

## COMMENT

***REBUS SIC STANTIBUS:***  
**NOTIFICATION OF CONSULAR RIGHTS**  
**AFTER MEDELLIN**

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*The answer to Lord Ellenborough's famous rhetorical question, "Can the Island of Tobago pass a law to bind the whole world?," may well be yes, where the world has conferred such binding authority through treaty.*

—Justice Steven Breyer<sup>1</sup>

## I. INTRODUCTION

In its previous term, the U.S. Supreme Court considered the federal habeas corpus petition of Jose Medellin, a Mexican national sentenced to death by a Texas court after his conviction for the rape and murder of two girls. Medellin claimed state officials had violated the Vienna Convention on Consular Relations (VCCR) by failing to notify him of his right to assistance from the Mexican consulate. The International Court of Justice (ICJ) addressed his claim in the *Case Concerning Avena and Other Nationals* in 2003, finding that the VCCR confers individual rights<sup>2</sup> and that a violation of the VCCR requires “review and reconsideration”<sup>3</sup> in U.S. courts notwithstanding the procedural default rule.<sup>4</sup>

By granting certiorari in *Medellin v. Dretke*,<sup>5</sup> the Supreme Court created an opportunity to reassess its decision in *Breard v. Greene*,<sup>6</sup> the last case in which it considered consular rights claims under the VCCR, and reconcile U.S. and ICJ jurisprudence on the issue. When the Court then dismissed the certiorari as improvidently granted, it failed to clarify whether ICJ decisions regarding the VCCR constitute binding domestic law. U.S. courts consequently remain rudderless in adjudicating claims of article 36 violations, particularly with regard to whether such violations raised in federal habeas petitions may be procedurally defaulted and still comply with the requirements of the VCCR.

This Comment examines, through principles of public international law and U.S. jurisprudence, the relationship between U.S. courts and the ICJ to determine if the former are indeed bound by the latter's decisions, *proprio motu*, or if instead some Executive action is required to make the

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1. Torres v. Mullin, 540 U.S. 1035, 1041 (2003) (Breyer, J., dissenting), quoted in Andreas Paulus, *From Neglect to Defiance? The United States and International Adjudication*, 15 EUR. J. INT'L L. 783, 783 (2004).

2. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1, at para. 40 (Mar. 31) [hereinafter *Avena*]. See also LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 1, at para. 77 (June 27) [hereinafter *LaGrand*].

3. LaGrand, *supra* note 2, para. 121.

4. *Id.* para. 112.

5. Medellin v. Dretke, 125 S. Ct. 2088 (2005).

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

decisions binding on the judiciary. Part of this examination will entail a discussion of the potential for dialogue between the ICJ and U.S. courts to “pierce the veil of sovereignty” that traditionally conceals the inner workings of sovereign states from the scrutiny of international tribunals. Based on this assessment, the Comment then addresses how U.S. courts may approach the requirements of *Avena* and *LaGrand* in light of the Supreme Court’s refusal to specifically address the effect of those decisions in lower courts.

Part I recounts the events surrounding *Medellin* and briefly summarizes the majority and dissenting opinions in the case. Part II describes the three findings in *LaGrand* and *Avena* that are most important for U.S. courts considering article 36 in habeas petitions: first, article 36 confers rights on individuals and grants them standing to enforce those rights and seek meaningful remedies; second, procedural bars cannot preclude meaningful review and reconsideration of cases involving article 36 violations; and third, meaningful review and reconsideration is necessarily a judicial task, excluding state clemency proceedings.

Part III examines the ways in which the *LaGrand* and *Avena* decisions might bind U.S. courts. It argues that the Supremacy Clause of the U.S. Constitution not only clearly integrates international treaties into U.S. domestic law but also incorporates interpretations of those treaties by international tribunals such as the ICJ. Thus, through its self-executing decision in *Avena*, the ICJ engaged in a direct dialogue with the U.S. judiciary.

While the Supremacy Clause forms the basis of this argument, it does not address all aspects of the current dispute, particularly the findings in *Avena* and *LaGrand* that run contrary to current Supreme Court jurisprudence. Part IV addresses this conundrum, examining the history of the Supremacy Clause and existing legal doctrine to determine how U.S. courts may implement the spirit of the ICJ decisions without flying in the face of *Breard*. The finding of individual rights in article 36 of the VCCR will inform a great deal of this discussion. Part IV also briefly discusses why the last-in-time rule need not necessarily apply in a conflict between the VCCR and the U.S. statutes codifying procedural default rules. Part V concludes.

## II. THE SUPREME COURT AND MEDELLIN

### A. *Granting Cert and the Bush Proclamation*

On April 13, 2004, the U.S. Court of Appeals for the Fifth Circuit denied Jose Medellin’s habeas petition on procedural default grounds,

holding that the VCCR did not confer individual rights.<sup>7</sup> The court relied on *Breard* to conclude that such claims, like constitutional claims, can be procedurally defaulted even in death penalty cases.<sup>8</sup> The Fifth Circuit was adamant in favoring its own precedents and those of the Supreme Court over the decisions of the ICJ in *Avena* and *LaGrand* “until taught otherwise by the Supreme Court.”<sup>9</sup>

In their application for certiorari, the *Medellin* petitioners asked the Supreme Court to consider two questions: first, should U.S. courts apply the *Avena* decision in full, granting review and reconsideration of article 36 violations without resort to procedural default doctrines? Second, should U.S. courts give effect to the *LaGrand* and *Avena* decisions as a matter of “international judicial comity” and in the interest of uniform treaty interpretation?<sup>10</sup> The first question challenged the Court to decide whether the decisions of the ICJ are a self-executing, and therefore binding, part of the VCCR. The second question asked the Court, in the event it found ICJ decisions were not binding on U.S. courts, to delineate the boundaries of the comity doctrine and to explain how courts should consider ICJ decisions *outside* a level of strict legal obligation.

After the Supreme Court agreed to hear the *Medellin* case, the Bush administration filed a brief with the Court in which it stated that the “United States will discharge its international obligations under . . . *Avena* . . . by having State courts give effect to the decision in accordance with *general principles of comity* . . . .”<sup>11</sup>—further complicating the relationship between the ICJ and U.S. courts. The Bush proclamation invited the Supreme Court to consider the relationship between the U.S. judiciary and the ICJ as one of comity, whereby mutual respect, and not legal obligation, steers the decisions of each body.<sup>12</sup> The U.S.

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7. *Medellin v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004) (referring to *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001)).

8. *Medellin*, 371 F.3d at 280.

9. *Id.*

10. See Brief for the Petitioner at I, *Medellin*, 125 S. Ct. 2088 (No. 04-5928).

11. Memorandum for the Attorney General, Feb. 28, 2005, at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html> (last visited Feb. 17, 2006) (emphasis added); see also Charles Lane, *Mexicans on Death Row to Get Hearings: Bush Tells Texas Courts to Review Cases of 51 Denied Consular Aid*, WASH. POST, Mar. 8, 2005, at A2.

12. Comity as a legal concept occupies a space somewhere between legal obligation and mere courtesy. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (“Comity in the legal sense, is neither a matter of absolute obligation on the one hand nor of mere courtesy and good will on the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”); Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1 (1991).

government argued that the presidential determination, “like an executive agreement, has independent legal force and effect, and contrary state rules must give way under the Supremacy Clause.”<sup>13</sup> After the United States filed its brief, a spokesman for Texas disputed the authority of the presidential determination, stating that it exceeded “the constitutional bounds for federal authority.”<sup>14</sup> Medellín then moved to stay the Supreme Court proceedings to pursue enforcement of the *Avena* decision in Texas courts under the authority of the presidential determination. The Court, however, proceeded with oral arguments on the merits.

### B. *Dismissing Cert*

On May 23, 2005, the Supreme Court dismissed its certiorari as improvidently granted.<sup>15</sup> In a *per curiam* opinion, the Court described five unresolved threshold issues that argued against a conclusive ruling on Medellín’s claim. First, Medellín had not shown that *Reed v. Farley*,<sup>16</sup> which requires violations of statutory rights to meet a “fundamental defect” test before receiving recognition in post-conviction proceedings, did not bar his claim.<sup>17</sup> Second, Medellín had yet to overcome the deference accorded to state habeas proceedings absent a showing that the adjudication “was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.”<sup>18</sup> Third, because a habeas petitioner “cannot enforce a ‘new rule’ of law,” the Court could not address Medellín’s claim without first deciding how the *Avena* decision impacted U.S. jurisprudence.<sup>19</sup> Fourth, Medellín lacked a certificate of appealability, which is available only upon a showing of a denial of a constitutional right, and he had failed to demonstrate that “his allegation of a *treaty* violation could satisfy this standard.”<sup>20</sup> Finally, Medellín did not show he had exhausted all state court remedies.<sup>21</sup>

In her concurring opinion, Justice Ginsburg, joined by Justice Scalia, agreed with the dismissal of the writ as improvidently granted and rejected the dissent’s proposal to remand Medellín’s claim to the

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13. Brief for the United States as Amicus Curiae Supporting Respondent at 9, Medellín, 125 S. Ct. 2088 (No. 04-5928).

14. Hugh Dellios & Steve Mills, *U.S. Orders Reviews for Mexican Inmates*, CHI. TRIB., Mar. 9, 2005, at C5.

15. Medellín, 125 S. Ct. 2088, 2089 (2005).

16. See *Reed v. Farley*, 512 U.S. 339 (1994).

17. Medellín, 125 S. Ct. at 2090.

18. *Id.* at 2091.

19. *Id.*

20. *Id.*

21. *Id.* at 2091–92.

Fifth Circuit as “leaving unresolved a bewildering array of questions.”<sup>22</sup> Dismissing the writ, in contrast, granted the Texas courts the opportunity to provide reconsideration of Medellín’s claim and avoided the “formidable threshold issues . . . that deter definitive answers to the questions presented in the petition for certiorari.”<sup>23</sup>

Justice O’Connor, joined by Justices Stevens, Souter, and Breyer, dissented from the *per curium* opinion. The “tentative predictions” driving the dismissal of the writ, in her view, were not “reason enough to avoid questions that are as compelling now as they were when we granted a writ of certiorari.”<sup>24</sup> The dissent further found that the Texas court’s rejection of Medellín’s claim did not “adjudicate the merits of the relevant federal question—whether, under article 36(2), the treaty overrides state procedural default rules.”<sup>25</sup> Further, contrary to the Supreme Court’s precedents, the Texas court “reasoned that private individuals (as opposed to offended nations) can never enforce any treaty in court.”<sup>26</sup> Therefore, the Texas proceedings merited no deference, and Medellín’s claim should have been remanded to the Fifth Circuit for *de novo* proceedings.<sup>27</sup>

Two less substantial dissents followed Justice O’Connor’s opinion. Justice Souter agreed that Medellín’s case should have been remanded to the Fifth Circuit, but with the caveat that the court should “take no further action until the anticipated Texas litigation responding to the President’s position had run its course,” potentially disposing of the need for a federal habeas petition.<sup>28</sup> Justice Breyer, in his dissent, also advocated returning the case to the Fifth Circuit, although he expected the court to recognize the exigent circumstances favoring a stay.<sup>29</sup>

### III. BACKGROUND ON *LaGrand* AND *Avena* FROM THE U.S. PERSPECTIVE

Both *LaGrand* and *Avena* dealt with violations of article 36 of the VCCR, which requires, *inter alia*, that states parties allow foreign detainees to contact and freely communicate with their consulate.<sup>30</sup>

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22. *Id.* at 2093 (Ginsburg, J., concurring).

23. *Id.* at 2095.

24. *Id.* at 2096 (O’Connor, J., dissenting).

25. *Id.* at 2099.

26. *Id.*

27. *Id.* at 2100.

28. *Id.* at 2106 (Souter, J., dissenting).

29. *Id.* at 2107 (Breyer, J., dissenting).

30. Article 36 provides:

Article 36 demands that states give “full effect” to these requirements.<sup>31</sup>

Of primary importance in both the *LaGrand* and *Avena* cases was the application of procedural default rules by U.S. courts. In U.S. federal courts, before a state criminal defendant can make a claim for relief he must already have presented the claim in state court.<sup>32</sup> In both *LaGrand* and *Avena*, U.S. courts procedurally defaulted the petitioners’ article 36 claims in their habeas petitions because they had failed to raise the claims in state court criminal proceedings. Fundamental to both cases was the question of how closely the ICJ would examine the U.S. criminal justice system to determine whether the United States had complied with its commitments under article 36.

#### A. Important Holdings from *LaGrand* and *Avena* for U.S. Courts

U.S. courts, at both the federal and state level, have in past decisions considered three important holdings from *LaGrand* and *Avena*: first, the

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1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

31. *Id.*

32. *See, e.g.,* *Wainwright v. Sykes*, 433 U.S. 72 (1977).

VCCR confers individual rights; second, the United States must grant “review and reconsideration” in cases involving article 36; and third, clemency proceedings do not constitute sufficient review and reconsideration. In many ways, these holdings diverge from or directly conflict with the Supreme Court’s *Breard* decision, which it issued before either *LaGrand* or *Avena*.

The first of these holdings involves the admissibility of VCCR claims under the Optional Protocol of 1963, which gives the ICJ compulsory jurisdiction over disputes arising “out of the interpretation or application of the [Vienna] Convention.”<sup>33</sup> The ICJ’s holding in the *LaGrand* case that article 36(1) confers rights on individuals was significant in that it granted standing to Germany to raise claims based on diplomatic protection under the 1963 Optional Protocol.<sup>34</sup> The court based its decision on a textual interpretation of article 36, pointing out that the language of article 36(1) specifically addresses the detainee’s rights in addition to the rights of the mother state.<sup>35</sup> Based on this observation, the court held that article 36(1) “creates individual rights, which . . . may be invoked in this Court by the national State of the detained person.”<sup>36</sup>

The second significant holding of the *LaGrand/Avena* cases addresses remedies, particularly the duties of the United States with regard to a violation of article 36. As an initial matter, the ICJ in *LaGrand* held that its power to award remedies stemmed directly from its jurisdiction over the dispute.<sup>37</sup> Specifically, “[w]here jurisdiction exists over a particular matter, no separate basis for jurisdiction is required by the Court to consider . . . remedies.”<sup>38</sup> Based on this authority, the *LaGrand* court went on to declare that, due to its violation of the article 36 rights of the *LaGrand* brothers, “the United States of America, *by means of its own choosing*, shall allow the *review and reconsideration* of the conviction and sentence [of German nationals] by taking account of the violation of the rights set forth in [the VCCR].”<sup>39</sup> Despite leaving the determination of the means of “review and reconsideration” to the United States, the

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33. Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations, Apr. 24, 1963, art. 1, 21 U.S.T. 325, 596 U.N.T.S. 487.

34. *LaGrand*, *supra* note 2, para. 77. See Bruno Simma & Carsten Hoppe, *From LaGrand and Avena to Medellín—A Rocky Road Toward Implementation*, 14 TUL. J. INT’L & COMP. L. (forthcoming 2006).

35. *Id.*

36. *Id.*

37. *Id.* para. 48. See also Simma & Hoppe, *supra* note 34.

38. *LaGrand*, *supra* note 2, para. 48.

39. *Id.* para. 128 (emphasis added).

court found that the procedural default rules applicable in U.S. courts prevented the “full effect” of individual rights under the VCCR.<sup>40</sup>

U.S. courts typically require prejudice to the detainee to overcome procedural default.<sup>41</sup> Because the individual right under article 36 is one of notification and access and not necessarily consular assistance, the harm caused by a violation of article 36 is difficult to determine.<sup>42</sup> In addition, because Arizona had already executed the LaGrand brothers, the ICJ in *LaGrand* did not explicitly decide how plaintiffs must show prejudice in domestic courts:

It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance[,] . . . whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach . . . from exercising them, had they so chosen.<sup>43</sup>

While the ICJ seemed to suggest that prejudice need not be shown to establish a *violation*, the court did not determine whether it is a necessary trigger for remedies.<sup>44</sup> Needless to say, the answer to this question depends on whether the procedural default rule as used by U.S. courts fits within the ambit of “review and reconsideration.”

The ICJ resolved this issue, albeit somewhat less than satisfactorily, in the *Avena* case. Faced with a myriad of possible applications of the *LaGrand* decision within U.S. courts,<sup>45</sup> the court attempted to clarify “review and reconsideration.” In reference to the freedom of the United States to choose the *means* by which it conducts review and reconsideration, the ICJ stated:

It should be underlined . . . that this freedom in the choice of means for such review and reconsideration is not without qualification . . . such review and reconsideration has to be carried out “by taking account of the violation of the rights set forth in the Convention” . . . [T]he Court would point out that what is crucial

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40. *Id.* para. 91.

41. Douglas Cassel, *International Remedies in National Criminal Cases: ICJ Judgment in Germany v. United States*, 15 LEIDEN J. INT’L L. 69, 83 (2002).

42. Joan Fitzpatrick, *The Unreality of International Law in the United States and the LaGrand Case*, 27 YALE J. INT’L L. 427, 431 (2002).

43. *LaGrand*, *supra* note 2, para. 74.

44. Cassel, *supra* note 41, at 83.

45. The scope of the interpretation of “review and reconsideration,” as well as the respect for the determination that art. 36 confers individual rights, runs the gamut from compliance to disobedience. *See infra* Part II.

in the review and reconsideration process is the *existence of a procedure* which guarantees that full weight be given to the violation of the rights set forth in the Vienna Convention, whatever may be the outcome of such review and reconsideration.<sup>46</sup>

By requiring a procedure giving full weight to the violation of the rights set forth in the VCCR, the ICJ suggested that prejudice to the detainee *may* be considered, not in finding a violation of article 36, but in determining what remedies are appropriate. The issue, in essence, is not the correctness of the conviction or the sentence but rather their causal connection to the violations committed.<sup>47</sup> Thus, the court drew a fine line, approving the doctrine of harmless error (which reviews whether an error was actually harmful to the defendant) while rejecting the doctrine of procedural default (which prevents review of any kind).<sup>48</sup>

Finally, in addition to finding that review and reconsideration must give full weight to a violation's prejudicial impact on a detainee, the ICJ held in the *Avena* case that "the process of review and reconsideration should occur within the overall *judicial* proceedings relating to the individual defendant concerned."<sup>49</sup> In making this determination, the court rejected the U.S. argument that executive clemency procedures are a legitimate and effective part of meeting the requirement for review and reconsideration.<sup>50</sup> The court continued:

[W]hat is at issue in the present case is not whether executive clemency as an institution is or is not an integral part of the "existing laws and regulations of the United States," but whether the clemency process as practiced within the criminal justice system . . . can . . . qualify as an appropriate means for undertaking the effective "review and reconsideration" . . . .

The ICJ's assertion that the review and reconsideration required in *LaGrand* is a distinctly *judicial* consideration can be read in two ways. On a cursory level, the ICJ stayed within the boundaries of its judicial charter. As it is already in the uncharted territory of imposing an international will on U.S. domestic courts, the court declined to review the efficacy of clemency proceedings beyond stating that they "do[] not appear to meet the requirements described in [*LaGrand*]."<sup>51</sup> On a deeper level, the ICJ's insistence on judicial consideration can be read as an at-

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46. *Avena*, *supra* note 2, paras. 131, 139 (emphasis added).

47. Dinah L. Shelton, Case Note, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, 98 AM. J. INT'L L. 559, 566 (2004).

48. *Id.*

49. *Avena*, *supra* note 2, para. 141 (emphasis added).

50. *Id.* para. 136.

51. *Id.* para. 143.

tempt to place the problem outside the realm of politics (as clemency proceedings are by nature more political and less judicial) and engage U.S. courts in a dialogue between learned and mutually respectful judicial bodies. As described below, this posture contributed to the general discussion of the binding nature of ICJ decisions on U.S. courts, as well as the issue, clearly a sensitive one for the ICJ, of the limits of that binding nature.

### B. A Diverging (and Dated) Supreme Court Jurisprudence

One of the primary reasons for the divergence in interpretation of consular rights between U.S. courts and the ICJ is the fact that the Supreme Court's major examination of article 36 in *Breard v. Greene* came before either *Avena* or *LaGrand*. In addition, while the ICJ had the advantage of time and multiple cases to fine tune its treatment of consular rights, the Court's analysis of article 36 in *Breard* was short, imprecise, and insufficiently contrary to the ICJ's decisions to supply U.S. courts with a clear alternative precedent.

The Supreme Court first dealt with procedural default rules generally in *Breard*,<sup>52</sup> holding that procedurally defaulting article 36 claims in federal habeas petitions was permissible because the procedural rules of the forum state govern treaty implementation.<sup>53</sup> The Court further emphasized the language of the VCCR:

This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention "shall be exercised in conformity with the laws and regulations of the receiving State," providing that "said laws and regulations must enable *full effect* to be given to the purposes for which the rights accorded under this Article are intended."<sup>54</sup>

The problem with this determination is that the Court glossed over the language concerning the "full effect" of article 36 that the ICJ meticulously articulated in *LaGrand*. The Court thus ignored one of the most important provisions of the VCCR.

The Supreme Court's cursory treatment of the "full effect" requirement is somewhat understandable given the second part of the *Breard* decision. The Court acknowledged that the VCCR "*arguably confers on an individual the right to consular assistance following arrest,*"<sup>55</sup> but it

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52. The Court points out that "[i]t is a rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas." *Breard*, 523 U.S. at 375.

53. *Id.*

54. *Id.* (emphasis added).

55. *Id.* at 376.

quickly cabined this determination: “Breard’s ability to obtain relief based on violations of the Vienna Convention is subject to the subsequently enacted rule, just as any claim arising under the United States Constitution would be.”<sup>56</sup> The “subsequently enacted rule” in this case is the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which codified the procedural default rule for federal habeas petitions.<sup>57</sup> The Court held that Breard’s rights under the VCCR were limited to the extent that his claims must follow the procedures enumerated in AEDPA or potentially be defaulted.<sup>58</sup>

#### IV. *PACTA SUNTA SERVANDA*—PIERCING THE SOVEREIGNTY VEIL

Though many U.S. domestic courts have not given full accord to the *LaGrand* and *Avena* decisions, one exception to this rule is the Oklahoma Court of Appeals, which recently followed the ICJ’s *Avena* holding in *Torres v. Oklahoma*.<sup>59</sup> Osbaldo Torres, a Mexican national, was not notified of his consular rights after being arrested and charged with two murders in Oklahoma.<sup>60</sup> Torres was later convicted of murder and sentenced to death, and his federal habeas petition was unsuccessful. Torres was one of the Mexican nationals in the *Avena* case; after the ICJ’s decision, the Legal Adviser of the U.S. State Department recommended to the Oklahoma Pardon and Parole Board that it carefully review Torres’ case.<sup>61</sup> The Pardon and Parole Board recommended clemency, and the Governor of Oklahoma commuted Torres’ sentence to life without parole.<sup>62</sup> On the same day, the Oklahoma Court of Criminal Appeals issued an order staying execution and remanded the case to determine whether the violation of article 36 had prejudiced Torres.<sup>63</sup> In a special concurrence to the order, Judge Charles Chapel argued that the Supremacy Clause of the Constitution obligated U.S. states to follow treaties.<sup>64</sup> Judge

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56. *Id.*

57. 28 U.S.C. § 2254(a), (e)(2) (1998).

58. The Court further states that even if Breard had not fallen afoul of the procedural default rule, he would not have likely passed scrutiny under the doctrine of harmless error. If not procedurally defaulted, a defendant must still show that the adjudication of the claim in the lower court was both incorrect (based on either the application of federal law or determination of facts) and objectively unreasonable. Breard, 523 U.S. at 377.

59. *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (on file with author); see Sean D. Murphy, ed., *Contemporary Practice of the United States Relating to International Law*, 98 AM J. INT’L L. 579, 581 (2004).

60. Murphy, *supra* note 59, at 582.

61. *Id.*

62. *Id.*

63. *Torres*, No. PCD-04-442.

64. *Id.*; see Shelton, *supra* note 47, at 566.

Chapel noted that “[a] treaty is a contract between sovereigns. The notion that contracts must be enforceable against those who enter them is fundamental to the Rule of Law.”<sup>65</sup> With regard to his court’s relationship with the ICJ, Judge Chapel continued:

As this Court is bound by the treaty itself, we are bound to give full faith and credit to the *Avena* decision. I am not suggesting that the International Court of Justice has jurisdiction over this Court—far from it. However, in these unusual circumstances the issue of whether this Court must abide by that court’s opinion in Torres’s case *is not ours to determine*.<sup>66</sup>

Thus, Judge Chapel saw the decision of the ICJ as a self-executing element of the VCCR itself, which federal law compelled his court to follow under federal law.

International lawyers may applaud Judge Chapel and the Oklahoma Court of Criminal Appeals for diving into a torrent into which federal appeals courts have feared to wade. The most pressing question, however, persists: are U.S. courts actually bound by ICJ decisions, and if so, how?

#### A. *Evolving Treaty Interpretation*

The Supreme Court’s reliance in *Breard* on *lex posterior* may not sit on as firm a foundation as it once did. Now that the ICJ has given further meaning to the terms of article 36, a genuine conflict between the VCCR and AEDPA may not actually exist. Indeed, based on U.S. case law, including the *Charming Betsy* decision, the AEDPA and the VCCR can be interpreted as complementary statutes, thereby obviating the need to apply *lex posterior*.

Under the Supremacy Clause of the U.S. Constitution, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land,”<sup>67</sup> equally as binding on courts as the Constitution itself.<sup>68</sup> Judge Chapel used this same basic reasoning to bind the Oklahoma Court of Criminal Appeals to the *Avena* decision.<sup>69</sup> Though the reasoning is elegant, the devil is in the details. Two important considerations persist when deciding how U.S. treaty obligations bind U.S. courts under the Supremacy Clause. First, how is the treaty interpreted, and by whom? Second, what happens when an international

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65. Torres, No. PCD-04-442.

66. *Id.* (emphasis added).

67. U.S. CONST. art. VI, § 1, cl. 2.

68. *See, e.g.,* *Antoine v. Washington*, 420 U.S. 194, 201 (1975) (treaties are binding upon states under the Supremacy Clause).

69. *See* Torres, No. PCD-04-442.

tribunal interpreting a treaty provision creates requirements directly addressed to the judiciary?

### 1. How is a Treaty Interpreted?

There are two schools of thought on treaty interpretation: a treaty may either be static, with the meaning of its provisions frozen (but perhaps uninterpreted) at the time the parties ratified it, or it may be evolutionary, in which case the actual meaning of the words may differ over time.<sup>70</sup> Genuinely static treaties, needing no interpretation, are rare. Most arguments for authentic interpretation of treaties (or “treaty rigidity”) center around large multilateral treaties like the WTO agreements, where changing the agreement is logistically impossible.<sup>71</sup> At the other end of the spectrum, giving treaties an evolutionary meaning—in effect allowing a treaty system to “keep up with what is going on in the world”—is controversial.<sup>72</sup> (Justice O’Connor noted in *Medellin*, however, that “the Court has revisited its interpretation of a treaty when new international law has come to light.”<sup>73</sup>) In the middle ground are treaties with rigid language whose nuances, while not yet illuminated, may not take on new progressive meanings once interpreted. These treaties are considered open to judicial or political interpretation, aided by the *travaux préparatoires* of the treaty, the plain language of the provisions, or other treaties such as the Vienna Convention on the Law of Treaties (VCLT),<sup>74</sup> which specifies the rules by which a treaty may be interpreted.<sup>75</sup> Although the United States has not ratified the VCLT, considering it a codification of already existing customary laws of treaty interpretation,<sup>76</sup> there is a great burden on U.S. courts to interpret the VCCR according to its provisions.

The structure of the U.S. constitutional system, however, complicates this type of interpretation. Treaties in the United States are administered via a hierarchy: the Executive branch negotiates the treaty provisions with other sovereign nations;<sup>77</sup> the Executive and Legislative

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70. See John H. Jackson, *The Varied Policies of International Juridical Bodies—Reflections on Theory and Practice*, 25 MICH. J. INT’L L. 869, 873 (2004).

71. *Id.*

72. *Id.*

73. *Medellin*, 125 S. Ct. at 2105 (O’Connor, J., dissenting).

74. See generally DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 34–35 (2001) (discussing various “schools” of treaty interpretation).

75. See Vienna Convention on the Law of Treaties, part III, § 3, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

76. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 580 (2003) (citing *North Sea Continental Shelf Cases*).

77. U.S. CONST. art. II, § 2, cl. 2.

branches ratify the treaty,<sup>78</sup> bringing it within the ambit of the U.S. legal system; and the Judicial branch applies and interprets the treaty as U.S. law.<sup>79</sup> When a treaty provides for binding dispute resolution, as with article 1 of the VCCR, an international judicial body may interpret treaty provisions and issue binding opinions.<sup>80</sup> In recognition of variances in domestic political systems, however, these interpretations are only binding on the parties to the treaties as states. It is up to each individual state to determine how it will respect these decisions internally. In this traditional model, the inner workings of the domestic judicial system are a “black box” from the point of the view of other states and international tribunals; the domestic legal system is hidden behind a “veil of sovereignty.”<sup>81</sup>

Under this veil, two important interpretative techniques guide U.S. courts in reconciling international obligations and domestic structural limitations. The Supreme Court formulated the first technique in *Murray v. Schooner Charming Betsy* in 1804, holding that “an act of Congress ought never to be construed to violate the law of nations, if *any other possible construction remains . . .*”<sup>82</sup> More than 180 years later, the ICJ employed similar reasoning in a dispute between the United States and the Palestinian Liberation Organization, finding that the U.S. Anti-Terrorism Act of 1987 could be read to comply with the United Nations Headquarters Agreement.<sup>83</sup> Despite this pedigree, the *Charming Betsy* doctrine has suffered from its inconsistent application in U.S. courts. Some scholars argue that by denying Angel Breard relief under the VCCR, the Supreme Court in *Breard* missed an opportunity to employ the doctrine to show deference to the ICJ’s interpretation.<sup>84</sup> Even more troubling, *Breard* seemingly abandoned *Charming Betsy* in the VCCR context by showing “a preference for domestic doctrine, even

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78. *Id.*

79. *Id.* art. VI, cl. 2.

80. For a history of the development of international judicial procedures starting with the First Hague Peace Conference of 1899, see SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945–1986 268–77 (1989).

81. Of course, where the provisions of a treaty specifically address the inner workings of a state, this would naturally be within the ambit of consideration for an international tribunal. *See id.* at 272–73 (discussing the limitations of judicial review in treaty disputes).

82. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (emphasis added).

83. *See* Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, 1998 I.C.J. 1 (Apr. 26).

84. *See, e.g.,* Laura A. Young, *Setting Sail with Charming Betsy: Enforcing the International Court of Justice’s Avena Judgment in Federal Habeas Corpus Proceedings*, 89 Minn. L. Rev. 890, 905–06 (2005).

judge-made procedural doctrine, over treaty obligations that had been freely and voluntarily assumed by the United States . . . .”<sup>85</sup>

Compounding the inconsistent application of *Charming Besty* is the notion of *lex posterior* (or the last-in-time rule), the second important interpretative technique of U.S. courts. Found both in international law and in U.S. jurisprudence, most notably in the *Breard* case, *lex posterior* holds that if domestic legislation and treaty obligations are in conflict, “the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.”<sup>86</sup> Under the VCLT, as in the domestic context, *lex posterior* only applies if two sets of obligations are incompatible.<sup>87</sup> In *Medellin*, the Supreme Court reiterated the principle, espoused in *Reid v. Covert* and *Whitney v. Robertson*, that “in conflicts with [a] subsequently enacted statute, the statute must govern.”<sup>88</sup> Indeed, the Court’s application of *lex posterior* in *Breard* rested on the assumption of a conflict between the VCCR and AEDPA.

Now that the ICJ has given deeper meaning to the requirements of article 36, should this assumption still hold? The ICJ in *Avena* noted that individuals enjoy rights under the VCCR “irrespective of due process rights under United States constitutional law,”<sup>89</sup> which could be interpreted as a declaration of the supremacy of VCCR rights in the face of constitutional due process rights. This outcome, however, seems unlikely for a tribunal that is highly respectful of domestic constitutional provisions. A more nuanced and arguably more fair reading is that the ICJ sees the two sets of rights as running parallel to each other, avoiding conflict and obviating an application of the *lex posterior* rule.

## 2. Who Interprets the Treaty?

The deference U.S. courts give to other interpretations of the VCCR adds another layer of complexity. According to a normative approach to treaty interpretation, different interpretive results do not necessarily mean the actual significance of the treaty changes; texts are open to a variety of interpretations.<sup>90</sup> Different courts may make different choices as to interpretation, and so long as these different interpretations do not claim to be binding on each other, there is no conflict.<sup>91</sup>

85. *Id.* at 900.

86. *See, e.g.*, *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

87. Vienna Convention on Law of Treaties, *supra* note 75, art. 30(3).

88. *Medellin*, 125 S. Ct. at 2098 (O’Connor, J., dissenting).

89. *Avena*, *supra* note 2, para. 139.

90. *See* Ulrich Fastenrath, *Relative Normativity in International Law*, 4 EUR. J. INT’L L. 305, 332 (1993).

91. *Id.* (citing M.S. McDUGAL, *STUDIES IN WORLD PUBLIC ORDER* 987 (1960)). William W. Burke-White has argued that in situations where there is risk of multiple tribunals diverging in their interpretation of “general international law,” the rules of *lex posterior* and

The authority of courts to interpret treaties varies, however.<sup>92</sup> Anne-Marie Slaughter points out that courts have often used “adequate forum analysis” to determine whether a particular court has sufficient competency to hear a case.<sup>93</sup> For instance, the Supreme Court has previously acknowledged that British courts have superior competence to hear admiralty cases.<sup>94</sup>

In the case of the VCCR, the ICJ alone has interpretative authority. As Lori Damrosch argues, the binding nature of the dispute resolution provisions in the VCCR makes the judgments of the ICJ “both an interpretation and an application of the treaty.”<sup>95</sup> Furthermore, Damrosch explains, “a treaty is not a unilateral act by which one state decides how far it’s going to be bound, but rather it is an international act as to which there is an authoritative international meaning.”<sup>96</sup> In this sense, the ICJ’s opinions override domestic judgments.<sup>97</sup> In his dissent in *Medellin*, Justice Souter seemed amenable to this interpretation, writing that final ICJ judgments “may be entitled to considerable weight, if not preclusive

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*lex specialis* are insufficient and what instead should be created is a set of background legal rules which would enable courts to resolve conflicts when they arise. William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963, 970 (2004); see generally Fastenrath, *supra* note 90, at 335.

92. Fastenrath, *supra* note 90, at 334. Fastenrath observes that “[t]he capacity of a normative contention to assert itself will not only depend upon its content but will have to rely upon external factors also, in particular on the power of the actor or entity who proposes it.”

93. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 92–94 (2004).

94. *Id.* (citing *Bremen v. Zapata*, 407 U.S. 1, 12 (1972) (“[T]he Courts of England meet the standards of neutrality and long experience in admiralty litigation.”)); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (agreement to arbitrate before foreign tribunal upheld); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 257–61 (1981) (action dismissed under *forum non conveniens*).

95. Curtis Bradley, Lori Fisler Damrosch & Martin Flaherty, Moderator, Discussion, *Medellin v. Dretke: Federalism and International Law*, 43 COLUM. J. TRANSNAT’L L. 667, 677 (2005).

96. *Id.* at 686.

97. Ulrich Fastenrath points out that interpretations by international organizations empowered by express authorization to interpret treaties are called “authoritative” and are inferior only to “authentic” interpretations by the parties themselves. Fastenrath, *supra* note 90 at 335–36; see also *Commentary of the ILC on Art. 27 of its draft convention on the law of treaties*, II Y.I.L.C. 177, 221 (1967); IOAN VOICU, *DE L’INTERPRÉTATION AUTHENTIQUE DES TRAITÉS INTERNATIONAUX* (1968) (discussing authentic treaties). Fastenrath argues, however, that international tribunals’ interpretations may not necessarily be considered authoritative because their interpretations are limited in scope to one case, *id.*, as with the limitations imposed on the ICJ in article 59 of its statute. We argue below, however, that despite article 59, in *obiter dicta* in the *Avena* judgment, the ICJ applied a more general understanding of the requirements of article 36 of the VCCR.

Another important element in treaty interpretation that is not dealt with in this discussion, but which bears mentioning, is the interpretation of treaties that are authentic in more than one language. For a treatment of the ICJ’s jurisprudence on the authenticity of multilingual treaties, see SHABTAI ROSENNE, *AN INTERNATIONAL LAW MISCELLANY* 397 (1993).

effect.”<sup>98</sup> Similarly, Justice Breyer found that the argument that “American courts are now bound to follow the ICJ’s decision in *Avena* is substantial.”<sup>99</sup> Thus, when the Court concluded that Medellin had not proven his habeas proceedings were contrary to “clearly established Federal law”<sup>100</sup> and had not shown a “denial of a constitutional right,”<sup>101</sup> it may have too hastily discounted the authoritative force of the ICJ’s interpretation in *Avena*.

Indeed, as Prosper Weil noted, “[t]he rules of general international law tend no longer to be elaborated . . . by the states *ut singuli* to which they are addressed, but by the international community of states as a whole.”<sup>102</sup> Although Weil addressed the particular problem of select states defining legal norms for all, his underlying sentiment is rooted in the idea that international law ebbs and flows with the sentiments of its players. Acknowledging this reality, the ICJ does not interpret treaties in a vacuum but, when circumstances warrant, instead tracks an evolutionary tendency in international law. For example, in an advisory opinion regarding the South African occupation of Namibia, the court determined, based on a progressive reading of the term “well-being,” that South Africa’s furtherance of apartheid in Namibia could no longer be considered as serving the best interests of the native population.<sup>103</sup> While the Supremacy Clause makes the language of treaties binding in the United States, it is progressive interpretation, in this case the interpretation of the ICJ, that ultimately gives them life and their full meaning.

### B. Treaty Execution and the Judicial Dialogue

When determining to what extent U.S. courts are bound to ICJ decisions, there is a gossamer line separating U.S. *courts* from the U.S. *government*. Although the Executive makes treaties and binds the United States to political-cum-legal commitments, the dialogue between the ICJ, the U.S. Supreme Court, and lower federal and state courts may prove the most significant consideration. This dialogue ultimately blurs the distinction between international law and the law governing U.S. states, the federal government, and individuals.

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98. Medellin, 125 S. Ct. at 2106 (Souter, J., dissenting).

99. *Id.* at 2107 (Breyer, J., dissenting).

100. *Id.* at 2091.

101. *Id.*

102. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 441 (1983).

103. See generally Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. (June 21).

The point of departure from Judge Chapel's comfortable conclusion in *Torres*, then, is the interpretation of the ICJ itself. Indeed, there is no question that the United States is bound by the provisions of the VCCR, which it signed and ratified.<sup>104</sup> Until its withdrawal in March 2005,<sup>105</sup> the United States was also under ICJ jurisdiction as a signatory to the Optional Protocol of 1963.<sup>106</sup> The VCCR and the 1963 Optional Protocol comprise a legally binding set of rules for behavior as well as dispute settlement. When then-Deputy Legal Adviser of the U.S. State Department J. Edward Leyerley submitted the VCCR to the Senate for advice and consent in 1969, he noted that the United States considered the Convention to be *entirely* self-executing, requiring no congressional implementing legislation.<sup>107</sup> Because both the Senate and President Nixon ratified the VCCR, Leyerley's assertion was never tested in court.

If the VCCR is viewed as a contract between states, U.S. jurisprudence supports the idea that the decisions of its specified arbitrator are part of the Convention itself.<sup>108</sup> But in the case of ICJ decisions, what does "self-executing" actually mean? As Justice O'Connor wrote in *Medellin*, "[r]easonable jurists can vigorously disagree about whether and what legal effect ICJ decisions have in our domestic courts . . . ."<sup>109</sup> Notwithstanding the Supremacy Clause, treaties are not exactly the "law of the land." It is an act of Congress that ratifies the treaty, with the

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104. The U.S. Senate formally ratified the VCCR and the Optional Protocol on Nov. 12, 1969. It entered into force with respect to the United States on Dec. 24, 1969, and Nixon proclaimed the treaty's entry into force on Jan. 29, 1970. 21 U.S.T. 77, 373; 114 CONG. REC. 30997 (Oct. 22, 1969).

105. See Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A1.

106. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes art. 1, April 24, 1963, 596 U.N.T.S. 8640; SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 67 (2003).

107. SEN. REP. NO. 91-9, app. 1, at 5 (1969).

108. See *E. Assoc. Coal Corp. v. United Mine Workers*, Dist. 17, 531 U.S. 57, 61-62 (2000) (stating when parties "have granted to [an] arbitrator the authority to interpret the meaning of their contract's language . . . the arbitrator's award [must be treated] as if it represented an agreement between [the parties] as to the proper meaning of the contract . . ."). The United States took this view in a recent NAFTA Chapter 11 dispute in which it argued that applying an interpretation by the NAFTA Free Trade Commission, a body empowered to issue binding interpretations of NAFTA, was not a retroactive application of a new rule, but "an application of the correct interpretation of the governing law, which remains unchanged." Response of Respondent United States of America to Methanex's Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation, *Methanex Corp. v. United States, Arbitration Under Ch. 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules*, available at <http://www.state.gov/documents/organization/6028.pdf> (last visited Mar. 18, 2006).

109. *Medellin*, 125 S. Ct. at 2102 (O'Connor, J., dissenting).

subsequent ratification by the President giving it direct effect.<sup>110</sup> In discussing the relationship of treaty law to domestic law, Justice Marshall wrote:

Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when, the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, *the treaty addresses itself to the political, not the judicial department*, and the legislature must execute the contract before it can become a rule for the Court.<sup>111</sup>

Marshall describes the subtle differences between the application of a treaty provision binding on the U.S. government (the “political”) and a provision binding on the courts. While Marshall is correct in stating that U.S. courts are bound by self-executing (or “executed”) treaties, he is assuming, in either case, that the treaty has passed through some level of Executive supervision, be it ratification or negotiation with other states.

Here, the Executive branch represented the VCCR to the Senate as a self-executing treaty; presumably, ICJ interpretations, as part of the treaty, are “binding on all state judges notwithstanding anything in state constitutions or laws . . . .”<sup>112</sup> The idea that treaties trump state law finds substantial support in U.S. jurisprudence, from *Ware v. Hilton*, which held in 1796 that a “treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way,”<sup>113</sup> to *U.S. v. Belmont*, which in 1937 reaffirmed that “[w]ithin the field of its [foreign affairs] powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate,” notwithstanding “state constitutions, state laws, and state policies . . . .”<sup>114</sup>

What makes the *Avena* decision unique, then, is not that it mandates changes on the state level, but that, in seeking a distinctly *judicial* solution, it directly addresses the U.S. judiciary and bypasses the Executive. Although the ICJ reiterates that it is indeed left to the United States to determine the *means* by which to give “full effect” to the VCCR,<sup>115</sup> the court is quick to stress that the procedural default rule “in itself” is not a

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110. Gregory Dean Gisvold, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 MINN. L. REV. 771, 785 (1994). Because the United States is a dualist system, treaties do not have direct effect by themselves.

111. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (emphasis added).

112. Bradley, Damrosch & Flaherty, *supra* note 95, at 675.

113. *Ware v. Hylton*, 3 U.S. (6 Dall.) 199, 236 (1796).

114. *United States v. Belmont*, 301 U.S. 324, 332 (1937).

115. *Avena*, *supra* note 2, para. 141.

violation.<sup>116</sup> Rather, it is the *application* of the rule in U.S. courts that causes offense.<sup>117</sup>

While the authority of U.S. courts to apply procedural default rules is statutorily granted,<sup>118</sup> *Avena* does not call for a statutory solution.<sup>119</sup> Instead, the ICJ prescribes a change in how U.S. courts comply with the statute—a new kind of “review and reconsideration.”<sup>120</sup> When the ICJ later states that review and reconsideration should occur within “overall *judicial* proceedings,”<sup>121</sup> its intended audience has shifted from the United States as a treaty party to the U.S. judiciary as a treaty-implementing body.

Despite the requirements of article 59 of the ICJ Statute, the ICJ considers its review and reconsideration requirement as extending beyond the confines of the *Avena* decision.<sup>122</sup> The court confirms this near the end of *Avena*: “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.”<sup>123</sup> By declaring its holding generally applicable, the ICJ gives notice not just to the U.S. government but to all courts within the United States (and perhaps globally) that currently consider article 36 violations.

As a rebuke of the U.S. criminal justice system’s approach to consular rights violations (which by any measure it clearly is), is not *Avena* piercing the veil of sovereignty? Anne-Marie Slaughter suggests such communication indicates a tendency towards judicial cooperation “that

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116. *Id.* para. 112.

117. *Id.*

118. *See infra* Part III.B, discussing procedural default under AEDPA.

119. Indeed, the ICJ indicated that as the rule had not changed, further consideration was necessary. *Avena*, *supra* note 2, para. 113.

120. *Id.*

121. *Id.* para. 141.

122. Statute of the International Court of Justice, art. 59 (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”) For a discussion of the limits of article 59 and the general applicability of ICJ decisions, see III SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–1996* 1627 (1997). It should be observed that when taking a normative approach to the ICJ’s holding in *Avena*, two parallel obligations become apparent: the United States’ obligation to follow the ICJ’s specific holding in this case (as per article 59) and the general obligation of all states that are signatories to the VCCR to comply with the Convention. The fact that the ICJ gave more meaning to the Convention provisions in article 36 does not necessarily mean that the actual holding in *Avena* can be extended to all other cases in violation of article 59 of the ICJ statute. *See, e.g.*, Fastenrath, *supra* note 90, *passim* (discussing generally the normative approach to international law).

123. *Avena*, *supra* note 2, para. 151.

transcends national borders.”<sup>124</sup> She writes: “If an international tribunal recognizes the importance of the national courts of the countries within its jurisdiction as enforcers of its decision, it is inviting a kind of judicial cooperation that melds the once distinct planes of national and international law.”<sup>125</sup> By addressing U.S. courts as the domestic enforcers of the VCCR, and by making its holding generally applicable, the ICJ reaches beyond traditional interstate interaction and engages in a judicial dialogue with U.S. courts—piercing the veil that otherwise divides the two judicial bodies.<sup>126</sup> Admittedly, this interpretation is highly progressive and must be teased from the language of the decision, including sections that are clearly dicta.<sup>127</sup> If ICJ decisions are self-executing, however, a direct dialogue between the U.S. judiciary and the Hague court may be the inevitable result.

### C. Individual Rights under the VCCR in the United States

Central to understanding how the VCCR binds U.S. courts is determining whether or not it confers individual rights. If the VCCR does not confer these rights, then it only binds U.S. courts in so far as it applies to the United States as a *state*. Building on the ICJ’s conclusion in *LaGrand* that the VCCR does confer individual rights, this Part argues that these rights may apply *within* the U.S. domestic legal system.

Early in the *LaGrand* case, the United States argued that the VCCR confers rights solely on states: “[r]ights of consular notification and access under the Vienna Convention are rights of States, and not of individuals, even though these rights may benefit individuals by permitting states to offer them consular assistance.”<sup>128</sup> As described above, the ICJ found that the VCCR *did* confer individual rights, basing its conclusion primarily on the language of article 36 itself.<sup>129</sup> This emphasis on the VCCR as a law protecting individuals, rather than a contract between states, may help U.S. courts reconcile *Avena* and *Breard*.

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124. SLAUGHTER, *supra* note 93, at 68.

125. Ann-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 194 (2003).

126. The French Institute of International Law in 1993 envisioned exactly such a relationship between national courts, calling on them to become independent actors in the area of international law, applying norms of international law and not being beholden to executive branches of government. See Eyal Benvensti, *Judges and Foreign Affairs: A Comment on the Institut de Droit International’s Resolution on “Activities of National Courts and the International Relations of Their States,”* 5 EUR. J. INT’L L. 424 (1994).

127. See, e.g., *Avena*, *supra* note 2, para. 151.

128. *LaGrand*, *supra* note 2, para. 76.

129. *Id.* para. 77.

### 1. The Supremacy Clause

An examination of the history of the Supremacy Clause sheds light on this undertaking by illustrating how the Framers of the U.S. Constitution intended treaties to have the status of law. Because the Articles of Confederation had very weak enforcement mechanisms for ensuring U.S. states complied with treaties, the Framers created the Supremacy Clause to make treaties enforceable in the courts by individuals without the need for further implementing legislation.<sup>130</sup> Justice Story described the crucial difference between conceiving of treaties as contracts between states and considering them as internal law:

[This difference] is exceedingly important in the actual administration of public justice. If [treaties] are supreme laws, courts of justice will enforce them directly in all cases, to which they can be judicially applied . . . If they are deemed but solemn compacts, promissory in their nature and obligation, courts of justice may be embarrassed in enforcing them, and may be compelled to leave the redress to be administered through other departments of the government.<sup>131</sup>

The Supremacy Clause serves to impose the international commitments of the United States on both federal and state courts. In terms of individuals, the Supremacy Clause does not serve in and of itself to transfer to individuals rights conferred upon states under treaties. The Supremacy Clause does, however, give a treaty, where applicable, the “character of municipal law enforceable in domestic courts at the behest of private individuals.”<sup>132</sup> A primary consideration, then, is whether the treaty in question provides a private right to individuals.

### 2. Individual Rights

Carlos Manuel Vázquez proposes a framework for considering whether a treaty confers rights on individuals. He envisions his framework as particularly applicable in situations involving:

a foreign national seeking to enforce in the courts of [the United States] against a state or federal official a treaty provision that he claims requires the United States to act—or refrain

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130. Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 699 (1995).

131. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 695 (1833).

132. Vázquez, *supra* note 130, at 700.

from acting—in a way that affects him, or seeking a remedy for a claimed violation of the treaty by the official.<sup>133</sup>

Vázquez breaks the framework into three stages: first, does the treaty impose obligations that are judicially enforceable by individuals within the United States?<sup>134</sup> Second, if the treaty imposes judicially enforceable obligations, does an individual have standing to enforce those obligations?<sup>135</sup> This determination depends in part on whether there is a right of action within the treaty or whether the individual is using the treaty as a defense or a means of seeking affirmative relief.<sup>136</sup> Third, if the individual has standing, the court will have to fashion a remedy.<sup>137</sup> In the case of international treaties, Vázquez argues that this remedy may come from customary international law or the treaty itself.<sup>138</sup>

The application of the Vázquez framework to the VCCR is particularly appropriate.<sup>139</sup> The ICJ in *LaGrand* found, based primarily on textual analysis, that the VCCR created individual rights that “may be invoked *in this Court* by the national State of the detained person.”<sup>140</sup> Even if U.S. courts are uncomfortable with following the ICJ’s lead, individual rights can be found in the VCCR based on U.S. jurisprudence. The Supreme Court held that in determining whether a federal statute confers a “right” on an individual, the first question to ask is whether the provision creates obligations “binding on the government unit or rather does no more than express a . . . preference for certain kinds of treatment.”<sup>141</sup> Vázquez points out that this distinction is analogous to the distinction between a hortatory or aspirational treaty and a treaty imposing binding obligations.<sup>142</sup> Here, the fact that the VCCR is intended to be enforced by a judicial body—the ICJ—is evidence that the provisions of the VCCR are binding on governments.<sup>143</sup>

U.S. courts could apply the same textual analysis the ICJ used in *LaGrand* and reasonably conclude, based on U.S. law, that the VCCR’s

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133. Carlos Manuel Vázquez, *Treaty Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 116 (1992).

134. *Id.* at 1123.

135. *Id.* at 1134.

136. *Id.* at 1141.

137. *Id.* at 1157.

138. *Id.* at 1161.

139. Although Vázquez wrote this seminal piece seven years before the *LaGrand* case, his framework is almost perfectly applicable to the situation that arose in *LaGrand* and *Avena*, illustrating the primacy of the legal problem the ICJ faced in both of these cases.

140. *LaGrand*, *supra* note 2, para. 77 (emphasis added).

141. *Dennis v. Higgins*, 498 U.S. 439, 449 (1991).

142. Vázquez, *supra* note 133, at 1124.

143. See Vázquez, *supra* note 133, at 1124–25 (noting that it could be argued that a treaty could be considered hortatory if there is no effective mechanism for its international enforcement).

clear prescriptions for specific treatment are binding on a state.<sup>144</sup> The Supreme Court has long endorsed the view that individual rights can be found in international agreements between states. As early as the *Head Money Cases*, the Supreme Court found that a treaty may contain provisions that “confer rights upon citizens . . . which are capable of enforcement as between private parties in the courts of other countries.”<sup>145</sup> In more recent times, the Supreme Court has found that self-executing treaties are enforceable on behalf of an individual.<sup>146</sup>

Unfortunately, U.S. jurisprudence on whether article 36 of the VCCR confers individual rights is mixed: the Fifth Circuit in *United States v. Jimenez-Nava* stated that article 36 does not confer individual rights,<sup>147</sup> and a year earlier the Supreme Court in *Breard* stated in dicta that article 36 “arguably” confers individual rights.<sup>148</sup> In her dissent in *Medellin*, O’Connor recalls the *Breard* dicta<sup>149</sup> and finds that the guarantees of the VCCR are “susceptible to judicial enforcement just as the provisions of a statute would be.”<sup>150</sup> In *Jogi v. Voges*, discussed below, the Seventh Circuit echoed this argument, finding that “Article 36 confers individual rights on detained nationals.”<sup>151</sup>

If, in the future, the Supreme Court decides to follow *Jimenez-Nava* and technically not overrule *Breard*, it would strike a serious blow to the development of consistent international jurisprudence on the right to be informed of consular rights under the VCCR. This, however, would not be the first major blow struck to consistent jurisprudence in this area. In 1999, the Inter-American Court of Human Rights stated in an advisory opinion that consular rights granted under article 36 had the status of human rights.<sup>152</sup> In contrast, the ICJ in *Avena*, while not explicitly rejecting the notion of consular rights as fundamental human rights, did find that “neither the text nor the object and purpose of the Convention, nor any indication in the *travaux préparatoires*, support [that] conclusion.”<sup>153</sup> Therefore, while the Supreme Court would be judicious in respecting the

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144. See LaGrand, *supra* note 2, para. 77 (observing that “[t]he clarity of these provisions, viewed in their context, admits no doubt [as to the binding nature of the obligations].”).

145. *Head Money Cases*, 112 U.S. 580, 598–99 (1884).

146. *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992).

147. *United States v. Jimenez-Nava*, 243 F.3d 192, 280 (5th Cir. 2001).

148. *Breard*, 523 U.S. at 538.

149. *Medellin*, 125 S. Ct. at 2102 (O’Connor, J., dissenting) (quoting *Breard*, 523 U.S. at 538).

150. *Id.* at 2103 (O’Connor, J., dissenting).

151. *Jogi v. Voges*, No. 01-1657, slip op. at 24 (7th Cir. 2005).

152. See Inter-American Court of Human Rights, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999, available at [http://www.corteidh.or.cr/seriea\\_ing/Seriea\\_16\\_ing.doc](http://www.corteidh.or.cr/seriea_ing/Seriea_16_ing.doc) (last visited Feb. 17, 2006).

153. *Avena*, *supra* note 2, para. 124.

need for uniform treaty interpretation, the ICJ itself has strayed from this path on occasion.<sup>154</sup>

If the Supreme Court finds that article 36 does indeed confer individual rights, it must then determine the status of those rights. As mentioned above, the Court in *Breard* held that an article 36 claim, like any claim arising under the U.S. Constitution, is subject to the procedural default provisions in AEDPA.<sup>155</sup> It would be difficult for the Court to justify a wholesale reversal of this decision, even in light of judicial comity. One possible approach, as discussed above, involves grounding the article 36 analysis in the idea that ICJ decisions are self-executing components of the VCCR itself. Thus, the superior interpretative position of the ICJ allows its decision in *Avena* to undermine the 1998 *Breard* interpretation. The “full effect” requirement in article 36, then, does not mean foreign nationals must be provided with the same constitutional protections given citizens regardless of whether the protections offer meaningful relief under the VCCR, as the Supreme Court thought at the time of *Breard*. The petitioner’s brief in *Medellin* encouraged the Court away from this interpretation, arguing that the self-executing nature of the VCCR, along with the binding jurisdiction of the Optional Protocol, makes the decision of the ICJ “no less [binding] than if the terms of the decision had been written into the agreement itself.”<sup>156</sup> While the Court deferred addressing this issue, a future decision could find, based on the *Avena* decision, that article 36 requires review and reconsideration beyond the provisions of the U.S. Constitution.

### 3. Standing under the VCCR

After determining that the VCCR confers judicially enforceable individual rights, a U.S. court would have to examine whether a detainee had standing under the Convention. Vázquez argues that treaties imposing duties on states are analogous to statutes imposing duties on administrative agencies: in either case the central question is whether the litigant has a correlative primary right.<sup>157</sup> The Supreme Court has held that an individual has standing to enforce a primary right provided by federal law if the provision in question was “inten[ded] to benefit” the

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154. It is important to point out that one element of judicial comity is a greater willingness of international and national tribunals to clash with other courts, engaging each other as “equals in a common enterprise.” See SLAUGHTER, *supra* note 93, at 87.

155. See *Breard*, 523 U.S. at 376.

156. Brief for the Petitioner at 35, *Medellin v. Dretke*, 125 S. Ct. 2088 (No. 04-5928).

157. *Id.* For further history of the doctrine of standing in administrative law, see William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 225 (1988).

individual.<sup>158</sup> In that case, the individual is an “incidental” beneficiary of the law,<sup>159</sup> much like a third-party beneficiary of a contract who can enforce the agreement between two other parties.<sup>160</sup>

With the VCCR, U.S. courts can again mirror the ICJ’s reasoning to find the same result under U.S. law. As the ICJ pointed out in *LaGrand*, while the VCCR is clearly a contract between states, the beneficiary of the contract, at least in terms of article 36, is not necessarily the state itself, but rather the *individual* who is a national of that state.<sup>161</sup> Individuals therefore receive a right through the VCCR and should have standing under it. In addition, although the VCCR does not expressly provide for an individual right of action, Vázquez maintains that this is only important for the purposes of standing if an individual is attempting to maintain an action.<sup>162</sup> If the individual is using the statute as a means of affirmative defense, as was the case in *LaGrand* and *Avena*, the statute need not expressly provide for a cause of action by an individual.

#### 4. Remedies

The final consideration in determining whether the VCCR confers meaningful individual rights within U.S. courts is whether these courts can fashion a remedy based on the VCCR. Lack of remedy has been one of the primary reasons U.S. courts have refused to hear article 36 appeals.<sup>163</sup> But despite the fact that the VCCR does not provide a remedy for an individual, one could nonetheless be read into the treaty. Indeed, the Seventh Circuit in *Jogi v. Voges* found that article 36 confers an “implied private right of action.”<sup>164</sup> After concluding that an individual must be accorded *some* method for vindicating his treaty rights, the court held that a civil remedy for damages was “the only avenue left.”<sup>165</sup> The Seventh Circuit found remedies only in the civil context,<sup>166</sup> but its holding

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158. Vázquez, *supra* note 133, at 1136 (quoting *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 106 (1989)).

159. Henry Paul Monaghan, *Federal Statutory Review under Section 1983 and the APA*, 91 COLUM. L.R. 233, 257–60 (1991).

160. Vázquez, *supra* note 133, at 1136. Because a treaty is in many ways a contract between nations, the comparison is apt. *Id.*

161. See *LaGrand*, *supra* note 2, para. 77.

162. Vázquez, *supra* note 133, at 1142.

163. Specifically, courts have held that article 36 does not require a judicial remedy even if it does provide for an individual right. See *United States v. Bustos de la Pava*, 268 F.3d 157, 165 (2d Cir. 2001); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000). See also Simma & Hoppe, *supra* note 34; John Quigley, *LaGrand: A Challenge to the U.S. Judiciary*, 27 YALE J. INT’L L. 435, 436 (2002).

164. *Jogi v. Voges*, No. 01-1657, slip op. at 30 (7th Cir. 2005).

165. *Id.* at 29.

166. *Id.* at 19.

confirms the ability of U.S. courts to find individual remedies within the text of article 36.

While the court in *Jogi* found a civil right of action for damages by examining the limitations of the U.S. justice system, Vázquez argues instead that rules of customary international law should fill the gap when a treaty fails to specify a remedy.<sup>167</sup> Because states conclude treaties against the backdrop of the customary rules of international law, these rules define the secondary rights of parties outside the treaty.<sup>168</sup> The ICJ in *Oil Platforms* confirmed this reasoning, rejecting the U.S. argument that self-defense should be analyzed solely in terms of a treaty provision;<sup>169</sup> rather, the court held, provisions of a treaty should be understood “in the light of international law on the use of force in self-defence.”<sup>170</sup>

One rule of customary international law relevant to the VCCR discussion is the requirement that an offending state return an object held unlawfully.<sup>171</sup> Thus, if one state unlawfully (i.e., in contradiction of a treaty provision) holds the citizen of another state, the offending state is under an obligation to return that citizen to his status prior to the violation. Would a U.S. court cite this customary rule or others to conclude that the VCCR confers a remedy on an individual? The prospect may not be altogether absurd.

The ICJ in *Avena* addressed this very concern by requiring the United States to provide meaningful judicial review of article 36 violations.<sup>172</sup> U.S. courts could arrive at the same conclusion through the Supremacy Clause. As mentioned previously, the Framers intended the

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167. Vázquez, *supra* note 133, at 1158.

168. *Id.* at 1157. The Preamble to the Vienna Convention on the Law of Treaties states, “the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention.” See Vienna Convention on the Law of Treaties, *supra* note 75. See also *The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 299 (1900) (“International law is part of our law . . . where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat.”).

169. Case Concerning Oil Platforms (Iran v. U.S.), 1996 I.C.J. 803 (Dec. 12) paras. 40–41, 44.

170. *Id.* para. 44.

171. See BROWNIE, *supra* note 76, at 446. This stems from a more general obligation to repair the wrong. See *Chorzow Factory*, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) (stating that “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”).

172. See *Avena*, *supra* note 2, paras. 121, 140 (stating “the remedy . . . should consist of an obligation on the US to permit review and reconsideration . . . with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant” and that “it is the judicial process which is suited to this task.”).

Supremacy Clause in part to allow an individual to cure a treaty violation by his state.<sup>173</sup> In this sense, the Supremacy Clause can be read to require courts to provide an individual, at a minimum, with such remedies as would cure a violation of international law by the United States against the state of his nationality.<sup>174</sup> In the case of article 36 violations, this would require giving foreign nationals a full review of treaty violations, without the procedural bars applicable under U.S. law.<sup>175</sup> This is necessarily a judicial process; as the ICJ stated in *Avena*,<sup>176</sup> the judiciary is the best body to determine whether violations of the law occurred.

## V. CONCLUSION

Just before the Supreme Court heard oral arguments in *Medellin*, the Bush administration formally withdrew the United States from the Optional Protocol to the VCCR. This withdrawal could be viewed as insurance that the current morass in which U.S. domestic courts are embroiled will never happen again. Viewed another way, however, the withdrawal from the Option Protocol is the latest example of the United States' standing attitude towards the ICJ: when the court's decisions favor the United States, such as the *Iran-Hostages* decision, the United States will participate. When the United States feels the decision will not go its way, as in *Military and Paramilitary Activities in and against Nicaragua*, it will not. Just before the *Nicaragua* case, the United States withdrew from its declaration submitting itself to ICJ general jurisdiction (under article 36 of the ICJ statute); the latest withdrawal is a natural extension of the same attitude. This gradual erosion of U.S. respect for the Hague court is troubling.

The title of this Comment, *Rebus Sic Stantibus*,<sup>177</sup> refers, in this sense, not to changes in circumstances upon which a treaty is based but rather to a frame-shift in the political will to respect international law and international judicial decisions. Notwithstanding the current trend, however, and regardless of whether the ICJ in *Avena* actually reached beyond the United States as a state to speak directly to U.S. courts, the

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173. Vázquez, *supra* note 133, at 1160.

174. *Id.* at 1161.

175. On the difference between U.S. due process rights and treaty provisions, see *Avena*, *supra* note 2, para. 139.

176. *Id.* para. 140.

177. "Rebus sic stantibus" literally means "things as they are in a given situation;" it is the doctrine that a treaty is made in the context of a situation, and if the situation fundamentally changes then the treaty is no longer binding. See Vienna Convention on the Law of Treaties, *supra* note 75, art. 62; JAMES R. FOX, DICTIONARY OF INTERNATIONAL & COMPARATIVE LAW 369 (1992).

decision has had a significant effect on the U.S. judiciary. On November 7, 2005, the Supreme Court granted certiorari in *Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson*, Oregon and Virginia state court cases that turn on whether the VCCR confers individual rights, provides for suppression of evidence obtained in violation of these rights, and prohibits the procedural default rule.<sup>178</sup> In this time of tension between the U.S. government and international legal systems, perhaps the Court will recognize in its newest analysis that direct communication between international and domestic courts may be the most effective response to the current change in circumstances.

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178. *State v. Sanchez-Llamas*, 108 P.3d 573 (Or. 2005), *cert granted in Sanchez-Llamas v. Oregon*, 126 S. Ct. 620 (2005); *Bustillo v. Johnson*, 63 Va. Cir. 125 (Cir. Ct. 2003). In *Virginia v. Pham*, issued on January 3, 2006, Virginia's Fairfax Circuit Court (the same court that heard arguments in *Bustillo*) ruled out the death penalty for a defendant because police violated his rights under the VCCR. Writing for the court, Judge Leslie M. Alden explained: "Like the operation of the procedural default rule, the idea that the state can completely ignore its obligations without consequence essentially obliterates the purposes for which the rights under the Vienna Convention were intended." *Virginia v. Pham*, Crim. No. K105537 (Va. Cir. Ct. Jan. 3, 2006), available at [http://www.vc3.org/foreignnationals/Commonwealth%20v.%20Pham%20\(Va.%20Cir.%20Ct.%202006\).pdf](http://www.vc3.org/foreignnationals/Commonwealth%20v.%20Pham%20(Va.%20Cir.%20Ct.%202006).pdf) (last visited Feb. 17, 2006).