

THE VIENNA CONVENTION ON CONSULAR RELATIONS: AFTER THE
FEDERAL COURTS' ABDICATION, WILL STATE COURTS FILL IN THE
BREACH?

By Asa Markel*

I. INTRODUCTION

Twice in the past two years the United States Supreme Court has confronted two issues concerning the Vienna Convention on Consular Relations¹ (“VCCR”): compliance of state law enforcement officials with the VCCR and the tension between state criminal procedural rules and the VCCR. At least four cases heard by the Court since 1998 have involved alleged violations of the VCCR by state officials; two of which involved claims brought by foreign governments. Additionally, all four cases of alleged violations found their way into three separate suits by three different foreign governments against the United States in the International Court of Justice (“ICJ”). One of the first American appellate decisions on the subject expressed “disenchantment” with state officials’ conduct in violating the VCCR, observing that “[t]here are disturbing implications in that conduct for larger interests of the United States and its citizens.”² However, the Supreme Court’s latest decision, *Sanchez-Llamas v. Oregon*,³ does very little to counter these disturbing implications.

In light of the Court’s most recent decision on the subject, this article seeks to summarize the current domestic legal status and availability of the right of a foreign national under international law, as embodied in Article 36 of the VCCR, to be advised

* Attorney and solicitor with the law firm of Shorall McGoldrick Brinkmann (J.D., University of Arizona).

¹ Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, 1973 Gr. Brit. T.S. No. 14 (Cmnd. 5219), J.O. Apr. 18, 1971, 1971 Recueil des traités, No. 34 (Fr.) [hereinafter VCCR].

² Rep. of Para. v. Allen, 134 F.3d 622, 629 (4th Cir. 1998).

³ 126 S. Ct. 2669 (2006).

upon arrest in the United States by local law enforcement officials of his or her right to have access to consular assistance and advice. As will be seen, the problem in the United States appears largely confined to state law enforcement compliance with the VCCR, rather than compliance by federal law enforcement officials. Thus, the wider legal and political issue for American jurists to consider is the effect on the federal government's foreign relations due to state governments' recurring failure to give effect to the rights established under the VCCR. Moreover, the present impasse on the issue of Article 36 compliance appears to originate from the restrictions imposed on the federal courts' ability to review alleged violations by state law enforcement officials and concomitant defects in state criminal proceedings. However, the Supreme Court's recent decision in *Sanchez-Llamas* appears to read the VCCR to exonerate such a state of affairs. Nevertheless, there is reason to be concerned that these domestic legal developments (or lack thereof) will have more far-reaching effects for Americans living and working abroad, as well as foreigners arrested by state law enforcement officials in this country.

II. THE CONSULAR NOTIFICATION RIGHT AND STATE COMPLIANCE

The VCCR, along with the Vienna Convention on Diplomatic Relations⁷ and the Convention on the Prevention and Punishment of Crimes Against Internationally

⁷ Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, 1965 Gr. Brit. T.S. No. 19 (Cmnd. 2565), J.O. Apr. 17, 1971, 1971 Recueil des traités, No. 32 (Fr.) [hereinafter VCDR].

Protected Persons, Including Diplomatic Agents (“CPPC”),⁸ forms the core of international law concerning diplomatic and consular rights and obligations between nation states.⁹ The United States and 169 other nations have signed and ratified the VCCR.¹⁰ Article 36 of the VCCR provides three essential rights with respect to consular access: the right of consular officials to have “access to” and “to communicate” with their nationals within the host state;¹¹ the right of consular officials to have access to their nationals in “prison, custody, or detention” in the host state;¹² and the right of foreign nationals who have been arrested in the host state to be informed of their rights to consular access “without delay.”¹³ Indeed, some bilateral consular treaties *require* the host state to inform the foreign state’s consular officials of the arrest of one of its nationals.¹⁴ The importance of this right of consular notification to national governments is emphasized by its acknowledgment not only in the VCCR¹⁵ and the mandatory notification provisions of bilateral consular treaties, but also in the CPPC.¹⁶

⁸ Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167, 1980 Gr. Brit. T.S. No. 3 (Cmnd. 7765), J.O., Oct. 16, 2003, p. 17597 (Fr.) [hereinafter CPPC]. The federal government has specifically codified offenses against foreign officials and other internationally protected persons under domestic criminal law. *See, e.g.*, 18 U.S.C. §§ 112, 1116 (2006).

⁹ This presumption is evident from the United States Code, where no specific enabling provision domesticates the VCCR. However, Congress has determined to allow foreign missions within the United States to enjoy the privileges and immunities of the VCCR even if they are not parties to that treaty, evidencing that treaty’s status as the yardstick for diplomatic law. *See* 22 U.S.C. § 254b (2006).

¹⁰ *Sanchez-Llana v. Oregon*, 126 S. Ct. 2669, 2674 (2006).

¹¹ VCCR, *supra* note 1, art. 36(1)(a).

¹² VCCR, *supra* note 1, art. 36(1)(c).

¹³ VCCR, *supra* note 1, art. 36(1)(b).

¹⁴ *See, e.g.*, Consular Convention, U.S.-U.K., art.16, June 6, 1951, 3 U.S.T. 3426, 1958 Gr. Brit. T.S. No. 37 (Cmnd. 524); Consular Convention, U.S.-U.S.S.R., art. 12, June 1, 1964, 19 U.S.T. 5018.

¹⁵ Consular representation is of such importance that the Member States of the European Union and Commonwealth of Nations have specifically undertaken to provide reciprocal consular representation for nationals of other member states wherever a European or Commonwealth citizen’s own government does not have adequate consular facilities. *See* Council Decision 95/553, 1995 O.J. (L 314) 73 (EC); MARGARET P. DOXEY, *THE COMMONWEALTH SECRETARIAT AND THE CONTEMPORARY COMMONWEALTH* 104 (St. Martins Press 1989) (discussing Ottawa Commonwealth Heads of Government Meeting (CHOGM) of 1973). Countries within the Commonwealth have also agreed that where a Commonwealth citizen’s government has no adequate consular representation, the host government will provide consular services. *Id.* Indeed, the United States has expressed a clear interest in the rights of its citizens imprisoned

The importance of consular access for American citizens traveling abroad has been acknowledged again and again by both judicial and political commentators. In his dissenting opinion in *Sanchez-Llamas* Justice Breyer noted that the object of the Article 36 “is to assure consular communication and assistance to such nationals, who may not fully understand the host country’s legal regime or even speak its language.”¹⁷ Justice Breyer then, quoting from State Department materials, stated, “one of the basic functions of a consular office has been to provide a ‘cultural bridge’ between the host community and the [U.S. national]. No one needs that cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail.”¹⁸ The State Department has specifically stated:

The right of governments, through their consular officials, to be informed promptly of the detention of their nationals in foreign states, and to be allowed prompt access to those nationals, is well established in the practice of civilized nations Detained foreign nationals are inevitably distressed by the prospect of securing and preserving their rights in a legal system with whose institutions and rules they are not familiar The consul, while fully complying with the law of the detaining state, is able to assist these nationals in securing and preserving their rights, often by helping them to obtain local counsel. The consul’s presence may also help assuage the distress of detained nationals.¹⁹

Among the services U.S. consuls provide that relate directly to legal proceedings are:

- (1) providing a list of attorneys who are familiar with the kinds of law relevant to the detainee’s case;
- (2) removing names of “dishonest, incompetent, or inattentive” attorneys from the list;
- (3) monitoring the well-being of the detainee;
- (4) protesting discrimination against the

abroad. *See, e.g.*, 22 U.S.C. § 1732 (2006) (President has duty to demand and effectuate release of Americans wrongfully imprisoned abroad).

¹⁶ CPCC, *supra* note 8, art. 6(2) (foreign national arrested for crime against internationally protected person specifically accorded right to consular notification).

¹⁷ *Sanchez-Llama v. Oregon*, 126 S. Ct. 2669, 2691 (2006) (Breyer, J., dissenting).

¹⁸ *Id.* at 2692 (*quoting* 7 Foreign Affairs Manual § 401 (1984)).

¹⁹ Telegram 40298 from U.S. Dept. of State to Embassy in Damascus (Feb. 21, 1975) in Lawyers Committee for Human Rights, *Memorandum of Nov. 29, 2001 re: Consular Notification & Access*, 2-3, available at <http://www.cdt.org/security/011129Ichr.pdf> [hereinafter “LCHR”].

detainee; and (5) attending the trial, even in the absence of discrimination.²⁰

Along the same lines, denying a foreign national detained in this country the “cultural bridge” provided by his or her consulate, “deprives the foreign national of equality of legal process and the ability to mount a proper defense.”²¹ From a domestic view, the problem has largely been seen as one of ineffective assistance of counsel.²² Yet, the right to consular access implicates additional dimensions in the realm of criminal defense. In at least one Texas criminal case, the U.S. Supreme Court’s remand of the case for reconsideration of the sentence cast light on the importance and effectiveness of consular assistance to the defendant.²³ In that case, the Argentine Consul General specifically worked toward the eventual replacement of the lead defense counsel.²⁴

These concerns are pertinent not only to American tourists, but also:

United States citizens are scattered around the world as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example.²⁵

Presently, concerns about compliance with the VCCR in the United States arise almost entirely from the actions of *state* officials. The federal government has enacted regulations specifically requiring that notification of consular rights be given to foreign

²⁰ *Id.* at 3.

²¹ M. Todd Parker, “Review and Reconsideration:” *In Search of a Just Standard of Review for Violations of Article 36 of the Vienna Convention on Consular Relations*, 12 U.C. DAVIS J. INT’L L. & POL’Y 225, 244 (2006) (quoting 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, 601 (1997)). Consular access would allow the defendant, whose family resides in another country, the ability to communicate with his family, to obtain mitigating evidence for the penalty phase of trial, and obtain medical history if applicable. *Id.*

²² See Sanchez-Llamas, 126 S. Ct. at 2686 n.6; *id.* at 2690 n.3 (Ginsburg, J., concurring).

²³ Saldano v. Texas, 530 U.S. 1212 (2000).

²⁴ Margaret Mendenhall, Note & Comment, 8 Sw. J.L. & Trade Am. 335, 350 (2001-2002).

²⁵ Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring) (quoted in LCHR, *supra* note 19, at 3).

nationals who are arrested, whether by law enforcement or immigration officials.²⁶ The State Department has also published specific instructions on the notification of consular rights for federal, state, and local law enforcement use.²⁷ However, only California appears to have given any serious thought to the issue of compliance by law enforcement officials with the VCCR.²⁸ In the meantime, judicial commentators have voiced alarm at the number of consular rights violations often admitted by state officials.²⁹

The problem of state compliance with federal treaties is not a new one. The United States Constitution itself was born out of an era in which the federal government was unable to effectively enter into treaties because of the various state governments' non-compliance with existing treaty obligations.³⁰ The most prominent cases during that era involved state legislatures' unwillingness to abide by the terms of the Treaty of Peace of 1783 between the United States and Great Britain, wherein British creditors' rights against American debtors were to be safeguarded.³¹ With the national government unable to operate on the international level, the framers of the Constitution fashioned the treaty power so that treaties entered into by the United States would be the "supreme law of the land," and thus binding the states.³² From the earliest days of the Constitution, the Supreme Court has upheld the supremacy of federal treaties over conflicting state

²⁶ *E.g.*, 28 C.F.R. § 50.5 (2006) (DOJ law enforcement personnel required to give notice of consular rights to arrested alien); 8 C.F.R. § 236.1(e) (2006) (DHS officials required to give notice of consular rights to detained alien); 8 C.F.R. § 1236.1(e) (2006) (consular rights notification required in proceedings before Executive Office of Immigration Review).

²⁷ *See, e.g.*, Dept. of State Publication: *Consular Notification & Access: Instructions for Federal, State, and Local Law Enforcement & Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them* (1998), available at http://travel.state.gov/pdf/CNA_book.pdf; LCHR, *supra* note 19, at 5.

²⁸ *See* CAL. PENAL CODE § 834c (2006) (requiring notification to alien arrestee of VCCR access rights).

²⁹ *See* *Medellin v. Dretke*, 544 U.S. 660, 673 (2005) (O'Connor, J., dissenting); *U.S. v. Emuegbunam*, 268 F.3d 377, 391 (6th Cir. 2001) (discussing cases involving state violations of the VCCR).

³⁰ *See* Brief of Former United States Diplomats as Amici Curiae Supporting Petitioner at 21-29, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928), for an excellent discussion of this issue.

³¹ *See id.*

³² *See id.*; U.S. CONST. art. VI.

statutes.³³ Accordingly, there should be no question that the VCCR is binding upon state officials.³⁴

III. FEDERAL COURT REVIEW OF STATE VCCR VIOLATIONS

A. Overview

As a matter of constitutional law, the federal courts are well positioned to correct treaty violations that have not been adequately addressed by the state courts. For example, the Supreme Court has the authority to directly review the decisions of state supreme courts on issues of federal law by way of the writ of certiorari.³⁵ However, where state officials have not notified an alien criminal defendant of his or her rights under the VCCR, the factual basis of a VCCR violation claim will likely not have been developed in state court.

Federal habeas corpus review of state officials' violations of the VCCR has been the central forum for American jurisprudence on the rights of alien defendants under the VCCR. Accordingly, this article will focus on constraints placed on the federal habeas review of state court criminal convictions. Currently, federal habeas review appears to be hampered by two domestic procedural constraints: procedural default rules and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").³⁷ Both constraints have featured prominently in the Court's VCCR jurisprudence.

³³ *See id.* (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 235, 236-37 (1796)).

³⁴ The parties in *Sanchez-Llamas* conceded that the VCCR was "self-executing" so that no act of Congress was necessary for it to have domestic effect and be enforceable in American courts. 126 S. Ct. 2669, 2694 (2006) (Breyer, J., dissenting). However, the self-executing nature of a treaty does not solve the problem of whether a criminal defendant has standing to complain of a VCCR violation.

³⁵ 28 U.S.C. § 1257 (2006).

³⁷ Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Under the AEDPA, federal habeas review is no longer permitted unless the petitioner can demonstrate that the state court proceedings resulted in a decision contrary to “clearly established Federal law, as determined by the Supreme Court of the United States.”³⁸ Where the federal district court denies the habeas petition, federal appellate courts do not have jurisdiction to pass upon the merits of the petition until the issuance of a certificate of appealability (“COA”),³⁹ which it may not issue unless the petitioner demonstrates a violation of a *constitutional* right.⁴⁰

The problem for alien criminal defendants, who have not been informed of their rights under the VCCR, is that normally neither they, nor their attorneys, are aware that such a violation has occurred.⁴¹ As a result, the defendant will not have raised the VCCR violation during state trial or appellate proceedings.⁴² So, direct review of a state supreme court’s decision by the Supreme Court of any VCCR claim would be futile, because such a claim will not appear in the reviewable appellate record. Often, the defendant invokes the VCCR only as part of the habeas proceedings in federal court, at which time the procedural default rule applies to bar argument on the issue.⁴³ The procedural default rule bars federal habeas review of issues that were not raised in state courts.⁴⁴ One of the major questions in cases of VCCR violations is whether the United

³⁸ 28 U.S.C. § 2254(d)(1) (2006). Otherwise, the petitioner faces the considerable hurdle of showing that state court criminal proceedings “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2) (2006).

³⁹ 28 U.S.C. § 2253(c)(1) (2006). *See, e.g.,* Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003).

⁴⁰ 28 U.S.C. § 2253(c)(2) (2006) (COA requires “substantial showing of the denial of a constitutional right”). *See e.g.,* Miller-El, 537 U.S. at 327.

⁴¹ *See* LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 476-77 (June 27).

⁴² *See, e.g.,* Sanchez-Llamas, 126 S. Ct. 2669, 2676-77 (2006); Breard v. Pruett, 134 F.3d 615, 625 (4th Cir. 1998); LaGrand v. Stewart, 133 F.3d 1253, 1261 (9th Cir. 1998).

⁴³ *See, e.g.,* LaGrand, 133 F.3d at 1261.

⁴⁴ *See* Breard v. Greene, 523 U.S. 371, 375, 118 S. Ct. 1352, 1355 (1998) (*citing* Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497 (1977)).

States' obligation to give "full effect" to Article 36 consular rights⁴⁵ trumps the considerable restrictions on federal habeas review imposed by AEDPA. Unfortunately, before a defendant can even address that argument, in most cases, the procedural default rules have already foreclosed discussion of the VCCR in federal court.⁴⁶

B. The Procedural Default Rule

Concerning Article 36 of the VCCR, there is potential conflict between the treaty's statement that the rights contained therein "shall be exercised in conformity with the laws and regulations of the receiving State" and the clear condition that "said laws and regulations must enable full effect to be given" to rights under the VCCR.⁴⁷ The Supreme Court first addressed this potential conflict in *Breard v. Greene*, where a Paraguayan national failed to raise VCCR violations until his federal habeas petition.⁴⁸ The Court in *Breard* appears to have downplayed the conditional clause and relied primarily upon the provision stating VCCR rights were to be exercised in conformity with the procedural law of the forum. The Court found that the procedural default rule barred discussion of VCCR violations during federal habeas proceedings by relying upon its earlier jurisprudence on treaty interpretation which found that "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."⁴⁹ Nevertheless, the Court conceded that "we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such,"⁵⁰ and observed that

⁴⁵ See VCCR, *supra* note 1, art. 36(1)(b)(2).

⁴⁶ See, e.g., *Medellin v. Dretke*, 371 F.3d 270, 279 (5th Cir. 2004) (per curiam).

⁴⁷ See VCCR, *supra* note 1, art. 36(2).

⁴⁸ 523 U.S. 371, 373 (1998).

⁴⁹ *Id.* at 375.

⁵⁰ *Id.*

“[i]t is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier.”⁵¹

In the end, the ICJ did not address the international legal implications of the *Breard* case, because the United States and Paraguay settled their differences and stipulated to the dismissal of the ICJ proceedings.⁵² However, domestic courts were left to rely on *Breard* for guidance concerning VCCR violations in criminal proceedings. The Supreme Court itself relied on *Breard* in dismissing Germany’s 1999 domestic lawsuit against the United States and the State of Arizona.⁵³ However, that case turned on a separate holding of *Breard* that had reiterated the sovereign immunity of the United States and the Eleventh Amendment bar of suits against a state in federal court.⁵⁴ Germany’s domestic lawsuit involved consular rights violations against two German nationals in Arizona, which the defense had not raised in state court before seeking federal habeas review.⁵⁵ Nevertheless, Germany’s international suit against the United States in the ICJ resulted in a judgment that the procedural default rule violated the United States’ VCCR obligations, where no meaningful review was given.⁵⁶ Before the

⁵¹ *Id.* at 378.

⁵² Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 426 (Order of Nov. 10).

⁵³ F.R.G. v. U.S., 526 U.S. 111, 112, 119 S. Ct. 1016, 1017 (1999).

⁵⁴ *Id.* The Eleventh Amendment has been an impediment in several domestic VCCR enforcement actions by foreign states in federal courts. *See, e.g.*, Rep. of Para. v. Allen, 134 F.3d 622, 629 (4th Cir. 1998); Mex. v. Woods, 126 F.3d 1220 (9th Cir. 1997). There do not appear to be any similar suits by foreign governments in state courts. However, the prospect remains open provided that the hurdle of a forum state’s sovereign immunity can be overcome. *Compare* 28 U.S.C. §§ 1350 (district courts have original jurisdiction over international tort claims by aliens), *and* 1351 (district courts have exclusive jurisdiction over cases where foreign consul or diplomat is defendant), *with* Lamont v. Travelers Ins. Co., 24 N.E.2d 81, 83 (N.Y. 1939) (foreign governments may request vindication of rights in state court).

⁵⁵ *See* LaGrand v. Stewart, 133 F.3d 1253, 1261 (9th Cir. 1998), *cert. denied*, LaGrand v. Arizona, 526 U.S. 1001, 119 S. Ct. 1137 (1999). The underlying state court proceedings involved questions of purely domestic law. *See* State v. LaGrand (Walter), 153 Ariz. 21, 734 P.2d 563 (1987); State v. LaGrand (Karl), 152 Ariz. 483, 733 P.2d 1066 (1987), *cert. denied*, LaGrand v. Arizona, 484 U.S. 872, 108 S. Ct. 206 (1987).

⁵⁶ LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 497-98, 515-16 (June 27).

Supreme Court could revisit the issue, Mexico obtained another ICJ judgment against the United States directing that the VCCR required review for possible prejudice, regardless of domestic procedural default rules.⁵⁷

The issue of VCCR violations took center stage again in the case of one of the Mexican nationals on whose behalf Mexico had sued the United States in the ICJ.⁵⁸ In *Medellin v. Dretke*, the Fifth Circuit was confronted with a defendant whose VCCR violation claims had already been barred by the procedural default rule in *state* habeas proceedings, prior to the denial of his petition for federal habeas relief.⁵⁹ The petitioner argued that since the Supreme Court's opinion in *Breard*, the ICJ had not only determined that procedural default should not be a complete bar to post-conviction review of VCCR rights violations, but also had specifically held that post-conviction review should be considered for this particular petitioner (and others on whose behalf Mexico had sued).⁶⁰ International law apparently moved more quickly than domestic jurisprudence, as prophesied in Lord Denning's famous admonition that, in matters of international law, lower courts need not always wait for the higher courts to change the rule.⁶¹ However, the Fifth Circuit decided that the *Breard* opinion prevented it from granting the COA necessary for Medellin's federal habeas petition to go forward.⁶²

⁵⁷ Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 65, ¶ 138 (Mar. 31).

⁵⁸ *Medellin v. Dretke*, 371 F.3d 270, 279 (5th Cir. 2004).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] Q.B. 529, 554 (Eng. C.A.). In Lord Denning's famous words: "International law knows no rule of *stare decisis*. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change-and apply the change in our English law-without waiting for the House of Lords to do it." *Id.* One of his colleagues on the English Court of Appeal came to Lord Denning's aid, observing that for international commercial actors who rely on predictable judicial outcomes: "Lastly, there must be a greater risk of confusion if precepts discarded outside England by a majority (or perhaps all) of civilized states are preserved as effective in English courts in a sort of judicial aspic." *Id.* at 579 (per Shaw, L.J.). Those familiar with Lord Denning's distinguished career may also recall his "one-man crusade" to alter the

The Supreme Court accepted review of Medellín's case, where the issues to be decided revolved around the domestic effect of the ICJ's interpretations of the VCCR as a matter of comity, *stare decisis*, and *res judicata*.⁶³ In the end, the Supreme Court managed to avoid these politically sensitive questions when President George W. Bush issued a memorandum directing state courts to give effect to the ICJ's judgment in favor of Mexico.⁶⁴ The Texas Court of Criminal Appeals followed the presidential directive and granted a last minute habeas review. The Supreme Court deferred to this decision, finding that "state proceeding may provide Medellín with the review and reconsideration of his Vienna Convention claim that the ICJ required, and that Medellín now seeks in this proceeding."⁶⁵ With the Supreme Court's dismissal of the writ of certiorari in his case, the state court will decide Medellín's Vienna Convention claims.⁶⁶

Finally, in *Sanchez-Llamas*, the Supreme Court took the VCCR head on. The Court rejected the ICJ's requirement to disregard procedural default rules where necessary, and instead based its decision upon the text of the treaty itself and the supposed intentions of the treaty parties. The Court held fast to its earlier opinion in *Breard* and came to the conclusion that (1) it was not bound by the decisions of the ICJ,⁶⁷

doctrine of *stare decisis* in domestic jurisprudence as well. See *Davis v. Johnson*, [1979] A.C. 264, 325 (U.K.H.L.) (per Lord Diplock).

⁶² Medellín, 371 F.3d at 274. The panel also determined that it was bound by an earlier *en banc* opinion by the same circuit in the case of *U.S. v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir. 2004), finding that the VCCR did not provide any rights to individuals in U.S. courts. Medellín, 371 F.3d at 280.

⁶³ See Medellín v. Dretke, 544 U.S. 660, 661-62 (2005).

⁶⁴ *Id.* at 663.

⁶⁵ *Id.* at 664. The state court proceedings are still pending. See *Ex parte Medellín*, 2005 WL 1532996 (Tex. Crim. App. June 22, 2005).

⁶⁶ See *id.* at 667.

⁶⁷ The majority in *Sanchez-Llamas* devoted a great deal of space to justifying its refusal to apply pertinent ICJ precedent. There is no question that neither the U.S. Constitution, the Statute of the I.C.J., 59 Stat. 1062, T.S. No. 993 (1945), nor the U.N. Charter, 59 Stat. 1051, T.S. No. 933 (1945), requires U.S. courts to follow ICJ decisions. See *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684-85 (2006). However, *Sanchez-Llamas* represents the first case in which the high court has declined to do so. See *id.* at 2701-02 (Breyer, J., dissenting). The opinion signals the United States' withdrawal from the ICJ's compulsory

and (2) “[t]he ICJ’s interpretation of Article 36 is inconsistent with the basic framework of an adversary system” like that of the United States.⁶⁸ The majority in *Sanchez-Llamas* determined that “[i]n our system . . . the responsibility for failing to raise an issue generally rests with the parties themselves,” whereas in an “inquisitorial” system, used by the majority of parties to the VCCR, the judge investigates the facts and law independently of the parties.⁶⁹

One reading of *Sanchez-Llamas* is that the VCCR’s provision on the exercise of treaty rights according to local procedural rules permits common law jurisdictions to ignore the ICJ’s censure of procedural default rules. The Court justifies this interpretation by arguing that default rules are integral to the adversarial system.⁷⁰ Moreover, the majority in *Sanchez-Llamas* also noted that in inquisitorial systems “the failure to raise a legal error can in part be attributable to the magistrate, and thus to the state itself,” unlike in an adversarial system.⁷¹ The Court ultimately found that the United States is not in violation of the VCCR when its courts employ blanket procedural default rules, and thus it would not be necessary to revisit the messy issue of trumping state and federal procedural default doctrines with a federal treaty.

jurisdiction for VCCR disputes. Moreover, the majority’s argument that the United States’ withdrawal from the Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, [1970] 21 U.S.T. 325, T.I.A.S. No. 6820, 596 U.N.T.S. 487, 1973 Gr. Brit. T.S. No. 14 (Cmnd. 5219), somehow negates the effect of the ICJ’s opinions prior to the U.S. withdrawal is inconsistent with the court’s own wholesale adoption of precedent from appellate court decisions of the now defunct Articles of Confederacy. Compare *Sanchez-Llamas*, 126 S. Ct. at 2685, with *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54, 85-86 (1795) (affirming jurisdiction of defunct U.S. Ct. App. in Cases of Capture). Ironically, the U.S. played a key role in drafting the Optional Protocol and was the first country to invoke its compulsory jurisdictional clause in her 1979 dispute with Iran. Camille Cancio, *The United States’ International Obligations and the Impact on Federalism: Medellin v. Dretke and the Force of Avena in American Courts*, 27 WHITTIER L. REV. 1047, 1052 (2006).

⁶⁸ *Sanchez-Llamas*, 126 S. Ct. at 2686.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* However, this appears to contradict cases where the Supreme Court considered court enforcement of unconstitutional private covenants a “state action.” *E.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 14, 68 S. Ct. 836, 842 (1948).

C. Domestic Conflicts between the AEDPA and the VCCR

The Supreme Court ruling in *Sanchez-Llamas* had two other important results: the vindication of procedural default rules in *Breard* remains in place, and a criminal defendant must raise any VCCR claims in state court proceedings before seeking federal habeas review. However, the question remains as to whether federal habeas relief can be extended to defendants convicted in state courts, even where the claim was properly developed in state court proceedings. The Supreme Court has not specifically revisited the conflict between the AEDPA and the VCCR since its decision in *Breard*. Nevertheless, the Court's decision in *Sanchez-Llamas* lends no support whatsoever to criminal defendants' attempts to base federal habeas review of their state convictions on VCCR claims. The majority in *Sanchez-Llamas* specifically observed that "[a] foreign national detained on suspicion of crime, like anyone else in our country, enjoys under our system the protections of the Due Process Clause . . . Article 36 adds little to these 'legal options.'"⁷² Such clear judicial indifference from the nation's highest court to the importance of the VCCR rights of foreign nationals will likely have a chilling effect on petitions for federal habeas review based on violations of VCCR rights.

Under the AEDPA, a successful habeas petition against a state court conviction requires the violation of a right under federal law. However, the Supreme Court in *Sanchez-Llamas* declined to decide whether the VCCR grants rights to individuals (as opposed to state parties to the treaty).⁷³ The Court also refused to grant any appreciable remedy for VCCR violations.⁷⁴ After *Sanchez-Llamas*, federal district judges cannot be faulted for denying habeas review of state convictions where VCCR rights violations

⁷² *Sanchez-Llamas*, 126 S. Ct. at 2681-82.

⁷³ *Id.* at 2677-78.

⁷⁴ *Id.* at 2682, 2687.

form the basis of the defendant's petition. Furthermore, the Supreme Court has not yet even determined whether individuals have VCCR rights under federal law.

Federal appellate courts, moreover, are not likely to issue many COA's in VCCR violation cases. In *Sanchez-Llamas*, the Supreme Court seems to have answered the question it posed in *Medellin* as to whether a person convicted in spite of a violation of VCCR rights could clear the considerable hurdle of demonstrating that the deprivation of a treaty right is legally comparable to the deprivation of a constitutional right.⁷⁵ By deciding that a mandatory exculpatory rule in VCCR rights violation cases is not appropriate, the Court in *Sanchez-Llamas* effectively ruled out the possibility that anyone in such cases can show the violation of a *constitutional* right.⁷⁶ The basis of the Court's refusal to impose such a rule arose out of its conclusion that VCCR notification does not implicate any constitutional concerns and does little to strengthen any applicable constitutional safeguards.⁷⁷ A COA is contingent on the deprivation of a *constitutional* right, and the *Sanchez-Llamas* opinion appears to be the clearest indication that the deprivation of the VCCR notification right does not rise to that level.

The AEDPA also thwarts the ICJ's interpretation of the VCCR on a more direct level. The AEDPA requires that a defendant exhaust all state court remedies prior to seeking review in federal court.⁷⁸ The AEDPA also declares that a petitioner seeking federal habeas review of a state conviction based on a treaty violation cannot obtain an evidentiary hearing where the petitioner failed to develop the factual basis of the treaty

⁷⁵ See *Medellin v. Dretke*, 544 U.S. 660, 666 (2005).

⁷⁶ See *Sanchez-Llamas*, 126 S. Ct. at 2682.

⁷⁷ *Id.* at 2681-82.

⁷⁸ 28 U.S.C. §§ 2254(b)(1)(A), (b)(3) (2006).

violation in state court.⁷⁹ This specific rule for treaty violations essentially renders the federal courts unable to carry out the ICJ's rulings in *La Grand* and *Avena*. The Court in *Breard v. Greene* accepted it as a given that the AEDPA superseded the United States' obligations under the VCCR.⁸⁰ In coming to this conclusion, the Court employed the *lex posterior* rule adopted in *Whitney v. Robertson*,⁸¹ which mechanically establishes that where a federal statute conflicts with a treaty, "the one last in date will control the other."⁸² The ultimate result of the AEDPA is that state courts have been further insulated from federal review, even where state court criminal decisions implicate federal treaties.

D. Alternative Interpretations of the AEDPA's Effects on U.S. VCCR Obligations

The Supreme Court's mechanical use of the *lex posterior* rule in *Breard* was not its only option. After all, an older rule of statutory interpretation urges courts to interpret statutes in line with pre-existing treaty obligations unless there is an express legislative declaration to the contrary.⁸³ This "Charming Betsy doctrine" has persisted for well over two hundred years.⁸⁴ It is a doctrine of judicial interpretation not limited to American

⁷⁹ 28 U.S.C. §§ 2254(a), (e)(2) (2006). However, the terms of these statutory provisions speak in general terms regarding habeas proceedings and do not single out claimed treaty violations for treatment that differs from other federal legal claims.

⁸⁰ See 523 U.S. 371, 376 (1998).

⁸¹ 124 U.S. 190, 194, 8 S. Ct. 456, 458 (1888). See also *Reid v. Covert*, 354 U.S. 1, 18, 77 S. Ct. 1222, 1231 (1957).

⁸² *Breard*, 523 U.S. at 376 (quoting *Whitney*, 124 U.S. at 194). The same standard is generally employed in international law for conflicting legal norms. See Vienna Convention on the Law of Treaties, art 30(3), May 22, 1969, 1155 U.N.T.S. 311, 8 I.L.M. 679, 1980 Gr. Brit. T.S. No. 58 (Cmd. 7964) (parties to same treaty will give effect to later adopted obligations).

⁸³ See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("...an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

⁸⁴ 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, 519 (2006).

courts.⁸⁵ The wisdom of this approach is evident when one considers that a court's failure to read a new statute over a pre-existing treaty can be remedied by more specific domestic legislation, while the same court's over-eagerness to read down treaty obligations and give preeminence to newly passed statutes would result in the nation's withdrawal (intentional or not) from a treaty in spite of its earlier negotiation, adoption, signature, and ratification processes. The Charming Betsy doctrine acknowledges that the legislature has the means to correct the courts' decisions, while, if left to their own devices, the courts have the power to wreak havoc on the Executive's ability to conduct foreign policy.

While the Charming Betsy doctrine and its call for judicial restraint may seem sensible enough, American courts have no uniform rule of treaty interpretation with respect to statutory derogation of treaty obligations. The strict *lex posterior* rule adopted in *Breard* for VCCR cases appears to be one of three co-existing standards for resolving conflicts between treaties and federal statutes.⁸⁶ As stated above, the oldest standard originates with *Charming Betsy*. After the Supreme Court announced its decision in *Charming Betsy*, lower federal courts divided along lines that one commentator has termed the "internationalist" and "moderate" standards under the wider doctrine.⁸⁷ Under the "internationalist" interpretation of the doctrine, in order for a court to disregard a treaty obligation in favor of a federal statute, the statute must contain "the clearest of expressions on the part of Congress."⁸⁸ In *United States v. Palestinian Liberation*

⁸⁵ *E.g.*, *Garland v. Brit. Rail Eng'g Ltd.*, [1983] 2 A.C. 751, 771 (U.K.H.L.) (British courts ought to construe later statutes in conformity with pre-existing treaties wherever possible). Some other nations' constitutions have solidified this rule of construction by specifically subordinating domestic legislation to treaty law. *E.g.*, 1958 CONST. 55 (Fr.); CONST. ARG. 75(22).

⁸⁶ *See* Franck, *supra* note 84, generally.

⁸⁷ *Id.* at 522, 529.

⁸⁸ *Id.* at 523-24 (*quoting* *U.S. v. P.L.O.*, 695 F. Supp. 1456, 1468 (S.D.N.Y. 1988)).

Organization,⁸⁹ the district court refused to override the U.N. Headquarters Agreement⁹⁰ in favor of a statute which prohibited the establishment of a PLO office in the United States, “notwithstanding any provision of law to the contrary.”⁹¹ The district court essentially required the statute to explicitly state that it was superseding the Headquarters Agreement before it would disregard the treaty.⁹²

However, under the “moderate” approach to the Charming Betsy doctrine, some courts do not require Congress to expressly name the treaty being superseded, but will disregard a treaty where Congress has expressed its intent to “override the protection that a treaty would otherwise provide.”⁹³ Thus, the disagreement between the two interpretations of the Charming Betsy doctrine stems from differences on how “express” a congressional desire to supersede a treaty must be.⁹⁴ Under the internationalist standard, Congress has to name the treaty to be superseded, while under the moderate standard, Congress need only expressly override a right or protection otherwise offered by a treaty. While the moderate standard usually favors the domestic statute, the ultimate decision in such cases can only be made after identifying Congress’s clear intent to abrogate the treaty.⁹⁵ In contrast, under the third model of treaty-statute conflict analysis, exemplified in *Breard*, no analysis of congressional intent is necessary, since the later law automatically controls.⁹⁶

⁸⁹ 695 F. Supp. 1456 (S.D.N.Y. 1988).

⁹⁰ Pub. L. No. 80-357, 61 Stat. 3416 (1947).

⁹¹ 22 U.S.C. § 5202(3) (2006).

⁹² P.L.O., 695 F. Supp. at 1471.

⁹³ Franck, *supra* note 84, at 529 (*citing* *Havana Club Holding v. Galleon*, 203 F.3d 116, 124 (2d Cir. 2000)).

⁹⁴ *See id.*

⁹⁵ *Id.* at 531.

⁹⁶ *See id.*

In the cases of the conflict between the AEDPA and the VCCR, the only interpretive standard that could save the VCCR is the internationalist approach to the Charming Betsy doctrine. It is clear from the AEDPA that state remedies must be exhausted before allowing a resort to federal habeas review, and federal courts will not rule on treaty rights violations during habeas proceedings without a factual record established in state court. Accordingly, the VCCR's requirement that "full effect" be given to the rights established under Article 36 conflicts with the prohibitions on federal review contained in the AEDPA. The coexistence of the *lex posterior* rule announced in *Whitney v. Robertson* and the Charming Betsy doctrine in U.S. Supreme Court jurisprudence represents a puzzling lacuna in the law on conflicts of federal law. The fact that both standards come from the Supreme Court and neither has been overruled undermines the precedential effect of *Breard's* view of the VCCR. *Sanchez-Llamas* did not resolve this conflict between the *Whitney* and *Charming Betsy* standards. Nevertheless, under *Breard*, the AEDPA trumps the VCCR.

Sanchez-Llamas avoided the issue of the conflict between AEDPA and the VCCR by relying on the language in Article 36(2) and on case law concerning treaty interpretation. As a result, the Court determined that the rules for implementing Article 36 rights were to be left to the domestic law of the state parties to the VCCR. Under that analysis, the United States can never be in violation of the VCCR by merely employing neutral procedural rules. Since the AEDPA imposes only neutral procedural rules, it does

not run afoul of the Supreme Court's interpretation of the VCCR or the plain text of Article 36(2). However, the ICJ's interpretation of the VCCR taking precedence over procedural default rules remains. If the AEDPA imposes such rules, then it represents a departure from the United States' treaty obligations under the VCCR according to the ICJ. Since the ICJ is perhaps the most widely respected authority on public international law,⁹⁸ the effect of the Supreme Court's refusal to apply ICJ precedent is significant. In the meantime, the Court appears to have given its imprimatur to Congress' grant of authority to the states to ignore treaty violations with impunity. Under the AEDPA and *Sanchez-Llamas*, treaty violations in state courts, particularly of the VCCR, will probably not even be subject to review in federal habeas proceedings.⁹⁹

IV. PRECLUSION AS REMEDY FOR TREATY VIOLATION

The Court in *Sanchez-Llamas* also considered whether the remedy of mandatory exclusion was proper in cases where state law enforcement officials had violated the VCCR by failing to inform an arrested alien of his or her rights under the treaty.¹⁰⁰ The

⁹⁸ See, e.g., *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2700-01 (2006) (Breyer, J., dissenting) (citing RESTATEMENT (THIRD) ON THE FOREIGN RELATIONS LAW OF THE U.S. § 103 cmt. b (1987)); See Susan W. Tiefenbrun, *The Role of the World Court in Settling International Disputes: A Recent Assessment*, 20 LOY. L.A. INT'L & COMP. L.J. 1 (1997); Edith Brown Weiss, *Judicial Independence and Impartiality: A Preliminary Inquiry*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 134 (L. Damrosch ed. 1987).

⁹⁹ There remains, of course, the separate route of domestic civil redress for VCCR violations, which is beyond the scope of this article. Nevertheless, at least one court has specifically determined that a state party to the VCCR has standing in U.S. courts to sue for violations of the VCCR against its nationals. *Rep. of Para. v. Allen*, 949 F. Supp. 1269, 1274 (E.D. Va. 1996), *aff'd*, 134 F.3d 622, 629 (4th Cir. 1998). However, the Eleventh Amendment remains a hurdle to such suits in federal court where the defendant state has not waived its immunity from suit. *Id.* Additionally, at least one federal circuit court has determined the alien defendant in criminal proceedings may bring a claim under the Alien Tort Claims Act for state criminal proceedings that run afoul of the VCCR. *Jogi v. Voges*, 425 F.3d 367 (7th Cir. 2005). However, American legal commentators have already begun to show vehemence against such domestic vindication of international legal rights. E.g., Anthony Jones, Comment, *Jogi v. Voges: Has the Seventh Circuit Opened the Floodgates to Vienna Convention Litigation in U.S. Courts?*, 15 MINN. J. INT'L L. 425 (2006). Such statements of domestic disinterest for the plight of foreigners in the American criminal justice system do little to solve the larger problem of safeguarding the rights of Americans abroad by domestic compliance with the VCCR.

¹⁰⁰ 126 S. Ct. 2669, 2677 (2006).

Court determined that mandatory suppression was not necessary.¹⁰¹ However, the petitioner in *Sanchez-Llamas* seeking suppression had conceded to the question of whether mandatory exclusion was to be decided by domestic law rather than international law.¹⁰² The petitioner was limited to this purely domestic legal argument, since the ICJ had already specifically rejected the international imposition of a mandatory exclusionary rule.¹⁰³ Unfortunately for the petitioner in *Sanchez-Llamas*, the Supreme Court declined to fashion a remedy “for the enforcement of federal law in state-court criminal proceedings.”¹⁰⁴

The Court began its rejection of mandatory exclusion by observing that “our authority to create a judicial remedy applicable in state court must lie, if anywhere, in the treaty itself.”¹⁰⁵ The Court determined that Article 36(2) deferred to American domestic law for the implementation of Article 36 rights.¹⁰⁶ The Court also determined that mandatory exclusionary rules had only been developed to address Fourth and Fifth Amendment issues,¹⁰⁷ whereas the right to consular notification “is at best remotely connected to the gathering of evidence. Article 36 has nothing whatsoever to do with searches or interrogations.”¹⁰⁸ Furthermore, while the unreliability of confessions under duress is a valid consideration for imposition of a mandatory exclusionary rule, “[t]he failure to inform a defendant of his Article 36 rights is unlikely, with any frequency, to

¹⁰¹ *Id.* at 2682.

¹⁰² *Id.* at 2678-79.

¹⁰³ Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 61 (Mar. 31).

¹⁰⁴ *Sanchez-Llamas*, 126 S. Ct. at 2679.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 2680.

¹⁰⁷ *Id.* at 2680-81.

¹⁰⁸ *Id.* at 2681. The ICJ also rejected the notion that VCCR notification must occur *before* any interrogation. Case Concerning Avena and Other Mexican Nationals, 2004 I.C.J. at 49.

produce unreliable confessions.”¹⁰⁹ Additionally, the Court deferred to the government’s observation that “[w]e are unaware of any country party to the [Vienna Convention] that provides remedies for violations of consular notification through its domestic criminal justice system.”¹¹⁰

Sanchez-Llamas, however, leaves open the question of whether state courts are free to adopt mandatory or discretionary exclusionary rules of their own in cases of VCCR notification rights violations.¹¹¹ Since the Court has clearly stated that Article 36 “adds little” to the domestic legal rights of a criminal defendant in American courts,¹¹² it is unlikely that state supreme courts will jump at the chance to impose mandatory exclusionary rules against state law enforcement officials that violate Article 36. Nevertheless, there is some reason to think that a discretionary exclusionary rule for Article 36 violations would be appropriate in both state and federal courts.

To begin with, the domestic courts of other common law countries reserve the right to exclude evidence where there has been an egregious violation of Article 36. Cases from Canada and Australia show that trial judges in those countries have considered Article 36 violations when deciding whether to exclude evidence in criminal

¹⁰⁹ *Sanchez-Llamas*, 126 S. Ct. at 2681.

¹¹⁰ *Id.* at 2680. Reviewing the practices of the United States’ treaty partners in their implementation of the same treaty is an accepted means of determining the United States’ own compliance with that treaty. *Id.* at 2689 (Ginsburg, J., concurring) (*citing* *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 175-76 (1999)). When undertaking such comparative analyses, the court probably needs to underscore the reasoning for the examination of foreign sources in light of the various domestic voices raised in staunch opposition to any use of foreign law. *See, e.g.*, Const. Restoration Act, H.R. 1070, 109th Cong. §§ 201, 302 (2005) (banning the use of non-Anglo-American sources for judicial interpretation of the U.S. Constitution and calling for the impeachment of judges who violate the ban).

¹¹¹ As to the question of review of the failure of state police to give notice to a defendant of his or her rights under the VCCR, this question appears to have been “collapsed” into the domestic ineffective assistance of counsel claim. *See Force of Judgments by the Int’l Court of Justice – Vienna Convention on Consular Relations*, 119 HARV. L. REV. 327, 336 (2005).

¹¹² *Sanchez-Llamas*, 126 S. Ct. at 2682.

proceedings.¹¹³ Moreover, both Ireland and the United Kingdom have domestic statutory and regulatory frameworks that enable the exclusion of evidence obtained in violation of the VCCR.¹¹⁴

Giving trial judges the discretion to exclude evidence obtained in violation of the VCCR would insulate these decisions from appellate reversal, thus making the Article 36 right to notification more real. Yet, it would also allow American courts to deliver an “effective remedy” for VCCR violations, which is all that some sources interpret the ICJ’s decisions against the United States to require.¹¹⁵ So far most state courts have not

¹¹³ See *Tan Seng Kiah v. Queen* (2001) 160 F.L.R. 26 (Austl.); *Regina v. Tan* [2001] W.A.S.C. 275 (Austl.) (Sup. Ct. W. Austl.); *Regina v. Partak*, [2001] 160 C.C.C.3d 553, ¶ 63 (Can.); *Queen v. Van Bergen*, [2000] 261 A.R. 387, 390 (Can.) (Ct. App. Alberta). The case of *Regina v. Su*, [1997] 1 V.R. 1, 55 (Austl.) (Sup. Ct. Vic.) does not address the VCCR *per se*, but did consider the foreign defendant’s unfamiliarity with the domestic legal system in determining whether inculpatory evidence should have been excluded for threatening the “fairness” of the criminal proceedings. See Brief of Crim. Justice Legal Foundation as Amicus Curiae Supporting Respondent at 14-15, *Sanchez-Llamas*, 126 S. Ct. 2669 (2006) (No. 04-10566). Certain amici in *Sanchez-Llamas* also cited *Regina v. Bassil and Mouffaregi* (Acton Crown Ct. 1990) and *Regina v. Van Axel and Wezer* (Snaresbrook Crown Ct. 1991), handed down by the same English trial judge. *Id.* at 18. In these cases, the judge suppressed evidence obtained in violation of Article 36 because of the importance of Britain’s treaty obligations and of the right to notification itself. See Legal Action 23 (Dec. 1990).

¹¹⁴ See Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations); Regulations 1987, Regulation 14 (Irish police required to give advisory on VCCR); Code of Practice C, available at http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/PACE_Chapter_C.pdf?view=Binary (July 2006 revisions per Terrorism Act, 2000, c. 11 (U.K.); Reg. 7.1 requires that arrestee “must be informed as soon as practicable” of VCCR rights *authorized by* Police & Crim. Evid. Act 1984 (Code of Practice C & Code of Practice H) Order 2006, S.I. 2006/1938 (U.K.)). English courts are specifically empowered to take into account the fairness of allowing evidence that was obtained in breach of a statute or regulations when deciding whether to exclude the evidence. Police & Crim. Evid. Act, 1984, c. 60, § 78 (U.K.). Even though Article 36 was not among the VCCR provisions stated to have the force of law within the U.K. See Consular Relations Act, 1968, c. 18, § 1 and Sch. 1 (U.K.). Nevertheless, earlier sources have claimed that British courts had the power at common law to suppress evidence where the manner of its procurement brought the fairness of proceedings into doubt. *R. v. Sang*, [1980] 2 A.C. 402, 435 (U.K.H.L.) (per Lord Diplock). The new statutory power of suppression applies even if the illegally obtained evidence is reliable. However, some British jurists have claimed a similar discretion at common law “to exclude evidence if it is necessary in order to secure a fair trial for the accused.” *Scott v. R.*, [1989] A.C. 1242, 1256 (U.K.P.C.). The *Sanchez-Llamas* majority’s bold assertion that American courts invented the remedy of suppression and continue to be the only courts that dispense it is refuted by the strength and antiquity of the authorities to the contrary. 126 S. Ct. at 2706 (Breyer, J., dissenting) (*citing, inter alia*, *King v. Warickshall*, 1 Leach 262, 168 Eng. Rep. 234 (K.B. 1783)).

¹¹⁵ *Sanchez-Llamas*, 126 S. Ct. at 2700 (Breyer, J., dissenting).

discussed the notion,¹¹⁶ preferring, like the Supreme Court, to address the issue as a choice between no exclusion or mandatory exclusion.¹¹⁷ In such cases, American courts should evaluate the need for suppression in terms of “prejudice” to the defendant.¹¹⁸ This would arguably be equivalent to the “fairness” inquiry conducted by trial judges in other common law jurisdictions.¹¹⁹

The majority in *Sanchez-Llamas* dismissed the idea of putting aside the procedural default rule in cases of VCCR violations, in part because it felt that doing away with such default rules was anathema to the adversarial common law system. However, common law systems rely on evidentiary suppression more than inquisitorial civil law systems. In an inquisitorial proceeding, the judge is able to “put aside” or “forget about” evidence obtained in violation of the law more readily than a jury.¹²⁰ Accordingly there is less reason to keep such evidence away from the fact-finder, because in inquisitorial proceedings the judge is able to weigh the importance of infractions by the police by imposing, for example, a more lenient sentence.¹²¹ In other words, rules of evidentiary suppression actually have more utility in American courts than in the courts of most of America’s treaty partners.

V. OVERSEAS EFFECTS OF DOMESTIC VCCR JURISPRUDENCE

¹¹⁶ One exception is the Oklahoma Court of Criminal Appeals in *Torres v. State*, where it declined to require an alien criminal defendant to show “consular assistance would, or could, have made a difference in the outcome of the criminal trial.” 120 P.3d 1184, 1186-87 (Okla. Crim. App. 2005).

¹¹⁷ *Sanchez-Llamas*, 126 S. Ct. at 2706 (Breyer, J., dissenting) (“[t]he majority answers in absolute terms, stating that ‘suppression is not an appropriate remedy for a violation of the Convention’ . . . [however] *sometimes* suppression could prove the only effective remedy”); *E.g.*, *State v. Prasertphong*, 206 Ariz. 70, 83, 75 P.3d 675, 688 (2003) (declining to impose mandatory suppression in case of VCCR notification violation).

¹¹⁸ *See Parker*, *supra* note 21, at 255.

¹¹⁹ *See* sources cited *supra* note 113.

¹²⁰ *Sanchez-Llamas*, 126 S. Ct. at 2707 (Breyer, J., dissenting).

¹²¹ *See id.*

The Supreme Court's opinion in *Sanchez-Llamas* is good domestic constitutional law. However, the ramifications of American domestic practices overseas remains an open question, since the VCCR is an international treaty representing the obligations of the United States to other nations. The majority in *Sanchez-Llamas* paid lip service to this fact when it concluded that "[o]ur holding in no way disparages the importance of the Vienna Convention."¹²² Apparently, the majority felt that "[a]lthough these cases involve the delicate question of the application of an international treaty, the issues in many ways turn on established principles of domestic law."¹²³ Chief Justice Rehnquist perhaps did a better job of highlighting the "delicate" nature of the problem in *U.S. v. Alvarez-Machain*, where the Court held that American courts had jurisdiction to try a Mexican national who had been abducted while in Mexico by federal agents and forcibly taken to the U.S. for trial.¹²⁴ He noted that such an abduction "may be in violation of general international law principles" as a clear invasion of Mexico's sovereignty.¹²⁵

The basic problem in consular rights cases is that the realms of domestic and international law are mutually exclusive in the American constitutional order.¹²⁶ As an example, "[s]tatutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency."¹²⁷ The result is that in domestic courts, "no enactment of Congress can

¹²² *Id.* at 2687.

¹²³ *Id.*

¹²⁴ 504 U.S. 655, 669-70, 112 S. Ct. 2188, 2196-97 (1992).

¹²⁵ *Id.* at 670.

¹²⁶ *See* *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988). This is in contrast to those countries whose constitutions expressly subordinate domestic law to the country's international legal obligations. *Id.* at 939. The D.C. Circuit also specifically concluded in that case that "private parties have no cause of action in this court to enforce an ICJ decision." *Id.* at 934.

¹²⁷ *Id.* at 938.

be challenged on the ground that it violates customary international law.”¹²⁸ The *lex posterior* rule places international treaties on par with international custom; for domestic purposes, both can be superseded by a later-enacted federal statute. However, because the realms of international and domestic law are also mutually exclusive, there remains a distinct legal effect between the United States and its treaty partners that is separate from issues of domestic constitutionality.

At this point in time, there is no certainty as to whether the rule in *Sanchez-Llamas* puts the United States in breach of its obligations under the VCCR. Considering such, the laws and practices of other countries are important in the interpretation of the VCCR.¹²⁹ The VCCR itself is obviously an important treaty, as the rights of a traveler in a foreign country often do, and should, have a certain resonance with the American public. This is evident with the general public’s understanding of the reciprocal nature of public international law. For example, American newspapers responded to the ICJ decisions against the United States with predictions that if the United States did not honor its commitments under the VCCR, other countries may decide not to extend consular rights notification to American citizens abroad.¹³⁰ Other countries do have the option of suspending their obligations to the United States under the VCCR, if they consider the

¹²⁸ *Id.* at 939.

¹²⁹ A newly developed custom will not usually supersede a treaty obligation in the same way that a treaty will supersede pre-existing custom, but developments in national practices that lead to changes in customary law can lead to changes in the *interpretation* of treaty obligations. *Gabcikovo-Nagymaros Project* (Hung./Slovak.), 1997 I.C.J. 6, 64 (Sept. 25).

¹³⁰ See Michael Candela, Casenote, *Judicial Notification: A Simple Solution to Ensure Compliance with the Vienna Convention on Consular Relations*, 18 PACE INT’L L. REV. 343, 370 (2006). For example, when the United States began the annoying practice of photographing and fingerprinting all foreigners entering the country, Brazil retaliated by singling out incoming Americans for equivalent treatment. This episode culminated in the arrest of an American commercial pilot who made an obscene gesture at the camera. *US pilot freed after paying a \$12,775 fine*, CHINA DAILY (Jan. 16, 2004), available at http://www.chinadaily.com.cn/en/doc/2004-01/16/content_299367.htm. However, it would be considerably less humorous were an American tourist to disappear in police custody after being denied the right to access U.S. consular officials or to have them notified of the arrest.

U.S. to be in breach of its own obligations under that treaty.¹³¹ This doctrine of “retorsion,” or countermeasures, has always been available to nations where one of their treaty partners has refused to uphold its legal obligations.¹³² Presently, with two ICJ decisions against the United States, the prospect of being found in violation of the VCCR is real, even if it is slight.¹³³ Accordingly, a great deal of attention should be paid to jurisprudential developments abroad.¹³⁴

While *Sanchez-Llamas* refused to determine whether the VCCR actually vested rights in individuals¹³⁵ (in spite of two clear ICJ holdings that Article 36 did vest individuals with enforceable rights),¹³⁶ the lower federal courts are divided on the question.¹³⁷ However, outside of the United States, courts are generally moving in a

¹³¹ JAMES L. BRIERLY, *THE LAW OF NATIONS* 398-99 (Sir Humphrey Waldock ed., Oxford 6th ed. 1963).

¹³² *Sanchez-Llama v. Oregon*, 126 S. Ct. 2669, 2707 (2206) (Breyer, J., dissenting). The ICJ discussed the more obvious resort states have to seek monetary damages for breaches of international law. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 59-60, ¶ 121 (Mar. 31) (*citing* *Chorzow Factory Case (Pol. v. Ger.)*, 1928 P.C.I.J. (ser. A) No. 9, at 21). However, damages suits between countries have little or no impact on the average American citizen.

¹³³ As noted above, few countries outside of the common law world appear to address the issue of redress of VCCR violations. For example, while French law gives primacy to the VCCR above domestic statutes, there is only one corresponding domestic regulation giving effect to VCCR rights. FR. C. PR. PÉN. art. D264 (providing that foreign consular officials shall have access to their nationals imprisoned in France where the sending country affords similar rights to French consular officials). However, no domestic regulation requires that police specifically advise an alien arrestee of his or her rights under the VCCR. *E.g.*, FR. C. PR. PÉN. art. R53-8-18 (only other criminal regulation relating to consular matters covers mandatory registration of one’s address). No recent French decisions have even addressed Article 36. *E.g.* Case No. 91-21267, 1993 Bull. Civ. I, No. 234, p. 161 (Fr.) (construing Articles 31 and 43 of VCCR) and Case No. 86-90325, 1988 Bull. Crim., No. 89, p. 251 (Fr.) (mentioning Article 5 of VCCR). The dissent in *Sanchez-Llamas* noted at least one German decision declining to suppress confession on VCCR grounds despite the domestic effect of that treaty. 126 S. Ct. at 2708 (Breyer, J., dissenting) (*citing* Judgment of Nov. 7, 2001, 5 BGHSt 116).

¹³⁴ One simple solution may be to have the judge in criminal proceedings inform the defendant of the relevant VCCR provisions. *See* Candela, *supra* note 130, at 369 (proposing amendment to Fed. R. Crim. P. 5). States that have already adopted the Federal Rules of Criminal Procedure may be more likely than not to adopt any amendments to Rule 5 that are designed to allow the United States to fulfill its treaty obligations. *See e.g.* Ariz. R. Civ. P. 4.2(i)(1) and CAL. CIV. PROC. CODE § 413.10(c) (domesticating U.S. obligations under Hague Convention on Service Abroad of Judicial & Extrajudicial Documents in state courts).

¹³⁵ 126 S. Ct. at 2677. *But cf.* Candela, *supra* note 130, at 359 (“[s]ince its ratification . . . [the VCCR] was considered by the United States to be a self-executing treaty”).

¹³⁶ *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 494 (June 27); *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 63, ¶ 134 (Mar. 31).

¹³⁷ *Sanchez-Llamas*, 126 S. Ct. at 2694 (Breyer, J., dissenting).

direction that attempts to vindicate individual human rights in spite of the State-centric nature of international law. For example, in *Pinochet*, the House of Lords held that human rights considerations should be taken into account in cases of extradition despite the fact that extradition treaties generally exist to preserve only the rights of the states involved.¹³⁸ The debate between American jurists on whether Article 36 even creates individual rights merely confirms that, along with most issues arising out of international law, “unfortunately, too many courts continue to labor in the international field using only the tools of domestic doctrine.”¹³⁹

Another recent House of Lords decision imposed upon British courts a mandatory exclusionary rule applicable to all evidence obtained under torture, even if the torture was administered by officials of other governments.¹⁴⁰ In that decision, the Law Lords determined that the United Kingdom’s commitment to various treaty obligations to eliminate torture warranted a mandatory exclusionary rule against evidence obtained by torture, even if the U.K. government was not itself to blame.¹⁴¹ That decision has garnered considerable attention abroad.¹⁴² Yet, the Supreme Court’s refusal to implement a mandatory exclusionary rule for violations that do not implicate Fourth or Fifth Amendment rights shows how little such international currents have affected American shores.¹⁴³ While American judicial decisions now may seem merely

¹³⁸ R. v. Bow Street Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 3), [2000] 1 A.C. 147, 268, 279 (U.K.H.L.) (per Lord Millet).

¹³⁹ Louise Ellen Teitz, *Parallel Proceedings – Sisyphean Progress*, 36 THE INT’L LAWYER 423, 424 (Summer 2002).

¹⁴⁰ A. v. Secretary of State for the Home Department, [2005] U.K.H.L. 71, ¶ 51.

¹⁴¹ *Id.*

¹⁴² See, e.g., Adrienne Margolis, *The Unacceptable Face of Torture*, INT’L BAR NEWS, June 2006, at 19.

¹⁴³ Some commentators have opined that American judges do not care what foreign opinion of their positions is. See, e.g., Lord Johan Steyn, *Lecture: Guantanamo Bay: The Legal Black Hole*, F.A. Mann Lecture to the Brit. Inst. of Int’l and Comp. Law (Nov. 23, 2003), available at http://www.fcni.org/civil_liberties/guantanamo.htm; Lawrence v. Texas, 539 U.S. 558, 598, 123 S. Ct.

unfashionable, the question remains as to whether the United States will be left behind if other nations' courts rise to the ICJ's challenge and vindicate the rights of the foreigner in strange criminal courts by seeking to give "full effect" to Article 36 rights. If such a practice becomes prevalent, the practices in the United States with respect to the VCCR will cease to be simply unfashionable, and may become a grave matter of noncompliance.

VI. CONCLUSION

For the most part, this article has assumed that ICJ jurisprudence forms part of the VCCR itself. Continuing with this assumption, it appears that the Supreme Court has allowed procedural default rules that protect the efficacy of state court convictions to override ICJ interpretations of the United States' VCCR obligations. Specifically, the Roberts' Court has determined that the VCCR does not supersede procedural default rules. As a result, criminal defendants in state court must litigate any VCCR rights they may have (regardless of whether they or their defense attorneys are ever aware that such rights exist). In declining to prescribe any remedy where federal courts are in a position to review VCCR violations, the Court has signaled its obvious indifference to the domestic effects of the treaty.

Moreover, the Court's latest opinion on the subject appears to solidify the belief that the AEDPA prevents the post-conviction review required by ICJ decisions. The Court clearly demonstrated that Article 36 violations cannot be on par with the sorts of

2472, 2495 (2003) (Scalia, J., dissenting) ("this Court . . . should not impose foreign moods, fads, or fashions on Americans." (*quoting* *Foster v. Florida*, 537 U.S. 990, 123 S. Ct. 470 (2002) (Thomas, J., concurring in denial of *certiorari*))).

constitutional violations necessary to guarantee federal collateral review of a state court conviction. By upholding its earlier opinion in *Breard*, the Court has interpreted the AEDPA's protection of state court proceedings to override rights created by a federal treaty of fundamental significance for U.S. foreign relations, in spite of its own jurisprudence on treaty interpretation that allows it to harmonize the AEDPA and the VCCR. In the end, the Supreme Court appears, despite its constitutional powers to safeguard the Republic's duty to honor its treaty obligations, to have changed the issue of VCCR compliance into a question of states' rights. The several states appear to have prevailed in this domestic legal discourse, possibly at the cost of both the federal government's credibility and the well-being of Americans abroad.