

January 2007

Spreading Democracy Everywhere But Here: The Unlikely Prospect of Foreign National Defendants Asserting Treaty Violations in American Courts After *Sanchez-Llamas v. Oregon* and *Medellin v. Dretke*

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Recommended Citation

Miquelon-Weismann, Miriam F. (2007) "Spreading Democracy Everywhere But Here: The Unlikely Prospect of Foreign National Defendants Asserting Treaty Violations in American Courts After *Sanchez-Llamas v. Oregon* and *Medellin v. Dretke*," *University of Massachusetts Law Review*: Vol. 2: Iss. 1, Article 1.

Available at: <http://scholarship.law.umassd.edu/umlr/vol2/iss1/1>

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**SPREADING DEMOCRACY EVERYWHERE
BUT HERE: THE UNLIKELY PROSPECT OF
FOREIGN NATIONAL DEFENDANTS
ASSERTING TREATY VIOLATIONS IN
AMERICAN COURTS AFTER *SANCHEZ-
LLAMAS v. OREGON* AND *MEDELLIN v.
DRETKE***

MIRIAM F. MIQUELON WEISMANN*

*Neither can international institutional issues be treated as if they were exotic hot house flowers, rarely of relevance to domestic courts. Those issues, when relevant, must be briefed fully with the legal relationships between our Court, and say the International Court of Justice, comprehensively explained.***

- Justice Stephen Breyer

I. INTRODUCTION

Three recent Supreme Court decisions underscore the continuing decisional confusion regarding the binding legal effect of international law in domestic state courts. In *Sanchez-Llamas v. Oregon*, *Bustillo v. Johnson* (companion case), and *Medellin v Dretke*,¹ the United States Supreme

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** Remarks of Associate Justice Stephen Breyer, The American Society of International Law, 97th Annual Meeting (April 4, 2003).

Court sidestepped two legal questions: whether a defendant who is a foreign national may raise a claim, at trial or on appeal, that state officials violated the defendant's Article 36 rights under the Vienna Convention on Consular Relations² (VCCR); and, whether orders entered against the United States, pursuant to the compulsory jurisdiction of the International Court of Justice³ (ICJ), are binding on domestic state courts. Instead of deciding these questions, the Supreme Court merely concluded that even "assuming" the existence of an individual right to assert a treaty claim, American courts can apply state procedural default rules to bar any remedy for the violation.⁴ Further, the Court addressed only the binding effect of ICJ treaty interpretation on domestic courts, sidestepping the larger issue of the binding effect on domestic courts of ICJ orders, entered against the United States as a treaty member, under the ICJ's compulsory jurisdiction. At the heart of the treaty dispute is the habitual domestic noncompliance with Article 36 of the VCCR, which requires state and federal law enforcement authorities to promptly advise a detained foreign national of his right to

¹ *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669 (2006); *Bustillo v. Johnson*, No. 05-51 (companion case); and *Medellin v. Dretke*, 544 U.S. 660 (2005), on remand *Ex Parte Medellin*, No. AP-75207, 2006 W.L. 3302639 (Tex. Crim. App. Nov. 15, 2006), petition for cert. filed, 75 U.S.L.W. 3398 (January 16, 2007) (No. 06-984).

² Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (1969) [hereinafter "*VCCR*"].

³ The International Court of Justice is a multinational body, operating in conformity with the Charter of the United Nations, that interprets and applies international law in cases within the ICJ's jurisdiction. Under the Charter of the United Nations, "[a]ll Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice." Charter of the United Nations, Art. 93, 59 Stat. 1031, 1051, U.N.T.S. No. 993. The United States Senate consented to the Charter of the United Nations on July 28, 1945, 91 Cong. Rec. 8185, 8190, causing the United States to be a party to the Statute of the ICJ.

⁴ In the *Sanchez-Llamas* and *Bustillo* decisions, the Court "assumed without deciding" that Article 36 invested individuals with enforceable rights in American courts finding it "unnecessary to resolve the question" because petitioners were not entitled to relief on their claims. *Sanchez-Llamas*, 126 S.Ct. at 2677-78.

contact his consulate.⁵ International law recognizes that severing communications between a detained foreign national and his consulate may serve as an unlawful coercive measure used by law enforcement to extract confessions or obtain other incriminating evidence from an otherwise uninformed and legally disadvantaged suspect.⁶

Seemingly, these three cases merely join a long list of unresolved predecessor criminal cases raising the same arguments in the context of the same treaty violation. However, there is one significant difference between these three cases and the cases that precede them. Prior to the Supreme Court's decisions in the individual cases of these three defendants, the ICJ entered an order against the United States, under its compulsory jurisdiction acceded to by the United States, adjudicating the rights of the same defendants. Specifically, the ICJ found that state authorities violated the Article 36 treaty rights of convicted foreign national

⁵ At least one scholar previously recognized the need for informing the legal issues in terms of the political consequences and made various recommendations in the hope of avoiding the inevitable collision between the United States and the International Court of Justice. See William Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257 (1998). The true consequences of the political fallout could not have been anticipated until after the 2001 and 2004 ICJ opinions finally deciding the very legal issues avoided by the Supreme Court in *Sanchez-Llamas*, *Bustillo*, and *Medellin*, respectively. Even the Supreme Court recognized that a final ICJ adjudication on the issues changed the legal playing field, distinguishing cases prior to the final adjudication by the ICJ. See *Medellin*, 544 U.S. at 665, n. 3.

⁶ See Brief of Ambassador L. Bruce Laingen et al. as Amici Curiae Supporting Petitioners, *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669 (2005) (Nos. 04-10566, 05-51) citing the U.S. Department of State Foreign Affairs Manual (1984), 7 FAM 411-14:

Apart from ensuring the timely provision of legal information, prompt notification and access 'is necessary to forestall physical abuse of the prisoner ... or to ascertain when such abuse has occurred.' American consuls are required to determine if there has been 'any physical abuse or violation of rights' and to look for signs of ill-treatment, bearing in mind that 'many forms of physical abuse, including systematic torture, are calculated to leave no physical evidence.' *Id.*

defendants in fifty-one capital cases, including the cases of *Sanchez-Llamas*, *Bustillo* and *Medellin*, and that all fifty-one defendants had the individual right to raise Article 36 violations in their respective domestic criminal cases. The ICJ further ordered the United States to review the convictions and sentences of all fifty-one defendants and remediate the treaty violations in accordance with America's international legal obligations under the VCCR. The ICJ particularly warned the United States against applying domestic procedural default rules to bar remediation. Thus, the ICJ guaranteed a detained foreign national defendant the legal right to raise this treaty violation in domestic criminal proceedings in the United States where the Supreme Court has yet to do so and in direct conflict with lower domestic court decisions.⁷

In fact, the growing tension between the Supreme Court's concern over federalist principles honoring the states' autonomous rights to conduct criminal trials without undue federal interference and the binding effect of ICJ decisions in cases over which the ICJ clearly exercised compulsory jurisdiction, is palpable.⁸ Indeed, the *Sanchez-Llamas*, *Bustillo* and *Medellin* cases confronted the Supreme Court with the same legal issues that the ICJ had already resolved in cases where the United States was a member-party.⁹ Still, the Supreme Court chose to ignore ICJ orders and treaty interpretation in reaching its decisions.¹⁰ The reasons seem

⁷ Historically, those state courts that have previously considered this legal question decided, contrary to ICJ precedent, either that an Article 36 violation does not create an individual right that a defendant may assert in a state criminal case, or assumed that if such a right existed, procedural default rules barred any remedy. Thus, state courts have held that there is no right and if there is, then there is no remedy. *See, e.g.,* *Rocha v. State*, 16 S.W.3d 1, 19 (Tex. Crim. App. 2000).

⁸ *See Medellin*, 544 U.S. at 683-84, (O'Connor, J., dissenting).

⁹ *LaGrand Case* (F.R.G. V. U.S.), 2001 I.C.J. 466 (June 27) and *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

¹⁰ In fact, the ICJ's legal precedents were fully briefed and presented to the Court as central to the appellants' argument. *Brief of International Court of Justice Experts as Amici Curiae Supporting Petitioners, Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669 (2005) (Nos. 04-10566, 05-51).

obvious. Arguably, any ruling in conformity with ICJ precedent would legally bind American courts, and to some extent American foreign policy, to the ICJ's treaty interpretation.¹¹ Additionally, any ruling in favor of ICJ precedent would expressly contradict prior federal and state court decisions. Lastly, providing finality to the question would also force the Supreme Court into the seldom traveled arena of international law, a venue of unusual discomfort for the current Supreme Court.¹²

Instead, the Supreme Court remanded the *Medellin* case to allow the Texas state court to consider the issues that it refused to decide. Not surprisingly, the Texas court merely shunned both the ICJ orders and the President's commitment to the ICJ, binding state courts to follow these international orders.¹³ This led to a second ascent, in 2007, of the *Medellin* case to the Supreme Court's doorstep.¹⁴ To add to the confusion, while the *Medellin* case was pending before the Texas court on remand, the Supreme Court ruled in *Sanchez-Llamas* and *Bustillo*, deciding at least one of the issues it had earlier remanded for decision in *Medellin*. Parenthetically, that ruling expressly contradicted the ICJ's earlier order.

¹¹ And so the United States has argued at length in the *Medellin* decision. *Medellin*, 544 U.S. at 693-94.

¹² The court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), underscored the heated dispute between the justices about the role of international law in resolving domestic legal disputes. Indeed, Justice Breyer disagreed with his colleagues on the court who believe that comparative analysis of international and domestic law "is inappropriate to the task of interpreting the constitution, though it was of course quite relevant to the task of writing one." Justice Breyer directly addresses the authority of the ICJ: "Neither can international institutional issues be treated as if they were exotic hot house flowers, rarely of relevance to domestic courts. Those issues, when relevant, must be briefed fully with the legal relationships between our Court, and say the International Court of Justice, comprehensively explained." Remarks of Associate Justice Stephen Breyer, The American Society of International Law, 97th Annual Meeting (April 4, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html (last visited April 27, 2007).

¹³ *Ex Parte Medellin*, 223 S.W.3d 315, (Tex. Crim. App. 2006).

¹⁴ *Ex Parte Medellin*, petition for cert. filed, 75 U.S.L.W. 3398 (January 16, 2007) (No. 06-984).

The political pressure undoubtedly felt by the Supreme Court following the contentious foreign policy dispute that erupted between the United States and the ICJ as a result of the unfavorable ICJ decisions, may account for the Court's reluctance to finally decide these thorny questions of international law. While ICJ orders are technically binding only on the member-parties in the case before it,¹⁵ the language of the ICJ orders establishes clear international legal policy based on treaty interpretation certain to be invoked in future cases where the ICJ retains compulsory jurisdiction. The political knee-jerk reaction of the United States, in response to the unfavorable orders, was an unceremonious withdrawal in 2005 from the international protocol vesting compulsory jurisdiction in the ICJ to decide these issues.¹⁶ The presidential caveat was a parting Memorandum committing American courts to abide only by the current ICJ orders.¹⁷ Those ICJ orders were then ignored by the Supreme Court in the three individual decisions, which served only to further intensify the debate in the state courts.

To squarely address this decisional quagmire, this article examines the binding effect of ICJ orders, entered pursuant to its compulsory jurisdiction, on American courts; earlier decisions of the Supreme Court penalizing foreign nationals for failing to timely raise individual treaty claims; the effect on treaty enforcement in domestic courts after the executive branch's recent foreign policy decision to withdraw from compulsory ICJ jurisdiction; the current policy disputes dividing the United States and the ICJ; and, the national interest, or lack thereof, in treaty compliance.

This article concludes that the government's current claim that a "long standing presumption" exists to prevent the assertion of individual rights under Article 36 is simply not

¹⁵ Statute of the International Court of Justice, Art. 59, (June 26, 1945), 59 Stat. 1062, 33 U.N.T.S. No 993 [hereinafter "*Court's Statute*"].

¹⁶ See discussion *infra* Section III. A. (discussing the withdrawal of the United States from the Protocol).

¹⁷ President Bush, Memorandum for the Attorney General (Feb. 28, 2005), App. To Brief for United States as *Amicus Curiae* in *Medellin v. Dretke*, O.T. 2004, No. 04-5928, p. 9a. [hereinafter "*Memorandum*"].

supported by international law or prior decisions of the Supreme Court. It appears to be nothing more than a disingenuous effort to ground foreign policy and politics in decisional law. However, even if the right exists, the recent exercise by the executive branch of its foreign policy prerogative in treaty negotiations may effectively prevent the judicial branch from deciding the remedial issue on other than a case by case basis. Indeed, those Supreme Court Justices favoring recognition of an individual right to assert an Article 36 treaty violation remain curiously tight-lipped over the remedy. In short, the political score between America and the ICJ will have to be settled before the Supreme Court is free to decide the issues which, parenthetically, have already been decided by the ICJ. In any case, the Supreme Court needs to get back into the game. Justice Breyer's observation about the need to integrate U.S. decisional law with the decisions of the ICJ, where appropriate, makes legal sense.¹⁸

Finally, this article advocates that, as a matter of policy, there is a national interest in creating individually enforceable rights and domestic remedies to redress demonstrable treaty violations, particularly where American citizens may be subject to the same or similar treatment in foreign courts. Following the "Golden Rule" in American foreign policy and decisional law may provide predictable and consistent enforcement of individual treaty rights in American courts in the hope of securing the same fair treatment for American citizens abroad.

¹⁸ In fact, it has become a legal necessity. On the subsequent remand of the *Medellin* case from the Supreme Court, the Texas Supreme Court refused to honor both the ICJ order and the presidential memorandum committing the states to comply with the ICJ order based on the principle of comity. It is against this backdrop that the Supreme Court is now being asked to decide the issues on the second petition for writ of certiorari filed by *Medellin*, *Ex Parte Medellin*, *supra* note 14.

II. FRAMING THE LEGAL ISSUES

A. *Medellin v. Dretke*

Medellin, a Mexican national, confessed to participating in a capital offense that resulted in his conviction and the imposition of a death sentence.¹⁹ His conviction was affirmed on appeal. Subsequently, Medellin filed a state habeas corpus action raising for the first time the denial under Article 36 of his right to consular access under the VCCR. After exhausting state remedies, Medellin filed a similar habeas petition in the federal courts raising the same issue. While it was pending, the ICJ determined²⁰ that the VCCR guaranteed individually enforceable rights in domestic proceedings and that the United States violated those rights. The ICJ further ordered the United States, in Medellin's case and fifty others, to review the convictions and sentences without allowing state procedural default rules to bar such review.²¹

Subsequently, the Fifth Circuit acknowledged but ignored the ICJ decision²² in *Medellin* and instead, ruled in conformity with an earlier Supreme Court decision in *Breard v. Greene*²³ where state procedural default rules were applied to bar review and other prior Fifth Circuit decisions rejecting any individual rights to raise a treaty violation.²⁴ After the Supreme Court granted certiorari, President George W. Bush issued a memorandum committing domestic courts to follow the ICJ order in the fifty-one cases "in accordance with general principles of comity."²⁵ The Supreme Court, thereafter, granted certiorari to consider two questions in the *Medellin* case: first, whether a federal court is bound by the ICJ order ruling that domestic courts must review Medellin's

¹⁹ *Medellin v. Dretke*, 544 U.S. 660, 662 (2005).

²⁰ Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, No.128 (Mar. 31).

²¹ *Medellin*, 544 U.S. at 662-63.

²² *Id.* at 663.

²³ *Breard v. Greene*, 523 U.S. 371 (1998) (*per curiam*).

²⁴ *See, e.g.*, *United States v. Jiminez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001).

²⁵ Memorandum, *supra* note 17.

conviction under the VCCR without regard to procedural default rules; and second, whether a federal court should give legal effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ's order.²⁶ Instead of deciding these issues, the Supreme Court remanded the case to the Texas court to rule in light of the ICJ order and the President's Memorandum.²⁷ However, the Court indulges in several pages of dicta commenting on the merits of the legal issues which "are not free from doubt"²⁸ and even suggesting an avenue for a later appeal of the case "unencumbered by the issues that arise from the procedural posture of this action."²⁹ The Court also cautioned that its decision in *Breard* was decided at a time when "we confronted no final ICJ adjudication."³⁰

As discussed in further detail below,³¹ the Texas Court of Criminal Appeals affirmed the conviction and ruled³² that the ICJ order was not binding federal law and thus, under *Breard*, did not preempt state procedural default rules barring review³³ and that the President of the United States had exceeded his constitutional authority in binding domestic courts to ICJ orders.³⁴ In response to this decision, Medellin filed a petition for writ of certiorari to the United States Supreme Court in 2007.³⁵

To further complicate matters, the Supreme Court ruled on several of the same issues in *Sanchez-Lamas v. Oregon* and *Bustillo v. Johnson*, while the *Medellin* case was on remand before the Texas Court of Appeals.³⁶

²⁶ *Medellin*, 544 U.S. at 661-62.

²⁷ *Id.* at 666-67.

²⁸ *Id.* at 664.

²⁹ *Id.* at 664, n.1.

³⁰ *Id.* at 665, n.3.

³¹ See *infra* Section VI.D.

³² *Ex Parte Medellin*, No. AP-75207, 2006 W.L. 3302639 (Tex. Crim. App. Nov. 15, 2006).

³³ *Id.* at 7-8.

³⁴ *Id.* at 19.

³⁵ *Ex Parte Medellin*, petition for cert. filed, 75 U.S.L.W. 3398 (January 16, 2007) (No. 06-984).

³⁶ *Ex Parte Medellin*, *supra* note 13.

B. *Sanchez-Llamas v. Oregon*, and *Bustillo v. Johnson* (companion case)

Sanchez-Llamas and *Bustillo* were consolidated to decide three issues: first, whether Article 36 of the VCCR grants rights enforceable by individuals in domestic proceedings; second, whether an Article 36 claim can be barred by a state procedural default rule; and third, whether suppression of evidence is an appropriate remedy for an Article 36 violation. The Supreme Court “assumed without deciding” that even if the VCCR created judicially enforceable rights,³⁷ suppression of evidence was not an appropriate remedy for an Article 36 violation and that state procedural default rules barred relief.³⁸ Significantly, the Court failed to decide whether ICJ orders, entered pursuant to its compulsory jurisdiction acceded to by the United States, were binding on domestic courts. Instead, it ruled that the VCCR did not expressly require suppression of evidence as a remedial measure and because the exclusionary rule was entirely an “American legal creation,” it had no application to the cases before the Court.³⁹ While the Court acknowledged that domestic courts must apply the remedy afforded in a self-executing treaty in the course of adjudicating litigants rights, it cautioned that, “where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for federal courts to impose one on the states through lawmaking of their own.”⁴⁰

The Court applied the same logic to the procedural default question. Because the treaty allows the United States to implement ICJ orders “in conformity with the laws of the receiving states,” the state procedural default rules apply.⁴¹ That reasoning, however, begs the central question of whether the ICJ orders are entitled to binding effect where

³⁷ *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2677 (2006)

³⁸ *Id.* at 2674.

³⁹ *Id.* at 2678.

⁴⁰ *Id.* at 2680.

⁴¹ *Id.* at 2678.

state procedural default rules deny “full effect” to the implementation of a self-executing treaty. That inherent clash of wills between the VCCR as a self-executing treaty and state procedural default rules barring relief, which rules the ICJ found impaired the United States’ international obligations to act in a manner that accords full effect to the treaty, remains chiefly unaddressed by the Supreme Court.⁴²

The political strain on the Court was apparent from the decision: “[W]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.”⁴³ However, rather than looking to the negotiating history of the VCCR and the past legal positions asserted by the United States in the ICJ with respect to the subject issues being decided by the Court, the Supreme Court chose merely to rely on the President’s 2005 memorandum for the short-sighted proposition that if the President authorized withdrawal from the treaty protocol and was unwilling to commit to the binding affect of ICJ orders on domestic courts, the Supreme Court was not in a position to second guess that political decision.⁴⁴ This analysis of the government’s negotiating and enforcement position flies in the face of 46 years of participation by the United States in the VCCR and contradicts the actual legal positions asserted by it in the ICJ with respect to Article 36 violations.⁴⁵

⁴² When confronted with the question, the Court merely stated that the “full effect” issue was not timely raised by the parties. *Id.* at 2685.

⁴³ *Id.* (citing *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)).

⁴⁴ *Id.*

⁴⁵ This was particularly true during the Iran hostage crisis in 1979. See *infra* section V.

III. A LEGAL PROBLEM EMBEDDED IN A FOREIGN POLICY DISPUTE

A. The Rift Between the United States and the International Court of Justice

Ironically, the United States was the first country to herald the ICJ as the court with exclusive jurisdiction over Article 36 violations when, in 1979, it invoked the exclusive jurisdiction of the ICJ over an Article 36 violation against a group of American citizens.⁴⁶ As a matter of foreign policy and treaty negotiation, the decision to select the ICJ as the appropriate forum was in conformity with the 1969 ratification of the VCCR,⁴⁷ whereupon the United States also agreed to the Optional Protocol to the Vienna Convention Concerning the Compulsory Settlement of Disputes⁴⁸ [hereinafter “Protocol”]. Among other things, the Protocol is a forum selection clause that invests the ICJ with exclusive jurisdiction to decide treaty issues under the VCCR.⁴⁹ However, in recent years, after the ICJ repeatedly declared the United States in violation of the rights of foreign nationals under Article 36, America’s foreign and legal policies changed dramatically regarding the binding effect of ICJ decisions in its domestic courts and the continuing exercise of its compulsory jurisdiction over the United States.

Indeed, the worst foreign policy trouble began in 2001, when the ICJ ruled that the United States violated Article 36 in a case in which Germany and the United States were parties.⁵⁰ There, the ICJ resolved the very legal issue that currently remains unresolved by the Supreme Court, namely, that Article 36 creates an individually enforceable treaty right

⁴⁶ *International Instruments*, The International Justice Project, <http://www.internationaljusticeproject.org/nationalsInstruments.cfm> (last visited April 27, 2007).

⁴⁷ Charter of the United Nations, *supra* note 3.

⁴⁸ Optional Protocol to the Vienna Convention Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 [hereinafter “Protocol”].

⁴⁹ See *infra* Section VII. B.

⁵⁰ LaGrand Case (F.R.G. V. U.S.), 2001 I.C.J. 466 (June 27).

in the domestic courts of a member state, and where a defendant was not promptly advised of his Article 36 right, is later convicted and subject to a severe sentence, the United States “should allow review and reconsideration”⁵¹ of the sentence.⁵² Matters further escalated when in 2004, in a case in which Mexico and the United States were parties, the ICJ again ruled that the United States was in violation of Article 36 and ordered the United States to provide the same relief to convicted foreign nationals.⁵³

In direct response to the 2004 ICJ decision, the President of the United States issued a policy memorandum in February 2005 stating that the United States would give effect to the 2004 ICJ decision⁵⁴ in accordance with general principles of comity in the individual cases then pending in American courts.⁵⁵ However, one month later, in March 2005, while several unrelated cases raising the same Article 36 treaty violation were pending before the United States Supreme Court, the United States unceremoniously withdrew from the Protocol that it had signed 46 years earlier, repudiating the policy of compulsory ICJ jurisdiction under the VCCR and the Protocol.⁵⁶

⁵¹ Previously, the ICJ had used the term “should” in its orders imposing remedial obligations to be followed by the United States. However, by the time it entered its order of provisional measures in *Avena*, the ICJ conspicuously changed the language of the remedial obligations of the United States to “shall.” This may certainly be interpreted as an attempt by the ICJ to bolster the binding effect of its decisions on the United States. See W. MICHAEL REISMAN, et.al., *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE*, 138, n.3 (Foundation Press 2004).

⁵² *LaGrand*, 2001 I.C.J. 466

⁵³ Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J.128 (Mar. 31).

⁵⁴ *Id.*

⁵⁵ Memorandum, *supra* note 17.

⁵⁶ Statement by Dala Jordan, spokeswoman for the U.S. State Department, describing the need for withdrawal to “[protect] against future International Court of Justice judgments that might similarly interfere in ways we did not anticipate when we joined the optional protocol.” *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. TIMES, (March 10, 2005), available at <http://select.nytimes.com/search/>

To underscore the legal morass created by the foreign policy dispute with the ICJ, the Texas state court, reviewing the *Medellin* case on remand, flatly rejected the binding affect of the President's Memorandum of February 2005 in which the President explicitly committed the courts of the United States to abide by ICJ legal precedent in respect to all pending cases affected by its decision.⁵⁷ Not surprisingly, a petition for certiorari is currently pending in the Supreme Court in the *Medellin* case commencing its second ascent on the same legal issues.⁵⁸

B. The Supreme Court on the Sidelines

It was against this foreign policy backdrop in 2006 that the Supreme Court was again confronted with a case raising the defense of an Article 36 treaty violation in a state criminal prosecution. Undoubtedly, the now contentious foreign policy dispute between the United States and the ICJ complicated the Supreme Court's review of the same legal issue already adjudicated in those cases where the United States had voluntarily acceded to ICJ jurisdiction. Faced with clear international treaty interpretation recognizing the individual right of a foreign national to raise the defense in domestic proceedings and the actual court orders issued by the ICJ,⁵⁹ the Supreme Court simply chose to sidestep the issue. Instead, the Court merely "assumed without deciding"⁶⁰ that the particular defendants had the right to raise the Article 36 treaty violation in their state criminal cases. Then, to avoid any direct confrontation with the mandate of the ICJ to review any case where a significant incarceratory sentence

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(last visited April 27, 2007).

⁵⁷ *Ex Parte Medellin*, No. AP-75207, 2006 W.L. 3302639 (Tex. Crim. App. Nov. 15, 2007).

⁵⁸ *Ex Parte Medellin*, petition for cert. filed, 75 U.S.L.W. 3398 (January 16, 2007) (No. 06-984).

⁵⁹ See *infra* Section VII.C. (discussing the question of the binding effect of ICJ decisions on American domestic courts).

⁶⁰ *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2677-78 (2006).

was imposed despite the violation,⁶¹ the Supreme Court disingenuously echoed lower state court decisions rejecting suppression as a remedy in one case⁶² and concluded that the issue could not be raised belatedly on appeal in another.⁶³ As a result of its rulings in the *Sanchez-Llamas* and *Bustillo* cases, the Supreme Court foreclosed the use of the exclusionary rule as a domestic judicial remedy to vindicate violations of Article 36 in state court proceedings.

The decisions are disconcerting because the Supreme Court ruled on the applicability of domestic legal remedies without first resolving the very existence or nature of the right sought to be vindicated and with complete indifference to international legal precedent. The Supreme Court decisions illustrate a plain legal inconsistency between domestic law and the international resolution of treaty issues.

IV. AMERICA'S SUBMISSION TO ICJ JURISDICTION: 1945 – 1969

From the inception of the ICJ in 1945, the international community wrought a compromise, hampering its jurisdiction. Article 36(2) of the Statute of the International Court of Justice⁶⁴ [hereinafter "Court's Statute"] offered member states the option to make "declarations" accepting the ICJ's jurisdiction, including reservations that bar the ICJ from hearing certain classes of disputes. Exercising its option, the United States declared that it would accede to the compulsory jurisdiction of the ICJ with one reservation, known as the Connally Reservation.⁶⁵ The Connally Reservation permits the United States to opt out of ICJ jurisdiction over "disputes with regard to matters which are

⁶¹ Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J.128, paras. 127-32 (Mar. 31).

⁶² *Sanchez-Llamas*, 126 S.Ct. at 2677.

⁶³ *Id.*

⁶⁴ Court's Statute, *supra* note 15.

⁶⁵ See Acceptance of Compulsory Jurisdiction of the International Court of Justice on August 2, 1946, 92 Cong. Rec. 10, 694-697, Dep't St.Bull., Sept. 1946, at 452-53.

essentially within the domestic jurisdiction of the United States as determined by the United States of America.”⁶⁶

In short, the United States undercut the compulsory jurisdiction of the ICJ by retaining an automatic jurisdictional veto over the ICJ in matters deemed to be within America’s domestic jurisdiction. A surge of criticism followed the Connally Reservation. Secretary of State Herter, on behalf of the Eisenhower administration, later criticized the Connally Reservation: “As a world leader, we are setting an exceedingly poor example by such [p]arochial action as the Connally Amendment.”⁶⁷ Scholars continued to call for a modification of the 1946 declaration and accept the compulsory jurisdiction of the ICJ to avoid “denigrating” the authority of the Court.⁶⁸

In the Foreign Relations Authorization Act for the Fiscal Year 1978,⁶⁹ Congress requested the President to prepare a report on the reform and restructuring of the United Nations system.⁷⁰ In the report, the President recognized that the Connally Reservation “conflicts with the provisions of the Court’s Statute⁷¹ that the Court shall determine what matters are within its jurisdiction....”⁷² The report recommended reinvesting exclusive jurisdiction in the ICJ in order to strengthen the use of the ICJ to settle international disputes.⁷³

⁶⁶ U.S. Declaration of Aug. 14, 1946, 61 Stat. 1218 (1947), *reprinted in* MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS ATT 31 DECEMBER 1982, at 23-24, UN Doc. ST/LEG/SER.E/2 (1983).

⁶⁷ *Close Vote*, TIME MAG. (Sept. 12, 1960) *available at* <http://205.188.238.109/time/magazine/printout/0,8816,897512,00.html> (last visited April 27, 2007).

⁶⁸ Anthony D’Amato, *Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court*, 79 AM. J. INT’L L. 385, 401-02 (1985).

⁶⁹ Foreign Relations Authorization Act for the Fiscal Year 1978, Pub.L.No. 95-105, 91 Stat. 844 (1977).

⁷⁰ Reform and Restructuring of the U.N. System, Department of State Publication 8940 (June 1978) at 5.

⁷¹ Court’s Statute, *supra* note 15, at Art. 3, para.1.

⁷² Reform and Restructuring of the U.N. System, *supra* note 70, at 17.

⁷³ Between 1946 and 1978, the United States had committed itself without reservation to the jurisdiction of the ICJ of the Court in 34

President Carter observed that the Connally Reservation was an obstacle to maximizing utilization of the ICJ because “it has caused other States to question U.S. confidence in the Court, and it (or its equivalent) in other states has been used as a means to defeat the Court’s consideration of legal issues which are clearly international in character.”⁷⁴ “The Department of State [likewise affirmed that the Connally] Reservation d[id] not provide the U.S. with any substantial benefit, and every Administration since that of President Eisenhower [until the date of the report] urged its repeal.”⁷⁵ To this day, however, the Connally Reservation retains vitality.⁷⁶ While the Connally Reservation was not formally invoked in any of the cases recently decided by the ICJ, the President’s decision to instead completely withdraw from the Protocol⁷⁷ undermines the compulsory jurisdiction of the ICJ in every future case, exceeding the more circumscribed and already politically disfavored escape route contemplated by the Connally Reservation.

multilateral treaties and 21 bilateral agreements with respect to disputes arising under them. *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 17-18.

⁷⁶ The Interhandel Case (Swit. v. U.S.), 1959 I.C.J. No. 6 (Mar. 21), is the only case in which the United States formally exercised the Connally Reservation. In that case, Switzerland filed a claim demanding the return of certain seized property of the Interhandel corporation. Switzerland rejected the application of the reservation finding that a disagreement by the parties as to the interpretation of the subject treaty was a question of international law and went directly to the merits of the case. Because the case was already pending in the United States court, the ICJ did not have occasion to rule on the validity of the automatic reservation clause. Interestingly, Bulgaria invoked the Connally Reservation on the basis of reciprocity against the United States in Aerial Incident of 27 July 1955 (U.S. v. Bulgaria, 1960 I.C.J. 146 (May 30)). See Richard Falk, *The Iran Hostage Crisis: Easy Answers and Hard Questions*, 74 AM. J. INT’L. L. 411(1980).

⁷⁷ Article 1 of the Protocol provides: “Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol.” Protocol, *supra* note 48.

**V. AMERICA'S SUBMISSION TO ICJ JURISDICTION
IN ARTICLE 36 CASES: 1979**

**A. *United States v Iran*: The Legal Position of the
United States in 1979**

The legal position taken by the United States before the ICJ in the Iran hostage crisis in 1979 provides the very legal basis for accepting ICJ legal precedent with respect to current domestic cases raising treaty violations of Article 36. Ironically, after Bulgaria invoked the reciprocal application of the Connally Reservation against the United States in 1955, forcing America to withdraw its own claim,⁷⁸ the Iran hostage crisis marked the first time in the succeeding thirty-five years that the United States turned to the ICJ for remediation.⁷⁹ This move was consistent with America's then foreign policy favoring investiture of exclusive jurisdiction in the ICJ over international disputes.⁸⁰

The 1979 case relates to the forced takeover of the American Embassy in Tehran and the American Consulates in Tabriz and Shiraz and the detention of 50 Americans by militants.⁸¹ To satisfy its prima facie burden to establish the jurisdiction of the ICJ, the United States primarily relied on the identical provisions of the Protocol and Article 1 of the Optional Protocols on the Compulsory Settlement of Disputes attached to the Vienna Conventions on Diplomatic and Consular Relations,⁸² which provide that: "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the

⁷⁸ Memorandum, *supra* note 17.

⁷⁹ Leo Gross, *The Case Concerning the United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures*, 74 AM. J. INT'L L. 395, 410 (1980).

⁸⁰ See discussion *supra* Section II.

⁸¹ Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Pleadings, Oral Arguments, Documents [hereinafter "*ICJ Pleadings*"]. Republished by The Hague, (1982). 1980 I.C.J. 3, No. 64 (May 24).

⁸² Gross, *supra* note 79, at 400.

International Court of Justice...” Referring to the VCCR and the 1961 Vienna Convention on Diplomatic Relations, (1961 Convention), the ICJ concluded that Article 1 provides “in the clearest manner for the compulsory jurisdiction of the court.”⁸³

Then Legal Advisor and Agent to the United States, Roberts B. Owen, citing Article 1 of the Protocol, unequivocally stated the position of the United States with regard to the legal principles of compulsory jurisdiction of the ICJ: “Since both States [U.S. and Iran] are parties to the Protocol, and since one of them (the United States) has presented an application to the Court, Article 1 confers mandatory jurisdiction upon the Court.”⁸⁴ However, having established the Court’s jurisdiction, it remained to show that the 50 hostages concerned, by their status, were covered by the VCCR and the 1961 Convention. The ICJ was satisfied that 48 hostages were covered by the two conventions. That left the status of two private individual hostages to be resolved. The ICJ concluded that the Protocol also furnished a basis for jurisdiction “with regard to the claims of the United States in respect of the two individuals in question.”⁸⁵ Thus, the ICJ assumed both subject matter jurisdiction over an Article 36 claim as well as jurisdiction over the individual hostages who, because of their status under the treaty, were subject to treaty protection pursuant to the claim asserted by the United States.

Indeed, the gravamen of America’s complaint before the ICJ arising under the VCCR, was unambiguously argued by Benjamin Civiletti, then Attorney General and U.S. counsel before the ICJ: “The Convention on Consular Relations also

⁸³ Order of the Court, December 15, 1979, para. 17, [1979] ICJ Rep. 7. *reprinted in* 74 AM. J. INT’L. L. 266 (1980). As a caveat, the Court also acknowledged that Articles II and III provided alternative avenues for settlement and conciliation, respectively, but that the right of unilateral arraignment in Article I was in no way modified by Articles II and III. This was completely consistent with the position taken by the U.S. during the oral argument of Mr. Owen stating that recourse under Articles II and III are purely optional. *See* ICJ Pleadings, *supra* note 81, para. 27.

⁸⁴ ICJ Pleadings, *supra* note 81, para. 27.

⁸⁵ Order of the Court, *supra* note 83, paras. 19 and 20, at 271-72.

requires the receiving State [Iran] to permit another State's party's consular officers to communicate with and have access to their nationals. The right *is manifestly violated* when the consular officers are themselves held incommunicado by force."⁸⁶ In fact, a violation of Article 36 of the VCCR was specifically included as one of the claims asserted against Iran and submitted to the ICJ under principles of compulsory jurisdiction for adjudication and remedial measures.⁸⁷ There can be no question that the United States expected Iran to comply with the ICJ's adjudication of the Article 36 treaty violation with respect to American nationals being held as hostages and denied access to their consular representatives.

Accordingly, the State Department's later justification in 2005 for divesting the compulsory jurisdiction of the ICJ under the Protocol, in response to the ICJ finding that America was in "manifest violation" of Article 36 of the VCCR, as a need to "[protect] against future International Court of Justice judgments that might similarly interfere *in ways we did not anticipate when we joined the optional protocol*,"⁸⁸ is purely disingenuous. The United States was the first country to exercise what it described as the ICJ's compulsory jurisdiction to remedy an Article 36 violation based on a manifest violation of the VCCR by Iran in refusing consular access to a U.S. national. Not only could the United States have anticipated the results in the ICJ decisions in *Sanchez-Llamas* and *Bustillo*, the United States urged the ICJ to adopt that same legal position in its own application for relief in the Iran hostage crisis. The ICJ ruled exactly in the recent Article 36 cases as the United States had asked it to rule during the Iran hostage crisis.

Based on clear international precedent, the Supreme Court should have found that such precedent compelled a ruling in *Sanchez-Llamas* and *Bustillo*, as opposed to merely assuming that an individual foreign national has the right to

⁸⁶ *Supra* note 83, para. 23 (emphasis added).

⁸⁷ *Id.* at 8, para. 5(a) Judgment Requested.

⁸⁸ *U.S. Says It Has Withdrawn From World Judicial Body*, *supra* note 56 (emphasis added).

raise a treaty violation by state authorities as part of his defense. The assumption had the effect of putting off the inevitable job of the Supreme Court, advocated by Justice Breyer, to comprehensively define and explain the relationship between domestic and international courts.⁸⁹ At best, the Court has created strange legal reasoning based on some unexplained principle of assumption upon which due process rights are *not* decided by the Court.

VI. A CONFLICT OF LAWS: THE AFTERMATH OF THE ICJ'S DECISIONS IN THE *LAGRAND* AND *AVENA* CASES

A. *LaGrand* and *Avena*: A Remedy for the Right

The ICJ has repeatedly ruled on the legal obligations of the United States under Article 36, in conformity with the VCCR and the Protocol. The *LaGrand* case,⁹⁰ involving a suit by the Germany against the United States, stands for the proposition that: the VCCR establishes rights for individuals and not just member states;⁹¹ domestic procedural default rules cannot be applied to nullify treaty rights;⁹² and it was “incumbent” upon the United States⁹³ to provide a remedy for an Article 36 violation of its own choosing by means of a legally obligatory review and reconsideration of all convictions and sentences of affected individuals.

This was perhaps the first blow to continued participation by the United States in the ICJ. The ICJ's determination that Article 36 created an individually enforceable right under treaty was in sharp contrast with American courts that had either not resolved the question or expressly rejected the enforceability of Article 36 rights under the VCCR by

⁸⁹ Hon. Stephen Breyer, *supra* note 12.

⁹⁰ *LaGrand* Case (F.R.G. V. U.S.), 2001 I.C.J. 466 (June 27).

⁹¹ *Id.* at 494, para. 77.

⁹² *Id.* at 497, paras. 90-91.

⁹³ *Id.* at 513-14, paras. 125-26. (The remedial provisions of the decision were stated in mandatory and not advisory terms.)

individual foreign nationals in domestic criminal proceedings.⁹⁴

It was then that the institutional conflict erupted between the ICJ, the Supreme Court, and the Arizona Governor. In the wake of the ICJ decision, the Supreme Court and the Governor of Arizona refused to recognize the ICJ's March 3, 1999 interim order staying LaGrand's execution, while the case was pending before the ICJ for final decision. The ICJ then ruled that this refusal evidenced a Protocol violation by the United States of its "international legal obligation to comply" and "to take all measures at its disposal" to effectuate the orders of the ICJ.⁹⁵ The refusal was a rather transparent foreign policy reaction, as opposed to a legal response, to the decision. Indeed, the Governor's refusal to honor the ICJ interim order directly contradicted the Arizona Clemency Board recommended stay of execution.⁹⁶ At the same time, the Supreme Court denied Germany's separate application to stay execution, although the option of granting a preliminary stay was an option available to the Court.⁹⁷

This conflict underscored the intransigence of the United States where international treaty obligations were not suited to domestic policy prerogatives. Given the Supreme Court's later refusal in *Sanchez-Llamas* and *Bustillo* to even acknowledge the law of the case in *LaGrand*, precluding the use of state procedural default rules to nullify treaty rights of individuals is in direct conflict with international law.⁹⁸ The

⁹⁴ See *United States v. Li*, 206 F.3d 56, 66 (1st Cir. 2000); *United States v. Jiminez-Nava*, 243 F.3d 192, 198-99 (5th Cir. 2001); *United States v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 621-22 (7th Cir. 2000); *United States v. Santos*, 253 F.3d 1105, 1108 (8th Cir. 2001); *United States v. Lombera-Carmolinga*, 206 F.3d 882, 885 (9th Cir. 2000); *United States v. Minjares-Alvarez*, 264 F.3d 980, 986 (10th Cir. 2001); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000); *Ledezma v. State*, 626 N.W.2d 134 (Iowa 2001); *State v. Issa*, 752 N.E.2d 904 (Ohio 2001); *Kasi v. Commonwealth*, 508 S.E.2d 57 (Va. 1998).

⁹⁵ *LaGrand*, 2001 I.C.J. at 508, paras. 115-16.

⁹⁶ *Id.* at 507-08, para. 113.

⁹⁷ *Id.* at 508, para. 114.

⁹⁸ Although some may argue that rulings of the ICJ are case specific based on the express language of the Protocol, there is some authority for

LaGrand decision was reaffirmed by the ICJ in *Avena* which followed.

B. Creating Binding International Policy

In *Avena*,⁹⁹ the ICJ again found multiple violations of Article 36 by the United States in fifty-one individual cases brought by Mexico. As a result, the ICJ reaffirmed the *LaGrand* decision¹⁰⁰ and ordered the same remedial measures including the review and reconsideration of all convictions resulting in a lengthy period of incarceration of the subject Mexican nationals.¹⁰¹ Then, in an astounding conclusion to the opinion, the ICJ escalated the conflict. The ICJ concluded, based on the earlier principles articulated in *LaGrand*, its decision established binding legal precedent in all future cases involving similarly situated foreign nationals in domestic American proceedings:

The Court would now re-emphasize a point of importance. In the present case, it has had occasion to examine the obligations of the United States under Article 36 of the Vienna Convention...To avoid any ambiguity, it should be made clear that...the Court has been addressing the issues of principle raised in the course of present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in

the proposition that when the ICJ interprets a multilateral treaty, its decision addresses the objective meaning of the treaty which must be applied in future cases as having precedential value. This finds support in Article 63 of the ICJ Statute, which requires the ICJ to notify other treaty adherents who are non-parties to the case before it when such interpretations are issued to allow other members to intervene in the case as a matter of right.

⁹⁹ Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J.12, No. 128 (Mar. 31).

¹⁰⁰ *Id.* at 44-5, paras. 111-14.

¹⁰¹ *Id.* at 51, para. 131.

respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.¹⁰²

C. The Resulting Conflict of Law

While much has been written about these two decisions, nothing seemed to predict the Supreme Court's next move in the aftermath of these cases. Indeed, there has been almost no mention about that aspect of the ICJ decision which ostensibly binds domestic courts and state governments to the interpretation and application of Article 36 by the ICJ in all future cases. Clearly, the Supreme Court had no interest or involvement in the development of international law under the compulsory jurisdiction of the ICJ. Subsequently, the Supreme Court behaved in its own later decisions as if the United States was a disinterested party. The thinking turned out to be particularly short-sighted in view of America's later foreign policy decision to withdraw from the Protocol in 2005, resulting in Article 36 disputes being handed back to the Supreme Court, but only after international legal precedent had been firmly decided by the ICJ.

D. 2007 Update: Medellin Returns to the Supreme Court

The legal mess continues to escalate. The Texas court flatly refused to apply the ICJ decision in *Avena* to defendant Medellin's case on remand, despite the President's Memorandum of February 2005 obligating the United States to do so. The Texas court concluded that it did not construe the constitutional provisions as expressly or implicitly

¹⁰² *Id.* at 57, para. 151.

granting the President the authority to mandate state court compliance with the ICJ *Avena* decision.¹⁰³

Undoubtedly, Justice Breyer saw the proverbial handwriting on the wall when he emphasized the critical need to decide these issues with full consideration of the legal relationships between the ICJ and American courts.¹⁰⁴ It remains to be seen whether the Supreme Court will embrace the task on the second visit of the *Medellin* case to its chambers.¹⁰⁵

VII. VI. AMERICA'S RETREAT FROM THE PROTOCOL: IS ICJ PRECEDENT BINDING?

A. The Political Dispute Dividing the U.S. and the ICJ

The political controversy, that may explain the Supreme Court's issue avoidance behavior, arises out of a fundamental disagreement between the executive branch of the United States government and the ICJ about the right of individual defendants, under international agreements, to assert violations of treaty rights in American courts. On one hand, the Government claims that there is a long-established presumption that treaties and other international agreements do not create individual judicially enforceable rights.¹⁰⁶ Hence, a foreign national may not claim in an American court that a state has convicted him in violation of treaty provisions. Under these circumstances, the best that a detained foreign national defendant can hope for is a non-judicial remedy such as post-conviction clemency or reparations.¹⁰⁷ In his dissent in *Sanchez-Llamas*, Justice

¹⁰³ *Ex Parte Medellin*, No. AP-75207, 2006 W.L. 3302639 (Tex. Crim. App. Nov. 15, 2007).

¹⁰⁴ Hon. Stephen Breyer, *supra* note 12.

¹⁰⁵ *Ex Parte Medellin*, petition for cert. filed, 75 U.S.L.W. 3398 (January 16, 2007) (No. 06-984).

¹⁰⁶ Brief for United States as *Amicus Curiae* in *Medellin v. Dretke*, O.T. 2004, No. 04-5928, at 11.

¹⁰⁷ *Id.* at 7.

Breyer rejected the government's claim regarding any such presumption, stating, "that no such presumption exists."¹⁰⁸

In opposition, the ICJ has consistently rejected the United States' claim that treaty rights may only be enforced by member states to the treaty, and not individuals.¹⁰⁹ Consistent with its interpretation that a specific treaty may provide an individually enforceable right to raise a violation, the ICJ acknowledged that any remedial measures must be left to the domestic laws of the member states consistent with each nation's autonomy under international law.¹¹⁰ However, the member state does have an affirmative obligation under the Protocol to remediate treaty violations.¹¹¹ Thus, the ICJ firmly concluded that the Vienna Convention creates judicially enforceable rights, with the concomitant obligation of each member state to provide the appropriate judicial remedy to vindicate the violation of the right.¹¹²

B. The Impact of Forum Selection Clauses on the Binding Affect of International Law

Article 59 of the Court's Statute¹¹³ provides that a decision of the ICJ has no binding force except between the

¹⁰⁸ Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 2697 (2006) (Breyer, J., dissenting).

¹⁰⁹ Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J.128, paras. 121, 128 (Mar. 31); LaGrand Case (F.R.G. V. U.S.), 2001 I.C.J. 466, para. 125 (June 27).

¹¹⁰ VCCR, *supra* note 2, at Art. 36(2), 21 U.S.T., at 101, (laws and regulations "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.").

¹¹¹ *Id.*

¹¹² The difficulty of achieving uniformity in remedial action among the various member states is discussed at point D *infra*. See also Miriam Miquelon-Weismann, *The Convention on Cybercrime: A Harmonized Implementation of International Penal Law: What Prospects for Procedural Due Process?* 23 J. MARSHALL. J. COMPUTER & INFO. L.329, 357 (2005). ("Whether a particular party has enacted sufficient due process protections, or even extends existing domestic due process protections to aliens prosecuted within its borders, must necessarily remain untested until cases are actually prosecuted.")

¹¹³ Court's Statute, *supra* note 15.

parties and in respect to that particular case.¹¹⁴ Thus, the legal principle of *stare decisis* does not exist in the traditional sense in international law.¹¹⁵ However, the Supreme Court has continually recognized the utility and enforceability of forum selection clauses under international law, such as the Protocol, even assuming that “a contrary legal result would be forthcoming in a domestic context.”¹¹⁶ The policy considerations of meeting international expectations of predictability and uniformity as the basis to enforce a voluntary agreement between the parties to submit to international or foreign authority under a forum selection clause was emphasized by the Court: “We cannot have trade and commerce in world markets and international waters exclusively on our own terms, governed by our laws, and resolved in our courts.”¹¹⁷

In the context of the VCCR and the utility of the Protocol as a forum selection clause, the Court observed that it should “give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such.”¹¹⁸ In early dicta in the *Breard* decision, the Court assumed without deciding that the VCCR “arguably confers on an individual the right to consular assistance following arrest...”¹¹⁹ This language may be something short of wholesale approval of ICJ interpretation of Article 36 as binding legal precedent, however, there is recognition that this interpretation cannot and should not be ignored.

Apparently, the fact that the Supreme Court continually assumes without deciding that Article 36 confers individually

¹¹⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 103, cmt (b) (1987).

¹¹⁵ *Id.*

¹¹⁶ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

¹¹⁷ *Bremen v. Zapatta Off-Shore Co.*, 407 U.S. 1, 9 (1972).

¹¹⁸ *Greene v. Gilmore*, 523 U.S. 371, 375 (1998).

¹¹⁹ *Id.* at 376. Greene’s claim under the VCCR based on an Article 36 violation was rejected on other procedural grounds. Parenthetically, the ruling based upon an interpretation of a state’s procedural default rules has also been subsequently rejected by the ICJ.

enforceable rights upon foreign nationals in domestic proceedings implies that the Court continues to apply the standard of “respectful consideration” to ICJ decisions. Arguably, the correct standard for the Court to apply is not “respectful consideration” but actual recognition of the ICJ order interpreting the treaty and establishing international policy as being dispositive of the issue. This would be consistent with the history of the negotiations leading up to the codification of a forum selection clause under the Protocol, the post-ratification conduct and legal position espoused by the United States in cases before the ICJ relating to Article 36 interpretation, and the prior decisions of the Supreme Court¹²⁰ enforcing forum selection clauses entered into voluntarily by the parties.

C. ICJ Decisions Should Be Treated as Binding Interpretation of Article 36 Based on the Negotiated Agreement Between Sovereigns

The Supreme Court has stated repeatedly that a treaty ratified by the United States is the law of the land.¹²¹ representing an agreement among sovereign powers.¹²² As such, the Court has considered as aids to treaty interpretation the negotiating and drafting history and the post-ratification understanding of the parties.¹²³

The negotiating and drafting history demonstrates that the United States played a major role in negotiating the specific language of the VCCR and the Protocol.¹²⁴ The United States’ fully supported the Protocol, with the understanding that members would be free to accept or reject the Protocol. However, once accepted, members were bound by its

¹²⁰ *Mitsubishi Motors Corp.*, 473 U.S. at 629; *Bremen*, 407 U.S. at 9.

¹²¹ U.S. CONST. art. II, § 2

¹²² *Zicherman v. Korean Airlines Co., Ltd.*, 516 U.S. 217, 226 (1996).

¹²³ *Id.*

¹²⁴ Report of the United States Delegation to the Vienna Conference on Consular Relations, reprinted in Sen. Exec. E., 91st Cong., 1st Sess., May 8, 1969 at 41, 59-61.

operation,¹²⁵ including Article 1¹²⁶ of the Protocol which places the adjudication of treaty interpretation squarely within the compulsory jurisdiction of the ICJ. The United States voluntarily accepted the Protocol when it ratified the VCCR in 1969¹²⁷ and has continued in the post-ratification period to be bound voluntarily by its operation until 2005, when the United States withdrew.¹²⁸

Moreover, the United States argued before the ICJ during the Iran hostage crisis that the failure to provide consular access under Article 36 is a manifest violation of the treaty.¹²⁹ The ICJ agreed and has repeatedly issued decisions consistent with that interpretation of the VCCR. There is no legal authority to suggest that a foreign policy decision by the executive branch to withdraw from the compulsory jurisdiction of the ICJ somehow voids international legal principles and an entire line of cases decided by the ICJ while the United States voluntarily submitted itself to the jurisdiction of that Court and urged the Court to embrace those same legal principles.

While the Supreme Court did not explicitly enforce ICJ interpretation of Article 36 in *Sanchez-Llamas* and *Bustillo*, it must assume (without deciding) that it is the law. The Court is at a loss of both words and logic to find otherwise.

D. Binding State Courts to ICJ Precedent Post-Protocol

It is axiomatic that the constitution of the United States¹³⁰ declares a treaty to be the supreme law of the land and its obligations are binding on the courts of the United States.¹³¹

¹²⁵ *Id.* at 72-73.

¹²⁶ Protocol, *supra* note 48. *See also supra* text accompanying note 77.

¹²⁷ Charter of the United Nations, *supra* note 3.

¹²⁸ Court's Statute, *supra* note 15; *see also supra* note 16.

¹²⁹ Case Concerning United States Diplomatic and Consular Staff in Tehran, *supra* note 81.

¹³⁰ U.S. CONST. art VI, cl.2.

¹³¹ *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109-10 (1801).

The VCCR is a self-executing treaty requiring no domestic legislation to make it operative.¹³² Self-executing treaties have the force and effect of a legislative enactment.¹³³ The Supreme Court early recognized that the Constitution places self-executing treaties in the same category as other laws of Congress that create rights “capable of enforcement as between private parties.”¹³⁴

Both James Madison¹³⁵ and John Jay¹³⁶ emphasized the importance of federal supremacy over state and local governments in foreign affairs. Likewise, the Supreme Court, early recognized federal supremacy in the field of foreign affairs: “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.”¹³⁷ So, what happens to the rules governing federal supremacy after the United States withdraws from a Protocol?

The question now certain to be presented to the Supreme Court on a petition for writ of certiorari, arising out of the recent decision by the state of Texas,¹³⁸ is whether the President of the United States can bind state courts post-protocol to follow ICJ precedent by virtue of a presidential memorandum submitted to the ICJ committing the states to do so. The Texas court seemed to think that presidential memoranda were not included in the group of documents, such as treaties and protocols, categorically included under

¹³² S. Exec. Rep. No.91-9 app. at 5 (1969) (statement of Deputy Legal Advisor J. Edward Lyerly). *See, e.g.,* *Breard v. Pruett*, 134 F.2d 615,622 (4th Cir. 1988).

¹³³ *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

¹³⁴ *The Head Money Cases*, 112 U.S. 580, 598 (1884).

¹³⁵ THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961). The power to make treaties and regulate commerce with foreign powers was seen as an “obvious and essential branch of federal administration.” *Id.*

¹³⁶ THE FEDERALIST NO. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961).

¹³⁷ *United States v. Belmont*, 301 U.S. 324, 331 (1937).

¹³⁸ *Ex Parte Medellin*, petition for cert. filed, 75 U.S.L.W. 3398 (January 16, 2007) (No. 06-984).

the federal supremacy clause and other case precedent declaring federal superiority in the field.¹³⁹ In other words, the Texas court found that the withdrawal from the Protocol left the President without the power to bind the states to ICJ orders. It is probably fair to say that neither the President in issuing the 2005 Memorandum nor the Supreme Court anticipated this legal result as a consequence of withdrawing from the Protocol.

While this issue may provide future scholars with fertile ground for comment, the short answer to a relatively lengthy opinion may be that the Texas court simply overlooked the meaning of the word “treaty.”

The Supreme Court observed long ago:

[N]egotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted... an international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention and [commercial] agreements like that under consideration are illustrations... [the commercial agreement] was a compact negotiated and proclaimed under the authority of the President, and as such was a ‘treaty’...¹⁴⁰

Presumably, the commitment made by the President to the ICJ pursuant to presidential memorandum fits into the seemingly broad penumbra of illustrations defining the meaning of “treaty.”¹⁴¹

¹³⁹ *Id.*

¹⁴⁰ *Belmont*, 301 U.S. at 330-31.

¹⁴¹ Parenthetically, a good deal more can be said about the Texas case. For example, the case completely ignores legal considerations attendant to international decisions rendered under compulsory forum selection clauses like the one in the Protocol.

In any case, as a direct result of the decision to withdraw from the Protocol, state courts have refused to follow ICJ orders regarding the impact of an Article 36 violation on the criminal conviction of a foreign national. The Supreme Court should not assume without deciding that such a right exists. The treatment of foreign nationals in American courts should not turn on an argument over the authority of the President to make the states comply with international law. In a country that prides itself on the principle of legality, where the law as opposed to personal predilection governs the outcome of a case, mere assumptions of the Supreme Court about the due process rights of foreign nationals fall short.¹⁴²

VIII. THE PROBLEMS INHERENT IN VINDICATING ENFORCEABLE LEGAL RIGHTS

Based upon the Supreme Court's refusal in *Sanchez-Llamas* to apply the exclusionary rule to protect the rights of foreign nationals, where the violation of those rights is conceded, or to prevent state procedural default rules from barring remediation, the issue of extending existing domestic due process protections to foreign nationals prosecuted within America's borders remains unclear. The Supreme Court should finally decide the application of international law to domestic legal proceedings. The need for this final determination is critical because of the general nature of international treaty enforcement mechanisms. Under most treaties, the dynamic of self-enforcement of the treaty objectives remains within the domain of each respective national legislature. That is particularly the case under the

¹⁴² One aspect of the principle of legality is the notion that the courts may not engage in the "arbitrary and discriminatory enforcement of the penal law and [the] resort to legal formalism as a constraint against unbridled discretion." John Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 201 (1985). The ambivalence shown by the Supreme Court with regard to the orders of the ICJ and the refusal to articulate any legal standard against which to provide foreign nationals notice of their rights in American courts is the precise kind of arbitrary judicial rule-making sought to be precluded by the principle of legality.

VCCR. ICJ orders require remediation in conformity with international obligations pursuant to the VCCR but permit each member state to fashion remedial measures according to each member's own legislative and judicial preferences.

Also central to the model of procedural due process in the international sphere is the mandate that all nations recognize:

[R]ights arising pursuant to obligations it has undertaken under the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR], the 1966 United Nations International Covenant on Civil and Political Rights, and other applicable international human rights instruments, and which shall incorporate the principle of proportionality.¹⁴³

However, Supreme Court decisions have historically treated these mandates with plain indifference. For example, in rejecting an alien's claim for damages under the Aliens Tort Statute arising out of an alleged arbitrary arrest and unlawful seizure,¹⁴⁴ the Supreme Court concluded that neither the ECHR nor the other international treaties imposed any legal obligation on the United States. Therefore, federal courts had no power to enforce individual rights violations

¹⁴³ Council of Europe Convention on Cybercrime, at Art. 15, para. 1. <http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm>, (last visited May 29, 2007).

¹⁴⁴ The petitioner was acquitted on charges arising out of the torture and murder of a DEA agent by Mexican nationals. The Ninth Circuit found, in a related lower court decision, *Alvarez-Machain v. United States*, 331 F.3d 604, 609 (9th Cir. 2003), that DEA agents had no authority under federal law to execute an extra-territorial arrest of the petitioner indicted in a federal court in Los Angeles. In fact, the agents unlawfully kidnapped petitioner to bring him to the United States to stand trial. Petitioner moved to dismiss his indictment based upon "outrageous government conduct" and a violation of the extradition treaty with Mexico. The district court agreed, the Ninth Circuit affirmed and the Supreme Court reversed holding that the forcible seizure did not divest the federal court of jurisdiction. *United States v. Alvarez*, 504 U.S. 655 (1992).

under these treaties, even where the United States was a signatory.

The Court observed:

[Petitioner] says that his abduction by [DEA operatives] was an ‘arbitrary arrest’ within the meaning of the Universal Declaration of Human Rights (Declaration), G.A. Res. 217A(III), U.N. Doc. A/810 (1948). And he traces the rule against arbitrary arrest not only to the Declaration, but also to article nine of the International Covenant on Civil and Political Rights (Covenant), Dec. 19, 1996, 999 U.N.T.S. 171, to which the United States is a party, and to various other conventions to which it is not. But the Declaration does not of its own force impose obligations as a matter of international law [...] [a]nd, although the Covenant does not bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.¹⁴⁵

Thus, the ECHR, along with the other human rights treaties, apparently creates no enforceable procedural due process rights in United States federal courts.

Moreover, the decision to extend the protections of the Bill of Rights to aliens is not an automatic one or implicit in the concept of ordered liberty. Specifically, the Supreme Court declined to extend the protection of the Fourth Amendment to an alien extradited to the United States for trial on criminal charges. The Court reasoned that “...aliens receive constitutional protections when they have come within the territory of the United States and developed *substantial connections with this country*...but this sort of

¹⁴⁵ *Sosa v. Alavrez-Machain*, 124 S.Ct. 2739, 2767 (2004).

presence-lawful but involuntary [extradition]- is not the sort to indicate any substantial connection with our country.”¹⁴⁶ Further rejecting the alien’s equal protection argument, to wit: that aliens should be afforded the same constitutional rights afforded U.S. citizens in criminal cases, the Court concluded: “They are constitutional decisions of this Court expressly according different protections to aliens than to citizens, based on our conclusion that the particular provisions in question were not intended to extend to aliens in the same degree as to citizens.”¹⁴⁷ Justice Kennedy, in his concurring opinion, concludes that: “The distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any judicial relation between our country and some undefined, limitless class of non-citizens who are beyond our territory.”¹⁴⁸

These decisions leave little doubt that the Bill of Rights does not operate extraterritorially in relation to searches and seizures or in relation to constitutional infringements of the right to privacy. The proposed application of these rights to remediate Article 36 violations seems equally unlikely. Instead, the Court extends existing procedural due process guarantees to aliens on the two-prong voluntariness and substantial connection analysis. That ad hoc determination leaves little room for predictability in the application of the treaty in the United States.

Accordingly, the procedural due process rhetoric of the ICJ warning against the application of state procedural default rules as a bar to remediation of treaty violations had no demonstrable influence on American jurisprudence as evidenced by the decision in *Sanchez-Llamas* and *Bustillo*. The Supreme Court’s adherence to depriving foreign nationals of procedural due process in these decisions, reaffirming the principles of *Beard*, flies in the face of the Golden Rule of foreign relations. Indeed, the United States

¹⁴⁶ *United States v. Verfugo-Urquidez*, 494 U.S. 259, 271 (1990) (emphasis added).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 275 (Kennedy, J., concurring).

should expect no more protection with respect to its citizens similarly situated in other nations. In view of decision to withdraw completely from the treaty, American citizens will have no ability to rely on the protections of Article 36 once in custody in another country. The cycle of international mistrust is inevitably self-perpetuating under these circumstances. Thus, even recognition of a judicially enforceable treaty right may be only a pyrrhic victory. What is an enforceable right without a remedy?

IX. NATIONAL POLICY CONSIDERATIONS

The United States State Department recognizes the importance of consular access to American citizens arrested abroad. The Department's Foreign Affairs Manual provides, "[O]ur most important function as consular officers is to protect and assist private U.S. citizens or nationals traveling or residing abroad. Few of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail."¹⁴⁹ The Department's Foreign Affairs Manual describes the VCCR as "the most important legislative and administrative authorities for providing assistance to U.S. citizens or nationals who are detained, arrested or imprisoned abroad...."¹⁵⁰ The importance of maximizing human rights, due process, and quick consular access, is a clearly stated foreign policy goal. Yet, there is a real disconnect in the Supreme Court between upholding America's obligations under treaty and the foreign policy goal of obtaining fair treatment for U.S. citizens under the same legal document. The maxim "do unto others as you would have them do unto you"¹⁵¹ has become enormously problematic. Remarkably, the Foreign Relations Manual includes an entire section about how U.S. consular officers should respond to the complaints of other host governments

¹⁴⁹ 7 Foreign Assistance Manual (FAM) §412 Policy, at 1 (Sept. 1, 2004). <http://foia.state.gov/masterdocs/07fam/07fam0410.pdf> (last visited April 24, 2007).

¹⁵⁰ *Id.* §413-Authority, at 2.

¹⁵¹ Babylonian Talmud, *Shabbat* 31a.

that America does not honor its obligations under Article 36: “Even where this might be true, it does not exempt the host government from its treaty obligations. *Two wrongs do not make a right.*”¹⁵²

While an almost laughable retort, the notion that America’s own misbehavior should not excuse the behavior of other member states, demonstrates the same disregard for America’s obligations under the VCCR as that exhibited by the executive and judicial branches of government. Reciprocal treaty violations which cannot be remedied by the extension of basic procedural due process rights to detained foreign nationals only serves to underscore the confusion embedded in America’s foreign policy contributed to by the Court’s decisions.

Justice Breyer observed in his dissent in *Sanchez-Llamas* that the United States joined the VCCR in order to promote the orderly and effective conduct of consular relations between member states and to guarantee protection to American citizens abroad.¹⁵³ The difficulty in achieving these goals poses a difficult question where enforcement depends upon “the details of a nation’s legal system”¹⁵⁴ because treaties do not include enforcement details which are left to member state preferences. “Yet, without any such guarantees it may prove difficult to prevent an individual nation, through application of its system’s details, from denying in practice the rights that the treaty sought to assure.”¹⁵⁵

X. CONCLUSION: THE GOLDEN RULE

The current state of the law has fomented a quagmire of legal and political turf battles over the authority to interpret and apply international law in domestic criminal proceedings. The aspirational goal of providing even legal footing for all foreign nationals, including our own citizens, is the most

¹⁵² FAM, *supra* note 149, §420-Notification, at 3 (Sept. 3, 2004) (emphasis added).

¹⁵³ *Sanchez-Llamas*, *supra* note 108, at 2708.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

salient feature of the VCCR. Yet, the Court remains indifferent to the inevitable need to establish working international relations shored up by domestic legal systems. Justice Breyer warns that a system which denies procedural due process to foreign nationals is one that:

...leaves States free to deny effective relief for Convention violations, despite America's promise to provide just such relief. That approach risks weakening respect abroad for the right of foreign nationals... And it increases the difficulties faced by the United States and other nations who would, through binding treaties, strengthen the role that law can play in assuring all citizens, including American citizens, fair treatment throughout the world.¹⁵⁶

America's foreign policy goals cannot be limited to spreading democracy abroad. Instead, the goal should be to enliven the principles of human rights for all citizens of the world even when those foreign nationals seek protections in this home.

¹⁵⁶ *Id.* at 2709.