# Can the United States Continue to Execute Mexican Nationals Who Were Deprived of their Rights under Article 36 of the Vienna Convention of Consular Rights?

— by Brendan Dominguez

**The U.S. domestic scheme has created a system whereby foreign nationals who are arrested and convicted may or may not be informed of the right to speak with their consulate prior to trial.**

On January 22, 2014 Edgar Arias Tamayo was executed via lethal injection by the state of Texas. Despite protest, Texas went forward with the execution as planned. Tamayo was convicted in 1994 for the murder of a Texas police officer[1]. Tamayo's execution is one of many in a sordid list of Mexican nationals executed within the U.S. Indeed, Tamayo's conviction and execution was pushed forward in violation of his rights under Article 36 of the Vienna Convention of Consular Relations.

This paper will navigate through the case law regarding the U.S.'s obligations under the VCCR and compare it with how other countries have applied the VCCR.

## The Vienna Convention on Consular Relations Article 36

The United Nations first proposed the VCCR in 1963[2]. It was ratified and is now signed by more than 170 countries, including the United States[3]. Article 36 lays out the obligations of signatory countries in how they interact with foreign nationals of a sending state. The Article itself states:

> 1. With a view to facilitating the exercise of consular functions relating to nationals 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… [that] a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner… The said authorities shall inform the person concerned without delay of his rights under this subparagraph…
>
> (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.[4]

The language of Article 36 reads plainly enough, relaying the message that arrested foreign nationals should be provided with access to their consulate office without delay. During the ratification process, the United States advocated greatly for the individual rights of foreign nationals under Article 36.[5] In a letter of transmittal ratifying the VCCR, the United States Secretary of State William P. Rodgers wrote "Article 36 requires that authorities of the receiving State inform the person detained of *his right* to have the fact of his detention reported to the consular post concerned and of *his right* to communicate with that consular post."[6]

The U.S.'s initial position would shift as the years passed, as will be discussed below. It is important to review the history of the VCCR in order to find the draft's original intent with regard to what rights, if any, existed and, if they exist, to whom do they belong?

## Optional Protocol of the Vienna Convention

The Optional Protocol concerning the Compulsory Settlement of Disputes was ratified April 24, 1963.[7] Article 1 provides "disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice…."[8] The Optional Protocol serves as the mechanism by which signatory nations may bring alleged violations of the VCCR against other signatory nations. After the International Court of Justice ruled unfavorably against the U.S. in several cases, the U.S. withdrew from the Optional Protocol in 2005.

## Iran Hostage Taking

The first time the U.S. invoked the VCCR and the Optional Protocol in the ICJ was in 1979 when the U.S. sued Iran for the taking of hostages at U.S. diplomatic and consular facilities in Iran.[9] The U.S. argued, relying in part on the VCCR, that the takeover and sequestration of the U.S. nationals violated the right of the U.S. to provide consular protection to its citizens and the rights of U.S. nationals to have consular protection.[10] The ICJ found that there had been a violation of the VCCR Article 36 by Iran.[11]

The U.S., having availed itself of the benefits of the ICJ against Iran, is seemingly the last state actor to ignore its VCCR obligations. However, U.S. enforcement of the VCCR shifted drastically as evidenced by Paraguay bringing brought the U.S. before the ICJ for failing to notify Paraguay of the execution of one of its citizens.

## *Breard v. Green*

In 1992, Angel Francisco Breard, a citizen of Paraguay, was arrested in the city of Arlington, Virginia for the attempted rape and murder of Ruth Dickie.[12] Breard was subsequently convicted and sentenced to death.[13] Having exhausted his state conviction appeal, Breard then filed a Habeas Corpus petition, arguing that the Arlington Police failed to inform him of his right to contact the Paraguayan consulate under VCCR Article 36.[14] In response, the country of Paraguay filed two suits - the first of which was filed in U.S. federal district court under the theory that the U.S. violated Paraguay's VCCR rights to be informed of Breard's arrest.[15] The case was consequently dismissed by the district court and Paraguay appealed to the U.S. Supreme Court.[16]

*The Supreme Court's interpretation creates a Catch-22.*

Paraguay filed its second suit with the ICJ pursuant to the Optional Protocol, wherein Paraguay argued that the U.S. violated Breard's VCCR right to consular access.[17] The ICJ ordered the U.S. to stay Breard's execution while the litigation in the ICJ was pending.[18] However, before the ICJ could reach the merits of the case, the Supreme Court denied both Breard and Paraguay's writs of certiorari to stay the execution.[19] The Supreme Court ruled Breard was barred from raising a VCCR violation because he failed to raise the issue in the initial state court proceedings before filing his motion for Habeas relief.[20] Breard's claim procedurally defaulted.[21] Breard was executed after the Governor of Virginia declined to grant him clemency.[22]

The *Breard* ruling is paradoxical. The VCCR explicitly states that the convention is to be given effect by the procedural law of the receiving state, but that the law must enable full effect to be given.[23] The Supreme Court requires ". . . absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."[24] The Supreme Court's interpretation creates a Catch-22: Many foreign nationals are unaware of their VCCR rights until after they have exhausted their state review. When the issue is finally raised on federal appeal, the procedural default doctrine prevents them from asserting the argument that the foreign national, or their counsel, did not know of the pending litigation, until after the case is lost at the state level. This method diminishes VCCR rights to little more than wide eyed aspirations. The U.S. again found itself before the ICJ in the LaGrand case, where the same issues were raised.

## *LaGrand (Germany v. United States)*

In 1982, brothers Karl and Walter LaGrand, both German nationals, were tried, convicted, and sentenced to death after a failed bank robbery attempt resulted in the killing of a bank manager.[25] Arizona state officials did not become aware of the brothers German citizenship until 1984. However, German officials were only informed of the LaGrands' convictions in 1992, pending their execution.[26] In 1998, the LaGrands were formally notified of their rights under the VCCR.[27]When raised on appeal, the LaGrands were barred by procedural default rules to attack their convictions based on the VCCR violation.[28] Karl LaGrand was executed on February 24, 1999.[29] Walter LaGrand's execution was set for March 3, 1999. At which time Germany then brought its case against the U.S. before the ICJ. [30]

The ICJ issued a provisional order for the U.S. to take all measures to delay the execution pending the ICJ decision. Unsurprisingly, the Supreme Court declined to order a last minute stay and the state of Arizona executed Walter LaGrand the same day.[31] Despite the executions of the LaGrands, Germany still pursued its case against the U.S.[32]

The U.S. acknowledged it had breached its obligation to Germany and apologized to Germany, articulating intention to take substantial measures to prevent another recurrence of the VCCR violations.[33] The U.S. then asked the court to dismiss the remainder of Germany's claims.[34] The U.S. argued the VCCR does not create rights for individuals, but rather creates rights for the nations from which individuals may benefit.[35] In its decision, the ICJ held Article 36 paragraph (1) does in fact create individual rights.[36] Additionally, the ICJ ruled that the procedural default doctrine was not per se violative of the VCCR, but rather the procedural default doctrines deprive individuals the chance to challenge their convictions by arguing officials failed to comply with their VCCR obligations to provide consular notification without delay.[37] Moreover, the court noted the procedural default doctrine denied individuals access to the underlying mechanism for which the VCCR rights were intended.[38]

*Implementation of the VCCR has been a mired affair.*

Similar to the argument the U.S. made in *Breard*, the U.S. asserted that procedural default doctrines do not deny the effect given to the VCCR, despite the continued execution of foreign nationals without the provision of notification of their consular rights. Again, this presents a Catch-22 dilemma. The LaGrand brothers had no knowledge of their VCCR rights until nearly a decade after their convictions. Had they contacted their consulate, arguably, they could have worked out a better deal and avoided the death penalty.

More concerning than the aforementioned effects of VCCR denial is the U.S. proposed stance that the VCCR does not create rights in individuals. However, the U.S.'s argument does have some merit. The Preamble of the VCCR states ". . . the purpose of such privileges and immunities is not to benefit individuals, but to ensure the efficient performance of functions by consular posts on behalf of their respective states."[39] Arguably the plain language of the text supports the U.S.'s position. However, Article 36(1) states ". . . nationals of the sending state shall have the same freedom with respect to communication with and access to consular officers of the sending state."[40] Moreover, "if *he* [the foreign national] *so requests* the competent authorities of the receiving State shall, without delay, inform the consular post of the sending state . . . a national of that State is arrested . . . ." (emphasis added).[41] This language suggests that the rights are in the individual; if the right were only in the state, then the VCCR itself would not need to make any mention of the foreign national's ability to request, only the sending state could. The U.S. continued to assert the VCCR does not create any individual rights nor does it trump state procedural rules in the *Avena* decision.

## *Avena (Mexico v. United States)*

In 2003, Mexico's government initiated a cause of action against the U.S. in the ICJ.[42] Mexico argued the U.S. had violated the VCCR by failing to notify fifty-four Mexican nationals on death row of their consular access rights.[43] The Mexican government learned of the arrests in twenty-nine cases only after the individuals were executed, and learned of twenty-three cases through sources other than law enforcement.[44]

Mexico argued that Mexican nationals were prevented from asserting their rights in state courts by the U.S.'s application of procedural default doctrines in VCCR cases, wherein a number of state courts ruled Article 36 does not create individual rights.[45]

Mexico sought provisional measures ensuring that no Mexican nationals could be executed and no execution dates could be set pending a final ICJ decision in the case for any named Mexican nationals (similar to the measures asked for by Breard and the LaGrands).[46] The ICJ ordered the U.S. to take all measures necessary to prevent any more executions pending a final ICJ judgment.[47]

The U.S. argued that after the *LaGrand* decision it had implemented effective review and reconsideration of foreign nationals in death penalty cases, including clemency proceedings.[48] The ICJ found the argument unpersuasive.[49]

On March 31, 2004 the ICJ issued its decisions.[50] The ICJ reiterated its finding in the LaGrand case that the procedural default rule prevented meaningful review and reconsideration and also prevented counsel from providing effective representation.[51] The ICJ noted the U.S. made no provisions to prevent application of the procedural default rule in cases where state officials failed to provide consular notification, thereby preventing the foreign national from raising it in initial trial and thus preventing full effect from being given to the purposes of the VCCR.[52]

*The U.S. failed twice to adequately provide review for the defendants in Breard and LaGrand. With nearly 50 death row inmates named in the Avena decision, the U.S. could not simply get away with another apology.*

The ICJ then turned to the issue of remedy. The ICJ ruled that Mexico's request for annulment of a conviction was not the "necessary and sole remedy" of the Article 36 violations.[53] The ICJ concluded that the courts of the U.S. were to determine the process of review and reconsideration.[54] Shortly after the *Avena* decision, the U.S. withdrew from the Optional Protocol of the VCCR.

The ICJ ruling was unsurprising. The U.S. failed twice to adequately provide review for the defendants in *Breard* and *LaGrand*. With nearly 50 death row inmates named in the *Avena* decision, the U.S. could not simply get away with another apology.

## *Sanchez Llamas v. Oregon*

The decision in the case of *Sanchez Llamas v. Oregon* was the first Supreme Court decision regarding VCCR violations after *Avena* was decided. Sanchez Llamas was a Mexican national arrested in Oregon (he was not named as a party to the *Avena* decision). He was given his Miranda warnings, but was never notified of his VCCR rights.[55] Police interrogated Sanchez Llamas eliciting incriminating responses.[56] Prior to trial, Llamas filed a motion to suppress the statements but it was denied. Llamas was convicted and sentenced to twenty years in prison.[57] The decision was affirmed by the Oregon Supreme Court.[58] The Supreme Court of the United States granted certiorari.[59]

The Supreme Court ruled the remedy that Sanchez Llamas sought was inappropriate as the VCCR itself doesn't mandate suppression.[60] Article 36 leaves implementation of rights under Article 36 to be executed in conformity with the receiving state's laws and regulations.[61] The issue then turned on whether suppression was an appropriate remedy. The court ruled suppression was not required because suppression is available only for constitutional violations.[62] Ultimately the court ruled no remedy was required and the court could not enlarge the obligations of the U.S. under the Constitution.[63]

The interpretation of the VCCR by the U.S. is consistent with the plain language of the VCCR. The VCCR does not contain any language requiring the signatory nations to provide suppression in

all incidences where officials have failed to notify detained foreigners of their VCCR rights. As the Supreme Court explains in *Llamas*, the right of suppression is only granted for violations of the Fourth Amendment under the U.S. Constitution. Furthermore, the Supreme Court reaffirmed position that the U.S. adopted in decisions prior: the VCCR does not create any individual rights. Indeed, in future cases the Supreme Court directly ruled on the ICJ decision in *Avena* in the *Medellin v. Texas*.

## *Medellin v. Texas*

In 2005, President Bush issued a memorandum to the Attorney General, ordering state courts to abide by the *Avena* decision to discharge the nation's international obligations.[64] José Medellin, a Mexican national, was convicted and sentenced to death for murder.[65] Consequently, Medellin was one of the fifty-one Mexican nationals named in the *Avena* decision.[66] Medellin filed a writ of Habeas Corpus in state court relying upon the *Avena* decision and President Bush's memorandum.[67] The Texas Court of Criminal Appeals dismissed Medellin's writ because he failed to raise his VCCR claim at the state level.[68] Medellin then petitioned the Supreme Court who granted certiorari.[69]

The Supreme Court's decision focused on two aspects of Medellin's petition. First, was the ICJ decision in *Avena* domestically enforceable? Second, did President Bush's memorandum independently require the states to provide review and consideration in the case of the Mexican nationals named in the *Avena* decision?[70]

Addressing the first issue, the Court determined the *Avena* decision is indeed an international law obligation binding the U.S. to act because it was rendered when the U.S. was still party to the Vienna Convention Optional Protocol.[71] However, the Court also considered whether the *Avena* decision had binding domestic legal effects so that the judgment applied in state and federal courts.[72] Medellin argued the ICJ, the Optional Protocol, and the UN Charter supplied relevant obligation to make the ICJ ruling of *Avena* binding.[73]

The Court relied heavily on the *Neilson*[74] decision to distinguish self-executing treaties from non-self-executing treaties.[75] Treaties can either be self-executing or non-self-executing, a standard that is set forth by the Court.[76] While self-executing treaties have binding domestic effect when they are entered into, non-self-executing treaties must be implemented by Congress.[77] The Court ruled that the Optional Protocol is a "bare grant of jurisdiction"; it says nothing about the effect of an ICJ decision and does not commit signatories to comply with ICJ rulings.[78] According to the UN Charter, Article 94 states each member of the UN "undertake" to comply with any ICJ decision to which it is a party.[79] However, the article does not require that the United States "shall" or "must" comply with ICJ ruling. Analyzing the enforcement mechanism of the UN Charter, the Court determined the mechanisms were diplomatic, which led the court to conclude ICJ judgments were not intended to be enforceable in domestic courts.[80] Finally, the Court analyzed the ICJ Statute, finding the ICJ's primary purpose is to arbitrate disputes between national governments. Thus Medellin could not be a party to a case before the ICJ because he is an individual.[81] The Court ultimately ruled that none of the listed authorities Medellin relies upon provide for direct implementation of ICJ judgments through enforcement in domestic Courts.[82]

*The Court determined the mechanisms of enforcement of the UN Charter were diplomatic, which led the court to conclude ICJ judgments were not intended to be enforceable in domestic courts.*

To address the second prong of the inquiry, the Court determined that President Bush's memorandum acted unilaterally to convert a non-self-executing treaty into a self-executing treaty, an act of power that was not provided for in the President's political or diplomatic powers.[83] In doing so, the Court relied on Congress to implement a law that would make ICJ rulings binding upon domestic courts, and concluded that the president can only execute this law.[84] Medellin could not rely on President Bush's memorandum to compel the states to provide review. The Court ultimately denied Medellin's stay of execution for the above reasons. With his legal options exhausted, Medellin was then executed by the State of Texas.[85]

In 2008, shortly after *Medellin* was decided, Mexico turned to the ICJ, filing a request for interpretation of the *Avena* judgment. In their request Mexico asked the ICJ to declare the U.S. has an obligation to use any and all means to provide judicial review and consideration (as required by the *Avena* judgment) before any Mexican national can be executed.[86] The ICJ refrained from ruling on the matter, though it declared the U.S. had violated its international obligations by executing Medellin.[87] The ICJ emphasized the U.S. has an obligation not to execute other Mexican nationals named in the *Avena* case pending review and reconsideration, including Humberto Leal Garcia.[88]

The Supreme Court's ruling in *Medellin* starkly contrasted with the intentions of the VCCR when the U.S. first ratified it. In essence, the VCCR does not provide individual rights under American jurisprudence. With the *Medellin* decision the U.S. effectively ruled the VCCR provides no rights and the ICJ ruling has no binding effect on domestic law. Moreover, the debate came down to whether or not the VCCR and the ICJ ruling were self-executing.

## Monism v. Dualism in the International Realm

It is helpful to look at the philosophical underpinnings of how international law affects domestic law to get a sense of the rationale behind the back and forth of the VCCR cases. The status of international law varies from state to state.[89] Under the monist view, there is only one legal order by which international and domestic legal system make up the parts.[90] As an example, under France's Constitution treaties and international accord do not need formal reception in French law. There is no distinction between self-executing and non-self-executing agreement, the agreements only need to be published.[91]

In a dualist model, international and legal orders have independent status.[92] For example, The United Kingdom is considered a dualist system because Parliament must first approve domestic implementing legislation before treaties of international law can have domestic effect.[93] In contrast, the U.S. has a unique model which has caused much of the debate over whether international law and treaties, like the VCCR, should be given domestic effect.

The Supremacy Clause of the U.S. Constitution states, "Treaties made, or which shall be made, under the Authority of United States, shall be supreme law of the Land."[94] The Supremacy clause suggests a monist model.[95] However, the self-executing and non-self-executing treaty distinction suggests a dualist model.[96] The *Medellin* decision created a situation whereby conduct required by domestic law (state procedural defaults) forces the U.S. to violate its international legal obligations (providing notification of VCCR consular rights).[97]

The dualist and monist model of international obligations helps to explain the tension the U.S. faces. It is worth exploring the self-executing and non-self-executing distinctions of treaties to further

determine whether the U.S. continues to violate its international obligations.

## Self-Executing vs. Non-Self-Executing Treaties Distinction

Before the VCCR was ratified, the U.S. State Department insisted it was self-executing and did not require implementing legislation.[98] Contrary to the original stated intent of the VCCR, the Supreme Court held in Medellin that a self-executing treaty must contain language plainly providing for domestic enforceability.[99] The Supreme Court's prior cases did not use a textual analysis; rather the Supreme Court previously determined if a treaty is self- executing based on whether the treaty provides rights.[100] The *Medellin* decision muddied the waters by adding a textual analysis requirement in to determine whether a treaty is self-executing or not self-executing.

*The U.S.'s enforcement of the VCCR in its courts is lackluster.*

It is much less troublesome to European courts to recognize individual rights for foreign individuals as enforceable in domestic courts.[101] The basic understanding of self-execution of international norms in European courts is that once a rule has been incorporated into the municipal legal order, "… its direct applicability is a matter of whether or not the rule by its content lends itself to be applied directly by the judge."[102] This interpretation does not require the court to determine whether or not the any rights exist for an individual, but rather does the right apply to the individual before the court.

After the *Medellin* decision, the Court was granted another chance to examine whether the ICJ ruling should be given effect pending looming implementation legislation.

## *Leal Garcia v. Texas*

In 1995 Leal Garcia was convicted for the murder of a sixteen year old girl.[103] Garcia was arrested and interrogated by police without being notified of his VCCR right to consular access. Garcia was also another individual named in the *Avena* decision.[104]After exhausting both state appeal and federal appeal, Garcia then filed a motion with the Supreme Court demanding a stay of his execution.[105]

The Supreme Court's majority opinion denied Garcia's application and petition for writ of *habeas corpus*.[106] In his motion, Garcia primarily relied upon pending legislation within Congress that would implement the ICJ order in Avena, referred to as the Leahy legislation.[107] The Court found his argument unpersuasive, holding the Court's duty is to rule on what the law is and not what it might be.[108] Garcia's petition was denied with prejudice and Garcia was executed.

## Current State of the VCCR in the United States

The U.S.'s enforcement of the VCCR in its courts is lackluster. After *Medellin*, the VCCR has no effect on domestic law until Congress enacts enabling legislation. Interestingly, state legislatures, such as California and Oregon, can and actually do give effect to the VCCR.[109] Other states, such as Texas, generally have not given effect to the VCCR by requiring state officials to inform foreign national detainees of their right to contact their home country's consulate.

State procedural rules trump the VCCR. Foreign detainees who fail to raise the issue at the state level (usually due to the receiving state having no knowledge of the detainee's foreign status) are procedurally barred from raising the VCCR issue at the appellate level. Those foreign nationals who do

manage to raise the issue in state court successfully must overcome a prejudicial standard. Courts have been reluctant to provide relief either on the basis that the claim was not raised in state court or that the VCCR requires no judicial remedy.[110]

## States' Enforcement of the VCCR

The Medellin decision has left many foreign detainees in a legal limbo. Many who are not informed of their consular rights fail to raise them at the state level.[111] After failing to raise the issue at state level, foreign defendants are then procedurally barred by state procedural default rules, creating a Catch-22. Defendants, who are not informed of their consular rights by any officials, must nevertheless raise the issue at trial, and when they learn of the rights on appeal, they are then barred from raising the issue.[112]

Some states, such as Arkansas, have chosen to give effect to the *Avena* decision and the VCCR. Oklahoma courts reviewed the case of a Mexico national, Osbaldo Torres[113]. Using a three-prong test other courts had applied, the court found that Torres' case had been prejudiced because he was not informed of his VCCR rights.[114] The Governor of Oklahoma decided to commute Torres' death sentence to life without parole, citing concerns that American citizens' rights abroad may be jeopardized by the VCCR decisions.[115]

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Moreover, some states have given the VCCR domestic effect by incorporating its requirements into judicial code. In 1999, California legislators passed a bill implementing part of the notification provisions of Article 36.[116] Surprisingly, Texas published a manual on consular notification and distributed this manual to law enforcement agencies and courts (though state agencies do not always follow the manual).[117]

## Reciprocity

A number of critics have expressed concern the *Medellin* decision will endanger U.S. citizens abroad.[118] The *Medellin* dissent expressed concern the decision would endanger American citizens abroad. Under the principle of reciprocity, governments extend special advantages or privileges to citizens of other governments on the condition that its own citizens will be granted the same treatment in return.[119] It is important to remember the U.S. is part of the international community. Ensuring reciprocity of the VCCR is important to protect American citizens abroad and also to demonstrate that the U.S. does not give effect to international obligations merely when it is convenient for the U.S.

## How Other Signatory States Implement the VCCR

The VCCR was created to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems."[120] It is important to examine the effect that other signatory nations give to the VCCR to determine whether the U.S. treatment of it is aberrant to the VCCR's intended purpose.

### Germany

Germany stands to benefit the most by giving the VCCR domestic effect given its prior involvement with the ICJ in the *LaGrand* decision. In 2006, four defendants (two from Turkey and two from Serbia-Montenegro) were arrested during the course of a murder investigation that occurred in a red light district.[121] The defendants were informed

of their rights as defendants under the German law of criminal procedures, but none were provided with information regarding their right to contact their consular staff in compliance with the VCCR.[122] All four defendants appealed their conviction to the Federal Court of Justice (Bundesgerichtshof).[123]

The Federal Court of Justice denied their appeals. Relying upon the ICJ ruling in *LaGrand*, the Court ruled the purpose of Article 36 is to protect against the unexplained disappearance of foreign detainees.[124] Following the denial, the defendants then appealed to the Federal Constitutional Court (Verfassungsbeschwerde) by arguing that because authorities had failed to inform them of their rights under Article 36, the authorities had violated their rights as guaranteed by the German Constitution.[125]

The Constitutional Court ruled that Germany is under a constitutional obligation to adhere to the interpretation of treaties by competent international courts.[126] The Court examined the *LaGrand* and *Avena* decisions as well the U.S. decision in *Sanchez-Llamas*.[127] Like the U.S., the German Court found the VCCR has the same status as federal law.[128] However, unlike the U.S., the German Court found the VCCR specific enough to be self-executing.[129] The Court required review of the VCCR violation, but the domestic courts still have the authority to determine if the procedural error was harmless or not.[130]

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Germany's enforcement of the VCCR provided a model establishing the standards for VCCR violation. The key is in the interpretation of whether the VCCR is self-executing. The U.S. ruled the VCCR is not self-executing and requires implementing legislation be in place before the VCCR can take domestic effect. Once the implementing legislation is in place, then the VCCR will occupy the same place as federal law. Germany's approach is a hybrid. In *Sanchez-Llamas*, the Supreme Court said the ICJ ruling should be given some deference and then largely ignored the ICJ ruling in *Avena*.[131] Germany recognized the ICJ's expertise regarding the VCCR and took this expertise into consideration before ruling that the VCCR is self-executing.

Germany's enforcement of the VCCR tends to reflect the original intent of the VCCR, but not as sufficient as it could be reflected. The German Constitutional Court gives a greater deference to the rulings of the ICJ, treating ICJ rulings as binding upon German domestic law.[132] Moreover, Germany requires domestic courts to actually give review.[133] However, this leaves open the possibility that domestic courts retain the authority to determine the failure to inform the defendants of their VCCR rights was harmless error.[134]

## Australia

Australia has taken an approach similar to the U.S. by requiring implementing legislation to give portions of the VCCR domestic effect. In *La Bara v. Minister of Immigration and Citizenship*, the defendant, an Indonesian citizen, came to Australia after Australian Fisheries and Management Authority boarded his fishing vessel, took the defendant and his crew into custody, and destroyed his vessel.[135] The defendant argued his deportation would violate the VCCR. [136] In his decision, the Magistrate pointed out the VCCR is not incorporated into domestic law. [137] This holding contrasts with the Australian court system's application of the VCCR in criminal law.

In an earlier case, *Tan Keng Siah v. R*, a national from Singapore was arrested by Australian police in connection with smuggling drugs.[138] The arrested national requested contact with a consular officer,

but was denied the request. During his detention the defendant made incriminating statements to the police.[139] Crimes Act 1924 Section 23P requires that any arrestee who is not an Australian citizen must be informed that the arrestee may have their consular office notified of their arrest and communicate with that consulate if they so request.[140] Because the police had failed to do so, the court recommended the arrested individual's statements be suppressed.[141]

In *Foo v. the Queen*, the court reaffirmed the *Tan Keng Siah* ruling that a violation of Section 23P was sufficient to suppress or exclude incriminating statements.[142] Further in *R v. SU*, the court recognized that "Contacting the consular office by a detained foreign national provides an opportunity to . . . seek advice and assistance . . . One need only contemplate the predicament of an Australian national held in custody in a foreign non-English speaking country without access to and Australian consular office to appreciate the importance of the right."[143]

Australia's application of the VCCR is similar to the U.S. view. Much like in *Medellin*, *La Bara* makes the distinction that the VCCR is a non-self-executing treaty, so that without implementation in the domestic law, there is no right for the individual. However, unlike the U.S., the Australian legislature has recognized the importance of consular access. Section 23P sets out to provide the rights contemplated in the ratification of the VCCR, mimicking the language of the VCCR. Australia provides a model whereby concerns over maintaining sovereignty can be balanced against the need to provide consular access to foreign nationals.

## Canada

In *R. v. Partak*, a U.S. citizen was accused of murder.[144] The accused made incriminating statements, but alleged he would not have made the statements had he been advised of his consular rights.[145] Canada ratified the VCCR in 1966 and implemented it in the Foreign Missions and International Organizations Act in 1991.[146] The Ontario Superior Court recognized that the VCCR creates rights for individuals, not just obligations between states.[147] Moreover, the Court also recognized that the purpose of the VCCR is to ensure that foreign detainees receive equal treatment under the local justice system that may be unfamiliar to them.[148] Ultimately, however, the Court ruled that the omission by the police was not oppressive to the detained U.S. citizen.[149]

Another Canadian case, *R. v. Van Bergen*, ruled that the VCCR creates obligations between states and not independent rights for foreign nationals[150] (similar to the U.S. Supreme Court's *Medellin* ruling). The Court further held that the accused "needed to establish serious prejudice in the process of the foreign state."[151] The lack of consular notification was thus harmless error.[152] It is important to note *R. v. Partak* was decided in an Ontario court and *R. v. Van Bergen* was decided in an Alberta court. This demonstrates how two courts within the same country can have different interpretations regarding the domestic applicability of the VCCR.

Canada's enforcement and application of the VCCR mirrors that of the U.S. courts. In order to have convictions reviewed, detained foreign nationals in both the U.S. and Canada must prove that failure to provide consular notification led to prejudice. Conversely, Canadian courts recognize a private right for foreign nationals; this starkly contrasts with the U.S. position that the VCCR creates no such right. Canada gives some effect to the VCCR, but not as much as VCCR signatory nations should give.

## Conclusion

The inherent conflict of the rule of international law and the sovereignty of states is played out in the enforcement of the VCCR by the U.S. The VCCR itself is vague enough that the U.S.

can interpret it as a non-self-executing treaty without automatic domestic effect, whereas countries such as Germany find that the VCCR is specific enough to have binding effect on German domestic law. Other countries have given the VCCR mixed effect as well: some mimic the U.S. enactment and enforcement, while others give more deference to the international legal community.

Can the U.S. continue to execute Mexican nationals who have not received notice of their rights under the VCCR? Sadly, the answer seems to be yes. The U.S. domestic scheme has created a system whereby foreign nationals who are arrested and convicted may or may not be informed of their right to speak with their consulate prior to trial. Whether or not consular access would have given any of these defendants a better sentence is anyone's guess. Many of the defendants in the aforementioned cases were convicted of heinous crimes. Until implementing legislation is enacted, the U.S. can legally continue to sentence the remaining foreign nationals named in *Avena* to death without any type of review regarding failure to provide the foreign nationals with consular notification.

## Recommendations

For the U.S. to come into compliance with its international obligations under the VCCR, any number of the listed recommendations would help.

### *Enable Legislation for the Avena Decision*

In *Medellin*, the Supreme Court left Congress with the task of implementing legislation that would enable the ICJ's *Avena* decision to be binding on state courts.[153] Moreover, as was the key issue in *Garcia*, Congress has attempted to pass enabling legislation.[154] The Consular Notification Compliance Act would have enabled federal courts to review a petition claiming a violation of the VCCR.[155] Moreover, the Act would have granted a stay of execution for any petitioners facing the death penalty.[156] The petitioner would have to show actual prejudice to the criminal conviction or sentencing as a result of the violation.[157] Alternatively, potential legislation implementing the *Avena* decision could give federal courts the ability to provide relief such as overturning convictions, ordering new trials or sentencing proceedings, and providing declaratory relief to ensure the foreign national's rights.[158] While promising, the chances of such a proposal passing are very unlikely, given the current political climate and a culture of deadlock in Congress.

*The Supreme Court's continued rulings that the VCCR provides no individual rights has changed consular notification from a right to a privilege.*

### *Abolish the Distinction between Self-Executing Treaties and Non-Self-Executing Treaties*

A more direct and radical way to implement the VCCR would be to eliminate the judicial distinction between self-executing and non-self-executing treaties. Scholars argue that the Supremacy Clause requires states to respect and enforce all international treaties and to treat them as binding upon domestic law.[159] Based on the rulings in *Medellin*, the non-self-executing treaty distinction has resulted in a lack of enforcement of the VCCR in domestic courts. By eliminating this distinction, the Supreme Court would clear up the confusion as to any rights foreign defendants have under the VCCR. This proposal is very likely to fail, given that the Supreme Court is loath to overrule previous case law.

### *Rejoin the VCCR Optional Protocol*

When President Bush withdrew from the VCCR Optional Protocol in 2005, the aim was to prevent any future ICJ judgments against the U.S.[160] This was a mistake. Rights and obligations under the Optional Protocol are entirely reciprocal; withdrawal removed the binding enforcement mechanism for the right of U.S. citizens abroad to access their consulate when detained in a foreign signatory country.[161] Moreover, withdrawal sent the message that the U.S. will only honor the rule of law under the Optional Protocol so long as ICJ decisions favor the U.S.[162]

### *Train Prosecutors and Defense Attorneys to Better Understand the Rights of Foreign Nationals*

The Supreme Court's continued rulings that the VCCR provides no individual rights has changed consular notification from a right to a privilege.[163] Police agencies and prosecutors, depending on the region as well as state and local law, may never inform detained individuals of their rights, either out of ignorance of the VCCR or (even worse) intentionally. Depending on the expertise of his or her appointed counsel, the detained foreigner may never learn of the right to consular contact, or it may never be raised in a timely fashion at the local level, which would make the issue procedurally barred at appeal.[164]

Prosecutor's offices should implement programs that alert the attorneys to their VCCR obligations.[165] Moreover, local bar programs should provide criminal defense attorneys with legal education and training that would help them better understand the implications of timely raising VCCR notification complaints as well as the remedies available to their foreign national clients.[166]

Implementation of the VCCR does not take much effort on a local level. For example, the King County court in the state of Washington has implemented a process in which foreign nationals are given a form at every arraignment whereby they can request consular notification by signing one line or waive the notification by signing the other line.[167] The form is simple enough to make available for foreign defendants. However, this system still falls short of making consulate access immediately available.

Implementation of the VCCR has been a mired affair. In order to achieve the results for which the U.S. advocated at the inception of the VCCR, it is necessary to provide consular access to all foreign nationals when they are detained. ■

### Author Biography

Brendan Dominguez is a 2015 graduate of Chapman University's Dale E. Fowler School of Law. He is licensed to practise law in California, and has since been working as a volunteer attorney with the Offices of the Public Defender in Orange County. He believes firmly in the constitutional right of every Defendant to have adequate representation, and that an individual's wealth, or lack thereof, should not dictate whether a Defendant is entitled to the best defense possible.

■

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