VCCR Article 36 Civil Remedies and Other Solutions: A Small Step for Litigants but a Giant Leap Towards International Compliance

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INTRODUCTION

Imagine being an inmate on death row. Days away from your execution, you learn that the United States government has violated its obligation under Article 36 the Vienna Convention on Consular Relations ("the VCCR") by withholding notification of your arrest to your nation's consulate. Little did you know, this right to consular notification had the potential of gaining you diplomatic intervention, help with translation, and possibly even legal assistance. However, based on the domestic treatment of Article 36 violations, learning about your right to consular notification at this stage renders it meaningless. Although you will face many procedural and substantive bars in bringing a successful claim, this is your last chance of legal justice as a death row inmate. This is the typical backdrop of Article 36 claims. Thus far, except for one case, the result has also been typical: denial of Article 36 rights.

The VCCR is a 79-article treaty signed by 170 nations covering the protocol concerning consular or ambassador relations and the privileges and immunities enjoyed by consular officers and staff.[1] Nations adhere to this protocol in their pursuit of friendly international relations and the maintenance of international peace.[2] Article 36 of the VCCR requires local authorities to notify all detained foreigners without delay of their right to have their consulate or embassy notified of their detention.[3] Article 36 has been hotly contested because it deviates from the general scope of the treaty by focusing on a foreign national's rights when arrested in a foreign country as opposed to diplomatic and consular privileges and immunities encapsulated in the rest of the treaty.[4]

Recently, there has been a flood of Article 36 litigation involving the availability of criminal and civil remedies under Article 36. In *Breard v. Greene*[5], the Supreme Court stated that Article 36 conferred a foreign

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[1] The Vienna Convention on Consular Relations, Apr. 24, 1969, 21 U.N.T.S. 77 [hereinafter VCCR].

[2] *Id*.

[3] *Id*. at Art.36.

[4] *Id*.

[5] Breard v. Greene, 523 U.S. 371, 376 (1998).

national with an individual right as compared to the general purpose of the VCCR's text which outlines consular immunities and privileges and makes no mention of individuals and their rights.[6] The Court conferred this individual right upon a foreign national in the criminal context but did not address the availability of criminal remedies.[7] Moreover, subsequent cases have hindered the progress of Article 36 claims by creating a number of procedural and substantive hoops. Specifically, the procedural default doctrine, a common procedural hurdle that many courts have used to bar Article 36 litigation from moving forward, bars Article 36 claims not first raised in State courts and the prejudice test which places an undue burden on the foreign national in showing that he was not aware of this right.[8] Even so, foreign nationals who overcome the procedural default doctrine and prejudice test hurdles are not awarded with remedies they seek, such as suppression of evidence or reversal of indictment.[9]

This disheartenment with the lack of criminal remedies under Article 36 has led foreign nationals to file civil claims under 42 U.S.C. § 1983 and the Alien Tort Claims Act ("ATCA").[10] With no guidance from the Supreme Court regarding civil remedies under Article 36, there remains a circuit split regarding whether Article 36 in fact confers an individual right to recover civil damages and if so, what the civil remedies would be and the procedure by which a foreign national would bring such a civil claim. Specifically, the Fifth, Sixth, and Second Circuits have held that there is no civil right of Article 36 compliance, while the Seventh Circuit has held that a foreign national does indeed have a civil right under Article 36 and can assert a claim under § 1983 and ATCA.[11]

The recent influx of VCCR litigation clogging federal and state court dockets makes it very likely that there are specific litigation strategies at play. Specifically, creating awareness of the United States' disregard for international law, especially it's reluctance to adhere to international law when it concerns human rights violations, creating a

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[6] *Id*.

[7] *Id*.

[8] *See* Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) (holding that the exclusionary rule does not apply as a remedy).

[9] *Id*.

[10] *See* Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005) [hereinafter Jogi I]; Brief of Plaintiff-Appellant, Mora v. The People of New York, No. 06-0431 (2nd Cir. Dec. 21, 2006).

[11] *See generally Jogi I*, 425 F.3d 367 (7th Cir. 2007); United States v. Jimenez-Nava, 243 F.3d 192 (5th Cir. 2001); United States v. Emuegbunam, 268 F.3d 377 (6th Cir. 2001); Mora v. People of New York, 524 F.3d 183 (2d Cir. 2008).

storm of federal circuit litigation and circuit splits on Article 36 issues thereby forcing the Supreme Court to grant certiorari on the narrow issue of whether Article 36 contains an individual right, and which criminal and civil remedies are appropriate, if any. These litigation strategies also serve as proxy enforcement mechanisms by the international community which is motivated by it's disbelief and growing concern over the United States' failure to abide by its international legal obligations.

Consequently, this comment uses the VCCR as a microscope to magnify and analyze United States' compliance in international legal matters. Part I of this comment discusses the VCCR's text, purpose and drafting history with a focus on Article 36, the center of immense controversy. This comment argues, in light of the interpretation of the United States Constitution, federal statutes, and international legal authority that Article 36 does imply a private cause of action. Part II explores the scope and availability criminal remedies under Article 36 of the Vienna Convention through discussing the recent Supreme Court cases and the ICJ rulings. Part III addresses the current circuit split on the issue of Article 36's grant of a civil right of action focusing on the *Jogi v. Voges* and *Mora v. People of New York* cases as well as mechanisms to enforce civil remedies such as § 1983 and the ATCA. This comment analyzes the sophisticated litigation strategies at play as both a proxy enforcement mechanism and a death row prisoner's last chance. Part IV analyzes why the VCCR is being used as a litigation strategy and addresses the recent influx of VCCR litigation in state and federal courts. By comparing United States' deference to international law in the international trade context with its utter disregard for international law in the human rights arena, this comment aims to use the VCCR as a lens through which to forecast United States' behavior in the international law arena. Each section in this comment inevitably advocates for the proclamation of an individual right under Article 36, and consequently counter argues each argument put forward by opponents of Article 36's power to grant individual rights. Finally, Part V presents the most prevalent obstacles faced by VCCR litigants and proposes solutions that all three branches of government can implement in order to bring the United States closer to fulfilling its international legal obligations. For example, accountability at the executive level, reformulation of threshold tests at the judicial level, and implementation of international doctrines into domestic laws at the legislative level.

THE VIENNA CONVENTION ON CONSULAR RELATIONS

The VCCR, entered into force on December 24, 1969, has a checkered background surrounding its adoption. The most significant

reason for the lengthy and heated debates leading up to the VCCR's adoption can be attributed to Article 36's controversial language. A closer look at the history of the VCCR and Article 36, the United States' position on Article 36 and the United States' subsequent enforcement shows that Article 36's language confers an individual right for foreign nationals.

The VCCR is a 79-article multilateral treaty covering "consular relations, privileges, and immunities" for consular officers and staff.[12] There are currently 170 signatory nations to the VCCR including the United States.[13] The privileges and immunities the VCCR lays out serve to facilitate consular personnel's ability to carry out consular functions. These functions include protecting the sending State's interest in the receiving State within the ambit of international law and "furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State."[14] Through the VCCR, its signatories aim to achieve and maintain friendly and diplomatic relations.[15] While the VCCR generally covers privileges and immunities of consular personnel, Article 36 speaks of individual rights of foreign nationals at the time of detainment or arrest.[16] Amidst extensive debate and discussion surrounding the adoption of Article 36, many nations vehemently opposed Article 36's inclusion in the VCCR, while other nations passionately supported the inclusion.[17] Consequently, the placement of Article 36 in the VCCR was not an oversight by the drafters.

Text of Article 36

Article 36 is divided into three sections with each section defining the rights of a foreign national. The first right is one between the national of the sending State (the foreign national) and the consular officer of the sending State. There is a reciprocal right of communication. The foreign national has "the freedom . . . to [communicate] with and have access to

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[12] VCCR art. 36, *supra* note 1.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH J. INT'L L. 565, 597–98 (2000) (discussing the debate over individual rights that took place in the committee debates as well as plenary meetings). Ironically, among Article 36's greatest supporters was the United States.

consular officers of the sending State" and consular officers are given the same freedom with regard to nationals of the sending State.[18]

The second right is between the foreign national and the detaining or arresting authorities of the receiving State. Upon the foreign national's *request*, the "competent authorities of the receiving State shall, *without delay*, inform the consular . . . [officials] of the sending State . . . that a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner."[19] Furthermore, "any communication addressed to the consular post by the [foreign national] . . . shall also be forwarded . . . *without delay*. . . . [And] the said authorities shall inform the [foreign national] *without delay* of *his rights* under this [section]."[20] Under this right, upon the foreign national's request, it is the duty of officials to notify the consular official's of the foreign national's home country of the foreign national's arrest along with any other communication the foreign national deems should be forwarded to the consulate on his behalf.[21]

The third right deals with visitation between the foreign national and the consular officers of the sending State. Article 36 states: "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. . . . [Or] in pursuance of a judgment."[22] The third right is strictly limited to the approval of the foreign national.[23]

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[18] VCCR art. 36(1)(a), *supra* note 1 ("[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.").

[19] VCCR art. 36(1)(b), *supra* note 1 ("[I]f 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.") (emphasis added).

[20] *Id.* (emphasis added).

[21] *Id*.

[22] VCCR art. 36(1)(c), *supra* note 1 ("[C]onsular 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.").

[23] *Id.*

Article 36 next outlines the parameters of the applicable law used to enforce Article 36 violations by stating: "The rights . . . shall be exercised in conformity with the laws and regulations of the receiving State [conditioned on the premise that] . . . said laws and regulations *must* enable *full effect* to be given to the *purpose* for which the rights accorded under this Article are *intended*."[24] Article 36's language of "rights" stirred up such heated debate that the Article was completely removed from the original draft of the treaty only to be added in just two days before the closing of the Convention.[25] Further interpretation of the VCCR requires a review of the drafting history as well as the United States' position towards Article 36.

History of the Vienna Convention and Article 36

The VCCR delegates engaged in protracted dialogue before finally adopting Article 36 with its current language.[26] In committee meetings, several nations expressed concern over the individual rights implied in Article 36.[27] In particular, an amendment proposed by Venezuela received a great deal of attention.[28] The proposed amendment eliminated the first right: the freedom of reciprocal communication between the foreign national and consular officials of his nation.[29] The proponents of the Venezuelan amendment argued that an article establishing a foreign national's individual rights was misplaced given the general scope of the treaty as a document detailing the rights and protections of consular officials.[30] Nonetheless, the Venezuelan amendment received strong opposition, and the reciprocal freedom of communication right remained intact.[31]

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[24] VCCR art. 36(2), *supra* note 1 ("The rights referred to in paragraph 1 of this Article 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.") (emphasis added).

[25] Kadish, *supra* note 17, at 570–71.

[26] *See* Jogi v. Voges, 480 F. 3d 822, 829 (7th Cir. 2007); [hereinafter Jogi II]; U. N. CONFERENCE ON CONSULAR RELATIONS, OFFICIAL RECORDS at 3, U.N. Doc. A/Conf. 2 5/6, U.N. Sales. No. 63.X.2. (1963).

[27] Kadish, *supra* note 17, at 597–98.

[28] *Id.*

[29] *Id.*

[30] *Id.*; *See also* ILC, Summary Records of 535th Meeting, U.N. Doc. A/CN.4/Sr.535 at 48–49 (1960) ("[Article 36 is] related to the basic function of the consul to protect his nationals vis-à-vis the local authorities and to regard the question as one involving primarily human rights or the status of aliens would be to confuse the issue.").

[31] VCCR, *supra* note 1.

An additional subject of debate was the language "if he so requests" contained in Article 36's second section.[32] Many nations pushed for the notification requirement to the sending State's consular officials to be mandatory instead of elective in order to shield these nations from due process attacks.[33] Once again, the contested language remained ("if he so requests") over the resistance of opposing nations.[34]

Unfortunately, there was never a consensus on Article 36's underlying meaning. This is illustrated by the United States' position in *Mora v. People of New York.*[35] In *Mora,* the United States submitted an amicus brief arguing that the purpose of Article 36's notification requirement as elective was not to confer an individual right on a foreign national.[36] Instead, the United States argued that the delegates incorporated the language "if he so requests" into Article 36 to ease the significant burden of receiving States that have large tourist and immigrant populations.[37] This argument and the argument in support of Article 36 containing an individual right rely on the same authority.[38] Thus, the VCCR's drafting history left little in the way of determining a clear grant of individual rights under Article 36.

The VCCR's Preamble and Article 36's language create another inconsistency. The Preamble states, in pertinent part: "[T]he purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States."[39] The delegates passed a resolution at the Vienna Convention clarifying the meaning of the Preamble.[40] The resolution implies that the Preamble merely establishes the immunities and privileges that protect consular personnel. The Preamble warns that nations should not use these privileges and immunities as shelter against wrongdoing.[41] The Preamble's language did not disallow Article 36 rights. Furthermore, the Preamble of the VCCR in and of itself is not conclusive in establishing the absence of foreign nationals' individual rights under Article 36.[42]

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[32] *Id.*
[33] Kadish, *supra* note 17, at 597–98.
[34] *Id.*
[35] Mora v. People of New York, 524 F.3d 183 (2008).
[36] 1 OFFICIAL RECORDS at 36–38, 81–86, 336–40.
[37] *Id*.
[38] VCCR, Art. 36 *supra* note 1.
[39] VCCR pmbl., *supra* note 1.
[40] Kadish, *supra* note 17, at 597–98.
[41] *Id*. at 594–96.
[42] *Id*.

In addition, during the ratification process, the United States was a zealous advocate for individual rights of foreign nationals under Article 36.[43] The United States delegate proposed an amendment to Article 36's right of consular notification at the request of the foreign national; the delegate suggested that the request be made "to protect the rights of the national concerned."[44] Furthermore, in the United States' letter of transmittal ratifying the VCCR, Secretary of State William P. Rodgers indicated that Article 36 provided an individual right.[45] In the letter, he wrote: "Article 36 requires that authorities of the receiving State inform the person detained of *his right* to have the fact of his detention reported to the consular post concerned and of *his right* to communicate with that consular post."[46] Finally, the U.S. Vienna Report explained that the consular notification requirement "is not beyond the means of practical implementation in the United States."[47] Whether the United States has practically implemented the VCCR is a question for further review.

United States Enforcement of Article 36

The United States Department of State ("DOS") has devoted considerable attention and resources toward creating awareness of Article 36's mandatory notice requirements.[48] For example, the DOS manual instructs law enforcement officials to treat a foreign national the way an American citizen would expect to be treated in a foreign country.[49] The DOS highlights such treatment as "prompt, courteous notification to the foreign national of the possibility of consular assistance and prompt, courteous notification to the foreign national's nearest consular official . . . ."[50] The DOS has also provided law enforcement officials with a list of countries in which mandatory notification of consular officials is required, even if the foreign national does not request it.[51] The manual further notes that DOS occasionally receives inquiries from foreign governments concerning foreign nationals in detention.[52] To address the inquiries, the DOS requires a

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[43] *Id*. at 597–98.
[44] *Jogi II*, 480 F.3d at 830.
[45] *Id*.
[46] *Id*. (emphasis added).
[47] *Id*.
[48] BUREAU OF CONSULAR AFFAIRS, U.S. DEPT. OF STATE, CONSULAR NOTIFICATION AND ACCESS (2008), *available at* http://travel.state.gov/law/consular/consular_737.html#requirements.
[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] *Id*.

recorded confirmation of receipt of notification to respond to inquiries of foreign nationals and to assist foreign nationals if notification issues arise in litigation.[53] Finally, the DOS has included a set of frequently asked questions to emphasize the importance of Article 36's notification requirement.[54]

For example, the DOS has clarified that law enforcement officials must notify a consular official even if a law enforcement official has given Miranda warnings.[55] The DOS has listed various remedies that may be available for violating the notification requirement, such as discussing the matter in which the foreign government was involved, apologizing on the United States' behalf, or seeking to improve future compliance.[56] In addition to the DOS guidelines, some states have implemented statutory provisions making Article 36 notification mandatory.[57]

Through a plain reading of the text of Article 36 itself, it is clear that the drafters intended to articulate the provisions contained in Article 36 as a foreign national's rights and a violation resulting therefrom to be remedied by the laws of a particular country. Furthermore, during intense debates surrounding the adoption of Article 36 in the text of the VCCR, United States was one of the greatest advocates for the adoption of an Article containing individual rights for foreign nationals. Moreover, recognizing the importance of Article 36 for foreign nationals, the DOS has extensively covered the role of local authorities in fulfilling Article 36 obligations in its manual.

Despite the numerous efforts to emphasize the importance of notification at the federal and state levels, compliance with Article 36's notification requirement has been intermittent, and there has been no meaningful penalty for non-compliance at the local level.[58] It follows then, that even though the United States disagreed with other signatories

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[53] BUREAU OF CONSULAR AFFAIRS, *supra* note 48.

[54] *Id*.

[55] *Id*.

[56] *Id*.

[57] *See, e.g.,* CAL. PENAL CODE § 834 (c) ("California law enforcement agencies shall ensure that policy or procedure and training manuals incorporate language based upon provisions of the treaty that set forth requirements for handling the arrest and booking or detention for more than two hours of a foreign national pursuant to this section prior to December 31, 2000."); FLA.STAT.ANN.§ 288.816(2)(f) ("Establish a system of communication to provide all state and local law enforcement agencies with information regarding proper procedures relating to the arrest or incarceration of a foreign citizen.").

[58] BARBARA H. BEAN, GUIDE TO VIENNA CONVENTION ON CONSULAR RELATIONS NOTIFICATION REQUIREMENT (2007), http://www.nyulawglobal.org/globalex/Vienna_Convention_Consular_Relations.htm#_I._Introduction.

regarding the inclusion of Article 36's language granting individual rights and asserted that Article 36 was not beyond practical implementation, the United States is seriously lagging behind in its efforts to provide foreign nationals with those very rights.

Foreign nationals and their home countries, who believed their rights under Article 36 were violated, have sought criminal remedies in federal and state courts. A summation of what resulted from this wave of VCCR litigation follows.

CRIMINAL REMEDIES UNDER THE VIENNA CONVENTION

The facts of Article 36 non-compliance cases have become commonplace: a criminal defendant seeks a criminal remedy for an Article 36 violation in a habeas corpus proceeding.[59] The Supreme Court has not yet allowed foreign nationals to obtain the criminal remedies they seek by often dismissing the case before a remedy determination even begins. An in-depth look at the most notable Article 36 cases, *Breard v. Greene; Sanchez-Llamas v. Oregon;* and the ICJ cases of *Avena and LaGrand*, clarify the procedural and substantive hurdles a foreign national must overcome before there is any hope of a meaningful remedy. Although these hurdles are difficult to overcome, the Supreme Court has arguably conceded that Article 36 does create a individual right for a foreign national, but has severely limited its holding to a narrow issue of a specific criminal remedy thereby circumventing the ICJ's guidance to the Supreme Court in its *Avena* and *LaGrand* decisions.

Breard v. Greene

In *Breard v. Greene*,[60] the Supreme Court concluded without ultimately resolving the issue, that Article 36 "arguably confers on an *individual a right to consular assistance* following arrest."[61] Breard, a Paraguay citizen living in the United States, was convicted of attempted rape and capital murder and was sentenced to death.[62] In his habeas corpus petition, Breard argued that both his conviction and sentence should be overturned because law enforcement officials had failed to inform him of his rights under Article 36 of the VCCR.[63] The Fourth Circuit concluded that Breard's claim was procedurally defaulted because in order to raise an Article 36 violation on appeal, the claim

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[59] *Jogi II*, 480 F.3d at 831.
[60] Breard v. Greene, 523 U.S. 371, 376 (1998).
[61] *Id*. (emphasis added).
[62] *Id*. at 373.
[63] *Id*. at 373–74.

must have been raised in the state court and Breard failed to raise the claim in state court and also lacked a showing of cause and prejudice for this default.[64] The prejudice showing the court required is a three-prong test in which: first, the foreign national must establish that "he did not know of his right to consult with consular officials." Second, had the foreign national known of the right, "he would have availed himself of that right. . . ." and third, "there is a likelihood that the contact would have resulted in assistance. . . ."[65]

Five years following Breard's conviction, the Republic of Paraguay and the Consul General of Paraguay initiated suit against Virginia officials[66] alleging a violation of their separate rights.[67] Additionally, the Republic of Paraguay instituted proceedings against the United States in the International Court of Justice ("ICJ") (now World Court) alleging that the United States violated the VCCR at the time of Bread's arrest.[68] The ICJ issued an order requesting that the United States "take all measures at its disposal to ensure . . . Breard is not executed pending the final decision in these proceedings."[69] The Supreme Court held that in international law, "absent a clear and express statement to the contrary, the procedural rules of the forum-State govern the implementation of the treaty in that State."[70] According to the Supreme Court, this pronouncement of international law is also held in the VCCR.[71] Therefore, by applying the forum-State's procedural rules the Supreme Court also concluded that Breard defaulted his VCCR claim by not asserting the Article 36 violation in state court.[72] The Supreme Court also

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[64] *Id*. at 373; *See also* Breard v. Pruett, 134 F. 3d 615, 620 (4th Cir. 1998) The procedural default doctrine is a common procedural hurdle that many courts have used to bar Article 36 litigation from moving forward. *Id*.

[65] Simma, *infra* note 250, at 37.

[66] The ICJ's role is to settle, in accordance with international law, legal disputes submitted to it by States asserting a violation of the State's right and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies. International Court of Justice, http://www.icjcij.org/court/index.php?p1=1&PHPSESSID=0d379fddb0ca63f7220a9b14d539b3c4 (last visited on Dec. 18, 2008).

[67] The Consul General also asserted a parallel claim under 42 U.S.C. §1983 alleging a denial of rights under the Vienna Convention which the Court dismissed because Paraguay is not a "person within the jurisdiction of the United States." *Breard*, 523 U.S. at 374.

[68] *Id*. at 373.

[69] *Id*. at 375.

[70] *Id*.

[71] *Id*. (noting that the Vienna Convention provides that the rights expressed in the Convention "shall be exercised in conformity with the laws and regulations of the receiving State, provided that said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this rule are intended.").

[72] *Breard*, 523 U.S. at 375–76.

rejected Breard's Supremacy Clause argument,[73] holding that an "Act of Congress . . . is on full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute[74] to the extent of conflict renders the treaty null."[75] As a result, *Breard* provided foreign nationals with two lessons: (1) they must raise Article 36 claims in state court to make their claims reviewable at the appellate level, and (2) a Supremacy Clause argument will not hold weight given the current makeup of the Court. The Court's decision *Sanchez-Llamas v. Oregon* added an extra hurdle for foreign nationals.[76]

Sanchez-Llamas v. Oregon

In *Sanchez-Llamas v. Oregon*, the Supreme Court decided two consolidated cases concerning Article 36 violations of the VCCR. In one case, police arrested Sanchez-Llamas, a Mexican national, for shooting a police officer in the leg during an exchange of gunfire.[77] Police failed to inform him that he could notify the Mexican consulate of his arrest.[78] After his arrest, Sanchez-Llamas made several incriminating statements during a police interrogation.[79] Prior to trial, he moved to suppress these statements, arguing that they were made involuntarily because of Article 36 noncompliance.[80] The other case concerned Mario Bustillo, a Honduran national who was arrested and eventually convicted of murder.[81] The arresting authorities never informed Bustillo of his right to notify the Honduran consulate of his arrest.[82]

The Supreme Court declined to answer the question of whether the VCCR granted enforceable individual rights because both Sanchez-Llamas and Bustillo were not entitled to any relief on their claims; however, the Supreme Court noted in dicta that Article 36 *does* grant

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[73] Breard argued that the Supremacy Clause calls for the Vienna Convention to be the supreme law of which effectively trumps the procedural default doctrine. *Id*.

[74] *Id*. at 376. The court is referring to the Antiterrorism and Effective Death Penalty Act (AEDPA), which provides that "a habeas petitioner alleging that he is held in violation of treaties of the United States will as a general rule, not be afforded an evidentiary hearing if he 'has failed to develop the factual basis of the claim in State court proceeding.'" Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214.

[75] *Id*.

[76] *See generally Sanchez-Llamas,* 548 U.S. 331 (2006).

[77] *Id*. at 340.

[78] *Id*.

[79] *Id*.

[80] *Id*.

[81] *Sanchez-Llamas*, 548 U.S. at 341.

[82] *Id*.

such rights.[83] The Court asserted that remedies, if any, shall be found within the treaty itself, specifying that "where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own."[84] Therefore, the Court left open the question of whether Article 36 explicitly allows for individuals to recover remedies.

Moreover, Chief Justice Roberts, writing for the majority, conceded that remedies under Article 36 should be granted in "conformity with the laws and regulations of the receiving State," stated that:

> the exclusionary rule is not a remedy that the Supreme Court applies lightly. [It] is applied primarily to deter constitutional violations such as violations of the Fourth and Fifth Amendments and not in situations like Article 36 violations, which is, if at all, remotely connected to evidence gathering. Article 36 only secures a right to notify consul and does not guarantee any assistance by consul officials.[85]

Chief Justice Roberts further noted that non-compliance with Article 36 is not likely to produce unreliable confessions and allowing suppression to be a remedy would be grossly disproportionate for Article 36 non-compliance.[86] Instead, he reasoned that it is unnecessary to apply the exclusionary rule when other statutory and constitutional safeguards are already in place to mitigate the possible effects of an Article 36 violation.[87]

Not content with the unavailability of remedies in the United States court system, foreign nations began instituting proceedings in the International Court of Justice, finding jurisdiction under the VCCR's Optional Protocol concerning the Compulsory Settlement of Disputes.[88]

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[83] The Court rejected Sanchez's request for suppression of evidence stating: "Suppression of evidence, the relief which Sanchez-Llamas asks for is an 'American legal creation' [] universally rejected by other countries. It is implausible that other signatories to the Convention would have thought it to require a remedy that nearly all refuse to recognize as a matter of domestic law. The Court does not have power to invoke supervisory authority over state courts." *Id*. at 394.

[84] *Id*. at 347.

[85] *Id*.

[86] *Sanchez-Llamas*, 548 U.S. at 349 (Giving examples of statutory and constitutional safeguards such as the Fourteenth Amendment Due Process Clause, the Fifth Amendment protection against compelled self-incrimination, and the Sixth Amendment entitlement to an attorney).

[87] *Id*.

[88] Case Concerning Avena and Other Mexican Nationals Summary of the Judgment of 31 March 2004, http://www.icj-cij.org/docket/files/128/8190.pdf (last visited Jan. 15, 2009).

International Court of Justice Rulings and its Effect on United States Proceedings

After a line of cases including *Breard* and *Sanchez-Llamas*, foreign nationals and their nations were convinced that the United States' violation of the VCCR would go unremedied in domestic courts. Therefore, in 1999, Germany sued for violations of the VCCR on behalf of its citizens in the ICJ.[89] By signing the VCCR optional protocol, the United States submitted jurisdiction to the ICJ, which allowed other nations to sue the United States for violations of international law in this forum. The ICJ heard cases involving German nationals in the *La Grand* case and Mexican nationals in the *Avena* case.[90] The United States' response to the ICJ rulings demonstrated extreme indifference to its international law obligations.

In both decisions, the ICJ orders were similar. The ICJ focused on three main issues: (1) the procedural default doctrine; (2) remedies available; (3) and "review and consideration."[91] First, in *La Grand*, the ICJ held that the procedural default doctrine violated Article 36(1) (b)[92] because it deprived Germany the possibility of assisting the La Grand brothers in a timely manner.[93] The German consulate was only made aware of their right to communicate with the foreign nationals under Article 36 after the state proceedings had ended, and thus the procedural default doctrine effectively barred Germany from assisting its nationals in their defense.[94] The ICJ held that in the future the United States Courts should review and consider these cases with an eye towards whether the foreign national was prejudiced by late notification of consulate.[95]

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[89] The ICJ is the principal judicial organ of the United Nations (UN). The ICJ was established in June 1945 by the Charter of the United Nations and began work in April 1946. The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies. International Court of Justice, http://www.icjcij.org/court/index.php?p1=1&PHPSESSID=0d379fddb0ca63f7220a9b14d539b3c4 (last visited on Dec. 18, 2008).

[90] *See* Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.), 2004 I.C.J. 12 (March 31); La Grand Case (Germany v. U.S.) 2001 I.C.J. 466 (June 27).

[91] *See id*.

[92] *See* VCCR, *supra* note 1.

[93] Fredric L. Kirgis, *World Court Rules Against the United States in LaGrand Case Arising from a Violation of the Vienna Convention on Consular* Relations, ASIL, (July 2001), http://www.asil.org /insigh75.cfm.

[94] *Id*.

[95] Case concerning Avena and other Mexican nationals Summary of the Judgment of 31 March 2004, http://www.icj-cij.org/docket/files/128/8190.pdf (last visited Jan. 25, 2008) (According to Article 36, notification to sending State's consulate shall be made "without delay"—in *La Grand* the notification to consulate was made after the state court

Second, regarding remedies, the ICJ in *Avena* agreed with the Supreme Court, albeit on different grounds,[96] and held that the appropriate remedy in VCCR cases would not be reversal of conviction and sentence because it is not the foreign national's conviction and sentence that is a violation of international law, rather it is a breach of treaty obligations binding the United States prior to the conviction and sentencing.[97] Third, the ICJ in *Avena* ordered that the United States, "by means of its own choosing [should] allow the review and reconsideration of the conviction and sentence."[98] The ICJ outlined the parameters in which the United States can choose the review and reconsideration: "by taking account of the violation of rights set forth in the Convention, including, in particular, the question of legal consequences of the violation upon the criminal proceedings that have followed the violation."[99] Furthermore, the ICJ emphasized that review and reconsideration should be of both the sentencing and conviction.[100]

In *Avena*, Mexico requested that the United States' review and reconsideration exclude "clemency," the power of the President or a governor to pardon a criminal or commute a criminal sentence.[101] Mexico referred to clemency as "standardless, secretive and immune from judicial oversight."[102] This description of clemency is accurate in the sense that clemency power lies in the executive, not the judicial branch of government and therefore executive clemency is divested of substantive or procedural confinements.[103] The executive branch does not take a specific set of factors into consideration when deciding to grant or deny clemency nor is there consistency in making the clemency

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proceedings effectively barring defense counsel from asserting Article 36 non-compliance as a relief mechanism until after state court proceedings).

[96] *See generally Sanchez-Llamas*, 548 U.S. 331 (noting in dicta, that even if Article 36 created individual rights, reversal of conviction or sentence would not be a proper remedy because of alternative constitutional and statutory safeguards already in place).

[97] Case concerning Avena and other Mexican nationals Summary of the Judgment of 31 March 2004, http://www.icj-cij.org/docket/files/128/8190.pdf (last visited Jan. 25, 2008).

[98] *Id*.

[99] *Id*. (citation omitted).

[100] *Id*.

[101] BLACK'S LAW DICTIONARY, 269 (8th ed. 2004).

[102] Cases Concerning Avena and Other Mexican Nationals (Mexico v. U.S.), 2004 I.C.J. 12, 64 (March 31).

[103] Linda E. Carter, *Compliance with ICJ Provisional Measures and the Meaning of Review and Reconsideration under the Vienna Convention on Consular Relations: Avena and other Mexican Nationals (Mex. v. U.S.)* 25 MICH. J. INT'L. L. 117, 128 (2003).

determination between states.[104] Moreover, a parole board or governor has complete discretion to deny clemency without stating its reasons and is precluded from judicial review.[105] Clemency can be viewed both as a blessing and a curse: a blessing as the "last check on injustice in the criminal process" and a curse because it is hardly applied and is not a reliable feature of the criminal justice system.[106]

Without procedural and substantive transparency, clemency proceedings are unpredictable and ineffective remedies for VCCR violations.[107] Moreover, because Article 36 grants a foreign national's consulate the right to meet with the foreign national to assist in proceedings against him and these proceedings are likely to take place in a legal forum, the judicial branch becomes the heart of review and reconsideration for VCCR remedies, not the executive branch.[108] According to ICJ orders, the United States was obligated to conduct review and reconsideration of *La Grand* and *Avena* decision and provide meaningful remedies in the case of a VCCR violation.[109] The United States' response to the ICJ rulings in *La Grand* reflects the United States' reluctance to adhere to its international law obligations.[110] First, the State Department forwarded the order to Arizona's Governor without any comment, not even a plea for temporary stay of execution.[111] Second, the Supreme Court held that ICJ's order is not binding on the Court. Third, the Government of Arizona disregarded the Arizona Board of Executive Clemency's recommendation not to proceed with the execution. Instead, Arizona officials executed LaGrand.[112] This deliberately disregarded ICJ orders of review and reconsideration of the conviction and sentence because the Supreme Court held the ICJ order was not binding on the Court. Consequently, this allowed the executive branch to engage in its

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[104] *Id*. at 129–30. For example, the former governor of Illinois recently commuted the sentence of all 167 death row inmates in that state. In contrast, Texas has only stayed the execution of one inmate of over 400 on death row. *Id*.

[105] *Id*. at 131. Justice O'Connor stated that judicial review may be warranted in circumstances where the clemency authority flipped a coin to determine whether to grant clemency or "arbitrarily denied a prisoner any access to clemency process*." Id*. This demonstrates how unregulated the process is by judicial oversight.

[106] *Id*. at 130.

[107] *Id*. at 131.

[108] *See* VCCR, *supra* note 1.

[109] *See* Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.), 2004 I.C.J. 12 (March 31); La Grand Case (Germany v. U.S.) 2001 I.C.J. 466 (June 27).

[110] Shortly after the *LaGrand* and *Avena* cases, the United States also withdrew from the VCCR's optional protocol thereby removing itself from the ICJ's jurisdiction.

[111] *See* Carter, *supra* note 103, at 124.

[112] *See generally* Monica Feria Tinta, *Due Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the La Grand Case*, 12 EJIL 363 (2001).

questionable clemency proceedings free from any checks by the judicial branch. Furthermore, the United States' declared its intention to discount the importance of international law by withdrawing itself from the VCCR Optional Protocol, thereby removing itself from the ICJ's jurisdiction.[113]

Finally, in the spring of 2008, the Supreme Court reheard the case of *Medellin v. Texas*.[114] Medellin was one of the 51 Mexican nationals named in *Avena*.[115] As noted above, the President had issued a memorandum determining that the state courts were to give effect to the ICJ decision.[116] The Texas court found that the inmate was not entitled to habeas relief because he failed to timely raise his VCCR claim.[117] The Supreme Court granted certiorari on the narrow issue of the legal effect the United States must give to the ICJ's decision in *Avena* regarding Texas' procedural denial of a successive habeas corpus review for Medellin.[118] The Supreme Court held that the ICJ's *Avena* judgment, although a binding international obligation, has no legal effect on the United States because the VCCR is not self-executing.[119] Therefore the Supreme Courts hands are effectively tied in enforcing ICJ judgment in the domestic setting until Congress implements legislation giving legal effect to the VCCR.[120] The Court further noted that the President's memorandum ordering Texas to stay execution of Medellin did not make the VCCR self-executing.[121] Therefore, under the current posture of the VCCR, the Supreme Court has handed Congress the ultimate responsibility to ensure that the United States complies with the VCCR as to the remaining Mexican nationals in *Avena.*[122] Failure to bring the United States into compliance with the ICJ's judgment will have detrimental effects and undermine the reciprocal consular rights that United States citizens have while traveling, working, and living abroad.[123]

The Supreme Court in *Breard* and *Sanchez-Llamas* along with its response to the ICJ rulings of *La Grand* and *Avena* effectively left

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[113] *See generally* Carter, *supra* note 103.
[114] Medellin v. Texas, 128 S. Ct. 1346 (2008).
[115] *See id.*
[116] *Id*. at 1353.
[117] *Id*.
[118] *Id*.
[119] *Id*.
[120] *Medellin*, 128 S. Ct. at 1346.
[121] *Id*. at 1371.
[122] Lucy Reed, Speech delivered to the Malaysian Chapter of the Asian Society of International Law: Treaties in US Domestic law: Medellin v. Texas in Context (Aug. 7, 2008) (transcript available at http://www.asil.org/files/lucy-malaysia.pdf).
[123] *Id*.

foreign nationals without any solace in domestic courts and stripped foreign nationals the benefit of the United States' adherence to international proceedings.[124] With the above outcomes in Article 36 cases as a guiding light, "[o]ne can imagine that an appropriate remedy [falls] . . . somewhere in the middle of two unacceptable extremes."[125] On one end of the spectrum the remedy is diplomatic resolution.[126] On the other is the applicability of the exclusionary rule. In order for the court to even consider the exclusionary rule, either the foreign national must have raised the VCCR claim in state court (procedural default doctrine) or have demonstrated that the foreign national was prejudiced and therefore could not raise the VCCR claim in state court.[127]

Resolution through diplomatic channels is not an effective means of redress on both political and philosophical grounds. During the ICJ rulings, the United States ratified the Optional Protocol and submitted to its jurisdiction, therefore the concept of equal treatment before law should govern for American legal actions in the international context and diplomatic resolution should not be the only remedy available.[128] As a matter of sound policy, it is contradictory that the United States enforced Article 36 as the sending State in Iran and Nicaragua (in 1979 and 1986, respectively) and is unwilling give other signatory nations equal treatment when it concerns foreign nationals.[129] Thus, the United States "must demand more from its government than mere apologies for VCCR violations."[130]

The Supreme Court decisions of *Breard and Sanchez* effectively limited recovery for Article 36 violations by imposing the bar of the procedural default doctrine, a heavy burden of showing prejudice to overcome it, and by limiting the remedies of suppression and exclusion of evidence. In both *LaGrand* and *Avena*, the ICJ advised the Supreme Court to implement review and reconsideration of the fate of foreign nationals on death row because of a violation of their Article 36 right of consular notification. But, because the Supreme Court ignored ICJ guidance and handed Congress the ultimate responsibility in enacting

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[124] *See generally Sanchez-Llamas,* 548 U.S. 331 (2006); *Breard*, 523 U.S. 371 (2008); Cases Concerning Avena and Other Mexican Nationals (Mexico v. U.S.), 2004 I.C.J. 12, 64 (March 31); La Grand Case (Germany v. U.S.), 2001 I.C.J. 12 (June 27).

[125] Cara Drinan, *Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the La Grand Case* 54 STAN. L.REV. 1303, 1314 (2002).

[126] *Id.* The author discusses such resolutions as an apology or promise not to repeat the same mistake.

[127] *Id*.

[128] *Id*

[129] *Id*.

[130] Drinan, *supra* note 125, at 1314.

laws ensuring that the United States complies with the VCCR, lawyers have begun to explore an alternate to recovery for Article 36 violations: civil remedies.

CIVIL REMEDIES UNDER THE VIENNA CONVENTION

Many foreign nationals have headed in a new direction in seeking remedies for VCCR violations after exhausting remedies at the criminal level in both domestic and international forums. These litigants have brought VCCR claims in the civil context under 42 U.S.C. §1983 and the ATCA. Amidst the debate regarding the availability and scope of criminal remedies for Article 36 violations, the current dispute plaguing federal circuit courts is the issue of whether foreign nationals are afforded civil remedies along with or in the absence of criminal remedies. *Breard* stands for the proposition that the Supreme Court conceded that Article 36 creates an individual right for foreign nationals in the criminal context.[131] Unfortunately, the Court makes no mention of an individual right in the civil context.[132] The Supreme Court's silence regarding a private right in the civil context paved the way for a federal circuit split on this issue. Although there is only one circuit advocating for civil remedies as a means for recourse for Article 36 violations, it was the only case decided after the Supreme Court's declaration that Article 36 arguably confers individual rights and therefore is reflective of the approach federal and state courts should adopt.

In March 2007, in *Jogi v. Voges*, the Seventh Circuit considered the novel issue of whether the federal courts had jurisdiction in proceedings against state officials for civil suits for Article 36 non-compliance.[133] The Seventh Circuit concluded that foreign nationals may recover under §1983.[134] This opinion stands in contrast to the Fifth and Sixth Circuit

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[131] *See generally Breard,* 523 U.S. 371 (2006).

[132] *Id*.

[133] Chimene I. Keitner & Kendall C. Randall, *The Seventh Circuit Again Finds Jurisdiction for Private Remedies for Violations of Article 36 of the Vienna Convention on Consular Relations*, 11 (2007), available at: http://www.asil.org/insights070514.cfm.

[134] *See* 42 U.S.C. §1983 (2000) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.").

who held that Article 36 did not confer a private right of action in civil cases.[135] A detailed review of this circuit split is insightful to determine whether foreign nationals may rely on civil remedies as a last resort in a quest for meaningful VCCR redress.

Jogi v. Voges: The Silver Lining in a Cloud of Article 36 Cases

The Seventh Circuit had initially decided *Jogi v. Voges* ("*Jogi I*") prior to the Supreme Court decision of *Sanchez-Llamas* which limited criminal remedies through the procedural default doctrine.[136] *Jogi I* is notable for three main propositions: (1) that the court had subject matter jurisdiction under both the general federal jurisdiction statute as well as the ATCA Statute; (2) that VCCR was a self-executing treaty;[137] and (3) that the VCCR gives rise to an implied private right of action for damages.[138] Following the Supreme Court's decision in *Sanchez-Llamas*, regarding the limitation on the VCCR remedies, the Seventh Circuit detracted from its decision in *Jogi I*, which considerably broadened the scope of Article 36.[139] The Seventh Circuit issued another opinion in *Jogi v. Voges* ("*Jogi II*") and withdrew part of its earlier decision in *Jogi I*. In *Jogi II*, the Seventh Circuit limited its holding to the facts of the case and refrained from making a sweeping decision that would expand the

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[135] *See Sanchez-Llamas*, 548 U.S. at 331.

[136] *Jogi II*, 480 F.3d at 824.

[137] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS §111 ("In the absence of special agreement, it is ordinarily for the United states to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action. If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to the Congress as a whole for approval, and of any expression by the Senate or by Congress in dealing with the agreement. . . . After the agreement is concluded, often the President must decide in the first instance whether the agreement is self-executing, i.e. whether existing law is adequate to enable the United States to carry out its obligations, or whether new legislation is necessary and, is required. . . . There . . . can be instances in which the United States Constitution or previously enacted legislation will be fully adequate to give effect to an apparently non-self executing international agreement."); *see also* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Theories*, 89 AM. J. INT'L L. 695, 696–97 (1995) ("First, legislative action is necessary if the parties to the treaty . . . intended that the treaty's object be accomplished through intervening acts of legislation. Second, legislative action is necessary if the norm of the treaty establishes is 'addressed' as a constitutional matter to the legislature. Third, legislative action is necessary if the treaty purports to accomplish what under our Constitution may be addressed only by statute. Finally, legislation is necessary if no law confers a right of action on a plaintiff seeking to enforce the treaty.").

[138] *Jogi II*, 480 F.3d at 824.

[139] *Id*.

decision's scope larger than necessary to resolve the case.[140] The Seventh Circuit withdrew its decision granting subject matter jurisdiction under the ATCA.[141] The court held that whether the treaty violation Jogi alleged amounted to a tort was unclear.[142] Hesitant to create a holding with broad implications, the Seventh Circuit cautiously concluded that: "[w]e can safely leave for another day the question of whether the [VCCR] would directly support a private remedy."[143] However, the court conceded that a state actor's failure to inform a foreign national of his right to consular notification violates a federal right under a treaty.[144]

The facts of *Jogi II* differ from *Breard, Sanchez-Llamas, and Medellin* because Jogi was not asserting his claim in a habeas corpus petition. Jogi, an Indian national, was arrested for aggravated battery with a firearm in Illinois.[145] When Jogi turned himself in to the local authorities, they questioned him and his mother about Jogi's passport and informed him of the possibility that he would have to return to his home country of India, thus indicating they knew he was a foreign national.[146] Jogi pleaded guilty, served half of his twelve-year sentence, and returned to India upon deportation from the United States.[147] From the time of his arrest until he carried out his sentence, local law enforcement official neither informed Jogi of his rights under Article 36, nor did they contact the Indian consulate on his behalf.[148] While in prison, Jogi learned about the VCCR and his rights under Article 36. This led him to file a *pro se* complaint praying for compensatory, nominal, and punitive damages for Article 36 non-compliance.[149]

Jogi's legal theory was based on 42 U.S.C. § 1983.[150] The issue in this case turned on whether the term "and laws" in § 1983 encompasses all laws or is limited to a subset of laws.[151] The Seventh Circuit held that "laws" meant "all laws" based on its reading of the Supremacy Clause of

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[140] *See id.*
[141] *See generally Jogi II,* 480 F.3d 823 (7th Cir. 2007).
[142] *Id*.
[143] *Id*.
[144] *Jogi II*, 480 F.3d at 825.
[145] *Id*.
[146] *Jogi I,* 425 F.3d at 370.
[147] *Id*.
[148] *Id*.
[149] *Jogi II,* 480 F.3d at 825.
[150] *See* 42 U.S.C. §1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States *or other person* within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .") (emphasis added).
[151] *Jogi II*, 480 F.3d at 826.

the Constitution which states: "the Constitution and the Laws of the United States . . . and all Treaties made" are "the supreme law of the land."[152] In order to block the floodgates of litigation based on this reading of § 1983, the court outlined the requirements the plaintiff must overcome before seeking relief of a violation of international treaty rights under §1983. Most importantly, the court suggested that the treaty must be self-executing[153] and that Jogi was entitled to a remedy under the statute.[154] The Seventh Circuit noted that, thus far, the Supreme Court, as well as most circuits, has refrained from deciding whether Article 36 implies a private right of action.[155] Instead, the courts have assumed that Article 36 confers a private right in order to proceed to the remedies analysis—where most courts effectively limit any significant redress.[156]

The Seventh Circuit applied the same legal analytical framework used in other cases to determine whether an implicit private right of action exists.[157] First, the court determined "whether the statute by its terms grants private rights to any identifiable class" and second, "whether the text of the statute is phrased in terms of the persons benefited."[158] Looking to the plain language of Article 36, the court found no clearer indication of a private right than the words "*shall* inform the person concerned without delay *of his rights* under this sub-paragraph."[159] Furthermore, the court found that once again, the plain language of the statute conferred this private right on an identifiable class of people: foreign nationals.[160]

The Seventh Circuit retracted its holding regarding the ATCA. In *Jogi I*, the court found jurisdiction for the ATCA claim under 28 U.S.C.

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[152] *Id*.; *See also* U.S. CONST. art. VI, cl. 2.

[153] The weight of this opinion may be compromised by the Supreme Court's recent holding in *Medellin v. Texas* in which the Court held that VCCR is not a self-executing treaty. *See Medellin*, 128 S. Ct. 1346 (2008).

[154] *Jogi II*, 480 F.3d at 827.

[155] *Jogi I,* 425 F.3d 349.

[156] *Jogi II,* 480 F.3d at 831.

[157] *Id*.

[158] *Id*. at 828; *See also Jogi I*, 425 F.3d at 377. The court found other factors persuasive in determining the intent of a treaty to confer individual rights such as (1) the language and purpose of the agreement as a whole; (2) the circumstances surrounding its execution; and (3) the nature of the particular obligation imposed by the part of the agreement under consideration. If however, the court finds that intent is clear from the language, which it indeed did, it will apply the remaining factors. *Jogi I,* 425 F.3d at 377.

[159] *Id*. at 833 (citing VCCR art. 36 at (1)(b), *supra* note 1) (emphasis added). The court goes on to mention other sources that imply rights under Article 36 such as the *travaux preparatoires,* the State Department's Foreign Affairs Manual, the binding interpretations of the ICJ who has definitively announced that Article 36 proffers individually enforceable rights, and the court also reconciles the explicit grant of individual right in Article 36 with the language of the Preamble. *Id.*

[160] *Jogi II*, 480 F.3d at 835; *See also supra* note 1.

§1350.[161] The Seventh Circuit relied on the Supreme Court's decision in *Sosa v. Alvarez Machain* where the Court concluded that the ATCA was not enacted with the intent to "furnish jurisdiction for a relatively modest set of actions alleging violations of the law of the nations."[162] Distinguishing this holding in *Sosa*, the Seventh Circuit held, in *Jogi I*, the that subject matter jurisdiction was straightforward because Jogi was asserting his claim under the violation of a treaty—the VCCR—and not customary international law.[163] Hence, the court decided that the issue of what degree of customary law is considered federal law or federal common law did not need to be entertained.[164] Furthermore, the Seventh Circuit found jurisdiction under 28 U.S.C. § 1331 which states that "the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties. . . ."[165]

The Seventh Circuit ultimately remanded the case to the district court, finding jurisdiction under the ATCA, but refrained to decide whether a violation under Article 36 is a tort.[166] The court did, however, indicate that an Article 36 violation could be construed as a "breach of duty to disclose in the context of a special relationship" or a regulatory violation.[167] The Seventh Circuit in *Jogi I* alluded to the notion that, on remand, the district court would most likely be able construe Article 36 violation as a tort.[168] However, by withdrawing federal jurisdiction over an ATCA claim arising out of an Article 36 violation, the Seventh Circuit foreclosed the opportunity for district courts to engage in meaningful evaluation of such a novel claim.[169]

The Fifth, Sixth, and Second Circuits: The Gray Clouds Restricting Civil Remedies for Article 36 Violations

Although the Seventh Circuit limited private remedies under Article 36 violations to recovery exclusively under § 1983, the court ultimately held that the language of Article 36 was intended to convey a private right of action in the event of a violation.[170] The Fifth, Sixth, and Second

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[161] *Id*.; *See also* 28 U.S.C. § 1350 (2000) (which states in pertinent part: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or by a treaty of the United States").
[162] *Jogi I*, 425 F.3d at 372 (citing Sosa v. Alvarez-Machain*,* 542 U.S. 692 (2004)).
[163] *Id*.
[164] *Id*. at 373.
[165] 28 U.S.C. §1331 (2000).
[166] *Jogi I*, 425 F.3d at 373.
[167] *Id.* at 385.
[168] *See id*.
[169] *See generally Jogi II,* 480 F.3d 822.
[170] *See id*.

Circuits, on the other hand, came to a different conclusion, which deprives foreign nationals of even a singular recovery under a §1983 cause of action.[171] A discussion of these decisions is important for understanding the split in rationale between the Seventh Circuit and the Fifth, Sixth, and Second Circuits.

In *United States v. Jimenez-Nava*, Immigration and Naturalization Service (INS) agents went to Jimenez-Nava's apartment after suspecting that he was an undocumented immigrant.[172] Upon admitting that he was illegally living in the United States, law enforcement officials arrested Jimenez-Nava.[173] At the INS office, the INS officials gave Jimenez-Nava a standard notice of his rights, in Spanish, advising him of his right to legal counsel and right to communicate with his consulate.[174] Jimenez-Nava testified that he declined his right to communicate with the Mexican consul because he was not certain what the consul's function was.[175] Perhaps even more importantly, he did not believe INS officials would deport him.[176] After his indictment, however, Jimenez-Nava requested suppression of his statements and evidence because of a violation of his Article 36 rights.[177]

When dealing with whether the VCCR created a private cause of action, the Fifth Circuit likened treaties to international contracts between and among independent nations, which do not create judicially enforceable rights.[178] As such, the court determined that the VCCR, a standard international treaty, was subject to the same interpretation.[179] Furthermore, the court looked to the VCCR's preamble for support as precluding the treaty to confer any individual rights for foreign nationals.[180]

In disallowing private remedies for consular notification, the Fifth Circuit rejected Jimenez-Nava's arguments. First, Jimenez-Nava argued that the clear language of Article 36 grants "rights" to foreign nationals. The court pointed out that by relying on the text of Article 36, Jimenez discounted the preamble as specifically "not to benefit individuals."[181]

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[171] *See generally* United States v. Jimenez-Nava, 243 F.3d 192 (5th Cir. 2001); United States v. Emuegbunam, 268 F.3d 377 (6th Cir. 2001); Mora v. People of New York, 524 F.3d 183 (2d Cir. 2008).

[172] United States v. Jimenez-Nava, 243 F.3d 192,194 (5th Cir. 2001).

[173] *Id*.

[174] *Id*.

[175] *Id*.

[176] *Id*.

[177] *Jimenez-Nava*, 243 F.3d at 194.

[178] *Id*. at 195.

[179] *Id*. at 196.

[180] *Id*.

[181] *Id*. at 197.

The court summarized its disagreement by posing the rhetorical question: "If the treaty cannot benefit [foreign nationals] . . . by creating individually enforceable rights, how can . . . [the VCCR] intend to confer enforceable rights on all foreign nationals detained in the receiving state?"[182] Next, the court rejected Jimenez-Nava's argument that, similar to any agreement, the VCCR may explicitly confer individual rights.[183] The Fifth Circuit distinguished the Supreme Court precedent from the case at bar determining the purpose and provisions of the extradition treaty under issue directly pointed to an individual right, whereas the explicit purpose of the VCCR is to outline consular privileges and protections.[184] Finally, Jimenez-Nava pointed to the United States Department of State's Foreign Affairs Manual and the "Memorandum of Understanding on Consular Protection of Mexican and United States Nationals" as asserting an individual's right.[185] The court rejected that argument finding those documents only indicate the United States' intention to abide by the treaty and in no way imply that violations of the treaty are judicially enforceable.[186] Therefore, the Fifth Circuit held that Jimenez-Nava did not have a private right of action under Article 36 and was not entitled to a remedy.[187]

Similarly, the Sixth Circuit, in *United States v. Emuegbunam*,[188] found there was no private right of action for Article 36 violations.[189] In 1998, Emuegbunam, a Nigerian national, was indicted for conspiring to import 800 grams of a substance which contained heroin into the United States.[190] Emuegbunam claimed that law enforcement officials violated his Article 36 rights by not informing him that he had a right to notify the Nigerian consulate of his arrest.[191] Despite a violation of Article 36, the court was not convinced by Emuegbunam's arguments and found no private right of action.[192]

The Sixth Circuit relied on broad principles relating to international agreements in support of the proposition that the VCCR does not confer

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[182] *Jimenez-Nava*, 243 F.3d at 197. Jimenez is referring to United States v. Rauscher, 119 U.S. 407 (1886), in which the Supreme Court constructed an individual right of an extradition treaty.
[183] *Id*.
[184] *Id*.
[185] *Id*. at 198.
[186] *Id*.
[187] *Jimenez-Nava*, 243 F.3d at 198.
[188] United States v. Emuegbunam, 268 F.3d 377 (6th Cir. 2001).
[189] *Id*.
[190] *Id*. at 385.
[191] *Id*. at 386.
[192] *Id*.

private rights to individuals.[193] For example, the court cited the Restatement Third of the Foreign Relations Law of the United States which states "[i]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts. . . ."[194] However, the Sixth Circuit explained that the Supreme Court has recognized that the particular treaty involved governs whether individual enforceable rights exist, as they do in a narrow set of circumstances.[195] Furthermore, the Sixth Circuit noted that the Supreme Court, in *Breard*, conferred a foreign national's rights but left open the question of private right of action.[196]

The Sixth Circuit did, however, note that federal courts have been "[c]onfronted in recent years with numerous claims based upon the Vienna Convention without the benefit of a definitive statement from the Supreme Court, [and circuit courts have] whenever possible sidestepped the question of whether the treaty creates individual rights. . . ."[197] In the end, the Sixth Circuit concluded that irrespective of the status on enforceable private rights, Emuegbunam was not entitled to the relief he sought: reversal of indictment and conviction.[198]

Most recently, the Second Circuit joined the majority of circuits in *Mora v. People of New York*.[199] In *Mora*, the plaintiff was an incarcerated native and citizen of the Dominican Republic, charged with attempted robbery in violation of New York State law.[200] He was interrogated without an interpreter and, although he told the arresting officers he wished to speak with somebody in Spanish, he was appointed counsel that did not speak Spanish and was coerced into taking a plea without the benefit of an interpreter.[201] In addition, though the prosecutor and the arresting officials were aware of his status as a citizen of the Dominican Republic, they never notified the consulate of the Dominican Republic of his arrest.[202] The Second Circuit held that the drafters of the VCCR did not intend to include individual rights in the scope of the treaty.[203] The Second Circuit did not find persuasive the view that

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193 *Emuegbunam*, 268 F.3d at 386.
194 *Id*. at 389.
195 *Id*. (citing United States v. Alvarez-Machain, 504 U.S. 655, 667–68 (1992)).
196 *Id*.
197 *Id*. at 391.
198 *Id*. at 390–91.
199 Mora v. People of New York, 524 F.3d 183 (2d Cir. 2008).
200 *Mora*, 524 F.3d at 191.
201 *Id*.
202 *Id.*
203 *Id*. at 187.

Article 36 confers an individual right that can be remedied in a damages action, expressed by the ICJ in *Avena* or *La Grand,* either directly[204] or indirectly through § 1983.[205]

The Second Circuit, indifferent to domestic obligations to international law, made a series of insincere suggestions towards the enforcement of the VCCR. The first solution proposed by the Second Circuit was to provide the United States with the ability to sue state and local governments in order to ensure compliance with the VCCR on a local level.[206] However, in *Medellin v. Texas*, although the President did not sue the Texas government, he did issue a memorandum ordering a stay of the execution of José Medellin as a result of Texas' failure to comply with the VCCR, but the Texas government chose to ignore the President's order and executed Medellin in spite of this memorandum.[207]

The second solution the Second Circuit proposed was to have the domestic courts ask the foreign national whether the their consulate had been given notice.[208] The text of the VCCR clearly states that the arresting authorities shall notify the foreign national's consulate of his arrest.[209] Under this provision, the implementation of Article 36 lies in the hands of federal or local law enforcement and is not within the court's power to micromanage compliance.[210]

Finally, the Second Circuit proposed that the foreign national petition detaining or arresting officials, including courts of law, to comply request compliance with obligations set forth in Article 36.[211] Once again, the Second Circuit conflated the role of the foreign national and of the arresting/detaining authorities.[212] Not only is it the arresting official's duty to notify the foreign national's consulate, as opposed to the foreign national petitioning the arresting official to do so, a foreign national more often than not is not aware of VCCR Article 36. Furthermore, according to case law, and individual cannot raise an

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[204] The Supreme Court in *Medellin v. Texas* held that VCCR was not self-executing. *Medellin*, 128 S. Ct. 1346, 1358 (2008).

[205] *Id*. at 205.

[206] *Id*. at 198.

[207] *See generally* Medellin v. Texas, 128 S. Ct. 1346 (2008)

[208] *Id.* at 198.

[209] *See* VCCR art. 36(1)(b), *supra* note 1 ("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.").

[210] *Id*.

[211] *Mora,* 524 F.3d at 198.

[212] *Id*.

Article 36 claim in an appellate level court or when the foreign national learns of this right under Article 36, because the foreign national is barred under the procedural default doctrine.[213]

The split among the circuits with respect to whether or not a private right of action exists for an Article 36 violation has left foreign nationals with little guidance as to how to pursue civil remedies under Article 36. The Seventh Circuit found that Article 36 does contain a civil right whereby a foreign national may recover under such vehicles as § 1983 while the Fifth, Sixth, and Second Circuits vehemently opposed these rights. Nonetheless, many foreign nationals continue to bring Article 36 claims in both federal and state courts. The many litigation strategies at play in initiating VCCR litigation reflects the impetus the VCCR serves as a vehicle in international comity and legal obligations enforcement.

LITIGATION STRATEGIES

Two Legal Aid Society attorneys properly noted that: "[a]n often overlooked yet potentially fruitful area of litigation for . . . criminal defense attorney[s] concerns utilizing the [VCCR] in the representation of foreign nationals."[214] The high volume in Article 36 litigation indicates that more than mere case victories lies at stake in Article 36 litigation. Several rationales exist to explain the increase in Article 36 litigation during the past decade.[215] These litigation strategies include: (1) an attempt to make the United States aware that it deviates significantly with the international community regarding its jurisprudence; (2) also that the United States seems to favor enforcement of trade-related treaties over international human rights treaties; (3) that by creating federal litigation at the circuit level, attorneys are hopeful that the Supreme Court will grant certiorari and answer these pressing issues for once and for all; and (4) because the VCCR was found to be not self-executing, attorneys are trying to find other mechanisms that do not require implementing legislation as a means to bring Article 36 claims.

First, cases brought by foreign nationals, as well as those brought by the home countries of foreign nationals, have forced the United States to recognize that a rift exists between United States jurisprudence and the

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[213] *See generally Breard*, 523 U.S. 371 (2006).

[214] Kweku Vanderpuye and Robert W. Bigelow, *The Vienna Convention and the Defense of Noncitizens in New York: A Matter of Form and Substance,* 18 PACE INT'L. L. REV. 99, 99 (2006).

[215] *Id*.

international community.[216] This is evidenced by *LaGrand*,[217] where Germany urged future compliance with Article 36 and argued that violations of Article 36 cannot be remedied by apologies or the distribution of leaflets alone.[218] Instead, as argued by Germany, violations must be remedied by changes to United States law.[219] This need for change is especially important in cases in which the foreign national is sentenced to death. Presumably, Germany wanted to emphasize its disagreement with both the United States' jurisprudence as well as the United States' use of capital punishment. The disagreement with the latter idea mirrors a general disapproval of this practice on an international level.[220] This interpretation of Germany's approach seems especially plausible in light of the ICJ cases, *LaGrand* and *Avena*, as well as the fact that a majority of domestic cases involve foreign nationals awaiting capital punishment.[221] It may be argued that VCCR litigation is a call to action to abolish the death penalty—at least in those states that have not already done so.

A second strategy that seems to be at play is creating state and federal court awareness of VCCR violations because, although the influence of international law is expanding domestically, courts seem reluctant to adhere to international law where it concerns human rights violations. The unfortunate truth is that many state and federal courts are impervious to *LaGrand*; in fact, some are even unaware of the VCCR's existence.[222] To that end, there is speculation that attorneys are bringing VCCR claims as a demand to the United States to adhere to promises made under the U.N. Charter Article 94(1) and thereby binding the United States to comply with ICJ rulings.[223]

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[216] Sarah M. Ray, Comment, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, 91 CALIF. L. REV. 1729, 1751 (2003).

[217] *See* LaGrand Case (Germany v. U.S.), 2001 I.C.J. 12 (June 27).

[218] *See* Memorial of the Federal Republic of Germany (F.R.G. v. U.S.), 1999 I.C.J. Pleadings 1, 148 (Sept. 16, 1999).

[219] *Id*. at 158.

[220] Ray, *supra* note 216, at 1752.

[221] *See generally* United States v. De La Pava, 268 F.3d 157, 165 (2d Cir. 2001); Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir. 1997); United States v. Page, 232 F. 3d 538, 540 (6th Cir. 2000); United States v. Chaparro-Alcantara, 226 F.3d 616, 621 (7th Cir. 2000); United States v. Lawal, 231 F. 3d 1045, 1048 (7th Cir. 2000); United States v. Oritz, 315 F.3d 873, 886 (8th Cir. 2002); United States v. Lombera-Camorlinga, 206 F.3d 882, 885 (9th Cir. 2000); United States v. Minjares-Alvarez, 264 F. 3d 980, 986–987 (10th Cir. 2001); United States v. Duarte-Acero, 296 F.3d 1277, 1282 (11th Cir. 2002); United States v. Cordoba-Mosquera, 212 F.3d 1194, 1196 (11th Cir. 2000).

[222] Ray, *supra* note 216, at 1766.

[223] *Id*. at 1769.

A third approach involves forcing the Supreme Court to address the issue by creating a storm of litigation on Article 36 in which the circuit courts will be unable to come to an agreement on the status of individual and private rights. As some circuit courts have noted,[224] the ICJ decisions hold little more than a persuasive force on domestic courts. Therefore, it is advantageous for litigants to bring claims in lower courts and hope that eventually this flood of litigation will result in a Supreme Court grant of certiorari and a subsequent decision of binding law on this narrow issue. A decision by the Supreme Court would provide guidance to courts on how to interpret and implement the ICJ decisions. The decision will also answer many burning questions, such as: (1) what remedies will be available; (2) whether there is in fact an individual right of action for Article 36 violations; (3) whether the VCCR is self-executing; and (4) what are the effects of the procedural default doctrine and the Supremacy Clause in the VCCR context.

Further, Article 36 claims in criminal and civil proceedings provide an attorney with many practical advantages. Setting aside potential negative ramifications,[225] seeking consular involvement at the outset can serve a great benefit to defense counsel.[226] Filing a motion requesting the state to formally advise the defendant of his right to consular notification as well as notifying the consulate would perhaps lead to consular involvement not otherwise available to detainees. For example, the consulate may facilitate communication between the foreign national and his attorney, provide translation assistance to overcome language barriers, explain the structure and nuances of the criminal justice system, secure supplementary counsel, and assist in locating and acquiring critical evidence abroad.[227] Furthermore, continued use of the channels of consular assistance and increased litigation may lead to positive legislation on the state level which in turn leads to deliberate and significant steps towards domestic enforcement of international law.[228]

A final proxy enforcement mechanism involves the most recent litigation in the cases of *Jogi II* in the Seventh Circuit and *Mora* in the Second Circuit.[229] In these cases, counsel for foreign nationals utilized

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[224] *See, e.g., Jogi II*, 480 F.3d 822.

[225] Potential negative ramifications include: the risk of drawing attention to the defendant's immigration status, the possibility of deportation and any action a country may take on their nationals for crimes committed in the United States. Vanderpuye, *supra* note 214, at 126.

[226] *Id*. at 126–129.

[227] *Id*.

[228] *Id*.

[229] *See Jogi II*, 480 F.3d at 822; *Mora,* 524 F.3d at 183.

the ATCA to obtain relief for the VCCR violations.[230] Because causes of action under the ATCA generally "mirror developments of international law,"[231] the benefit of using the ATCA is that it grants jurisdiction and provides for a substantive cause of action for treaty violations and the law of nations.[232] More importantly, because the status of the VCCR as a self-executing treaty was not yet resolved at the time of these decisions, courts consider the ATCA as implementing language for treaties in certain contexts.[233] Therefore, the ATCA is a supplemental proxy that defense counsel uses as an alternative to criminal remedies in attaining civil remedies such as monetary damages or injunctive relief.[234]

Regardless of the motive, there has been an increase in VCCR claims in state and federal court. Often, these claims are quickly extinguished because the procedural default doctrine bars review, no prejudice is found, or no meaningful remedies are available. The inquiry then becomes: are domestic courts ducking international obligations wholesale or only in certain instances, such as human rights violations? A review of United States' enforcement of international law and treaties in other areas such as trade and environmental law provides some insight on this question.

BEYOND VCCR, INTERNATIONAL OBLIGATIONS IN OTHER CONTEXTS

Of the international treaties ratified by the United States, international trade treaties are widely upheld in domestic courts, while human rights treaties and other public interest treaties, such as environmental treaties, are not enforced in the same way. The oral argument in *Medellin* gave the Supreme Court justices a chance to play devil's advocate and stump counsel for both sides with an assortment of hypotheticals.[235] One such hypothetical, mentioned at least twice during oral argument, was the treatment of international agreements or commitments such as NAFTA and WTO—United States' trade obligations.[236] Justice Breyer posed an important question: "[T]he WTO interprets a treaty. It interprets a treaty that binds the United States, just like the ICJ is interpreting a treaty that binds the United States. So what's

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[230] *See id*.
[231] Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy For Environmental Claims* 6 YALE H.R. DEV. L. J. 1, 2–3 (2003).
[232] *Id*. at 5–6.
[233] *Id*. at 33–34.
[234] *See generally Jogi II*, 480 F.3d 821.
[235] Transcript of Oral Argument at 46, *Medellin,* 128 S.Ct. 18 (2007) (No. 06-984).
[236] *Id*. at 47.

the difference?"[237] Ted Cruz, counsel for the United States, answered that NAFTA is not a treaty; rather, it is a congressional agreement which applies facts to specific circumstances. On the other hand, the ICJ does not have binding effect in United States Courts.[238] Furthermore, Justice Scalia stated that ICJ rulings do not become binding on United States Courts until a United States law is enacted.[239] As conceded by two Justices of the Supreme Court, international trade agreements and verdicts based on a violation of these agreements bind the United States, even though the United States is lending jurisdiction to a foreign tribunal.[240] Unfortunately for many foreign nationals, the rulings of the ICJ do not hold such weight.

Scholars have presented various reasons for the disregard of Article 36 claims in domestic courts. The most cynical rationale given for the disregard of ICJ rulings has been an ideological opposition to the role of the ICJ.[241] This rationale, however, would not hold water if the VCCR was self-executing or a law was enacted to give the VCCR effect because this would make the treaties the supreme law of the land and would not allow judges to enforce the treaties on a discretionary basis.[242] Another rationale is that heightened protections for foreigners in the United States is a hard sell due to the continued war on terror.[243]

In the face of the United States' disregard of the VCCR and other international treaties, it is imperative that the United States determine a solution to this problem it has created. The United States must restore faith in the international community that it will stand by its international commitments and obligations. A look into the tangled web of problems the United States has created and their ramifications leads to a discussion of potential solutions that the United States should adopt immediately.

PROBLEMS, RAMIFICATIONS, AND SOLUTIONS

The United States' non-enforcement of the ICJ rulings, its noncompliance with the VCCR, and the domestic courts' procedural and

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[237] *Id*.
[238] *Id*.
[239] *Id*. at 56.
[240] Transcript of Oral Argument at 46, *Medellin,* 128 S.Ct. 18 (2007) (No. 06-984).
[241] Drinan, *supra* note 125, at 1319.
[242] *Id*. Ironically, in the discussion concerning whether the VCCR is self-executing and, if not, which branch of government had the power to execute the VCCR, Justice Scalia lightheartedly contended that allowing the ICJ the responsibility to determine the meaning of a United States treaty is a power given to the ICJ of which Justice Scalia is "rather jealous." *See* Transcript of Oral Argument at 56, *Medellin,* 128 S. Ct. 18 (2007) (No. 06-984).
[243] Drinan, *supra* note 125, at 1319.

substantive hurdles to VCCR victories has had a ripple effect on both the domestic and the international communities. Foreign nationals raising VCCR claims in domestic courts are faced with four hurdles: (1) the procedural default doctrine, which requires foreign nations to raise VCCR claims in state court; (2) the requirement that foreign nationals must convincingly argue that the Article 36 confers individual rights; (3) foreign nationals must show that the violation resulted in prejudice, and (4) foreign nationals must propose an appropriate remedy. Each of these hurdles is extremely burdensome for a foreign national if not completely impossible to achieve given the present status of VCCR litigation.

Procedural Default Doctrine

In the *LaGrand* decision, the ICJ noted that the United States' procedural default doctrine "frustrates the purpose for which the rights . . . are intended."[244] The ICJ reasoned that a foreign national's ability to bring VCCR claims was effectively and illogically barred.[245] In order to raise an Article 36 violation on appeal, the claim must be raised in state court.[246] However, foreign nationals cannot raise that claim in state court proceedings because the foreign national only learns of the violation after state court proceedings. Consequently, the procedural default doctrine bars review of Article 36 violations.[247]

A solution to this procedural default doctrine problem lies with the Legislative Branch. Congress can amend the habeas corpus statute to allow federal courts jurisdiction to hear procedurally defaulted claims, or, in the alternative, allow district courts to order a new trial or a new sentencing phase for Article 36 violations. This is an effective solution because it would take the majority of VCCR claims to the next stage of review. Furthermore, this change in habeas corpus law is relatively easy to implement as Congress has broad discretion to define the scope of federal habeas corpus relief.[248]

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[244] La Grand Case (Germany v. U.S.), 2001 I.C.J. 12 (June 27).
[245] *Id*.
[246] Ray, *supra* note 216, at 1749.
[247] *Id*.
[248] Joshua A. Brook, *Federalism and Foreign Affairs: How to Remedy Violations of the Vienna Convention and Obey the U.S. Constitution, Too,* 37 U. MICH. J. L. REFORM 573, 597 (2004).

Individual Rights

In both *LaGrand* and *Avena*, the ICJ affirmatively concluded that Article 36 confers individual rights upon foreign nationals.[249] However, many federal and state courts still hold otherwise.[250] Other courts, while holding that Article 36 does confer individual rights, sidestep a complete analysis that would require placing the claim through procedural and substantive hoops.[251] Furthermore, the majority of decisions do not support contentions that there is no individually enforceable right with any substantive legal doctrine or authority.[252] Apparently, there is no dialogue between domestic courts and the ICJ rulings. Therefore, the Supreme Court must give guidance to both federal and state courts on this issue because the federal circuit split arises out of a perception that the Supreme Court is at odds with ICJ rulings.[253]

Prejudice Analysis

Prejudice analysis plays a critical role in VCCR litigation because it is the middle and crucial step, coming after procedural default and before remedy determination. After procedural default doctrine, this is where most litigants face a closed case on an Article 36 claim. Domestic courts have put the burden of proof solely on the foreign national in VCCR claims.[254] In placing the burden of proof on the foreign national, courts employ one of two tests. The first test is a general test requiring the foreign national to adduce proof that he was in fact prejudiced by Article 36 noncompliance.[255] The second and more frequently used test is the three-prong test.[256] First, the foreign national must establish that "he did not know of his right to consult with consular officials." Second, had the foreign national known of the right, "he would have availed himself of that right. . . ." Third, "there is a likelihood that the contact would have resulted in assistance. . . ."[257] This seems counterintuitive, as one who has suffered disadvantages in his representation from the start now has a heavy burden placed on him to prove that the VCCR violation is

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[249] *See generally* La Grand Case (Germany v. U.S.), 2001 I.C.J. 12 (June 27); Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.), 2004 I.C.J. 12 (March 31).

[250] Bruno Simma and Carsten Hoppe, *From LaGrand and Avena to Medellin - A Rocky Road Toward Implementation,* 14 TUL. J. INTL. & COMP. L. 7, 13 (2005).

[251] *Id*. at 28.

[252] *Id*.

[253] *Id.* at 31.

[254] *Id*. at 37.

[255] Simma, *supra* note 250, at 37.

[256] *Id*.

[257] *Id*.

prejudicial.[258] Because in most VCCR claims a violation of consular notification is conceded, the litigant and the court should share this burden in order to ensure that where the litigant has poor representation, the court will conduct an independent inquiry into whether the violation has indeed prejudiced the litigant.[259]

Under the more frequently used three-prong test, the first prong's burden of proof should be flipped to the prosecution to show that the foreign national knew of his rights and chose not to exercise these rights. Making the foreign national prove his ignorance is illogical.[260] The second prong assumes that what the foreign national did immediately after the violation serves as a proxy for what he would have done had he been informed of his rights at that time.[261] The third prong, however, is the most problematic. Under this prong, the reviewing court assumes that the conduct occurring after a VCCR violation is indicative of what would not have happened had the consulate intervened, whereas it is possible that the consulate could have assisted in a fundamentally different manner than that assumed.[262] For example, the consulate may not have given the same advice after the foreign national made a statement as he would have if the foreign national had not yet made the statement. Similarly, the consulate may have been contacted immediately on notification but may have been unreachable until a later date, providing for a different outcome than the court presupposes.[263]

A reformulation of the second prejudice test has been proposed and is a better reflection of logic and fairness than when courts place the burden of proving prejudice on the defendant.[264] The first reformulated prong calls for the individual to demonstrate through an affidavit of a state official that his state consulate would have aided him if notified.[265] This keeps the spirit of the original third prong intact, but clarifies its application and still requires the foreign national to prove the burden in a meaningful way.[266] The second reformulated prong asks the foreign national to demonstrate that he knew of his right of consular notification under Article 36 and voluntarily chose not to exercise it.[267] This shifts the

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[258] *Id*. at 38.
[259] *Id*.
[260] Simma, *supra* note 250, at 38.
[261] *Id*.
[262] *Id*. at 40.
[263] *Id*.
[264] *Id*.
[265] Simma, *supra* note 250, at 40.
[266] *Id*. at 43.
[267] *Id*. at 44.

burden to the United States to prove otherwise.[268] The third reformulated prong (as an alternative to the second reformulated prong) asks the receiving state to demonstrate that law enforcement officials notified the consulate of the foreign national's arrest or detention and that the consulate chose not to act upon the notification. [269] This would complete the inquiry by showing that although the Article 36 rights were violated, the foreign national was not prejudiced because the state's consulate refused to come to his aid.[270]

Remedy

The ICJ did not specify an appropriate remedy for Article 36 violations.[271] In fact, the ICJ left the remedy determination to domestic courts which would give "full effect" to the purpose and meaning of Article 36.[272] The United States did not adhere to the ICJ's ruling because domestic courts made no meaningful remedies available to foreign nationals.[273]

A remedies inquiry under VCCR violations can only be undertaken after the foreign national has overcome the procedural default and prejudice inquiry hurdles. However, even when prejudice is established, an appropriate remedy for an Article 36 violation is unclear.[274] Foreign nationals have sought suppression of incriminating statements, new trials, and/or commutation of a death sentence.[275] Foreign nationals have argued that under the Restatement Third of Foreign Relations, the appropriate recovery for a treaty violation is to "restore the status quo ante" and therefore, this remedy should be employed for the violation of the VCCR.[276] Until recently, only *Rangel-Gonzales*, a Washington state court case, has granted suppression of statement as an Article 36 remedy.[277] Other courts have reasoned that no other country has applied such a remedy and therefore it would be "self-limiting" to apply such a remedy to an Article 36 violation in the United States.[278] Some courts

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[268] *Id*
[269] *Id*.
[270] Simma, *supra* note 250, at 44.
[271] La Grand Case (Germany v. U.S.) 2001 I.C.J. 12 (June 27).
[272] *Id*.
[273] *See generally Sanchez-Llamas*, 548 U.S. 331 (2006).
[274] Ray, *supra* note 216, at 1741.
[275] *Id*.
[276] *Id*. at 1742.
[277] *Id*. *See also* United States v. Rangel-Gonazales, 617 F.2d 529, 533 (9th Cir. 1980).
[278] Vanderpuye, *supra* note 212, at 123. *See also* United States v. Li, 206 F.3d 56, 62 (1st Cir. 2000); Lombera-Camorlinga, 206 F.3d 882, 891 (9th Cir. 2000); United States v. Cordoba-Mosquera, 212 F.3d 1194, 1196 (11th Cir. 2000).

have gone as far as denying the possibility of any remedy for a VCCR violation.[279]

The first proposed solution, by Sarah Ray, to the remedy problem is that the Supreme Court should fashion a remedy that binds all state and federal courts.[280] It is within the Supreme Court's power to fashion a remedy for international treaty violations. Seeing as how there is an existing conflict among the circuits as to the appropriate remedy, only the Supreme Court has the ability to address this issue adequately.[281] Alternatively, in cases where a foreign national's "life" is not literally on the line, a civil damages remedy is a plausible solution. First, civil remedies may provide future deterrence if the government recognizes the threat posed by an increase in expensive VCCR litigation and related expenses. Therefore, the government will be more inclined to enforce Article 36 compliance. Article 36 cases have been brought under §1983 and other revolutionary vehicles, and may offer substantive relief—possibly pushing courts to apply appropriate remedies such as exclusion and preventing federal habeas.[282]

CONCLUSION

The VCCR is a multilateral treaty ratified by 170 nations, including the United States.[283] While the VCCR generally outlined consular privileges and immunities, the United States and other nations strongly advocated for the inclusion of Article 36, which deviated from the basic purpose of the VCCR and conferred rights of consular notification and assistance for foreign nationals upon a foreign national's arrest.[284] Yet, foreign nationals arrested in the United States have consistently been deprived of consular notification by law enforcement officials and have been stripped of any meaningful remedy for Article 36 violations.[285] The United States has been consistently disregarded its international legal obligations, particularly in the human rights arena.[286] As such, many American and international lawyers have brought claims under Article 36 invoking many litigation strategies, most notably using Article 36 as a proxy enforcement mechanism to force the United States to comply with

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279 Simma, *supra* note 250, at 36.
280 Ray, *supra* note 216, at 1769.
281 *Id.* at 1770.
282 Drinan, *supra* note 125, at 1318.
283 *See* VCCR, *supra* note 1.
284 Kadish, *supra* note 17, at 597–598.
285 Bean, *supra* note 58.
286 Ray, *supra* note 216, at 1766.

its international comity and legal obligations.[287] Unfortunately, there has been no noteworthy progress towards achieving this end.

Foreign nationals face many setbacks in successfully bringing an Article 36 claim. The first of these setbacks is the procedural default doctrine which bars foreign nationals from bringing Article 36 cases in federal court when they have not raised the issue in state court.[288] This requirement is unfair as most foreign nationals do not find out about their Article 36 rights until after the state tr1ial.[289] Therefore, the federal habeas corpus statute should be amended to allow foreign nationals to bring Article 36 claims in federal court without first raising them in state court.[290] The second setback is the prejudice inquiry—a court undergoes this inquiry to determine if the foreign national was prejudiced and therefore could not bring his claim in state court.[291] The current prejudice test used by most courts places an undue and counterintuitive burden of proof on the foreign national.[292] To remedy this, courts should adopt one of the reformulated prejudice tests discussed above.[293] Finally, foreign nationals face the setback of no meaningful remedy.[294] Although, the Supreme Court has precluded suppression of evidence and reversal of indictment as available remedies under Article 36, the Court has yet to prescribe a tangible remedy to foreign nationals.[295] Hence, the Court should fashion a remedy that would be binding on all domestic courts.[296]

Faced with the absence of success on the criminal level, many foreign nationals have sued for monetary damages using vehicles such as §1983 and the ATCA.[297] The federal circuit courts are split as to whether Article 36 does indeed confer private rights to foreign nationals. To solve this problem and provide some solace to civil litigants for Article 36 violations, the Supreme Court should affirmatively declare that the Article 36 does indeed grant an individual the right of consular notification instead of holding in dicta that "Article 36 arguably confers an individual right."[298] This is essential to resolve the circuit split and equally essential to give foreign nationals recourse for Article 36 violations they are legally entitled to under international law.

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[287] *Id*. at 1751.
[288] *Breard*, 523 U.S. at 373.
[289] Kirgis, *supra* note 93.
[290] Brook, *supra* note 248, at 597.
[291] Simma, *supra* note 250, at 37.
[292] *Id*. at 38.
[293] *See id*. at 38–43.
[294] La Grand Case (Germany v. U.S.) 2001 I.C.J. 12 (June 27).
[295] *See Sanchez-Llamas*, 548 U.S. at 347.
[296] Ray, *supra* note 216, at 1769.
[297] *See Jogi I*, 425 F.3d 367 (7th Cir. 2005).
[298] *See generally Breard,* 523 U.S. 371 (2006).