The Unreality of International Law in the United States and the *LaGrand* Case

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The Judgment of the International Court of Justice (ICJ) in the *LaGrand*[1] case has not to date resulted in a discernible improvement in United States compliance with the Vienna Convention on Consular Relations.[2] The gross deficiencies of U.S. practice regarding consular access under Article 36 of the Convention are a sad but telling reflection of the unreality of international law in the United States today. The lessons from *LaGrand* are varied and important.

First, consular access is an individual right. The *LaGrand* judgment affirms that the right to consular notification and access guaranteed by Article 36(1)(b) of the Convention is an individual right of detained persons,[3] which may be asserted by their state of nationality in proceedings under the Optional Protocol to the Convention.[4] The United States had argued that "rights of consular notification and access under the Vienna Convention are rights of States, and not of individuals, even though these rights may benefit individuals by permitting States to offer them consular assistance."[5]

As the ICJ noted, the language of Article 36(1)(b) could hardly be clearer in its conferral of rights on detained individuals. Significantly, this subparagraph ends with the following language: "the said authorities shall inform the person concerned without delay of *his rights* under this

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1. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. (June 27), *available at* http://www.icj-cij.org.

2. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

3. Article 36(1) of the Vienna Convention provides:

> With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
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> ....
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> (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 be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

Id. art. 36(1).

4. *LaGrand*, ¶ 77.

5. *Id.* ¶ 76.

subparagraph." Moreover, under Article 36(1)(c), the sending State's right to provide consular assistance to the detained person may not be exercised if he expressly opposes such action. The clarity of these provisions, viewed in their context, admits no doubt. [6] That Article 36(1)(b) has been so systematically misinterpreted in the United States is troubling, and reflective of a resistance to view treaties as a meaningful source of legal constraint on the conduct of domestic officials.

Second, the judgment provided a rare instance in which the treaty obligations of the United States, affecting individual rights, were subject to binding international adjudication. Rights under such ratified treaties as the International Covenant on Civil and Political Rights (ICCPR)[7] and the 1967 Protocol relating to the Status of Refugees[8] are regularly violated by the United States, without effective redress, because of peculiar but dominant contemporary views of treaties held by domestic authorities responsible for their implementation.[9] *LaGrand* reveals that U.S. disregard of individual treaty rights is not simply a problem of a lack of legally binding international mechanisms for interpretation and enforcement of treaties.[10] Even where an authoritative international body conclusively finds that the United States has violated a treaty, domestic bodies remain unruffled and complacent. A deeply ingrained pattern of treaty violations proceeds apace. Violation of the Vienna Convention is costless to those committing the violations. The judiciary continues to ignore violations of the Vienna Convention, as if the ICJ had not spoken.

Note, for example, the eight decisions rendered by federal courts of appeals between July 2001 and March 2002 concerning violations of the right of consular notification and access.[11] In all eight cases, clear and uncontested violations of Article 36(1)(b) of the Vienna Convention were committed by federal law enforcement and detention officials.[12] In none of the cases did the court provide any remedy for these violations. Only one of the opinions even mentions the ICJ's *LaGrand* Judgment.[13]

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6. *Id.* ¶ 77.

7. International Convention on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

8. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

9. Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313 (2001).

10. For example, failure to comply with the ICCPR is sometimes attributed to the extensive reservations, understandings, and declarations the United States entered with its ratification, as well as to the U.S. failure to ratify the Optional Protocol to the ICCPR.

11. U.S. v. Dixon, No. 01-4298, 2002 U.S. App. LEXIS 2402 (4th Cir. Feb. 13, 2002); U.S. v. Cowo, No. 00-1499, 2001 U.S. App. LEXIS 24963 (1st Cir. Nov. 20, 2001); U.S. v. Carrillo and Soto, 269 F.3d 761 (7th Cir. 2001); U.S. v. Minjares-Alvarez, 264 F.3d 980 (10th Cir. 2001); U.S. v. Dwyer, No. 99-2483, 2001 U.S. App. LEXIS 16142 (6th Cir. July 16, 2001); U.S. v. Emuegbunam, 268 F.3d 377 (6th Cir. 2001); U.S. v. Felix-Felix, 275 F.3d 627 (7th Cir. 2001); U.S. v. Bustos de la Pava, 268 F.3d 157 (2d Cir. 2001).

12. That these eight cases all involved violations by federal officials underscores the fact that *LaGrand* is not simply a problem of federalism. Compliance with *LaGrand* requires more than modifying the procedural default rules that bar federal habeas corpus relief for state prisoners situated as the LaGrands were.

13. *Minjares-Alvarez*, 264 F.3d at 987 n.3 (rejecting relevance of *LaGrand* because the ICJ

Writing one month after the ICJ's judgment in *LaGrand*, the Tenth Circuit opined that "it remains an open question whether the Vienna Convention gives rise to any individually enforceable rights."[14] In dicta, the Second Circuit stated four months after the *LaGrand* judgment that the Vienna Convention creates no individual rights.[15] In several cases, courts found Vienna Convention claims to be foreclosed by the Circuit's pre-*LaGrand* precedents, holding either that the Convention confers no rights to individuals or that the remedy sought (suppression or dismissal of indictment) is unavailable.[16] The Courts of Appeals have continued to rely on pre-*LaGrand* interpretations by the Department of State that "the Vienna Convention does not create individual rights."[17] The cases betray a deep skepticism of treaties as legal, rather than political, instruments.[18]

The United States voluntarily accepted the mechanism of the Optional Protocol to resolve disputes over the interpretation of the Vienna Convention. The ICJ has spoken, quite clearly, that Article 36(1)(b) confers individual rights. Yet U.S. courts continue to rely exclusively on their own contrary precedent and the views of the Department of State that the ICJ rejected in its *LaGrand* decision.

Third, the ICJ was curiously diffident on the question of whether the right to consular notification and access is a human right. Having found that Article 36(1)(b) creates an individual right, the court reserved the issue pressed by Germany that this right "has today assumed the character of a human right."[19] Unmentioned in the *LaGrand* Judgment is the well-reasoned Advisory Opinion of the Inter-American Court of Human Rights on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*.[20] The Inter-American Court's authority to interpret

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did not specifically consider the applicability of the exclusionary rule to violations of the Vienna Convention).

14. *Id.* at 986.

15. *Bustos de la Pava*, 268 F.3d at 164-166, 167 (Sack, J., concurring). ("Although this statement and the corresponding discussion, based on minimal briefing, seem to me clearly to be dicta, I see no reason to decide so broad and potentially sensitive an issue of international law.").

16. *Felix-Felix*, 275 F.3d at 635; *Cowo*, 2001 U.S. App. LEXIS 24963, at *2; *Carrillo and Soto*, 269 F.3d at 771; *Dwyer*, 2001 U.S. App. LEXIS 16142, at *7.

17. U.S. v. Emuegbunam, 268 F.3d 377, 392 (6th Cir. 2001); U.S. v. Bustos de la Pava, 268 F.3d 157, 165 n.6 (2d Cir. 2001) (relying upon Department of State argument, rejected by the ICJ in *LaGrand*, that preambular language in the Vienna Convention relating to immunities of consuls indicates that Article 36(1)(b) creates no individual rights in detainees).

18. *Emuegbunam*, 268 F.3d at 389 ("[C]ourts presume that the rights created by an international treaty belong to a state and that a private individual cannot enforce them.").

19. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. ¶ 78 (June 27), *available at* http://www.icj-cij.org. In oral pleadings before the ICJ, Dr. Bruno Simma stated that "the right to information under Article 36 of the Vienna Convention constitutes an individual, indeed, a human right." Verbatim Record, Lagrand Case (F.R.G. v. U.S.), ICJ Doc. CR 2000/26, ¶ 1 (Nov. 13, 2000), *available at* http://www.icj-cij.org. He further submitted that "in the light of the development of international human rights law subsequent to the conclusion of the Vienna Convention in 1963, Article 36 has assumed the character of a human right pertaining to foreigners." *Id.* ¶ 7. Referring to the Advisory Opinion of the Inter-American Court of Human Rights, *infra* note 20, Dr. Simma urged the ICJ to conclude that "Article 36 constitutes an individual right of foreign nationals and is to be regarded as a human right of aliens." *Id.* ¶ 14.

20. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. C.H.R. (ser. A) No. 16 (1999), ¶ 141.

the Vienna Convention hinged on whether the Convention contains provisions "concerning the protection of human rights in the American States,"[21] and thus it was far from diffident about the human rights implications of denying consular access to foreign criminal suspects. The Inter-American Court expressed the view, *inter alia*, that the phrase "without delay" in Article 36(1)(b) requires notification to a detainee "at the time of his arrest or at least before he makes his first statement before the authorities"; that the individual's rights are not contingent on state protest; that violations of Article 36(1)(b) are prejudicial to due process and that death sentences imposed on victims who have been denied consular access may violate the prohibition on arbitrary deprivation of life in Article 4 of the American Convention on Human Rights and Article 6 of the International Covenant on Civil and Political Rights; and that federal states have the same obligation as unitary states to respect Article 36(1)(b).[22]

Fourth, the ICJ clarified that provisional measures indicated under Article 41 of its Statute impose a binding legal obligation. Twice the United States has executed foreigners in the face of Article 41 provisional measures by the ICJ requesting a stay of execution until the condemned men's rights under the Vienna Convention could be adjudicated.[23] The United States exploited the ambiguity in the legal character of provisional measures, leading the ICJ to analyze at length the nature of its Article 41 authority.[24]

The text of Article 41 is susceptible to differing interpretations concerning whether the indication of provisional measures creates a binding legal obligation. The terminology ("indicate," "ought to be taken," and "suggested") is not unambiguously expressive of prescriptive intent. Indeed, the United States argued with some force that "the preponderant view is that an indication of interim measures [by the ICJ] is not binding."[25] The implications of the ICJ's bold decision to claim binding legal effect for provisional measures indicated under Article 41 remain to be seen.

The ICJ also found that "the various competent United States authorities failed to take all the steps they could have taken to give effect to the Court's Order."[26] The Department of State had simply transmitted the ICJ Order of March 3, 1999 to the Governor of Arizona, who determined to reject the recommendation of the Arizona Board of Clemency to grant a stay of

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21. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, article 64(1), 1144 U.N.T.S. 123.

22. Advisory Opinion OC-16/99, *supra* note 20, ¶ 141.

23. See Federal Republic of Germany v. United States, 526 U.S. 111 (1999); Breard v. Greene, 523 U.S. 371 (1998); Statute of the International Court of Justice, June 26, 1945, art. 41, 59 Stat. 1055, 1061.

24. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. ¶¶ 92-110 (June 27), *available at* http://www.icj-cij.org.

25. Counter-Memorial of the United States of America (F.R.G. v. U.S.), I.C.J. Pleadings (Lagrand Case) ¶ 139 (March 27, 2000), *available at* http://www.icj-cij.org (quoting L. Collins, *Provisional and Protective Measures in International Litigation*, *in* RECUEIL DES COURS/COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1992, at 219 (1993)).

26. *LaGrand*, ¶ 115.

execution to Walter LaGrand.[27] In response to Germany's petition for a stay of Walter LaGrand's execution, the Solicitor General argued before the Supreme Court that provisional measures ordered by the ICJ are not legally binding.[28] This categorical statement went beyond the representations made to the Supreme Court in the *Breard* case concerning the "substantial disagreement among jurists as to whether an ICJ order indicating provisional measures is binding."[29]

This aspect of the *LaGrand* judgment may have the most profound implications. William Aceves has already identified three possible consequences: (1) that a breach of an obligation to comply with provisional measures could be found, even though the ICJ ultimately determines that it lacked jurisdiction over the dispute; (2) that, for this reason, the ICJ may hesitate to indicate provisional measures in response to *ex parte* requests and under the time pressures presented in the *LaGrand* case; and (3) that the poor record of state compliance with provisional measures may persist even after the clarification of their binding legal nature, ultimately undermining the ICJ's authority.[30] In addition, another possible result of the decision may be a general reluctance of states to seek provisional measures and for the ICJ to indicate them, because of their significant legal consequences, even where time permits greater deliberation.

Fifth, the ICJ largely leaves open the issue of the proper remedy for a violation of Article 36(1)(b). Because the individual right is to notification and access, and not to consular assistance, the harm caused by the treaty violation in any particular case is often indeterminable. Concerns about causation and harm in part underlie the reluctance of U.S. courts to order suppression of evidence, dismissal of indictment, or reversal of convictions as a remedy for undisputed violations of the Vienna Convention. The United States argued that an apology and its program disseminating information about the Vienna Convention should suffice.[31] The ICJ ventured beyond this position, but in limited and indefinite directions:

> The Court considers in this respect that if the United States should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violations of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.[32]

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27. *Id.* ¶¶ 112-113.
28. *Id.* ¶ 33.
29. *Id.* ¶ 112 (quoting Brief for the United States as Amicus Curiae, at 49, Breard v. Greene, 523 U.S. 371 (1998) (No. 97-1390)).
30. William Aceves, *International Decisions:* LaGrand, 96 AM. J. INT'L L. 210, 217-218 (2002).
31. *LaGrand*, ¶¶ 117-127.
32. *Id.* ¶ 125.

The meanings of "prolonged detention" and "severe penalties" are as indeterminate as the resulting obligation to "allow the review and reconsideration" of convictions and sentences. The way in which the US will fulfill this obligation is left open to domestic determination.

The failure of the ICJ to specify the mechanisms for domestic "review and reconsideration" in cases involving violations of Article 36(1)(b) can be defended as an appropriate accommodation of permissible variations among national criminal justice systems and as deference to national authorities' better grasp of remedial realities. However, the ICJ's failure to specify the precise remedial action that must be taken for proven violations of Article 36(1)(b) leaves U.S. courts adrift and likely will result in more decisions similar to that of the Tenth Circuit in *Minjares-Alvarez* in which the court declined to provide a remedy for violations of international treaty law, rejecting the relevance of *LaGrand* because the ICJ did not specifically consider the applicability of the exclusionary rule to violations of the Vienna Convention.[33] The changes that must be made to the procedural default rules that barred federal habeas corpus relief for the LaGrand brothers and for Breard also remain uncertain.

Sixth, LaGrand *is, and at the same time is not, a death penalty case.* The Vienna Convention does not differentiate between the rights of capital defendants and other foreign detainees. Yet, there can be little doubt that the death sentences imposed on the LaGrand brothers strongly influenced Germany's willingness to bring proceedings against the United States. Even the Supreme Court has recognized that "the penalty of death is different in kind" and demands more rigorous procedural safeguards.[34] But, because the actual harm caused by a denial of consular notification is often difficult to determine even in a capital case, it is hard to tailor a remedy to the severity of the deprivation. Violations of consular notification and access are pervasive, and freeing all the victims is not a realistic form of reparation. The ICJ and the Inter-American Court limit their demands for vigorous remedial steps to cases in which severe criminal penalties have been imposed.[35] There is a certain justice in this resolution, but also an equal lack of logic.

Seventh, the reciprocity of treaty obligations provides insufficient leverage to induce U.S. compliance with certain treaty obligations. Human rights obligations *erga omnes* are frequently breached by states, with little fear of retribution. Although systematic U.S. noncompliance may endanger U.S.

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33. U.S. v. Minjares-Alvarez, 264 F.3d 980, 986-988 (10th Cir. 2001).

34. *E.g.*, Gregg v. Georgia, 428 U.S. 153, 188 (1978).

35. *LaGrand*, ¶125 (noting that an apology is insufficient where the victim of a violation of the Vienna Convention has been subjected to prolonged detention or severe criminal penalties); Advisory Opinion OC-16/99, *supra* note 20, ¶¶ 125-137 (noting that Mexico had framed its request for an Advisory Opinion in terms of the consequences of violations of the Vienna Convention in death penalty cases, and concluding that violations of Article 36(1)(b) are prejudicial to due process, that imposition of the death penalty after denial of consular notification and access is a violation of the right not to be arbitrarily deprived of life, and that such a violation gives rise to an international obligation to make reparations).

citizens abroad and create tensions in relations with other states, it is evident that this risk poses no real concern to officials in a position to affect U.S. practice regarding consular notification.