THE IMPACT OF ARTICL E 36 VIOLATIONS ON M EX 1 (O)32NSentences throughout the United
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Of course, Mexico cannot help its nationals if it is unaware they have been arrested or are facing capital charges. The law unequivocally requires arresting authorities to tell arrested foreign nationals without delay that they have a right to have their consulate notified of their arrest—and just as unequivocally requires the authorities to then notify the consulate if requested, also without delay. The harm flowing from failing to comply with consular notification requirements is clearly greatest in a capital case, where a governmental authority proposes to take the life of a foreign citizen and the failure to notify his consulate results in lost opportunities. And no one stands to benefit more from the proper exercise of consular notification than Mexican nationals, both because they are uniquely vulnerable to being discriminated against in every stage of capital prosecutions and because the assistance offered them by Mexico is especially far-reaching. However, U.S. authorities routinely violate these notification laws, with predictably disastrous results.

In this article

> inform the person concerned without delay of his rights under this subparagraph.[8]

Simply put, police must inform a foreign national of his right to contact his consulate for assistance, and shall inform the arrestee's consulate of the arrest if the arrestee asks them to. Both requirements must be met without delay. Article 36 also gives consular officers a right to visit, converse, and correspond with their detained nationals, and to arrange their legal representation.[9] It further requires that domestic laws and regulations give "full effect" to these rights.[10]

The treaty also includes a mechanism for signatory nations to resolve disputes between themselves, known as the Optional Protocol concerning the Compulsory Settlement of Disputes.[11] The Optional Protocol creates compulsory jurisdiction over any dispute concerning the treaty in the International Court of Justice ("ICJ").[12] The United States signed and ratified this optional protocol; however, in 2015, the United States notified the Secretary-General of the United Nations that it was withdrawing from that Optional Protocol, though not withdrawing from the VCCR.[13]

B. A Brief History of Noncompliance/Enforcement Issues

Arresting agencies throughout the United States have historically abysmally failed to notify foreign detainees of their right to consular notification.[14] On several occasions prior to the United States' withdrawal from the Optional Protocol, countries have taken their complaints about the repeated failures to the ICJ. For instance, in 1998, Paraguay instituted proceedings against the United States in the ICJ, complaining of a violation of Article 36 by authorities in the Commonwealth of Virginia, who detained and ultimately sentenced to death—

8. VCCR, supra note 4, art. 36(1)(b).

9. VCCR, supra note 4, art. 36(1)(c).

10. VCCR, supra note 4, art. 36(2).

11. Optional Protocol Concerning the Compulsory Settlement of Disputes art. I, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

12. Id.

13. Letter from Condeleeza Rice, U.S. Secretary of State, to Kofi Annan, Secretary-General of the United Nations (Mar. 7, 2005), https://www.state.gov/documents/organization/87288.pdf [https://perma.cc/6N87-3D3P].

14. See, e.g., Medellín v. Dretke (Medellín I), 544 U.S. 660, 674 (2005) (O'Connor, J., dissenting) ("[T]he individual States' (often confessed) noncompliance with the treaty has been a vexing problem."); see also Mark Warren, Consular Rights, Foreign Nationals and the Death Penalty, DEATH PENALTY INFO. CTR., https://d.479 0 Td (6)Tj52x(R)12.4 ((R)]TJ 0 (l)3-10.7 (S.4 (y)]14.2 ( )-13.8 (n)-14.1 (g-10

"actual prejudice to the defendant."[25] Importantly, the United States judiciary also had to review and reconsider the convictions and sentences as if procedural default rules did not exist.[26]

2. Sanchez-Llamas and Medellín

Following *Avena*, the procedurally advanced case of Ernesto Medellín Rojas, one of the fifty-one nationals in whose case the ICJ found a violation,[27] became the test case for how the United States judiciary would implement the ICJ's orders. Mr. Medellín unsuccessfully sought to enforce the ICJ ruling that mandated review and reconsideration in United States federal court; the Fifth Circuit denied relief,[28] and the United States Supreme Court granted certiorari.[29] Before the Supreme Court could consider the case, President George W. Bush issued an executive memorandum to the Attorney General, asserting federal constitutional authority to order states to review the convictions and sentences of foreign nationals whose Article 36 rights had been violated.[30] Medellín filed a new claim in state court on the basis of President Bush's memorandum, and the U.S. Supreme Court dismissed his existing case.[31]

25. Id. ¶ 121.

26. Id. ¶ 153(11).

27. The especially gruesome facts of Mr. Medellín's case provided Texas with ample opportunity to focus media and political attention away from the true issue: Texas's refusal to comply with a binding international obligation to provide review and reconsideration of Mr. Medellín's conviction and death sentence in light of the Article 36 violation, and the plethora of negative consequences to U.S. interests that would flow from that refusal.

state court dismissed Medellín's second appeal,[32] and again, the U.S. Supreme Court granted certiorari.[33]

business, military, diplomatic, religious, and other American interests that all recognize the critical importance of treaty compliance in general, and of Article 36 compliance specifically, have promoted federal implementation of the Avena judgment.[41]

made by now-President Donald Trump.[54] It is not simply race or foreignness, but specifically Mexican nationality targeted by this focused tirade. Such unfair

Latinos on the basis of their race.[62] And the Supreme Court has recognized that where broad discretion exists, "there is a unique opportunity for racial prejudice to operate."[63] But because of the virtually impossibly high evidentiary standards of proof imposed on defendants seeking to establish selective prosecution, prosecutors largely maintain the ability to discriminate with impunity,[64] and they continue to do so.

When consular officials become aware that Mexican nationals are detained and facing serious charges, they can and do intervene and attempt to minimize the effects of these biases. As Mexico explained to the ICJ in the Avena litigation, "Mexican consular officers are keenly aware of the overt and subtle ways in which Mexican nationals can be treated differently, based upon their nationality. Through their vigilant presence in courtrooms, jails, and lawyers' offices, they can detect the presence of unfair bias, and take steps to expose it."[65] The mere presence of officials from Mexico in court may have the effect of increasing awareness and reducing the impunity with which racist attitudes might be expressed and enacted. But more importantly, consular officials and the MCLAP lawyers employed to bring their expertise to the fore charge into these cases with a wide array of immediate assistance, ranging from short-term advice to the defendant to not discuss the case with anyone besides their lawyers to mitigation investigation to intensive strategy assistance.[66]

B. Differences between the Mexican and U.S. Justice Systems Render Mexicans Uniquely Vulnerable

Unfamiliarity with the U.S. justice system can be a major problem for any foreign national detained in this country. For instance, most Americans are at least vaguely familiar with the concept of the "right to remain silent" and the rest of the *Miranda* rights from movies and television, if not from a civics class; foreign citizens often are completely unaware of their most basic rights. Beyond this baseline risk, however, particular differences between the Mexican and U.S.

62. *See* Ortega Melendres v. Arpaio, 784 F.3d 1254, 1266 (9th Cir. 2015) (upholding injunction based on law enforcement practices discriminating against Latinos in Maricopa County, Arizona); *see also* Press Release, Department of Justice Files Lawsuit in Arizona Against Maricopa County, Maricopa County Sheriff's Office, and Sheriff Joseph Arpaio, U.S. DEP'T OF JUSTICE (May 10, 2012), https://www.justice.gov/opa/pr/department-justice-files-lawsuit-arizona-against-

criminal justice systems render Mexicans particularly vulnerable to making unwise decisions after their arrests.

1. Confessions

Crucially, until recently,[67] the law in Mexico provided that confessions were not admissible unless taken in front of the Public Prosecutor or judge and in the presence of counsel or "a person of confidence" to the defendant.[68] Thus, a Mexican unfamiliar with U.S. pretrial rules would understandably believe any information he told police would not be used against him and indeed, giving an uncounseled statement might actually be useful in avoiding harsh treatment.[69] Mexicans have thus historically been—and many surely remain—uniquely likely to give damaging admissions, especially where police use coercive interrogation tactics. In addition, because of draconian immigration consequences for many arrested Mexican nationals and their families, coercive interrogation techniques abound in cases involving Mexican suspects; they are more deferential to law enforcement because of fear of deportation, and in some cases police may intentionally exploit this vulnerability. A suspect who believes he or a loved one will receive harsher treatment if he does not confess, for instance, or one who believes he will be allowed to go home or contact family if he offers a statement first, is much more likely to do so if he comes from a culture where that statement cannot be used against him.

Consular officials can mitigate this concern; when given access to their nationals without delay, they thoroughly explain this particular aspect of the U.S. justice system, advise the detainee not to speak to the police without an attorney, and put things in familiar terms the detainee can process and understand. Advice from a consular official is much more likely to be both understood and trusted than, say, a Miranda warning given by police. Moreover, consular officials, when given prompt notification and access, advise their nationals before police typically would appoint an attorney;[70] appointed attorneys generally do not

67. In 2008, a set of sweeping reforms to the Mexican criminal justice system was passed, to be implemented over the course of eight years. See NANCY G. CORTÉS, OCTAVIO RODRÍGUEZ FERREIRA & DAVID A. SHIRK, 2016 JUSTICIABARÓMETRO—PERSPECTIVES ON MEXICO'S CRIMINAL JUSTICE SYSTEM: WHAT DO ITS OPERATORS THINK? 1, 41 (2016), https://justiceinmexico.org/wp-content/uploads/2017/03/2016-Justiciabarometro_English-Version_Online.pdf [https://perma.cc/XW3D-4APZ]. The last of these reforms were scheduled to take effect in 2016, but implementation efforts are still underway. *Id.*

68. See Memorial of Mexico, *supra* note 59, ¶ 59 (quoting Declaration of Adrián Franco, annex 3).

69. Of course, Miranda warnings include an advisement that statements can be used against a defendant, but significant barriers exist to comprehension of Miranda warnings, especially for non-English-speaking defendants. *See infra* Part II.C.

70. U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS 24–25 (2016), https://travel.state.gov/content/dam/travel/CNATrainingresources/CNA_Manual_4th_Edition_September_2017.pdf [https://perma.cc/6U4V-7J86].

receive formal appointment during early interrogations unless the detainee specifically requests one, something many Mexican nationals do not even realize they can request, or may not know how to request.[71] Consular officials are thus uniquely situated to prevent damaging, often illegal, and sometimes outright false, confessions if they are notified of the detention and given prompt access to their nationals, as Article 36 requires.

2. Plea Bargains

Prior to recent changes, Mexican law did not allow for negotiated

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a plea offer, and might never be discovered or presented without the assistance of the Mexican government.

Hundreds of lives have been saved by plea bargains secured in the cases of Mexican nationals who received prompt and ongoing assistance from their government. But when the consulate is not aware of a Mexican national's detention and prosecution, its personnel are unable to offer this critical assistance.[76]

3. Public Defenders

Until quite recently, Mexico has had a well-known and longstanding history of corruption in its judicial system.[77] As a consequence and in contrast to much of the U.S. citizenry, many Mexicans have a "lack of faith that lawyers, judges, and others in positions of authority will be sensitive to their concerns."[78] This mistrust can manifest as an unwillingness to work with public defenders or court-appointed lawyers, who are often perceived as part of the "system."[79] When the defendant does not trust the lawyer, it is almost impossible to conduct the deeply personal mitigation investigation that is necessary for the proper

performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases"); *see also* ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 921 (2003) ("Thus, it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as possible—ideally before the prosecution has actually determined that the death penalty will be sought") [hereinafter ABA, *Guidelines for Defense Counsel*].

76. If an incompetently advised defendant rejects a plea offer, relief is generally not available unless the defendant can prove, by more than just his own say-so, that he would have accepted the offer had he been advised accurately, and that the Court would have approved it. *See* Missouri v. Frye, 566 U.S. 134, 147 (2012). Thus, timely intervention when the offer is actually on the table is essential. *Id.*

77. *See, e.g.*, Hiroshi Fukurai & Richard Krooth, *The Establishment of Anti-Citizen Juries as a Key Component of Mexico's Judicial Reform: Cross-National Analyses of Lay Judge Participation and the Search for Mexico's Judicial Sovereignty*, 16 TEX. HISP. J.L. & POL'Y 37, 39 (2010) (introducing proposal "to combat political and institutional corruption within the judicial branch of the government"); Benjamin H. Harville, *Ensuring Protection or Opening the Floodgates?: Refugee Law and Its Application to Those Fleeing Drug Violence in Mexico*, 27 GEO. IMMIGR. L.J. 135, 147 (2012) ("Mexico's

preparation of a capital case, including sensitive topics such as history of abuse, poverty, family violence, drug and alcohol use, mental illness, and intellectual disability.[80] Nor

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subpoena will not obtain materials located in Mexico.

courts certainly remain free to comply with our treaty obligations and give effect to the ICJ's judgment.

There has also been some progress toward avoiding these violations in the first instance. Six states now have at least some statutory requirements concerning consular notification.[109] Of particular note, Illinois recently enacted a statute requiring both notification by detaining authorities and notification by the judge at the initial court appearance, and allowing for a continuance if a foreign defendant who did not receive a timely consular rights notification requests it.[110] Similarly, beginning in December 2014, the Federal Rules of Criminal Procedure now provide that at an initial appearance, the judge must inform the defendant that "a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested—but that even without the defendant's request, a treaty or other international agreement may require consular notification."[111] Of course, these provisions do not guarantee compliance, but like the isolated states' decisions to comply with Avena voluntarily, they are a step in the right direction.

a petition for writ of habeas corpus. Contra to the People'