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Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solutions

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Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solutions

Yury A. Kolesnikov*

TABLE OF CONTENTS

I. INTRODUCTION	180
II. THE VIENNA CONVENTION ON CONSULAR RELATIONS	183
A. <i>Historical Development of Consular Relations</i>	184
B. <i>Article 36 of the VCCR</i>	186
C. <i>Enforcement of the Convention</i>	187
III. DOMESTIC IMPLEMENTATION OF THE VCCR	188
A. <i>The Convention is Self-Executing</i>	189
B. <i>The Convention Provides for Individually Enforceable Rights</i>	191
1. <i>Addressing Argument 1—Treaties Are Solely Compacts Between Nations and Do Not Create Individual Rights</i>	193
2. <i>Addressing Argument 2—Treaties that Create Individual Rights Must Be Enforceable “as Between Private Parties”</i>	194
3. <i>Addressing Argument 3—The Preamble, Title to the Section, and the Introductory Paragraph Demonstrate that Article 36 Was Not Intended to Convey Individual Rights</i>	194
4. <i>Addressing Argument 4—The Travaux Préparatoires Show No Intent for Article 36 to Create Individual Rights</i>	197
5. <i>Addressing Argument 5—State Department’s Conclusion that There Are No Individual Rights Is “Entitled to Great Weight”</i>	198
C. <i>The Dilemma of Remedies</i>	200
1. <i>“Disproportional” Remedies</i>	200
2. <i>“Review and Reconsideration”</i>	203
3. <i>Prejudice Analysis</i>	206
4. <i>Medellin II</i>	208
D. <i>AEDPA and the Procedural Bars</i>	210
1. <i>The Case of Angel Francisco Breard</i>	211
2. <i>AEDPA</i>	212
3. <i>Applicability of State Procedural Default Rules</i>	213
4. <i>Giving “Full Effect” to Article 36</i>	216
IV. PROPOSED SOLUTIONS	217
A. <i>The Wholesale Implementation Approach— Enacting a Statute Giving Binding Effect to All ICJ Decisions</i>	218
B. <i>The Judgment-by-Judgment Approach—Enacting a Statute Implementing the Avena Decision</i>	220
C. <i>The Dames & Moore / Garamendi Approach—Negotiating an Executive Agreement with Mexico</i>	222

D. *The Habeas Approach—Amending the Habeas Corpus Statute to Allow for Review by Federal Courts* 223

V. CONCLUSION 225

I. INTRODUCTION

[I]f a Government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either to States or to individuals.¹

Imagine that Hank, an American citizen, decides to spend his Christmas vacation on the tropical island of HakWandu. One day, while Hank is walking through a city, a homeless person begins pestering him. One thing leads to another and the man pulls a knife on Hank. In the struggle that ensues, Hank accidentally stabs and kills the homeless man. The police arrest Hank and charge him with first-degree murder. To make matters worse, Hank is not familiar with the country’s language or legal system.

As the trial date nears, the court appoints an under-paid public defender and a mediocre translator to assist in Hank’s defense. Knowing only the American legal system, Hank wants to plead “not guilty” and to assert self-defense. However, his lawyer tries to explain that, in HakWandu, “not guilty” is reserved only for those who did not commit the crime. In cases of self-defense, the defendant must plead “guilty” and should then beg for forgiveness with the hope of getting only the minimum sentence of ten years. Thinking that his court-appointed lawyer does not have his best interests in mind, Hank ignores his advice and pleads “not guilty.”

The trial is relatively short: Hank is found guilty and is sentenced to death. Subsequent appeals are ineffective because the lower court correctly applied the applicable law. Once aware of Hank’s situation, the United States consulate tries desperately to delay the execution but to no avail. Unfortunately for Hank, HakWandu’s law does not allow further reviews. With the execution fast approaching, Hank cannot help but wonder whether the outcome would have been different if he had assistance from the American consulate from the very beginning.²

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1. Letter from Mr. Bayard, Sec’y of State, to Mr. Connery (Nov. 1, 1887), *reprinted in* 1 U.S. DEP’T OF STATE, EXECUTIVE DOCUMENTS OF THE HOUSE OF REPRESENTATIVES FOR THE FIRST SESSION OF THE FIFTIETH CONGRESS, 1887-’88, at 753 (1889).

2. See 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, 2-4 (2002) (describing a somewhat

Indeed, if HakWandu was a real country, rather than an imaginary one, it would likely be a party to the Vienna Convention on Consular Relations (“VCCR” or “Vienna Convention”).³ Under the VCCR, HakWandu would have been obligated to notify Hank “without delay” of his right to contact the United States consulate after being arrested in a foreign country.⁴ Yet, even though HakWandu clearly violated the VCCR, the United States might lack the moral authority to complain about the violation.

As a party to the VCCR, the United States is similarly obligated to inform foreigners who are arrested or detained in this country about *their* right to contact their consular officials.⁵ The United States’ compliance, however, has traditionally been lacking.⁶ Every year, several thousands of foreigners are arrested, tried, and sentenced without being informed of their rights under the VCCR.⁷ Furthermore, similar to the hypothetical situation with Hank, a number of them are sentenced to death,⁸ and the failure to notify is typically not discovered until “weeks, months or even years after their arrests.”⁹

similar hypothetical about an American being arrested after accidentally shooting his guide). The facts of this hypothetical also resemble some parts of an actual case involving a Paraguayan national arrested in the United States. *See* *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam); *see also infra* Part III.D.1.

3. *See* Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force with respect to the United States of America on Dec. 24, 1969); U.S. DEPARTMENT OF STATE, 7 FOREIGN AFFAIRS MANUAL § 421.1-1 (2004), <http://www.state.gov/documents/organization/86605.pdf> [hereinafter FOREIGN AFFAIRS MANUAL] (on file with the *McGeorge Law Review*) (“The vast majority of countries are parties to the VCCR.”). In October 2008, there were 192 U.N. member-states and 172 State parties to the VCCR. United Nations, United Nations Member States, <http://www.un.org/members/list.shtml> (last visited Oct. 26, 2008) (on file with the *McGeorge Law Review*); United Nations Treaty Collection, Vienna Convention on Consular Relations, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=219&chapter=3&lang=en> (last visited on Oct. 26, 2008) [hereinafter U.N. Treaty Collection] (on file with the *McGeorge Law Review*).

4. *See* Vienna Convention on Consular Relations, *supra* note 3, art. 36(1)(b).

5. *See id.*

6. *See, e.g.,* *Medellin v. Dretke (Medellin I)*, 544 U.S. 660, 674 (2005) (O’Connor, J., dissenting from dismissal of writ as improvidently granted) (“[T]he individual States’ (often confessed) noncompliance with the treaty has been a vexing problem.”).

7. *See, e.g.,* Death Penalty Information Center, Foreign Nationals and the Death Penalty in the US, <http://deathpenaltyinfo.org/article.php?did=198&scid=31> (last visited Oct. 22, 2008) (on file with the *McGeorge Law Review*) (stating that, in New York City alone, there were over 53,000 foreign nationals arrested in 1997 but “the NYPD Alien Notification Log registered only 4 cases in which consulates were notified of those arrests”).

8. At the end of October 2008, there were 124 foreigners on death row in 15 states and federal custody. *Id.*

9. *Id.* (noting that, out of more than 160 reported death sentence cases in the United States, there were only 7 cases of complete compliance with the VCCR, with the rest of defendants learning of their rights “weeks, months or even years after their arrest”). Furthermore, despite protests by other countries and even adverse decisions by the International Court of Justice, United States has executed twenty-three foreign nationals since 1988. *See* Foreigners Under Sentence of Death Worldwide, <http://www3.sympatico.ca/aiwarren/world.html> (last updated June 23, 2008) (on file with the *McGeorge Law Review*) (noting that the United States executed twenty-one foreign nationals up to June 23, 2008); Death Penalty Information Center, Execution of Foreign Nationals Raises Legal Concerns, <http://deathpenaltyinfo.org/execution-foreign-nationals-raises-legal-concerns> (last visited Oct. 23, 2008) (on file with the *McGeorge Law Review*) (noting that two more foreign nationals were executed in August 2008, one of them being Medellin).

Unfortunately, to date, there has not been an effective solution to this dilemma in the United States. One problem is that the VCCR itself does not prescribe a specific remedy for the failure to notify.¹⁰ Second, corrective efforts by U.S. courts have usually been either nonexistent or inadequate.¹¹ Third, even if the courts were willing to interfere, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) or judicially-created procedural default rules would bar any additional review in most cases.¹²

This Comment argues that, in view of the recent failures by the Judiciary and the Executive to remedy this dilemma,¹³ a statutory solution is required.¹⁴ By

10. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 343 (2006). The Convention only provides that it is to be exercised “in conformity with the laws and regulations of the [arresting] 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 [Article 36] are intended.” Vienna Convention on Consular Relations, *supra* note 3, art. 36(2).

11. *See, e.g., Sanchez-Llamas*, 548 U.S. at 350 (noting that neither the VCCR nor the Court’s precedents permit suppression of defendant’s statements to the police); *Breard v. Greene*, 523 U.S. 371 (1998) (*per curiam*) (refusing to stay the execution to allow the International Court of Justice to consider the case where the defendant has procedurally defaulted on his VCCR claim); *see also infra* notes 70, 126 and accompanying text (listing a myriad of cases where a reviewing court denied relief due to absence of a remedy, procedural default rules, or some other infirmity). *But see Torres v. State*, 120 P.3d 1184 (Okla. Crim. App. 2005) (setting out a three-pronged test for determining whether the defendant was prejudiced by the failure to give the VCCR notification).

12. *See, e.g., Medellin v. Texas (Medellin II)*, 128 S. Ct. 1346, 1353 (2008) (holding that the defendant’s VCCR claim was precluded due to a state procedural default rule); *Breard*, 523 U.S. at 375-76 (holding that the defendant defaulted on his VCCR claim by failing to raise it in the state proceedings); *Villafuerte v. Stewart*, 142 F.3d 1124, 1125 (9th Cir. 1998) (noting that the defendant’s VCCR claim was barred due to state procedural default rules as well as 28 U.S.C. § 2244, which limits successive federal habeas petitions). Rather than being one single rule, “‘procedural default rule’ actually refers to a principle of U.S. law embodied in many individual provisions in state and federal law.” Bruno Simma & Carsten Hoppe, *The LaGrand Case: A Story of Many Miscommunications*, in JOHN E. NOYES ET AL., INTERNATIONAL LAW STORIES 371, 385 (2007). In short, “‘a defendant who could have raised, but fails to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of *habeas corpus*.’” Case concerning *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 56 (Mar. 31) (quoting the definition of American “procedural default rule” provided by Mexico and noting that it has not been challenged by the United States). For example, the state procedural default rule at issue in *Medellin*’s trial provided:

If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

- (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
- (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
- (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state’s favor one or more of the special issues that were submitted to the jury in the applicant’s trial under Article 37.071, 37.0711, or 37.072.

TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a) (Vernon 2004); *see Ex parte Medellin*, 223 S.W.3d 315, 323 (Tex. Crim. App. 2006).

13. *See, e.g., Medellin II*, 128 S. Ct. 1346 (denying relief despite an International Court of Justice ruling and a memorandum by President Bush calling for “review and reconsideration” of the defendant’s case).

14. *See, e.g., William J. Aceves, The Vienna Convention on Consular Relations: A Study of Rights*,

giving wholesale effect to the International Court of Justice (ICJ) decisions in general, codifying the ICJ's *Avena* judgment in particular, or allowing the federal courts to review these claims despite AEDPA and procedural defaults, Congress can ensure that the right of arrested foreign nationals to contact their consular officials is protected in the United States.

The proposed solutions, however, cannot be discussed in a vacuum. To this end, Part II provides the necessary background on consular relations and the VCCR. It first discusses the history of consular relations from the time of the Greek city-states, through the Crusades, and up until the middle of the twentieth century. It then introduces the VCCR, focusing specifically on Article 36, and explains how it is enforced on the international plane.

Part III discusses the implementation of the VCCR on the domestic level—within the United States. It first argues that the Vienna Convention is self-executing, which, under the Supremacy Clause, makes it the supreme law of the land. Part III then argues that the Vienna Convention also provides for individually enforceable rights. In the course of this argument, the Comment raises and resolves the five most prevalent arguments against finding such rights under the VCCR. Part III then presents the current dilemma of remedies—an issue that has been the downfall of many claims under the VCCR. Part III concludes with a discussion of AEDPA and procedural defaults as they apply to the VCCR claims.

Part IV then sets out the proposed solutions (mostly statutory) that, in view of the failed efforts by the Judiciary and the Executive, would bring the United States closer to compliance with the ICJ's decision in *Avena*. Finally, Part V concludes that, despite the failed efforts, awareness of the VCCR in the United States has improved over the past ten years. However, much more needs to be done to comply with the ICJ's decision. To that end, this Comment urges Congress to act by implementing the *Avena* judgment in one of the enumerated ways.

II. THE VIENNA CONVENTION ON CONSULAR RELATIONS

The VCCR is a multilateral treaty that currently has 172 parties to it.¹⁵ The United Nations Conference on Consular Relations adopted it in 1963 on the basis of a draft prepared by the International Law Commission (ILC).¹⁶ Although it

Wrongs, and Remedies, 31 VAND. J. TRANSNAT'L L. 257, 315-17 (1998) (proposing several statutory solutions); Joshua A. Brook, *Federalism and Foreign Affairs: How to Remedy Violations of the Vienna Convention and Obey the U.S. Constitution, Too*, 37 U. MICH. J.L. REFORM 573, 594-97 (2004) (same); Linda E. Carter, *Lessons from Avena: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations*, 15 DUKE J. COMP. & INT'L L. 259, 277-78 (2005) (same).

15. U.N. Treaty Collection, *supra* note 3.

16. G.A. Res. 1685 (XVI), ¶¶ 3-5, U.N. Doc. A/5100 (Dec. 18, 1961); United Nations Conference on Consular Relations, Vienna, Austria, Mar. 4–Apr. 22, *Final Act*, U.N. Doc. A/CONF.25/13 (Apr. 24, 1963).

was the first consular relations treaty of such proportions,¹⁷ the principles it addressed have been in development for the past two millennia.¹⁸

A. *Historical Development of Consular Relations*

The VCCR begins by recalling that “consular relations have been established between peoples since ancient times.”¹⁹ Indeed, the forerunners of modern consuls could be found in Greek city-states as far back as the first millennium BC.²⁰ Although their range of duties was more limited than that of today’s consuls, these Greek counterparts were nevertheless responsible for representing the interests of their nationals or the nationals of the appointing government.²¹

The word “consul,” however, did not come about until the time of the Romans.²² Originally, the term referred only to the chief magistrates appointed in southern European cities.²³ Beginning with the eleventh century, however, the definition expanded to include magistrates who were sent to foreign cities.²⁴ As trade between nations increased, more and more States began sending their nationals to other States “to supervise their commerce, protect national interests, and adjudicate disputes between merchants.”²⁵

17. Prior to the VCCR, consular relations were governed either by provisions in Friendship, Commerce, and Navigation treaties, by bilateral consular relations treaties, or by memoranda of understandings. U.S. Dep’t of State, Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them 42-43 (2003), http://travel.state.gov/pdf/CNA_book.pdf [hereinafter Consular Notification and Access] (on file with the *McGeorge Law Review*). A number of these treaties are still in effect and might actually provide for more protections than the VCCR. *Id.*

18. See ELMER PLISCHKE, CONDUCT OF AMERICAN DIPLOMACY 11 (2d ed. 1962) (noting that the roots of consular practice “are traceable to ancient times,” with “permanent consular stations antedating by centuries the establishment of permanent diplomatic missions”). For additional materials on the history of consular relations, see sources cited in *Report on Consular Intercourse and Immunities by Mr. J. Zourek, Special Rapporteur*, [1957] 2 Y.B. INT’L L. COMM’N 72-73, U.N. Doc. A/CN.4/SER.A/1957/Add.1 [hereinafter Zourek Report] and in LUKE T. LEE, CONSULAR LAW AND PRACTICE 3 n.1 (2d ed. 1991).

19. Vienna Convention on Consular Relations, *supra* note 3, preamble.

20. Zourek Report, *supra* note 18, at 73 (describing two separate offices that existed in Greece “six centuries before our era”: the *prostates* and the *proxenos*).

21. *Id.*; LEE, *supra* note 18, at 4. The *prostates* were selected by Greek colonists “to act as intermediaries in legal and political relations between the foreign (Greek) colony and the local Government.” *Id.* Just like regular consuls today, they were chosen from among the Greek colonists and not from the local population. *Id.* The *proxenoi*, on the other hand, were more like honorary consuls because they were appointed in the Greek city-state and were chosen from among the nationals of that city-state to represent the interests of the appointing State. *Id.* Unlike the *prostates*, these individuals were directly involved in “represent[ing] the nationals of [their] appointing government before local legislative bodies and courts [and] assist[ing them] with commercial activities.” PLISCHKE, *supra* note 18, at 11.

22. LEE, *supra* note 18, at 5; PLISCHKE, *supra* note 18, at 12.

23. PLISCHKE, *supra* note 18, at 12.

24. Zourek Report, *supra* note 18, at 73 (noting that the practice began in 1060, when “Venice acquired the right to send magistrates to Constantinople”). The duties of these consuls, however, were limited to only resolving disputes involving nationals of the appointing city. *Id.*

25. LEE, *supra* note 18, at 5. The practice continued even in parts that were conquered by the Muslim

Unfortunately, the ensuing growth of consular relations between nations, and the assertion by centralized governments of direct control over these relations, resulted in “confusion over the exact status” of these officials.²⁶ Beginning with the seventeenth century, the law governing this area quickly developed to provide some of the answers.²⁷ However, many questions remained unresolved until the twentieth century.²⁸

By the middle of the twentieth century, the law of consular relations was governed by many bilateral treaties and a few regional treaties.²⁹ These treaties, however, often conflicted with one another and did not exist between every country.³⁰ Nevertheless, some of their principles were already regarded as part of customary international law³¹ and the codification of these principles in a multilateral treaty was seen as appropriate.³² This codification was achieved to a large extent by the VCCR in 1963.³³ The finalized version of the treaty now governs many important aspects of consular relations³⁴ and is considered by most

States and by the Byzantine Empire during the Crusades. Zourek Report, *supra* note 18, at 73.

26. LEE, *supra* note 18, at 6.

27. *Id.* at 6-7 (describing that this “law” developed through the commercial and consular treaties, domestic statutes, and extraterritorial concessions); see also 2 ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 280 ff. (Butterworths, 3d ed. 1882) (listing 140 treaties concluded before 1876 with respect to the duties, powers, and privileges of consuls). Extraterritorial concessions refer to instances where States are allowed to exercise “full and exclusive civil and criminal jurisdiction over their fellow nationals” in another State. LEE, *supra* note 18, at 7-8. These concessions, although “incompatible” with the notions of sovereignty and territorial jurisdiction, were prevalent during the nineteenth century. *Id.* at 7.

28. See LEE, *supra* note 18, at 6 (noting that the resulting confusion was “not fully clarified until the [twentieth] century”).

29. *Id.* at 18. For a comprehensive list of consular treaties concluded between 1923 and 1989, see *id.* at 646-57. As for regional treaties, the first one was adopted at Caracas on July 18, 1911, by Bolivia, Columbia, Ecuador, Peru, and Venezuela. Zourek Report, *supra* note 18, at 78. The next one was adopted at the Sixth International Conference of American States in Havana on February 20, 1928. *Id.*

30. LEE, *supra* note 18, at 18.

31. See, e.g., *id.* at 136 (“In a majority of [pre-VCCR] cases, the right of consular access to nationals in prison was accepted as [a] rule of customary international law or at least of international practice, regardless of the existence of a treaty.”). But see PLISCHKE, *supra* note 18, at 306 (noting that, although some international scholars concluded that the provisions of consular relations were part of customary international law by 1962, “this [was] not yet borne out by actual state practice” at the time).

32. LEE, *supra* note 18, at 23-24. Pursuant to Article 13(1) of the U.N. Charter, “the General Assembly shall initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification.” In 1949, such recommendation was made by Secretary-General Trygve Lie with regard to consular relations and, six years later, the International Law Commission began work on lying to codify the subject. LEE, *supra* note 18, at 23-24. The first draft was completed in 1960 and, after being commented on by the governments, was finalized in 1961. *Id.* at 24. In 1962, upon the receipt of the draft, the General Assembly decided to convene a United Nations Conference on Consular Relations in 1963. G.A. Res. 1685 (XVI), ¶¶ 3-5, U.N. Doc. A/5100 (Dec. 18, 1961).

33. Consular Notification and Access, *supra* note 17, at 42 (“The VCCR to a large extent codified customary international law and thus represents the most basic principles pertaining to the performance of consular functions.”).

34. See, e.g., Kelly Trainer, Comment, *The Vienna Convention on Consular Relations in the United States Courts*, 13 TRANSNAT’L LAW. 227, 233 (2000) (“The Treaty deals with various aspects of consular duties, including: the general details of setting up a consul, the duties and privileges of the consul staff, and the rights of the foreign nationals with respect to their consul.”).

nations and scholars to be a codification of customary international law that sets the “baseline” to which *all* countries, not just the parties, need to conform.³⁵

B. Article 36 of the VCCR

While there is some debate whether each individual article of the VCCR amounted to a codification of customary international law, there is little doubt that, today, Article 36 is such a codification.³⁶ Article 36 provides that whenever a foreign national is arrested or detained in any manner, the arresting State (referred to as the “receiving State” in the VCCR) must inform him “without delay” about his right to contact the consular official of his country (referred to as the “sending State”).³⁷ Upon the foreign national’s request, the receiving State must, “without delay,” inform the appropriate consular official about the arrest or detention.³⁸ At that time, the receiving State must also forward any communication, again “without delay,” from the foreign national to the consular

35. LEE, *supra* note 18, at 26 (“Even States which are not parties to the Convention[] have come to consider [it] as declaratory of international law.”); Consular Notification and Access, *supra* note 17, at 42 (“[T]he VCCR now establishes the ‘baseline’ for most obligations with respect to the treatment of foreign nationals . . .”).

36. See Consular Notification and Access, *supra* note 17, at 44 (“Consular notification is in our view a universally accepted, basic obligation that should be extended even to foreign nationals who do not benefit from the VCCR or from any other applicable bilateral agreement.”).

37. Vienna Convention on Consular Relations, *supra* note 3, art. 36(1)(b). Article 36, as a whole, provides:

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. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
 - (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
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.

Id. art. 36.

38. *Id.* art. 36(1)(b).

official.³⁹ Once notified, the consular official has the right to visit the national in jail, “converse and correspond” with him, and “arrange for his legal representation.”⁴⁰

C. Enforcement of the Convention

Under the United Nations (U.N.) Charter, the ICJ is “the principal judicial organ of the United Nations.”⁴¹ However, just like other international courts, the ICJ is a court of limited jurisdiction,⁴² and its competence extends only to cases where there is consent by all parties to the dispute.⁴³ The parties can provide such consent *ante hoc* (in advance of a dispute), *ad hoc* (once a dispute has arisen), or *post hoc* (expressed after the case has been brought before the Court by the other party).⁴⁴

One way to provide consent *ante hoc* is through a separate treaty.⁴⁵ The Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes (Optional Protocol), which provides for compulsory jurisdiction with respect to the VCCR, is one such treaty.⁴⁶ Interestingly, despite subsequent non-compliance, the United States initially played a leading role in the development of both the VCCR and the Optional Protocol.⁴⁷ In fact, the United States was the first country to propose that the

39. *Id.*

40. *Id.* art. 36(1)(c).

41. U.N. Charter art. 92.

42. See Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1031, T.S. No. 993 (entered into force with respect to the United States of America on Oct. 24, 1945) (setting out the situations to which ICJ’s jurisdiction extends).

43. RENATA SZAFARZ, COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 3 (1993) (“Few norms in international law give rise to as little controversy as the one which states that the basis or source of the jurisdiction of international courts is the consent of the states which are parties to a given dispute.”); see also *Aerial Incident of July 27th, 1955 (Israel v. Bulgaria)*, Preliminary Objections, 1959 I.C.J. 127, 142 (May 26) (stating that Article 36 of the ICJ Statute embodies a well-established principle that “the Court can only exercise jurisdiction over a State with its consent”); *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, 1954 I.C.J. 19, 32 (June 15) (same); *Anglo-Iranian Oil Company Case (United Kingdom v. Iran)*, Preliminary Objection, 1952 I.C.J. 93, 102-03 (July 2) (same).

44. SZAFARZ, *supra* note 43, at x, 4.

45. Statute of the International Court of Justice, *supra* note 42, art. 36(1) (“The jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force.”).

46. See Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes art. I, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force with respect to the United States of America on Dec. 24, 1969) (“Disputes arising out of the interpretation or application of the [VCCR] shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.”).

47. Brief for Petitioner at 6, *Medellin II*, 128 S. Ct. 1346 (2008) (No. 06-984) (citing Report of the United States Delegation to the United Nations Conference on Consular Relations in Vienna, Austria, March 4 to April 22, 1963, *reprinted in* S. Exec. Doc. E, 91st Cong., at 59-61 (1st Sess. 1969)).

VCCR include a provision for compulsory dispute settlement,⁴⁸ and it vigorously opposed efforts by other States to weaken this provision.⁴⁹ Although the provision was not included as one of the articles in the VCCR,⁵⁰ the United States was ultimately successful in having it adopted as the Optional Protocol.⁵¹ On March 7, 2005, however, following two adverse decisions by the ICJ, the United States withdrew from the Optional Protocol.⁵²

III. DOMESTIC IMPLEMENTATION OF THE VCCR

Although the VCCR is a valid and binding international treaty that was duly ratified by the United States,⁵³ its domestic implementation depends on a number of additional factors. First and foremost, to be binding upon the individual U.S.

48. This is clear from the text of an article that the United States proposed adding to the Convention: "Any dispute arising from the interpretation or application of this convention shall be submitted at the request of either of the parties to the International Court of Justice unless an alternative method of settlement is agreed upon." United Nations Conference on Consular Relations, Vienna, Austria, Mar. 4–Apr. 22, *United States of America: Proposed Final Articles*, U.N. Doc. A/CONF.25/C.1/L.7 (Mar. 5, 1963), reprinted in United Nations Conference on Consular Relations, Vienna, Austria, Mar. 4–Apr. 22, 2 *Official Records*, U.N. Doc. A/CONF.25/16/Add.1 (1963).

49. Brief for Petitioner at 6, *Medellin II*, 128 S. Ct. 1346 (No. 06-984) ("Among other things, the United States proposed the binding dispute settlement provisions that became the Optional Protocol and successfully led the resistance to efforts by other States to weaken or eliminate altogether those provisions." (citing Report of the United States Delegation to the United Nations Conference on Consular Relations in Vienna, Austria, March 4 to April 22, 1963, reprinted in S. Exec. Doc. E, 91st Cong., at 72-73 (1st Sess. 1969))). In defending its proposal for binding dispute settlement, the United States argued that "codification of international law and formulation of measures to ensure compliance therewith should go hand in hand." LEE, *supra* note 18, at 631.

50. Despite being adopted at first by a vote of 39 to 14, with 15 abstentions, the proposal could not muster the required two-thirds majority for adoption of the VCCR itself. United Nations Conference on Consular Relations, Vienna, Austria, Mar. 4–Apr. 22, *Report of the First Committee*, U.N. Doc. A/CONF.25/L.10 (Apr. 5, 1963), reprinted in United Nations Conference on Consular Relations, Vienna, Austria, Mar. 4–Apr. 22, 2 *Official Records*, U.N. Doc. A/CONF.25/16/Add.1 (1963).

51. See, e.g., Brief for Petitioner at 6, *Medellin II*, 128 S. Ct. 1346 (No. 06-984). Apart from being greeted enthusiastically by the majority of other delegates at the Conference, the provision for compulsory dispute resolution was also approved unanimously by the Senate. 115 CONG. REC. 30,997 (Oct. 22, 1969).

52. Letter from Condoleezza Rice, Sec'y of State, to Kofi A. Annan, Sec'y-Gen. of the United Nations (Mar. 7, 2005) available at http://untreaty.un.org/English/CNs/2005/101_200/186E.doc [hereinafter Letter from Condoleezza Rice] (on file with the *McGeorge Law Review*).

53. On the "international plane," for a State to be bound by a treaty, two things need to happen: (1) that State has to express its consent to be bound by the treaty, and (2) the treaty has to enter into force for that State. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 312(1) (1987). The United States expressed its consent to be bound by the VCCR on November 24, 1969, and the treaty entered into force with respect to the United States on December 24, 1969. Vienna Convention on Consular Relations, *supra* note 3. Once a treaty enters into force for a State, the principle of *pacta sunt servanda* comes into play—i.e., that the treaty is binding and must be carried out in good faith. Vienna Convention on the Law of Treaties, art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 321 (1987). The only exceptions are if the treaty is invalid or void, or if the State entered a reservation with respect to the provision in question. Vienna Convention on the Law of Treaties, *supra*, art. 19-23, 46-53, 64; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 313, 331 (1987). In the case of the VCCR, no grounds of invalidity or voidability have ever been raised. Furthermore, the United States has not entered any reservations. U.N. Treaty Collection, *supra* note 3.

states, a treaty must either be self-executing or be codified by an implementing federal legislation.⁵⁴ Second, even if a treaty is self-executing or has been implemented by Congress, there is still a question of whether it provides for individual rights that are enforceable in domestic courts.⁵⁵ Third, even if there is an individual right, in order for a claim or a suit under that treaty to survive, there must also be a remedy for the alleged violation.⁵⁶ Finally, even when there is such a right and a remedy, the individual affected might still have to deal with AEDPA and procedural default rules.⁵⁷

A. *The Convention is Self-Executing*

Today, it cannot seriously be disputed that the VCCR is self-executing, “at least in the sense that its provisions automatically become part of the law of the United States without additional congressional legislation.”⁵⁸ In the absence of a clear indication in the treaty⁵⁹ or a specific declaration at ratification,⁶⁰ “it is ordinarily for the United States to decide how it will carry out its international obligations.”⁶¹ With respect to the VCCR, that intention is clear—even before the

54. *Medellin II*, 128 S. Ct. at 1356 (“In sum, while treaties ‘may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be “self-executing” and is ratified on these terms.’” (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc))); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(3) (1987).

55. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. h (1987) (“Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies.”).

56. See *Jogi v. Voges*, 480 F.3d 822, 831-32 (7th Cir. 2007) (listing cases where, regardless of whether a private right existed, the courts denied relief for VCCR violations based on absence of a remedy).

57. See, e.g., *Medellin II*, 128 S. Ct. 1346; *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam).

58. *Torres v. Mullin*, 540 U.S. 1035, 124 S. Ct. 562, 564 (2003) (Breyer, J., dissenting from denial of certiorari); see also *Medellin II*, 128 S. Ct. at 1372 (Stevens, J., concurring in judgment) (“[T]he Vienna Convention on Consular Relations ‘is itself self-executing and judicially enforceable.’” (quoting *Medellin II*, 128 S. Ct. at 1385 (Breyer, J., dissenting))).

59. For example, the International Plant Protection Convention provides that “the contracting Governments undertake to adopt the legislative, technical and administrative measures specified in this Convention and in supplementary agreements . . .” International Plant Protection Convention, art. I, *opened for signature* Dec. 6, 1951, 23 U.S.T. 2770, T.I.A.S. no. 7465 (emphasis added). Justice Stevens suggested that such “obligation to enact legislation” was a clear enough indication to make the Convention non-self-executing. *Medellin II*, 128 S. Ct. 1346, 1373 (Stevens, J., concurring in judgment).

60. See, e.g., United Nations Treaty Collection, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=128&chapter=4&lang=en> (last visited on Oct. 26, 2008) (on file with the *McGeorge Law Review*) (“[T]he United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing.”); United Nations Treaty Collection, International Covenant on Civil and Political Rights, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=321&chapter=4&lang=en> (last visited on Oct. 26, 2008) (on file with the *McGeorge Law Review*) (“[T]he United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.”).

61. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. h (1987). The distinction between self-executing and non-self-executing treaties has been labeled as the “‘most confounding’ in the United States law of treaties” (or even the United States law in general). Carlos Manuel Vazquez, *The Four Doctrines of Self-*

Executing Treaties, 89 AM. J. INT'L L. 695, 695 & n.3 (1995). According to the Restatement, unless the treaty unambiguously states that it is or is not meant to be "self-executing" or the United States declares its intent at ratification, the court should look to the contemporaneous statements made by the executive and legislative branches as to whether they considered the treaty to be self-executing. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(4) & cmt. h (1987). In the absence of such statements, "there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts." *Id.* § 111 reporters' note 5.

It is unclear to what extent the Supreme Court's recent decision in *Medellin II* departs from this framework. Compare Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 646-65 (2008) [hereinafter Vázquez, *Enforcement*] (noting that the majority opinion in *Medellin II* is susceptible to a number of interpretations, most of which are "plagued with constitutional problems" and appear to be inconsistent with the Restatement's approach, but concluding that a narrower reading is possible), with Ilya Shapiro, *Medellin v. Texas and the Ultimate Law School Exam*, 2008 CATO SUP. CT. REV. 63, 96 (2008) (concluding that *Medellin II* "more or less reinforced the status quo on international law, in line with the Court's traditional deference to the political branches' powers to make and ratify treaties but asserting judicial supremacy in interpreting them"). In *Medellin II*, the Court stated that the self-executing nature of the treaty depends on whether "the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." 128 S. Ct. at 1356 (internal quotation omitted) (emphasis added). To that end, the majority looked almost exclusively to the text of the treaty in determining whether it was self-executing. *Id.* at 1357-59. At several points of the opinion, however, the majority also considered the intent of the Executive and of the ratifying Senate. See, e.g., *id.* at 1361 (noting that "the United States' interpretation of a treaty 'is entitled to great weight'" (citations omitted)). The dissent, on the other hand, would have focused less on looking for some talismanic language in the treaty and would have settled for an application of a "practical, context-specific" approach that takes into account a number of factors, such as: (a) the treaty's subject matter, (b) whether the enforcement of the treaty sets forth "definite standards that judges can readily enforce," and (c) whether enforcement would create "constitutionally undesirable conflict with the other branches." *Id.* at 1377, 1380-83 (Breyer, J., dissenting).

Both the majority and the dissenting opinion, however, purport to apply the test established by the Supreme Court in *Foster v. Nelson*, 27 U.S. (2 Pet.) 253 (1829), as clarified in *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). Compare, e.g., *Medellin II*, 128 S. Ct. at 1362-63, with *id.* at 1379-80 (Breyer, J., dissenting). In *Foster*, Chief Justice Marshall declared that, in the United States, a treaty is to be regarded self-executing unless it is addressed to the political branches:

Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

27 U.S. (2 Pet.) at 314. In *Foster*, the Court determined that the provision in a treaty that grants of land "shall be ratified and confirmed" was addressed to the political branches and therefore was non-self-executing. *Id.* at 315 (emphasis added). Four years later, however, after examining an equally authentic Spanish version of the same treaty, which instead provided that the grants in question "shall remain ratified and confirmed," Chief Justice Marshall, writing for the Court once again, changed his mind and concluded that the treaty provision could be directly enforceable in U.S. courts. *Percheman*, 32 U.S. (7 Pet.) at 88-89 (emphasis added).

In the end, both the majority and the dissenting opinion in *Medellin II* ask the same question: Does the treaty either on its face or in its intent prescribe an obligation that is to be performed domestically right now or is it merely "addressed" to the political branches in the hope of some future action? Compare *Medellin II*, 128 S. Ct. at 1356 n.2 (focusing on whether "the treaty has automatic domestic effect as federal law upon ratification" (emphasis added)) and *id.* at 1358-62 (utilizing words such as "immediate," "directly enforceable," "automatic," "automatically enforceable," and "direct enforcement" to characterize self-executing treaties), with *id.* at 1382 (Breyer, J., dissenting) (focusing on whether the treaty provision addresses itself "to 'the judicial department' for direct enforcement" (quoting *Foster*, 27 U.S. (2 Pet.) at 314) (emphasis added)). However, by focusing almost exclusively on the text of the treaty, the majority appears to have made the same mistake that Chief Justice Marshall made in *Foster*. Vázquez, *Enforcement, supra*, at 632-45 (noting that *Foster* and *Percheman*, viewed together, expose the weakness and danger of trying to find an indication of self-execution in the specific terms of the treaty, and concluding that if the majority in *Medellin II* focused mostly on interpreting the treaty language, then the Court "appears to have lost sight of the lesson learned by the Marshall

Convention was ratified, the State Department insisted that the Convention was “entirely self-execut[ing] and [did] not require any implementing or complementing legislation.”⁶²

As a result, pursuant to the Supremacy Clause, the Convention should be the “supreme law of the land”⁶³ and should trump any conflicting state law.⁶⁴ As to federal law, the Supremacy Clause puts treaties and acts of Congress on equal footing.⁶⁵ When a treaty and federal legislation are not in conflict, both are equally authoritative. However, when they are incompatible and cannot be reconciled,⁶⁶ the one later in time will govern.⁶⁷ Both of these concepts are covered in more detail in Part III.D.

B. The Convention Provides for Individually Enforceable Rights

The VCCR provides that an individual who is detained or arrested in a foreign country has a “right” to be informed of his or her rights under Article 36 (i.e., a right to be informed of the *availability* of consular notification and access).⁶⁸ Specifically, this is an *individual* right and, when violated, should give rise to a private “right of action.”⁶⁹

Court in *Percheman*” and its decision “reflects many of the same problems as *Foster*, and then some”). In this regard, the dissent’s approach of looking at a myriad of factors, such as the “text and history, along with subject matter and related characteristics,” appears to be more appropriate. See *Medellin II*, 128 S. Ct. at 1382 (Breyer, J., dissenting).

62. VIENNA CONVENTION ON CONSULAR RELATIONS, S. Exec. Doc. No. 91-9, at 5 (1969) [hereinafter VCCR Senate Exec. Documents] (statement of J. Edward Lyerly, Deputy Legal Adviser, State Dep’t). Moreover, even today, the State Department’s official policy on consular notification and access provides that: “The obligations of consular notification and access are not codified in any federal statute. Implementing legislation is not necessary (and the VCCR and bilateral agreements are thus ‘self-executing’) because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers.” Consular Notification and Access, *supra* note 17, at 44.

63. U.S. CONST. art. VI, cl. 2.

64. See *Asakura v. City of Seattle*, 265 U.S. 332, 341(1924) (“[A treaty] cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws.”); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801).

65. See U.S. CONST. art VI, cl. 2; *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 reporters’ note 1 (1987).

66. *Whitney*, 124 U.S. at 194; *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

67. *Medellin II*, 128 S. Ct. at 1359 n.5; *Whitney*, 124 U.S. at 194; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 reporters’ note 1 (1987).

68. Case Concerning *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 43 (Mar. 31). In fact, the ICJ noted that Article 36 encompasses three separate elements: (1) the right of the arrestee to be informed of his rights, (2) the right of the consular post to be notified of the arrest, if the arrestee so requests, and (3) the obligation to forward any communication by the arrestee to the consular post. *Id.*; accord *Medellin I*, 544 U.S. 660, 686-87 (2005) (O’Connor, J., dissenting from dismissal of writ as improvidently granted); *Mora v. New York*, 524 F.3d 183, 186 & n.2 (2d Cir. 2008). While presenting interesting and challenging issues, the latter two elements are beyond the scope of this Comment.

69. In this Comment, the “right of action” will refer solely to the right of the individual to *challenge* his conviction or sentence, in either a direct or a collateral attack, based on the VCCR violation. The applicability of the VCCR to separate causes of action for *damages* (such as under 42 U.S.C. § 1983) is beyond the scope of this Comment. However, to the extent that it might be easier for the court to find a cause of action pursuant to

However, when faced with the question of whether the VCCR provides for individually enforceable rights, many U.S. courts have opted not to decide the issue, instead disposing of the cases based on the absence of a remedy or by applying procedural default rules.⁷⁰ The Supreme Court, for its part, also failed to provide guidance by “assum[ing], without deciding, that Article 36 grants foreign nationals ‘. . . individually enforceable right[s].’”⁷¹ Despite these rulings, which have rarely been more than dicta,⁷² this Comment argues that Article 36 does unequivocally provide for such rights.

Section 1983 than a right of action in a criminal prosecution, this Comment’s conclusion that the latter exists might necessarily imply that the former does as well. *See, e.g., Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007) (“The distinction between a private right, on the one hand, and various remedial measures that affect criminal prosecutions, on the other, is an important one . . . Our consideration here of the question whether the Convention creates private rights is therefore in no way inconsistent with our [prior conclusion] that the exclusionary rule is not an available remedy for violations of the Vienna Convention.” (internal citations omitted)).

70. *See, e.g., United States v. Ortiz*, 315 F.3d 873, 886-87 (8th Cir. 2002) (avoiding the question by going straight to remedy discussion); *United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir. 2002) (same); *United States v. De La Pava*, 268 F.3d 157, 164 (2nd Cir. 2001) (suggesting, but not deciding, that the VCCR did not create enforceable individual rights); *United States v. Minjares-Alvarez*, 264 F.3d 980, 986 (10th Cir. 2001) (“It remains an open question whether the Vienna Convention gives rise to any individually enforceable rights.”); *United States v. Li*, 206 F.3d 56, 61-66 (1st Cir. 2000) (en banc) (concluding that, “irrespective of whether [the treaty] create[d] individual rights,” the requested remedy was not available); *United States v. Lawal*, 231 F.3d 1045, 1047-48 (7th Cir. 2000) (same); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000) (en banc) (same); *Murphy v. Netherland*, 116 F.3d 97, 99-101 (4th Cir. 1997) (ignoring the issue of individual rights and dismissing appeal on the ground of procedural defaults). The few courts that have decided the question have not reached a consensus. Among Circuit courts, two have decided against individual rights. *See United States v. Jimenez-Nava*, 243 F.3d 192, 197-98 (5th Cir. 2001) (concluding that Article 36 does not create enforceable individual rights); *United States v. Emuegbunam*, 268 F.3d 377, 391-94 (6th Cir. 2001) (same). On the other hand, among district courts, a number have found individual rights. *See, e.g., United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 988-990 (D. Cal. 1999) (finding that a criminal defendant had an individual right to consular notification); *United States v. Torres-Del Muro*, 58 F. Supp. 2d 931, 933 (C.D. Ill. 1999) (same); *United States v. Hongla-Yamche*, 55 F. Supp. 2d 74, 77-78 (D. Mass. 1999) (same); *United States v. Briscoe*, 69 F. Supp. 2d 738, 744-46 (D. V.I. 1999), *aff’d without opinion*, 234 F.3d 1266 (3d Cir. 2000) (same). Finally, in the context of a Section 1983 action, several courts have found that Article 36 creates individually enforceable rights. *See, e.g., Jogi v. Voges*, 480 F.3d 822, 832-34 (7th Cir. 2007) (finding an enforceable individual right); *Standt v. City of New York*, 153 F. Supp. 2d 417, 422-427 (S.D.N.Y. 2001) (concluding that the plaintiff, who was detained by U.S. authorities without consular notice, was entitled to pursue a claim under the VCCR). *But see Mora*, 524 F.3d at 188 (finding no private right of action in the context of an action for damages); *Diaz v. Van Norman*, 351 F. Supp. 2d 679, 681 (E.D. Mich. 2005) (holding that, per the decision in *Emuegbunam*, 268 F.3d 377, the VCCR did not create any individually enforceable rights).

71. *Medellin II*, 128 S. Ct. at 1357 n.4; *see also Sanchez-Llamas v. Oregon*, 548 U.S. 331, 341-42 (2006) (“Because we conclude that Sanchez-Llamas and Bustillo are not in any event entitled to relief on their claims, we find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights. Therefore, for purposes of addressing petitioners’ claims, we assume, without deciding, that Article 36 does grant Bustillo and Sanchez-Llamas such rights.”); *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) (noting that the Vienna Convention “arguably confers on an individual the right to consular assistance following arrest” (emphasis added)).

72. As one judge noted:

A dictum is an assertion in a court’s opinion of a proposition of law which does not explain why the court’s judgment goes in favor of the winner. If the court’s judgment and the reasoning which supports it would remain unchanged, regardless of the proposition in question, that proposition plays

Of the few courts that have addressed this question directly, a number have erroneously suggested that Article 36 does not confer individually enforceable rights. Specifically, these courts have outlined five arguments in support of their conclusion. This Section will address each argument in turn.⁷³

1. *Addressing Argument 1—Treaties Are Solely Compacts Between Nations and Do Not Create Individual Rights*

First, there is the premise that treaties are meant to govern relations between nations, and therefore individual rights that do exist, if any, can be exercised only by the aggrieved individual's country.⁷⁴ The Supreme Court first articulated this principle in the *Head Money Cases*: "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it."⁷⁵

However, this language should not be taken out of context. The opinion in the *Head Money Cases* proceeds to clarify that treaties *can* "contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which *are* capable of enforcement as between private parties in the courts of the country."⁷⁶

no role in explaining why the judgment goes for the winner. It is superfluous to the decision and is dictum.

Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1256 (2006). This view was supported by Chief Justice Marshall, who stated that (albeit, in dicta himself):

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

73. Throughout this discussion, reference is also made to the Seventh Circuit's decision in *Jogi v. Voges*, 480 F.3d 822. This is one of the few decisions that has directly addressed the question of individually enforceable rights under Article 36 and is the only Circuit court case holding that those rights exist. *Jogi*, 480 F.3d at 832 ("This court is the first one to be confronted directly with the question whether the Convention creates a private right."); *id.* at 834 ("We conclude that . . . Article 36 confers individual rights on detained nationals."). It must be noted, however, that the court in *Jogi* was dealing with a Section 1983 action for damages and not with a situation where Article 36 was asserted to remedy the defendant's sentence or conviction. *Id.* at 832. The court's reasoning and the arguments raised, however, are equally applicable to this context.

74. *See, e.g., Jimenez-Nava*, 243 F.3d at 195-96 (noting that there are no enforceable individual rights under Article 36 because treaties only create rights in the contracting nations).

75. *Head Money Cases*, 112 U.S. 580, 598 (1884).

76. *Id.* (emphasis added). In fact, U.S. courts normally enforce such treaties, provided they are not deficient in some other way. *See, e.g., Kolovrat v. Oregon*, 366 U.S. 187 (1961) (enforcing the rights of Yugoslavian nationals under the "most favored nation" clause); *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150 (1940) (enforcing foreign trademark owner's rights under the Pan American Trade-Mark Treaty); *Cheung*

2. *Addressing Argument 2—Treaties that Create Individual Rights Must Be Enforceable “as Between Private Parties”*

The second argument is tied to the first one and states that, even though treaties may confer individual rights, those rights *must* be enforceable “as between private parties.”⁷⁷ This conclusion is equally flawed. A better approach is outlined in the *Restatement (Third) of Foreign Relations Law*, which suggests that “[w]hether an international agreement provides a right . . . to a private person is a matter of interpretation of the agreement.”⁷⁸ By emphasizing a case-by-case inquiry over a bright-line rule, this approach avoids jumping to conclusions and encourages the court to look to the text of the specific treaty in question.⁷⁹ Thus, a court presented with a treaty that arguably confers individual rights should proceed further to determine if those rights are “of a nature to be enforced in a court of justice.”⁸⁰

3. *Addressing Argument 3—The Preamble, Title to the Section, and the Introductory Paragraph Demonstrate that Article 36 Was Not Intended to Convey Individual Rights*

Unlike the first two arguments, the third argument actually attempts to examine the text of the VCCR. However, rather than focusing on the text of Article 36 itself, the courts asserting this argument focus on the Convention’s preamble, the heading to the section in which Article 36 is located, and the first sentence of Article 36.⁸¹ Overall, the argument is threefold. First, the preamble provides that “the purpose of [the treaty’s] privileges and immunities is *not to benefit individuals* but to ensure the efficient performance of functions by

Sum Shee v. Nagle, 268 U.S. 336 (1925) (upholding, pursuant to a treaty of commerce and navigation with China, the right of petitioners to immigrate to the United States); see also Sital Kalantry, *The Intent-to-Benefit: Individually Enforceable Rights Under International Treaties*, 44 STAN. J. INT’L L. 63, 84-91 (2008) (arguing that individually enforceable rights could exist under treaties because treaties are akin to contracts and therefore could provide for such rights under the intent-to-benefit approach); *id.* at 94-97 (applying that to the VCCR).

77. See, e.g., *Jimenez-Nava*, 243 F.3d at 197 n.6 (quoting *Head Money Cases*, 112 U.S. at 598) (noting as one example treaties that govern rights of aliens to “property by descent or inheritance”).

78. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 907 cmt. a (1987). Indeed, in the *Head Money Cases*, the Supreme Court went on to note that the more important distinction might be whether the rights under the treaty are “of a nature to be enforced in a court of justice.” 112 U.S. at 598-99 (“A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.”).

79. Cf. *Medellin II*, 128 S. Ct. 1346, 1357 (2008) (“The interpretation of a treaty, like the interpretation of a statute, begins with its text.” (citing *Air France v. Saks*, 470 U.S. 392, 396-97 (1985))).

80. *Head Money Cases*, 112 U.S. at 598-99.

81. See, e.g., *United States v. Emuegbunam*, 268 F.3d 377, 392 (6th Cir. 2001) (noting that the preamble to the VCCR “expressly disclaims the creation of any individual rights”); *United States v. Li*, 206 F.3d 56, 62 (1st Cir. 2000) (en banc) (“[T]he Vienna Convention’s preamble explicitly disclaims any attempt to create individual rights Moreover, the preamble’s drafters cite an intent to ‘contribute to the development of friendly relations among nations’ without ever mentioning any intent to equip defendants with [remedies].”).

consular posts on behalf of their respective States.”⁸² Second, the heading of the section where Article 36 is located makes no mention of the individual rights. On the contrary, it is titled: “*Facilities, Privileges and Immunities Relating to Consular Posts, Career Consular Officers and Other Members of the Consular Post.*”⁸³ Finally, Article 36 itself begins with these words: “With a view to *facilitating the exercise of consular functions* relating to nationals of the sending State”⁸⁴ These facts, the argument goes, show that the Article is solely directed to facilitating the job of the consulate and “explicitly disclaims any attempt to create individual rights.”⁸⁵

However, this argument fails for three reasons. First, it is a mistake to defer to the preamble or to the title of the section when the text is otherwise clear and unambiguous.⁸⁶ As a matter of statutory construction,⁸⁷ the clear text “eliminates the interpretive role of the title, which may only ‘shed light on some *ambiguous* word or phrase in the [Article] itself.’”⁸⁸ Since Article 36 clearly and unambiguously states that the receiving State must inform the arrested individual “of *his* rights under [that Article],”⁸⁹ there should be no further inquiry.⁹⁰ The words in the Article must be given their plain and ordinary meaning,⁹¹ and the

82. Vienna Convention on Consular Relations, *supra* note 3, preamble (emphasis added).

83. *Id.* ch. II.

84. *Id.* art. 36(1) (emphasis added).

85. *Li*, 206 F.3d at 62.

86. *See, e.g.*, *Jogi v. Voges*, 480 F.3d 822, 833-34 (7th Cir. 2007) (“Courts should look to materials like preambles and titles only if the text of the instrument is ambiguous.”).

87. “In construing treaties, we use principles analogous to those that guide us in the task of construing statutes.” *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1361 (2d Cir. 1992), *rev’d sub nom. on other grounds*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993); *see also United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992) (“In construing a treaty, *as in construing a statute*, we first look to its terms to determine its meaning.” (emphasis added)).

88. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 483 (2001) (quoting *Carter v. United States*, 530 U.S. 255, 267 (2000)) (emphasis added); *see accord* 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47:3 (Norman J. Singer & J.D. Shambie Singer eds., 7th ed. 2007) (“Although the title is part of the act, it may not be used as a means of creating an ambiguity when the body of the act itself is clear.”); *Id.* § 47:4 (“[T]he preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.”).

89. Vienna Convention on Consular Relations, *supra* note 3, art. 36(1)(b) (emphasis added).

90. *Jogi*, 480 F.3d at 834 (“It is a mistake to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists. Courts should look to materials like preambles and titles only if the text of the instrument is ambiguous.”). Indeed, as Justice O’Connor noted, there would be no point at all to the disputed language in Article 36 if it conferred no rights on an individual. *Medellin I*, 544 U.S. at 687 (O’Connor, J., dissenting from dismissal of writ as improvidently granted) (“If Article 36(1) conferred no rights on the detained individual, its command to ‘inform’ the detainee of ‘his rights’ might be meaningless.”). *But see Cornejo v. County of San Diego*, 504 F.3d 853, 863 (9th Cir. 2007) (“Article 36 does not *unambiguously* give [the defendant] a privately enforceable right to be notified.” (emphasis added)); *Li*, 206 F.3d at 62 (“[T]he Vienna Convention [is] *facially ambiguous* on the subject of whether [it] create[s] individual rights at all” (emphasis added)).

91. *See, e.g.*, Vienna Convention on the Law of Treaties, *supra* note 53, art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 325(1) (1987) (identical provision).

terms of the Article—providing for individually enforceable rights—must control.⁹²

Second, even if the title and the preamble are considered, statutory interpretation requires that the general terms appearing there be subject to more specific terms in the applicable Article.⁹³ Thus, “the most reasonable understanding”⁹⁴ of the language in the preamble is that it was not meant to be applicable to the specific rights conferred in Article 36 and was only meant to clarify that the VCCR was not intended to benefit the consular officials in *their* individual capacity.⁹⁵

Third, even if courts find both meanings equally persuasive, they should follow the well-recognized canon that a treaty be liberally construed.⁹⁶ Specifically, the Supreme Court has noted that, “where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred.”⁹⁷ That is precisely the dilemma here. Assuming, *arguendo*, that Article 36 admits of two constructions, the courts should err on the side of *recognizing* enforceable individual rights rather than denying them completely.⁹⁸

92. *Jogi*, 480 F.3d at 833-34.

93. See *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) (“[S]pecific statutory language should control more general language when there is a conflict between the two.”); *Jogi*, 480 F.3d at 833-34.

94. *Jogi*, 480 F.3d at 833.

95. *United States v. Rodrigues*, 68 F. Supp. 2d 178, 182 (E.D.N.Y. 1999) (“[I]t appears that the purpose of [the preamble] is not to restrict the individual notification rights of foreign nationals, but to make clear that the Convention’s purpose is to ensure the smooth functioning of consular posts in general, not to provide special treatment for individual consular officials.”). Furthermore, comparison to other treaties concluded at the time reinforces this interpretation of the preamble. 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, 594-95 (1997) (noting that the Vienna Convention on Diplomatic Relations contains an almost identical language in its preamble and that a resolution adopted at the conclusion of that Conference clarified that that language was only meant to ensure that “the privileges and immunities granted . . . should not be used . . . as a shield against punishment for wrongdoing”).

96. *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 581 (1908); *De Geofroy v. Riggs*, 133 U.S. 258, 271 (1890); *Jogi*, 480 F.3d at 834.

97. *Bacaradi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940).

98. See *Jogi*, 480 F.3d at 834 (recognizing individual rights under Article 36). *But see Medellin II*, 128 S. Ct. 1346, 1357 n.3 (“[T]he background presumption is that ‘international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’” (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 907 cmt. a (1987))). It is not certain what the Supreme Court meant by the “background presumption” in *Medellin II*. On the one hand, it can be taken as putting the burden on the party arguing for the rights to overcome the presumption against them. On the other hand, it can be taken as simply stating that, with everything else equal, the court will err in favor of *not* finding individually enforceable rights. Seeing as the Court in *Medellin II* specifically declined to decide the issue of individual rights, *id.* at 1357 n.4, it is hard to see how this phrase is anything but dictum.

4. *Addressing Argument 4—The Travaux Préparatoires Show No Intent for Article 36 to Create Individual Rights*

The fourth argument that could be made is that the intent of the parties in ratifying the VCCR was *not* to create individually enforceable rights. Specifically, this argument is supported by the deliberations of the ILC, which was responsible for preparing the draft Articles upon which the negotiations at the Conference were based, that seem to indicate that the drafters did not intend to create such rights.⁹⁹

However, this argument is correct only to the extent that the precise intent is hard to pinpoint. For one, reference should be made both to the deliberations of the ILC *and* to the records of the subsequent Conference.¹⁰⁰ Such Conference records are a part of, indeed an important one, of the *travaux préparatoires*. Once both of these sources are examined, there appears to be a shift from the ILC's intent, which was to focus solely on the "consul's rights,"¹⁰¹ to the intent expressed by the majority of delegates at the Conference, which was to safeguard the *individual's* rights as well.¹⁰² In fact, the draft of Article 36 that the ILC produced for the Conference was ultimately rejected by the delegates in favor of a version that arguably gave more protection to individual rights.¹⁰³

99. See, e.g., *Mora v. New York*, 524 F.3d 183, 207 (2d Cir. 2008) (examining the question and concluding that "[w]hether the [*travaux préparatoires*] support plaintiff's stance is by no means clear").

100. Compare *Summary Records of the 535th Meeting*, [1960] 1 Y.B. Int'l L. Comm'n 49, U.N. Doc. A/CN.4/SER.A/1960 (statement of Sir Gerald Fitzmaurice, United Kingdom of Great Britain and Northern Ireland) ("To regard the question as one involving primarily human rights or the status of aliens would be to confuse the real issue."), and *id.* (statement of Mr. Nihat Erim, Turkey) ("[T]he discussion should be confined to the basic purpose of the proposed provision [(the rights and duties of consuls)] and should not be broadened to cover other subjects which were involved only incidentally in the proposed provision."), with United Nations Conference on Consular Relations, Vienna, Austria, Mar. 4–Apr. 22, 1 *Official Records*, at 332, U.N. Doc. A/CONF.25/16 (1963) (statement by Spanish delegate) (referring to the right provided for by the ILC's draft as "one of the most sacred rights of foreign residents in a country"), *id.* at 338 (statement by Korean delegate) ("[This] relate[s] to one of the fundamental and indispensable rights of the individual."), and *id.* at 339 (statement by Greek delegate) (noting that the Conference was "following the present-day trend of promoting and protecting human rights").

101. See *Draft Articles on Consular Relations, and Commentaries*, [1961] 2 Y.B. Int'l L. Comm'n 112 cmt. 1, U.N. Doc. A/CN.4/SER.A/1961/Add.1 (the commentary to the ILC's draft of Article 36 provided that: "This article defines the rights granted to consular officials with the object of facilitating the exercise of the consular functions relating to nationals of the sending State").

102. See Kadish, *supra* note 95, at 596-97 (describing the discussions that took place at the Conference and concluding that "the 'legislative history' of the Treaty supports the interpretation that Article 36 was intended to confer individual rights on foreign nationals").

103. See United Nations Conference on Consular Relations, Vienna, Austria, Mar. 4–Apr. 22, 1 *Official Records*, at 81-87, 331-48, U.N. Doc. A/CONF.25/16 (1963) (discussing the problems with the ILC's draft of Article 36 as well as the proposed amendments to that draft at the Second Committee and plenary meetings).

5. Addressing Argument 5—State Department’s Conclusion that There Are No Individual Rights Is “Entitled to Great Weight”

The final argument rests on the principle that, “[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”¹⁰⁴ The State Department is the agency charged with the domestic implementation of the VCCR.¹⁰⁵ Unfortunately, when deciding whether Article 36 provides for enforceable rights, some courts have put too much weight on the occasional self-serving statements¹⁰⁶ by the State Department.

The decisions in *United States v. Li* and *United States v. Emuegbunam* are typical of this piece-meal approach.¹⁰⁷ For example, the court in *Li* put considerable emphasis on the fact that, when submitting the VCCR to the Senate, the State Department noted that the Convention “does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions.”¹⁰⁸ According to the court, the State Department did “not believe that the [VCCR] will require significant departures from the existing practice within the several states of the United States.”¹⁰⁹

For one, these statements appear to reinforce the view that there already *was* an existing duty to notify. Moreover, the reliance on these statements is puzzling because they do not shed any light on what the Department’s position would be *if* there were any departures. Fortunately, the answer can be found in another statement by the State Department, which was not mentioned by the *Li* court: “To

104. *United States v. Li*, 206 F.3d 56, 63 (1st Cir. 2000) (en banc) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982)).

105. See Letter from David R. Andrews, Legal Adviser, U.S. Dep’t of State, to James K. Robinson, Assistant Att’y Gen., U.S. Dep’t of Justice (Oct. 15, 1999) [hereinafter Andrews Letter] (on file with the *McGeorge Law Review*) appended to Supplemental Brief for the U.S. on Rehearing En Banc, *Li*, 206 F.3d 56 (Nos. 97-2034, 2413, and 98-1229, 1230, 1447, 1448) (“It is the Executive Branch—through the Department of State—that has defined and continues to define the practice of the United States under its consular conventions.”).

106. Some scholars have argued that, when deciding how much deference to give to an executive interpretation of the treaty, “executive self-interest” should be one of the factors considered. Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777, 812-13 (2008); see also Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 399-400 & n.363 (2008) (concluding that, if *Chevron*-type deference is to be allowed with respect to executive branch treaty administration, “checks on self-aggrandizement” (i.e., executive self-interest) would need to be developed).

107. See *United States v. Emuegbunam*, 268 F.3d 377, 392-93 (6th Cir. 2001) (noting that “[s]ince 1970 the State Department has consistently taken the view that the Vienna Convention does not create individual rights” and providing several examples); *Li*, 206 F.3d at 63-65 (same).

108. *Li*, 206 F.3d at 64 (quoting VCCR Senate Exec. Documents, *supra* note 62, at 18 (statement of J. Edward Lyerly, Deputy Legal Adviser, State Dep’t)).

109. *Id.* (quoting “[a] 1970 letter sent by a Department legal adviser to the governors of the fifty states shortly after the [VCCR] ratification”). Based on this, the court in *Li* noted that recognizing individual rights “would constitute just the sort of ‘significant departure’ disclaimed by the [State Department].” *Id.*

the extent that there *are* conflicts with Federal legislation or State laws,” the VCCR would govern.¹¹⁰

In addition, such broad deference is misplaced in the case of the VCCR, where, despite subsequent statements to the contrary, the State Department on numerous occasions referred to the rights under Article 36 as *arrested individual’s* rights.¹¹¹ When faced with two conflicting positions, one taken in the regular course of business and another during litigation, the courts would be wise to give more weight to the former.¹¹²

Thus, once one abandons the erroneous supposition that there is a blanket prohibition on enforceable individual rights in treaties,¹¹³ the language of Article 36 clearly and unambiguously provides that such rights do exist.¹¹⁴ Furthermore, as this Section has argued, even if this specific language conflicts with more general language in the preamble, courts should either prefer the specific over the general¹¹⁵ or err on the side of more liberal construction.¹¹⁶ The result is

110. VCCR Senate Exec. Documents, *supra* note 62, at 18 (statement of J. Edward Lyerly, Deputy Legal Adviser, State Dep’t) (emphasis added).

111. *See, e.g.*, FOREIGN AFFAIRS MANUAL, *supra* note 3, § 412(1) (“Neither arrest nor conviction deprives a U.S. citizen of the right to the consular officer’s best efforts in protecting the citizen’s legal and human rights.”); *id.* § 413.1 (quoting Article 36 of the VCCR); *id.* § 421.1-1 (“Article 36 . . . provides that the host government must notify a foreign national arrestee without delay of the *arrestee’s* right to communicate with his or her consular officials” (emphasis added)); *id.* § 426.2-1(b)(2) (referring once again to the *arrestee’s* right to have U.S. consular authorities notified); Consular Notification and Access, *supra* note 17, at 3, 13-14, 18-20; *accord Li*, 206 F.3d at 74-75 (Torruella, C.J., concurring in part and dissenting in part) (noting pre-litigation actions by the State Department that indicate its belief that Article 36 provides for individually enforceable rights); *United States v. Cisneros*, 397 F. Supp. 2d 726, 731-32 (E.D. Va. 2005) (noting that when asked what options were available to a foreign national, John Ashcroft replied that, “[c]onsistent with the [*Avena* opinion, the foreign national] is free to argue in the trial court that *his rights* under Article 36 of the [VCCR] were violated by a failure to inform him of *his right* to contact his consulate . . .” (quoting Letter from Att’y Gen. John Ashcroft to His Excellency Carlos de Icaza, Ambassador of Mexico (June 3, 2004)) (emphases added)). In the letter submitted to the First Circuit in the *Li* case, the State Department tried to justify these references to individual’s rights by calling them simply “derivative.” Andrews Letter, *supra* note 105 (“The right of an individual to communicate with his consular officials is derivative of the sending state’s right to extend consular protection to its nationals . . .”). However, the fact that a right is derivative does not make it less enforceable by the person to whom it is granted. *See Medellín II*, 128 S. Ct. 1346, 1387 (2008) (Breyer, J., dissenting) (“[D]erivative claims are a well-established feature of international law . . .”); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 713(2)(a) (1987) (“A person of foreign nationality injured by [another state’s action] may pursue any remedy provided by . . . international agreement between [his state] and the state responsible for the injury . . .”).

112. *See, e.g., Li*, 206 F.3d at 74 n.4 (Torruella, C.J., concurring in part and dissenting in part) (“I find the majority’s reliance on positions taken by the State Department during litigation to be unpersuasive, particularly as those positions are both self-serving and directly contrary to the Department’s nonlitigation position . . .”).

113. *See supra* Parts III.B.1, III.B.2.

114. *See supra* notes 88-92 and accompanying text.

115. *See supra* notes 93-95 and accompanying text. This Comment has analyzed the VCCR as one would analyze a statute. For an intriguing analysis of the VCCR under contract principles, see Kalantry, *supra* note 76 (arguing that courts should use the intent-to-benefit approach to find enforceable individual rights under the VCCR).

116. *See supra* notes 96-98 and accompanying text.

unchanged regardless of the approach taken: Article 36 of the VCCR unequivocally provides for individually enforceable rights.

C. *The Dilemma of Remedies*

Even when courts do find that the individual has enforceable rights, most claims under the VCCR fail because of the absence of a remedy.¹¹⁷ The result is not surprising when one takes into account that (a) Article 36 does not explicitly prescribe any specific remedy for its violation,¹¹⁸ (b) in the absence of a constitutional violation, courts are reluctant to read a remedy into a treaty that contains none,¹¹⁹ and (c) some of the proposed remedies seem to be out of proportion to the harm, if any, suffered by the defendant.¹²⁰

1. *“Disproportional” Remedies*

U.S. courts have been almost consistent in refusing to apply seemingly disproportional remedies, such as exclusion of evidence or dismissal of the charges, when the only proven violation is that the criminal defendant was not notified of his or her right to contact his or her consulate. The typical justification

117. See *Jogi v. Voges*, 480 F.3d 822, 831-32 (7th Cir. 2007) (listing a number of cases where, regardless of whether a private right existed, the courts denied relief for VCCR violations based on the absence of a remedy).

118. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 343 (2006). The only relevant language is that the receiving State’s laws and regulations “must enable *full effect* to be given to the purposes for which the rights accorded under [Article 36] are intended.” Vienna Convention on Consular Relations, *supra* note 3, art. 36(2) (emphasis added). However, the absence of an express remedy is not surprising when one considers the different legal systems existing among the party States. Paul B. Stephan, *Open Doors*, 13 LEWIS & CLARK L. REV. (forthcoming 2009) (manuscript at 32, on file with *McGeorge Law Review*) (“Because the domestic legal orders of states vary widely, treaties normally do not specify the means by which a state integrates its international obligation with its domestic law.”); cf. *Medellin II*, 128 S. Ct. 1346, 1381 (2008) (Breyer, J., dissenting) (noting that the absence of a provision for self-execution says little about intent—indeed, “[i]t may reflect the drafters’ awareness of national differences”).

119. For example, in *Sanchez-Llamas*, the Court noted that “where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.” 548 U.S. at 347. Statements such as this, however, seem to be at odds with the Latin maxim of *ubi jus, ibi remedium* (“where there is a right, there is a remedy”). See John Quigley, *Toward More Effective Judicial Implementation of Treaty-Based Rights*, 29 FORDHAM INT’L L.J. 552, 565 (2006) (noting that the courts that have “raised the issue of a judicial remedy as a matter divorced from that of a right” under the VCCR “have thereby subverted the Supremacy Clause”); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147, 163 (1803) (“It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”); *United States v. Pena-Gonzalez*, 62 F. Supp. 2d 358, 365 (D. P.R. 1999) (“We begin with a fundamental principle of our jurisprudence, *ubi jus ibi remedium*—where there is a right there is a remedy. This axiomatic principle forms the bedrock of our system of justice.”).

120. See, e.g., *Sanchez-Llamas*, 548 U.S. at 349 (“Suppression would be a vastly disproportionate remedy for an Article 36 violation.”).

is that for such remedies to apply, they must be specifically provided for by the treaty provision in question or the violation must rise to a constitutional level.¹²¹

Historically, the exclusionary rule or the dismissal of charges has been limited to cases involving constitutional violations.¹²² It is hard to argue, however, that a violation of a treaty, by itself, rises to that level. First, treaties are undoubtedly inferior to the Constitution.¹²³ Second, if anything, treaties are more akin to statutes than to the Constitution.¹²⁴ Thus, because a violation of a statute, by itself, does not give rise to a constitutional violation, it follows that a violation of a treaty likewise cannot give rise to a constitutional violation.¹²⁵

Indeed, most courts addressing this issue have concluded that a violation of the VCCR does not implicate constitutionally protected rights.¹²⁶ More importantly, this position finds support in the Supreme Court's recent decision in *Sanchez-Llamas*.¹²⁷ There, one of the defendants argued that the court should have suppressed his statements to the police because he was never notified of his

121. See, e.g., *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999) (“[I]n order for [Defendants] to invoke the exclusionary rule in this case, the Vienna Convention must explicitly provide for that remedy, or the violation of the treaty must rise to a level of a constitutional violation.”).

122. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (violation of Fifth Amendment); *Massiah v. United States*, 377 U.S. 201 (1964) (violation of Sixth Amendment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (violation of Fourth Amendment). In this context, the purpose of the exclusionary rule “is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” *Elkins v. United States*, 364 U.S. 206, 217 (1960).

123. See, e.g., *Reid v. Covert*, 354 U.S. 1, 16 (1957) (“[Neither treaties nor executive agreements] can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.”); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (“It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids . . .”).

124. See, e.g., *Torres v. State*, 120 P.3d 1184, 1187 n.8 (Okla. Crim. App. 2005) (noting that many courts discussing remedies under the VCCR “have concluded that the Vienna Convention is equivalent to a statute rather than a constitutional provision”).

125. *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (“Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty.”); see also *United States v. Ware*, 161 F.3d 414, 424 (6th Cir. 1998) (“Statutory violations, absent any underlying constitutional violations or rights, are generally insufficient to justify imposition of the exclusionary rule.”). However, there are rare cases where a court would allow exclusion as a remedy for *other* than a constitutional violation. See, e.g., *United States v. Blue*, 384 U.S. 251, 255 (1966) (noting that the exclusionary rule has been applied “where evidence has been gained in violation of the accused’s rights under the Constitution, federal statutes, or federal rules of procedure” (emphases added)); *Miller v. United States*, 357 U.S. 301, 305-14 (1958) (excluding evidence obtained in violation of District of Columbia law); *United States v. Soto-Soto*, 598 F.2d 545, 550 (9th Cir. 1979) (suppressing evidence for violation of 19 U.S.C. § 482). These instances, however, are too infrequent and shed little light on the propriety of exclusionary rule outside of constitutional violations. *United States v. Lombera-Camorlinga*, 206 F.3d 882, 887 (9th Cir. 2000) (en banc).

126. See, e.g., *United States v. Carrillo*, 70 F. Supp. 2d 854, 861 (N.D. Ill. 1999) (“[A] violation of the Article 36 does not rise to the level of a constitutional violation.”); *United States v. Rodrigues*, 68 F. Supp. 2d 178, 185 (E.D. N.Y. 1999) (“[F]ailing to satisfy the consular notification requirement of Article 36 does not rise to the level of a constitutional violation.”); *United States v. Miranda*, 65 F. Supp. 2d 1002, 1006 (D. Minn. 1999) (“[T]he rights that the Convention establishes do not rise to the level of fundamental or constitutional right.”). For a list of additional cases holding the same way, 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, 196 n.86 (2002).

127. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

rights under Article 36.¹²⁸ In rejecting his argument, the Supreme Court, per Chief Justice Roberts, articulated several key points.

First, the Court noted that, because the exclusionary rule was a uniquely American creation, “[i]t would be startling if the Convention were read to require suppression.”¹²⁹ Seeing as even today almost no other country recognizes suppression as an appropriate remedy for the failure to notify, it is unlikely that the signatories at the Vienna Convention intended that to be the remedy forty years ago.¹³⁰ Nor should this remedy be read into the Convention.¹³¹ According to the Court, such an action would be “entirely inconsistent with the judicial function.”¹³²

128. *Id.* at 343.

129. *Id.*

130. *Id.* (“It is implausible that other signatories to the Convention thought it to require a remedy that nearly all refuse to recognize as a matter of domestic law.”). The Court further noted that it was unaware of any other country that has provided such a remedy when Article 36 was violated. *Id.* at 2678 n.3. *But see* Klaus Ferdinand Garditz, *Case Nos. 2 BvR 2115/01, 2 BvR 2132/01, & 2 BvR 348/03 [Vienna Convention on Consular Relations case]: German Federal Constitutional Court Decision on Failure to Provide Consular Notification*, 101 AM. J. INT’L L. 627 (2007) (describing a recent German case where the Federal Constitutional Court concluded that, pursuant to German Constitution, failure to notify could amount to a violation of a right to a fair trial and that it could give rise to exclusion of inculpatory statements obtained by the police); Jana Gogolin, *Avena and Sanchez-Llamas Come to Germany—The German Constitutional Court Upholds Rights Under the Vienna Convention on Consular Relations*, 8 GERMAN L.J. 261 (2007) (discussing the same case); *see also* John Quigley, *Must Treaty Violations Be Remedied?: A Critique of Sanchez-Llamas v. Oregon*, 36 GA. J. INT’L & COMP. L. 355, 372-78 (2008) (noting that other countries to address the question of suppression have found it to be a viable remedy for a violation of Article 36 or its equivalent, and noting Australia, Canada, Germany, and United Kingdom as examples); Human Rights Research, *Individual Consular Rights: Foreign Law and Practice*, <http://www3.sympatico.ca/aiwarren/foreignlaw.html> (last visited Oct. 26, 2008) (on file with the *McGeorge Law Review*) (similar findings and examples).

Furthermore, by focusing on the fact that no other country applies the exclusionary rule, the Supreme Court in *Sanchez-Llamas* seems to lose sight of the forest for the trees. All that is required by the VCCR is that “full effect” be given to the rights guaranteed under Article 36. Vienna Convention on Consular Relations, *supra* note 3, art. 36(2). How the country does that is irrelevant. *Sanchez-Llamas*, 548 U.S. at 396 (Breyer, J., dissenting) (“[T]he absence of reported decisions formally suppressing confessions obtained in violation of the Convention tells us nothing at all about whether such nations give ‘full effect’ to the ‘purposes’ of Article 36(1).”); *see also* Frederic L. Kirgis, *International Law in the American Courts—The United States Supreme Court Declines to Enforce the I.C.J.’s Avena Judgment Relating to a U.S. Obligation Under the Convention on Consular Relations*, 9 GERMAN L.J. 619, 627 (2008) (“The absence of cases outside the United States directly enforcing I.C.J. judgments suggests little or nothing about what the law in the United States should be.”).

131. *Sanchez-Llamas*, 548 U.S. at 346.

132. *Id.* “‘To alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty.’” *Id.* (quoting *In re The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821)). Moreover, some have argued that such “practice of unilaterally implying remedies when the President and the Senate by its advice and consent have not expressly agreed to them might also dissuade the political branches from entering into rights-based treaties in the first place.” Ryan D. Newman, Note, *Treaty Rights and Remedies: The Virtues of a Clear Statement Rule*, 11 TEX. REV. L. & POL. 419, 474 (2007). However, such a view is not very persuasive when one considers that the aggrieved individuals will not be any worse off without a treaty than they are with a treaty that does not provide for a remedy. Furthermore, since the United States has already withdrawn from the Optional Protocol, which could have provided for a political remedy, the only protection remaining is for a remedy to be recognized in the domestic courts. Indeed, some commentators have argued that, “[t]he Supreme Court’s power to provide a remedy for judicially implied rights

Second, in line with most other federal courts, the Court concluded that the exclusionary rule should be applied “primarily to deter constitutional violations” or in cases where statutory violations directly implicate constitutional interests.¹³³ According to the Court, a violation of Article 36 did not rise to that level.¹³⁴ Furthermore, the Court re-iterated its belief that the exclusionary rule should be applied only in cases where it would *deter* unlawful police conduct.¹³⁵ In the Court’s opinion, the exclusionary rule would not have that effect with respect to the VCCR.¹³⁶

The requirement of a constitutional violation, however, is not the only obstacle facing the defendant at the remedy stage. Even if that requirement is set aside, there is still a question as to what remedy is mandated by Article 36.

2. “Review and Reconsideration”

As already noted, Article 36 does not explicitly provide for a remedy when the rights it affords are violated. It does, however, mandate that the receiving State’s laws and regulations “must enable full effect to be given to the purposes

in the statutory context [should] not [be] diminished for rights created by international treaties.” Sarah M. Ray, Comment, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, 91 CAL. L. REV. 1729, 1769 (2003).

133. *Sanchez-Llamas*, 548 U.S. at 347-49.

134. *Id.* at 349 (“Article 36 has nothing whatsoever to do with searches or interrogations. Indeed, Article 36 does not guarantee defendants *any* assistance at all. . . . In most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police.”). Unfortunately, this narrow view fails to account for the fact that, absent assistance from his or her consulate, the arrested foreign national might be in jeopardy of not understanding all of his or her *other* constitutional rights. Justice Breyer stated this nicely in his dissent:

One can imagine a case, for example, involving a foreign national who speaks little English, who comes from a country where confessions made to the police cannot be used in court as evidence, who does not understand that a state-provided lawyer can provide him crucial assistance in an interrogation, and whose native community has great fear of police abuse. . . . [Such] person who fully understands his *Miranda* rights but does not fully understand the *implications* of these rights for our legal system may or may not be able to show that his confession was involuntary under *Miranda*, but he will certainly have a claim under the Vienna Convention. In such a case suppression of a confession may prove the only effective remedy.

Id. at 393 (Breyer, J., dissenting) (emphasis added).

135. *Id.* at 348-49 (majority opinion); *see also* *Elkins v. United States*, 364 U.S. 206, 217 (1960) (noting that the purpose of exclusionary rule “is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it”).

136. *Sanchez-Llamas*, 548 U.S. at 349. The Court noted that, “unlike the search-and-seizure context—where the need to obtain valuable evidence may tempt authorities to transgress Fourth Amendment limitations—police win little, if any, practical advantage from violating Article 36.” *Id.* This, however, begs the question of why the exclusionary rule would not be as effective when applied to the VCCR. Specifically, if the police know that any statements a foreign national makes will be suppressed if the police fail to inform that national of his or her rights under the VCCR, would not that likewise encourage compliance?

for which [those] rights . . . are intended.”¹³⁷ The ICJ interpreted this phrase in the two cases brought against the United States: *LaGrand* and *Avena*.¹³⁸

In *LaGrand*, two German nationals (brothers) were arrested in the United States for murder and attempted bank robbery.¹³⁹ They were tried, found guilty, and sentenced to death.¹⁴⁰ At no time during the proceedings were they informed of their rights under Article 36.¹⁴¹ Once Germany discovered the violations, it instituted proceedings before the ICJ and tried to delay the execution pending the determination on the merits by the ICJ.¹⁴² However, despite a Provisional Order issued by the ICJ,¹⁴³ the State of Arizona proceeded with the execution.¹⁴⁴

In examining the case, the ICJ concluded that there was no dispute that the United States violated its obligation under Article 36(1)(b) of the VCCR to notify the *LaGrand* brothers of their right to consular notification and access.¹⁴⁵ It also noted that the United States has since issued an apology and has undertaken a number of steps designed to assure compliance with the VCCR.¹⁴⁶ However, in future cases, “an apology would not suffice.”¹⁴⁷ Specifically, the ICJ concluded that,

[i]n [future cases], it would be incumbent upon the United States to allow the *review and reconsideration* of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.¹⁴⁸

137. Vienna Convention on Consular Relations, *supra* note 3, art. 36(2).

138. Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 60, 65 (Mar. 31) (concluding that, in each Article 36 violation, the United States must provide “review and reconsideration” of both the conviction and sentence); *LaGrand* Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 514 (June 27) (same).

139. *LaGrand*, 2001 I.C.J. at 475.

140. *Id.*

141. *Id.*

142. *Id.* at 478. The proceedings before the ICJ were instituted and the request for provisional measures was filed only after one of the brothers was already executed. *Id.*

143. The Order stated the following:

(a) The United States of America should take all measures at its disposal to ensure that Walter *LaGrand* is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order; (b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.

Id. at 479.

144. *Id.* at 479-80.

145. *Id.* at 490.

146. *Id.* at 511-13.

147. *Id.* at 513.

148. *Id.* at 514 (emphasis added).

The ICJ reiterated this standard, although in more defined terms, three years later in *Avena*. There, Mexico brought a suit against the United States on behalf of fifty-four Mexican nationals who were on death row in the United States.¹⁴⁹ The ICJ concluded that, by failing to notify the arrested foreigners of their rights under the VCCR, the United States has breached its obligation in fifty-one of the fifty-four cases.¹⁵⁰ In spelling out the remedy, the Court once again stated that the United States was under the obligation “to permit *review and reconsideration*.”¹⁵¹ This time, however, the Court emphasized that the task must be performed “by the United States courts,” rather than the executive branch.¹⁵² Moreover,

the “review and reconsideration” prescribed . . . should be effective. Thus it should “take account of the violation of the rights set forth in the Convention” and guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process. Lastly, review and reconsideration should be both of the sentence and of the conviction.¹⁵³

Unfortunately, even with this clarification, the ICJ’s determination leaves a lot of questions unanswered. What can a domestic court take into account when doing the “review and reconsideration”? Who should have the burden of proof? How much prejudice is required before a defendant is given a remedy? What should that remedy be, if prejudice is found?

Not surprisingly, the ICJ has avoided answering these questions,¹⁵⁴ and it has fallen on U.S. courts to interpret the language. As the following Section demonstrates, however, that process is still only in the beginning stages.

149. Case Concerning *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12, 24-26 (Mar. 31).

150. *Id.* at 53-54.

151. *Id.* at 60-66 (emphasis added).

152. *Id.*

153. *Id.* at 65 (alterations and internal citation omitted).

154. *See, e.g., id.* at 61 (declining to decide whether exclusionary rule could be an appropriate remedy and relegating the question to U.S. courts).

3. Prejudice Analysis¹⁵⁵

The court in *United States v. Rangel-Gonzalez* articulated the prevailing test for determining whether the defendant was prejudiced by an Article 36 violation.¹⁵⁶ Under the test, the court needs to look at three factors: “(1) whether the defendant did not know he had a right to contact his consulate for assistance; (2) whether he would have availed himself of the right had he known of it; and (3) whether it was likely that the consulate would have assisted the defendant.”¹⁵⁷ This test, although a good start to addressing the VCCR dilemma, is nevertheless deficient in a number of ways.¹⁵⁸

An effective critique of the test appears in Simma¹⁵⁹ and Hoppe’s 2005 law review article.¹⁶⁰ According to the authors, as far as the first prong goes, “[i]t is simply counterintuitive, if not impossible, to prove one’s ignorance of a fact.”¹⁶¹

155. A note of caution is necessary here. The prejudice discussed in this Section refers to whether the defendant was actually prejudiced by the VCCR violation either at the conviction or sentencing stage. As such, this analysis would be *part* of the “review and reconsideration” mandated by the ICJ. *See id.* at 59-60, 65. This does not refer to “prejudice” that some courts might require to be shown *before* the court even undertakes the review and reconsideration. *See* Bruno Simma & Carsten Hoppe, *From LaGrand and Avena to Medellín—A Rocky Road Toward Implementation*, 14 TUL. J. INT’L & COMP. L. 7, 33 (2005) [hereinafter Simma & Hoppe II] (noting “an unfortunate similarity of judicial terminology between the holding of the ICJ in *Avena* and the U.S. legislation regarding habeas corpus review”).

Requiring the defendant to show this second type of “prejudice” appears to be contrary to what the ICJ had in mind. The decision in *Avena* seems to regard the review and reconsideration as “unconditional where a violation of article 36 [has] occurred.” *Id.* (citing *Avena*). Specifically, the defendant should not be required to prove anything to obtain the review because “such review is a matter of right arising out of the U.S. breach of the Convention.” *Id.*; *see also* Simma & Hoppe, *supra* note 12, at 400 (concluding that requiring the defendant to show prejudice “would still be far from granting [him] a firm right to review and reconsideration of his judgment and sentence, based solely on the violation of his Article 36 rights, as required by the ICJ’s interpretation of Article 36”). If anything, “it should be a shared obligation, between the claimant and the court, to ensure that where the claimant may be in a weak position to prove prejudice, the court will still inquire whether such violation did *actually prejudice* the defendant, and if so, what remedies to award.” Simma & Hoppe II, *supra*, at 38 (emphasis added).

156. *United States v. Rangel-Gonzales*, 617 F.2d 529, 531 (9th Cir. 1980); *see also* *Torres v. State*, 120 P.3d 1184, 1186 & n.6 (Okla. Crim. App. 2005) (explaining the test and noting that “[t]he majority of jurisdictions considering the Vienna Convention question have adopted some version of [it]”). Although the prejudice in *Rangel-Gonzales* was based not on Article 36 but rather on violation of 8 C.F.R. § 242.2(e), which implemented Article 36 for INS purposes, subsequent cases have applied it to Article 36 directly. *See, e.g., Torres*, 120 P.3d at 1186 (applying the test to Article 36 directly).

157. *Torres*, 120 P.3d at 1186; *see also id.* at 1186 nn. 6-7 (citing other jurisdictions utilizing the same or similar test); *Rangel-Gonzales*, 617 F.2d at 531 (articulating the three-factor test).

158. *See* Simma & Hoppe II, *supra* note 155, at 38-47 (noting that although the three-factor test, at least as applied in *Torres*, is “a welcome first,” there are nevertheless “significant dangers inherent in [its] application”).

159. Judge Bruno Simma, who was counsel for Germany in the *LaGrand* case, is currently a Judge on the ICJ. International Court of Justice, Current Members, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1> (last visited Oct. 26, 2008) (on file with the *McGeorge Law Review*).

160. *See* Simma & Hoppe II, *supra* note 155, at 38-41.

161. *Id.* at 39. Here, a distinction must be made between the *government* proving that the defendant knew of the VCCR at the time of his arrest, which is likely to be a bearable task, and the *defendant* proving that he was not aware of it at the relevant time, which is a daunting task indeed. Unfortunately, “[i]n practice, U.S.

As for the second prong, it “demands a counterfactual inquiry”—i.e., “what would the defendant have done, had he known of his rights?”¹⁶² However, as the authors correctly note, it is almost impossible to accurately determine this, unless one takes the conduct *after* the defendant found out about his rights “as a proxy for what he would have done, had he been properly informed.”¹⁶³

Likewise, with respect to the third prong, to determine whether a consulate would have assisted the defendant, the court would be required to look at the consulate’s *past practice* as a proxy for its likely response in the case at hand.¹⁶⁴ Once again, however, the fact that a particular consulate never helps its citizens does not mean that, on this occasion, it would have refused to help.¹⁶⁵

Seizing on these problems, Simma and Hoppe attempt to provide a more workable reformulation of the three-factor test:

Prejudice from a violation of an individual’s Article 36 rights shall be presumed if:

- (1) such individual can demonstrate that his state of nationality would have aided him. An affidavit of an appropriate official of the state of nationality to that effect shall constitute conclusive proof of this presumption, unless;
- (2) the receiving state’s authorities demonstrate that the individual knew of his right under this provision, or was informed of it within the relevant timeframe by a third party, and voluntarily chose not to exercise it; or
- (3) the receiving state’s authorities demonstrate that the consulate of the individual’s state of nationality gained knowledge of the individual’s arrest or detention within the relevant timeframe but chose not to act.¹⁶⁶

Although much more in tune with *Avena*, this reformulation appears to swing the delicate balance proposed by the ICJ too much in defendant’s favor. To be entitled to a presumption of prejudice under this test (and any remedy that would follow that determination), all that the defendant would need to produce is a self-

courts have overwhelmingly put the burden of proof solely on the defendant . . .” *Id.* at 37; *see also Torres*, 120 P.3d at 1187 (“If a *defendant* shows that he did not know he could have contacted his consulate, would have done so, and the consulate would have taken specific actions to assist in his criminal case, he will have shown he was prejudiced by the violation of his Vienna Convention rights.” (emphasis added)).

162. Simma & Hoppe II, *supra* note 155, at 39.

163. *Id.* It is dangerous to use future conduct as a proxy in circumstances where the defendant’s “factual situation” has fundamentally changed. *Id.* at 39-40. Just because the defendant refuses to contact his consulate *after* he has already confessed to the crime and pleaded guilty does not necessarily mean that he would have refused had he been informed of his right *before* he confessed.

164. *Id.* at 39-42.

165. *Id.*

166. *Id.* at 42.

serving affidavit from his home country. This could not have been the ICJ's intention in *Avena*, where it specifically focused on whether the defendant was *actually* prejudiced.¹⁶⁷

As such, what is needed is a test somewhere between the one utilized in *Torres* and the one advocated by Simma and Hoppe. If adopted, such test would move the United States much closer to the "review and reconsideration" that the ICJ stated the United States must provide in cases of Article 36 violations.¹⁶⁸

4. Medellin II

The recent Supreme Court case of *Medellin v. Texas* represents yet another hurdle in enforcing the *Avena* judgment in U.S. courts. Writing for the Court once again, Chief Justice Roberts noted that "[a] judgment is binding only if there is a rule of law that makes it so."¹⁶⁹ In the case of the ICJ's decision in *Avena*, the Chief Justice concluded that there was no such rule of law.

First, the Supreme Court agreed that the *Avena* decision "constitutes an *international* law obligation on the part of the United States."¹⁷⁰ However, to determine whether it also has a binding *domestic* effect, the Court examined three applicable treaties: the Optional Protocol, the ICJ statute, and the U.N. Charter.¹⁷¹ The Court concluded that all three were non-self-executing and, without implementing legislation, did not create binding federal law.¹⁷²

Specifically, in examining the Optional Protocol, the Supreme Court noted that there is a big difference between "submitting to jurisdiction [of a court] and agreeing to be bound" by that court's decision.¹⁷³ According to the Supreme Court, because the Optional Protocol "says nothing about the effect of an ICJ decision" on the parties, "[t]he most natural reading . . . is [that it is] a bare grant of jurisdiction."¹⁷⁴

Instead, "[t]he obligation . . . to comply with ICJ judgments derives . . . from Article 94 of the United Nations Charter,"¹⁷⁵ which provides that "[e]ach Member of the United Nations *undertakes to comply* with the decision of the International Court of Justice in any case to which it is a party."¹⁷⁶ However, the Supreme Court construed the words "undertakes to comply" as implying "a *commitment* on the part of U.N. Members to take *future* action through their political branches

167. See Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 59-60 (Mar. 31).

168. See *id.* at 60, 65 (Mar. 31); *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466, 514 (June 27).

169. *Medellin II*, 128 S. Ct. 1346, 1364 (2008).

170. *Id.* at 1356.

171. *Id.* at 1357.

172. *Id.*

173. *Id.* at 1358.

174. *Id.*

175. *Id.*

176. U.N. Charter art. 94, para. 1 (emphasis added).

to comply with an ICJ decision.”¹⁷⁷ The Court also pointed to the fact that the sole remedy for noncompliance was a referral to the Security Council (where the United States has a veto) as an indication that Article 94 was not meant to have a domestic legal effect by itself.¹⁷⁸ Based on these determinations, the Court concluded that Article 94 was not self-executing and thus could not provide the necessary federal law to implement the *Avena* decision.¹⁷⁹

Finally, the Court also rejected the President’s attempt to make the *Avena* decision binding on state courts.¹⁸⁰ In analyzing President’s authority, the Court noted that his power with respect to the *Avena* decision was “at its lowest ebb.”¹⁸¹ Indeed, according to the Chief Justice, “[w]hen the President asserts the power to

177. *Medellin II*, 128 S. Ct. at 1358.

178. *Id.* at 1359 (citing U.N. Charter art. 94, para. 2).

179. *Id.* at 1358-60. The Court’s premise in this whole analysis, however, begs the question. First, even if the United States was aware that it could veto within the Security Council any attempt to enforce an ICJ judgment against it, it most likely did not sign the U.N. Charter and the ICJ Statute with that in mind. After all, the cardinal rule of international law is that treaties are binding and must be carried out in good faith. Vienna Convention on the Law of Treaties, *supra* note 53, art. 26; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 321 (1987). Second, the effect of Article 94(2) of the U.N. Charter, dealing with State *non-compliance*, is irrelevant when the United States has expressly decided to *comply*. *Medellin II*, 128 S. Ct. at 1385 (Breyer, J., dissenting); Steve Charnovitz, *Revitalizing the U.S. Compliance Power*, 102 AM. J. INT’L L. 551, 556 (2008).

Third, the Court erred by analyzing separately Article 94(1) and the President’s attempt to enforce the *Avena* judgment. See *Medellin II*, 128 S. Ct. 1346 (analyzing Article 94(1) in Part II and the President’s Memorandum in Part III). If the Court would have analyzed both at the same time, it could have concluded that the President’s subsequent action changed Article 94(1) from non-self-executing to self-executing, at least as it relates to the *Avena* judgment. Charnovitz, *supra*, at 552-59 (noting that the Court “skewed its analysis by omitting to use the president’s memorandum as a prism for analyzing the enforceability of the *Avena* judgment,” and concluding that the President’s action made Article 94(1) self-executing “with respect to *Avena*”); see also *infra* note 184.

Finally, it is at least plausible to argue that, similar to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the President’s decision to enforce the ICJ judgment vis-à-vis the U.N. Charter and Optional Protocol should be given some deference because of the authority delegated to him by Congress under the U.N. Participation Act, 22 U.S.C. § 287c(a) (2006). Stephan, *supra* note 118, at 31-32 (“In the case of the UN Charter and the Optional Protocol, there exists, through the UN Participation Act, a clear statutory allocation of administrative authority to the Executive. It is at least not inconsistent with *Chevron* to hold that the President’s interpretation of the Charter and the Protocol as containing an implicit delegation of discretion to implement ICJ judgments requires substantial deference.”). But see Swaine, *supra* note 106, at 374-75 (“[Because] Congress explicitly addressed [in the U.N. Participation Act] the President’s authority to implement Security Council resolutions . . . , Congress’s comparative silence on enforcement of ICJ judgments arguably communicated its understanding that no power was being delegated in connection with the ICJ . . .”).

180. *Id.* at 1367-72. After the *Avena* judgment was decided and when *Medellin*’s case was pending before the Supreme Court for the first time, President Bush issued a Memorandum to Attorney General stating the following:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its inter-national obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Memorandum from President George W. Bush to the U.S. Att’y Gen. (Feb. 28, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html> (on file with the *McGeorge Law Review*).

181. *Medellin II*, 128 S. Ct. at 1367-69 (referring to Justice Jackson’s third category in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring)).

'enforce' a *non-self-executing* treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate."¹⁸² In such a case, the President must have independent constitutional authority if his action is to be successful.¹⁸³ In *Medellin II*, the Court concluded that the President did not have such authority and thus could not unilaterally require enforcement of the *Avena* judgment.¹⁸⁴

D. AEDPA and the Procedural Bars

Unfortunately, the dilemma of the VCCR does not end with the determination of rights and remedies. Even if a court finds that both a right and a remedy exist, relief might still be barred if either the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)¹⁸⁵ or one of the judicially-created procedural default rules comes into play.¹⁸⁶

182. *Id.* at 1369 (emphasis added). This statement seems a little broad, especially because nothing is preventing Congress from changing its mind after some time has passed. Thus, just because the Senate labeled a treaty as "non-self-executing" at one point in time does not necessarily mean that the full Congress cannot later implicitly acquiesce in its enforcement by the President.

183. *Id.* at 1367 & n.13, 1368.

184. *Id.* at 1371-72. In this regard, the Court's "back-of-the-hand treatment" of *Medellin's* argument that the President has the authority to "Take Care" that the laws are faithfully executed is very unfortunate. Kirgis, *supra* note 130, at 631. "Arguably, a non-self-executing treaty (or treaty provision) that is in force for the United States presents a classic case in which the President could (and should) take care that the law is faithfully executed." *Id.* Indeed, it is not at all clear that just because a treaty or a judgment might not be self-executing or might not provide for an individual or a private right of action, the President necessarily lacks authority to ensure that the treaty or judgment is implemented—especially when the country's international obligations are at stake. *Id.*; Jordan J. Paust, *Medellin, Avena, the Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT'L L. REV. 301, 313-15 (2008) (stating that the Supreme Court was incorrect in implying that the President does not "make" laws and noting that case law recognizes that "the President *can* 'unilaterally execute a non-self-executing treaty by giving it domestic effect' or by making executing choices that can have domestic legal effect" (emphasis added)). After all, although potentially not self-executing, the treaties made "under the Authority of the United States" are still *laws* within the definition of the Supremacy Clause. See U.S. CONST. art. VI, cl. 2; Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 547-50 (2008) (concluding that such interpretation is more consistent with the Supremacy Clause and the decision in *Foster v. Nelson*). In turn, the President has the unquestionable power to take care that the "laws" are faithfully executed. See U.S. CONST. art. II, § 3; Paust, *supra*, at 313-15 (concluding that the Supreme Court in *Medellin II* was incorrect in holding that the President could not execute a treaty or assure compliance with an ICJ decision); see also Swaine, *supra* note 106, at 372-86 (analyzing the President's "Take Care" power and concluding that President Bush's Memorandum was a valid exercise of that power).

The Court, surprisingly, does not address either of these arguments. See *Medellin II*, 128 S. Ct. at 1372. Moreover, it is also surprising that in dismissing the "Take Care" argument, the Court only mentions the *Avena* judgment and does not even purport to analyze the U.N. Charter, the ICJ Statute, the Optional Protocol, or, what is most disappointing, the VCCR itself. See *id.* (devoting only five sentences to the argument and basing the conclusion solely on its earlier determination that "the *Avena* judgment is not domestic law").

185. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the United States Code).

186. See, e.g., *Medellin II*, 128 S. Ct. at 1353 (holding that the defendant's VCCR claim was precluded under state procedural default rules); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 358-60 (2006) (same); *Breard v. Greene*, 523 U.S. 371, 375-76 (1998) (per curiam) (holding that the defendant procedurally defaulted on his

1. *The Case of Angel Francisco Breard*

There was little knowledge of the VCCR and sparse litigation pursuant to it for more than two decades after the Convention entered into force for the United States.¹⁸⁷ In 1998, however, the issue gained world attention with the case of Angel Francisco Breard.¹⁸⁸ Breard, a citizen of Paraguay, was arrested in the United States and tried for the attempted rape and capital murder of Ruth Dickie.¹⁸⁹ The State of Virginia presented overwhelming evidence of his guilt and, during his own testimony, Breard confessed to the murder, “but explained that he had only done so because of a Satanic curse placed on him by his father-in-law.”¹⁹⁰ Needless to say, he was convicted of both charges and sentenced to death.¹⁹¹ At no time during the trial did Virginia offer—nor did Breard request—that the Paraguayan consular official be notified.¹⁹²

Breard raised the VCCR violation for the first time in a federal habeas petition.¹⁹³ The district court denied the petition, holding that Breard procedurally defaulted on his claim because he failed to raise it in state court.¹⁹⁴ In affirming the denial of the petition, the Supreme Court of the United States articulated three separate grounds. First, it agreed with the district court that Breard defaulted on his VCCR claim.¹⁹⁵ Second, citing the “later in time” rule,¹⁹⁶ the Court held that the subsequently enacted AEDPA effectively rendered the VCCR “null.”¹⁹⁷ Finally, the Court noted that, even if the claim was properly raised, it nevertheless failed because there was no adequate showing of how it impacted the outcome of the case.¹⁹⁸

VCCR claim by failing to raise it in the state proceedings).

187. John Cary Sims & Linda E. Carter, *Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool*, CHAMPION, Sept./Oct. 1998, at 28, 28-29 (noting how, in mid 1990s, Sandra Babcock “unearthed the VCCR” and found a new theory for challenging the death sentence while representing Joseph Stanley Faulder, a Canadian citizen).

188. *Id.* at 29.

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

190. *Id.* The decision to testify was made contrary to his attorneys’ advice. Bishop, *supra* note 2, at 16-17 (explaining how Breard “did not trust his lawyers” and how he “did not understand the American plea bargaining process”). Furthermore, being familiar with only the Paraguayan legal system, Breard erroneously believed that confessing in open court would actually lower his sentence. *Id.*

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

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 375-76.

196. See *Whitney v. Robertson*, 124 U.S. 190, 193-94 (1888) (noting that an act of Congress that is passed after a treaty is concluded controls because it is later in time).

197. *Breard*, 523 U.S. at 376-77.

198. *Id.* at 377.

2. AEDPA

Breard is not the only case in which a VCCR violation was raised for the first time in a federal habeas corpus proceeding—in fact, due to unfamiliarity with the VCCR, this was the trend initially.¹⁹⁹ As in *Breard*, however, this usually led to a swift dismissal of the claim under the AEDPA, which requires the factual basis for such claims to be first “developed” in state court proceedings.²⁰⁰ At first glance, being later in time, the AEDPA should control the VCCR provisions.²⁰¹ However, the answer is not that simple.

Often missing from the discussion of the AEDPA is the principle that, when a statute and a treaty conflict, a court should do its best to reconcile the two.²⁰² Because the doctrine of “later in time” operates based on an express or implied intent by Congress to repeal the prior inconsistent statute or treaty, it is not always necessary to find a conflict between the two.²⁰³ Moreover, in cases where the later enacted statute merely touches upon the subject matter of the prior

199. See Linda E. Carter, *Compliance with ICJ Provisional Measures and the Meaning of Review and Reconsideration Under the Vienna Convention on Consular Relations: Avena and Other Mexican Nationals* (Mex. v. U.S.), 25 MICH. J. INT'L L. 117, 120 (2003) (“In the initial [VCCR] cases, the [violation] was typically not discovered until federal *habeas corpus* proceedings.”).

200. 28 U.S.C. § 2254(e)(2) (2000). Under the AEDPA, a court is not allowed to hold an evidentiary hearing on the VCCR violation if the applicant “failed to develop the factual basis of a claim in State court proceedings.” *Id.* The only exceptions are “a new rule of constitutional law” made retroactive by the Supreme Court, as long as it was “previously unavailable,” or “a factual predicate that could not have been previously discovered through the exercise of due diligence.” *Id.* § 2254(e)(2)(A). And even if that is established, the applicant still needs to show that “the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” *Id.* § 2254(e)(2)(B).

AEDPA made a number of other changes as well. For example, the above-mentioned test is also used with respect to any claim raised in a second or successive habeas petition that was not raised in the initial habeas petition. See *id.* § 2244(b)(2). On the other hand, if the claim was raised in a prior habeas petition, the subsequent claim will be automatically dismissed. *Id.* § 2244(b)(1). Moreover, the writ cannot be granted as to any issue that was adjudicated on the merits in the state court, unless the adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law” or “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented.” *Id.* § 2254(d).

201. *Whitney*, 124 U.S. at 194. Indeed, that is what the Supreme Court held in *Breard*. 523 U.S. at 376-77 (holding that the subsequently enacted AEDPA “prevents *Breard* from establishing that the violation of his Vienna Convention rights prejudiced him”).

202. *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (“[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.”) (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)); *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988) (“Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence.” (emphasis added)).

203. See Michael Franck, Note, *The Future of Judicial Internationalism: Charming Betsy, Medellín v. Dretke, and the Consular Rights Dispute*, 86 B.U. L. REV. 515, 522-32 (2006) (setting out three approaches to treaty abrogation: express statement, clearly expressed intent, and intent implied from the mere fact that an inconsistent statute was enacted).

treaty, it is difficult to argue that Congress *intended* the United States to be in violation of its international obligations.²⁰⁴

Nevertheless, an argument can still be made that the AEDPA was meant to apply to VCCR-type challenges. After all, although it was passed to fight terrorism and to ensure prompt enforcement of death penalties,²⁰⁵ the primary purpose has always been to deal with perceived abuses of habeas corpus proceedings.²⁰⁶ To the extent that VCCR claims involve death row inmates challenging their convictions and thus prolonging the dates of their executions, the AEDPA can be said to squarely address the issue.²⁰⁷

However, a reading of both the statute and the legislative history shows that Congress never considered the statute's application to the United States' international obligations, in general, or to foreign inmates on death row, in particular.²⁰⁸ Indeed, if the courts follow the approach outlined in *Charming Betsy*,²⁰⁹ then the most rational conclusion is that Congress would not have implicitly abrogated a treaty obligation and thus put the United States in breach on the international plane.²¹⁰ This is especially true in view of the importance of protecting the rights of American citizens abroad.²¹¹

3. *Applicability of State Procedural Default Rules*

Another argument against allowing defendants to raise VCCR claims in federal courts is based on the applicability of state procedural default rules. These rules typically require a defendant to object to a violation of a federal constitutional right either at the trial or not at all, and the failure to timely object amounts to "an independent and adequate state procedural ground" that will

204. Indeed, that is the approach taken when a subsequently ratified treaty conflicts with an existing federal statute. *See* *Johnson v. Browne*, 205 U.S. 309, 321 (1907) ("Repeals by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty. If both can exist the repeal by implication will not be adjudged.") (citation omitted)).

205. *See, e.g.,* Franck, *supra* note 203, at 533.

206. *Id.* at 533-34. The goal was to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.).

207. Franck, *supra* note 203, at 536-37.

208. *See id.* at 534-36.

209. "An act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

210. Franck, *supra* note 203, at 536 ("[F]or generalized statutes, it is particularly prudent to protect a treaty from abrogation in the absence of clear congressional intent."); *see also* *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988) (requiring a clear Congressional intent before a treaty is abrogated).

211. *See, e.g.,* *People v. Madej*, 193 Ill. 2d 395, 402 (2000) (Heiple, J., dissenting) ("The question arises, how can we expect protection under this treaty for American citizens abroad if we do not extend equal protection to foreign nationals residing in the United States? The answer is, we cannot. The decision reached in this case thus has implications reaching far beyond the execution of this defendant.").

preclude review by the federal court.²¹² “If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for [him to follow] state procedure in making known his objection.”²¹³ If the defendant fails to do so, the issue cannot be re-litigated in federal court unless he can demonstrate “‘cause’ and ‘prejudice.’”²¹⁴

Moreover, by its terms, Article 36 requires that the rights under it must “be exercised in conformity with the laws and regulations of the receiving State.”²¹⁵ Seizing on this language, the Supreme Court in *Sanchez-Llamas* concluded that state procedural rules can preclude a claim under the VCCR.²¹⁶ The Court stressed the fact that this result would apply in all cases involving a failure to raise a claim—even with constitutional violations.²¹⁷

However, the argument for the applicability of state procedural default rules fails to consider the superiority of the VCCR under the Supremacy Clause.²¹⁸ The crucial difference is that, while federal law can trump a treaty if the federal law is “later in time,” the same does not apply to state law. As James Madison emphasized, “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”²¹⁹ To that end, *any* inconsistent state law must give way

212. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

213. *Id.* at 90.

214. *Id.* at 87, 90. Although difficult to establish as it is, this “cause and prejudice” exception is absent all together for violations of Article 36. *See infra* note 217 (noting how, while present with constitutional violations, this exception is not available for violations of Article 36).

215. Vienna Convention on Consular Relations, *supra* note 3, art. 36(2).

216. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356 (2006). According to the Court, even though the violation was because of the United States’ failure to notify the defendant of his rights, in an adversarial system like United States “the *responsibility* for failing to raise an issue [nevertheless] rests with the parties themselves.” *Id.* at 357 (emphasis added).

217. *Id.* at 356 (citing *Engle v. Isaac*, 456 U.S. 107, 129 (1982)). It is true that the Supreme Court has held that failure to raise even constitutional violations during trial can lead to them being defaulted upon. *Engle*, 456 U.S. at 129. The rationale is to prevent defense counsel from “deliberately choos[ing] to withhold a claim in order to ‘sandbag’—to gamble on acquittal while saving a dispositive claim in case the gamble does not pay off.” *Id.* at 129 n.34 (citing *Wainwright*, 433 U.S. at 88-89). However, where that has happened in the past, the Court nevertheless allowed the defendant to rebut by showing cause and prejudice. *Id.* at 129 (“[A]ny prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief.”). As such, the only way to read the Court’s opinion in *Sanchez-Llamas*, which barred the VCCR claim without ever looking into cause and prejudice, is to conclude that a defendant who has been notified of his *Miranda* rights cannot possibly be prejudiced by the failure to notify him of his VCCR rights. However, such a conclusion is hard to defend. A defendant who is notified of his *Miranda* rights and “who fully understands [them] but does not fully understand the *implications* of these rights for our legal system” might be just as prejudiced as a defendant who is never notified of his *Miranda* rights. *Sanchez-Llamas*, 548 U.S. at 393 (Breyer, J., dissenting) (emphasis added).

218. *See* U.S. CONST. art. VI, cl. 2 (“[A]ll treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”).

219. THE FEDERALIST No. 42, at 270 (James Madison) (Random House 1941). Madison believed that there would be no point to a treaty that could not supersede contravening state law. James Madison, Remarks on the Treaty Clause, in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 514, 515 (Jonathan Elliot ed., 1891). “To counteract [a treaty] by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war.” *Id.*

to the obligations undertaken pursuant to the federal government's legitimate treaty power.²²⁰

This relationship between treaties and state laws has long been recognized by the Supreme Court. In one of its earliest cases, the Court considered the 1783 Treaty of Peace between England and United States that allowed British creditors to recover previously owed debts from American citizens.²²¹ In upholding the treaty over inconsistent state law, the Supreme Court emphatically declared:

A treaty cannot be the Supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way. . . . It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the Constitution and laws of any individual State; and their will alone is to decide.²²²

Moreover, contrary to the Supreme Court's implication in *Medellin II*, Article 36's express language does not become pointless if one concludes that state procedural rules *cannot* preclude a claim under the VCCR. Specifically, it is possible to read "laws and regulations of the receiving State"²²³ to apply only to *federal* laws and not to state laws.

This, however, is not much of consolation because the ability of state procedural default rules to bar review in federal courts *is* a federal judicial creation.²²⁴ As such, an argument can be made that the application of these defaults is nevertheless valid because it constitutes *federal* law. As with the discussion of AEDPA, however, the courts should try to reconcile the two sources of law before finding that a VCCR claim is precluded.²²⁵ More importantly, since the rules of procedural default are *judicially* created, the case is different (and less persuasive) than when dealing with a federal statute, and the VCCR should clearly control.²²⁶

220. See Aceves, *supra* note 14, at 294-95 (noting that the Supreme Court affirmed the "primacy of treaty obligations" on numerous occasions). Indeed, as the Supreme Court has noted:

Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. . . . And when judicial authority is invoked in aid of such consummation, State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power.

United States v. Belmont, 301 U.S. 324, 331-32 (1937).

221. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 203-04 (1796).

222. *Id.* at 236-37.

223. Vienna Convention on Consular Relations, *supra* note 3, art. 36(2).

224. See Wainwright v. Sykes, 433 U.S. 72, 81-85 (1977) (describing the Supreme Court's "somewhat tortuous efforts to deal with this problem").

225. See *supra* notes 202-04 and accompanying text.

226. See, e.g., Laura A. Young, Note, *Setting Sail with the Charming Betsy: Enforcing the International Court of Justice's Avena Judgment in Federal Habeas Corpus Proceedings*, 89 MINN. L. REV. 890, 913-15

4. Giving “Full Effect” to Article 36

If all Article 36 said about implementation was that the rights under it are to “be exercised in conformity with the laws and regulations of the receiving State,”²²⁷ the decisions in *Breard*, *Sanchez-Llamas*, and *Medellin II* would not be as controversial. In reality, however, Article 36(2) contains a proviso: “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.”²²⁸

Focusing on this proviso, Mexico argued in *Avena* that the United States, “[b]y applying provisions of its municipal law to defeat or foreclose remedies for the violation of rights conferred by Article 36 . . . has violated, and continues to violate, the Vienna Convention.”²²⁹ While noting that “‘a distinction must be drawn between [the procedural default] rule as such and its specific application in the present case,’” the ICJ agreed with Mexico that the rule’s application could have precluded Mexican counsel from raising the VCCR violations during the initial trials.²³⁰ If that was the case, the ICJ concluded that the application of the procedural default rules would have prevented courts from giving “full effect” to Article 36’s intended purposes.²³¹

The Supreme Court in *Sanchez-Llamas*, however, nonchalantly dismissed the ICJ’s determination. In emphasizing the importance of procedural default rules, Chief Justice Roberts noted that they apply to all claims—whether arising under the Constitution or a treaty—and thus “‘routinely deny ‘legal significance’ . . . to otherwise viable legal claims.”²³² In fact, according to the Chief Justice, these rules are much more important in an adversarial system like that of the United States—where the law expects the *litigants*, rather than the magistrate, to raise issues—than in an inquisitorial system of many other parties to the VCCR.²³³

Accordingly, the Supreme Court concluded that “[t]he ICJ’s interpretation of Article 36 [was] inconsistent with the basic framework of an adversary system.”²³⁴ This result is unfortunate because, not only does it prolong the United States’ breach under international law and prejudice foreign defendants, who are

(2005) (arguing how the rule from *Charming Betsy* dictates that the VCCR should trump the application of “judge-made doctrine of procedural default”).

227. Vienna Convention on Consular Relations, *supra* note 3, art. 36(2).

228. *Id.* (emphasis added).

229. Case Concerning *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12, 55 (Mar. 31) (quoting Mexico’s third final submission).

230. *Id.* at 56-57 (quoting *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466, 497 (June 27)).

231. *Id.* at 57.

232. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356-57 (2006).

233. *Id.* at 357.

234. *Id.* According to the Court, if the procedural default rules do not apply, then an equally strong argument can be made about denying effect to statutes of limitations or “prohibitions against filing of successive habeas petitions.” *Id.* In the Court’s view, such a reading of the “full effect” proviso would “sweep[] too broadly and would leave no room for Article 36’s other instruction that those rights ‘shall be exercised in conformity with the laws and regulations of the receiving State.’” *Id.*

already vulnerable by the mere fact of being tried in an unfamiliar system, but it also exposes the United States' citizens to similar risks abroad.²³⁵

IV. PROPOSED SOLUTIONS

Having examined the history of Article 36 claims and the way that they are enforced (or not) in U.S. courts, one can see that difficult arguments arise at numerous steps. For an aggrieved individual to receive relief, he or she must (1) demonstrate to the court that the VCCR is self-executing,²³⁶ (2) persuade the court that the rights granted under Article 36 are individually enforceable,²³⁷ (3) show that there is a remedy for the violation,²³⁸ and (4) be able to overcome the application of AEDPA and any procedural defaults.²³⁹ Knowing this, it is not surprising that so many defendants lose their battle at one stage or another.²⁴⁰

A question thus arises: What can be done to remedy this dilemma? To begin with, it must be acknowledged that no one solution can possibly make all the obstacles listed above disappear. A court bent on holding against a defendant can always find a way not to give effect to the *Avena* judgment. Likewise, a court that is sympathetic to a defendant will be able to broadly construe any proposed solution. But prejudiced courts aside, the goal of this Section is to propose several (mostly statutory) solutions that, although not solving the whole dilemma, will move the United States much closer to complying with the *Avena* decision.

To that end, this Comment suggests four distinct solutions. First, Congress can give binding effect to all ICJ judgments through a single implementing legislation. Second, on a narrower level, Congress can simply enact a statute that implements the decision in *Avena*. Third, on an even narrower level, the President can enter into an executive agreement with Mexico to provide for "review and reconsideration" in the fifty one cases adjudicated in *Avena*. Finally, in what might be the most practical way to remedy the VCCR dilemma, Congress can simply amend the Habeas Corpus statute to allow for post-conviction review in federal courts of Article 36 violations.

235. See, e.g., *Medellin II*, 128 S. Ct. 1346, 1391 (2008) (Breyer, J., dissenting) (concluding that the majority's holding will, among other things, weaken the rule of law, "increase the likelihood of Security Council *Avena* enforcement proceedings," worsen relations with Mexico, and put at risk American citizens traveling abroad); Jeffrey Davidow, *Protecting Them Protects Us: Why You Should Care About What Happens to 51 Mexican Nationals on Death Row*, L.A. TIMES, Aug. 4, 2008, at A15 ("A failure to comply with this most basic of treaty commitments would significantly impair the ability of our diplomats and leaders to protect the interests—individual and collective—of Americans abroad.").

236. See *supra* Part III.A.

237. See *supra* Part III.B.

238. See *supra* Part III.C.

239. See *supra* Part III.D.

240. See *supra* notes 70, 126 (listing a myriad of cases where a reviewing court denied relief due to absence of a remedy, procedural default rules, or some other infirmity); see also *Jogi v. Voges*, 480 F.3d 822, 831-32 (7th Cir. 2007) (listing cases where, regardless of whether a private right existed, the courts denied relief based on absence of a remedy).

A. *The Wholesale Implementation Approach—Enacting a Statute Giving Binding Effect to All ICJ Decisions*

In holding that neither the *Avena* judgment by itself nor the President's memorandum constituted binding domestic law, the Supreme Court in *Medellin II* left open the possibility that Congress could give the ICJ decisions wholesale effect through implementing legislation.²⁴¹ Moreover, according to the Court, "Congress is up to the task of implementing non-self-executing treaties The judgments of a number of international tribunals enjoy a different status [precisely] because of [such] implementing legislation."²⁴²

There are three ways that Congress can go about this. First, Congress can simply declare that all judgments by the ICJ are directly enforceable in U.S. courts.²⁴³ To avoid abuse, such enforcement can be made subject to certain requirements such as "unless determined to be clearly erroneous" or unless the court finds that "one of the grounds for refusal or deferral" provided in the statute is applicable.²⁴⁴ Even with such provisions, however, this approach is unlikely to be favored by either the Executive or the Legislative branch because it cedes substantial authority to the ICJ on "politically sensitive judgments."²⁴⁵

The second approach would be for Congress to give the President the authority to enforce ICJ judgments as he or she deems necessary.²⁴⁶ It is unlikely

241. *Medellin II*, 128 S. Ct. 1346, 1365 (2008).

242. *Id.* at 1366. Indeed, the Court noted that "when treaty stipulations are 'not self-executing'"—and the Court concluded that that was the case here—"they can only be enforced pursuant to legislation to carry them into effect." *Id.* at 1368 (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)).

243. *Cf.*, e.g., 9 U.S.C. §§ 201-208 (2006) ("The [U.N.] Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter."); 22 U.S.C. § 1650a(a) (2006) ("An award of an arbitral tribunal rendered pursuant to chapter IV of the [Convention on the Settlement of Investment Disputes] shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention.").

244. *Cf.* 9 U.S.C. § 207 (2006) (providing that, with respect to foreign arbitral awards, "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [corresponding] Convention" (emphasis added)).

245. *Medellin II*, 128 S. Ct. at 1388 (Breyer, J., dissenting) ("Congress is unlikely to authorize automatic judicial enforceability of *all* ICJ judgments, for that could include some politically sensitive judgments and others better suited for enforcement by other branches: for example, those touching upon military hostilities, naval activity, handling of nuclear material, and so forth."); accord *id.* at 1364 (majority opinion) (same); *id.* at 1373 (Stevens, J., concurring in judgment) (same).

246. *Cf.*, e.g., United Nations Participation Act of 1945, 22 U.S.C. § 287c(a) (2006) ("Notwithstanding the provisions of any other law, whenever the United States is called upon by the Security Council to apply measures which said Council has decided, pursuant to article 41 of said Charter, are to be employed to give effect to its decisions under said Charter, the President may, to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any

that this approach will be viewed as an unconstitutional delegation of lawmaking power to the Executive branch.²⁴⁷ However, problems might arise if, for example, the Senate declares that a particular treaty is *non-self-executing* and then later the ICJ determines several issues pertaining to that treaty that would make the treaty more or less *self-executing*. On the one hand, the President should be able to enforce the ICJ judgment by relying on the power given to him or her by Congress.²⁴⁸ On the other hand, by enforcing that judgment, the President will be going against the express will of the “ratifying Senate.”²⁴⁹ In the end, it seems that the later-enacted delegation—Congress’ explicit act of giving President the power to enforce ICJ judgments—should control the Senate’s earlier declaration that the treaty is non-self-executing.

Finally, a more workable approach might be to “make ICJ judgments enforceable upon the expiration of a waiting period that gives the political

property subject to the jurisdiction of the United States.”). To the extent that this could be viewed as an impermissible commandeering of state courts, see discussion of that issue below. *See infra* Part IV.B.

247. The Supreme Court has emphasized that “[t]he fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress and may not be conveyed to another branch or entity.” *Loving v. United States*, 517 U.S. 748, 758 (1996) (citation omitted). Nevertheless, according to the Court, total prohibition against delegation is unwise and thus “Congress must be permitted to delegate to others at least some authority that it could exercise itself.” *Id.* Such delegation will be constitutional “if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.” *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *see also* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“[Congress] must ‘lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform.’” (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (mem.))); *Mistretta v. United States*, 488 U.S. 361, 379 (1989) (requiring “intelligible principles” or other “minimal standards” to be satisfied when Congress delegates).

These principles are most likely satisfied when Congress delegates within the foreign affairs framework. *See, e.g., Goldwater v. Carter*, 444 U.S. 996, 1000 n.1 (1979) (mem.) (Powell, J., concurring) (“The Court has recognized that, in the area of foreign policy, Congress may leave the President with wide discretion that otherwise might run afoul of the nondelegation doctrine.” (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936))); *see also* Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 362-64 (2006) (“The significant message from *Curtiss-Wright* is that, when Congress acts in this field of executive competence, courts properly accord an important degree of latitude in recognizing and interpreting a delegation of authority to the president.”).

248. *See, e.g., Curtiss-Wright*, 299 U.S. 304 (1936) (upholding delegation to the President of the power to regulate arms sales in connection with the armed conflict in Chaco). One of the reasons that *Curtiss-Wright* came out the way it did was because it involved the President’s *foreign affairs* power. *Id.* at 315. To the extent that enforcement of ICJ decisions might involve the President’s *domestic* powers, this will definitely fall within Justice Jackson’s first category because the Congressional delegation will act as express authorization. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”).

249. *See, e.g., Medellin II*, 128 S. Ct. at 1369 (2008) (“When the President asserts the power to ‘enforce’ a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate.”). “None of this is to say, however, that the combination of a non-self-executing treaty and the lack of implementing legislation precludes the President from acting to comply with an international treaty obligation. It is only to say that the Executive cannot *unilaterally* execute a non-self-executing treaty by giving it domestic effect.” *Id.* at 1371 (emphasis added). Arguably, if the President relies on a congressional statute delegating to him the power to enforce ICJ decisions, such enforcement would not be “unilateral.”

branches an opportunity to intervene.”²⁵⁰ This approach appears to be most consistent with *Medellin II*'s articulation of treaty implementation because it can be structured to allow either the President or Congress to intervene if they believe that a specific ICJ judgment should not be implemented.²⁵¹

B. The Judgment-by-Judgment Approach—Enacting a Statute Implementing the Avena Decision

Another approach would be for Congress to legislate on a judgment-by-judgment basis. Specifically, with regard to the VCCR, Congress can pass a statute embracing the *Avena* judgment that would (1) recognize a right to review and reconsideration for those defendants who were not informed of their VCCR rights and (2) supply a remedy by requiring either federal or state courts to provide that review and reconsideration, procedural defaults notwithstanding.²⁵²

It is unlikely that such an approach will be challenged as an impermissible commandeering of state courts by Congress. In *New York v. United States* and *Printz v. United States*, the Supreme Court held that Congress could not commandeer state legislatures to enact or state executives to enforce federal law.²⁵³ The Court, however, explicitly refused to extend the anticommandeering

250. *Medellin II*, 128 S. Ct. at 1374 n.3 (Stevens, J., concurring in judgment); *cf.*, e.g., 16 U.S.C. § 1823 (2006) (“No governing international fishery agreement, bycatch reduction agreement, or Pacific Insular Area fishery agreement shall become effective with respect to the United States before the close of the first 120 days (excluding any days in a period for which the Congress is adjourned sine die) after the date on which the President transmits to the House of Representatives and to the Senate a document setting forth the text of such governing international fishery agreement, bycatch reduction agreement, or Pacific Insular Area fishery agreement.”).

251. *See Medellin II*, 128 S. Ct. at 1369-70 (concluding that when it comes to “giving domestic effect to an international treaty obligation,” the Constitution “requires *joint action* by the Executive and Legislative Branches” (emphasis added)).

252. The possibility of a judgment-by-judgment approach was mentioned in all three opinions in *Medellin II*. *See id.* at 1366 (“Congress knows how to accord domestic effect to international obligations when it desires such a result.”); *id.* at 1374 n.3 (Stevens, J., concurring in judgment); *id.* at 1388 (Breyer, J., dissenting) (noting that, while a judgment-by-judgment approach is available, Congress might not have the time or the will to legislate in that manner). For an attempt at this, see the *Avena Case Implementation Act of 2008*:

(a) Civil Action—Any person whose rights are infringed by a violation by any nonforeign governmental authority of article 36 of the Vienna Convention on Consular Relations may in a civil action obtain appropriate relief.

(b) Nature of Relief—Appropriate relief for the purposes of this section means—

(1) any declaratory or equitable relief necessary to secure the rights; and

(2) in any case where the plaintiff is convicted of a criminal offense where the violation occurs during and in relation to the investigation or prosecution of that offense, any relief required to remedy the harm done by the violation, including the vitiation of the conviction or sentence where appropriate.

(c) Application—This Act applies with respect to violations occurring before, on, or after the date of the enactment of this Act.

Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong. § 2 (referred to the H. Comm. on the Judiciary, July 14, 2008).

253. *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).

principle to state judiciaries.²⁵⁴ Noting that state courts “appl[y] the law of other sovereigns all the time,”²⁵⁵ the Court concluded that such “commandeering” would be permitted by the Supremacy Clause.²⁵⁶

However, even where commandeering is allowed, there is still some uncertainty as to whether Congress can override conflicting state *procedural* rules. On the one hand, the Supreme Court in *Mondou v. New York, New Haven, & Hartford Railroad Company* stated that:

The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of [an individual state] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of [that] state.²⁵⁷

On the other hand, in *Howlett v. Rose*, the Court clarified that “a state court [can] refuse[] jurisdiction because of a *neutral state rule* regarding the administration of the courts.”²⁵⁸ According to the Court, “[t]he general rule [here], ‘bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.’”²⁵⁹

254. *Printz*, 521 U.S. at 907 (“[T]he Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.”); *New York*, 505 U.S. at 178 (noting “the well established power of Congress to pass laws enforceable in state courts”).

255. *New York*, 505 U.S. at 178-79.

256. *Printz*, 521 U.S. at 907; *see also* *Testa v. Katt*, 330 U.S. 386, 391-93 (1947) (“[A] state court cannot ‘refuse to enforce the right arising from the law of the United States because of conception of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.’” (quoting *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 222 (1916))).

257. *Mondou v. N.Y., New Haven, & Hartford R.R. Co.*, 223 U.S. 1, 57 (1912); *see accord* *Felder v. Casey*, 487 U.S. 131, 138 (1988) (“No one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts. By the same token, however, where state courts entertain a federally created cause of action, the ‘federal right cannot be defeated by the forms of local practice.’ The question . . . , therefore, is essentially one of pre-emption” (citation omitted)); *Dice v. Akron Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952) (noting that state courts are bound to apply federal procedures that are “part and parcel” of the federal right (quoting *Bailey v. Cent. Vt. Railway, Inc.*, 319 U.S. 350, 354 (1943))). Thus, because the right provided by the Congressional act will be *federal*, the state courts will be bound to apply the review and reconsideration as “part and parcel” of that right.

258. *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (emphasis added). A neutral rule is one that “is simply part of ‘the vast body of procedural rules, rooted in policies unrelated to the definition of any particular substantive cause of action, that forms no essential part of “the cause of action” as applied to any given plaintiff.’” *Felder*, 487 U.S. at 145 (citation omitted). This Comment does not dispute that, to the extent that they are applied consistently and without regard to the particular case at hand, state procedural default rules that typically bar VCCR claims fall within this definition.

259. *Howlett*, 496 U.S. at 372 (quoting Henry M. Hart, Jr., *The Relations Between State and Federal*

The reach of such state rules, however, is not unlimited. “States may apply their own neutral procedural rules to federal claims, *unless* those rules are preempted by federal law.”²⁶⁰ Such preemption must be express.²⁶¹ Thus, in order to override state procedural default rules in the context of VCCR claims, Congress would need to expressly consider the issue and explicitly state that such “review and reconsideration” ordered by the statute is to be performed *notwithstanding any procedural default bars*. If that happens, a court should uphold Congress’ action as constitutional.

C. *The Dames & Moore / Garamendi Approach—Negotiating an Executive Agreement with Mexico*

Another approach would be for the President to negotiate an executive agreement with Mexico obligating the United States to give “review and reconsideration” to the fifty-one cases adjudged in *Avena*. Although Article II requires that treaties be made with “Advice and Consent of the Senate,”²⁶² the Supreme Court has recognized that the President also has authority to make sole executive agreements with other countries.²⁶³ Such authority, however, “‘must stem either from an act of Congress or from the Constitution itself.’”²⁶⁴

In the past, the Court has been lenient in finding that the President has the requisite authority.²⁶⁵ In *Medellin II*, however, the Court seemed to limit this practice.²⁶⁶ According to the Court, only Congress can transform “an international

Law, 54 COLUM. L. REV. 489, 508 (1954)).

260. *Id.* (emphasis added).

261. *See, e.g., id.* at 375 n.19 (“‘It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in [this] Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse.’” (quoting *Douglas v. N.Y., New Haven & Hartford R.R. Co.*, 279 U.S. 377, 387-88 (1929))). In analogous contexts, the Supreme Court has required that Congress’ intention be “clear and manifest.” *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (“Congress should make its intention clear and manifest if it intends to pre-empt the historic powers of the States In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” (internal quotation marks and citations omitted)).

262. U.S. CONST. art. II, § 2.

263. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003); *Dames & Moore v. Regan*, 453 U.S. 654, 679, 682-83 (1981); *United States v. Pink*, 315 U.S. 203, 223, 229-30 (1942); *United States v. Belmont*, 301 U.S. 324, 330-31 (1937).

264. *Dames & Moore*, 453 U.S. at 668 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)).

265. *See, e.g., Garamendi*, 539 U.S. at 424 & n.14 (“[T]he President possesses considerable independent constitutional authority to act on behalf of the United States on international issues” (citing *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381 (2000))). *But see* Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1576-77 (2007) (arguing against broad executive power to bind states through sole executive agreements and concluding that *Dames & Moore* was based on the “settlement of claims” power, while *Pink* and *Belmont* were based on the “act of state” doctrine).

266. *See Medellin II*, 128 S. Ct. 1346, 1367-72 (2008).

obligation arising from a non-self-executing treaty into domestic law.”²⁶⁷ When the President attempts to unilaterally “enforce” a non-self-executing treaty, “he acts in conflict with the implicit understanding of the ratifying Senate” and must find independent constitutional authority for his action.²⁶⁸

It must be noted, however, that *Medellin II* did not deal with sole executive agreements. Instead, the focus was on a memorandum issued by the President directing state courts to comply with the ICJ’s decision in *Avena*.²⁶⁹ Nevertheless, the Court’s discussion of *Dames & Moore* and *Garamendi*, albeit dicta, did not leave much hope that the Court would have upheld a sole executive agreement even if one had existed in that case.²⁷⁰

D. *The Habeas Approach—Amending the Habeas Corpus Statute to Allow for Review by Federal Courts*

Finally, to deal with the bars due to AEDPA, Congress can amend the Habeas Corpus statute to provide for “review and reconsideration” of VCCR claims in federal courts.²⁷¹ Such a task is indisputably within Congress’ power.²⁷² Furthermore, such an approach would also be in line with the Supreme Court’s

267. *Id.* at 1368. Thus, curiously, it appears that it is easier for the President to act completely on his own (as when he concludes an executive agreement) than it is when there already exists a non-self-executing treaty. With no act of Congress or prior treaty hindering him, the President’s action in such a case would at the very least fall in Justice Jackson’s second category. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”); *see accord* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 reporters’ note 12 (1987).

Indeed, Presidents in the past have not shied away from using executive agreements (including sole executive agreements) more often than Article II treaties. *See* STEPHEN C. MCCAFFREY, UNDERSTANDING INTERNATIONAL LAW 131 n.355 (2006) (noting that, as of 1983, “there were 906 treaties and 6571 executive agreements to which the United States was a party” (citation omitted)).

268. *Medellin II*, 128 S. Ct. at 1367 & n.13, 1368-69. In *Medellin II*, the Court concluded that President Bush did not possess any treaty-based or independent constitutional authority to enforce the *Avena* judgment. *Id.* at 1369-72.

269. *Id.* at 1355; *see also id.* at 1367 n.13 (limiting the scope of the decision).

270. *Id.* at 1371-72 (noting that “[t]he claim-settlement cases involve a narrow set of circumstances” and are unlikely to provide support for unilateral executive action that attempts to “compel[] state courts to reopen final criminal judgments and [to] set aside neutrally applicable state laws”).

271. *See, e.g., Brook, supra* note 14, at 595-96 (suggesting that Congress amend the Habeas Corpus statute “to (1) give federal courts jurisdiction to hear procedurally defaulted [VCCR] claims and (2) empower the district courts to order a new trial or new sentencing phase where a VCCR violation has occurred”); Carter, *supra* note 14, at 277-78 (noting that an amendment to the federal Habeas Corpus statute would allow individuals “to gain access to federal habeas corpus either through exhausting state remedies first or through basing a claim on a law that requires a hearing or review”).

272. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (“[W]e have long recognized that ‘the power to award the writ by any of the courts of the United States[] must be given by written law,’ and we have likewise recognized that judgments about the proper scope of the writ are ‘normally for Congress to make.’” (quoting *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) and *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996))).

requirement that Congress, and not the President, “implement” the *Avena* judgment.²⁷³

Although there are a number of ways Congress can amend the Habeas Corpus statute to achieve the desired result, one straightforward approach seems to have been provided by Professor Linda Carter in her 2005 law review article.²⁷⁴ There, she suggests adding the following subsection (new material is underlined) to Section 2254(b)(1)²⁷⁵:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant; or

(C) the applicant is raising a claim, whether or not raised in state court, that is based on the Constitution or laws or treaties of the United States, and which requires a hearing, or review and reconsideration of the conviction and sentence, on the alleged violation.²⁷⁶

This addition will not result in a radical change to federal courts’ habeas jurisdiction because it necessarily requires that the new claim (1) be “based on the Constitution or laws or treaties” and (2) must require a hearing or “review and reconsideration.”²⁷⁷ To the contrary, there might be some concern that it does not go far enough.²⁷⁸ Overall, however, it does present one of the simplest and potentially effective solutions for bringing the United States closer to complying with the *Avena* judgment.²⁷⁹

273. *Medellin II*, 128 S. Ct. at 1366-69.

274. Carter, *supra* note 14, at 277-78.

275. 28 U.S.C. § 2254(b)(1) (2000).

276. See Carter, *supra* note 14, at 277-78.

277. *Id.*

278. For example, Professor Carter’s approach does not seem to resolve the controversy over whether a VCCR claim constitutes an individually enforceable right, thus potentially allowing courts to still dismiss such claims despite the amendment. Cf. *United States v. Jimenez-Nava*, 243 F.3d 192, 197-98 (5th Cir. 2001) (concluding that Article 36 does not create enforceable individual rights); *United States v. Emuegbunam*, 268 F.3d 377, 391-94 (6th Cir. 2001) (same). Moreover, depending on the language of the amendment, it may or may not address the analogous issue of procedural defaults.

279. Carter, *supra* note 14, at 278.

V. CONCLUSION

A decade after *Breard*, despite the predominantly adverse rulings against the defendants who raise Article 36 claims, there is nevertheless room for hope. As seen from both the ICJ and the Supreme Court cases, the United States has come far over the past ten years. Efforts by the Executive have been directed at educating state and federal law enforcement officers about the VCCR.²⁸⁰ At the same time, the judiciary has struggled to determine whether the VCCR provides for individually enforceable rights and to define what remedy, if any, could be afforded to the aggrieved individuals. However, with President Bush pulling out of the Optional Protocol²⁸¹ and with the Supreme Court announcing that the *Avena* judgment has no binding domestic effect,²⁸² the progress in the United States might have ran out of breath.

Now is the time for that proverbial second wind. As noted by the Supreme Court in *Medellin II*, Congress has both the power and the means to implement a prior non-self-executing treaty or to make an ICJ decision binding within the United States.²⁸³ Congress can no longer stay in the shadows and shun its responsibility. Any of the proposed statutory solutions in Part IV would bring the United States closer to complying with the *Avena* judgment. Moreover, only by protecting foreign nationals at home can United States expect reciprocity towards its own citizens living or traveling abroad.²⁸⁴

As the Supreme Court famously stated more than a century ago: “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”²⁸⁵ In an increasingly globalized world, it is imperative for a leading nation to show that international law deserves more than “respectful consideration.”²⁸⁶

280. See, e.g., Consular Notification and Access, *supra* note 17 (a booklet by the State Department providing, among other things, “instructions and guidance [for all federal, state, and local officials] relating to the arrest and detention of foreign nationals”); U.S. Dep’t of State, Consular Notification Pocket Card, <http://travel.state.gov/pdf/CNApocketcard.pdf> (last visited Apr. 5, 2008) (on file with the *McGeorge Law Review*) (depicting a copy of a card, similar to the *Miranda* warning, that “summarizes for law enforcement officials the basic consular notification procedures to follow upon the arrest or detention of a foreign national”); see also *Mora v. New York*, 524 F.3d 183, 199 n.22 (2d Cir. 2008) (describing extensive efforts by U.S. federal authorities “to raise awareness of, and secure adherence to, the terms of the Convention at all governmental levels”).

281. Letter from Condoleeza Rice, *supra* note 52.

282. *Medellin II*, 128 S. Ct. 1346, 1367 (2008).

283. *Id.* at 1365-66, 1368-69.

284. See *id.* at 1391 (Breyer, J., dissenting) (suggesting that the Court’s decision could put at risk American citizens who are arrested while traveling abroad); Davidow, *supra* note 235 (a statement by former U.S. ambassador on negative implications of *Medellin II* with respect to providing help to Americans arrested abroad).

285. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

286. *Medellin II*, 128 S. Ct. at 1361 n.9.

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