South Carolina Journal of International Law and Business

Volume 3
Issue 1 *Fall*

Article 5

2006

Notice Under Article 36: The Vienna Convention Dilemma

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INTRODUCTION

This note will provide an overview of the controversy surrounding the failure of United States authorities to observe the notice provision of Article 36 of the Vienna Convention on Consular Relations (hereinafter "VCCR"). Part I will discuss the VCCR and the entities that interpret it. Part II will examine the apparently conflicting views on this topic of the United States Supreme Court and the International Court of Justice (hereinafter "ICJ") through the cases those courts have considered. Part III will identify the problems inherent in rectifying the failure and recommend solutions.

BACKGROUND

In 1963, the United States signed the VCCR, a multilateral treaty aimed at "[ensuring] the efficient performance of functions by consular posts on behalf of their respective States."[1] Under Article 36 of the VCCR, when authorities of one member nation detain a foreign national belonging to another member nation, those authorities must allow the detainee to contact and communicate with his consulate.[2] In addition, they must allow his consulate free access to, and communication with, the detainee.[3] In the words of Article 36, "[t]he said authorities shall inform the person concerned without delay of his rights."[4]

On its face, the VCCR appears to have created individual rights for a foreign national –the rights to contact his consulate, communicate

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[1] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 77, T.I.A.S. No. 6820 [hereinafter VCCR].

[2] *Id.* at art. 36.

[3] *Id.*

[4] *Id.*

with his consulate, and perhaps most importantly, the right to receive notice of these rights from his custodians. Additionally, States appear to have rights of access and communication under the VCCR in regards to their citizens who are in custody within another State. However, if these rights exist, it appears that United States authorities observe them more often in the breach. Decisions from United States federal courts indicate, at best, confusion in applying Article 36 and, at worst, a total disregard of its provisions.[5] Opinions by the Supreme Court itself have interpreted VCCR Article 36 as a toothless and non-binding agreement, enabling the United States to incarcerate and execute foreign nationals without notifying their consulates.

Forty-three years after the creation of the Vienna Convention, cases arising under its notice provision are numerous in both state and federal courts. The majority of these cases have arisen within the last decade. This paper will focus on apparent conflicts in interpretation between recent opinions from the United States Supreme Court and opinions of the ICJ.

Treaties as Part of the 'Supreme Law of the Land'

The United States Constitution proclaims:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made*, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[6]

By this clause, the Constitution incorporates international treaties into the "supreme Law of the Land," binding not only the federal authorities, but also the individual legal system of every State in the Union to honor the treaties' provisions. The precise point at which a treaty assumes this strength, however, is less clear. Through the years, the Supreme Court has developed a distinction between treaties that are "self-executing" and "non-self-executing" – treaties that, on the one hand, become law immediately through operation of their provisions, and treaties that, on the other hand, only reach "supreme Law" status

[5] *Compare* Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005) (recognizing an implied private right of action in tort to recover for Article 36 violation), *with* Ramirez Cardenas v. Dretke, 405 F.3d 244 (5th Cir. 2005), available at 2005 WL 705049 (recognizing no private right to confer with consulate).

[6] U.S. CONST. art. VI, § 2 (emphasis added).

after Congress has enacted additional domestic laws to trigger their obligations and protections.[7] In drawing this rather indistinct line, the Supreme Court approached treaties as contracts between countries, with the legislature entering the contract on behalf of the United States.[8] Generally speaking, treaties functioning as contracts for performance required additional congressional action before the Court would regard them as law.[9]

Not only is the power to enter treaties restricted to federal authorities,[10] but the power to modify their provisions is limited as well. Over the years, the comparatively static treaty law proved somewhat inflexible and impractical alongside the more flexible domestic law. In 1957, the Supreme Court affirmed its longstanding opinion that while the executive branch may bind the country by treaty, the legislative branch has the authority to alter the domestic impact of treaty obligations by enacting statutes that supersede specific provisions within the treaties.[11] Thus, Congress needs only enact a statute to "line-out" or revise the domestic law concerning a treaty provision that proved unwieldy, outdated, or unpopular. However, the Court limited this power to the federal government only: "[a] treaty cannot be the supreme law of the land . . . if any act of a State Legislature can stand in its way."[12]

When treaty provisions and domestic laws conflict, the Supreme Court reviews the two together and looks for ways to reconcile them. If reconciling the two proves impossible, the more recent provision will prevail:

> [T]he courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.[13]

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[7] Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 772 (1988).

[8] Foster & Elam v. Neilson, 27 U.S. 253 (2 Pet.) 314 (1829).

[9] *Id.*

[10] U.S. CONST. art. II, § 2 and art. I, § 10.

[11] Reid v. Covert, 354 U.S. 1, 18, n.34 (1957) (citing Whitney v. Robertson, 124 U.S. 190, 194 (1888)).

[12] Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236 (1795).

[13] Whitney v. Robertson, 124 U.S. 190, 194 (1888).

The Vienna Convention on Consular Relations

The United States recognizes the VCCR, entered into in 1963 by over a hundred nations and ratified by the United States in 1969, as a self-executing treaty.[14] As such, its provisions need not be individually enacted into United States law to be effective. The VCCR endeavors to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems" by establishing certain norms that would facilitate consular functions.[15] The VCCR also includes an Optional Protocol on dispute resolution that places compulsory jurisdiction over disputes with the ICJ.[16] The United States initially subscribed to the Optional Protocol but withdrew its support in 2005.[17]

The Courts

The United States Supreme Court has issued opinions denying certiorari in two cases involving parties to ICJ suits[18] and has considered one case arising under VCCR Article 36.[19] The Supreme Court has granted certiorari in two cases involving notice under VCCR, with oral arguments presented on March 29, 2006, and decisions anticipated within a few months.[20] State and federal courts have resolved the remaining cases.

As the judicial branch of the United Nations and the forum that resolves VCCR disputes among member nations, the ICJ has heard complaints against the United States under Article 36 of the VCCR on three occasions for alleged violations extending back as far as 1982.[21]

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[14] Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998).

[15] VCCR, *supra* note 1.

[16] Optional Protocol Concerning the Compulsory Settlement of Disputes, art. I, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820.

[17] Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A16, *available at* 2005 WL 3685583.

[18] Breard v. Greene, 523 U.S. 371 (1998) (denying certiorari, companion case is *VCCR-Breard*); Torres v. Mullin, 540 U.S. 1035 (2003) (Stevens, J.); Torres v. Mullin, 540 U.S. 1035 (2003) (Breyer, J., dissenting).

[19] Medellín v. Dretke, 544 U.S. 660 (2005).

[20] Sanchez-Llamas v. Oregon, 108 P.3d 573 (Ore. 200), *cert. granted*, 126 S.Ct. 620 (2005) (Mem) (No. 04-10566) and Bustillo v. Johnson, 65 Va. Cir. 69 (2004), *cert. granted*, 126 S.Ct. 621 (2005) (No. 05-51).

[21] *See* LaGrand Case (F.R.G v. U.S), 2001 I.C.J. 466 (June 21) *available at* 2001 WL 34607609; Vienna Convention on Consular Relations (Para. v. U.S), 1998 I.C.J. 426 (Nov. 10), *available at* 1998 WL 1180014 [hereinafter

The ICJ has the authority to decide questions of international law between or among member nations.[22] However, its decisions are binding only upon the parties and only within the context of the case at bar.[23] ICJ decisions may convey the Court's attitude toward a particular issue, but they have no precedential authority.[24]

Treaty Interpretation and the Vienna Convention on the Law of Treaties

Treaties represent a point of tension between international law, over which each sovereign State has very limited control, and domestic law, over which each sovereign State has total control. While the Constitution authorizes the Supreme Court to interpret treaties to which the United States is a party, and the Optional Protocol authorizes the ICJ to resolve disputes under the VCCR, both courts would likely look to certain norms of international law in construing the VCCR. Although not actually in force for the United States, both courts would likely look to the Vienna Convention on the Law of Treaties ("VCLT") for guidance.[25] The VCLT represents years of work by the United Nations's International Law Commission[26] and "purports to constitute a comprehensive set of principles and rules governing all the most significant aspect so the law of treaties."[27] The VCLT itself is not retroactive, applying only to treaties that came after it,[28] and for this reason would not automatically apply to the earlier-signed VCCR. However, the usefulness of the VCLT lies in the fact that many of the

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VCCR-Breard II]; Avena and Other Mexican Nationals (Mex.v. U.S.), 2004 I.C.J. 12 (March 31) *available at* 2004 WL 2450913.

[22] Optional Protocol Concerning the Compulsory Settlement of Disputes, *supra* note 16; *see also* http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm.

[23] http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm (follow "The Decision" hyperlink; then scroll to "A Judgment is Binding on the Parties").

[24] *Id.*

[25] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 336. This treaty is not in force for the United States.

[26] SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES, 1 (2nd ed., Manchester University Press 1984) (1979).

[27] *Id.* at 5.

[28] *Id.* at 6.

standards it codified derive from centuries of customary international law and would apply even in the absence of the VCLT.[29]

HISTORY AND COURT DECISIONS

Criminal defendants from foreign nations have complained bitterly that, despite the VCCR's provisions, United States officials failed to advise them of their rights to consular contact and communication. Because they did not know of their rights, they failed to assert them in a timely manner during their court cases. Each case has hinged on the United States officials' failure to perform under the notice provision of the treaty: the authorities' failure to give notice of the rights to contact and communication effectively precluded the exercise of those rights. The controversy resides in how to weigh the notice issue when a defendant first raises it in his federal habeas corpus petition, well after the lower courts have decided the defendant's fate: is a defendant who fails to raise the notice issue timely procedurally barred from raising it in a petition for post-conviction relief?

The first two cases trekked through the federal court system and the ICJ during roughly the same time period. Although the crime underlying *LaGrand* predated the *Breard* crime by ten years, the courts disposed of the *Breard* case first.

Breard/Paraguay: Procedural Default and Prejudice

In 1998, the Supreme Court found that a defendant who failed to assert a claim under the VCCR during his criminal trial procedurally defaulted on that claim.[30] In a case with a now-familiar sequence of events, Angel Francisco Breard, a Paraguayan national convicted of a 1992 rape and capital murder in Virginia, filed for federal habeas relief after Virginia affirmed his conviction and denied his state habeas petition.[31] Breard first alleged a VCCR violation in his federal habeas petition.[32] Concurrently with that petition, the Republic of Paraguay filed a companion suit in federal court against Virginia officials for alleged violations of Breard's rights under the VCCR.[33] The District Court dismissed the case for lack of subject-matter jurisdiction, and

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[29] Customary international law refers to the common customs and practices that developed over the course of centuries of interaction among nations. These practices were usually not codified. *Id.* at 2.

[30] Breard v. Greene, 523 U.S. 371, 375 (1998).

[31] *Id.* at 372-73.

[32] *Id.* at 373.

[33] *Id.* at 374.

Paraguay filed a petition for certiorari with the United States Supreme Court.[34] Considering Paraguay's and Breard's petitions together, the Supreme Court denied both.[35]

Before turning to the parties' arguments, the Court found that it was "clear that Breard procedurally defaulted his claim, if any, under the Vienna Convention by failing to raise that claim in the state courts."[36] Paraguay and Breard argued that, as a treaty was part of the "supreme Law of the Land" under the Constitution,[37] the VCCR "trump[ed] the procedural default doctrine."[38] Upon reviewing this argument, the Court pointed out that, unless a treaty specifically provided otherwise, international law properly required application of the forum State's procedural rules.[39] Applying the procedural rules of the United States, the Court found that the trump claim was "plainly incorrect,"[40] as well-established federal law provided that constitutional claims were subject to procedural default.[41] However, applying the procedural default doctrine here effectively resulted in circular logic: Breard's claim of lack of notice failed as a result of his lack of notice. In addition, the Court denied certiorari in Paraguay's collateral suit because the nation lacked standing to sue for the violations under applicable federal laws.[42]

Although Breard lost his petition because of procedural default, the Court went on to note that a successful petition would have to prove that any violation of the VCCR had had a prejudicial effect on the defendant's criminal trial.[43] In a brief paragraph tinged with what may be guilt, the Court also placed its own authority in perspective while suggesting that Breard might obtain a more favorable outcome from the executive rather than the judicial branch of government. The Court proposed that the President might choose to intervene and handle the matter with Paraguay directly, or that the Governor of Virginia might choose to stay Breard's execution.[44] Colored by guilt or not, these

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[34] *Id.*
[35] *Id.* at 378-79.
[36] Breard v. Greene, 523 U.S. 371, 375 (1998).
[37] U.S. CONST. art. VI, § 2.
[38] 523 U.S. at 371.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 376.
[42] *Id.* at 378.
[43] *Id.* at 376.
[44] Breard v. Greene, 523 U.S. 371, 378 (1998).

suggestions ring hollow, given that the opinion opens by noting that Breard's execution was slated for that very evening.[45]

During the pendency of these actions, Paraguay also filed a complaint against the United States with the ICJ alleging violations of the VCCR.[46] At Paraguay's request, the ICJ issued a provisional order instructing the United States to refrain from executing Breard on the basis of a procedural default.[47] Virginia executed him, notwithstanding the ICJ's provisional order. Subsequently, both Paraguay and the United States abandoned the suit. The ICJ discontinued the matter without issuing a final opinion.[48]

LaGrand/Germany: Defendants Unsure of their Nationality and Courts in Conflict

Ten years before Breard's crime, in 1982, United States authorities arrested and charged brothers Walter and Karl LaGrand with attempted armed robbery, kidnapping, and murder in connection with a bank robbery.[49] The LaGrand brothers, who were born in Germany, had been adopted as small children by United States citizens and had lived almost exclusively in the United States.[50] They had never pursued United States nationality, and at least one of them appeared unaware that he held German citizenship.[51] Upon arrest, Walter LaGrand affirmed that he was a United States citizen.[52]

Arizona courts tried and convicted the LaGrand brothers and sentenced them to death.[53] At no time during their criminal trials or in their first two petitions for post conviction relief did the LaGrands assert a VCCR violation.[54] However, upon learning of their nationality and of the VCCR's provisions from a non-governmental source, the

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[45] *Id.* at 372.

[46] Vienna Convention on Consular Relations, 1998 I.C.J 248, 249 (April 9).

[47] *Id.* at 258.

[48] *VCCR-Breard II*, 1998 I.C.J. at 427.

[49] State v. LaGrand, 734. P.2d 563, 565 (Ariz. 1987) (as to Walter), State v. LaGrand, 733 P.2d 1066, 1067 (Ariz. 1987) (as to Karl).

[50] LaGrand Case (F.R.G v. U.S.), 2001 I.C.J. 466, 474-75 (June 27).

[51] *Id.* at 476.

[52] *Id.*

[53] 734 P.2d at 565, 733 P.2d at 1067.

[54] *LaGrand Case*, 2001 I.C.J. at 476-77.

LaGrands filed federal habeas petitions alleging VCCR violations.[55] Their petitions were dismissed.[56] The LaGrands, like Breard before them, lost their petitions on the basis of procedural default.[57]

Arizona executed Karl LaGrand on February 24, 1999.[58] In early March 1999, in response to Germany's request for assistance, the ICJ issued a provisional order instructing the United States to refrain from executing Walter LaGrand until it issued a final judgment with regard to the VCCR violations.[59] However, in March 1999, Arizona executed Walter LaGrand.[60]

Unlike Paraguay, Germany continued to pursue its complaint with the ICJ against the United States after the defendants' deaths. On June 27, 2001, more than two years after the LaGrands' deaths, the ICJ issued a judgment that noted, among other things, that ICJ "provisional measures ... have binding effect."[61] The Court concluded that while the United States government may have facially complied with the order by transmitting it to the Governor of the State of Arizona, the United States did not fully comply because it did not "take all measures at its disposal" to avoid the executions.[62] Despite findings that the United States had breached its obligations under both the VCCR and the ICJ's provisional order, the ICJ imposed no sanctions or obligations on the United States.[63] Rather, the Court noted its satisfaction with the United States' commitment to comply with the VCCR in the future and to provide detailed descriptions of its ongoing efforts to ensure that officials were aware of the treaty's provisions.[64] However, the Court cautioned that should another German national suffer the same procedural default as the LaGrand brothers, apologies from the United States would be insufficient to atone for its breach.[65]

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[55] LaGrand v. Stewart, 170 F.3d 1158, 1161 (9th Cir. 1998) (as to Karl); LaGrand v. Stewart, 133 F.3d 1253, 1261 (9th Cir. 1998) (as to Karl and Walter).

[56] 170 F.3d at 1161; 133 F.3d at 1277.

[57] 170 F.3d at 1161; 133 F.3d at 1261.

[58] LaGrand Case (F.R.G v. U.S.), 1999 I.C.J. 9, 11 (Mar. 3).

[59] *Id.* at 16.

[60] *LaGrand Case*, 2001 I.C.J. at 478.

[61] *Id.* at 506.

[62] *Id.* at 507.

[63] *Id.* at 515-16.

[64] *Id.* at 516.

[65] *Id.*

Torres/Avena

A third group of actors played out the procedural default script in 2003. During that year, the Supreme Court denied the petition for certiorari from a Mexican national convicted of a 1993 murder in Oklahoma,[66] and Mexico filed its own complaint against the United States with the ICJ.[67] On this occasion, however, two Supreme Court Justices issued separate opinions concerning the Court's denial of certiorari.[68]

Justice Stevens expressed regret that the Court had expedited the *Breard* case such that the final decision rested neither on briefs nor on oral arguments.[69] Although he had dissented from *Breard* on the basis of procedure, in retrospect, Justice Stevens seemed convinced that he should have aimed his dissent at the merits of the case.[70] Noting the "obvious tension between the holding in *Breard* and the purpose of Article 36 of the Vienna Convention,"[71] he averred that the Court's "manifestly unfair"[72] application of procedural default in Article 36 cases indicated faithlessness to the Constitution's clause that incorporated treaties into the "supreme Law of the Land."[73]

Justice Breyer's comparatively dispassionate dissent, on the other hand, recognized the issues raised by each party and suggested a judicial itch to address and resolve those issues. Hinting strongly that the authoritative voice in interpreting the VCCR might belong exclusively to the ICJ, Justice Breyer recommended deferring a decision on Torres's petition until after the ICJ passed judgment on Mexico's suit.[74]

More than fifty separate criminal cases involving alleged VCCR violations against Mexican nationals, including Torres, comprised Mexico's basis for the ICJ action.[75] Several of the defendants had

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[66] Torres v. Mullin, 540 U.S. 1035 (2003).

[67] Avena and other Mexican Nationals (Mex. v. United States), 2004 I.C.J. 12, 17 (Mar. 31).

[68] 540 U.S. at 1035 (Stevens, J.); Torres v. Mullin, 540 U.S. 1035 (2003) (Breyer, J., dissenting).

[69] 540 U.S. at 1035.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 1035 (citing U.S. CONST. art. VI, cl. 2).

[74] *Id.*.

[75] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 13 (Mar. 31).

received death sentences, and the ICJ again ordered that the United States refrain from carrying out those sentences until it had adjudicated Mexico's VCCR claim.[76] In keeping with its task of resolving disputes between nations, the Court focused on the rights and obligations of one nation to another.

In a long and exhaustive judgment, the ICJ identified two major points of contention in interpreting Article 36 of the VCCR: (1) which party should bear the burden of establishing the defendants' citizenship in the ICJ case, and (2) how to define "without delay" as it occurs in Article 36(1)(b) of the VCCR.[77] As to the first question, the Court found that Mexico, which held the most records concerning the defendants, should establish for the ICJ which defendants held Mexican citizenship and which defendants held dual or United States citizenship.[78]

With regard to the second question, the Court found that the obligations to advise the defendant of his rights and to notify his consulate "without delay" arose at the point when officials first suspected that the person in custody might not be a United States citizen.[79] After searching available records for some indication of what the VCCR's drafters intended by the phrase "without delay," the Court determined that while the phrase did not require immediate action upon a suspicion that the person in custody was a foreign national, it did require prompt action so that the foreign consulate could provide meaningful assistance.[80]

However, again, the Court imposed no sanctions. After finding that the United States had breached its duties, the Court merely acknowledged the United States' ongoing efforts to improve compliance with Article 36[81] and exhorted the United States to review and reconsider the defendants' cases.[82]

An extensive separate opinion by Judge Sepúlveda noted that the appropriate remedy for a VCCR notice violation lay not in restitution but in a meaningful review and reconsideration of both sentence and

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[76] *Id.* at 17.
[77] *Id.* at 40.
[78] *Id.* at 41.
[79] *Id.* at 49.
[80] *Id.*
[81] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 73 (Mar. 31).
[82] *Id.* at 72.

conviction.[83] Specifically, he found that, because the courts of the United States continued to apply procedural default to notice arguments made under the VCCR even after the LaGrand judgment, judicial review in the United States was neither "meaningful" nor "effective."[84] Evidencing its impatience with the United States' apparent refusal to depart from the procedural default rule, Judge Sepúlveda threatened "to recover the concept of 'juridical restitution' . . . [which may include] 'rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner.'"[85]

Within a year of the *Avena* decision, the United States withdrew its support of the Optional Protocol that seated jurisdiction over VCCR disputes with the ICJ.[86]

Medellín and a Sidestep

Following the ICJ's decision in *Avena*, VCCR cases appeared in the Fifth, Seventh, and Eleventh Circuit Courts of Appeals, with one Fifth Circuit case sparking a heated debate within the Supreme Court.[87]

In 2005, the United States Supreme Court considered the case of Jose Ernesto Medellín, a Mexican national convicted in Texas state court of the gang rape and murder of two girls, a capital offense.[88] In predictable form, the defendant alleged a VCCR Article 36 violation in his federal habeas petition, relying for authority on the ICJ's then-brand new opinion in *Avena*[89] and President Bush's memorandum in response to *Avena*.[90] The Court briefly pondered its own relationship to the ICJ,

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[83] *Id.* at 120-21.

[84] *Id.* at 124.

[85] *Id.* at 124-25.

[86] Charles Lane, *U.S. Quits Pact Used in Capital Cases: Foes of Death Penalty Cite Access to Envoys*, WASH. POST, Mar. 10, 2005, *available at* http://www.washingtonpost.com/wp-dyn/articles/A21981-2005Mar9.html.

[87] Medellín v. Dretke, 544 U.S. 660 (2005); Darby v. Hawk-Sawyer, 405 F.3d 942 (11th Cir. 2005); Rosales v. Bureau of Immigration and Customs Enforcement, 426 F.3d 733 (5th Cir. 2005) *available at* 2005 WL 2292526; and Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005).

[88] Medellín v. Dretke, 544 U.S. 660, 661 (2005).

[89] *Id.*

[90] *Id.* at 663. The Court quoted the presidential memorandum as stating that the "United States would discharge its international obligations under the *Avena* judgment by 'having State courts give effect to the [ICJ] decision in accordance with general principles of comity . . . .'" *Id.* (quoting George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005)).

noting as the two issues under consideration "whether a federal court is bound by the International Court of Justice's (ICJ) ruling that United States courts must reconsider petitioner Jose Medellín's claim for relief under the Vienna Convention on Consular Relations ... without regard to procedural default doctrines" and "whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ's judgment."[91] However, even as it identified these questions, the Court deftly skirted answering either of them. Offering a handful of procedural reasons why it might rule against Medellín, a divided Court dismissed his federal petition in favor of the new state habeas petition he had filed four days before oral argument.[92]

In a scathing dissent, Justice O'Connor, joined by Justices Stevens, Souter, and Breyer, argued that the questions at hand were too compelling and too likely to recur in the future to ignore merely because the defendant "*might*" receive some relief in his new state petition.[93] The dissent pointed to problems the Court might have resolved definitively had it chosen to consider the merits of Medellín's case.[94] An exasperated dissent suggests the Court was avoiding the merits altogether by pointing out potential procedural snags not raised by the parties.[95] It appears that the dissent, while limiting an immediate decision to the Certificate of Appealability, viewed this case as a doorway to judicial review of far more expansive issues, such as proper construction of Article 36 and remedies for the United States' repeated failure to comply with treaty obligations.[96]

While the Court's approach to this case appears a little weak-kneed and the dissent's equally rash, Justice Ginsburg's concurring opinion, joined by Justice Scalia, restores perspective to the overall decision. Recognizing the Court's division, the concurring opinion analyzed the divergent paths chosen by the Court and by the dissent, finding that the dissent's fervor to address the problems and to remand the case for further proceedings would likely result in confusion, with duplicative proceedings in state and federal courts, and could jeopardize the defendant's case.[97] Justice Ginsburg went on to note

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[91] *Id.* at 661-62.
[92] *Id.*
[93] *Id.* at 673 (emphasis in original).
[94] Medellín v. Dretke, 544 U.S. 660, 673 (2005).
[95] *Id.* at 681-82.
[96] *Id.* at 689.
[97] *Id.* at 669-72.

that, should the defendant appeal the state proceedings, the Court would have jurisdiction to revisit this case at a later date.[98]

Bustillo and Sanchez-Llamas

The Supreme Court has granted certiorari in and joined together two more cases asserting notice violations under the VCCR. Although the questions presented in each of these cases differ, each of these cases is distinguishable from its predecessors on a very important point. The Court's willingness to consider the merits of these two cases brings hope that it is poised to answer some of the longstanding questions concerning rights and obligations under the VCCR.

In *Bustillo v. Johnson*, a Honduran national stood accused of murder.[99] Mario Bustillo was arrested, tried, and convicted of murdering James Merry with a baseball bat behind a local Popeye's restaurant, an act he denied.[100] At Bustillo's trial, the sole issue was whether Bustillo or another man known at that time only as "Sirena" had swung the bat.[101] Despite its obligation to "disclose exculpatory material,"[102] the State withheld multiple articles of evidence that would have cleared Bustillo and identified Sirena as the killer.[103] Lacking this crucial police evidence, Bustillo defended himself primarily on the basis of eyewitness testimony that State witnesses rebutted; consequently, his attempt to inculpate Sirena and exculpate himself at trial failed.[104]

As in other cases, Bustillo claimed on federal habeas petition that United States authorities never advised him of his VCCR rights.[105] Unique to this case, Bustillo credibly argued that the VCCR violation prejudiced his defense and that, while he learned of his rights under the VCCR after his criminal trial, he first asserted those rights during the appeals process, prior to any petition for post-conviction relief.[106]

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[98] *Id.* at 671-72.

[99] Brief for Petitioner at 2, Bustillo v. Johnson, ___ U.S. ___ (2006) (No. 05-51), *available at* http://abanet.org/publiced/preview/briefs/pdfs/05-06/05-51_Petitioner.pdf [hereinafter Bustillo v. Johnson Brief].

[100] *Id.*

[101] *Id.* at 6.

[102] *Id.* at 6, n.1.

[103] The withheld evidence included detectives' notes that memorialized both a police encounter with a red-stained Sirena/Osorto and an eyewitness account of Sirena "with his 'bat cocked.'" *Id.* at 6, 8.

[104] *Id.* at 8.

[105] Bustillo v. Johnson Brief, *supra* note 99, at 2.

[106] *Id.* at 8-9.

During the course of his appeals and habeas petitions, Bustillo acquired from the State and developed with the help of the Honduran consulate the evidence implicating Sirena, whose real name is Julio C. Osorto.[107] The police records he acquired enabled him to obtain a photograph of Osorto through the Honduran consulate[108] and Osorto's secretly videotaped confession to the crime, in which Osorto described the murder and acknowledged Bustillo's wrongful conviction.[109] The Honduran consulate also supplied Bustillo with evidence that corroborated another witness's testimony that Sirena/Osorto had fled the United States for Honduras the day after the murder.[110] However, the Virginia courts held that Bustillo had procedurally defaulted on his VCCR claims and that new evidence was inappropriate upon habeas petition, and they affirmed his conviction.[111]

It is likely due to the Honduran consulate's extensive assistance in developing Bustillo's theory that Sirena/Osorto committed the murder that the Supreme Court has granted certiorari in this case. Eight years ago, when Breard failed to persuade the Supreme Court to grant relief based on his VCCR claim, the Court noted that a successful habeas petition would prove that the VCCR violation had prejudiced the defendant's criminal trial.[112] Bustillo has now cleared that hurdle and gained the attention of the Court. However, although the facts Bustillo has developed appear compelling, the question before the Court in his case is still procedural at heart:

> Whether, contrary to the International Court of Justice's interpretation of the Vienna Convention on Consular Relations [citation omitted], state courts may refuse to consider violations of Article 36 of that treaty because of a procedural bar or on the ground that the treaty does not create individually enforceable rights.[113]

In Bustillo's favor is his strong evidence of innocence. Where previous defendants have had little evidence to recommend review of their cases, Bustillo now has police records and the preserved

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[107] *Id.*

[108] *Id.* at 10.

[109] *Id.* at 9.

[110] *Id.* at 8.

[111] Bustillo v. Johnson Brief, *supra* note 99, at 9.

[112] Breard v. Greene, 523 U.S. 371, 378 (1998).

[113] Brief for Petitioner at 1, Sanchez-Llamas v. Oregon, ___ U.S. ___ (2006) (No. 04-10566), *available at* http://abanct.org/publiced/preview/briefs/pdfs/05-06/04-10566_Petitioner.pdf [hereinafter Sanchez-Llamas Brief].

confession of another man to underscore the injustice apparently done to him.

In *Sanchez-Llamas v. Oregon*, police arrested a Mexican national for shooting at officers who were responding to a call for assistance from the roommates of Sanchez-Llamas's girlfriend.[114] The roommates reported that Sanchez-Llamas had "threatened them with a gun."[115] Officers arriving on the scene found a "heavily intoxicated" Sanchez-Llamas hiding behind the residence.[116] The officers identified themselves, ordered him to drop his weapon, and when he did not do so, briefly exchanged gunfire with him.[117] Sanchez-Llamas eventually gave himself up but failed to follow the officers' verbal direction to drop to his knees.[118] Because of this failure, four officers physically subdued Sanchez-Llamas, punching him and beating him with a flashlight.[119] During the course of the night, authorities learned that Sanchez-Llamas possessed a very limited English proficiency.[120] They administered his *Miranda* notice in both Spanish and English on two separate occasions, including one time when Sanchez-Llamas was in the hospital "lying on a bed waiting to be x-rayed."[121] Sanchez-Llamas communicated with the officers during interrogation adequately to convey his version of the night's events; however, his answers to crucial questions often contradicted one another.[122] Sanchez-Llamas never received notice of his rights under the VCCR.[123]

The trial courts appear to have been a little bewildered by Sanchez-Llamas's assertions of rights under the VCCR. In pre-trial motions, Sanchez-Llamas argued that the court should suppress his statements to police because the defendant's inebriation, fear of police, and below-average language skills and intelligence prevented him from understanding or knowingly waiving his right to counsel.[124] Defense counsel also argued for suppression on the grounds that the police obtained the defendant's statements "in violation of the Vienna

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[114] Petitioner's Brief refers to a call from "two roommates of respondent's girlfriend" complaining about "respondent"; however, as Respondent in this case is the State of Oregon, this appears to be a typographical error. *Id.* at 3.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] Sanchez-Llamas Brief, *supra* note 113, at 3.

[120] *Id.*

[121] *Id.* at 4.

[122] *Id.* at 4-6.

[123] *Id.* at 6.

[124] *Id.*

Convention and his right to due process."[125] The trial and appellate courts declined to entertain Sanchez-Llamas's claim for relief under the VCCR. Basing its analysis on an opinion from the First Circuit Court of Appeals, the Oregon Supreme Court affirmed his conviction.[126]

The two questions presented in Sanchez-Llamas's case speak directly to the existence of an individually enforceable right and a potential remedy for violation of that right:

> 1. Does Article 36 of the Vienna Convention on Consular Relations confer on a foreign national detained in the United States individual rights of consular notification and access enforceable in the courts of the United States by that national?
> 2. Does the failure to advise a foreign national detained in the United States of his rights under the Vienna Convention result in the suppression of his statements to police?[127]

Thus, in quite different procedural contexts, Bustillo's and Sanchez-Llamas's cases present the same basic question: whether Article 36 of the VCCR confers individually enforceable rights on foreign nationals. Whereas Bustillo first raised his VCCR claim after being convicted and consequently lost his appeals and state petition for habeas relief on the basis of the procedural default doctrine, Sanchez-Llamas first raised his VCCR claim prior to trial. He lost because the lower courts refused to hear his VCCR argument and the Oregon Supreme Court declined to recognize any individual rights under the VCCR.

On March 29, 2006, the Supreme Court heard oral arguments in these two cases, starting with the defendants/petitioners, followed by the two States, the United States government, and finally from Bustillo on rebuttal.[128] The Court examined those arguments from three perspectives, including whether the VCCR created any individually enforceable right; if so, who qualified as a competent authority under the treaty to advise the defendant of that right; and the nature and source of any remedy for a violation of that right.

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[125] Sanchez-Llamas Brief, *supra* note 113, at 3.

[126] *Id.* at 7. It should be noted that Oregon is in the Ninth Circuit, on the opposite geographical end of the country from the First Circuit.

[127] *Id.* at i.

[128] Transcript of Oral Argument at 1, Sanchez-Llamas and Bustillo, ___ U.S. ___ (Nos. 04-10566 and 05-51), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-10566.pdf [hereinafter Sanchez-Llamas Oral Argument].

Delving into the primary question of whether an individually enforceable right exists, the Court recognized that treaties exist as agreements between sovereigns and normally "[do not] confer enforceable rights on individuals."[129] However, the justices appeared to exhibit diverging views on this question, and on the question of whether to follow the ICJ, from an early point. When Justice Ginsburg acknowledged early in the proceedings that the ICJ had ruled that the VCCR did indeed create an individual right, Justice Scalia almost immediately undercut the international court's authority: "it . . . does not set forth propositions of law that are binding in future cases. If it's not bound by its prior cases, I don't know why we should be."[130] In addition, counsel for the United States government bluntly asserted that the ICJ's interpretation of the treaty as creating individual rights was "wrong."[131] In light of this argument and his attitude, it is unlikely that Justice Scalia, at least, would find persuasive the ICJ's consistent rulings on this matter or the United States' subscription to the Optional Protocol that seated interpretive authority with the ICJ.

In surveying other signatory nations' approaches to the VCCR's notice provision, the Court learned that while "[m]any" nations purport to recognize a right, only eleven proactively advise defendants of the right, and perhaps only two exclude evidence when authorities violate that right.[132] However, counsel was unable to provide a detailed description of how other nations remedy the problem, if they do so at all. Although counsel for Bustillo asserted that the remedy of excluding evidence originated in the treaty, Justice Souter's line of questions eventually led counsel to acknowledge that this remedy came from domestic law[133] and that "suppression is a creature of this Court's authority, common law authority."[134]

In evaluating who qualifies as a competent authority under the treaty to advise a foreign national of any VCCR rights, the Court considered three options: attorneys, judges, and police officers. The Court devoted a great deal of time to its examination of the role of counsel in VCCR cases, particularly because Bustillo's trial attorney was personally familiar with the notice provisions of Article 36 and, as a matter of strategy, declined to advise Bustillo of his right to consular

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[129] *Id.* at 5.
[130] *Id.* at 7.
[131] *Id.* at 71.
[132] *Id.* at 8.
[133] *Id.* at 10, 15.
[134] Sanchez-Llamas Oral Argument, *supra* note 128, at 14.

contact.[135] Despite admitting that defense counsel is not "a competent authority under the treaty for the purposes of notifying the accused,"[136] the State in Bustillo's case nonetheless argued in favor of a new rule laying the burden of VCCR notification on the defendant's attorney. This approach would not only equate asserting a VCCR claim with asserting a Miranda or Fourth Amendment violation, but would also excuse the State from its failure to notify Bustillo of his rights.[137] As a result, where counsel failed to advise his client of the right to consular contact, the defendant could further his case by claiming ineffective assistance of counsel. The Chief Justice noted that seating the burden on defense counsel would create an incentive for counsel to refrain from advising the defendant of his VCCR rights, resulting in an "ace in the hole" for gaining post-conviction review if the State failed to provide notice.[138] In addition, the Court acknowledged, but did not comment further, that an unrepresented defendant would automatically suffer.[139]

The Court also considered the possibility that judges and police officers might carry the responsibility of ensuring defendants receive notice. Consideration of the judge's role, however, was fleeting, limited only to an inquiry of counsel for the State of Oregon as to the State's attitude toward requiring state judges to enforce a federal treaty.[140] Far more telling were the Court's comments in response to the State of Oregon's brief description of its ongoing efforts to ensure treaty compliance by the police force.[141] The justices expressed no small amount of frustration at the practical difficulties encountered by law enforcement in ascertaining defendants' origins and administering notice.[142]

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[135] *Id.* at 58.

[136] *Id.* at 62.

[137] *Id.* at 59.

[138] *Id.* at 64.

[139] *Id.* at 19.

[140] Sanchez-Llamas Oral Argument, *supra* note 128, at 49 and 54.

[141] *Id.* at 51.

[142] On counsel advising the Court that some defendants concealed their origins, Justice Souter exclaimed, "You ask him what his name is. Why don't you ask him whether he's an American citizen? If he says no, say what country are you a citizen of. I mean, I—I don't see the difficulty of that." *Id.* at 53. Upon hearing about the State's extensive research into methods of implementation, Justice Kennedy observed that "it's not like rocket science. You've had study groups and everything. Well, you just tell the policemen give them—give them the advice. End of case." *Id.* at 52.

Should the Court determine that an individually enforceable right exists under the VCCR, the next question is whether a corresponding remedy exists. Noting that neither the treaty nor customary international law supplies a remedy, the Court focused on potential remedies in domestic law.[143] With nods to the ICJ's exhortation to provide a reasonable reconsideration of the case,[144] the Court explored several possible remedies, including suppression of evidence, a standalone cause of action, and review based on an assertion of ineffective assistance of counsel. In spite of Sanchez-Llamas's arguments, the Court seemed unwilling to accept suppression of evidence as the singular remedy,[145] particularly where no causal link exists between the lack of notice and the evidence gained.[146] While not embracing suppression, the Court also did not exclude it as always inappropriate. The Court fleetingly considered the possibility that an individual right might not stand alone but rather might depend on another law to provide a cause of action.[147] Peppered throughout the discussion and inextricably woven into the question of whether the obligation to give notice lies with counsel is the possibility of gaining a post-conviction review based on a claim of ineffective assistance of counsel. An ineffective assistance of counsel claim would have to meet the two-prong *Strickland* test that requires deficient performance and prejudice.[148] This approach seemed appealing to the justices, as it comports with the Court's prior ruling that a petitioner must support his VCCR claim with an allegation of prejudice. However, Bustillo's counsel explained that to date, courts had rejected ineffective assistance claims based on VCCR violations by nature as "that category of treaty violations that, if [pushed] ... to ineffective assistance, ... evaporate ...".[149]

Considering these two cases together provides the Supreme Court with an unparalleled opportunity to conduct a meaningful, in-depth examination of the individual rights question, both as it affects substantive domestic law and treaty interpretation and as it interacts with the procedural default doctrine. The Court may well address Justice O'Connor's concerns from Medellín, this time unfettered by the

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[143] *Id.* at 12.
[144] *Id.* at 14 and 31.
[145] *Id.* at 13-14, 19-20.
[146] Sanchez-Llamas Oral Argument, *supra* note 128, at 13.
[147] *Id.* at 83 (suggesting 42 U.S.C. § 1983 as an example).
[148] Strickland v. Washington, 466 U.S. 668, 693 (1984).
[149] Sanchez-Llamas Oral Argument, *supra* note 128, at 38.

limitations of the Certificate of Appealability question and the complications observed by Justice Ginsburg.

IDENTIFYING PROBLEMS AND FINDING SOLUTIONS

The failure of United States officials to comply with the notice provision of the treaty underlies each and every domestic case invoking VCCR Article 36. Despite repeated assurances to the ICJ of future compliance involving broadly distributed instructional publications and education initiatives,[150] the government has failed to eradicate non-compliance, even from high-profile, capital cases. The primary problem plaguing compliance efforts in general is confusion over whose interpretation of the VCCR is authoritative. The ICJ, the Supreme Court, and the governments of various countries all have offered interpretations of the VCCR, but each entity appears to have turned if not a deaf ear, at least a tin ear to the others.

The disparity in available interpretations of the treaty belies the greater dilemma that underlies the simple procedural confusion. Its noble purpose aside,[151] the VCCR has done more to inflame the tension between international and domestic law in the United States than assuage it. Under the VCCR, member nations committed to bind their domestic criminal justice systems to a wholly external international agreement. However, in the case of the United States, this graft appears to be failing, as the criminal justice system continually rejects its international component. The question inevitably arises: where compliance with a treaty demands procedural modifications to domestic law, how should the United States resolve the tension between international obligations and domestic law? On one hand, the United States voluntarily committed itself to behave in certain ways under a treaty with other sovereign nations and, under the Constitution, that voluntary commitment became a part of United States law. The United States' adherence to, or divergence from, its promises under the treaty will likely affect its relations with its purported equals – the other member nations of the VCCR. On the other hand, the United States must respect its own long tradition of domestically generated laws. Continuity in enforcing domestic law, particularly through uniform and

[150] LaGrand Case (F.R.G v. U.S.), 2001 I.C.J. 466, 512-13 (June 27); Avena and Other Mexican Nationals (Mex.v. U.S.), 2004 I.C.J. 12, 60 (March 31).

[151] The stated purpose of the VCCR is to facilitate consular relations. VCCR, *supra* note 1, at 77.

predictable procedures which apply to a variety of substantive areas, ensures fairness in the judicial process.

Executive, Judicial, or Legislative Problem?

The two branches of United States government that have recently addressed the nation's obligations under the VCCR appear to support domestic concerns over international concerns. Given the Supreme Court's deference to the procedural default rule and its corresponding diminishment of VCCR notice obligations, to date, the Judicial branch unsurprisingly has favored preserving the sanctity of domestic law. The Executive branch, which itself entered the treaty some forty years ago on behalf of the United States, also appears to favor domestic law over international obligations, as evidenced by its withdrawal from the Optional Protocol following the ICJ's decision in *Avena*.[152]

This predilection for domestic law derives partly from the nature and focus of these two governmental branches. The Supreme Court is, by its nature, the ultimate interpreter of domestic law and bears the burden of making treaty law work with common law and statutes. Populated by professional jurists whose lifetime tenure on the Court enables them to remain by the changing tides of political sentiment, the Court is perhaps the most politically stable of the three branches of government. Members of the Supreme Court aim to ensure that United States law is constitutional, just, and uniformly applied. By contrast, the Executive branch undergoes upheaval, and often personnel changes, every four years through the electoral process. This regular change of administration promotes short-term fixes and self-serving decisions by the executive branch rather than coordinated long-term solutions. Members of the executive branch aim to lead the country well but also to sustain their own employment. Despite differing motivations, in the case of the VCCR, these two branches have both elevated domestically generated procedure over treaty obligations.

This observation does not recommend that either the Executive or the Judicial branch of the government is the ideal branch to resolve the issue at hand. Once the treaty became effective, the duty of reconciling domestically generated law and treaty law or choosing between the two fell to the Judiciary.[153] However, as Justice Ginsburg has hinted,[154] given the broad spectrum of issues that spring from the question of VCCR rights, the Judiciary may be ill-equipped to resolve

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[152] Lane, *supra* note 86.

[153] Whitney v. Robertson, 124 U.S. 190, 194 (1888).

[154] Medellín v. Dretke, 544 U.S. 660, 668-69 (2005).

this particular problem. While the Supreme Court could offer a narrow but long-term procedural fix through case law as it did in *Miranda v. Arizona*,[155] the Court has, up to this point, reviewed alleged VCCR violations only as they opposed the procedural default rule. Only now is the Court getting the opportunity to evaluate a VCCR violation on its merits.

Should the Court find that the questions raised in connection with an assertion of individual rights under the VCCR too broad for judicial resolution, the proper branch to consider this problem is the Legislative branch. While the Constitution has vested ultimate judicial power of this country in the Supreme Court, giving the Court authority to interpret the nation's treaties,[156] the Supreme Court has determined that Congress can override portions of treaties simply by passing laws that conflict with the treaty provisions.[157] If Congress has the greater power to override treaty provisions, then certainly it should be able to support or clarify problematic provisions. Although the VCCR has been deemed a self-executing treaty,[158] it should be evident that integrating certain of its provisions into United States law has not proceeded seamlessly. Congress has not rejected its provisions: on the contrary, rather than enacting statutes that would supersede the VCCR, the Legislature has approved a supportive regulation in the area of immigration.[159] Ideally, Congress would enact a law of broader application than the immigration regulation, requiring notice of VCCR rights and designating some recourse for defendants who did not receive the notice. This law, if enacted and carried out, would not only bring the United States into compliance with the VCCR and protect foreign defendants but, depending on the recourse Congress chose,

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[155] 384 U.S. 436, 444 (1966) (requiring law enforcement authorities to advise arrestees of specific rights). Although hailed by some as an important protection for arrestees, to others *Miranda* represents an impermissible Supreme Court foray into the area of legislation. *See* 384 U.S. at 524-26 (Clark, J., dissenting) (favoring a legislative solution to the problem presented over a judicial one).

[156] U.S. CONST. art. III, cl. 1-2.

[157] Reid v. Covert, 354 U.S. 1, 18 & n.34 (1957) (citing Whitney v. Robertson, 124 U.S. 190, 194 (1888)).

[158] Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998).

[159] 8 C.F.R. § 1236.1(e) (2006) (requiring that authorities provide immigrants subject to deportation with notice of their rights to contact and communicate with their consuls).

might also satisfy the ICJ's request for provision of a meaningful review.[160]

Domestic or International Solution?

In considering whether to enforce compliance with the VCCR's notice requirement, United States authorities would do well to consider international concerns as well as domestic concerns. From a practical standpoint, lawmakers will naturally concern themselves with domestic issues such as whether a law is constitutional, whether it conforms with current law, whether it is logistically feasible, and whether it is politically popular; justices will determine whether the law comports with the Constitution. However, where a domestic law may impact on compliance with a multilateral treaty such as the VCCR, it is also important to consider any international ramifications tied to it. When the United States enacts a law or the Supreme Court rules in a way that impacts on its treaty obligations to other nations, those other nations will evaluate that law or ruling to determine whether their treaty partner is behaving as a good citizen in the world community. Support or rejection of promises under the VCCR, which entails obligations not only to the other sovereign states but also to their individual citizens, will speak directly to the other member states about respect and trust. A decision upholding voluntarily assumed treaty obligations will suggest that the United States respects its peers as equals rather than as subordinates. Similarly, a decision closing a common-law loophole that has deprived foreign nationals of meaningful review of their cases will suggest that the United States respects human rights. These displays of respect, in turn, should engender trust that the United States will keep its word under the VCCR as well as under future treaties.

A brief comparison of two well-worn philosophies of international relations bears up this community-conscious approach. Nearly four hundred years ago, Hugo Grotius envisioned an idyllic world in which a community of sovereign states flourished because they recognized and respected their own interdependence. Each adhered to its promises to the others in both wartime and peacetime because "there is no state so powerful that it may not some time need the help of others outside itself, either for purposes of trade, or even to ward off the forces of many foreign nations united against it."[161]

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[160] Avena and Other Mexican Nationals (Mex.v. U.S.), 2004 I.C.J. 12, 120-21 (March 31).

[161] HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, 17 (Kelsey trans. 1913).

Conversely, "the state which transgresses the laws of nature and of nations cuts away ... the bulwarks which safeguard its own future peace."[162] Opposing Grotius' theory of a morally unified community of states, Machiavelli's famous parable of the Prince presupposed not that states were wholly independent of one another, but that they had the potential to be faithless and self-serving in their dealings with one another. Because of this presumed dishonesty, Machiavelli admonished that:

> [A] prudent ruler ought not to keep faith when by so doing it would be against his interest, and when the reasons which made him bind himself no longer exist. If men were all good, this precept would not be a good one; but as they are bad, and would not observe their faith with you, so you are not bound to keep faith with them.[163]

Each of these philosophies is built upon an imperfect foundation, and the truth likely lies somewhere between them. Both Grotius and Machiavelli assumed that sovereign states would exhibit a constancy of nature in their quest for self-preservation – that, like individual people, states would behave either morally or selfishly toward one another – and that their relations with one another would develop in accordance with that constant nature. However, in the United Nations, modern society appears to anticipate both types of behavior in international relations: not only does it embrace multilateral treaties and agreements and encourage discourse and unity among the nations, but it employs judicial and security arms to check misdeeds.

The ICJ's Role

In determining how to address the apparent conflict between domestic law and the VCCR, the United States would do well to remember its own image as a world citizen. The United States withdrew its support of the Optional Protocol after the ICJ's judgment in the *Avena* case, complaining that "fewer than thirty percent of the signatories of the Vienna Convention had agreed to the Optional Protocol."[164] By withdrawing from the Optional Protocol with the cries of death penalty opponents still in the air, the United States arguably demonstrated a distrust of the ICJ. If, as it appears from *Avena*, the United States worries that the ICJ will use VCCR Article 36 as an

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[162] *Id.* at 16.

[163] N. MACHIAVELLI, THE PRINCE AND THE DISCOURSES, 64 (Lerner ed. 1950).

[164] Lane, *supra* note 86.

avenue for imposing anti-death penalty attitudes on the United States, the distrust may well be unfounded. Despite examining over fifty cases involving criminal defendants, the ICJ remained detached and focused on resolving the contractual disputes between Mexico and the United States by interpreting the language and intent of the VCCR. In fact, the Court specifically noted that "[w]hether or not the Vienna Convention rights are human rights is not a matter that this Court need decide."[165] In the *Avena* opinion, the ICJ explored contractual issues, such as the purpose behind VCCR Article 36, "which [was] to enable 'meaningful consular assistance' and the safeguarding of the vulnerability of foreign nationals in custody."[166] On the other hand, a worry that the ICJ may eventually impose sanctions for continued non-compliance may be well-founded.

The United States should not allow its withdrawal from the Optional Protocol to render it deaf to the considered judgments already rendered by the ICJ. As the judicial branch of the United Nations, with limited power and a diverse membership that should promote just results, the ICJ is uniquely well suited to guide member nations in uniformly interpreting the VCCR. Without an authoritative interpreter, practical questions about the VCCR will remain unanswered. Nations and courts will continue to apply the VCCR's provisions unevenly or not at all. Without a respected nonpartisan voice providing answers, questions concerning whether the VCCR created any individual rights, what rights they are and in whom they reside, how to enforce them, and what remedies are appropriate will continue to vex trial judges and bog down dockets.

Diverging Attitudes and Inconsistent Case Law

Despite the fact that both the Optional Protocol and the rules of the ICJ required it to accept ICJ decisions as binding, the United States has yet to honor the ICJ's interpretations of the VCCR.[167] However, under pressure from within the Supreme Court as well as from outside it, the law is beginning to change. In *Torres* and *Medellin*, members of the Supreme Court demonstrated a growing dissatisfaction with the inequitable and unjust application of the procedural default rule. Congress enacted an immigration statute that reflects the notice provision of VCCR Article 36, codifying the contact and

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[165] 2004 I.C.J. at 61.

[166] *Id.* at 47.

[167] Medellín v. Dretke, 544 U.S. 660, 682-685 (2005) (O'Connor, J., dissenting).

communication rights of immigrants facing deportation.[168] Foreign nationals' arguments have begun to probe the courts' attitudes toward VCCR violations by exploring alternative remedies for Article 36 breaches.[169]

While it is true that the law already exists in the form of the treaty itself and the constitutional provision that gives treaties constitutional status, the plain fact is that the law, as currently configured, has failed. The various courts are not the appropriate venue for rectifying the problem. While it is true that the Supreme Court stands poised to clarify the judiciary's role in resolving VCCR claims, buttressing the current system of laws guarantees no better result than relying on it as-is.

The role of lawmaker properly belongs to Congress. Having already ensured that immigrants subject to deportation have the right receive notice and communicate with their consuls,[170] Congress should stride more confidently into the broader venue of criminal law and enact legislation that will ensure future conformity with the VCCR. The United States should ensure that upcoming changes in the law are consistent both with one another and with prior decisions by accepting the ICJ's expertise in interpreting the VCCR.

CONCLUSION

United States authorities' failure to honor the notice provision of Article 36 of the VCCR is a correctable and preventable problem. United States courts disagree on aspects of defendants' VCCR arguments, ranging from whether the procedural default rule should properly apply to late VCCR claims; to which rights, if any, flow from the VCCR and to whom; to which remedies are available to injured parties. While withdrawing from the Optional Protocol may have spared the United States the continuing reproach of the ICJ and possible future sanctions therefrom, that relief fails to resolve the disputes that will continue to grow out of non-compliance. A practical solution to the problem must eventually come from Congress. An

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[168] Rosales v. Bureau of Immigration and Customs Enforcement, 2005 WL 2292526 (5th Cir. (Tex.)) (explaining VCCR's notice provision now codified in 8 C.F.R. §1236.1(e), but habeas relief still requires showing of demonstrable prejudice).

[169] In 2005, the Seventh Circuit Court of Appeals recognized that the VCCR creates in the individual a private right of action in tort for violations of Article 36. Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005).

[170] 8 C.F.R. § 1236.1(e).

informed solution should consider and incorporate the ICJ's prior judgments.