VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,	)	
	)	
	)	
v.	)	Criminal No. K105537
	)	
DINH PHAM	)	
	)	

ORDER

This matter came before the Court upon Defendant's Motion to Prohibit the Death Penalty. For the reasons stated in this Court's opinion letter dated January 3, 2006, which is attached hereto and made a part hereof, the Motion to Prohibit the Death Penalty is granted.

Entered this 3rd day of January, 2006.

Leslie Alden

JUDGE LESLIE M. ALDEN

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: *Commonwealth of Virginia v. Dinh Pham*, Criminal No. K105537

Dear Counsel:

On April 15, 2005, the Defendant filed a Motion to Prohibit the Death Penalty. Oral arguments on the motion were heard on July 11, 2005. The Commonwealth responded on July 27, 2005 with a Supplemental Brief in Opposition to Barring the Death Penalty by the Court. On August 2, 2005, the Defendant replied. Finally, on August 4, 2005, the Commonwealth responded to the Defendant's Reply. The Defendant's trial is set for January 9, 2006. The issue under advisement is as follows:

Can the Commonwealth be precluded from seeking the death penalty against the Defendant for failing to notify him of his rights under Article 36 of the Vienna Convention?

The Court has now been able to review the briefs and applicable authorities. For the reasons stated herein, the Court concludes that it may permissibly apply the judgment of the International Court of Justice in this proceeding. Further, the Court concludes that the Vienna Convention does confer judicially enforceable individual rights, and the Commonwealth violated these rights of the Defendant. Accordingly, the preclusion of the death sentence is an appropriate remedy for the breach of treaty obligations, and is one which will give full effect to the purposes for which the treaty rights are intended. Thus, the Motion to Prohibit the Death Penalty is granted.

I. Factual Background

On January 8, 2004, the Defendant, a Vietnamese national, was arrested for the double murders of Loan Nguyen and her daughter, Ashley Ton. During an interrogation by two detectives from the Fairfax County Police Department, the Defendant was read his Miranda rights, through a Vietnamese interpreter, and signed a waiver. Thereafter, the Defendant confessed to the murders. At this time, no notification was given to the Defendant of his right to contact the Vietnamese consulate. Because one of the victims was a child, the Defendant is charged with capital murder. To date, the Defendant has still not been notified of his Vienna Convention protections by the Commonwealth.

II. Discussion

Defendant Pham argues that as a result of the Commonwealth's failure to comply with the government's obligations under the Vienna Convention, the Commonwealth should now be precluded from seeking the death penalty against Pham. The question of whether such a violation of international treaty obligations merits a preclusion of the death penalty is one of first impression in Virginia. Nor has the United States Supreme Court yet directly addressed this question.

A. The Vienna Convention

In 1963, under the direction of the United Nations' International Law Commission, ninety two nations codified the then-existing body of international treaty law into the Vienna Convention on Consular Relations (Vienna Convention).[1] The primary purpose of this instrument was to create a consistent and uniform body of treaty law in the wake of World War

[1] Vienna Convention on Consular Relations and Optional Protocol on Disputes, 21 U.S.T. 77, 500 U.N.T.S. 95 (*entered into force*, Dec. 24, 1969)

II.[2] In 1969, the United States ratified this multinational treaty and became a signatory to it and its Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol).[3] Accordingly, the Supremacy Clause of the U.S. Constitution rendered the Vienna Convention and the Optional Protocol binding on the states.[4] Despite the existence of the prevailing law pursuant to the Supremacy Clause, this case, as well as several others in this and other states, demonstrate that the agents of the Commonwealth routinely and persistently refuse to comply with the government's legal obligations under the Vienna Convention.[5]

To date, the Vienna Convention, and its Optional Protocol, is regarded as the most expansive agreement on the subject of consular relations.[6] The Vienna Convention sets out the rights owed to foreign nationals living and traveling abroad by signatory States. Specifically, Article 36 guarantees contact between nationals of the sending State and its consular officers. In particular, under this section:

> a) [C]onsular 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;

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[2] Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 289 (1988).

[3] Although the United States purported to withdraw from the Optional Protocol on March 7, 2005 (*see* Letter from Condoleezza Rice, Sec'y of State to Kofi A Annan, Sec'y General of U.N. (Mar. 7, 2005)), such withdrawal does not affect the resolution of this case.

[4] U.S. Const. Art. VI Cl. 2 ("all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

[5] *See e.g. Breard v. Netherland*, 949 F. Supp. 1255, 1266 (E.D. Va. 1996) ("Virginia's persistent refusal to abide by the Vienna Convention troubles the Court."); *see also Bustillo v. Johnson*, 63 Va. Cir. 125, 126 (Fairfax County, 2003) (noting that the defendant filed a habeas petition alleging that the Fairfax County Police failed to give him notice of his consular rights).

[6] Robert Iraola, *Federal Criminal Prosecutions And The Right To Consular Notification Under Article 36 Of The Vienna Convention*, 105 W. VA. L. REV. 179, 183 (2002).

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.[7]

B. The Vienna Convention Grants Judicially Enforceable Individual Rights

1. *The Role Of ICJ Judgments*

It is evident in United States jurisprudence by virtue of the Supremacy Clause that properly executed treaties, like the Vienna Convention, are a part of domestic law.[8] Under Article I of the Optional Protocol, the interpretation and application of the provisions of the Vienna Convention lie within the compulsory jurisdiction of the International Court of Justice (ICJ).[9] In March of 2004, the ICJ held that the Vienna Convention confers individually enforceable rights in the *Avena* case, a case involving foreign nationals deprived of treaty rights in the United States.[10] In *Avena*, the government of Mexico brought suit against the United States for its failure to observe the provisions of Article 36 of the Vienna Convention with regard to 52 Mexican individuals on death row in this country.[11] The ICJ found that the United States breached its obligations to the Mexican nationals, and that the application by U.S. courts of the so-called "procedural default" rule did not give effect to the protections under the Vienna Convention. Even though the Mexicans had not raised their Vienna Convention claims in a timely manner, the ICJ Judgment required the United States to reconsider and review the convictions and sentences imposed upon those nationals, in order to give full effect to the purposes for which the Vienna Convention rights were intended.[12]

In February of 2005, President George W. Bush issued a White House Memorandum in which he acknowledged that as a party to the Vienna Convention, "the United States will discharge its international obligations under the decision of the International Court of Justice"

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[7] Vienna Convention, Art. 36.

[8] Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 HARV. L. REV. 1867, 1931 (2005).

[9] Optional Protocol Concerning Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, Art. I.

[10] Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. No. 128 (Judgment of Mar. 31).

[11] *Id.* ¶ 19.

[12] *Id.* ¶ 153.

determined in *Avena*, through the courts, giving "effect to the decision in accordance with general principles of comity."[13] President Bush acknowledged that the courts of the United States must comply with the ICJ Judgment and the obligations of the Vienna Convention in a manner that will give effect to the rights accorded under the Convention. Manifestly, the United States has acknowledged that the treaty obligations can not be negated or diminished by the application of domestic procedural rules.

In Virginia, it is fundamental that courts should give full faith and credit to any order of a foreign court of competent jurisdiction, "when that law, in terms of moral standards, societal values, personal rights, and public policy, is reasonably comparable to that of Virginia."[14] Certainly, it is the public policy of Virginia to ensure that its agents comply with domestic and international legal obligations. Moreover, the Virginia Supreme Court has acknowledged that it is obligated to observe the judgments of the ICJ.[15]

ii. ***Consular Rights Under the Vienna Convention are Judicially Enforceable by Individuals***

At the outset, this Court acknowledges that the Virginia Supreme Court stated that the Vienna Convention does not create enforceable individual rights in *Bell v. Commonwealth*.[16] This holding, however, was predicated on the Court's conclusion that, pursuant to an earlier ICJ Judgment in *LeGrand*, individual rights created by the Vienna Convention are enforceable *only* by the nation state of the detained person, and only before the International Court of Justice.[17] However, in light of the recent *Avena* decision, the legal underpinnings of the *Bell* holding have been entirely eroded.

In *LeGrand*, the ICJ held that the Vienna Convention confers individual rights on foreign nationals, and that the nation state of the detained person may invoke these rights before the ICJ

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[13] Presidential Memorandum for the Attorney General (Feb. 28, 2005); *available at* http://www.asil.org/inthenews/avenamemo050308.html

[14] *America Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350, 360 (Va. 2001) *citing* Oehl v. Oehl, 221 Va. 618, 623 (Va. 1980); *see also America Online, Inc. v. Nam Tai Electronics, Inc.*, 264 Va. 583, 586 (2002) (In Virginia, a foreign court's ruling is in accordance with general principles of comity as long as: (1) the foreign court has personal and subject matter jurisdiction over the case, (2) the procedural and substantive laws of the foreign court are reasonably comparable to Virginia law, (3) the order of the foreign court was not obtained fraudulently, and (4) enforcement of the foreign law is not contrary to the public policy of Virginia and does not prejudice Virginia citizens).

[15] *Bell v. Commonwealth*, 264 Va. 172 (2002).

[16] 264 Va. 172, 188 (2002).

[17] *Id.* at 188; *citing* LeGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27).

on behalf of the detainee.[18] Importantly, the ICJ did *not* hold that such procedure is the *only* way to vindicate an individual's consular rights.[19] Clearly, the *LeGrand* Court did not intend to so limit its ruling. Indeed, in addressing the pitfalls of the procedural default doctrine, the ICJ stated that the doctrine is most problematic when if fails to allow *the detained individual* to challenge a conviction and sentence.[20] Further, the United States conceded the point by its failure to argue in *Avena* that Article 36 rights are not judicially enforceable.[21]

Moreover, *Bell* is factually and procedurally distinct from the case at bar. Defendant Bell arguably *was* notified of his consular rights under the Vienna Convention, unlike the Defendant in this case. In addition, Bell sought reversal of his conviction and a subsequent suppression of his statement in a new trial as a remedy for the alleged violation. Thus, the post conviction harmless error analysis discussed in *Bell* is inapplicable to the Defendant's pre-trial motion in this case.[22]

The United States Supreme Court, in *Medellin,* has also suggested that the Vienna Convention confers judicially enforceable individual rights.[23] In *Medellin*, the petitioner, one of the Mexican nationals subject to the *Avena* decision, was granted a writ of certiorari by the Supreme Court to determine, in part, whether a federal court should give effect to the ICJ's judgment. Specifically, the Court noted that in accordance with its decision in *Breard*, the Vienna Convention confers on an individual the enforceable right to consular assistance.[24]

Although the Court did not rule on the question of enforceability in *Medellin*, Justice O'Connor's opinion is persuasive. She notes that, as a self-executing treaty, the Vienna Convention is "equivalent to an act of the legislature."[25] As such, its provisions may be

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[18] *Id.* ¶ 78

[19] *Id.*

[20] *Id.* ¶ 90

[21] *Id.* ¶ 110

[22] Moreover, it appears that the harmless error test is *not* the test that should apply *in a pre-trial motion* when determining whether to suppress a statement made in violation of one's Fifth Amendment Right against self incrimination. In *Milton*, the U.S. Supreme Court employed a harmless error analysis to the trial court's decision to admit a statement made in violation of the defendant's Fifth Amendment right. Because the jury was presented with overwhelming evidence of the defendant's guilt, the Court held that the admission was harmless error. Milton v. Wainwright, 407 U.S. 371, 373 (1972). This post conviction analysis simply would not apply to a pre-trial motion seeking suppression.

[23] *Medellin v. Dretke*, 125 S. Ct. 2088 (2005)

[24] *Medellin v. Dretke*, 125 S. Ct. 2088, 2091 (2005); *citing Breard v. Greene*, 523 U.S. 371 (1998)

[25] *Id.* at 2103 (O'Connor, dissenting).

judicially enforced to the same extent as a statute.[26] Further, Justice O'Connor acknowledges that the Court commonly enforces treaty-based rights of individual foreigners.[27] Indeed, the "individual rights-conferring language" in those treaties is in no way distinct from the language of Article 36(1)(b) in as much as neither expressly specify "judicial enforcement of violations."[28] Finally, Justice O'Connor opines that other provisions of the Vienna Convention relating to consular privileges and immunities are treated as judicially enforced individual rights. For example, Justice O'Connor points to article 43(1) of the Vienna Convention which provides immunity for the actions of consular officers in the context of their consular functions.[29] In *Risk v. Halvorsen*, the right to consular immunity was raised by two Norwegian consular officers in the context of a criminal prosecution. Notably, this right was judicially enforced and was *not* raised by Norway, the sending State, in the context of diplomacy.[30] Like the right to notification contained in Article 36(1)(b), this privilege of consular immunity could "theoretically also be vindicated exclusively in political and diplomatic processes, *but [has] not been*," and indeed is routinely raised as a defense in judicial proceedings.[31]

iii. ***State Court is the Appropriate Venue to Raise Vienna Convention Violations***

The U.S. Supreme Court suggested in *Medellin* that the ICJ's decision in *Avena* should be applied by state courts in the context of state proceedings.[32] While that case was pending, the Presidential Memorandum was issued regarding the *Avena* decision.[33] As a result of the Memorandum, Medellin filed an application for a writ of habeas corpus in the Texas Court of Criminal Appeals, a state court. Because the U.S. Supreme Court determined that the state proceeding could provide Medellin with adequate reconsideration of his claim under the Vienna Convention, the writ of certiorari was dismissed as improvidently granted.[34]

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[26] *Id.*

[27] *Id.* at 2104.

[28] *Id.*

[29] *Id.* at 2105; *citing* Vienna Convention, Art 43(1);

[30] *Risk v. Halvorsen*, 936 F.2d 393, 397-98 (9th Cir. 1991)

[31] *Medellin*, 125 S. Ct. at 2105 (emphasis added); *citing Risk v. Halvorsen*, 936 F.2d 393, at 398.

[32] *Id.* at 2090 (2005).

[33] *See* note 13, *supra*.

[34] *Id.* at 2092. The Court also discussed that the writ was improvidently granted because of four federal habeas procedural impediments. None of those procedural issues are present here. *Id.*

Despite the procedural disposition of *Medellin*, the Court was informative on the question of applicability of ICJ judgments, such as *Avena*, in state trial courts. That the *Medellin* Court dismissed the writ of certiorari in order to allow the state court to proceed in an effort to resolve the issues, is significant. Although *Medellin* was a divided plurality opinion, the one issue upon which the majority of the justices agreed, was that state court was the appropriate place to raise Vienna Convention claims.[35]

This legal principal is not new. The Court has previously suggested that state courts are an appropriate place to raise such claims. In *Breard*, the petitioner was convicted of capital murder and sentenced to death in Arlington County.[36] After two failed attempts to appeal at both the state and federal level, the petitioner filed a motion for habeas corpus arguing that his conviction and sentence should be overturned because of the Commonwealth's violations of the Vienna Convention.[37] The Court denied his petition and held that the petitioner defaulted on his Article 36 claim, *because he failed to raise it in state court prior to seeking collateral relief in federal court.*[38] The *Breard* Court held that the procedural default doctrine applied to bar his claim. Although the *Avena* decision has now denounced the procedural default doctrine, the Court in *Breard* clearly held that a state court is a proper venue to assert a Vienna Convention claim. Here, the Defendant's motion to preclude the death penalty is timely made in the appropriate forum.

C. Under Avena, The Commonwealth Violated The Vienna Convention

Detaining authorities must give notice to a foreign national of the consular rights under Article 36. Specifically, Article 36(1) guarantees that: 1) consular officers shall be free to communicate with their nationals; 2) upon the request of the foreign national, the competent authorities of the detaining State must inform without delay the consular post that its national is detained; and 3) consular officers shall have access to a detained national.

Precisely when this duty arises is a more complicated question. Although the duty to give notice does not arise immediately upon arrest,[39] it typically arises "once there are grounds to think that the person is probably a foreign national," which certainly may occur during a detention prior to arrest.[40] Notably, the ICJ observed, the *travaux preparatoires* to the Vienna

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[35] *Id.* at 2092; 2093 (Ginsburg, concurring).

[36] *Breard v. Green*, 523 U.S. 371, 372 (1998).

[37] *Id.*

[38] *Id.*; *see also Murphy v. Nederland*, 116 F.3d. 97, 100 (1997) (holding that the petitioner's claim of a violation of the Vienna Convention is procedurally barred on a habeas appeal because he did not first raise it in *state* court).

[39] Avena, ¶ 85, 87.

[40] *Id.* ¶ 63, 88.

Convention revealed the United State's position on the appropriate time limits for notification.[41] While the State Department's booklet on rights under the Vienna Convention surmises that notification to the consular offices should be made within 1 to 3 days, it also suggests that notice to the foreign national should be made "as soon as reasonably possible under the circumstances."[42]

Given this standard, this Court finds that the Commonwealth breached its duty to the Defendant by entirely failing to notify *him* of his rights under Article 36.[43] In response to the Defendant's arguments, the Commonwealth counters that no prejudice could have arisen from the delay in notifying the Vietnamese consulate (10 days after his arrest).[44] This argument ignores the primary violation alleged by the Defendant: that *he* was not notified. Importantly, the Commonwealth is not discharged from its duty to notify a foreign national upon the assumption that the arrested individual would not want to contact the consulate.[45] Rather, the duty to give notice is absolute.[46] Indeed, the ICJ notes that Article 36 imposes a *clear duty* on States to provide consular notification to the arrested person.[47] Once informed, the foreign national has "the right to say he nonetheless does not wish his consular post to be notified."[48] The Commonwealth's argument that the Vietnamese consulate rarely notifies the United States in a timely manner of the detention and arrest of its citizen is simply irrelevant. Although Courts would expect all parties to abide by their treaty obligations, the fact that other states may not do so adequately, surely, can not excuse the Commonwealth's failure here.

In his submission to the court, the Defendant alleged prejudice in not having been informed of his consular rights. Specifically, he argued, in having been denied the early assistance of his consulate, in light of the prosecution's decision to seek the death penalty, the Defendant was deprived of assistance during a critical stage and was unable to prepare a prompt defense.[49] Critically, it is impossible to surmise what might have happened had the Vietnamese authorities had the opportunity to employ diplomatic, legal or other means on the Defendant's

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[41] *Id.* ¶ 81, 86, 89.

[42] *Id.* ¶ 81 (internal quotations omitted).

[43] Defendant's Notice and Motion to Prohibit the Death Penalty at 4.

[44] Commonwealth's Supplemental Brief in Opposition to Barring the Death Penalty at 3.

[45] Avena, ¶ 76.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] Notice of Motion to Prohibit the Death Penalty, at 4.

behalf from the outset.[50] Simply put, it is now, in hindsight, impossible to determine the extent of diplomatic, legal or other assistance the Defendant might have received had he been informed of his treaty protections. In other words, the Commonwealth's conduct in failing to observe the requirements of Article 36 has completely eviscerated the purposes and intent of the Vienna Convention. Like the operation of the procedural default argument, the idea that the state can completely ignore its treaty obligations without consequence essentially obliterates the purposes for which the rights under the Vienna Convention were intended.

D. Preclusion of the Death Penalty is an Appropriate Remedy

In addressing whether preclusion of the death penalty is appropriate in this case to effect the purposes of the treaty, this Court again finds *Avena* informative. At the outset, this Court acknowledges that neither *Avena*, nor the text of the Vienna Convention, prescribes an express remedy for violations. Rather, it is up to the detaining State, through its courts, to fashion appropriate remedies.[51] To that end, the courts must bear in mind their obligation to "make reparation in adequate form" to redress the breach.[52] Indeed, the courts must attempt, to the extent possible, to wipe out all consequences of the illegal act and restore the situation that would have existed without the breach.[53] Most significantly, the courts must ensure that the remedy gives full effect to the purposes for which the consular rights are intended while crafting an appropriate remedy for a violation of Article 36.[54]

A very recent decision of the Court of Criminal Appeals of Oklahoma has suggested that relief from a capital sentence could appropriately redress Vienna violations.[55] In *Torres*, the state did not inform the Mexican defendant of his right to seek assistance from the Mexican consulate.[56] The court held that Torres suffered actual prejudice in the context of his capital

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[50] For instance, in *Le v. Mullin*, 311 *F.2d 1002 (2002)*, a capital case against a Vietnamese national whose government was not notified until after the defendant's death sentence had been imposed, the Vietnamese government, through diplomatic means, was able to secure a 30-day stay of execution mere moments before the execution was to take place. *See* http://clarkprosector.org/html/death/US/le904/htm.

[51] *See* Avena ¶ 119, 121,

[52] *Id.* ¶ 119; *citing* Factory at Chorzow, 1927 P.C.I.J., *Series A. No. 9*, p. 21).

[53] *Id.* ¶ 47 (same).

[54] Vienna Convention, Art. 36(2).

[55] Torres v. State of Oklahoma, 2005 OK CR 17, *9 (Ct. of App. Sept. 5, 2005).

[56] *Id.*

sentence only.[57] However, because this defendant was granted clemency from the Oklahoma governor, the court did not need to commute his sentence.[58]

Notably, Virginia Governor Mark Warner recently commuted the death sentence of Robin Lovitt.[59] In that case, despite the Commonwealth's obligation to maintain physical evidence until a defendant has exhausted all post conviction remedies, an Arlington County court employee destroyed evidence before the defendant exhausted all of his remedies.[60] Although the actual prejudice to the defendant was speculative, at best, the Governor nevertheless granted clemency. The Governor's rationale is equally applicable here: when agents of the Commonwealth act in a manner contrary to the express direction of the law, such action "comes at the expense of a defendant facing society's most severe and final sanction."[61] It is the duty of the Commonwealth to ensure in each case that this sanction is carried out, that is done fairly.[62]

It is precisely for this reason that the preclusion of the death penalty is appropriate in this case. Indeed, like the potential remedy suggested in *Torres*, this remedy is carefully calculated in scope to proportionately redress the violation and it directly addresses the defendant's alleged prejudice: his inability to promptly consult advisors and consider assistance in responding to the case against him.

More importantly, preclusion of the death penalty for a violation of the Convention is a remedy which will ensure that the laws and regulations of this State will give full effect to the purposes for which the rights accorded under the Convention are intended. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of due process rights under United States constitutional law. The Court must protect the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Convention.[63]

The notion of precluding a state from seeking the death penalty in exchange for compliance with international law is not a novel one. Indeed, preclusion of the death penalty is a

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[57] *Id.* at *13.

[58] *Id.*

[59] Statement of Governor Mark Warner On the Clemency Petition of Robin Lovitt, *available at* http://www.governor.virginia.gov/Press_Policy/Releases/2005/Nov05/1129c.htm

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *See* Avena ¶ 139

common practice employed in the context of extradition proceedings.[64] In the *Soering* case, the European Court of Human Rights ratified the United Kingdom's refusal to extradite a capital defendant to Virginia to stand trial, and held that a death row sentence constitutes inhuman and degrading punishment under the European Convention on Human Rights.[65] In light of *Soering* and its progeny,[66] it has been argued that "a requesting state would be well-advised to provide firm assurances that it will not impose the death penalty on the fugitive when it initiates an extradition request for a crime that carries the death sentence under its law."[67] Indeed, the U.N. General Assembly went so far as to codify this practice in its Model Treaty on Extradition.[68] Specifically, Article 4 lists the grounds for refusing extradition.[69] Offenses carrying the death penalty are considered an adequate ground for refusal.[70] Using the Model Treaty as a format, the United States and Great Britain executed a bilateral treaty in 2004 which will enable the United Kingdom to deny extradition of capital defendants back to the United States.[71]

It is for the foregoing reasons that the Defendant's Motion to Prohibit the Death Penalty is granted and an ORDER incorporating the Court's ruling will be entered on this date.

Sincerely,

Leslie Alden

Leslie M. Alden

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[64] *See generally*, Michael Kelly, *Cheating Justice by Death: The Doctrinal Collision for Prosecuting Foreign Terrorists -- Passage of Aut Dedere Aut Judicare into Customary Law & Refusal to Extradite Based on Death Penalty*, 20 ARIZ. J. INT'L & COMP. L. 491 (2003).

[65] *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439, 478 (1989).

[66] *See e.g.*, Ng v. Canada, U.N. Human Rights Committee, 49th Sess., Comm. No. 469/1991, PP16.3-.4, U.N. Doc. CCPR/C/49/D/469/1991 (1994).

[67] Kelly, 20 ARIZ. J. INT'L & COMP. L. at 514.

[68] *Id.* at 515, *citing* Model Treaty on Extradition, G.A. Res. 45/116, 45th Sess., 68th plen. Mtg., *at* http://www.un.org/documents/ga/res/45/a45r116.htm.

[69] *Id.*

[70] *Id.*

[71] United States-United Kingdom Extradition Treaty (Treaty No. 108-23) Art. 7 (Apr. 2004), *not yet entered into force*, *at* http://www.state.gov/p/eur/rls/fs/34885.htm.