2006

Case Comment Sanchez-Llamas v. Oregon

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INTERNATIONAL DECISIONS

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Treaty enforcement—suppression of evidence—procedural default—International Court of Justice—deference to executive branch—federalism

SANCHEZ-LLAMAS V. OREGON, 126 S.Ct. 2669.
United States Supreme Court, June 28, 2006.

In *Sanchez-Llamas v. Oregon*,[1] a majority of the U.S. Supreme Court held that suppression of evidence is not an appropriate remedy for violations of Article 36 of the Vienna Convention on Consular Relations[2] and that U.S. states may apply their regular procedural default rules to bar claims brought under Article 36. The Court reached the latter conclusion despite contrary reasoning by the International Court of Justice (ICJ).

Article 36(1)(b) of the Vienna Convention provides that when one party country arrests nationals of another party country, it shall inform the foreign nationals without delay that they have the right to have their consulate notified of the arrest, and to communicate with the consulate. Article 36(2) adds that these rights "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." The United States ratified the Vienna Convention in 1969, along with a protocol to the Convention providing that disputes between nations arising under the treaty could be heard in the ICJ.[3]

Several nations have brought cases against the United States in the ICJ concerning violations of Article 36. The first case was brought by Paraguay on behalf of Angel Breard, a Paraguayan citizen on death row in Virginia. The ICJ issued a provisional order in that case stating that the United States was to "take all measures at its disposal" to ensure that Breard was not executed pending the Court's final decision in the case.[4] In *Breard v. Greene*, however, the U.S. Supreme Court declined to halt the execution. While recognizing that it should give "respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such," the Court held that in the absence of "a clear and express

[1] 126 S.Ct. 2669 (2006).

[2] *See* Vienna Convention on Consular Relations, Apr. 24, 1963, Art. 36(1)(b), 21 UST 77, 596 UNTS 261.

[3] *See* Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 UST 325, 596 UNTS 487.

[4] Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 ICJ REP. 248, para. 41 (Apr. 9).

statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."[5] One such procedural rule in the United States is that "assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas," and Breard had not complied with this rule.[6]

The second case was brought by Germany on behalf of two brothers of German citizenship on death row in Arizona, Karl and Walter LaGrand. The ICJ eventually issued a final judgment in that case, concluding that Article 36 of the Vienna Convention confers not only state-to-state rights, but also individual rights; that the United States had violated the rights of the LaGrand brothers; and that U.S. court application of the procedural default rule had prevented "full effect" from being given to the rights under Article 36.[7] The ICJ also concluded that, in the future, when German nationals are sentenced to severe penalties in the United States without their Article 36 rights being respected, the United States would be obligated to provide for "review and reconsideration" of their convictions and sentences in light of the violation.[8] The ICJ noted, however, that this "obligation can be carried out in various ways" and that the "choice of means must be left to the United States."[9]

In the latest case, *Avena* (Mexico v. United States),[10] the ICJ held that the United States had violated the Article 36 rights of fifty-one Mexican nationals and that the proper remedy for these violations was for the United States "to permit review and reconsideration of these nationals' cases by the United States courts . . . with a view to ascertaining whether in each case the violation of Article 36 . . . caused actual prejudice to the defendant in the process of administration of criminal justice."[11] The ICJ suggested that procedural default rules should not be applied to bar this review and reconsideration, at least where the Article 36 violation may have contributed to the procedural default, because the application of such rules would prevent full effect from being given to the rights.[12]

After the *Avena* decision, the U.S. executive branch took the position that the ICJ had erred in its construction of the Vienna Convention. In a case that the Supreme Court ultimately decided not to review—involving one of the Mexican nationals covered by the *Avena* decision[13]—the executive branch filed a brief arguing, among other things, that Article 36 did not confer any private, judicially enforceable rights; that the article did not preclude application of procedural default principles; and that the *Avena* decision was not directly enforceable in U.S. courts.[14] The brief informed the Supreme Court, however, that President George W.

[5] 523 U.S. 371, 375 (1998).

[6] *Id.* For discussion of the *Breard* litigation, see, for example, Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999), and *Agora*: Breard, 92 AJIL 666 (1998).

[7] LaGrand (F.R.G. v. U.S.), 2001 ICJ REP. 466, paras. 67, 73, 77, 91 (June 27); *see* William J. Aceves, Case Report: LaGrand (Germany v. United States), 96 AJIL 210 (2002).

[8] LaGrand, para. 125.

[9] *Id.*

[10] 2004 ICJ REP. 12 (Mar. 31); *see* Dinah L. Shelton, Case Report: Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), 98 AJIL 559 (2004).

[11] Avena, para. 121.

[12] *Id.*, para. 113.

[13] *See* Medellin v. Dretke, 544 U.S. 660 (2005).

[14] *See* Brief for the United States as Amicus Curiae Supporting Respondent at 42, Medellin v. Dretke (No. 04-5928), *at* <http://www.usdoj.gov/osg/briefs/2004/3mer/1ami/2004-5928.mer.ami.pdf>.

Bush had written a memorandum to the U.S. attorney general stating that the United States, "in accordance with general principles of comity," would discharge its international obligations under *Avena* by having its state courts provide review and reconsideration in the fifty-one cases covered by *Avena*, and that this memorandum would, it was argued, override state procedural default rules.[15] About a week later, the U.S. secretary of state sent a letter to the UN secretary-general stating that the United States was withdrawing from the protocol that gives the ICJ jurisdiction over these disputes.[16]

Sanchez-Llamas involved two consolidated state cases, one from Oregon and one from Virginia. In each case, state authorities had failed to advise foreign nationals of their rights under Article 36. In the Oregon case, Moises Sanchez-Llamas, a Mexican citizen who was not one of the fifty-one Mexican nationals covered by the *Avena* decision, was convicted of various charges, including attempted murder. Before his trial, he moved to suppress incriminating statements that he had made after his arrest, arguing that authorities had not complied with Article 36, but the motion was denied. The Oregon courts upheld his conviction on appeal. In the Virginia case, Mario Bustillo, a Honduran national, was convicted of first-degree murder. After the conviction became final, he filed a petition for a writ of habeas corpus in state court, arguing for the first time that his Article 36 rights had been violated. The petition was dismissed on the ground that Bustillo had failed to raise the claim at trial or on direct appeal, resulting in a procedural default.

In an opinion by Chief Justice Roberts, a 6-3 majority of the U.S. Supreme Court rejected the claims of both petitioners. The Court did not take a position on whether Article 36 confers judicially enforceable individual rights. Instead, it reasoned that, even if Article 36 confers such rights, the petitioners were not entitled to relief on their claims (pp. 2677–78).[17]

With respect to the issue of suppression of evidence, the Court began by noting that the text of Article 36 does not prescribe specific remedies and that it expressly leaves the implementation of the rights mentioned in the article to domestic law. The Court also observed that the exclusionary rule, as it is applied in the United States,[18] is an American legal creation that is rejected in other countries, and that it would therefore be "startling" if the Vienna Convention were construed to require that particular remedy. "It is implausible," said the Court, "that other signatories to the Convention thought it to require a remedy that nearly all refuse to recognize as a matter of domestic law" (p. 2678).

The Court rejected Sanchez-Llamas's argument that the Court should use its domestic judicial authority to create a suppression remedy to help effectuate enforcement of Article 36. The Court explained that since federal courts have no supervisory authority over the state courts, such authority could not be the basis for creating the requested remedy in this case. The Court also reasoned that, if it were to adopt a remedy not entailed by the terms of the Vienna Convention, it "would in effect be supplementing those terms by enlarging the obligations of the

[15] *See id.* at 38–48.

[16] *See* Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A01.

[17] Justice Breyer issued a dissent, joined in full by Justices Stevens and Souter, and joined in part by Justice Ginsburg.

[18] Under the exclusionary rule, evidence obtained by authorities as a result of certain legal violations is excluded from consideration in a criminal trial. *See* Hudson v. Michigan, 126 S.Ct. 2159, 2163–68 (2006).

United States under the Convention" and that doing so would be "entirely inconsistent with the judicial function" (p. 2679). The Court further noted that Article 36 states that the rights are to be exercised "in conformity with the laws and regulations of the receiving State" and that the exclusionary rule is not a remedy that is applied lightly under U.S. domestic law (p. 2680). Finally, the Court reasoned that the usual justifications for applying the exclusionary rule did not apply in this context, noting that Article 36 is "at best remotely connected to the gathering of evidence" since it does not regulate searches or interrogations and does not even guarantee criminal defendants consular assistance; that the failure to give notice under Article 36 is "unlikely, with any frequency, to produce unreliable confessions"; and that "police win little, if any, practical advantage from violating Article 36" (p. 2681).

With respect to the procedural default issue, the Court reasoned that it should follow its earlier decision in *Breard*, in which it had held that procedural default rules could be applied to bar consideration of a federal habeas corpus action based on Article 36. The Court concluded that this approach was proper even though the ICJ had, after *Breard*, interpreted Article 36 as barring application of procedural default rules under these circumstances. While the ICJ's reasoning "deserves 'respectful consideration,'" said the Court, "it does not compel us to reconsider our understanding of the Convention in *Breard*" (p. 2683). Citing *Marbury v. Madison*, the Court stated that "[i]f treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution" (p. 2684).

The Court also found that "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts" (p. 2684). Among other things, the Court pointed out that ICJ decisions are not even binding on the ICJ itself and that the only mechanism provided for in the UN Charter for enforcing ICJ decisions is referral to the Security Council (p. 2685). The Court further observed that it has traditionally given "great weight" to the executive branch's interpretation of treaties and that the executive branch did not view the ICJ's decision as binding on U.S. courts. Finally, the Court noted that the United States had withdrawn from the protocol that gave the ICJ jurisdiction over these issues, and observed that "it is doubtful that our courts should give decisive weight to the interpretation of a tribunal whose jurisdiction in this area is no longer recognized by the United States" (*id.*).

The Court concluded by noting several reasons why it found the ICJ's views on the procedural default issue to be unpersuasive. Article 36 expressly allows application of the domestic laws and procedures of the receiving state, which in the United States includes rules of procedural default. Procedural default rules are especially important in an adversary legal system, "which relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication" (p. 2685). Finally, under U.S. law, procedural default rules are applicable even to constitutional rights, and yet those rights are still regarded as having "full effect" in the U.S. legal system (pp. 2687–88).

* * * *

The issue most obviously left open in *Sanchez-Llamas* is whether Article 36 confers judicially enforceable individual rights that a criminal defendant can invoke in the absence of a procedural default. Four justices expressed the view that Article 36 does confer such rights (pp. 2693–98; Breyer, J., dissenting). The majority did not take a position on the issue,

although there are suggestions in the Court's opinion that it might not be receptive to allowing private judicial enforcement of Article 36. The majority noted in its opinion that "diplomatic avenues" are "the primary means of enforcing the Convention" (p. 2682), and it stated that there "is reason to doubt" that Article 36 requires a judicial remedy (p. 2680). The majority also made clear that it would give some deference to the executive branch's construction of Article 36, and, as noted above, the executive branch has taken the position that this article does not confer judicially enforceable private rights. As with many issues that the Roberts Court may address, Justice Kennedy's views are likely to be critical here. His vote and concurrence in a decision issued the day after *Sanchez-Llamas*—*Hamdan v. Rumsfeld*—might suggest that he is receptive to private judicial enforcement of treaties; in that case he concluded that military commission procedures were invalid because, among other things, they conflicted with Common Article 3 of the Geneva Conventions.[19] Justice Kennedy made clear, however, that the Court was enforcing the treaty provision in *Hamdan* because of an underlying statutory incorporation,[20] whereas there has been no statutory incorporation of Article 36 of the Vienna Convention.

The conjunction of *Sanchez-Llamas* with *Hamdan* raises a further question about the extent to which U.S. courts will continue to defer to treaty interpretations by the executive branch. Traditionally, the Supreme Court has given substantial deference to executive branch interpretations of treaties, stating, for example, that these interpretations are entitled to "great weight."[21] The majority in *Sanchez-Llamas* cited and quoted with approval from this line of authority and ultimately agreed with the executive branch's views regarding the implications of Article 36 for suppression of evidence and procedural default. In *Hamdan*, however, the Court interpreted Common Article 3 of the Geneva Conventions to apply to a conflict between the United States and a nonstate terrorist organization, and it did not give much deference to a contrary interpretation by the executive branch.[22] Although there does appear to be some tension between the two decisions with respect to deference, it should be noted that Chief Justice Roberts did not participate in *Hamdan*, so *Sanchez-Llamas* may be a better indicator than *Hamdan* of the likely approach of the Roberts Court in treaty cases. Moreover, the Court's lack of deference to the executive branch in *Hamdan* might have stemmed from factors specific to U.S. policy at Guantánamo Bay—such as the international public relations difficulties engendered by the U.S. detention facility and the long delay in initiating any military commission trials there—and may not be indicative of more general views relating to treaty deference.

Another issue unresolved in *Sanchez-Llamas* is whether the president's February 2005 memorandum, with its assertion that state courts will provide review and reconsideration in the fifty-one cases covered by *Avena*, preempts otherwise applicable state procedural default rules. The Court in *Sanchez-Llamas* mentioned the memorandum when discussing deference to the executive (p. 2685, noting that "the United States has agreed to 'discharge its international

[19] *See* Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2795–97 (2006); *id.* at 2802–04 (Kennedy, J., concurring). A case report by Peter Spiro appears in this issue of the *Journal*.

[20] *See* 126 S.Ct. at 2774, 2786, 2794; *id.* at 2799 (Kennedy, J., concurring).

[21] *See, e.g.*, Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982).

[22] *See* 126 S.Ct. at 2795–96.

obligations' in having state courts give effect to the decision in *Avena*"), which may suggest that the Court is receptive to giving it preemptive effect. The Court also made clear, however, that the Vienna Convention does not itself preempt state procedural default rules and that the judiciary should not create remedies for a treaty violation that go beyond the terms of the treaty. If the memorandum has preemptive effect, therefore, it presumably must stem from a source of authority other than the treaty. It is possible that the president has some remedial lawmaking authority that the judiciary does not have by virtue of the Constitution's Take Care Clause, at least with respect to foreign affairs, although there is significant uncertainty regarding both the existence and content of any such authority.[23]

Sanchez-Llamas may also have implications for debates over the role of federalism in U.S. foreign relations law. It is often asserted that, whatever its relevance for domestic affairs, U.S. federalism has little, if any, relevance to foreign affairs.[24] In *Sanchez-Llamas*, the Court did not appear to question this conventional view with respect to the authority of the political branches to conclude treaties, noting that "where a treaty provides for a particular judicial remedy, there is no issue of intruding on the constitutional prerogatives of the States" (p. 2680). The Court did suggest, however, that federalism was relevant to the *judiciary*'s role in the foreign relations law area. The Court disclaimed any supervisory authority over state court proceedings, even for the purpose of effectuating compliance with international law, and also stated that "where a treaty does not provide a particular remedy, . . . it is not for the federal courts to impose one on the States through lawmaking of their own" (*id.*). Justice Ginsburg similarly emphasized judicial federalism in her concurrence (p. 2689; Ginsburg, J., concurring). The Court's consideration of federalism as a limitation on the federal judicial power may have relevance to other foreign affairs law issues—for example, in relation to the idea of "dormant" judicially enforced preemption in foreign affairs and the debate over whether U.S. judges should apply customary international law as preemptive federal law.

Finally, the Court's decision to depart from the reasoning of the ICJ concerning procedural default may suggest limitations on the Supreme Court's willingness to conceive of itself as part of a "global community of courts," as some have advocated.[25] Despite the Supreme Court's controversial citation of foreign and international materials in some of its constitutional law decisions,[26] the Court indicated in *Sanchez-Llamas* that it will insist on a certain degree of autonomy from the international legal system. Although the Court took international law seriously, it made clear that international law will be applied in the United States against the backdrop of the usual constitutional, procedural, and remedial doctrines that govern the domestic legal system. Moreover, the Court seemed to say that the international legal system neither enhances the federal judicial power nor places limits upon it. Thus, the Court declined to create a suppression remedy to help effectuate compliance with the Vienna Convention, because to do so would be "entirely inconsistent with the judicial function," and it declined to treat the

[23] *Cf.* American Ins. Assoc. v. Garamendi, 539 U.S. 396 (2003) (finding state statute to be preempted by executive agreements).

[24] *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 150 (2d ed. 1996) ("[A]s regards U.S. foreign relations, the states 'do not exist.'").

[25] *See, e.g.*, Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003).

[26] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 576–78 (2005).

ICJ's interpretation as controlling, because to determine the meaning of treaties in U.S. litigation "is emphatically the province and duty of the judicial department." International dialogue has a role under this approach, but it is one whereby national courts act as independent interpreters and filters of international law, rather than as agents of the international order.

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Military commissions—Uniform Code of Military Justice—1949 Geneva Conventions—Common Article 3—limits of presidential power

HAMDAN V. RUMSFELD. 126 S.Ct. 2749.
United States Supreme Court, June 29, 2006.

In *Hamdan v. Rumsfeld*,[1] the U.S. Supreme Court found that the military commissions established by President George W. Bush were unauthorized by law and inconsistent with both the Uniform Code of Military Justice (UCMJ) and the 1949 Geneva Conventions. Rejecting jurisdictional challenges to its resolving the legality of the tribunals, the Court found the military commission proceedings against Hamdan to violate the "uniformity" requirement of the UCMJ, under which military commissions must be governed by the same standards as courts-martial except where impracticable. The Court also found the tribunals to violate the Geneva Conventions as incorporated by Article 21 of the UCMJ, because the commissions did not qualify as "regularly constituted courts" as required under Common Article 3.

The case of Salim Ahmed Hamdan arose in the context of U.S. military operations in Afghanistan following the September 11 attacks. Hamdan was captured by militia forces and turned over to the U.S. military. In June 2002, he was transferred to the U.S. military detention facility in Guantánamo Bay, Cuba. In July 2003, President Bush designated Hamdan and five other Guantánamo detainees as eligible for prosecution before military commissions, the creation of which the president had authorized by executive order in November 2001.[2] Hamdan was charged in July 2004 with one count of conspiracy to commit "offenses triable by military commission," including conspiracy to attack civilians and engage in terrorism.[3] The charging document alleged overt acts in furtherance of the conspiracy, including serving as Osama bin Laden's bodyguard and personal driver, and transporting weapons for use by Al Qaeda.

Prior to the filing of charges, Hamdan had filed petitions for writs of habeas corpus and mandamus in the U.S. District Court for the Western District of Washington, which subsequently transferred the case to the U.S. District Court for the District of Columbia (p. 2761). In November 2004, the district court granted Hamdan's habeas petition and stayed the commission proceedings on the grounds that Hamdan was entitled to prisoner-of-war status in the

[1] Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006).

[2] Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

[3] List of Charges at 2 (July 13, 2004), United States v. Hamdan (U.S. Mil. Comm'n), *at* <http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf>.