INTERNATIONAL LAW AND CONSULAR IMMUNITY

In June 2006, as vacation season in the United States began in earnest, the United States Supreme Court decided a case that may have significant implications for the rights of Americans traveling abroad. Those comforted by the notion that an American consulate is nearby and available for visit and consultation should take special note of a case construing international law.

BY ASA W. MARKEL

In *Sanchez-Llamas v. Oregon*,[1] the high court confronted the domestic effect of article 36 of the Vienna Convention on Consular Relations of 1963 ("VCCR").[2] What is that convention?

Most people are only vaguely familiar with concepts like diplomatic or consular immunity, which are, for the most part, spelled out in the Vienna Convention on Diplomatic Relations of 1961[3] and the VCCR. Many who have traveled or lived abroad will have visited or used the services at a U.S. consulate or the consular section of a U.S. embassy. Nevertheless, in a society comfortable with numbered clauses such as the Second Amendment or the Fourth Amendment, few understand the importance of article 36 of the VCCR, which requires that a state party to the VCCR allow a foreign state's consular officials "access" to and "to communicate with" the foreign state's nationals.[4] This includes access to the foreign state's nationals held in "prison, custody, or detention."[5] However, article 36 also requires police in the host state to inform "without delay" an arrested foreign national of his or her right to have his or her consulate notified of the arrest, and of his or her right to communicate with the consulate.[6]

This last "consular notification" right was at the center of the controversy in *Sanchez-Llamas*. There, the U.S. Supreme Court was called upon to decide whether two foreign nationals' consular notification rights had been violated and what, if anything, the U.S. courts were willing and able to do about it. The importance of this domestic court opinion to the average American traveling abroad is not obvious at first. Yet its impact on U.S. passport holders in Arizona stems directly from the nature of international law.

Laws Foreign and Domestic

Lawyers who practice domestic law are generally more familiar with the "law" as a vertical concept: Lower courts follow decisions of higher courts, and the courts generally follow statutes and regulations promulgated by the executive and legislative branches.

However, international law is more horizontal, and it is based on reciprocity between nations. The reason for this is that, despite what critics or supporters of the United Nations may say, there is no global government. Instead, we live in a world of some 193 sovereign nations, who, under the legal fictions of international law, only follow the rules they agree to follow by either entering into treaties or showing their adherence to customary law. However, once a nation has become a party to a treaty, the central tenet of international law is *pacta sunt servanda*—"treaties are binding." Thus, when a country breaches its international obligations to another nation, the innocent party has a number of remedies, including a suit for damages.[7] However, the innocent party, as a sovereign state, is also entitled to take countermeasures, called "retorsion" in international law, by suspending the same right or duty against the breaching party.[8]

In other words, if foreign nationals in the United States are not accorded their full rights under consular law, then foreign countries are legally justified in suspending those rights for Americans traveling abroad.

For the petitioners in *Sanchez-Llamas*, there were two precise questions in issue:

1. whether a foreigner who was never informed by police of his consular notification right could seek suppression of his confessory statements at trial;

2. whether a foreigner who had been denied his consular notification rights, and whose attorney failed to raise the fact of such violations in trial and appellate proceedings, could still raise the issue on federal *habeas* review of the state court conviction.[9]

Supreme Court Holding

In *Sanchez-Llamas*, the U.S. Supreme Court definitively held that violations of article 36 do not create grounds for the mandatory suppression of evidence at trial, nor do they allow a petitioner in federal *habeas* proceedings to sidestep the procedural default rules and raise the issue for the first time in a collateral attack on a state court conviction.

The majority's opinion seems to have rested largely on its conclusion that:

> A foreign national detained on suspicion of crime, like anyone else in our country, enjoys under our system the protections of the Due Process Clause. … Article 36 adds little to these "legal options," and we think it unnecessary to apply the exclusionary rule where other constitutional and statutory protections … safeguard the same interests.[10]

This conclusion, that American domestic law is good enough, is supported by the many and considerable constitutional and statutory rights that criminal defendants enjoy in this country. However, because the Court was presented with a question of international law, the issues are much more complicated.

In his dissenting opinion, Justice Breyer noted that the object of the article 36 right to consular notification "is to assure consular communication and assistance to such nationals, who may not fully understand the host country's legal regime or even speak its language."[11] Justice Breyer then quoted from State Department materials that brought the issue home, stating:

> One of the basic functions of a consular office has been to provide a "cultural bridge" between the host community and the [U.S. national]. No one needs that cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail.[12]

The *Sanchez-Llamas* opinion is good domestic constitutional law. However, it does little to solve the complexities of the wider legal framework involved.

The late Chief Justice Rehnquist illustrated one basic problem in the case of *United States v. Alvarez-Machain*,[13] when he wrote that a U.S. court had jurisdiction to try a Mexican national who had been abducted by federal agents while in Mexico and forcibly taken to the U.S. for trial. But he also noted that such an abduction "may be in violation of general international law principles" as a clear invasion of Mexico's sovereignty.[14]

What problem is created by the existence of these contrary notions?

The Clash of Legal Systems

The basic problem is that domestic (or "municipal") law exists on one plane and "international" law exists on another. The first type of law deals with the rights of people (natural people, corporations, partnerships, government entities, etc.) within a given jurisdiction. The second type of law deals with the rights of sovereign states and their obligations between one another. Many lawyers prefer that the two legal planes not intersect, because major complications and unanswered questions will result.

When dealing with the rights of individuals under consular law, the two legal planes clearly intersect. The result in the case of the Supreme Court's latest opinion on the issue of consular rights is that although we have a clear position on domestic law, the United States may nevertheless be considered in violation of its treaty obligations to other governments. This may have consequences for Americans abroad, whether tourists, residents or businesspeople.

The United States and the World Court

The alarming fact about the high court's decision in *Sanchez-Llamas* is that for the first time, the U.S. Supreme Court specifically declined to apply a rule of international law announced by the International Court of Justice (the I.C.J. or "World Court").[15] The World Court exists as an organ of the United Nations and decides disputes between nations on points of international law.[16] The World Court's opinions are highly respected and provide perhaps the best opinion on what the law of nations actually is.[17] This is so, despite the fact that most practitioners of domestic law have never heard of the World Court, perhaps because its decisions usually have little or no relevance to the average citizen. The court exists to determine the rights and duties between sovereign states, not people.

The World Court already has ruled that the U.S. must give "full effect" to article 36 in domestic courts.[18] This is because the consular notification right is an individual right, not just a right of the foreign state.[19] A violation of an individual's consular notification right cannot be remedied by a diplomatic apology. Rather, the host state must "allow the review and reconsideration" of the effect of such violations on an individual's criminal conviction.[20]

That being the case, the procedural default rule in federal *habeas* proceedings was held in at least one case to violate U.S. obligations under the VCCR.[21] And yet the World Court has ruled this way not once, but twice—and both times against the United States in suits brought by different countries.[22] Before losing these two lawsuits, the United States settled out of court in an earlier consular notification right case brought by yet another country.[23]

The majority's opinion in *Sanchez-Llamas* devotes a great deal of space to explaining why the Supreme Court is not bound to obey the decisions of the World Court.[24] No one disputes this point as a matter of American constitutional law. However, perhaps the more pertinent question is whether the Supreme Court *should*

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give the World Court's opinions the "respectful consideration" to which the Supreme Court has said such decisions are entitled.[25] The majority specifically noted that only Brazil imposes a mandatory exclusionary rule in cases of consular rights violations.[26] America's common law sister countries—Britain, Canada and Australia— have employed only a discretionary exclusionary rule in such cases.[27] The significance of foreign case law in the matter of consular rights is its ability to show how other parties to the VCCR interpret their obligations under the treaty.

By the same token, foreign observers will look to the Supreme Court's opinions to gauge America's attitude toward compliance with the VCCR. When countries strive toward the same interpretation of their treaty obligations, there is less confusion about the nature and scope of those obligations. Presently, though past decisions in other countries have refused to implement a mandatory exclusionary rule where a person has not been notified of his or her consular rights, foreign courts clearly reserve the right to exclude such evidence in extreme cases. American courts have so far shown an unwillingness to even consider suppressing such evidence. In other words, courts in this country appear unwilling to second-guess the decision of the police to not inform a foreigner of his or her consular rights. This is a matter that will surely be watched closely by foreign ministries around the world.

And there is still the matter of the World Court's specific holdings against American police and judicial practices with respect to foreigners' consular rights. The jury may still be out on whether the United States is complying with its obligations under the VCCR. However, the Supreme Court's recent opinion in *Sanchez-Llamas* does little to assuage foreign pundits who believe that American courts simply do not care about U.S. obligations to other countries and their nationals.[28] By refusing to apply World Court precedent, the Supreme Court has decided to chart a course at odds with the most widely recognized tribunal of international law, which by itself may be reason for some to think that this country is in violation of its treaty obligations to other countries and their nationals.

Arizona and Consular Rights

The specific importance in Arizona of this line of case law on consular rights is twofold. First, much of the trouble that led to international litigation between Germany and the United States in 2001 began here in Arizona. Second, Arizona is a border state and is the next-door neighbor of Mexico, a country that has vigorously contested American violations of the VCCR with respect to its nationals. Arizona officials have been involved in several notable VCCR violations.

The consular rights issue first arose in Arizona when Mexico sued Arizona in federal court for violating the VCCR with respect to a Mexican national.[29] The Ninth Circuit threw out Mexico's case on the basis that the Eleventh Amendment precluded suit against a state in federal court.[30] With state governments' immunity from suit assured, the next battleground for the consular rights issue should have been state court. But, as later cases illustrate, not informing the accused of his or her consular rights generally has the effect of keeping the accused ignorant of those rights—and the accused's government (and family) ignorant of the arrest and prosecution.

Germany learned the importance of being promptly apprised of the arrest of one's nationals in the case of brothers Karl and Walter LaGrand, who were convicted of a stabbing murder at the Valley National Bank in Marana, Arizona, and sentenced to death.[31]

Citing the procedural default rule that would be so divisive later in Germany's suit against the United States in the World Court, the Ninth Circuit declined to conduct *habeas* review of the arresting authorities' failure to inform the brothers of their consular rights prior to interrogation.[32] The brothers had simply failed to raise the issue during any of the previous state court proceedings.[33] By the time Germany commenced suit in the World Court against the United States, one brother had already been executed.

The only avenue remaining to Germany was to request and obtain an order indicating provisional measures, similar to a preliminary injunction in domestic law.[34] Germany then commenced a domestic suit against both the federal and Arizona governments, seeking enforcement of a preliminary injunction against the execution of the second brother.[35] The injunction would have allowed the World Court to rule on the rights and duties between the two governments before the second brother's execution.

However, the U.S. Supreme Court dismissed the suit, finding that the federal government had not waived its sovereign immunity, and that the State of Arizona was immune from suit in federal court under the Eleventh Amendment.[36] By the time the World Court finally found the United States in violation of the order indicating provisional measures, and in violation of article 36, both brothers had been executed.

Given Arizona's close ties to the history of the development of consular law in this country, criminal defense counsel in Arizona should be very aware (at least from this point onward) of the possibility that their clients' consular notification rights may have been violated.

On the civil side, at least one federal circuit court also has concluded that individuals may have a civil cause of action for such violations,[37] such that civil litigators may be faced with such lawsuits, particularly in a border state such as Arizona.

Conclusion

Despite Arizona's extensive experience with consular law, there has been no sign that commentators or jurists in this state are particularly concerned about the international ramifications of their domestic legal conclusions. It is true that Arizona

courts have acknowledged that Arizona law must be in accord with international law.[38] However:

- When confronted with the issue of a consular notification right violation, the Arizona Supreme Court declined to determine whether the VCCR created an individually enforceable right, but specifically ruled out suppression of evidence as a remedy for such violations in criminal proceedings.[39]
- No Arizona case has yet posed the question of whether Arizona's interpretation of consular law violates general international law governing relations with foreign countries.
- And no ethical opinion in Arizona addresses a defense attorney's advice to a client regarding the client's consular options.[40]

The U.S. Supreme Court's ruling in *Sanchez-Llamas* does not affect the Arizona courts' refusal to apply an exclusionary rule in cases concerning consular violations. (Nor has the federal court precluded the states from fashioning discretionary exclusionary rules, as some foreign courts already do.) However, the issue of whether article 36 vests individuals with actionable rights is still an open question under federal and Arizona law. Moreover, foreign governments such as Mexico, who have tried to litigate their own rights as states parties to the VCCR in federal court, may, if the issue continues to cause concern, finally resort to suing state governments in state courts. Thus, it is likely that courts in Arizona may be faced with many difficult questions arising under consular law, given that the U.S. Supreme Court has failed to meaningfully address most of the issues.

In the final analysis, there is more doubt than certainty as to whether consular rights are being respected in this country. It is far from clear whether the United States is actually in breach of the VCCR to such an extent that Americans traveling abroad should be concerned about their treatment in other countries. Nevertheless, police officials, lawyers and judges should bear in mind the overseas consequences of the legal conclusions they reach here. This is perhaps more true in Arizona than most other states. Yet while we know we have due process protections in *this* country, the controversy over consular rights raises the question of whether Americans abroad might need a little help.

endnotes

1. 548 U.S. __, 126 S. Ct. 2669 (2006).
2. 21 U.S.T. 77, T.I.A.S. No. 6820.
3. 23 U.S.T. 3227, T.I.A.S. No. 7502. The United States has entered into numerous treaties on diplomatic and consular relations with individual countries; however, the Vienna Conventions represent a near-global consensus on the law of consuls and diplomats.
4. VCCR, art. 36(1)(a).
5. *Id.* art. 36(1)(c).
6. *Id.* art. 36(1)(b).
7. *Chorzow Factory Case (Pol. v. Ger.)*, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).
8. James L. Brierly, The Law of Nations 398-99 (Sir Humphrey Waldock ed., Oxford 6th ed. 1963).
9. *Sanchez-Llamas*, 126 S. Ct. at 2672 (Opinion of Roberts, C.J.).
10. *Id.* at 2682.
11. *Id.* at 2691 (Breyer, J., dissenting).
12. *Id.* at 2692.
13. 504 U.S. 655, 669-70 (1992).
14. *Id.*
15. *See Sanchez-Llamas*, 126 S. Ct. at 2702 (Breyer, J., dissenting).
16. *See* Statute of the I.C.J., 59 Stat. 1062, T.S. No. 993 (1945).
17. *See* Susan W. Tiefenbrun, *The Role of the World Court in Settling International Disputes: A Recent Assessment*, 20 Loy. L.A. Int'l & Comp. L.J. 1 (1997), and Edith Brown Weiss, *Judicial Independence and Impartiality: A Preliminary Inquiry,* in The International Court of Justice at a Crossroads 134 (L. Damrosch ed. 1987).
18. *Sanchez-Llamas*, 126 S. Ct. at 2692-93 (Breyer, J., dissenting) (*quoting LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (Judgment of June 27)).
19. *Id.* at 2692.
20. *Id.*
21. *Id.*
22. *Id.* at at 2693 (*quoting Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Judgment of Mar. 31)).
23. *See Case Concerning the Vienna Convention on Consular Relations (Par. v. U.S.)*, 1998 I.C.J. 426 (Order of Nov. 10).
24. *Sanchez-Llamas*, 126 S. Ct. at 2684-85 (Opinion of Roberts, C.J.). The Supreme Court was able to avoid the issue of the precedential weight of the World Court's opinions on consular rights in *Medellin v. Dretke*, 544 U.S. 660 (2005), because the Texas Court of Criminal Appeals apparently obeyed President Bush's directive that state courts uphold the World Court's ruling in favor of Mexico. *See Ex parte Medellin*, 2005 WL 1532996 (Tex. Crim. App. 2005) (requiring additional briefing before deciding issues presented on *habeas* petition).
25. *Breard v. Greene*, 523 U.S. 371, 375 (1998).
26. *Sanchez-Llamas*, 126 S. Ct. at 2678 (Opinion of Roberts, C.J.).
27. *Id.*
28. *See e.g.*, Lord Johan Steyn, *Lecture: Guantanamo Bay: The Legal Black Hole,* Nov. 23, 2003 F.A. Mann Lecture to the British Inst. of Int'l and Comp. Law. Available at www.fcnl.org/civil_liberties/guantanamo.htm.
29. *United Mexican States v. Woods*, 126 F.3d 1220 (9th Cir. 1997).
30. *Id.* at 1222; and *see Rep. of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998), for a similar result.
31. *See State v. LaGrand (Karl)*, 733 P.2d 1066 (Ariz. 1987), and *State v. LaGrand (Walter)*, 734 P.2d 563 (Ariz. 1987), *cert. denied*, 484 U.S. 872 (1987).
32. *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998), *cert. denied,* 526 U.S. 1001 (1999).
33. *Id.* at 1261.
34. *See* Statute of the I.C.J., art. 41(1).
35. *Fed. Rep. of Germany v. U.S.*, 526 U.S. 111 (1999).
36. *Id.* at 112.
37. *Jogi v. Voges*, 425 F.3d 367 (7th Cir. 2005).
38. *E.g., State v. Miller*, 755 P.2d 434, 439 (Ariz. Ct. App. 1988) ("Arizona must conform to international law in its exercise of extra-territorial jurisdiction"), and *Kadota v. Hosogai*, 608 P.2d 68, 71 (Ariz. Ct. App. 1980) (U.S. treaty is superior to and will prevail over conflicting state law).
39. *State v. Prasertphong*, 75 P.3d 675, 688 (Ariz. 2003).
40. Ariz. Ethics Op. 97-06 addresses a client's ethical duty to advise a client of the collateral consequences of entering into cooperation agreements with the prosecution. The opinion distinguishes this wider ethical duty of defense counsel from the court's lack of duty to advise a criminal defendant of the immigration consequences of accepting a guilty plea (citing *Fruchtman v. Kenton*, 531 F.2d 946, 949 (9th Cir. 1976)). It can be inferred that a criminal defense attorney is expected to understand immigration law when representing a foreign client; however, a foreign client's consular rights have not been explored in an ethical opinion.