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Exorcising the Ghost: Finding a Right and a Remedy in Article 36 of the Vienna Convention on Consular Relations

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Harrill: Exorcising the Ghost: Finding a Right and a Remedy in Article 36

EXORCISING THE GHOST: FINDING A RIGHT AND A REMEDY IN ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

I. INTRODUCTION

This nation must manifest integrity in our treaties with foreign countries. To honor the provisions of Article 36 of the Vienna Convention on Consular Relations . . . mandates a sense of justice and decency. To do anything less is a severe erosive compromise of our very essence equal if not greater than a Constitutional violation.¹

The Vienna Convention on Consular Relations² ("Vienna Convention") convened in Vienna, Austria in 1963 and produced an ambitious treaty to codify international common law consular relationships.³ Approved by the United States Senate on October 22, 1969, and ratified by President Richard M. Nixon on November 12, 1969,⁴ this multilateral treaty has sparked a continuing debate in both domestic and international fora questioning whether the language in one particular article creates an individual right.

The controversy flows from the language of Article 36 of the Convention, which, according to some courts and many scholars, creates a right accruing to the individual.⁵ This is remarkable because most treaties do not create individual rights; rather, treaties function as agreements between sovereigns and as such are generally only enforceable by national governments. However, Article 36 of the Vienna Convention is different and provides that if an individual is detained by law enforcement in a foreign country, the detainee has a right to access the consular officials of his nationality. Additionally, the arresting authority is required to notify the individual of this right at the onset of his detention. This short, two-paragraph portion of the Vienna Convention has sparked numerous court cases and an entire body of independent scholarly work. Yet this treaty and its implications still float

1. *United States v. Calderon-Medina*, 591 F.2d 529, 532 (9th Cir. 1979) (Takasugi, J., dissenting).

2. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter *Vienna Convention*].

3. Luke T. Lee, *Vienna Conventions on Diplomatic and Consular Relations*, 571 INT'L CONCILIATION 41, 41 (1969).

4. William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 268 (1998). The treaty officially became United States law on December 24, 1969. *Id.* at 269.

5. See discussion *infra* Part II.

on the periphery of legal consciousness, leading to a cycle of non-compliance in the United States.

The jurisprudence regarding the creation of this individual right is unsettled in the United States. Some courts have found that, like most other international agreements, any rights created under this article accrue not to the individual, but rather to the signatory nation; therefore, violations are only enforceable by and among nations. Other courts have determined that the treaty does create an individual right, but that it is not a right on par with fundamental rights such as the Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination. Accordingly, these courts find that, absent some showing by the individual of prejudice to the outcome of the proceedings, no plausible criminal remedy exists for a violation of Article 36.

Article 36 of the Vienna Convention, with its "tortuous and checkered background,"⁶ seeks, among other things, to establish the important protective function of consuls.⁷ Many courts have struggled with the United States' violations of this treaty, fully aware that if the United States does not move towards even and full compliance, it endangers its own citizens traveling abroad. When charged with a crime in an unfamiliar foreign justice system, American citizens need the protective shield that access to a representative of the United States government provides.

In South Carolina, this matter was addressed for the first time in late 2002 in *State v. Lopez*.⁸ In *Lopez*, the South Carolina Court of Appeals held that, despite the prosecution's admitted violation of Article 36, no prejudice to the defendant resulted from the violation, and the conviction of the defendant was therefore affirmed.⁹ The case, explored below in Part II, is a typical challenge to the actions of law enforcement officials under the Vienna Convention. As such, *Lopez* is remarkable only in that the defendant was astute enough, either through his own actions or that of counsel, to determine that a right existed and to raise the violation in the trial court. The issue of raising the violation in the trial court is an important element of the overall debate. If not raised in the trial court, the value of the right is forever lost and an individual, unaware of the right's existence, may find himself trapped in the unfortunate quagmire of procedural default. The individual thus loses the ability to challenge his conviction based on a violation of a right he did not know he had.¹⁰

This Comment explores the state of the law on Article 36 and suggests that

6. LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATION 107 (1966).

7. *Id.*

8. 352 S.C. 373, 574 S.E.2d 210 (Ct. App. 2002).

9. *Id.* at 382, 574 S.E.2d at 214.

10. In a recent United States Supreme Court order denying a petition for writ of certiorari, Justice John Paul Stevens filed a dissenting opinion in which he noted that "[a]pplying the procedural default rule to Article 36 claims is not only in direct violation of the Vienna Convention, but it is also manifestly unfair." *Torres v. Mullin*, 124 S. Ct. 919 (2003) (Stevens, J., dissenting).

because violations of the Vienna Convention do not appear to be remediable in most criminal settings, courts can and should allow parties to explore greater enforceability through actions brought under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.¹¹ By raising the specter of monetary and injunctive relief, courts will promote enforcement of the treaty. “Violation[s] of the Vienna Convention [are] costless to those committing the violations,”¹² and non-compliance in the United States will continue unless and until costs are imposed on willful violators.

Part II of this Comment explores the state of the current law illustrated by the South Carolina case *State v. Lopez*¹³ and provides an exploration of Article 36 of the Vienna Convention, including a general background on treaty enforcement in the courts of the United States. Part III argues that Article 36 of the Vienna Convention does create an individual right, explores the United States’ official position that an individual right does not exist in the treaty, and considers the Supreme Court’s most recent discussion of this question. Part IV proposes that the remedy for such violations should include civil liability through 42 U.S.C. § 1983.

II. THE STATE OF THE LAW

A. *State v. Lopez*

In late 2002, *State v. Lopez*¹⁴ addressed a Vienna Convention violation as a matter of first impression in South Carolina. Domitilo Lopez, “a Mexican national residing legally in the United States,”¹⁵ was arrested in June 1998 during a traffic stop. A consensual search of his vehicle yielded cocaine, and Lopez was indicted for trafficking more than 500 grams of cocaine.¹⁶ During the course of his plea hearing, Lopez twice turned down the court’s offer of an interpreter.¹⁷ With the advice of counsel, Lopez, advised of the charges against him and the constitutional rights that he would be waiving, entered a plea of guilty.¹⁸ Thus, circumstances indicated that Lopez’s decision to plead guilty was one made of his own free will.¹⁹ The trial court determined Lopez’s plea was knowing and voluntary, and pursuant to the plea agreement, the court sentenced Lopez to “fourteen years in prison, with credit for time served, and imposed a statutorily mandated \$100,000 fine.”²⁰ Lopez

11. 403 U.S. 388 (1971).

12. Joan Fitzpatrick, *The Unreality of International Law in the United States and the LaGrand Case*, 27 YALE J. INT’L L. 427, 428 (2002).

13. 352 S.C. at 373, 574 S.E.2d at 210.

14. *Id.*

15. *Id.* at 376, 574 S.E.2d at 211.

16. *Id.*

17. *Id.*

18. *Id.* at 377, 574 S.E.2d at 212.

19. *State v. Lopez*, 352 S.C. 373, 377, 574 S.E.2d 210, 212 (Ct. App. 2002).

20. *Id.*

subsequently moved to withdraw his plea based on the prosecution's violation of Article 36 of the Vienna Convention.²¹ Lopez argued that had he known of his right to contact the Mexican consulate, he would have secured a translator to "help him better understand the 'ramifications and consequences' of his decision to enter a guilty plea."²² The State admitted Lopez had not been advised of his rights under the Vienna Convention, stating it had "unintentionally failed"²³ to advise him of those rights. The trial court thereafter denied Lopez's motion to withdraw his plea, and Lopez filed an appeal.²⁴

The South Carolina Court of Appeals decision in *Lopez* is indicative of the posture of most criminal cases addressing this issue. The court of appeals determined that "[r]ights created by international treaties do not create rights equivalent to constitutional rights,"²⁵ and as such, for Lopez to prevail he needed to establish some evidence of prejudice to the outcome of his case.²⁶ Lopez argued that if he had been informed of his right under the Vienna Convention, he would have contacted the Mexican consulate in an effort to secure a translator.²⁷ The court found that the trial court record contained ample evidence of Lopez's ability to understand and comprehend English, that he had never requested an interpreter, and that, in fact, he had twice turned down the court's offer of a court-appointed translator.²⁸ The court of appeals held that "a violation of rights under the Vienna Convention . . . provides no basis for withdrawing a free and voluntary plea of guilty," and Lopez "failed to demonstrate that he suffered any prejudice as the result of the State's failure to make him aware of his rights under the Treaty."²⁹ The court affirmed Lopez's conviction.³⁰

There are several noteworthy aspects of the court of appeals' rather cursory opinion. First, the court did not undertake any analysis of whether Lopez had standing to bring a challenge to his conviction under Article 36. The court focused on the trial court record without even addressing the issue of whether Lopez could pursue this violation on his own behalf or whether the right to raise the violation belonged only to the United Mexican States. This is important because if no standing exists, no right exists. The court indicated that Lopez failed to show he was prejudiced by "the State's failure to make *him* aware of *his rights* under the Treaty."³¹ The court proceeded on the assumption that the rights mentioned in

21. *Id.*

22. *Id.* (quoting Record on Appeal at 25, *Lopez* (No. 3578)).

23. *Id.*

24. *Id.* at 376–77, 574 S.E.2d at 211–12.

25. *State v. Lopez*, 352 S.C. 373, 381, 574 S.E.2d 210, 214 (Ct. App. 2002).

26. *Id.*

27. *Id.*

28. *Id.* at 381–82, 574 S.E.2d at 214.

29. *Id.* at 382, 574 S.E.2d at 215.

30. *Id.*

31. *State v. Lopez*, 352 S.C. 373, 382, 574 S.E.2d 210, 215 (Ct. App. 2002) (emphasis added).

Article 36(1)(b) accrued to Lopez, and therefore it was “his own actions”³² that prevented his plea withdrawal. Even the court’s finding that “international treaties do not create rights equivalent to constitutional rights”³³ does not foreclose the existence of a right that belongs to the foreign national, but merely clarifies that the right does not rise to the level of a constitutional right.

Second, the opinion does not indicate whether the State ever affirmatively complied with its duty to inform Lopez of his rights under the Treaty. Lopez was arrested in June 1998, the plea hearing was held in January 1999, and the court held a hearing on Lopez’s motion to withdraw his guilty plea in December 1999.³⁴ The only reference in the opinion to whether the State ever complied with its duty is the court’s notation that the State *failed* to advise Lopez of his right to consular notification and access.³⁵ Mentioning whether the State had performed its duty was not essential to the court’s determination of Lopez’s case. However, the omission leaves the impression that the court either thought it was a moot point because the violation had been raised by the defendant, or that it was unimportant whether Lopez was ever formally advised of his rights. If the latter is the case, the court may have failed to recognize an opportunity to stem the very real potential for repetition of violations of this treaty obligation, particularly as the population of foreign nationals increases in South Carolina.³⁶

B. The Vienna Convention and Article 36

The Vienna Convention, as noted above, was undertaken in an attempt to memorialize international common law arrangements affecting consular relationships between nations. The treaty addresses a variety of the elements of consular relationships, including the many responsibilities of consuls. These responsibilities include furthering both economic and cultural relations between the sending state and the receiving state,³⁷ as well as performing a variety of ministerial duties.³⁸

However, Article 36 is slightly different. In the midst of a multilateral treaty that seeks to formalize official relationships, the following two paragraphs have sparked a vocal international debate:

32. *Id.* at 382, 574 S.E.2d at 214.

33. *Id.* at 381, 574 S.E.2d at 214.

34. *Id.* at 376–77, 574 S.E.2d at 211–12.

35. *Id.* at 377, 574 S.E.2d at 212.

36. *Cf.* Cheraine Stanford, *Lancaster Weighs Hiring Courtroom Interpreters*, THE STATE (Columbia, S.C.), July 25, 2003, at B5 (noting an increase in native Spanish-speaking individuals having interactions with the court system).

37. In this context, the sending state is the nation of which the foreign national is a citizen, and receiving state indicates the nation in which the foreign national is physically located. *United States v. Emuegbunam*, 268 F.3d 377, 388 (6th Cir. 2001).

38. Aceves, *supra* note 4, at 264.

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State; (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. . . . The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

. . . .

2. 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.³⁹

The language of Article 36 appears to be a two-pronged compromise between the delegations' competing ideas of what duties should be incumbent upon the receiving state.⁴⁰ Some delegations wanted to impose a mandatory obligation on the receiving state to inform the consuls of the sending state that their compatriots had been detained, while other delegations wanted to forgo such an obligation altogether.⁴¹ The second part of the compromise appears in the language at the beginning of Article 36(b). The phrase "[i]f he so requests" was inserted in response to several delegations' concerns over the foreign national's "autonomy and rights under the Treaty."⁴²

Article 36 operates to protect the individual in two important ways: it both allows the detained individual access to representatives of her government and protects the individual by allowing governments to have access to their citizens to ensure fair treatment in foreign judicial systems.⁴³

39. Vienna Convention, *supra* note 2, art. 36, 21 U.S.T. at 100-01, 596 U.N.T.S. at 292-94.

40. Lee, *supra* note 3, at 63.

41. *Id.*

42. 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, 571 (1997).

43. Aceves, *supra* note 4, at 259.

C. Treaties Generally

Treaties, as agreements between nations, are generally enforceable by and among nations, usually through diplomatic and political means.⁴⁴ Treaties generally do not create individually enforceable rights, although there are some notable exceptions.⁴⁵ In those instances where individual rights are implicated, whether a private right of action is created turns on the interpretation of the agreement.⁴⁶ “Whether or not treaty violations can provide the basis for particular claims or defenses thus appears to depend upon the particular treaty and claim involved.”⁴⁷

Self-executing treaties carry the force and weight of statutory enactments.⁴⁸ While the doctrine of self-execution means that no congressional legislation beyond ratification is needed to implement the treaty, “self-executing” in the international law sense also means that the treaty must provide an individual right of action.⁴⁹

Treaties are given force and effect and are binding on the states through the Supremacy Clause of the United States Constitution.⁵⁰ “The Supremacy Clause transformed instruments that had previously been operative on [nations] as political bodies and enforceable only by military force into instruments operative on individuals and enforceable in the courts.”⁵¹ Because of the structure of the language of the Supremacy Clause,⁵² treaties are on parity with legislative enactments and, because “the United States recognizes the doctrine of *lex posterior*

44. *United States v. Li*, 206 F.3d 56, 63 (1st Cir. 2000) (citing United States Department of State material).

45. *See, e.g., United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992) (finding if extradition treaty is self-executing, court must enforce it on behalf of individual if it implicates individual rights); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 442–43 (1989) (indicating some treaties create private rights of action for foreign corporations to recover compensation in United States courts).

46. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1987).

47. *United States v. Lomera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000).

48. *Valentine v. Neidecker*, 299 U.S. 5, 10 (1936) (treaties are “to be regarded in courts of justice as equivalent to an act of the legislature, whenever [the treaty] operates of itself without the aid of any legislative provision”) (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829)); *see also Head Money Cases*, 112 U.S. 580, 598 (1884) (finding that a treaty is the “law of the land as an act of Congress . . . whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined”).

49. *Kadish*, *supra* note 42, at 586–87; *see also Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988). There is some disagreement on this point in both commentary and in the courts. *See Roberto Iraola, Federal Criminal Prosecutions and the Right to Consular Notification under Article 36 of the Vienna Convention*, 105 W. VA. L. REV. 179, 211 nn.56–57 (2002) (discussing controversy).

50. *Antoine v. Washington*, 420 U.S. 194, 201 (1975) (“[A] legislated ratification of [a treaty] is a ‘(Law) of the United States . . . made in Pursuance’ of the Constitution and, therefore, like ‘all Treaties made,’ is made binding upon affected States by the Supremacy Clause.”)

51. Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1097 (1992).

52. U.S. CONST. art. VI, § 1, cl. 2.

derogat priori,”⁵³ can be modified by subsequently passed legislation.⁵⁴

When interpreting a treaty or its provisions, courts “first look to its terms to determine its meaning.”⁵⁵ If the meaning is not clear from the face of the treaty, courts cannot infer meanings from the presence or absence of language, but “[i]t is a familiar rule that the obligations . . . should be liberally construed so as to give effect to the apparent intentions of the parties.”⁵⁶ In an attempt to determine these intentions and resolve textual ambiguities, courts look to the records of the drafting, debate, and negotiation of the treaty,⁵⁷ to other signatories’ interpretation of the treaty,⁵⁸ to interpretative material of the Executive Branch agency charged with enforcement,⁵⁹ and to the decisions of any international tribunal charged with interpretation of the treaty.⁶⁰

In effectuating treaties, “the procedural rules of the forum [nation] govern the implementation of the treaty in that [nation].”⁶¹ The United States Supreme Court indicated that this idea is manifest in the Vienna Convention in section 2 of Article 36, which states the rights accorded in the treaty “shall be exercised in conformity with the laws and regulations of the receiving State” so long as “said laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended.”⁶²

III. BURIED RIGHT: THE RIGHT OF THE INDIVIDUAL IN ARTICLE 36

A. *An Individual Right Revealed*

Armed with the framework for interpreting treaties, this Comment now turns to whether the language of Article 36 creates a right in the individual: not only a right of access to one’s national representatives, but also a right to be notified of such a privilege. Courts are split on this issue,⁶³ and the Supreme Court has not

53. Aceves, *supra* note 4, at 289. This phrase literally means “a later law prevails over an earlier one.” BLACK’S LAW DICTIONARY 924 (7th ed. 1999).

54. Reid v. Covert, 354 U.S. 1, 18 (1957) (“[W]hen a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”); *see also* Head Money Cases, 112 U.S. 580, 599 (1884) (finding treaties subject to such acts as Congress passes for their “enforcement, modification, or repeal”).

55. United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992).

56. Valentine v. Neidecker, 299 U.S. 5, 10 (1936).

57. Air France v. Saks, 470 U.S. 392, 400 (1985).

58. *Id.* at 404.

59. United States v. Li, 206 F.3d 56, 67 (1st Cir. 2000).

60. Breard v. Greene, 523 U.S. 371, 375 (1998).

61. *Id.*

62. *Id.* (citing Vienna Convention, *supra* note 2, art. 36, para. 2, 21 U.S.T. at 101, 596 U.N.T.S. at 292).

63. Compare United States v. Torres-Del Muro, 58 F. Supp. 2d 931 (C.D. Ill. 1999) (finding individually enforceable right), and United States v. Rangel-Gonzales, 617 F.2d 529, 532 (9th Cir. 1980) (stating that “[t]he right established by the . . . treaty is a personal one”), and Standt v. City of New York, 153 F. Supp. 2d 417 (S.D.N.Y. 2001) (holding individual right enforceable under § 1983),

given a definitive answer. However, in the most recent case where the Court addressed a Vienna Convention violation, the Court did not question the individual petitioner's standing—a seminal element of justiciability—to raise a violation of the provisions of Article 36. More importantly, the Court indicated, albeit in *dicta*, that the treaty “arguably confers on an individual the right to consular assistance following arrest.”⁶⁴

Article 36 of the Vienna Convention is “an awkward place to enumerate the rights of an individual national.”⁶⁵ Nevertheless, it is evident from the clarity of the Article's language, compared with original wording of the Article,⁶⁶ that the Convention delegates knew the import of the language used. The language of Article 36 does not directly “require the receiving state to notify the consular post that its national has been detained;”⁶⁷ rather, the treaty explicitly states that the right belongs to and is triggered by the detained individual. The beginning phrase of Article 36(1)(b), “if he so requests,” places the burden and privilege to exercise the right of contact squarely on the detained individual.⁶⁸ The fact that the individual triggers notification, coupled with the mandatory language stating that the arresting “authorities *shall* inform the person concerned without delay of *his* rights under this sub-paragraph,”⁶⁹ indicates the signatories' intent to create a right in the individual and impose a duty on the receiving State. A British amendment added the obligatory language in subparagraph (b) “to avoid any possible abuse by local authorities or misunderstanding by the person involved.”⁷⁰ Surely if the signatories, including the United States, meant for this article to create only a derivative right enforceable by and among nations, then the original language, wherein the individual national is not even mentioned, would have won the day. “This provision does not entail arcane or obscure parlance, or require the application of complex notions or of concepts that are difficult to understand or decipher.”⁷¹ The

with *United States v. Emuegbunam*, 268 F.3d 377 (6th Cir. 2001) (finding the Vienna Convention does not create individual right), and *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001) (finding treaty does not create private, judicially enforceable right).

64. *Breard*, 523 U.S. at 376.

65. Kadish, *supra* note 42, at 593.

66. As originally put forth, Article 36(b) provided: “The competent authorities shall, without undue delay, inform the competent consulate of the sending State if, within its district, a national of that State is committed to prison or to custody pending trial or detained in any other manner.” Kadish, *supra* note 42, at 570 n.21 (quoting 2 United Nations Conference on Consular Relations: Official Records, at 3, U.N. Doc. A/Conf.25/6, U.N. Sales No. 63.X.2 (1963)).

67. Lori Fisler Damrosch, *Interpreting U.S. Treaties in Light of Human Rights Values*, 46 N.Y.L. SCH. L. REV. 43, 52 (2002–2003).

68. Vienna Convention, *supra* note 2, art. 36, para. 1(b), 21 U.S.T. at 101, 596 U.N.T.S. at 292. This is only true for those countries in which an arrest of one of its citizens does not trigger a mandatory notification provision. See <http://www.travel.state.gov/notification1.html> (State Department material indicating some countries, because of separate bilateral agreements, require mandatory notification).

69. Vienna Convention, *supra* note 2, art. 36, para. 1(b), 21 U.S.T. at 101, 596 U.N.T.S. at 292 (emphasis added).

70. LEE, *supra* note 6, at 114 (citing statement of United Kingdom delegation).

71. *United States v. Li*, 206 F.3d 56, 71 (1st Cir. 2000) (Torruella, C.J., dissenting).

clarity of the words and their implication for the individual should not be ignored.

Some courts have pointed to the preamble language of the treaty in an effort to show that the treaty itself specifically disavows any creation of individual rights.⁷² The preamble language states, in part, that “the purpose of such privileges and immunities [enumerated in the treaty] is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.”⁷³ Upon examination, however, the language of the entire preamble speaks to the reason for the inclusion of these privileges and immunities in the treaty as not to “benefit individuals,” but rather to “contribute to the development of friendly relations among nations.”⁷⁴ The preamble, viewed in context, simply recognizes that consuls are not afforded the immunities outlined in the treaty as personal benefits. The privileges allow consuls to fully function in their official capacities, and “[t]hus, the preamble language refers to the individual consul, not individual foreign nationals.”⁷⁵

B. The International Court of Justice and Inter-American Court of Human Rights: Persuasive Precedent

When the United States became a signatory to the Vienna Convention, it also became a signatory to the Optional Protocol Concerning the Compulsory Settlement of Disputes.⁷⁶ By participating in this Optional Protocol, the assenting signatories agreed that disputes regarding the application or interpretation of the Vienna Convention would be within the mandatory jurisdiction of the International Court of Justice (“ICJ”).⁷⁷ In the 2001 *LaGrand* matter, the ICJ determined that the treaty does create a right in the individual.⁷⁸

Karl and Walter LaGrand were German citizens who, in 1982, were convicted of murder and sentenced to death in Arizona state court.⁷⁹ While Arizona authorities were aware no later than 1984 that the LaGrands were German nationals,⁸⁰ German officials only became aware of the LaGrands’ convictions and

72. See *id.* at 62; *Sorensen v. City of New York*, No. 98 Civ 3356, 2000 U.S. Dist. LEXIS 15090 (S.D.N.Y. Jan. 23, 2000). (“[T]he Vienna Convention’s preamble explicitly disclaims any attempt to create individual rights.”).

73. Vienna Convention, *supra* note 2, pmbl., 21 U.S.T. at 79, 596 U.N.T.S. at 262.

74. *Id.*

75. Kadish, *supra* note 42, at 594.

76. Vienna Convention, *supra* note 2, Optional Protocol Concerning the Compulsory Settlement of Disputes, 21 U.S.T. at 325–29, 596 U.N.T.S. at 488–512.

77. *Id.* at art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488.

78. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 104 (June 27, 2001), available at <http://212.153.43.18/icjwww/idoctet/igusigugframe.htm>.

79. *State v. LaGrand*, 734 P.2d 563, 565 (Ariz. 1987).

80. Daniel J. Lehman, *The Federal Republic of Germany v. The United States of America: The Individual Right to Consular Access*, 20 LAW & INEQ. 313, 340 n.77 (2002). There was some dispute as to when authorities were aware that the LaGrands were German nationals and also as to who those authorities were. *Id.*

pending executions in 1992.⁸¹ It was not until sixteen years after their convictions and sentences, on December 21, 1998, that the LaGrands were formally notified of their rights under the Vienna Convention.⁸² As a result of the failure of state officials to notify the LaGrands of their rights under the Vienna Convention and the execution of Karl LaGrand on February 24, 1999, Germany brought suit in the ICJ in March 1999 on behalf of itself and the LaGrands.⁸³ While an ICJ ruling is only binding as to the parties before it, the Optional Protocol to the Vienna Convention, to which the United States is a signatory, provides that an ICJ interpretation of the treaty is authoritative.⁸⁴ The United States appeared and defended the case, thereby binding itself to the ruling.⁸⁵ The United States acknowledged Arizona's violation of the Vienna Convention and pointed to efforts to increase awareness among local law enforcement officials of their Vienna Convention obligations.⁸⁶ While the case was pending in the ICJ, Arizona authorities carried out the death sentence against Walter LaGrand.⁸⁷ Germany pursued a ruling by the ICJ even though both Karl and Walter LaGrand had been executed.⁸⁸

Despite the United States' vigorous argument that Article 36 does not create an individual right, the ICJ held that "[t]he clarity of these provisions, viewed in their context, admits of no doubt . . . that Article 36, paragraph 1, creates individual rights."⁸⁹ The court went on to conclude,

[we] cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 [that the rights under paragraph 1 of Article 36 should be exercised in conformity with the laws and regulations of the receiving state] applies only to the rights of the sending State and not also to those of the detained individual. The Court has already determined that Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State, and that consequently the reference to "rights" in paragraph 2 must be read as applying not only to the rights of the

81. *Id.* at 325–26.

82. *LaGrand*, 2001 I.C.J. 104, para. 24.

83. *Id.* at para. 30.

84. Lehman, *supra* note 80, at 325.

85. John Quigley, *LaGrand: A Challenge to the U.S. Judiciary*, 27 YALE J. INT'L L. 435, 438 (2002) (noting ICJ's judgment binding on the United States under United Nations Charter Article 94).

86. *LaGrand*, 2001 I.C.J. 104, para. 119.

87. Anthony N. Bishop, *The Unenforceable Rights to Consular Notification and Access in the United States: What's Changed Since the LaGrand Case?*, 25 HOUS. J. INT'L L. 1, 37 (2002). Walter LaGrand was executed March 3, 1999. *LaGrand*, 2001 I.C.J. 104, para. 34.

88. Bishop, *supra* note 87, at 37. The Republic of Paraguay sought a similar ruling from the ICJ regarding its citizen, Angel Breard, but dropped the petition after his execution. *Id.* at 23. See discussion *infra* Part II. C.

89. *LaGrand*, 2001 I.C.J. 104, para. 77.

sending State, but also to the rights of the detained individual.⁹⁰

Turning to the application of the doctrine of procedural default,⁹¹ the ICJ held that while not per se violative of Article 36, procedural default operates in many cases to deny an individual the opportunity to “challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular notification ‘without delay.’”⁹² The ICJ noted that procedural default, as applied in many criminal cases, denies individuals the full spectrum of “purposes for which the rights accorded under this Article are intended.”⁹³

These findings of the ICJ are important for two reasons. First, those courts struggling with the question of whether Article 36 creates an individual right can point to this solid precedent in making their decision.⁹⁴ Second, this ruling emphasizes the horns of the dilemma on which many detained foreign nationals find themselves impaled. Not aware of the right, a violation of the Vienna Convention goes unaddressed in the trial court, and these individuals thereafter find themselves mired in the seemingly circular trap of American procedural default law.

The ICJ is not the only international tribunal to find an individual right in Article 36. The Inter-American Court of Human Rights has also determined that Article 36 of the Vienna Convention creates an individual right.⁹⁵ The Inter-American Court issued an advisory opinion stating that the duty to notify a detained foreign national of the right to seek consular assistance is owed to the individual as part of the corpus of human rights.⁹⁶ While the United States is not a party to the treaty that formed the Inter-American Court or to the American Convention on

90. *Id.* at para. 89.

91. The procedural default doctrine bars any claim raised in a habeas corpus petition filed by a defendant convicted in state court where the habeas petitioner “fails to exhaust available state remedies and ‘the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.’” *Mickens v. Taylor*, 240 F.3d 348, 356 (4th Cir. 2001) (quoting *Beard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998)).

92. *LaGrand*, 2001 I.C.J. 104, para. 90.

93. Vienna Convention, *supra* note 2, art. 36, para. 2, 21 U.S.T. at 101, 596 U.N.T.S. at 292–94.

94. Despite the ICJ’s clear language and interpretative power, several courts’ rulings subsequent to the *LaGrand* decision have found either that the treaty does not create individual rights, or that the remedy sought is not available. “The cases betray a deep skepticism of treaties as legal, rather than political, instruments.” Fitzpatrick, *supra* note 12, at 429.

95. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, OC-16/99 (Inter-American Court of Human Rights, Oct. 1, 1999) (on file with author).

96. Mexico sought the Inter-American Court’s Advisory Opinion based on Article 64(1) of the American Convention on Human Rights, which authorizes members of the Organization of American States to consult the Inter-American Court regarding interpretation of “treaties concerning the protection of human rights in the American states.” William J. Aceves, *International Decision: The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 94 AM. J. INT’L L. 555, 556 (2000) (quoting American Convention on Human Rights, opened for signature Nov. 22, 1969, 1144 U.N.T.S. 123).

Human Rights, the advisory opinion is additional persuasive material for the United States Supreme Court to consider when it chooses to address this issue.

C. Breard v. Greene

In 1998, the United States Supreme Court addressed an Article 36 violation in *Breard v. Greene*.⁹⁷ In 1992, Angel Francisco Breard was charged with attempted rape and capital murder in the Commonwealth of Virginia.⁹⁸ Breard's Paraguayan passport was located while searching his apartment, so the Commonwealth was aware early during the proceedings that he was a foreign national.⁹⁹ Breard testified at his trial in 1993 and was convicted on both charges and sentenced to death.¹⁰⁰ The Virginia Supreme Court affirmed Breard's conviction, and the United States Supreme Court denied certiorari on his direct appeal in 1994.¹⁰¹ At no time during this appeal process was Breard informed of his rights under the Vienna Convention, nor was the Republic of Paraguay aware or informed of his arrest and conviction.¹⁰²

In 1996, Breard filed a petition for habeas corpus relief under 28 U.S.C. § 2254 in the United States District Court, arguing, *inter alia*, that his conviction and sentence should be overturned because of the alleged violation of the Vienna Convention.¹⁰³ The district court denied Breard's habeas petition, concluding Breard had procedurally defaulted on this claim when he failed to raise it in state court and that he could not show cause for, nor prejudice resulting from, this default.¹⁰⁴ The Fourth Circuit Court of Appeals affirmed the district court,¹⁰⁵ and Breard once again petitioned the Supreme Court for a writ of certiorari.¹⁰⁶

In a hurried opinion filed on the eve of Breard's execution, the Supreme Court rejected Breard's argument that the provisions of the Vienna Convention overrode the procedural default rule. The Court recognized 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."¹⁰⁷ The Court further noted that the Vienna Convention itself recognized this in its own language, which states that the rights expressed "shall be exercised in conformity with the laws and regulations of the receiving State."¹⁰⁸ Additionally, the Court found that

97. 523 U.S. 371 (1998).

98. *Id.* at 373.

99. Memorial of the Republic of Paraguay (Para. v. U.S.), para. 2.1 (I.C.J. Oct. 9, 1998) (on file with author).

100. *Breard*, 523 U.S. at 373.

101. *Id.*

102. Memorial of the Republic of Paraguay (Para. v. U.S.), para. 2.15 (I.C.J. Oct. 9, 1998) (on file with author).

103. *Breard*, 523 U.S. at 373.

104. *Id.*

105. *Breard v. Pruett*, 134 F.3d 615, 616 (4th Cir. 1998).

106. *Breard*, 523 U.S. at 373.

107. *Id.* at 375.

108. Vienna Convention, *supra* note 2, art. 36, para. 2, 21 U.S.T. at 101, 596 U.N.T.S. at 292.

because Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)¹⁰⁹ long after the Treaty's ratification in 1969, the provisions of the AEDPA modified any rights existing under the treaty.¹¹⁰ The AEDPA indicates that to warrant an evidentiary hearing, any state habeas petitioner alleging that he or she is held in violation of treaties of the United States must develop the claim in state court proceedings.¹¹¹ The Supreme Court indicated that the Vienna Convention, "which arguably confers on an individual the right to consular assistance following arrest,"¹¹² had therefore been modified by the AEDPA and "[t]his rule prevents Breard from establishing that the violation of his Vienna Convention rights prejudiced him."¹¹³ Even if "properly raised and proved,"¹¹⁴ the Court found it was doubtful Breard's conviction would have been overturned absent a claim that the Vienna Convention violation had a negative impact on his trial.¹¹⁵ Breard, who was never formally advised of his rights under the Vienna Convention,¹¹⁶ was executed on April 14, 1998 over the protest of the Republic of Paraguay.¹¹⁷

Lower courts have given ample consideration to the Supreme Court's *dicta* that the treaty "arguably"¹¹⁸ confers individual rights. Many lower courts have neatly sidestepped the issue, perhaps hesitating in the face of this language. Several courts have disposed of cases in an "assuming but not deciding" posture by accepting for argument's sake that a right exists and thereafter proceeding directly to whether the particular remedy sought by the foreign national is available. This is an awkward hole in Vienna Convention jurisprudence because

the fact that so many courts . . . have either assumed without deciding, or discounted the need to determine, whether an individual has rights under Article 36 leads one to question whether the courts themselves are certain that Article 36 does not confer individual rights. By declining to address the issue and resolve the conflict, courts are creating confusion in the law.¹¹⁹

Perhaps the more telling portion of the Supreme Court's position may be found in a sentence which follows the "arguably" language. The Supreme Court notes in

109. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered titles, mainly in 28 U.S.C.).

110. *Breard*, 523 U.S. at 376.

111. 28 U.S.C. § 2254(a), (e)(2) (2000).

112. *Breard*, 523 U.S. at 376.

113. *Id.*

114. *Id.* at 377.

115. *Id.*

116. Kadish, *supra* note 42, at 582.

117. Paraguay filed a case in the United States District Court for the Eastern District of Virginia, sought intervention through diplomatic channels, and instituted a proceeding in the ICJ on April 3, 1998. Bishop, *supra* note 87, at 17-18.

118. *Breard*, 523 U.S. at 376.

119. Bishop, *supra* note 87, at 57.

its discussion of the AEDPA that the AEDPA's modification of 28 U.S.C. § 2254 "prevents Breard from establishing that the violation of *his Vienna Convention rights* prejudiced him."¹²⁰ In a place where the Court could have qualified its language, it did not. This language, coupled with the Court's failure to address the standing issue, suggests the possibility of a different result. The Court, when presented with this issue again, may find foreign nationals have a right under this treaty, enforceable through means as yet not determined.

The *Breard* case stands as a prime example of the problem with the United States' uneven compliance with the provisions of Article 36 of the Vienna Convention. While there is no question Breard committed the heinous crimes for which he was convicted, there was some indication he may have rejected the Commonwealth's offer of a plea bargain because plea bargaining did not exist in Paraguay.¹²¹ Furthermore, the record suggests that he chose to testify not because he wanted to declare his innocence, but rather because Paraguayan juries tend to show leniency if defendants confess on the stand.¹²² If these assertions are true, a defendant's decisions to take a plea offer and to testify may be crucial moments in his interaction with the United States judicial system during which a consul, familiar with both systems of justice, could have assisted Breard. Paraguayan consular officials could have provided essential information regarding the differences between the United States' and Paraguayan jurisprudence that may have been determinative of Breard's fate.¹²³ In its own literature, the United States Department of State acknowledges this crucial role of consuls for American citizens traveling abroad, explaining that "[n]o one needs [this] cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail."¹²⁴ Surely this cultural bridge does not operate only for American citizens abroad.

United States courts are not likely to alter the application of procedural default. Nor are courts likely to apply the extraordinary judicial remedies available for violations of fundamental rights. As noted above, those courts that determine a right exists hold that the right is not a fundamental right; therefore, these extraordinary remedies are not available. It is also highly unlikely that courts will cull back through the many convictions of foreign nationals to determine whether a violation of Article 36 occurred and whether the violation prejudiced the

120. *Breard*, 523 U.S. at 376 (emphasis added).

121. See Memorial of the Republic of Paraguay (Para. v. U.S.), paras. 2.6, 2.11 (I.C.J. Oct. 9, 1998) (on file with author).

122. See Kadish, *supra* note 42, at 582 n.109 (explaining that "Breard believed he had committed a crime under a satanic curse," and in South American courts, this belief is "mitigating evidence in the sentencing phase").

123. There is also some indication Breard did not trust his attorneys because of the language and cultural barrier. Bishop, *supra* note 87, at 17. This is undoubtedly another area in which a consul could have provided assistance.

124. Aceves, *supra* note 4, at 271-72 (quoting 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 491 (1984)).

particular case. Individuals are therefore left with a question that has plagued defendants and courts for some time: while there may be a right, where is the remedy for this treaty's infringement?

D. Goose and Gander: The Official United States Position

The United States takes the position that Article 36 creates a right that is enforceable only by and among nations, and that no individual right accrues to the detained foreign national.¹²⁵ The United States Department of State asserts that the only remedies for failure to grant consular access and notification under the Vienna Convention are ““diplomatic, political, or exist between states under international law.””¹²⁶ This current view is consistent with the position taken by the Executive Branch during treaty ratification proceedings.¹²⁷ Therefore, according to the State Department, the only available remedies under Article 36 are investigations into alleged violations and apologies to the affected nations.¹²⁸

The United States did not take the above stated position when it sought access to the hostages taken from the United States embassy in Tehran, Iran, in November 1979, or when the United States sought access to individuals detained by Nicaragua¹²⁹ and Syria.¹³⁰ In these situations, the United States demanded access to its citizens pursuant to the very provisions of the Vienna Convention it chooses to ignore when the situation is reversed. While the argument can be made in these situations that the United States sought to enforce the treaty as a sovereign demanding the right of access, the underlying premise remains the same: the weight of sovereign power operates to protect the individual. In a sprawling country such as the United States, where individuals are dispersed among many states and no unified law enforcement system exists, foreign sovereigns can only protect their citizens with a right of access originating in the individual.¹³¹

Also contrary to its stated position, the United States has indicated through a variety of actions and publications that Article 36 does in fact create individual

125. See *United States v. Li*, 206 F.3d 56, 63 (1st Cir. 2000).

126. *United States v. Ernuagebunam*, 268 F.3d 377, 392 (6th Cir. 2001) (quoting *United States v. Page*, 232 F.3d 536 (6th Cir. 2000)).

127. *Li*, 206 F.3d at 64–65.

128. *United States v. Lombera-Camorlinga*, 206 F.3d 882, 887 (9th Cir. 2000).

129. See *United States v. Superville*, 40 F. Supp. 2d 672, 676 n.3 (noting U.S. interventions in these matters).

130. Aceves, *supra* note 4, at 270–71.

131. It is interesting to note that a few states have moved to codify the requirements of Article 36 of the Vienna Convention. See, e.g., CAL. PENAL CODE § 834c (West 2003) (codifying various responsibilities under the Vienna Convention); H.R. 2047, 72d Leg. Assem., Reg. Sess. (Or. 2003) (enacted May 28, 2003) (amending various sections of Oregon statutes to comply with requirements of Vienna Convention). Also, Texas has produced a sixty-seven page manual outlining requirements, procedures, and forms to be used in compliance with Article 36. Greg Abbott, Attorney Gen. of Tex., *Magistrate's Guide to Consular Notification Under the Vienna Convention* (on file with author).

rights. State Department materials,¹³² regulations promulgated by federal agencies,¹³³ and material contained in bilateral agreements with foreign nations¹³⁴ demonstrate that the United States expects that its citizens will receive their rights of consular access if arrested overseas and that its own law enforcement officials will comply with the provisions of Article 36. Unfortunately, even among the federal agencies that have promulgated explicit regulations regarding notification of foreign nationals, continuing violations¹³⁵ of the Vienna Convention indicate that this "requirement" of notification is inconsistent. "[W]hen federal officials argue against a judicial remedy in federal court for violations of the Vienna Convention, which their own regulations seek to enforce, their commitment to ensuring compliance with Article 36 seems dubious at best."¹³⁶

IV. REMEDY

Foreign nationals have a right with no discernable remedy when faced with state or federal officials' violations of the Vienna Convention. Those courts that have determined that an individual right exists in Article 36 have held that this right is not a fundamental right.¹³⁷ This finding relegates these cases to review under the "harmless error" standard;¹³⁸ the affected individual must therefore make a showing of prejudice to the outcome of his or her case to overcome the violation by the government. For the affected individual, Article 36 violations seem insurmountable

132. The State Department provides periodic "notices to state and local authorities reminding them of their obligations under the Treaty." Kadish, *supra* note 42, at 599. The State Department also publishes a Foreign Affairs Manual outlining the rights of American citizens arrested overseas, including "'the arrestee's right to communicate with the American consul.'" *Id.* (quoting U.S. DEPT. OF STATE, 7 FOREIGN AFFAIRS MANUAL § 411.1 (1984)).

133. 8 C.F.R. § 236.1(e) (2003) (indicating "detained alien shall be notified that he or she may communicate with the consular" officials); 28 C.F.R. § 50.5 (2003) (indicating in a policy statement of the Department of Justice that the arresting officer "shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given").

134. Kadish, *supra* note 42, at 600 (citing Memorandum of Understanding on Consular Protection of Mexican and United States Nationals, May 7, 1996, para. 2).

135. *See, e.g.*, *United States v. Ovalle*, No. 02 Cr. 975, 2003 U.S. Dist. LEXIS 1426 (S.D.N.Y. Feb. 3, 2003) (noting defendant was not advised of his rights when he was arrested on drug charges in 2002); *United States v. Pineda*, 57 Fed. Appx. 4, 6 (1st Cir. 2003) (finding the defendant "was not orally advised" of his rights under Article 36 after being arrested on state charges in 1997, and at a suppression hearing on January 9, 2001, district court found defendant "was never advised" of his Article 36 rights).

136. Bishop, *supra* note 87, at 58.

137. *See, e.g.*, *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1993) ("[W]e decline to equate such a provision with fundamental rights.").

138. Harmless error review is governed by Federal Rule of Criminal Procedure 52(a). This rule provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." FED. R. CRIM. P. 52(a). "Although this Rule by its terms applies to *all* errors where a proper objection is made at trial, [there is] a limited class of fundamental constitutional errors that defy analysis by 'harmless error' standards." *Neder v. United States*, 527 U.S. 1, 7 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)).

in the criminal arena. Direct appeals fall short because courts view violations of the treaty as harmless, and habeas corpus proceedings are foreclosed to the consideration of a violation because of procedural default. The lingering question remains: while there is a right, what is the remedy?

A. Remedies under Treaties

Generally, if a treaty affords an individual a remedy, the Supremacy Clause ensures that the individual receives that remedy.¹³⁹ The Vienna Convention, however, is silent as to a remedy for a violation of Article 36, and courts have been unwilling to afford remedies ordinarily available in criminal cases where there is egregious prosecutorial misconduct or ineptitude.

Treaties, as agreements between nations, are governed under the norms of customary international law. When violations of treaties occur, customary international law determines the instances in which parties to the treaty may rescind or take other measures in response to the violation.¹⁴⁰ As with the Vienna Convention, if a treaty does not specify a remedy, the customary remedy under international law is the restoration of the *status quo ante*.¹⁴¹ This would equate to suppression of evidence.¹⁴² As noted above, however, suppression is not a remedy criminal courts are willing to recognize as a cure for these violations. As one criminal court noted, “[i]f the Vienna Convention does not expressly provide for a remedy . . . it is not the proper role of [courts] to ‘connect the dots’ and thus create one.”¹⁴³ Therefore, a remedy for violations may not lie in the criminal arena but rather in the recognition and enforcement of a civil remedy.

B. Finding a Civil Remedy: 42 U.S.C. § 1983

State and federal violations of Article 36 continue to occur, despite the many cases and scholarly articles alerting the legal community to this treaty and its implications. Even judges and practitioners are unaware of the treaty and its provisions.¹⁴⁴ Foreign nationals will make the same unsuccessful arguments in

139. Vazquez, *supra* note 51, at 1157.

140. *Id.*

141. United States v. Torres-Del Muro, 58 F. Supp. 2d 931, 934 (C.D. Ill. 1999) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 901 cmt. d (1987)).

142. *Id.*

143. United States v. Alvarado-Torres, 45 F. Supp. 2d 986, 995 n.13 (S.D. Cal. 1999).

144. Bishop, *supra* note 87, at 28 (noting that during oral argument of a death penalty appeal, two Fourth Circuit judges and the Virginia Assistant Attorney General were “unaware of the Vienna Convention prior to [the case in question]”). Even as late as 1999, while arguing the motion to withdraw the guilty plea in the *Lopez* matter, the assistant solicitor remarked, “I did [not] even know this [treaty] existed and in fact called the Attorney General’s office today, and the person I spoke to spoke to several other attorneys down there, and none of them knew about it either, including the deputy.” Record on Appeal at 27–28, State v. Lopez, 352 S.C. 373, 574 S.E.2d 210 (Ct. App. 2002) (No. 3578).

criminal cases for many years to come unless there is some method of enforcement that brings the treaty into the consciousness of the law enforcement community. Individuals challenging Article 36 violations currently find themselves without a remedy for law enforcement personnel's continued ignorance of their obligations under the Vienna Convention.

If there is a right, surely there is a remedy. As Justice Holmes observed, "[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but . . . are elusive to the grasp."¹⁴⁵ Early English and American jurisprudence includes the adage "[w]here there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."¹⁴⁶ Even if the language of Article 36 does not provide a specific remedy, "courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice."¹⁴⁷ The law in this regard is well-settled: while there is not a remedy for every wrong, where there is a right recognized at law, there exists a remedy.

Although it may seem an empty remedy for those individuals fighting criminal convictions,¹⁴⁸ an effective vehicle may exist to promote enforcement in the civil arena through a civil action based in 42 U.S.C. § 1983. This statute provides in part that

[e]very 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 redress¹⁴⁹

The language of Section 1983 provides a cause of action not just for United States citizens, but also for any person within the jurisdiction of the United States, including foreign nationals. Suits under Section 1983 would address violations by state and local law enforcement, while suits brought pursuant to *Bivens v. Six*

145. *Ex parte The Western Maid*, 257 U.S. 419, 433 (1922).

146. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (citing WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAW OF ENGLAND 23).

147. *Monongahela Bridge Co. v. United States*, 216 U.S. 177, 195 (1910).

148. *See Preiser v. Rodriguez*, 411 U.S. 475 (1973) (holding § 1983 suit cannot be used by individuals seeking to end or shorten confinement).

149. 42 U.S.C. § 1983 (2000).

*Unknown Named Agents of Federal Bureau of Narcotics*¹⁵⁰ would address violations of the treaty by federal law enforcement agents. Sovereign immunity does not protect a United States official if his action is challenged as unconstitutional or contrary to law or treaty,¹⁵¹ and as such, the official's actions could be remedied under a civil action brought pursuant to *Bivens*.

Two recent civil cases applying Section 1983 reached different results. In *Sorensen v. City of New York*,¹⁵² the first court¹⁵³ to address the issue of whether a remedy is available under this statute found that a party may not bring suit under Section 1983, whereas in *Standt v. City of New York*,¹⁵⁴ a different court reached the opposite conclusion. In *Sorensen*, decided before the ICJ's ruling in *LaGrand*, the court found that the treaty did not provide for individually enforceable rights because the language of the treaty does not "provid[e] for civil liability under Article 36."¹⁵⁵ The court based its decision on the language of the treaty itself, which it construes as not "intend[ing] to confer enforceable rights upon individuals."¹⁵⁶ The *Sorensen* court collapsed the issues of standing and the existence of a judicially enforceable private right into one question¹⁵⁷ and then reached the merits of plaintiffs' claims by equating a remedy under Section 1983 with the remedy of suppression of evidence.¹⁵⁸ However, as the *Standt* court noted, "The remedy of civil damages for a plaintiff who alleges he was unlawfully detained without consular notification is much less 'drastic' than suppressing incriminatory evidence or dismissing an indictment against a properly charged criminal defendant."¹⁵⁹

In *Standt*, the outcome was different. On January 27, 1999, police arrested plaintiff Frank Standt, a German citizen, for driving under the influence.¹⁶⁰ At the time of his arrest, officials were aware of his nationality,¹⁶¹ but did not advise Standt of any rights under the Vienna Convention.¹⁶² While in police custody, Standt alleged that the police denied his requested contact with the German Consulate and that police officers assaulted him.¹⁶³ Standt did eventually contact the German

150. 403 U.S. 388 (1971). *Bivens* held that federal agents, acting under color of authority, can be held liable for "damages consequent upon [their] unconstitutional conduct." *Id.* at 389. This parallels the cause of action provided for in § 1983, which applies to state actors.

151. *See Ex Parte Young*, 209 U.S. 123, 124 (1908).

152. No. 98 Civ. 3356 (HB), 2000 U.S. Dist. LEXIS 15090 (S.D.N.Y. Jan. 23, 2000).

153. *Id.* at *8.

154. 153 F. Supp. 2d 417 (S.D.N.Y. 2001).

155. *Sorensen*, 2000 U.S. Dist. LEXIS 15090, at *18.

156. *Id.* at *12.

157. *Id.* at *9.

158. *Id.* at *16.

159. *Standt*, 153 F. Supp. 2d at 429.

160. *Id.* at 419-20.

161. When asked to produce his driver's license, Standt produced his German driver's license and his passport. *Id.* at 419.

162. *Id.* at 420.

163. *Id.* The court noted that almost all the facts in this case were heavily contested. *Id.* at 419.

Consulate,¹⁶⁴ and after hiring private counsel, appeared in traffic court where the traffic citations that had been issued to him were dismissed.¹⁶⁵ The *Standt* court determined that the language and history of the Vienna Convention suggest that “Article 36 of the Vienna Convention was intended to provide a private right of action to individuals detained by foreign officials.”¹⁶⁶ Further, the court found that *Standt* could pursue an affirmative claim for violation of his rights under Section 1983 because as a ratified treaty the Vienna Convention is enforceable pursuant to the Supremacy Clause of the United States Constitution.¹⁶⁷ The court noted that Section 1983 “provides a cause of action to redress the deprivation ‘of any rights . . . secured by the constitution and laws’ of the United States, not only fundamental or Constitutional rights.”¹⁶⁸ Instead of being limited by the showing of prejudice required in criminal cases, a plaintiff bringing a Section 1983 suit under the Vienna Convention “need only show that the violation injured him.”¹⁶⁹

Since *Sorensen* and *Standt*, only a handful of civil cases have dealt with the redressability of Vienna Convention violations under Section 1983.¹⁷⁰ However, as litigation in this area increases, litigants will use the *Standt* decision coupled with the ICJ ruling in *LaGrand* and the Supreme Court’s language in *Breard* to force recognition of the right created under Article 36 of the Vienna Convention.

V. CONCLUSION

Treaties function effectively because of the underlying premise of reciprocity. The United States cannot continue down the path of erratic compliance with the Vienna Convention. The “freedom and safety [of Americans traveling abroad] are seriously endangered if [law enforcement officials in the United States] fail to honor the Vienna Convention and other nations follow their example.”¹⁷¹ Civil actions under Section 1983 and *Bivens* will promote the consistency required in our international agreements. The United States is bound by the full force of the Vienna

164. It was not until he was at a hospital for a psychological evaluation that a nurse contacted the German Consulate on his behalf. *Standt v. City of New York*, 153 F. Supp. 2d 417, 421 (S.D.N.Y. 2001).

165. *Id.* at 421. The driving under the influence ticket was voided after *Standt* produced a breathalyzer result from the police station of 0.00%, but he was subsequently issued tickets for driving without a seatbelt and driving without a valid license. *Id.* at 420–21.

166. *Id.* at 427.

167. *Id.*

168. *Id.* at 428 (quoting *Blessing v. Freestone*, 520 U.S. 329, 340 (1997)).

169. *Standt v. City of New York*, 153 F. Supp. 2d 417, 430 (S.D.N.Y. 2001).

170. See, e.g., *Anthony v. City of New York*, No. 00 Civ. 4688, 2002 U.S. Dist. LEXIS 7189, at *18 (S.D.N.Y. Apr. 25, 2002) (denying plaintiffs’ motion to amend their complaint under Rule 15(a) because *Standt* did not create a new cause of action under § 1983; rather, *Standt* “merely confirmed that such a cause of action exists”); *Ulmann v. Anderson*, No. 02-405-JD Civ., 2003 U.S. Dist. LEXIS 874, at *1 (D.N.H. Jan. 21, 2003) (allowing a prisoner’s § 1983 petition alleging an Article 36 violation to survive initial review).

171. *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring).

Convention. If the United States did not intend to comply with or had reservations regarding Article 36, it could have noted exceptions to the language when it became a signatory, which it did not do.¹⁷² The United States should stand behind its agreement and promote compliance with this treaty in all levels of law enforcement, from the Department of Justice to the local sheriff.

Now more than ever, the United States should clear its jurisprudence of any ghosts that may haunt its citizens and own national interests. As the Supreme Court noted, “[h]e that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.”¹⁷³

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172. Vienna Convention, *supra* note 2, 21 U.S.T. at 322, 596 U.N.T.S. at 451.

173. *United States v. Alvarez-Machain*, 504 U.S. 655, 688 (1992) (Stevens, J., dissenting) (quoting *THE COMPLETE WRITINGS OF THOMAS PAINE* 588 (P. Foner ed. 1945)).