention, it was not in a position to determine if a violation had occurred and what impact a violation would have had.¹⁴¹ The Texas response further noted that while Tristán was never given his consular notification rights, his situation and nationality were no secret in Mexico, and Mexican authorities "have not required strict compliance with Article 36 as a matter of practice."¹⁴² Texas' blasé rejection of the Vienna Convention is remarkable in light of a May 1997 joint statement by President Clinton and then Mexican President Ernesto Zedillo pledging to honor the Vienna Convention and to work

135. *Id.* (finding that the district court granted conditional relief ruling that the state trial court judge coerced the jury into answering certain Texas special issues affirmatively, thus allowing for a unanimous verdict. The State appealed this issue and the Fifth Circuit held that the trial court's inquiries into jury deliberations were not coercive to warrant relief. The State also appealed the district court's holding that state trial court unconstitutionally instructed the jury on Texas' "law of parties" because Tristán had not been charged with conspiracy to commit murder. The trial court instructed the jury, under Texas' "law of parties" statute, on an "aiding and abetting" theory of criminal liability and a conspiracy theory of criminal liability. The Fifth Circuit again overruled the district court's ruling, stating, "one who has been indicted as a principal may, on proper instructions, be convicted on evidence showing only that he aided and abetted the commission of the offense.").

136. *Id.* at 421.

137. *Montoya v. Johnson*, 517 U.S. 1133 (1996).

138. Mark Warren E-mail, *supra* note 126 (explaining that Mexico filed its protest on May 6, 1997). Bonnie Goldstein represented Tristán.

139. Villafranca, *supra* note 88.

140. Mark Warren E-mail, *supra* note 126 (citing a June 12, 1997 letter from the State Department to Texas officials).

141. *Id.* Texas responded to the State Department letter on June 16, 1997.

142. Villafranca, *supra* note 88.

towards better consular protection for Mexicans within the United States.¹⁴³ Despite vigilant protest, Governor George W. Bush denied a stay based on the notification violation, and on June 18, 1997, Irineo Tristán Montoya was executed.¹⁴⁴

When Tristán's body was returned to Mexico, he was viewed by many Mexicans as a martyr, a victim of injustice in the United States.¹⁴⁵ The same fears of retaliation that arose four years earlier, after Ramón Montoya Facundo's execution, resurfaced.¹⁴⁶ United States authorities warned Americans to avoid the town of Matamoros, as death threats against Americans were reportedly widespread.¹⁴⁷ People lined the 500-mile stretch from the border to the town of Tampico to view the procession of Tristán's body.¹⁴⁸ The black ribbons strewn from poles throughout Mexico symbolized less the heroic martyrdom of Tristán than the continuing cultural abyss dividing the United States and Mexico over the issue of capital punishment.¹⁴⁹

3. The Case of Mario Benjamin Murphy

Benjamin's case is particularly important because it was one of the first to raise the legal claim of a violation of Article 36 of the Vienna Convention.¹⁵⁰ Whereas the Mexican government had previously centered their efforts within the diplomatic arena, Benjamin's case allowed the Mexican government to intercede judicially. Benjamin was convicted of capital murder for his participation in the murder conspiracy of Navy Petty Officer James Radcliff.¹⁵¹ Radcliff's then-wife and her boyfriend, Gary Hinojosa, offered Benjamin \$5000 to kill James Radcliff.¹⁵² Robin Radcliff, who was pregnant by Hinojosa, planned to collect on her husband's \$100,000 life insurance policy after he was killed.¹⁵³ Robin Radcliff, Hinojosa, and Benjamin agreed to stage a botched burglary, with James

143. Brian Duffy, *Stay Sought for Mexican Slated to Die; International Treaty Overhangs Va. Case*, WASH. POST, Sep. 14, 1997, at B01, available at 1997 WL 12886571.

144. Villafranca, *supra* note 88.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996); *see also* Interview with Sandra Babcock, Attorney with Mexican Capital Legal Assistance Program (Sep. 25, 2002). Sandra Babcock, attorney for Stanley Faulder, was the first to file a claim involving a violation of Article 36 of the Vienna Convention. She filed the claim in a December 2, 1992 *habeas corpus* petition.

151. *Murphy v. Commonwealth*, 431 S.E.2d 48, 49-50 (1993).

152. *Id.*; *see also* Duffy, *supra* note 143.

153. Duffy, *supra* note 143.

Radcliff the victim.¹⁵⁴ On the planned evening, Robin Radcliff waited downstairs as Benjamin and two others entered through a bedroom window she left open for them.¹⁵⁵ Benjamin and the others proceeded to beat and stab James Radcliff to death.¹⁵⁶

Benjamin's case was seen as unusual. Benjamin cooperated with police by confessing, entering a guilty plea at trial, helping police recover the murder weapons, and securing a second confession from a co-defendant.¹⁵⁷ Despite his assistance, Benjamin was denied the opportunity of a plea agreement and was the only one of the six people involved in the murder conspiracy that received the death penalty.¹⁵⁸ Robert J. Humphreys, the prosecutor in Benjamin's case, sought the death penalty because Benjamin allegedly played the "primary role in the murder and . . . recruited the others to participate in the murder."¹⁵⁹

Benjamin's attorneys, who argued that the state's position was inconsistent with court documents filed in an unrelated death penalty case, dismissed this contention.¹⁶⁰ In that case, the defendant argued that his sentence was disproportionate to the sentence received by his co-defendant.¹⁶¹ The defendant cited the *Benjamin* case, noting that Benjamin had been sentenced to death because he was "more culpable" than the others involved in the murder.¹⁶² The attorney general's office responded saying, the "allegation that Benjamin was more culpable than any of his co-defendants . . . is simply wrong."¹⁶³

José Angel Gurria, Mexico's Minister of Foreign Affairs, stepped in diplomatically before Benjamin's execution by sending a letter to Virginia Governor George Allen, noting Mexico was "unable to discover a satisfactory reason why our citizen should have been singled out among his co-defendants for the especially harsh penalty of death."¹⁶⁴ In an unusual move, Jerry Rankin, the President of the Southern Baptist International Mission Board, also sent a letter to

154. *Murphy*, 431 S.E.2d at 49-50.

155. *Id.*

156. *Id.* Robin Radcliff actually rolled in the blood of her husband after the murder to make it look as though she was a victim as well. She then ran to a neighbor's house feigning grief and tears, telling the neighbor that she had been robbed and asked the neighbor to call for an ambulance. When the police arrived, Robin was sitting in the apartment crying. She told police that her video cassette player had been stolen and pointed to the room where James Radcliff had just been murdered. See Laura LaFay & Jon Frank, *To Live or Die: Beach Prosecutor Defends Different Sentencings*, VIRGINIAN-PILOT & LEDGER-STAR, Sep. 8, 1997, at A1, available at 1997 WL 12454618.

157. Duffy, *supra* note 143.

158. *Id.*; see also LaFay & Frank, *supra* note 156.

159. Duffy, *supra* note 143.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

Governor Allen asking him to commute Benjamin's sentence.¹⁶⁵ With over 4200 missionaries and 15,000 volunteers worldwide, Rankin was "horrified to think of the potential repercussions in Mexico and other countries" of continued violations of the Vienna convention.¹⁶⁶

Allegations of racism and disproportionate treatment became more pronounced as Benjamin's execution drew near. It was later discovered that Humphreys handled a case five years after the Radcliff murder, involving a former Virginia Beach Sheriff's Deputy, Dana T. Driscoll.¹⁶⁷ Driscoll allegedly entered his ex-wife's home, brutally murdered her boyfriend, and after a stand-off with police, killed his ex-wife.¹⁶⁸ Driscoll's case seemed a likely choice for the death penalty, but Humphreys chose not to pursue it.¹⁶⁹ Driscoll pled guilty and received three life sentences.¹⁷⁰ The decision shocked Benjamin's lawyers, the families of those killed by Driscoll, and many of Humphreys' own colleagues.¹⁷¹ Cathleen Pritchard, an assistant under Humphreys when the crime occurred, believed that the Driscoll case had all the elements required for imposing the death penalty.¹⁷² The stark contrast between the Driscoll case and the Benjamin case highlights the power of prosecutorial discretion.¹⁷³ These cases give some credence to the claim that the application of the death penalty may be arbitrary.

Benjamin sought a writ of *habeas corpus* in federal court, arguing that he was singled out for the death penalty because he was a Mexican national, and was purposefully prevented from seeking the assistance of the Mexican consular post.¹⁷⁴ The Fourth Circuit denied Benjamin's claim, holding that even if the Vienna Convention could be said to create an individual right, the treaty does not create a constitutional right.¹⁷⁵ The court further noted that while the states may have an obligation to inform a foreign national of his right to contact his consulate, the Supremacy Clause of the United States Constitution does not convert violations of treaty provisions into violations of constitutional rights.¹⁷⁶

165. Frank Green, *Mission Chief Urges Allen to Commute Sentence*, RICH. TIMES-DISPATCH, Sep. 17, 1997, at A1, available at 1997 WL 7629382.

166. *Id.*

167. LaFay & Frank, *supra* note 156.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. LaFay & Frank, *supra* note 156.

174. *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997); see also Laura LaFay, *Court to Hear Appeal of Mexican National in Beach Murder Case*, VIRGINIAN-PILOT & LEDGER-STAR, Apr. 9, 1997, at B5.

175. *Murphy*, 116 F.3d at 99-100.

176. *Id.* at 100; see also U.S. CONST. art. VI, cl. 2 (reading, This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the

Even though the Fourth Circuit based its decision on procedural default,¹⁷⁷ its dicta provided a substantive basis for future rejections of Vienna Convention claims. The court also stated that Benjamin was not prejudiced by the “alleged violation” of the Vienna Convention because he was unable to explain how the Mexican consulate would have helped him obtain a plea or additional mitigating evidence.¹⁷⁸ The court placed the burden on Benjamin to show exactly what the consulate would have done to help him.¹⁷⁹ The Fourth Circuit did not find Mexico’s *amicus curiae* brief supporting Benjamin’s appeal persuasive.¹⁸⁰ In the end, the Fourth Circuit dismissed the Vienna Convention claim as a mere “novelty argument,”¹⁸¹ and, in so doing, highlighted its judicial indifference that continues to dominate Article 36 claims.

Robert J. Humphreys similarly dismissed the claim as the “argument du jour” of foreign capital defendants.¹⁸² He then stated, “I mean, what is the remedy? I suppose Mexico could declare war on us. . . . To me, it’s a completely ridiculous issue. I guess they [Benjamin’s lawyers] don’t have anything else to work with.”¹⁸³

In a desperate effort to spare Benjamin’s life, Mexico’s Secretary of Foreign Affairs, Angel Gurria, offered to assume responsibility for incarcerating Benjamin for the remainder of his life if Governor Allen would commute Benjamin’s death sentence.¹⁸⁴ Ultimately, the United States Supreme Court and Governor Allen refused to stay Benjamin’s execution.¹⁸⁵ Prior to his execution by lethal injection, Benjamin commented, “Today’s a good day to die.”¹⁸⁶ As the injection began, he laughed, saying, “I forgive all of you. I hope God does too.”¹⁸⁷ At 9:09 p.m., Mario Benjamin Murphy was pronounced dead.¹⁸⁸

Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding).

177. *Murphy*, 116 F.3d at 100; *see also* 28 U.S.C.A. § 2254 (West 1994) (asserting that procedural default in a *habeas corpus* petition is a bar to reaching the merits of a claim based on the petitioner’s failure to exhaust all remedies in state court).

178. *Murphy*, 116 F.3d at 100-01.

179. *Id.* at 101.

180. William J. Aceves, *Treaties–Vienna Convention on Consular Relations–Consular Access to Detained Nationals–Habeas Corpus–Antiterrorism and Effective Death Penalty Act of 1996*, 92 AM. J. INT’L L. 87 (1998) (referring to Brief of Amicus Curiae of the United Mexican States, *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997) (No. 96-14)).

181. *Murphy*, 116 F.3d at 100.

182. LaFay, *supra* note 174.

183. *Id.*

184. *See* Duffy, *supra* note 143.

185. *See* Ellen Nakashima, *Mexican Citizen Executed in Va. Despite Pleas from Government*, WASH. POST, Sep. 18, 1997, at D04.

186. *Id.*

187. *Id.*

188. *Id.*

Response to Benjamin's execution was subdued, despite original plans to execute Benjamin on Mexican Independence Day.¹⁸⁹ The Mexican Foreign Ministry announced that it had filed a formal letter of complaint with the United States, and the U.S. Department of State told Governor Allen that it would issue an apology for the apparent failure of Virginia to notify Benjamin of his consular rights.¹⁹⁰

III. RECENT INTERNATIONAL DEVELOPMENTS

The Mexican government responded to the executions of both Mario Benjamin Murphy and Irineo Tristán Montoya by submitting a request for an advisory opinion from the Inter-American Court of Human Rights.¹⁹¹ Conscious of the procedural hurdles faced in the American courts, Mexico took the unprecedented step of protecting its nationals by seeking an international forum willing to consider the judicial merits and implications of continued violations of the Vienna Convention. The Mexican government sought the opinion to spell out what judicial guarantees exist when a host nation fails to inform a foreign national of his right to contact his consulate.¹⁹² Mexico likely sought the opinion from the Inter-American Court because it was unable to seek redress in the International Court of Justice (ICJ).

Mexico, at the time, was not a signatory to the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes.¹⁹³ The

189. Frank Green, *Murphy Executed by Injection: Mexican Officials Contended His Rights Were Violated*, RICH. TIMES-DISPATCH, Sep. 18, 1997, at B1.

190. *Id.*

191. See *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Oct. 1, 1999, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999), available at <http://www1.umn.edu/humanrts/iachr/A/OC-16ingles-sinfirmas.html> [hereinafter *Advisory Opinion*]. The opinion of the Inter-American Court of Human Rights, an organ of the Organization of American States (OAS), was sought in December 1997; hearings were held in June 1998, and the final ruling was handed down in November of 1999. The Advisory Opinion is discussed in detail *infra* Part III (C). See also John Quigley, *Procedural Limitations on Capital Punishment: The Case of Foreign Nationals*, 6 ILSA J. INT'L & COMP. L. 519, 520 (2000) (providing a good overview of the 1999 Advisory Opinion). There are 35 member nations of the Organization of American States and the United States signed the Charter of the OAS in Bogota, Colombia on April 30, 1948 and ratified the Charter on June 19, 1951. See *Charter of the Organization of American States, Signatories and Ratifications* (Feb. 27, 1967), at <http://www.oas.org/default.htm>.

192. See *Advisory Opinion*, *supra* note 191.

193. *Foreign Nationals and the Death Penalty in the United States* (Sep. 26, 2002), at <http://www.deathpenaltyinfo.org/foreignnatl.html#UPDATE> [hereinafter *Foreign Nationals*].

Optional Protocol is the enforcement mechanism of the Vienna Convention.¹⁹⁴ Each signatory agrees that any dispute arising over the interpretation or application of the treaty falls within the compulsory jurisdiction of the ICJ, and each is bound by the ICJ.¹⁹⁵ The Inter-American Court of Human Rights did not issue its ruling until November of 1999, the details of which will be discussed in greater detail *infra*.

Mexico's persistent pressure on the State Department in the Mario Benjamin Murphy and Irineo Tristán Montoya cases, as well as the Advisory Opinion request, likely led the United States Department of State to issue a "Consular Notification and Access" booklet in January of 1998.¹⁹⁶ The State Department issued its handbook in an attempt to inform local law enforcement of the importance of the Vienna Convention and to set out procedures to follow when a foreign national is detained.¹⁹⁷ Despite attempts by the United States government to remedy future violations, it was forced to defend its past actions in several leading cases addressing violations of Article 36. These cases laid the foundation for international adjudications of the Vienna Convention and forced the United States to face the swell of international pressure concerning its continued violations of Article 36.

A. The Case of Angel Breard¹⁹⁸

The case of Angel Breard garnered a great deal of international attention, bringing violations of the Vienna Convention to the forefront of legal opinion. Angel Breard was sentenced to death in 1994 for the rape and murder of Ruth Dickie in Arlington, Virginia.¹⁹⁹ As Breard's execution approached, the Republic of Paraguay initiated proceedings against the United States in the International

194. *See* Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, art. I, 21 U.S.T. 77, 1969 WL 97928 [hereinafter *Optional Protocol*].

195. *Id.* Article I states: "Disputes arising out of the *interpretation* or *application* of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." (emphasis added). *Id.*

196. *See* State Department, Pub. No. 10518, *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them* (Jan. 1998), available at http://www.state.gov/www/global/legal_affairs/ca_notification/introduction.html.

197. Kelly Trainer, *The Vienna Convention on Consular Relations in the United States Courts*, 13 *TRANSNAT'L LAW* 227, 249 (2000). Despite the State Department handbook, local law enforcement has continually failed to follow through on the handbook suggestions.

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

199. *Breard v. Com.*, 445 S.E.2d 670 (1994).

Court of Justice (ICJ), alleging that Virginia violated Article 36 of the Vienna Convention when it failed to inform Breard of his right to contact his consular post.²⁰⁰ This marked the first time the ICJ was called upon to adjudicate a suit by one country attempting to halt an execution in another country.²⁰¹

On April 7, 1998, attorneys representing the United States and Paraguay, both signatories to the Optional Protocol, presented arguments before the fifteen-member body of the ICJ.²⁰² Paraguay argued that any criminal liability against Breard should be “recognized as void,” and Paraguay was entitled to *restitutio in integrum*, or reinstatement of a condition prior to a violation.²⁰³ The United States countered, asserting that the ICJ had no jurisdiction over criminal cases in the United States, and the only remedy available was an apology.²⁰⁴ The United States, while acknowledging the violation of Breard’s consular notification rights, argued that Paraguay did not have jurisdiction because its objections did not constitute a dispute concerning the “interpretation” or “application” of the Vienna Convention.²⁰⁵ Furthermore, the United States asserted that the violation did not prejudice Breard because he admitted his guilt, and the assistance of consular officers would not have changed the end result of the proceedings.²⁰⁶

The Court, amid hesitation from justices questioning the haste of their decision, unanimously ruled in favor of a Provisional Measures Order stating that the United States “*should* take all measures at its disposal” to stop Breard’s execution.²⁰⁷ The Court granted the provisional order and did so to permit greater time to consider the merits of Paraguay’s claims.²⁰⁸

200. *Breard*, 523 U.S. at 374.

201. *See Execution of Angel Breard: Apologies Are Not Enough* (Jan. 5, 1998), available at <http://www.web.amnesty.org/ai.nsf/index/AMR510271998> [hereinafter *Execution of Angel Breard*] (copy on file with author).

202. *Id.*

203. Optional Protocol, *supra* note 194.

204. *See also id.* (indicating that the issue of what remedy is available to a defendant who did not receive consular notification has not yet been clarified by the International Court of Justice).

205. *Id.* art. IV.

206. Concerning the Vienna Convention on Consular Relations (Para. V. U.S.), 1998 I.C.J. 248 (Apr. 9) (Request for the Indication of Provisional Measures of Apr. 9, 1998) [hereinafter *Provisional Measures*].

207. *Id.* at 257; *see also* Optional Protocol, *supra* note 194, art. 41. In his declaration, Judge Oda noted that “provisional measures are granted in order to preserve rights exposed to imminent breach which is irreplaceable and these rights must be those to be considered at the merits stage of the case, and must constitute the subject-matter of the Application or be directly related to it.” Judge Oda, concurring with other judges, felt that Paraguay did not have jurisdiction to bring the case in front of the court. Despite Judge Oda’s belief that the provisional measure should never have been granted, he voted in favor of the Order for “humanitarian reasons.” *Provisional Measures*, *supra* note 206, at 260.

208. *See Execution of Angel Breard*, *supra* note 201.

Only days before the April 14th scheduled execution of Breard, the Republic of Paraguay, the Ambassador of Paraguay to the United States, and the Consul General of Paraguay to the United States all brought suit against the State of Virginia, alleging that their separate rights under the Vienna Convention had been violated by Virginia's failure to inform Breard of his consular rights.²⁰⁹ Argentina, Brazil, Ecuador, and Mexico filed a joint *amicus* brief with the United States Supreme Court in support of Paraguay. The Court, faced with the unique situation of adjudicating a foreign suit against the State of Virginia, addressed for the first time some of the contours of the Vienna Convention.

The Court first disposed of Breard's individual claims by relying on the rule of procedural default.²¹⁰ Breard argued that because the Vienna Convention is a treaty and is the "supreme law of the land" it should trump any procedural bar.²¹¹ The Court held, however, that it is well established in international law that "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that state."²¹² While the Court cited several cases in support of this proposition, it failed to address the compulsory wording in the Vienna Convention on the Law of Treaties, which states "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."²¹³ The Court also held that the provisions of the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) trump those of the Vienna Convention.²¹⁴ The Court relied on a previous plurality decision "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."²¹⁵ Thus, the Court determined that Breard's

209. *Breard v. Greene*, 523 U.S. 371, 374 (1998).

210. *See* 28 U.S.C.A. § 2254 (West 1994) (providing an explanation of procedural default).

211. *Breard*, 523 U.S. at 375. Treaties are binding upon the states under the Supremacy Clause and a statute or policy will be struck down when inconsistent with a treaty. *See* U.S. CONST. art. VI, cl. 2; *Antoine v. Washington*, 420 U.S. 194 (1975); *Ware v. Hylton*, 3 U.S. 199 (1796). Left unsettled is the question of whether state procedural rules should have been allowed to override the United States' treaty obligations under the Vienna Convention. *See Zschernig v. Miller*, 389 U.S. 429 (1968).

212. *Id.*; *see also* *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988); *Volkswagenwerk v. Aktiengesellschaft*, 486 U.S. 694 (1988); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522 (1987).

213. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 27, 1155 U.N.T.S. 331.

214. *Breard*, 523 U.S. at 376; *see also* Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132 (S 735), 110 Stat. 1214 (1996). The court ruled that Breard's ability to obtain relief based on violations of the Vienna Convention would be subject to the newly enacted AEDPA, just as any claim arising under the United States Constitution would be. This procedural bar prevented Breard from establishing that violation of the Vienna Convention prejudiced him. *See Breard*, 523 U.S. at 376.

215. *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion) (holding that

case did not warrant judicial cognizance and effectively suggested that the Provisional Measures Order of the ICJ was not binding on the United States.

The Supreme Court then considered the suits brought by Paraguay.²¹⁶ The Court held that the Eleventh Amendment prevented Paraguay from bringing suit against the State of Virginia because the amendment's "fundamental principle . . . [is that] the States, in the absence of consent, are immune from suits brought against them . . . by a foreign state."²¹⁷ The Court also held that the Vienna Convention did not provide a foreign nation a private right of action in United States courts to set aside a criminal conviction for violations of Article 36.²¹⁸ The Supreme Court, by a six to three vote, denied Breard's petition despite pleas from Justice Stevens and Justice Breyer questioning the haste in which the case was decided.²¹⁹ The United States and, consequently, individual states, were able to rely on a domestic legal obstacle to absolve its treaty obligations.²²⁰

The Court subsequently denied Paraguay's petition for *certiorari*, relying on the Eleventh Amendment's immunity bar.²²¹ The government, through the solicitor general, was placed in the tenuous position of arguing against the Republic of Paraguay, effectively attempting to excuse the actions of the State of Virginia. This position was further compounded by pleas from Secretary of State

This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.)

See also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (finding that,

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: provided, always, the stipulation of the treaty on the subject is self-executing).

216. *Breard*, 523 U.S. at 376 (indicating that Paraguay brought both an original action and a petition for *certiorari* to the Supreme Court).

217. *Breard*, 523 U.S. at 377, quoted in *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329-30 (1934) (reasoning by the Court was that Paraguay's claim that their suit fell into the Eleventh Amendment's exception for continuing consequences of past violations of federal rights was without merit as the failure to inform Breard of his consular rights occurred "long ago and has no continuing effect."); see also U.S. CONST. amend. XI; *Milliken v. Bradley*, 433 U.S. 267 (1977).

218. See *Postscript*, 31 VAND. J. TRANSNAT'L L. 320, 321 (1998).

219. *Breard*, 523 U.S. at 378. Justice Stevens noted that Supreme Court Rule 13.1 would have permitted more time to consider Breard's case given his punctual petition for *certiorari* filing.

220. See *Execution of Angel Breard*, *supra* note 201.

221. *Breard*, 523 U.S. at 378; see also *Execution of Angel Breard*, *supra* note 201.

Madeline Albright asking Virginia Governor Gilmore to grant a temporary reprieve in Breard's case.²²² In the end, the State of Virginia refused Albright's request, flatly rebuffed a provisional order of the International Court of Justice, and executed Ángel Breard.

Breard's case clearly highlighted, once again, the ongoing reciprocity concerns underlying continued violations of the Vienna Convention and the difficulty of enforcing its provisions. On November 3, 1998, the United States government issued a formal apology to the Republic of Paraguay over the Vienna Convention violation.²²³ Surprisingly, the Republic of Paraguay withdrew its case against the United States in the ICJ, and praised the United States for having the courage to admit its error.²²⁴ Despite the lack of immediate repercussions for Virginia's decision to move forth with the execution of Breard, some have commented that the United States will be branded an "international outlaw," and future attempts by the United States to invoke international law or human rights will be discredited.²²⁵

B. The Cases of Karl and Walter LaGrand

The cases of Walter and Karl LaGrand featured many of the same convoluted issues of the *Breard* case, but this case eventually produced a watershed decision from the International Court of Justice. The LaGrand brothers were each convicted of first-degree murder for killing Ken Hartsock, a bank manager at Valley National Bank, in a 1982 bungled robbery attempt in Marana, Arizona.²²⁶ Neither brother was afforded the opportunity to contact the German consular post, and the consulate became involved some ten years after their arrest.²²⁷ Karl confessed to stabbing Hartsock to death and stated to police that

222. See *Execution of Angel Breard*, *supra* note 201.

223. See *Foreign Nationals*, *supra* note 193.

224. *Id.* "Within days of that decision, the U.S. government withdrew threatened trade sanctions against Paraguay for condoning the widespread illegal copying of brand-name goods. Paraguayan authorities announced new measures to crack down on the production of counterfeit goods and other copyright infringements, which reportedly cost U.S. producers \$100 million annually in lost revenues. Paraguayan officials denied that there was any link between the withdrawal of the ICJ complaint and the US decision not to impose trade sanctions." *Id.*

225. Laura LaFay, *World Court—U.S. to Halt Execution, the Dispute Between Paraguay, Virginia Must be Resolved First; The Ruling is Binding*, VIRGINIAN-PILOT & LEDGER-STAR, Apr. 10, 1998, at A1.

226. *LaGrand v. Stewart*, 133 F.3d 1253, 1257-58 (9th Cir. 1998).

227. *German Anger Rises over U.S. Executions*, DAILY OKLAHOMAN, Mar. 8, 1999, available at 1999 WL 7701946; see also *Court Finds United States in Breach of Consular Obligations to Germany in LaGrand Case; For First Time in its History Court Finds that Orders Indicating Provisional Measures are Legally Binding*, M2 PRESSWIRE, June 29, 2001, available at 2001 WL 23557357.

Walter had no part in the killing and was not even in the same room when Hartsock was killed.²²⁸ Following a jury trial, both brothers were sentenced to death for the murder of Ken Hartsock.²²⁹ After successive collateral attacks of his conviction, pleas from the German government for clemency, and a final denial of *certiorari* by the United States Supreme Court, Karl was executed by lethal injection on February 24, 1999 in Florence, Arizona.²³⁰

On March 2, 1999, Germany filed suit in the United States Supreme Court and the International Court of Justice seeking to block the execution of his brother Walter, scheduled to die the next day.²³¹ Germany argued to the ICJ that irreparable harm would occur to its case if Walter LaGrand were executed before the Court had an opportunity to consider the case more fully.²³² On March 3, 1999, the Supreme Court refused to exercise its jurisdiction to hear the case.²³³ The ICJ, on the other hand, determined that it had jurisdiction because both Germany and the United States were signatories to the Optional Protocol of the Vienna Convention and there was a *prima facie* dispute over application of the Vienna Convention treaty.²³⁴ The ICJ found, as it did in the *Breard* case, that the case was of great urgency.²³⁵ Despite the tremendous time pressures it faced, the ICJ issued a Provisional Measures Order instructing that the United States “should take all measures at its disposal to ensure that, Walter LaGrand is not executed pending” a final merits decision by the ICJ.²³⁶

Despite a binding Provisional Measures Order from the ICJ and a recommendation of the Arizona Clemency Board to stay LaGrand’s execution, Arizona Governor Jane Dee Hull refused the stay.²³⁷ On the night of March 3, 1999, Walter LaGrand became the last person in Arizona to be executed by lethal gas.²³⁸ The German press, from across the political spectrum, lobbed vitriolic commentary towards the United States and the State of Arizona. The conservative daily *Die Welt* said of Arizona Governor Jane Dee Hull, she is “[a] tough state

228. *LaGrand*, 133 F.3d at 1259.

229. *Id.*

230. *U.N.: Fixing of Time Limits for Filing of Written Pleadings in LaGrand Case*, M2 PRESSWIRE, Mar. 9, 1999, available at 1999 WL 14062828.

231. See Bernard H. Oxman & William J. Aceves, *LaGrand (Germany v. United States)*, 96 AM. J. INT’L L. 210, 211 (2001).

232. *Id.*

233. *F.R.G. v. United States*, 526 U.S. 111 (1999).

234. *Concerning the Vienna Convention on Consular Relations (Germany v. U.S.)*, 1999 I.C.J. 9, 10 (Mar. 1999) (request for the Indication of Provisional Measures of Mar. 3, 1999), available at 1999 WL 1258990.

235. *Id.* at 12.

236. *Id.*

237. See John L. Allen, Jr., *America Should Listen to Stirrings Abroad*, NAT’L CATH. REP., Mar. 19, 1999, at 28, available at 1999 WL 8553965.

238. *Id.*; see also *LaGrand v. Stewart*, 170 F.3d 1158, 1159-61 (9th Cir. 1999) (discussing the constitutionality of the gas chamber).

governor [who] enforces a medieval sentence, proud of her convictions; regardless of [the] obvious procedural shortcomings and modern, international law.”²³⁹

The State of Arizona followed the path of Virginia in the *Breard* case, giving short shrift to international law and placing the United States in the position of once again defending the actions of individual states. On June 27, 2001, the International Court of Justice issued its binding merits decision in the *LaGrand* case, the details of which are discussed *infra*.

C. The Inter-American Court of Human Rights Advisory Opinion

As previously discussed, Mexico sought an advisory opinion from the Inter-American Court of Human Rights, an organ of the Organization of American States (OAS), asking for an interpretation of the right of consular access under the Vienna Convention and a clarification of the question of whether a failure to inform a foreign national of his right to consular access constituted a due process violation.²⁴⁰ The Court issued its long-awaited Advisory Opinion in October 1999 and unanimously held that Article 36 confers specific legal and human rights on individual foreign nationals.²⁴¹ It further ruled that these rights entitle a foreign national to invoke them in a domestic court.²⁴² The Court supported its interpretation that Article 36 confers an individual right from the plain meaning of Article 36 and also a filed petition by the United States in the Teheran Hostage Case, where the petition referred directly to the right of foreign nationals to consular access as a right of the individual.²⁴³

The Court additionally addressed the issue of how soon detaining authorities must inform a foreign national of their right to contact their consulate.²⁴⁴ Mexico submitted a request concerning the meaning of “without delay” delineated in Article 36.²⁴⁵ The Court responded by stressing the importance of consular notification for an “effective defense” and noted that “without delay” requires “prompt” notification “at the time the accused is

239. *German Press Slams US Execution of Convicted Killer*, AGENCE FR.-PRESS, Mar. 5, 1999, available at 1999 WL 2558332.

240. See Advisory Opinion, *supra* note 191.

241. *Id.* The Court ruled that the individual right conferred by Article 36 may be invoked in a domestic court. The Court relied on the language in the Preamble to the Vienna Convention to support its contention. See also Quigley, *supra* note 191.

242. See Quigley, *supra* note 191, at 521.

243. *Id.* at 520-21 (indicating that the Court cited a memorial filed by the United States where it invoked the Vienna Convention on Consular Affairs as a basis for jurisdiction over Iran. The United States noted “Article 36 provides a right to consular officers to fulfill their functions and to foreign nationals to avail themselves of consular services.”).

244. *Id.* at 523; see also Advisory Opinion, *supra* note 191.

245. See Vienna Convention, *supra* note 12, 21 U.S.T. at 101, 596 U.N.T.S. at 292.

deprived of his freedom, or at least before he makes his first statement before the authorities,” regardless of whether the detaining state is able to ascertain the detainee’s nationality.²⁴⁶

Most importantly, the Court held, by a six to one vote, that the execution of death-row inmates never notified of their right to contact their consulate would be an “arbitrary” deprivation of life and would violate the foreign national’s due process rights under the International Covenant on Civil and Political Rights²⁴⁷ and the American Convention on Human Rights.²⁴⁸ The majority rejected the standard approach of the courts in the United States, requiring a defendant to show that a violation of the Vienna Convention prejudiced him.²⁴⁹ The majority noted that the right of access is fundamental and no inquiry is required to determine whether consular service would have changed the outcome of the proceedings.²⁵⁰

The Inter-American Court’s Advisory Opinion was an important step in establishing the rights of detained foreign nationals and underscored the unprecedented efforts of the Mexican government in support of its foreign nationals. While the decision elevated the rights of foreign nationals, it also highlighted the continued difficulty of enforcing international decisions.

246. Advisory Opinion, *supra* note 191, ¶¶ 96, 106. Compare *U.S. v. Superville*, 40 F. Supp. 2d 672, 675 (D.V.I. 1999) (recognizing the “without delay” language of the Vienna Convention), with *U.S. v. Lombera-Camorlinga*, 188 F.3d 1177 (9th Cir. 1999).

247. International Covenant on Civil and Political Rights (CCPR), Sep. 28, 1966, 1966 U.S.T. Lexis 521. The United States ratified the CCPR on Jun. 8, 1992. See Status of Ratifications of the Principal International Human Rights Treaties (Aug. 21, 2002), available at <http://www.unhchr.ch/pdf/report.pdf>.

248. Advisory Opinion, *supra* note 191 (including commentary submitted by the Inter-American Commission on Human Rights indicating:

The duty to notify a detained foreign national of his right to consular access ties in with a number of fundamental guarantees that are vital to ensuring humane treatment and a fair trial; consular officers have important verification and protection functions to discharge; these functions were the reason why Article 36 was included in the Vienna Convention on Consular Relations; when an OAS member State that is party to the Vienna Convention on Consular Relations fails to comply with its obligations under Article 36 thereof, it effectively denies the detained foreign national a right whose object and purpose is to protect the basic guarantees of the due process; thus, the burden of proof falls upon that State, and it must show that the due process was respected and that the individual in question was not arbitrarily denied the protected right)

See also *Foreign Nationals*, *supra* note 193; Edward Hegstrom, *OAS Court Says Foreign Inmates Denied Rights*, HOUS. CHRON., Feb. 18, 2000, at 30, available at 2000 WL 4281234.

249. Trainer, *supra* note 197, at 257. Once a defendant has established standing to sue based on a violation of the Vienna Convention, he must then show prejudice. The courts will often view the failure to notify as harmless because the violation does not rise to the level of a constitutional violation. See *United States v. Calderon-Medina*, 591 F.2d 529, 532 (9th Cir. 1979).

250. See Quigley, *supra* note 191; see also Advisory Opinion, *supra* note 191, ¶ 96.

Although the United States is a member of the OAS, it does not recognize the authority of the Inter-American Court and, thus, is not bound by its opinions.²⁵¹ Much like the Vienna Convention, an advisory opinion “must encourage rather than compel a course of action.”²⁵² The Advisory Opinion sought by the Mexican government, though not binding on the United States, was a profound precursor to the International Court of Justice decision in the *LaGrand* case and will continue to have “undeniable legal and moral effects on both national and international law.”²⁵³

IV. MEXICAN CAPITAL LEGAL ASSISTANCE PROGRAM

In September of 2000, in the wake of the Advisory Opinion by the Inter-American Court of Human Rights, the Mexican government established the Mexican Capital Legal Assistance Program (MCLAP).²⁵⁴ The primary objective of the MCLAP is averting death sentences involving Mexican nationals.²⁵⁵ This unprecedented program sought to achieve its goal by increasing the quality of defense provided to its foreign nationals potentially facing capital cases.²⁵⁶ Whereas prior efforts at averting death sentences have come from individual consulate offices, the MCLAP now coordinates all efforts by providing necessary assistance from the time of a national’s initial detention.²⁵⁷ The MCLAP is now able to monitor defense counsel’s performance, and when necessary, steps in to provide needed support.

To bolster its coordinated efforts with local consular offices, the MCLAP has retained a number of highly qualified capital attorneys to oversee the program.²⁵⁸ Because many consular officials are unfamiliar with the complexities involved in capital cases, the MCLAP has provided needed assistance in its efforts at averting death sentences.²⁵⁹ Sandra Babcock, a highly skilled capital attorney, who first brought a Vienna Convention violation claim, was hired by the Mexican government and currently oversees the MCLAP.²⁶⁰

251. Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 STAN. J. INT’L L. 241, 276 n.252 (2002).

252. *Id.* at 246.

253. *Id.* at 249.

254. Mexican Capital Legal Assistance Program: Summary of Accomplishments (Jan. 28, 2003) [hereinafter MCLAP] (on file with author).

255. *Id.*

256. *Id.*

257. Telephone interview with Sandra Babcock, staff attorney Mexican Capital Legal Assistance Program (Nov. 20, 2002) [hereinafter Babcock].

258. MCLAP, *supra* note 254.

259. *Id.*

260. *See id.*

The strategy of the MCLAP is markedly different than the tack of other nations seeking to provide assistance to its foreign nationals facing death sentences. The MCLAP works with the various consulate offices throughout the United States and monitors the progression of individual cases and provides support from the earliest stages of a case.²⁶¹ This early intervention has been crucial in securing plea bargains that increase the likelihood an individual national will receive a life sentence instead of a death sentence.²⁶² As of January 2003, the MCLAP has been involved in 110 cases.²⁶³ In thirty of those cases, foreign nationals have avoided the death penalty.²⁶⁴ Eighty cases are still pending, and while five nationals have been executed since the inception of the MCLAP in September 2000, it was only involved in one of those cases prior to trial.²⁶⁵

A. The Case of Miguel Angel Flores

Miguel Angel Flores was convicted of capital murder for the 1989 rape and murder of Angela Tyson, a college student in Borger, Texas.²⁶⁶ Flores was never informed of his consular rights, and the Mexican government did not learn of the charges against him until nearly a year after he had been sentenced to death.²⁶⁷ It was not until his federal *habeas* appeal that Flores claimed his consular rights under the Vienna Convention had been violated.²⁶⁸

The Fifth Circuit that heard Flores' federal appeal had occasion to revisit its prior decision in *Faulder v. Johnson*, which first addressed a claim based on a violation of the Vienna Convention.²⁶⁹ The court stated that it did not read its *Faulder* opinion "as recognizing a personal right under the [Vienna] Convention [and] any violation was [merely] harmless."²⁷⁰ The Fifth Circuit chose not to address whether the Vienna Convention conferred individual rights, as recognized

261. Babcock, *supra* note 257.

262. *Id.*

263. *Id.*

264. *Id.* (explaining that program lawyers were actively involved in eighteen of those cases, involving the following defendants: Felipe Petrona Cabañas, Fredy Bladimir Angel Zeveda, Tonatihu Aguilar Saucedo, Oberlin Cabañas Salgado, Eugenia Pedraza Pedraza, Nicolas Solorio Vasquez, Hugo Villarreal-Solis and Roberto Lopez Rivera, Ublester Romero Herrera, Ernesto Baylon Mendoza, Ricardo Luna, Nicolas Vasquez Romero, Santiago Margarito Varelas Rangel, Liliana Piña, Jose Carlos Carillo, Francisco Gonzales Reyes, Torribio Rodriguez, Pedro Perez Godinez (a 9-defendant case), and Jose Quintero).

265. MCLAP, *supra* note 254. The Program was involved in the case of Marcos Esquivel Barrera prior to trial.

266. Flores v. State, 871 S.W.2d 714, 715-16 (Tex. Crim. App. 1993).

267. Raymond Bonner, *U.S. Bid to Execute Mexican Draws Fire*, N.Y. TIMES, Oct. 30, 2000, at A14.

268. Flores v. Johnson, 210 F.3d 456, 457-58 (5th Cir. 2000).

269. *Id.* at 457; *see also* Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 2000).

270. Flores, 210 F.3d at 458 (Garza, J., concurring).

in the Inter-American Court Advisory Opinion, and deferred to the *Breard* decision stating that the Vienna Convention only “arguably confers on an individual the right to consular assistance following arrest.”²⁷¹

While the majority quickly disposed of the *Flores* case relying upon procedural default, a special concurrence by Circuit Judge Emilio M. Garza emphasized the crucial role that the MCLAP is currently serving in capital cases, and how important early consular notification is to a foreign national. Judge Garza wrote separately to question the foundation of authority on which the federal district court dismissed Flores’ ineffective assistance of counsel claim.²⁷² Garza was particularly troubled by this case because Flores’ trial attorney failed to offer any mitigating evidence to counter the “expert” opinion of Dr. Griffith, who opined that Flores would be a future danger to society, despite never having examined him.²⁷³ In fact, Flores’ attorney, Gene Storrs, argued against Flores saying:

I’m not going to get up here and talk to you about mitigating evidence because that’s ridiculous. That’s ridiculous. The charge in here that talks about mitigating evidence is ridiculous. I don’t have any more right to try and get up here and ask you people to vote such as not to assess the death penalty because of mitigating evidence.²⁷⁴

Dr. Griffith has been called by the State of Texas as its expert witness on numerous occasions to testify on the future dangerousness of a capital defendant.²⁷⁵ Despite the scientific community’s general reluctance to accept psychiatric testimony on future dangerousness as reliable, the Texas Court of Criminal Appeals has repeatedly upheld the admissibility of this type of evidence.²⁷⁶ It was sufficient in the *Flores* case for the court to sentence him to death.²⁷⁷

While Mexico, through its various consulates, was involved in the *Flores* case early on, the MCLAP was involved much later, as the Program had just begun in September 2000.²⁷⁸ With only two months before the scheduled execution, the MCLAP filed an *amicus curie* brief with the United States Supreme Court, but the Court denied Flores’ petition for *certiorari*.²⁷⁹ In an unusual move,

271. *Breard v. Greene*, 523 U.S. 371, 375 (1998); *see also Faulder*, 81 F.3d at 520.

272. *Flores*, 210 F.3d at 457-58 (Garza, J., concurring).

273. *Id.* at 458.

274. Memorandum from Sandra Babcock, *Mexican Nationals and the Texas Death Penalty*, at 2 (on file with author).

275. *Flores*, 210 F.3d at 462 (Garza, J., concurring).

276. *Id.* at 463.

277. *Id.*

278. Babcock, *supra* note 257.

279. *Id.*; *Flores v. Johnson*, 531 U.S. 987 (2000) (mem.).

the State Department wrote a letter to the Texas Board of Pardons and Paroles asking that it “give careful consideration to Flores’ pending clemency request, including taking into account apparent Vienna Convention violations.”²⁸⁰ Mexico, along with France, Argentina, Spain, Switzerland, and Poland, all sent letters to the Texas Board and Governor Bush seeking clemency in Angel’s case.²⁸¹ The Texas Board of Pardons and Paroles rejected Flores’ clemency request.²⁸² Governor Bush, embroiled in the political recount of the 2000 presidential election, failed to grant him a thirty-day reprieve.²⁸³ Asking for forgiveness from the family of victim Angela Tyson, Miguel Angel Flores was executed by lethal injection in the Huntsville death chamber on November 9, 2000.²⁸⁴

B. The Case of Gerardo Valdez Maltos

Gerardo Valdez Maltos was convicted in 1989 of killing Juan Barron in his own home after Barron allegedly made homosexual advances toward him.²⁸⁵ Valdez was never afforded his right to contact the consulate, and the Mexican government did not learn of the case until April 2001, some two months before Valdez’s scheduled execution, when Valdez’s family members contacted the Mexican Consulate in El Paso.²⁸⁶ Undeterred by its late entry into the case, the MCLAP was able to hire neuropsychologists to perform brain tests, and they determined that Valdez suffered from severe brain damage, evidence never presented to the jury at trial.²⁸⁷ Sandra Babcock noted that this case is “the most egregious case of [a violation of the] Vienna Convention because of the length of time without any consular assistance whatsoever, and because no one, either at trial or on appeal, ever bothered to conduct even the most rudimentary investigation into his background.”²⁸⁸

Armed with substantial new mitigating evidence, the Mexican government, assisted by the MCLAP, submitted a letter to Oklahoma Governor

280. George Gedda, *Enforcement of Diplomatic Law a Sore Point*, WASH. TODAY, Nov. 8, 2000.

281. *Id.*

282. *Bush Holds Fate of Mexican Citizen Set for Execution in His Hands*, DEUTSCHE PRESSE-AGENTUR, Nov. 9, 2000.

283. *Id.*

284. *Texas Executes Mexican Citizen Amid Protests*, DEUTSCHE PRESSE-AGENTUR, Nov. 10, 2000.

285. *Mexican Praises Re-sentencing for Oklahoma Death Row Prisoner*, ASSOCIATED PRESS NEWSWIRE, May 1, 2002; see also Bruce Zagaris, *Oklahoma Stays Execution of Mexican Partly Due to Violation of Consular Treaty*, 17 NO. 8 INT’L ENFORCEMENT L. REP. 340 (2001).

286. Gómez-Robledo Aff., *supra* note 33.

287. See Bruce Zagaris, *Oklahoma Governor Refuses Clemency Request for Mexican Death Row Inmate*, 17 INT’L ENFORCEMENT L. REP. 382 (2001).

288. *Id.*

Frank Keating urging him to adopt the clemency recommendation of the Oklahoma Pardon and Parole Board, a Board that had only recommended clemency twice in thirty years.²⁸⁹ Despite the recommendation, Governor Keating refused to stay the execution.²⁹⁰ The MCLAP successfully recruited lawyers from the firm of Sullivan and Cromwell to represent Valdez on a *pro bono* basis.²⁹¹ Valdez filed a subsequent application for Post-Conviction Relief and requested an evidentiary hearing in the Court of Criminal Appeals of Oklahoma.²⁹² Valdez petitioned the court on the basis of the recent decision of the International Court of Justice (ICJ) in the *LaGrand* case decided on June 27, 2001.²⁹³ Valdez asserted that the court should entertain his application because the legal basis for his claims was unavailable prior to the *LaGrand* decision.²⁹⁴

The ICJ had previously issued a binding Provisional Measures Order instructing the United States to take all measures at its disposal to ensure that Walter LaGrand would not be executed, pending a final decision by the ICJ. The State of Arizona denied the Order and executed Walter LaGrand nevertheless. The merits decision by the ICJ in the *LaGrand* case is momentous because it squarely contravenes many of the holdings of the United States Supreme Court in

289. *Id.*; see also *Gómez-Robledo Aff.*, *supra* note 33.

290. See *Zagaris*, *supra* note 287.

291. MCLAP, *supra* note 254.

292. *Id.* The Petition for Post-conviction Relief was filed on August 22, 2001. Also filed was a Motion for Evidentiary Hearing and Discovery, an Application for Special Admission of Non-Resident Attorneys, and Motion for Leave to File Amicus Curiae Brief from the Government of Mexico. *Valdez v. State*, 46 P.3d 703 (2002).

293. See *F.R.G. v. United States*, 2001 I.C.J. 104 (June 27) [hereinafter *LaGrand*] (finding that the German government made four submissions to the ICJ. First, by not informing the LaGrand brothers of their right to contact the German consulate under Article 36, subparagraph (1)(b), and by depriving Germany of the chance to render assistance, ultimately resulting in the execution of the LaGrand brothers, the United States violated its international treaty obligations to Germany. Second, the United States, by applying the domestic rule of procedural default, violated its international obligation to Germany under Article 36, paragraph 2 to give full effect to the purposes for which the rights accorded under Article 36 are intended. Third, by failing to take appropriate measures to ensure that Walter LaGrand was not executed pending a final decision of the ICJ, the United States violated its international legal obligations to comply with the Order on Provisional Measures issued by the Court on March 3, 1999. The United States also violated its obligation to refrain from any action, which would interfere with the subject matter of the dispute while judicial proceedings were pending. Fourth, the United States should provide Germany an assurance that it will not repeat its unlawful acts and that in future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights guaranteed under Article 36. Particularly in capital cases, this would require the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36. These submissions provided the basis for the ICJ's analysis and decision in the case); see also *Oxman & Aceves*, *supra* note 231, at 212-13.

294. *Valdez*, 46 P.3d at 706.

Breard. First, the ICJ rejected any jurisdictional challenges and affirmed the binding nature of the Optional Protocol to the Vienna Convention.²⁹⁵ The Court ruled unanimously that the United States, by way of the State of Arizona, had violated the Vienna Convention and its breach not only violated the rights of Germany under the treaty, but also the individual rights of Karl and Walter LaGrand.²⁹⁶ In *Breard*, as previously noted, the Court ruled that individual rights were only arguably conferred.²⁹⁷ Second, the ICJ held that application of procedural default cannot be applied by the states individually or by the United States to prevent review of an Article 36 violation.²⁹⁸ This holding directly contradicts the *Breard* decision, which supplied the reasoning for the Supreme Court to originally reject Vienna Convention violation claims in the *LaGrand* and *Angel* cases. Third, the ICJ ruled that its Provisional Measures Order issued on March 3, 1999 was binding and created a legal obligation for the United States.²⁹⁹

295. See Oxman & Aceves, *supra* note 231, at 212.

296. *LaGrand*, ¶ 77 (reviewing the language of Article 36(1)(b) and (c), the ICJ found that “[t]he clarity of these provisions, viewed in their context, admits of no doubt,” and that “the Court must apply these as they stand.” Using this text, the ICJ found the United States in violation of the Article 36(1)(b) because it denied Germany the right under Article 36(1)(a) and (c) to exercise its rights). The Court, though, failed to rule on whether the individual rights of the LaGrands rose to the level of human rights. The Court also failed to rule that a violation of the Vienna Convention rose to the level of a due process violation, as the Inter-American Court of Human Rights had done in its 1999 Advisory Opinion. See Advisory Opinion, *supra* note 191; *LaGrand*, ¶ 78.

297. *Breard*, 523 U.S. at 375. The ICJ noted that

It is immaterial . . . whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen.

Oxman & Aceves, *supra* note 231, at 213. This is in marked contrast to the Fifth Circuit decision in *Faulder v. Johnson*, where the court ruled that “[w]hile we in no way approve of Texas’ failure to advise Faulder [of his consular rights], 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.” 81 F.3d 515, 520 (5th Cir. 1996).

298. *LaGrand*, ¶¶ 90-91 (finding that the ICJ specifically addressed whether the United States had violated Article 36(2) through the application of procedural default. The Court distinguished between the ability of the United States to use procedural default and its specific application in the *LaGrand* case). The Court ruled that application of procedural default prevented the LaGrand brothers from challenging their convictions on the basis of a Vienna Convention violation. The Court held that by the express terms of Article 36(2), the application of procedural default prevented “full effect to be given to the purposes for which the rights accorded under this article are intended.” See Oxman & Aceves, *supra* note 231, at 213.

299. *LaGrand*, ¶ 110 (acknowledging that the ICJ had never been asked to rule on the legal effect of provisional measures issued under Article 41 of the ICJ Statute. The Court

Lastly, the ICJ held that a mere apology to Germany was insufficient to stop the possibility of future abuses by the United States.³⁰⁰

Valdez challenged the court to follow the dictates of the ICJ decision based on several grounds.³⁰¹ First, the United States signed and ratified the Optional Protocol to the Vienna Convention, as well as the U.N. Charter acknowledging compliance with decisions of the ICJ. Second, the court is bound by *stare decisis* and thus, must follow the ruling in *LaGrand*. Third, the doctrine of issue preclusion makes the *LaGrand* decision binding because the United States had ample opportunity to develop its defense in that case. Fourth, under the rule of *pacta sunt servanda*,³⁰² the United States is bound to follow the law of treaties. Lastly, to apply the holding of the ICJ to some foreign nationals, and not others, would violate the Equal Protection clause of the U.S. Constitution. The Government of Mexico, in its *amicus* brief, further noted that the Oklahoma Court could not apply the rule of procedural default because its application would violate the Supremacy Clause.³⁰³

The court was not persuaded by Valdez's argument proscribing the use of procedural default, but rather relied upon the Supreme Court's *Breard* decision, which stated, "it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."³⁰⁴ The court also ruled that the

noted some disparity in the text of Article 41, but found that the object and purpose of the Statute was that provisional measures are binding, inasmuch as the power in question is based on necessity. In regard to its Provisional Measure of March 3, 1999, the Court ruled that the United States had only met one of the provisional measures in the March Order. The United States was mandated "to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision" of the ICJ in the matter.). The United States and the State of Arizona failed to heed the ICJ order. Secondly, the United States was required to transmit the Order to the Governor of the State of Arizona. The U.S. did send the Order to the Governor, but did so with no comment or plea to follow the Order. See Oxman & Aceves, *supra* note 231, at 213-14.

300. *LaGrand*, ¶¶ 124-125 (acknowledging that the United States was attempting to meet its obligations under Article 36 by a comprehensive program to inform state and federal agencies of their obligations towards foreign nationals who have been detained. The Court took a more stringent stand in regard to future cases involving German nationals. If the United States fails in the future to provide consular notification to German nationals, "it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention."). The Court recognized a remedy, but left open to the United States how it would achieve this process-based remedy. See Oxman & Aceves, *supra* note 231, at 215.

301. *Valdez*, 46 P.3d at 707.

302. The maxim that agreements between parties to a contract must be obeyed.

303. *Valdez*, 46 P.3d at 708.

304. *Breard*, 523 U.S. at 375.

legal basis for Valdez's claim was available to him from the time of his arrest and that he gave no reasonable explanation for his failure to assert his claim earlier.³⁰⁵

While unwilling to forego the use of procedural default, the court was convinced that newly acquired evidence of Valdez's brain damage was sufficient to establish that his trial attorney was ineffective in presenting mitigating evidence at the sentencing phase of the trial.³⁰⁶ The court exercised its power to "grant relief when an error . . . has resulted in a miscarriage of justice."³⁰⁷ Mr. Valdez's case marked the first time a court has granted relief to a death row inmate who filed a successive, post-conviction relief application.³⁰⁸

This case is truly remarkable in that the court recognized the vital role of the Mexican government through the MCLAP, and the Mexican consular posts noting, "[w]e cannot ignore the significance and importance of the factual evidence discovered with the assistance of the Mexican consulate. It is evident . . . Mexico would have intervened in the case, assisted with Petitioner's defense, and provided resources to ensure that he received a fair trial and sentencing hearing."³⁰⁹

C. The Case of Javier Suárez Medina

Javier Suárez Medina was convicted of capital murder for the death of Lawrence Cadena, an undercover Dallas policeman, who died in an aborted drug deal.³¹⁰ Suárez was never informed of his right to contact the Mexican consulate. He was sentenced to death in large part due to the testimony at sentencing of a Dallas resident, who claimed that Suárez had shot he and his wife during a robbery in 1987.³¹¹ This testimony was sufficient to prove Suárez would be a future danger to society, a requisite element of the Texas death penalty statute.³¹²

The Mexican government, as it has done so many times previously, put significant diplomatic pressure on the State of Texas and used every legal option available to prevent the impending execution of Suárez. His attempts at relief in

305. *Valdez*, 46 P.3d at 708.

306. *Id.* at 710.

307. *Id.*

308. MCLAP, *supra* note 254.

309. *Valdez*, 46 P.3d at 710. The comments of the Court of Criminal Appeals of Oklahoma contrast to those stated by the Fifth Circuit in the case of Stanley Faulder, where it ruled that any assistance the Canadian consular post would have provided would have been merely cumulative and any violation was merely harmless error. *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996).

310. Karen Brooks, *Fox Asks Perry to Suspend Execution*, FORT WORTH STAR-TELEGRAM, Aug. 13, 2002, available at 2002 WL 24694386.

311. *Id.*

312. *Id.*

the Texas courts were unsuccessful, despite a plea to be granted a reprieve while he filed his case with the International Court of Justice.³¹³

Mexican President Vicente Fox pled with Texas Governor Rick Perry to suspend the death sentence of Suárez. Fox noted that “[b]y neglecting to notify [Suárez] of his prerogative to communicate with the Consulate of Mexico at the moment of his arrest, the Texas authorities flagrantly violated the rights conferred on Mr. Suárez Medina by Article 36 of the Vienna Convention.”³¹⁴ Domestically, the Mexican Congress took the unusual step of passing a joint resolution asking Governor Perry and President Bush to intervene in the case and reduce Suárez’s sentence to life.³¹⁵ Members of all the nation’s political parties signed the resolution: the National Action Party (PAN), the Institutional Revolutionary Party (PRI), the Green Party, and the Democratic Revolutionary Party (PRD).³¹⁶ Bilaterally, the Mexican government pressured the U.S. Department of State demanding that it comply with its international obligations under the Vienna Convention.³¹⁷ Internationally, Mexico adopted the Optional Protocol to the Vienna Convention, a move aimed at allowing Mexico to directly petition the International Court of Justice in future cases.³¹⁸ This allowed Mexico the opportunity to bring actions on behalf of its foreign nationals in front of the International Court of Justice as both Germany and Paraguay had done.³¹⁹

The Texas Board of Pardons and Paroles unanimously rejected a plea to stop Suárez’s execution, and Governor Rick Perry also refused to grant Suárez a thirty-day reprieve.³²⁰ The Mexican government responded by mounting an international effort to bolster support for halting the execution of Suárez. The U.N. High Commissioner of Human Rights, Mary Robinson, joined the effort urging Secretary of State Colin Powell to intervene on behalf of Suárez.³²¹ Mexico, supported by Argentina, Brazil, Chile, Colombia, El Salvador, Guatemala, Honduras, Panama, Paraguay, Uruguay, Venezuela, Poland, and Spain, intervened as *amicus curiae* in support of the argument that the United States violated the Vienna Convention and executing Suárez would violate the Provisional Order of the Inter-American Court on Human Rights and the ICJ’s

313. *Id.*

314. *Id.*

315. *Id.*

316. Brooks, *supra* note 310.

317. Press Release, Foreign Secretariat, Mexico Intensifies its Efforts to Commute the Death Sentence of Javier Suarez Medina (July 2, 2002) [hereinafter Press Release] (on file with author).

318. Foreign Nationals, *supra* note 193; *see also* Optional Protocol, *supra* note 194.

319. Optional Protocol, *supra* note 194.

320. John Moritz, *Parole Board Rejects Mexican Inmate’s Plea*, FORT WORTH STAR-TELEGRAM, Aug. 14, 2002, at B, available at 2002 WL 24694518.

321. Jeff Franks, *Texas Set to Execute Mexican for Murder of Cop*, at <http://story.new.yahoo.com> (last visited Aug. 14, 2002) (on file with author).

LaGrand decision.³²² On August 14, 2002, only ninety minutes before Suárez' scheduled execution, the United States Supreme Court refused to hear his appeal.³²³ Speaking in English and Spanish, Javier Suárez Medina thanked the Mexican government for its unwavering support and asked forgiveness from the family of slain officer Cadena.³²⁴ As the lethal injection was administered, Suárez quietly sang the hymn "Amazing Grace" and was pronounced dead nine minutes later.³²⁵

The execution of Javier Suárez Medina did not provoke the same level of reaction in Mexico as past executions had, evidenced by the fact that only four people were seen protesting in front of the United States Embassy.³²⁶ While the reaction among the Mexican people was subdued, the reaction of Mexican President Vicente Fox sent a much more powerful statement to the United States.

Expressing his anger over the execution of Suárez, Vicente Fox cancelled a scheduled trip to meet with Texas Governor Rick Perry and President Bush at the President's Crawford ranch.³²⁷ In a statement issued by Fox, he criticized Texas officials for ignoring the pleas of the international community and stated that his decision to cancel the trip was "an unequivocal signal of rejection of the execution," and it would be "inappropriate, in these lamentable circumstances, to go ahead with the visit to Texas."³²⁸ He further noted that the cancellation "contributes to strengthening respect among all nations for the norms of international law."³²⁹

Suárez' execution further strained already tenuous relations between Mexico and the United States. While Fox is viewed as the most pro-U.S. president in Mexican history, his attempts at comprehensive immigration reform were snubbed in light of the September 11th terrorist attacks.³³⁰ The execution may have also cast a pall over the State of Texas as it bid for the 2007 Pan

322. Press Release, *supra* note 317.

323. *Suarez Medina v. Texas*, 123 S.Ct. 14 (2002) (mem.).

324. *Convicted Killer Executed in Texas: Case Sore Point in Mexico-U.S. Relations*, DETROIT FREE PRESS, Aug. 15, 2002, available at 2002 WL 22379848.

325. Michael Graczyk, *Texas Executes Man Despite Pleas*, at <http://dailynews.yahoo.com> (last visited Aug. 14, 2002) (on file with author). Suárez's execution ended a tumultuous stay on death row that resulted in thirteen scheduled executions, one of which was set for September 16th, Mexican Independence Day. See Villafranca, *supra* note 88.

326. Will Weissert, *Mexican Leader Cancels Bush Meeting*, AP ONLINE, Aug. 15, 2002, available at 2002 WL 25139687.

327. *Id.*

328. *Id.*

329. Helen Thomas, *U.S. Must Not Act Like a Rogue Superpower*, TIMES UNION, Aug. 27, 2002, at A9. During a September trip to Nigeria, Fox took a forceful stand against an impending execution of a thirty year-old woman accused of having a child out of wedlock. See *Mexico's President to Fight Nigerian Death Penalty*, at <http://www.cnn.com> (last visited Aug. 28, 2002) (on file with author).

330. Mark Stevenson, *Mexican Leader Cancels Trip to Texas*, AP ONLINE, Aug. 15, 2002, available at 2002 WL 25139672.

American Games. The City of San Antonio was forced to try and build a coalition of Central and South American delegates in the weeks following the Suárez execution.³³¹ Rio De Janeiro was chosen to host the Games and some speculation centered on whether the execution proved the deciding factor in that decision.³³²

V. RECIPROCITY REVISITED

It has been argued that the key to understanding whether a nation will comply with international law is to understand the transnational legal process “whereby an international law rule is interpreted through the interaction of transnational actors . . . then internalized into a nation’s domestic legal system.”³³³ Obedience to international law arises when a given nation “adopts rule-induced behavior because the party has internalized the norm and incorporated it into its own internal value system.”³³⁴ There are four kinds of relationships between given international norms and the observation of these norms: coincidence, conformity, compliance, and obedience. Within these norms may occur three distinct shifts—from coincidence to conformity, conformity to compliance, and eventually compliance to obedience.³³⁵

The first shift is from a “grudging, one-time acceptance to habitual obedience.”³³⁶ In this regard, the United States has made strides in attempting to conform to the Vienna Convention, but it has failed to take adequate procedural steps to ensure total compliance.³³⁷ An international norm, such as consular

331. David King, *Pan Am Race Too Close to Call*, SAN ANTONIO EXPRESS-NEWS, Aug. 21, 2002, at 1C, available at 2002 WL 23794950.

332. *U.S., Mexico at Crossroads*, AUSTIN AM.-STATESMAN, Aug. 31, 2002, at A16, available at 2002 WL 24076911.

333. Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 625 (1998).

334. *Id.* at 627; see also Sandra Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 LEIDEN J. INT’L L. 367 (2002) (arguing that international law has had a measurable effect on the judgment of key decision-makers such as judges, juries, governors and parole boards in capital cases). Babcock uses Harold Koh’s transnational legal process framework to argue that transnational legal actors, e.g., Mexico, Germany, and Paraguay have largely succeeded in “establishing an international rule of law prohibiting the execution of foreign nationals who have been deprived of their rights to consular notification and access.” *Id.*

335. Koh, *supra* note 333.

336. *Id.* at 628.

337. See *Foreign Nationals*, *supra* note 193. The Chicago Police Department has taken steps to notify foreign nationals of their right to contact a consular post. The Department has posted signs notifying arrested foreign nationals of their right to contact their consular post. The Department has printed notices in Spanish and Polish with the telephone numbers of the consular posts in Chicago. California became the first state to pass legislation mandating full compliance with the consular notification provisions of the

notification, will only transform from an “external sanction” to an “internal imperative”³³⁸ when the United States government takes the necessary steps to mandate action on the part of the states. This transition has not taken place in the United States to date. The *Suárez* case indicates that the United States has yet to internalize its international obligations and has not even achieved the initial shift towards obedience. Likewise, the United States Supreme Court, as evidenced in the *Suárez* case, has failed to move the United States towards compliance because it has refused to address the conflicting provisions of the *LaGrand* decision and its own jurisprudence. The *LaGrand* decision is “qualitatively different from [an advisory opinion or a provisional measure and] . . . unquestionably binds the United States as a party to the case,”³³⁹ and the Court’s reluctance to recognize this signals a contempt of international law and an overt failure to internalize normative behavior.

The second shift towards obedience is from the “instrumental to the normative.”³⁴⁰ Compliance with an international norm moves from calculated compliance to incorporating a rule as part of a “value set.”³⁴¹ The United States Supreme Court, the federal government, and the individual states all seem to recognize the obligatory nature of the Vienna Convention and certainly do not advocate non-compliance. As the *Breard*, *LaGrand*, and *Suárez* cases all indicate, however, the states often make decisions that run counter to the federal government’s obligations under federal law. The governors of Virginia, Arizona, and Texas all faced the decision of whether to uphold state law or the amorphous provisions of a little understood international treaty. The decision to uphold state law and the will of each governor’s constituency is hardly unexpected. Even if the federal government attempted to force the states to follow the provisions of the ICJ *LaGrand* decision, there is no consensus on how it could be done. It has been speculated that the federal government would be forced to ask a federal judge to issue an injunction on the states from executing a foreign national.³⁴² For now, the Supreme Court has shown its continued deference to state law and domestic

Vienna Convention. Law enforcement agencies are now required to ensure that policies, procedures, and training manuals incorporate language based on the provisions of the Vienna Convention. The legislation also requires every peace officer, upon the arrest and booking or detaining of a foreign national, to advise the foreign national that he or she has a right to communicate with a consular representative. Notification of consular rights must take place within two hours of the detention. The United States Department of State has likewise worked to ensure compliance by issuing wallet-sized notification cards for police officers, which are to be sent to all state attorneys-general. The State Department also held a seminar on consular rights for law enforcement personnel in Los Angeles in 2001. See Jean Guccione, *On the Law—New Weapon in Defense: Foreign Consulates*, L.A. TIMES, Nov. 16, 2001, at B2, available at 2001 WL 28929308.

338. Koh, *supra* note 333, at 628.

339. Oxman & Aceves, *supra* note 231, at 218.

340. Koh, *supra* note 333, at 628.

341. *Id.*

342. LaFay, *supra* note 225.

procedural bars “rais[ing] doubts as to the possibility of ever attaining consistent enforcement within the states of Article 36.”³⁴³

The final shift that takes place is from coercive means to constitutive means of enforcement of international norms. “Coercive” means an attempt to force change, while constitutive means seek to “shape and transform personal identity.”³⁴⁴ The Mexican government has marshaled the greatest effort at effecting compliance through coercive action. Its interventionist model has pushed the Vienna Convention issue to the forefront of legal debate. This is evidenced by its recent decision to appeal to the International Court of Justice to stop the execution of all fifty-one Mexican nationals facing death sentences in the United States.³⁴⁵ This extraordinary move by the Mexican government illustrates the extent to which the Mexican government supports its condemned nationals. While it has been argued that coercion is not nearly as effective as self-enforcement, coercion has been and remains a necessary force in altering the continued abuses of the United States.³⁴⁶ “Internalized compliance” with international law will only be achieved by continued international pressure.³⁴⁷

The combined force of unfettered freedom on the part of individual states to uphold their own laws, the federal government’s impotence to control state action, and the judiciary’s unwillingness to recognize the legitimate parity of international treaty obligations, have placed “all-too-effective barriers against penetration by international normativity.”³⁴⁸

While the Mexican government may never single-handedly force the United States into obedience with international law, its continued efforts are placing increased pressure on the United States to address its abuses of the Vienna Convention. The International Court of Justice has recently issued a unanimous Provisional Measures Order requiring that the United States *shall* take all measures necessary to prevent the execution of three Mexican nationals.³⁴⁹ This language replaces the traditional permissive language that a state “*should* take all measures at its disposal,” creating an unequivocal binding standard. The ICJ

343. *Id.*

344. Koh, *supra* note 333, at 628.

345. Anthony Deutsch, ASSOCIATED PRESS (Jan. 21, 2003), at <http://story.news.yahoo.com> (discussing how Mexico initially sought to spare 54 citizens from imposed death sentences, but Illinois Governor Ryan commuted the sentences of three Mexican nationals and all others on Illinois’ death row. Mexico’s suit covers cases in California, Texas, Arizona, Arkansas, Florida, Nevada, Ohio, Oklahoma, and Oregon).

346. Koh, *supra* note 333, at 629-31.

347. *Id.* at 629.

348. See Thomas M. Franck, *Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh’s Optimism*, 35 HOUS. L. REV. 683, 689 (1998).

349. Nicki Tait, *World Court Tells U.S. to Stay Executions*, FIN. TIMES, Feb. 5, 2003, at <http://news.ft.com/world/us> (last visited Feb. 5, 2003) (explaining that the Mexican nationals are Cesar Roberto Fierro Reyna (Texas prisoner), Roberto Moreno Ramos (Texas prisoner), and Osvaldo Torres Aguilera (Oklahoma prisoner)).

issued the Order for three condemned Mexican nationals because they have exhausted their appeals and are facing impending execution.³⁵⁰ Gene Acuña, a spokesman for Texas Governor Rick Perry, stated that “according to our reading of the law and the treaty, there is no authority for the federal government or this World Court to prohibit Texas from exercising the laws passed by our legislature.”³⁵¹ Rick Perry, the Governor of Texas, has since stated that he believes that state and federal courts provide adequate safeguards and he sees no reason to postpone the executions as a result of the ICJ decision.³⁵² In a more pronounced judgment, Elihu Lauterpacht, an attorney representing the United States, simply called the Mexican effort a “publicity stunt” and questions whether the State Department would have the power to stop a state from carrying out an execution.³⁵³ Attorneys representing Mexico counter that the Supremacy Clause mandates that the states are bound by international law.³⁵⁴

Whether the United States will comply with any decision of the ICJ remains to be seen. Nevertheless, this is an extraordinary event because the ICJ has issued a mandatory provisional order, with explicit language that will force the United States to face its continued noncompliance with international law. This decision will force the United States government to face the continued difficulty in persuading individual states to comply with international treaty obligations. Absent compelled uniformity on the part of the states, the United States will continue to be subject to international litigation surrounding abuses of the Vienna Convention.

But history has shown the United States ineffectual in forcing individual states to comply with international treaty obligations. Continued intransigence on this issue may prove detrimental to the United States. Failure to heed the legitimacy of reciprocity threatens the safety of United States citizens abroad and could hamper attempts to build a solid coalition in the war on global terrorism.

Whether Mexico will prevail on behalf of its condemned nationals is debatable, but the fact remains that the Mexican government has fastidiously and aggressively assisted its foreign nationals facing death sentences in the United States.³⁵⁵ In so doing, the Mexican government’s continued commitment reflects

350. *Id.*

351. *Texas to Ignore Court Order to Stay Executions*, L.A. TIMES, Feb. 7, 2003, at A33, available at 2003 WL 2383552.

352. *World Court Complaint Should at Least Be Heard*, AUSTIN-AM. STATESMAN, Feb. 7, 2003, at A16, available at 2003 WL 3009244.

353. Tom Beyerlein, *Ruling May Stay Ohio Execution*, DAYTON DAILY NEWS, Feb. 7, 2003, at B1, available at 2003 WL 5761636.

354. Marcia Coyle, *A Death Penalty Duel*, NAT’L L.J., Feb. 17, 2003 (on file with author).

355. While the efforts of the Mexican government, on behalf of its condemned foreign nationals, have throughout this Note been described as “praiseworthy” and “unprecedented,” it is important to understand, though largely outside the scope of this Note, that Mexico faces severe problems associated with its own justice system. It may be

the sentiment that its cause is a “just cause” based on its deepest values and humanistic traditions.³⁵⁶



viewed as ironic that the Mexican government has spent such considerable resources defending its foreign nationals in the United States, while failing to substantively address its own misgivings. Evidenced by the unregulated physical abuses suffered by youth throughout the Mexican juvenile detention centers, the Mexican government must address its own abuses before the international community will regard Mexico's death penalty position as justifiable. President Vicente Fox has vowed to correct the institutional abuses wrought by seventy-one years of one-party rule in Mexico. His ardent stance against the death penalty, while laudable, will only shed the veil of political posturing once reformation of the justice system in Mexico is underway. See Mary Jordan, *Justice at a Price*, WASH. POST, Mar. 25, 2002, at A01, available at 2002 WL 17585437; Mary Jordan, *Mexico's Children Suffer in "Little Jails,"* WASH. POST, Nov. 4, 2002, at A01, available at 2002 WL 101782262; see also Kevin Sullivan & Mary Jordan, *Disparate Justice Imprisons Mexico's Poor*, WASH. POST, July 6, 2002, at A01, available at 2002 WL 23851725.

356. *Government of Mexico Awarded for its Vigorous Efforts to Defend Mexicans Facing the Death Penalty*, U.S. NEWSWIRE, Oct. 25, 2002, available at 2002 WL 101757836 (finding that the Southern Center for Human Rights honored the Mexican government for its continued work in protecting foreign nationals facing death sentences).