

# THE RIGHT TO CONSULAR NOTIFICATION: THE CULTURAL BRIDGE TO A FOREIGN NATIONAL'S DUE PROCESS RIGHTS<sup>†</sup>

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## ABSTRACT

*Under Article 36 of the Vienna Convention on Consular Relations (VCCR or Convention), foreign nationals have the right to consular notification when detained and/or arrested in a country other than their country of nationality, assuming both the arresting country and their country of nationality have ratified the Convention. The United States ratified the VCCR in 1969. However, there is a lack of consensus among domestic courts in the United States concerning whether Article 36 confers an individual right to consular notification. The subject is highly contested, and most courts have refrained from definitively answering the question. The Supreme Court has held that even if a right does exist, a violation of Article 36 does not warrant the suppression of evidence in a judicial proceeding. Accordingly, state procedural default rules will usually bar any such claim.*

*This Note will argue that the right to consular notification under Article 36 is an individual right and, in some circumstances, a foreign national defendant can be prejudiced in the absence of being informed of this right. This Note will also analogize Article 36 with the constitutional right to due process, the right to a fair trial, the right against self-incrimination, and the right to an attorney. Finally, this Note will propose a new statute conferring an individually enforceable right stemming from Article 36, listing preventative measures to lessen the number of Article 36 violations, and enacting concrete remedies should a violation occur.*

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<sup>†</sup> See *Osagiede v. United States*, 543 F.3d 399, 403 (7th Cir. 2008) (“The consulate can serve as a ‘cultural bridge’ between the foreign detainee and the legal machinery of the receiving state.” (citing William J. Aceves, *Murphy v. Netherland*, 92 AM. J. INT’L L. 87, 89-90 (1998))).

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I. INTRODUCTION

When citizens of one country travel to another country, they must consider legal concerns such as passport documentation, currency conversion, travel expenses, duty taxes, et cetera. However, one issue that is insufficiently addressed, and likely the most important, is a foreign national's right to contact his or her consulate in case of arrest and/or detention by law enforcement of the foreign state he or she is visiting. Hypothetically, suppose Martin and his sister Tanya travel from their home country, San Marquette,<sup>1</sup> to the United States for a vacation in New York City. Martin speaks fluent English, while Tanya speaks only broken English. While waiting for their tour bus to arrive outside their hotel, Martin sees a man harassing his sister and grabbing her wrist. Martin shoves the man backwards and tells him to leave. When the man advances, Martin shoves him again and the man stumbles over the curb, right into oncoming traffic, and is killed. Martin is arrested by the NYPD and later charged with murder after several witnesses attest that they saw Martin and the victim arguing. Martin is read his Miranda Rights, but not told of his right to contact the San Marquette consulate in New York.

After a few hours of being held in police custody, Martin is confused by the police officers' questioning and, though he understands English, a little overwhelmed by U.S. police procedure, including its laws and customs. Martin finally confesses to shoving the man and being the initial aggressor, though he does not understand what that term means. In San Marquette, the defense of others is not a defense to murder, so Martin does not say anything about protecting his sister as being the reason for actions. Further, Martin does not want the police to talk to his sister, as police officers in San Marquette are known for distorting facts during interviews. Martin is indicted, tried, and convicted of second degree manslaughter. While Martin is in prison, Tanya

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1. Please note that a fictitious country is being used for this hypothetical.

learns of her brother's right to contact the San Marquette consulate, which the police neglected to tell him.<sup>2</sup>

Did Martin have a right to be informed of his right to contact the consulate? What was the effect of the failure to notify Martin of his rights in U.S. domestic courts? And is the failure to provide this right a reason for setting aside his conviction? Article 36 of the Vienna Convention on Consular Relations provides for the right to consular notification.<sup>3</sup> Under this Convention, and assuming San Marquette is a party to this treaty, the police officers were obligated to inform Martin of this right after they arrested him. However, the United States, a party to this Convention, has been criticized by the international community for consistently failing to uphold its obligation of consular notification for foreign nationals arrested while in the United States.<sup>4</sup>

This Note will discuss whether an enforceable right exists under the Vienna Convention, and if so, the ramifications, if any, of a failure to adhere to that right are examined. First, the history and general overview of Article 36 of the Vienna Convention on Consular Relations will be discussed. Then, the Note will analyze the reasoning behind why Article 36 confers the right to consular notification on individuals by looking at treaty text and the VCCR preamble and preparatory works. It evaluates the holdings of U.S. domestic courts, including the U.S.

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2. See Yury A. Kolesnikov, *Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solutions*, 40 MCGEORGE L. REV. 179, 180-81 (2009) (describing a similar, basic fact pattern).

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

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 if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph; . . .
2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended. *Id.*

4. Rebecca E. Woodman, *International Miranda? Article 36 of the Vienna Convention on Consular Relations*, 70 J. KAN. B. ASS'N. 41, 42 (2001) (noting that the United States' lack of enforcement of Article 36 has been criticized by other nations, most particularly concerning foreign nationals who received the death penalty and those executed despite orders from the ICJ to stay those executions while suits brought against the United States by other nations were still pending in court).

Supreme Court, the circuit courts, and the state courts as well as international courts and the interpretation of Article 36 by other countries. Next, the problems U.S. courts have faced enacting remedies will be discussed. Then, this paper presents a proposed statute to remedy an Article 36 violation, followed with other solutions that will help aid in lessening the violations in the United States.<sup>5</sup> Lastly, the Note will address international relations and federalism concerns. International relations concerns arise with issues involving lack of consular notification because the United States is arresting, judging, and convicting nationals of another country. Federalism is also addressed because the proposed statute to remedy Article 36 violations will be criticized as disrupting the balance between state and federal governments.

## II. HISTORY

### A. Overview

The Vienna Convention on Consular Relations (hereinafter VCCR) is a multilateral treaty that has been ratified by 179 countries as of March 3, 2017.<sup>6</sup> Its main purpose is to codify the long-standing practice of consular relations between different nations.<sup>7</sup> The United States

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5. This paper does not address foreign nationals who are citizens of both a foreign country and the United States, as it goes beyond the scope of this research project. However, per a 2001 telegram to all U.S. diplomatic and consular posts, the State Department stated that “consular notification is not required by treaty if the U.S. citizen is also a citizen of the country in which the arrest occurred.” 7. *U.S. Dep’t of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals arrested abroad*, U.S. DEP’T STATE (Jan. 1, 2001), <https://www.state.gov/s/1/16139.htm>. However, it is also the policy of the State Department to “intervene on behalf of all Americans, and make representations on their behalf, regardless of dual national status.” *Id.* This policy is the best option. Whether a person is a national of one or two countries, that does not make either citizenship any less valuable to each country. However, in the United States, should an arrestee be both an U.S. citizen and a citizen of a foreign country, it might be very difficult for law enforcement to administer consular notification. In most situations, there probably will not be prejudice. However, suppose Martin, for example, was born in the United States, but moved to San Marquette with his family two years after his birth. He became a citizen of San Marquette through his father, because Martin’s father was a national of San Marquette. On return to the United States thirty years later, assume Martin was arrested for a being involved in the situation explained in the Introduction of this paper. While a U.S. citizen, Martin is oblivious to U.S. law and customs and will most likely make the same mistakes without the aid of his consular officer. Thus, consular notification may still be necessary in some circumstances (though probably fact-intensive). But the line of prejudice will be much more difficult to draw.

6. VCCR, *supra* note 3.

7. J. WILLIAM FULBRIGHT, VIENNA CONVENTION ON CONSULAR RELATIONS, S. EXEC. DOC. 91-9, at 1 (1969) [hereinafter VCCR Senate Documents].

ratified the treaty in 1969.<sup>8</sup> This Note will discuss the status of this treaty in accordance with U.S. law as well as whether Article 36 of the VCCR is enforceable in U.S. domestic courts.

### B. *Article 36*

Article 36 of the VCCR imposes an obligation on a state party to the treaty regarding the detention or arrest of a foreign national whose state of nationality is also a party to the treaty.<sup>9</sup> Article 36 states that foreign nationals arrested or detained in one state (receiving state) may contact the consulate of their state (sending state), and the receiving state must notify the consulate “without delay.”<sup>10</sup> Additionally, the authorities of the receiving state are obligated to inform the foreign national of this right.<sup>11</sup>

The question that confounds U.S. domestic courts is whether this provision in the VCCR creates an individual right that can be judicially enforced by U.S. courts, and if so, what is the appropriate remedy. On the international level, the International Court of Justice has found the United States to have violated this treaty by not informing foreign nationals of their right to consular notification and has ordered the United States to provide review and reconsideration.<sup>12</sup> At the national level, U.S. courts are in harmony only with their level of confusion. The United States Supreme Court has refused to address the issue of whether Article 36 creates an enforceable right and the circuit courts are not in agreement.<sup>13</sup> This Note will argue for the recognition of an enforceable right and promote a proposed statute that will remedy a violation of that right.

## III. ANALYSIS

### A. *The Vienna Convention on Consular Relations is a Self-Executing Treaty in the United States*

For Article 36 to confer an individual right in U.S. law, the VCCR must be either self-executing on each state in the United States or

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8. Woodman, *supra* note 4 at 42.

9. VCCR, *supra* note 3.

10. *Id.*

11. *Id.*

12. See Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I. C.J. 12 (Mar. 31) [hereinafter *Avena*]; LaGrand Case (Ger. v. U.S.), Judgment, 2001 I.C.J. 466 (June 27) [hereinafter *LaGrand*].

13. Woodman, *supra* note 4, at 43.

implemented by Congress via a statute. The U.S. Constitution declares treaties as the “supreme law of the land.”<sup>14</sup> However, Justice Marshall in *Foster v. Neilson* articulated the distinction between two types of treaties: self-executing treaties and non-self-executing treaties.<sup>15</sup> A self-executing treaty is one that “operates of itself without the aid of any legislative provision”<sup>16</sup> and it is enforceable as law in domestic courts. A self-executing treaty carries the same weight as a federal statute.<sup>17</sup> On the other hand, a non-self-executing treaty has no domestic effect and “can only be enforced pursuant to legislation to carry them into effect.”<sup>18</sup>

Unless decided by the President and the Senate during the “advice and consent” stage of ratification of a treaty,<sup>19</sup> to determine if a treaty has domestic effect as a self-executing treaty, courts normally interpret a treaty the same way it would interpret a statute: by looking at the text.<sup>20</sup> However, the text of the VCCR does not reveal the intent of the treaty drafters, so one must look to the circumstances surrounding the treaty’s execution or the reason it was ratified.<sup>21</sup>

Absent the view of the political branches, courts look to the negotiations of the drafting history of the treaty and the understanding of the treaty after ratification to aid in interpretation.<sup>22</sup> During the Senate meeting of the 91<sup>st</sup> Congress regarding the issue of the United States becoming a party to the VCCR, the treaty was recognized as self-executing and that it

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14. U.S. CONST. art. VI, § 2. “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.” *Id.*

15. *Foster v. Neilson*, 27 U.S. 253, 314 (1829), *overruled on other grounds* by *United States v. Percheman*, 32 U.S. 51 (1833).

16. *Medellin v. Texas*, 552 U.S. 491, 504 (2008) (quoting *Foster*, 27 U.S. at 314).

17. *Foster*, 27 U.S. at 314.

18. *Id.* (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)).

19. U.S. CONST. art II, § 2 (“He [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties. . .”).

20. *Medellin*, 552 U.S. at 506.

21. *State v. Reyes*, 1999 Del. Super LEXIS 353, at \*9 (Del. Super. Ct. Aug. 17, 1999) (stating when the language of a treaty is uncertain, look to the “circumstances surrounding its execution”); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §111 cmt. h (AM. LAW INST. 1987) (explaining the notion that absent an intent, the United States decides how to carry out its international obligations under a treaty).

22. *Medellin*, 552 U.S. at 507.

needed no further legislation to be implemented domestically.<sup>23</sup> Thus, from the moment of ratification, the VCCR was deemed to bind the United States domestically as a self-executing treaty. Therefore, the VCCR is directly applicable to the states and holds the same status as a federal statute.

However, it is noteworthy that one court—the Arkansas Court of Appeals—has misinterpreted the decision in the *Medellin* case as stating that the Vienna Convention on Consular Relations was not self-executing by confusing the difference between the VCCR and the Optional Protocol.<sup>24</sup> In *Gikonyo*, the Arkansas Court of Appeals relied on *Medellin*, holding that treaties are not domestic law unless Congress enacts legislation or the treaty itself was understood as self-executing when it was ratified.<sup>25</sup> The Arkansas Court concluded that it did not need to address the question of whether the defendant was detained as defined in Article 36 because, in accordance with *Medellin*, the VCCR was “not domestically enforceable,”<sup>26</sup> which is an incorrect interpretation of *Medellin*.

This court misinterpreted the *Medellin* decision because the court confused the difference between Article 36 of the VCCR and the enforcement of ICJ judgments via the Optional Protocol. In *Medellin*, the U.S. Supreme Court held that the Optional Protocol (including the ICJ decisions, which included *Avena*, stating that Article 36 of the VCCR conferred individually enforceable rights<sup>27</sup>) was non-self-executing and not binding on the state courts.<sup>28</sup> The Court in *Medellin* did not rule that the VCCR as a treaty was non-self-executing. Thus, the Arkansas court erroneously held that Article 36 is not domestically enforceable.

The Supreme Court did state that even though an ICJ judgment is not enforceable in domestic courts without implementing legislation, the underlying treaty (here the VCCR) may still be domestically enforceable.<sup>29</sup> Thus, there is no correct ruling in *Medellin* that holds that Article 36 of the VCCR is not domestically enforceable. Further, as

23. VCCR Senate Documents, *supra* note 7, at 5 (J. Edward Lyerly, the Deputy Legal Adviser for Administration noting that “The Convention is considered entirely self-executive and does not require any implementing or contemplating legislation.”).

24. *See Gikonyo v. State*, 283 S.W.3d 631, 636 (Ark. Ct. App. 2008) (citing *Medellin v. Texas*, 552 U.S. 491, 504-05 (2008)).

25. *Id.*

26. *Id.*

27. *See Avena*, 2004 I.C.J. at ¶ 153.

28. *Medellin v. Texas*, 552 U.S. 491, 511-13, 519 (2008).

29. *Id.* at 519-20.

explained in the above section, when the Senate ratified the VCCR, it understood the treaty to be self-executing, and thus did not need any further congressional legislation. Thus, the Arkansas court's refusal to further analyze if the defendant was "detained at the time his statement was made" because the "VCCR is not domestically enforceable" was incorrect.<sup>30</sup> The court should have further analyzed the case and made its decision on what side of the split it would take regarding Article 36 interpretation.

B. *The Vienna Convention on Consular Relations Confers an Individually Enforceable Right*

However, although the VCCR is self-executing, the question remains as to whether an individual has a right that can be individually enforced. Whether the VCCR creates an individually enforceable right has been a question that currently has a circuit split. Arguments exist on both sides, but this paper argues that an individually enforceable right exists.

1. Tools in Interpreting Article 36 of the Vienna Convention on Consular Relations

This section will explain why Article 36 of the VCCR confers an individual right based on the treaty interpretation. First, the text of the VCCR will be analyzed, and it will be explained why the text itself confers the individual right of consular notification. Next, the Preamble of the VCCR and the preparatory works will be analyzed with Article 36 to show that Article 36 should be interpreted to confer individual rights and that the state delegates when negotiating the VCCR meant for that to be the interpretation. Third, the view of the U.S. State Department's interpretation of the VCCR will be explained and show that courts do not always follow the opinion of the Executive Branch. Lastly, the presumption against treaties conferring rights on individuals will be examined and show that the United States does have a history of interpreting treaties to confer rights on individuals.

a. *Text of the Vienna Convention on Consular Relations*

The interpretation of a treaty begins with an examination of the text.<sup>31</sup> Article 36(b) of the VCCR does specifically mention individuals,

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30. *Gikonyo v. State*, 283 S.W.3d 631, 636 (Ark. Ct. App. 2008).

31. *Medellin*, 552 U.S. at 506-07 (citing *Air France v. Saks*, 470 U.S. 392, 396-97 (1985)); see also *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to define its meaning.").

stating that the authorities of the receiving state shall contact the consulate of the sending state if one of its sending state's nationals is arrested or in custody, or if the individual (foreign national) asks.<sup>32</sup> Further, Article 36(b) states that the authorities of the receiving state "shall inform the person [in custody] concerned without delay" of his rights under this paragraph."<sup>33</sup> Thus, the text of the VCCR itself explicitly identifies the ability of a foreign national to contact his or her consulate when in custody of the authorities of another state as "a right."

b. *Preamble Interpretation of the Vienna Convention on Consular Relations*

The purpose of the VCCR was to promote friendly relations of states and peace among them, as stated in the Preamble.<sup>34</sup> The Preamble further states that the purposes of the treaty were "not to benefit individuals," but only to promote efficient performance of consular relations.<sup>35</sup> Many U.S. courts have held this to be one reason for not finding an enforceable right in Article 36.<sup>36</sup> However, with regards to treaty interpretation, the Vienna Convention on the Law of Treaties (VCLT) governs.<sup>37</sup> Article 31 of the VCLT declares that a treaty is first interpreted by the original meaning of its terms.<sup>38</sup> In the original words of Article 36, as explained above, Article 36(b) intends to confer individual rights

32. See VCCR, *supra* note 3, art. 36(1)(b).

33. *Id.* (emphasis added).

34. VCCR, *supra* note 3, pmb1.

*The States Parties to the present Convention, . . .*

*Having in mind* the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

*Considering* that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,

*Believing* that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems, . . . *Id.*

35. *Id.*

36. See *United States v. Martinez-Rodriguez*, 33 P.3d 267, 272 (N.M. 2001); see also *United States v. Emuegbunam*, 268 F.3d 377, 392 (6th Cir. 2001) ("[T]he preamble to the Vienna Convention expressly disclaims the creation of individual rights . . .").

37. LORI FISHER DAMROSCH & SEAN D. MURPHY, *INTERNATIONAL LAW: CASES AND MATERIALS* (6th ed. 2014) (noting that although not ratified by the United States, the Executive Branch recognizes the VCLT as the authoritative guide to current treaty law and practice (citing S. EXEC. DOC. NO. L. 92-1 (1971))).

38. Vienna Convention on the Law of Treaties art. 31, Jan. 27, 1980, 1155 U.N.T.S. 331.

to a detained foreign national, in a country that is party to the VCCR.<sup>39</sup> However, under VCLT, Article 31(2), the purpose of the treaty is included in the interpretation.<sup>40</sup> Recognizing an individual right of consular notification would promote the purpose of promoting friendly relations, so interpreting Article 36 as conferring a right of consular notification on an individual does not go against the purpose in the Preamble. However, a contradiction of this above recognition can be said to exist in the treaty because another part of the Preamble states that the purpose of the treaty was not to give individual rights. But the Preamble does not even have to be examined because courts have held not to include the Preamble in the interpretation of the treaty when the text is perfectly clear.<sup>41</sup> And here, it clearly refers to rights of foreign nationals.

Further, even if it can be said that the VCCR is ambiguous as to the creation of individual rights, the framers of the VCLT also drafted Article 32 (of the VCLT), which states that there are other means of interpreting a treaty when Article 31 leaves the meaning ambiguous.<sup>42</sup> Under Article 32, the preparatory work of the treaty would be

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1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
  2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . . *Id.*

39. Article 36 confers a right to individuals in countries who have implemented the VCCR in accordance with their country's process of implementing treaties, whether it be automatically implemented or via legislation. See JOHN QUIGLEY, WILLIAM J. ACEVES & S. ADELE SHANK, *THE LAW OF CONSULAR ACCESS: A DOCUMENTARY GUIDE* 111 (2010) (treaty obligations of the Netherlands and Germany enter domestic law automatically without any need for legislation.). *But see id.* at 111-13 (offering an excerpt of the legislation enacted in the United Kingdom, Ireland, and Australia to implement Article 36 domestically).

40. Vienna Convention on the Law of Treaties, *supra* note 38, art. 31(2).

41. See *Whitman v. Amer. Trucking Ass'ns, Inc.*, 53 U.S. 457, 483 (2001) (holding it inappropriate to look at the title of a section if the text is clear); see also *Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) ("It is a mistake to allow general language of a preamble to create an ambiguity in specific statutory or treaty text were none exists. Courts should only look to materials like preambles and titles only if the text of the instrument is ambiguous.").

42. Vienna Convention on the Law of Treaties, *supra* note 38, art. 32.

#### Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

*Id.*

examined to determine the meaning of Article 36 of the VCCR. At the Convention Conference, when the state delegates were still negotiating the proper language of Article 36, the United States delegate suggested that the consular notification be made at the request of the foreign national in order “to protect the *rights of the national concerned*.”<sup>43</sup> At the time of treaty notification, the United States recognized that Article 36 conferred rights to individuals, as did many other state delegates.<sup>44</sup> This recognition by the United States and several other nations<sup>45</sup> that consular notification was a right of the foreign national strengthens and makes more plausible the interpretation that Article 36 confers individual rights.

c. *State Department Interpretation of Vienna Convention on Consular Relations*

Lastly, when courts interpret treaties, they tend to give “great weight” to the Executive’s interpretation of a treaty.<sup>46</sup> The State Department’s view is that the VCCR did not create individual rights.<sup>47</sup> However, the Executive’s interpretation is not always dispositive for the courts.<sup>48</sup> When the Executive’s interpretation is incorrect, courts do not follow the advice of the Executive Branch. In *Hamdan v. Rumsfeld*, the Supreme Court of the United States noted that the Government’s interpretation of the meaning of “conflict not of an international character” in Common Article 3 of the Geneva Conventions was erroneous.<sup>49</sup> The Supreme Court instead interpreted Common Article 3 itself to find that “conflict of an international nature” referred to a conflict not between nations, and thus, the conflict with al Qaeda fell under Common Article 3.<sup>50</sup> Thus, the Supreme Court overruled the lower court’s

43. See Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, Mar. 4 to Apr. 22, 1963, *reprinted in* S. EXEC. DOC. NO. E, at 337 (1963) [hereinafter Report of the United States] (emphasis added).

44. *Id.* (explaining the viewpoints of delegates from the UK, Australia, (former) Soviet Union, Tunisia, Greek, Congo, Korea, Spanish, French, German, Brazil, Kuwait, Venezuela, New Zealand, and Ecuador); see also *United States v. Li*, 206 F.3d 56, 73-74 (1st Cir. 2000) (Torruella, C.J., concurring and dissenting).

45. For a list of other nations that recognized that Article 36 confers individual rights, see Report of the United States, *supra* note 43.

46. See *Li*, 206 F.3d at 63-65 (explaining that the State Department’s view that treaties do not create rights and that that stance needs to be given weight by the courts).

47. *Id.* at 63.

48. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 106 cmt. g (AM. LAW INST., Tentative Draft No. 2, 2016).

49. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-631 (2006).

50. *Id.*

decision, which consequently rejected the Executive department's interpretation.<sup>51</sup> Thus, regarding Article 36 of the VCCR, a U.S. court can take a position contrary to that of the State Department if it finds, under its own analysis that Article 36 does confer the individual right of consular notification, which this Note argues for.

d. *Presumption Against Treaties Conferring Individual Rights*

Courts that fail to find that Article 36 confers an individual right cite to the general presumption that treaties do not create individual rights.<sup>52</sup> However, the Supreme Court has "routinely" permitted individuals to enforce treaties in the domestic courts of the United States.<sup>53</sup> Individuals have been permitted to use treaties as a defense to a criminal proceeding, or as a challenge to state laws or city ordinances.<sup>54</sup> Thus, although the VCCR does not explicitly call for a direct cause of action, because Article 36 confers a right on foreign nationals, they can use an Article 36 violation as a challenge to criminal proceedings.

The Supreme Court has stated that a treaty can confer enforceable rights to individuals.<sup>55</sup> These rights arise when a treaty expressly provides for it or it is implicit in the text.<sup>56</sup> In the VCCR, the text explicitly

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51. *Id.*

52. *See* *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) ("International treaties are not presumed to create rights that are privately enforceable."); *see also* *United States v. Rodrigues*, 68 F. Supp. 2d 178, 181-82 (E.D.N.Y. 1999); *Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) ("[T]reaties as a rule do not create individual rights.").

53. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 374 (2006) (Breyer, J., dissenting).

54. *See id.* at 374-75 (citing *United States v. Rauscher*, 119 U.S. 407, 410-11 (1886) (holding that defendant could raise a violation of an extradition treaty at his criminal trial)); *Kolobrat v. Oregon*, 366 U.S. 187, 191 (1961) (holding that foreign nationals could challenge a state law that limited their inheritance based on a treaty based on the most favored nation standard); *Asakura v. Seattle*, 265 U.S. 332, 340 (1944) (holding that a foreign national could challenge a city ordinance that forbade noncitizens from working as pawnbrokers via a treaty stating that citizens of each signing State should have the liberty to carry on a trade the same as native citizens).

55. *Edye v. Robertson*, 112 U.S. 580, 598 (1884) ("[A] treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other."); *see also* *United States v. Chaparro-Alcantara*, 226 F.3d 616, 620 (7th Cir. 2000) (stating that the general rule against individual rights in treaties has exceptions); *United States v. Rodrigues*, 68 F. Supp. 2d 178, 181-82 (E.D.N.Y. 1999) (same). *See* David Sloss, *United States, in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* 525 (David Sloss ed., 2004) for a detailed analysis of the two schools of thought regarding individual rights in treaties. Transnationalists believe that treaties create individual enforceable rights while nationalists do not. *Id.* at 526-527.

56. *Rodrigues*, 68 F. Supp.2d 178, 182 (E.D.N.Y. 1999); *see also* *Columbia Marine Servs., Inc. v. Reffet Ltd.*, 861 F.2d 18, 21 (2d Cir. 1988) (positing that an individual action arises out of a treaty when the treaty expressly or by implication confers a right on an individual).

refers to the receiving state's authorities "inform[ing] the person concerned [detained foreign national] of *his* rights."<sup>57</sup> Furthermore, even if not explicitly, a right can be found by implication because the preamble and most of the text concern "state parties" to the VCCR, but Article 36 refers to individual foreign nationals and, thus, is meant to be an exception.

Lastly, courts have adhered to the canon of liberal interpretation,<sup>58</sup> which states that when faced with two interpretations – rights conferred in a treaty and no rights conferred in a treaty – the more expansive view will prevail,<sup>59</sup> which would be the finding of an individual right in the treaty.

## 2. U.S. Court Interpretation of Article 36

This section will analyze the interpretation of Article 36 by U.S. courts. First the Supreme Court's interpretation from three cases (*Breard v. Greene*, *Medellin v. Texas*, and *Sanchez-Llamas v. Oregon*) will be discussed, explaining its lack of willingness to take a definitive stance on the matter. Next, the split of the U.S. circuit courts will be discussed and illustrated. Lastly, the confusion (and split) of the interpretation of Article 36 by U.S. state courts will be discussed and, also, illustrated by a graph. Thus, because such an inconsistency exists in the U.S. domestic courts, Congress needs to enact legislation to create uniformity.

### a. *Supreme Court of the United States and Article 36*

The U.S. Supreme Court has heard cases involving the violation of a foreign national's right of consular notification.<sup>60</sup> It has, however, continued to avoid the question of whether an individually enforceable right existed from Article 36. The facts of each case are similar. A

57. VCCR, *supra* note 3, art. 36(b) (emphasis added).

58. See SLOSS, *supra* note 55, at 525-26 ("[T]he 'long-established' rule is the canon of liberal interpretation, which favors treaty interpretations that promote broader protection for individual rights."); see also *id.* at 526, n.89 (citing David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issues in Hamdan and Sanchez-Llamas* COLUM. J. TRANS'L L. 45, 106-110 (2006) as a source documenting the presumption against enforceable rights starting in the 1970's and 1980's).

59. *Shanks v. Dupont*, 28 U.S. 242, 249 (1830) ("If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights, why should not the most liberal exposition be adopted?"); see also *Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) (holding a treaty should be construed liberally where there are two constructions—one restrictive and one expansive).

60. *Medellin v. Texas*, 552 U.S. 491 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 331 (2006); *Breard v. Greene*, 523 U.S. 371 (1998).

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foreign national is arrested and convicted of a criminal act and is not informed of his right to consular notification.<sup>61</sup> In each case, the Supreme Court has decided the judgment without affirming or negating the right to consular notification.<sup>62</sup>

*b. U.S. Circuit Courts and Article 36*

However, the circuit courts of the United States are not in agreement. A few circuit courts have held that Article 36 does not confer an individually enforceable right.<sup>63</sup> But most circuit courts have fallen in line with the Supreme Court’s approach of avoiding the question.<sup>64</sup> On the other hand, the Seventh Circuit is the only circuit court to find that Article 36 confers an individual right of consular notification to foreign nationals.<sup>65</sup>

Circuit Split Regarding Article 36 of the VCCR

Circuit	Enforceable Right	Non-enforceable Right	Enforceable Right Arguendo
First			X <sup>66</sup>
Second		X <sup>67</sup>	

61. See *Medellin*, 552 U.S. at 500-04; *Sanchez-Llamas*, 548 U.S. at 339-42; *Breard*, 523 U.S. at 372-74.

62. *Medellin*, 552 U.S. at 507 n.4 (assuming without deciding that Article 36 confers individual rights for consular notification); *Sanchez-Llamas*, 548 U.S. at 343 (finding that it is unnecessary to decide whether Article 36 confers an individual right on foreign nationals); *Breard*, 523 U.S. at 376 (stating that the Vienna Convention on Consular Relations arguably confers an individual right to consular assistance).

63. *De Los Santos Mora v. New York*, 524 F.3d 183, 188 (2d Cir. 2008); *Gandara v. Bennett*, 528 F.3d 823, 829 (11th Cir. 2008); *United States v. Jimenez-Nava*, 243 F.3d 192, 197-99 (5th Cir. 2001); *United States v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001).

64. *Earle v. District of Columbia*, 707 F.3d 299, 304 (D.C. Cir. 2012); *McPherson v. United States*, 392 Fed. App’x 938, 945 (3d Cir. 2010); *Cornejo v. City of San Diego*, 504 F.3d 853, 863 (9th Cir. 2007); *United States v. Al-Hamdi*, 356 F.3d 564, 574-5, 575 n. 13 (4th Cir. 2004); *United States v. Ortiz*, 315 F.3d 873, 886 (8th Cir. 2002); *United States v. Minjares-Alvarez*, 264 F.3d 980, 986 (10th Cir. 2001); *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000).

65. *Jogi v. Voges*, 480 F.3d 822, 835 (7th Cir. 2007). *But see Osagiede v. United States*, 543 F.3d 399, 407 (7th Cir. 2008) (holding that the VCCR created individual rights or it would proceed as if it did).

66. *Li*, 206 F.3d at 60 (assuming there was a right to consular notification, it would not require suppression of evidence). *But see U.S. v. Hongla-Yamche*, 55 F. Supp.2d 74, 78 (D. Mass. 1999) (holding that Article 36 does confer an individual right to consular notification).

67. *De Los Santos Mora v. New York*, 524 F.3d 183, 188 (2d Cir. 2008) (holding that Article 36 does not afford detained aliens with individual rights). *But see Standt v. City of New York*, 153 F. Supp.2d 417, 431 (S.D.N.Y. 2001) (holding that the VCCR confers a right to consular notification).

(CONT'D)

Circuit	Enforceable Right	Non-enforceable Right	Enforceable Right Arguendo
Third			X <sup>68</sup>
Fourth			X <sup>69</sup>
Fifth		X <sup>70</sup>	
Sixth		X <sup>71</sup>	
Seventh	X <sup>72</sup>		
Eighth			X <sup>73</sup>
Ninth			X <sup>74</sup>
Tenth			X <sup>75</sup>
Eleventh		X <sup>76</sup>	
DC Circuit			X <sup>77</sup>

68. *McPherson*, 392 Fed. Appx. at 945 (holding the court would not decide the issue of whether there was a right to consular notification). *But see* *United States v. Superville*, 40 F.Supp.2d 672, 677 (V.I. 1999) (holding that Article 36's language does indicate the drafters intended to create rights for individuals).

69. *Al-Hamdi*, 356 F.3d at 574 (noting it was unclear whether the VCCR created an individually enforceable right).

70. *United States v. Jimenez-Nava*, 243 F.3d 192, 197-99 (5th Cir. 2001) (holding that Article 36 does not bestow a private, judicially enforceable right to consult with consular officials upon foreign nationals).

71. *United States v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001) (holding that the Vienna Convention does not create an enforceable right for a foreign national to consular notification).

72. *Jogi v. Voges*, 480 F.3d 822, 835 (7th Cir. 2007).

73. *United States v. Ortiz*, 315 F.3d 873, 886 (8th Cir. 2002) (holding even if there was an individual right, that does not call for the suppression of evidence).

74. *Cornejo v. Cty. of San Diego*, 504 F.3d 853, 863 (9th Cir. 2007) (holding that it was too ambiguous to create individual right not expressly mentioned in text of VCCR).

75. *United States v. Minjares-Alvarez*, 264 F.3d 980, 986 (10th Cir. 2001) (holding that the court would not decide the issue of an enforceable right via the VCCR).

76. *Gandara v. Bennett*, 528 F.3d 823, 829 (11th Cir. 2008) (holding that the Vienna Convention does not confer enforceable individual rights).

77. *Earle v. District of Columbia*, 707 F.3d 299, 304 (D.C. Cir. 2012) (holding that the court would not decide whether Article 36 confers an individually enforceable right).

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*c. U.S. State Courts and Article 36*

State courts in the United States are also not in agreement on the existence an individually enforceable right of consular notification. The following chart represents the split in jurisdictions.<sup>78</sup>

State	Article 36 Confers an Individually Enforceable Right	Article 36 Does Not Confer an Individually Enforceable Right	Sidestepped the Issue of a Right and Took Position of Supreme Court <sup>79</sup>	Decided Case on Other Grounds <sup>80</sup>	Case was Decided on a Misinterpretation of the <i>Medellin</i> Holding
Alabama		X <sup>81</sup>			
Alaska			X <sup>82</sup>		
Arizona			X <sup>83</sup>		
Arkansas					X <sup>84</sup>

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78. Hawaii, Idaho, Maine, Maryland, Michigan, Mississippi, Montana, New Hampshire, Rhode Island, South Dakota, Vermont, and Wyoming are not included in the chart as they have not had a case involving the Article 36 of the Vienna Convention on Consular Relations.

79. *Medellin v. Texas*, 552 U.S. 491, 507 n.4 (2008) (assuming Article 36 confers individual rights for consular notification); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 343 (2006) (finding that it is unnecessary to decide whether Article 36 confers an individual right on foreign nationals); *Breard v. Greene*, 523 U.S. 371, 376 (1998) (stating that the Vienna Convention on Consular Relations arguably confers an individual right to consular assistance).

80. These cases were decided on other grounds apart from directly confronting the issue of whether Article 36 created an individually enforceable right. Some can be read to implicitly take the Supreme Court’s stance of sidestepping the issue; others implicitly consular notification a “right” but do not make anything of it and revert to the common notion of lack of remedy for violation of Article 36; and others compare it to being less than a constitutional right and thereby not allowed the remedies of a beach of a constitutional right.

81. *Sharifi v. State*, 993 So. 2d 907, 919 (Ala. Crim. App. 2008) (holding that even if Article 36 creates rights, the remedies defendant wanted were not warranted).

82. *Zuboff v. State*, No. A-8692, 2006 Alas. App. LEXIS 189, at \*56 (Nov. 1, 2006) (refusing to decide the issue of the defendant’s potential rights as a foreign national under Article 36).

83. *State v. Escalante-Orozco*, 386 P.3d 798, 814 (Ariz. 2017) (holding it need not decide whether VCCR was violated).

84. *Gikonyo v. State*, 283 S.W.3d 631, 636 (Ark. Ct. App. 2008) (holding the VCCR was not domestically enforceable).

(CONT'D)

State	Article 36 Confers an Individually Enforceable Right	Article 36 Does Not Confer an Individually Enforceable Right	Sidestepped the Issue of a Right and Took Position of Supreme Court <sup>79</sup>	Decided Case on Other Grounds <sup>80</sup>	Case was Decided on a Misinterpre- tation of the <i>Medellin</i> Holding
California			X <sup>85</sup>		
Colorado				X <sup>86</sup>	
Connecticut			X <sup>87</sup>		
Delaware				X <sup>88</sup>	
Florida			X <sup>89</sup>		
Georgia			X <sup>90</sup>		
Illinois			X <sup>91</sup>		

85. *In re Martinez*, 209 P.3d 908, 916 (Cal. 2009) (holding in arguendo that the VCCR did create individually enforceable rights).

86. *People v. Preciado-Flores*, 66 P.3d 155, 16 (Colo. App. 2002) (“It is not entirely clear whether the Vienna Convention creates a privately enforceable right.”).

87. *State v. Daye*, No. CR110234742, 2013 Conn. Super. LEXIS 467, at \*12 (Feb. 28, 2013) (holding that even if courts can enforce rights arguably conferred by Article 36 of the VCCR, a violation is merely a violation of a treaty, not a constitutional one).

88. *State v. Restrepo-Duque*, No. 1002011017, 2013 Del. Super. LEXIS 36, at \*25 (Feb. 19, 2013) (Article 36 only secures a right of a foreign national to have a consular informed of his or her detention (citing *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 349 (2006))); *State v. Quintero*, No. 0504024519, 2007 Del. Super. LEXIS 327, at \*9 (Oct. 30, 2007) (holding that Delaware does not recognize defendant’s right to consular notification to be equated to a Constitutional right).

89. *Conde v. State*, 860 So.2d 930, 953 (Fla. 2003) (even if defendant has a right to consular assistance under the Vienna Convention, it would not be grounds for suppression).

90. *Lopez v. State*, 558 S.E.2d 698, 700 (Ga. 2002) (assuming arguendo that the Vienna Convention did create rights, nothing requires suppression of evidence).

91. *People v. Najera*, 864 N.E.2d 324, 327 (Ill. App. Ct. 2007) (Vienna Convention does not generally provide rights enforceable by an individual defendant).

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(CONT'D)

State	Article 36 Confers an Individually Enforceable Right	Article 36 Does Not Confer an Individually Enforceable Right	Sidestepped the Issue of a Right and Took Position of Supreme Court <sup>79</sup>	Decided Case on Other Grounds <sup>80</sup>	Case was Decided on a Misinterpre- tation of the <i>Medellin</i> Holding
Indiana			X <sup>92</sup>		
Iowa			X <sup>93</sup>		
Kansas		X <sup>94</sup>			
Kentucky		X <sup>95</sup>			
Louisiana				X <sup>96</sup>	
Massachusetts			X <sup>97</sup>		
Minnesota			X <sup>98</sup>		
Missouri				X <sup>99</sup>	

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92. *Zavala v. State*, 739 N.E.2d 135, 140 (Ind. Ct. App. 2000) (holding that even if Article 36 conferred on individual a privately enforceable right, the violation does not justify suppression of evidence).

93. *State v. Lopez*, 633 N.W.2d 774, 783 (Iowa 2001) (assuming without deciding that Article 36 creates an individually enforceable right of consular notification).

94. *State v. Rosas*, 17 P.3d 379, 386 (Kan. Ct. App. 2000) (the purpose of the VCCR is not to benefit individuals).

95. *Gomez v. Commonwealth*, 152 S.W.3d 238, 242 (Ky. Ct. App. 2004) (falling in line with other courts that believe Article 36 does not give foreign national a right for standing to assert violation).

96. *State v. Garcia*, 26 So.3d 159, 166 (La. Ct. App. 2009) (Article 36 only provides right for consular to be informed of arrest, not intervene or have law enforcement stop the investigation).

97. *Commonwealth v. Diemer*, 785 N.E.2d 1237, 1245 (Mass. App. Ct. 2003) (holding that it was unnecessary for the court to decide if Article 36 conferred individual rights).

98. *Arredondo v. State*, 754 N.W.2d 566, 576 (Minn. 2008) (assuming *arguendo* that the VCCR creates an individual, judicially enforceable right).

99. *Cardona-Rivera v. State*, 33 S.W.3d 625, 627 (Mo. Ct. App. 2000) (holding that there was no prejudice on defendant by not being informed of Article 36 of the VCCR after arrest).

(CONT'D)

State	Article 36 Confers an Individually Enforceable Right	Article 36 Does Not Confer an Individually Enforceable Right	Sidestepped the Issue of a Right and Took Position of Supreme Court <sup>79</sup>	Decided Case on Other Grounds <sup>80</sup>	Case was Decided on a Misinterpre- tation of the <i>Medellin</i> Holding
Nebraska			X <sup>100</sup>		
Nevada			X <sup>101</sup>		
New Jersey			X <sup>102</sup>		
New Mexico		X <sup>103</sup>			
New York			X <sup>104</sup>		
North Carolina			X <sup>105</sup>		
North Dakota				X <sup>106</sup>	
Ohio			X <sup>107</sup>		

100. *Gonzalez v. Gage*, 861 N.W.2d 457, 464 (Neb. 2015) (holding that it would take the Supreme Court's approach of not deciding conclusively whether Article 36 of the VCCR confers individually enforceable rights).

101. *Garcia v. State*, 17 P.3d 994, 996-97 (Nev. 2001) (holding that the VCCR implicitly states that there is a consular notification right, but it does not amount to the same protections as a constitutional violation).

102. *State v. Jang*, 819 A.2d 9, 14 (N.J. Super. Ct. App. Div. 2003) (assuming that an individual right was conferred by Article 36 that would give a foreign national standing).

103. *United States v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001) (holding that defendant does not have standing because Article 36 does not confer a private right).

104. *People v. Ortiz*, 17 A.D.3d 190, 191 (N.Y. App. Div. 2005) (holding it was questionable whether VCR conferred judicially enforceable rights on individuals).

105. *State v. Herrera*, 672 S.E.2d 71, 80 (N.C. Ct. App. 2009) (not deciding whether Article 36 of the VCCR created an individual right on defendant).

106. *Rummer v. State*, 722 N.W.2d 528, 536 (N.D. 2006) (holding that defendant did not raise claim of Article 36 violation prior to trial or in appeal).

107. *State v. Issa*, 752 N.E.2d 904, 914-15 (Ohio 2005) (assuming without deciding that Article 36 conferred an enforceable right on the defendant under the VCCR).

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(CONT'D)

State	Article 36 Confers an Individually Enforceable Right	Article 36 Does Not Confer an Individually Enforceable Right	Sidestepped the Issue of a Right and Took Position of Supreme Court <sup>79</sup>	Decided Case on Other Grounds <sup>80</sup>	Case was Decided on a Misinterpretation of the <i>Medellin</i> Holding
Oklahoma		X <sup>108</sup>			
Oregon		X <sup>109</sup>			
Pennsylvania				X <sup>110</sup>	
South Carolina				X <sup>111</sup>	
Tennessee		X <sup>112</sup>			
Texas			X <sup>113</sup>		
Utah				X <sup>114</sup>	

108. *State v. Ramos*, 297 P.3d 1251, 1253-54 (Okla. Crim. App. 2013) (holding that Article 36 does little to add to constitutional protections).

109. *State v. Longo*, 148 P.3d 892, 898 (Or. 2006) (holding that Article 36 does not create individually enforceable rights).

110. *Commonwealth v. Baumhammers*, 960 A.2d 59, 97-98 (Pa. 2008) (holding that the Convention does not guarantee consular assistance or intervention to defendants, only that their consulate would be informed).

111. *State v. Lopez*, 574 S.E.2d 210, 214-15 (S.C. Ct. App. 2002) (holding that rights created by international treaties are not equivalent to constitutional rights).

112. *Song v. Carlton*, No. E2009-01299-CCA-R3-HC, 2011 Tenn. Crim. App. LEXIS 194, at \*5 (Tenn. Crim. App. Mar. 16, 2011) (holding that the VCCR does not create individual rights); *Cauthern v. State*, 145 S.W.3d 571, 627 (Tenn. Crim. App. 2004) (holding that treaties do not create privately enforceable rights).

113. *Sierra v. State*, 218 S.W.3d 85, 88 (Tex. Crim. App. 2007) (holding it was unnecessary to address the issue of whether Article 36 conferred an enforceable right on an individual); *Sorto v. State*, 173 S.W.3d 469, 481 (Tex. Crim. App. 2005) (holding it need not decide the issue of whether Article 36 confers an individually enforceable right).

114. *State v. Kozlov*, 276 P.3d 1207, 1227 (Utah Ct. App. 2012) (holding that the police were not required to inform defendant of his right to contact his consulate). The Court called consular notification a “right” but that police were not bound to tell defendant of it. *Id.*

(CONT'D)

State	Article 36 Confers an Individually Enforceable Right	Article 36 Does Not Confer an Individually Enforceable Right	Sidestepped the Issue of a Right and Took Position of Supreme Court <sup>79</sup>	Decided Case on Other Grounds <sup>80</sup>	Case was Decided on a Misinterpre- tation of the <i>Medellin</i> Holding
Virginia			X <sup>115</sup>		
Washington			X <sup>116</sup>		
West Virginia				X <sup>117</sup>	
Wisconsin		X <sup>118</sup>			

Thus, eighteen state courts have followed the Supreme Court’s assumption (without deciding) that Article 36 conferred individual rights. Eight other state courts were silent as to a direct answer, but implicitly side-stepped the issue as well, though some did call consular notification a “right.” Whether this remains due to an actual recognition of a right or just an assumption is not clear. What is clear is that most of the state courts have not decided the issue definitively. Seven courts have found that there is not a right that can be enforced by an individual. Thus, because such an inconsistency exists in the U.S. domestic courts, Congress needs to enact legislation to create uniformity.

### 3. International Interpretation of Article 36

This final section describes how the international community has interpreted the right to consular notification. First, the view of the International Court of Justice will be discussed, most importantly

115. *Teleguz v. Commonwealth*, 643 S.E.2d 708, 721 (Va. 2007) (holding that even if an Article 36 violation occurred, there was no evidence in the record that the trial was affected).

116. *State v. Jamison*, 20 P.3d 1010, 1017 (Wash. Ct. App. 2001) (holding that even if VCCR did create individual rights, it does not create constitutional rights).

117. *Braynen v. Plumley*, No. 15-0334, 2016 W. Va. LEXIS 222, at \*7 (W. Va. Apr. 8, 2016) (holding that suppression of evidence is a vastly disproportionate remedy for an Article 36 violation).

118. *State v. Navarro*, 659 N.W.2d 487, 491 (Wis. Ct. App. 2003) (holding that the VCCR does not confer standing in an individual foreign national to assert a violation of the treaty in a domestic criminal case).

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analyzing the *LaGrand* and *Avena* decisions. Secondly, the view of the Inter-American Court of Human Rights' interpretation of Article 36 will be discussed. Next, a new directive from the European Union regarding consular notification will be noted, and the last section presents the view of consular notification in other countries around the world. Thus, interpreting Article 36 as conferring an individual right is consistent with the interpretation of the international community.

### a. *International Court of Justice and Article 36*

The United States has been brought to the International Court of Justice twice regarding violations of Article 36 of the VCCR: once by Germany in 2001 and again by Mexico in 2004.<sup>119</sup> In *Germany v. United States*, (*LaGrand*), two German nationals and brothers, Walter and Karl LaGrand, were arrested and convicted for murder and attempted robbery.<sup>120</sup> They were not told of their right to consular notification.<sup>121</sup> The Supreme Court of Arizona affirmed the convictions in January 1987, and the petition for post-conviction relief and review by both the Arizona Supreme Court and the Supreme Court of the United States were denied.<sup>122</sup> In 1992, a German consulate learned of the LaGrands' imprisonment, and for a period of seven years an official from the German Consulate in Los Angeles helped the LaGrands raise the issue of lack of consular notification in proceedings in federal court.<sup>123</sup> First, the LaGrands filed for writs of habeas corpus in U.S. District Court for the District of Arizona to have their convictions set aside.<sup>124</sup> The claim of violation of their right to notify the German consulate was rejected because of the procedural default rule.<sup>125</sup> The federal courts held that the LaGrands had not shown an objective external factor to overcome the procedural default barrier.<sup>126</sup>

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119. *Avena*, 2004 I.C.J. at ¶ 1; *LaGrand*, 2001 I.C.J. at ¶ 1. *But see* Vienna Convention on Consular Relations (Para. v. U.S.), Order, 1998 I.C.J. 266 (Apr. 9). Paraguay abandoned the case once the United States executed Breard.

120. *LaGrand*, 2001 I.C.J. at ¶ 14.

121. *Id.* (the United States not disputing this fact).

122. *Id.* at ¶ 19-20.

123. *Id.* at ¶ 23.

124. *Id.* (or at least the death sentences).

125. *LaGrand*, 2001 I.C.J. at ¶ 23. (The procedural default rule "is a federal rule that, before a state criminal defendant can obtain relief in federal court, the claim must be presented to a state court.").

126. *Id.* The District Court held that the factor was not met and the Court of Appeals for the Ninth Circuit affirmed. *Id.* The Supreme Court refused to take review of the case in 1998. *Id.*

In January 1999, the LaGrands were formally notified of their right to contact the German consulate.<sup>127</sup> Germany took action to prevent the execution of the LaGrands by notifying several authorities in the United States, but Karl LaGrand was executed February 1999.<sup>128</sup> Germany filed an action against the United States in the International Court of Justice in March 1999.<sup>129</sup> The International Court of Justice did issue an order the next day mandating that the United States take all measures that Walter LaGrand not be executed before the announcement of its decision.<sup>130</sup> However, efforts were futile and Walter LaGrand was executed.<sup>131</sup> The ICJ held that the first paragraph of Article 36 creates individual rights for the detained foreign national and that the United States had violated the LaGrands' rights to consular notification.<sup>132</sup>

In *Avena*, Mexico brought an action against the United States for failure to inform fifty-four Mexican nationals currently on death row of their right to consular notification.<sup>133</sup> In that case, the ICJ ruled that the United States breached its duty under the Vienna Convention by failing to inform fifty-one Mexican nationals of the right to consular notification.<sup>134</sup>

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127. *Id.*

128. *Id.* at ¶ 25. The German Foreign Minister and German Minister of Justice wrote to their U.S. counterparts as well as the Governor of Arizona. *Id.* ¶ 26. The Arizona Board of Executive Clemency rejected an appeal for clemency by Karl LaGrand, precluding the Governor from granting such an appeal. *Id.* at ¶ 27. The Arizona Superior Court also rejected a petition by Walter LaGrand based on lack of consular notification. *Id.* at ¶ 28. The Ninth Circuit also rejected the issue of lack of consular notification brought by Karl LaGrand on February 24, 1999, who was executed later that day. *Id.* at ¶ 29.

129. *LaGrand*, 2001 I.C.J. at ¶ 30. The Arizona Board of Executive Clemency did recommend a 60-day halt on Walter LaGrand's death sentence because of the application pending in the ICJ. *Id.* at ¶ 31. The Governor ignored the request and decided to allow Walter LaGrand to be executed on schedule. *Id.*

130. *Id.* at ¶ 32.

131. *Id.* at ¶¶ 33-34. Germany brought an action in the Supreme Court against the United States and the Governor of Arizona seeking compliance with the ICJ Order. *Id.* at ¶ 34. The action was dismissed by the Supreme Court. *Id.* at ¶ 34. Walter LaGrand was executed later that day. *Id.* at ¶ 34.

132. *Id.* at ¶ 77 ("Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person.").

133. *Avena*, 2004 I.C.J. at ¶ 12.

134. *Id.* at ¶ 106.

## THE INDIVIDUAL RIGHT TO CONSULAR NOTIFICATION

### b. *Inter-American Court of Human Rights and Article 36*

Mexico requested an advisory opinion from the Inter-American Court of Human Rights regarding the “minimum judicial guarantees and the requirement of due process when a court sentences to death foreign nationals whom the host State has not informed of their right to communicate with and seek assistance from the consular authorities of the State of which they are nationals.”<sup>135</sup> The Court held that Article 36 has two purposes: “that of recognizing a State’s right to assist its nationals through the consular officer’s actions and, correspondingly, that of recognizing the correlative right of the national of the sending State to contact the consular officer to obtain the assistance.”<sup>136</sup> Further, the Court held that Article 36 gives a detained foreign national individual rights,<sup>137</sup> and that Article 36 protects human rights and is part of international human rights law.<sup>138</sup>

### c. *European Union and Article 36*

The European Parliament issued a directive in May 2012 that included the right to consular notification.<sup>139</sup> Article 4(2)(b) of the directive states that suspects or accused persons have a right to consular notification and Article 8(2) states that those suspects or accused persons or their lawyers have the right to challenge a violation of this right to consular notification.<sup>140</sup>

### d. *Other Countries and Article 36*

In 2006, the Federal Constitutional Court of Germany held that “failure to provide consular information to foreign nationals” regarding Article 36 of the VCCR was a violation of the German constitutional

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135. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 1 (Oct. 1, 1999) [hereinafter Inter-American Court of Human Rights Advisory Opinion].

136. *Id.* at ¶ 80.

137. *Id.* at ¶ 84 (“The Court therefore concludes that Article 36 of the Vienna Convention on Consular Relations endows a detained foreign national with individual rights that are the counterpart to the host State’s correlative duties.”).

138. *Id.* at ¶ 141(2).

139. Mark Warren, *Individual Consular Rights: Foreign Law and Practice*, HUMAN RIGHTS RESEARCH (June 2015), <http://users.xplornet.com/~mwarren/>.

140. Directive 2013/13, of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings, art. 8, 2012 O.J. (L 142) 6.

right to a fair trial.<sup>141</sup> Further, the Federal Constitutional Court stated that the Constitution's commitment to "friendliness toward international law" "created a duty to interpret and apply domestic law in conformity with Germany's obligations."<sup>142</sup> In that case, Germany took a big step deciding that ICJ decisions (such as those in *LaGrand* and *Avena*) are precedents in regard to international law and would be regarded as a "guiding function."<sup>143</sup> Germany further states that its domestic courts, when faced with two roads of treaty interpretation, must take the one that conforms with an ICJ decision.<sup>144</sup> Thus, the Federal Constitutional Court of Germany held that Article 36 granted individual rights to the persons arrested.<sup>145</sup>

In Mexico, Florence Cassez, a French national, was released from prison in 2013 after the Supreme Court in Mexico ruled that her rights had been violated.<sup>146</sup> Of these rights, the first violation was the denial of the right to consular notification, for which Mexico had breached the Vienna Convention.<sup>147</sup>

### C. Conclusion of Article 36

Article 36 should be interpreted to confer an individual right on a detained foreign national to consular notification. Most U.S. courts have not decided the issue, but rather have chosen to sidestep it. However, such an important issue cannot be sidestepped forever. Many other courts—both international and of other nations party to the VCCR—have recognized an individual right to consular notification. The United States needs to start taking its obligations under the Vienna Convention seriously.

## IV. PROBLEMS AND PREJUDICE

This section will first discuss how a foreign national is prejudiced by not being informed of his/her right of consular notification. The

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141. Klaus Ferdinand Garditz, Article 36, Vienna Convention on Consular Relations-Treaty Interpretation and Enforcement- International Court of Justice "Fair trial" Suppression of Evidence, 101 AM. J. INT'L L. 627, 628 (2007).

142. *Id.* at 629.

143. *Id.*

144. *Id.* An exception to this holding is when the ruling would be inconsistent with constitutional provisions of Germany. *See id.* at 629-30.

145. *Id.* at 630.

146. *Florence Cassez's Release Sparks Anger in Mexico*, BBC (Jan. 28, 2013), <http://www.bbc.com/news/world-latin-america-21234914>.

147. *Id.*

following section will discuss the problems of recognizing such a right, focusing on suppression of evidence and procedural default rules. The last section will discuss the importance of recognizing the right to consular notification, focusing on a foreign national's due process rights.

A. *Prejudice*

Although the VCCR is a self-executing treaty and, thus, domestically implemented in the United States, most courts do not recognize a right of consular notification for foreign nationals and remedies for a breach of that right. There are instances, albeit infrequent, where a foreign national's criminal trial will be prejudicial to him or her without consular assistance. For instance, Cesar Fierro was a Mexican national who was arrested for murder in Texas and not told of his right of consular notification.<sup>148</sup> He made incriminating statements to the police after the police officials in Texas informed Fierro of his mother and stepfather being held by police officials in Juarez, Mexico, which was known for its brutality and torture of interrogation suspects (which was known to Fierro through first-hand experience).<sup>149</sup> Fierro was allegedly told that if he did not confess, his parents would be hurt.<sup>150</sup> Many things spoken during this interrogation might not have been said with a consular officer present or a lawyer.<sup>151</sup> Had a Mexican consular officer been present, he or she could have helped Fierro in finding out about his parents and calling the Mexican authorities to help.<sup>152</sup> Thus, Fierro's confession was coerced by the Texas police and his due process was infringed.<sup>153</sup>

In another example, Jose Loza was a Mexican national, accused of murdering four people in Ohio.<sup>154</sup> He confessed to the murder after the police officers interrogating him hinted that his girlfriend and their unborn child might be electrocuted unless he "took the blame for the murder."<sup>155</sup> His confession was important to the case as there was no other evidence that connected him to the scene of the crime.<sup>156</sup> The

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148. Cesar Fierro v. United States, Case 11.331, Inter-Am. Cmm'n H.R. Report No. 99/03, OEA/Ser./L/V/II.114, doc. 70 rev. 1 ¶ 17 (2003).

149. *Id.*

150. *Id.*

151. *Id.* at ¶ 19.

152. *Id.* at ¶ 39.

153. *Id.* at ¶¶ 39-40.

154. Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 584 (1997).

155. *Id.*

156. *Id.* at 585.

only other evidence was the testimony of his girlfriend, which was far from credible as she was paid \$2,000 to testify, she found the murder weapon, and she was seen at her family's (the victims') residence, even though she testified she was not there.<sup>157</sup> Further, the police knew Loza was a Mexican national and still did not advise him of his rights under the VCCR.<sup>158</sup> A consular officer could have explained to Loza that the threats against his girlfriend and unborn child were strategic interrogation tactics and that no actual harm could come to them. Without Loza's confession, Loza most likely would not have been convicted.<sup>159</sup>

These examples demonstrate how a foreign national may be prejudiced by not being notified of his or her right to consular notification. While foreign nationals do not always experience this prejudice, as they may understand the U.S. legal system; others who do not understand the processes of the U.S. legal system may experience prejudice and, thus, are denied a fair trial with constitutionally obtained evidence.

## B. Problems

### I. Suppression of Evidence Problem

Many defendants have tried in vain to suppress evidence gained during an interrogation given without being notified of their right to consular notification, only to have the courts later hold that suppression was not an appropriate remedy.<sup>160</sup> In *Sanchez-Llamas v. Oregon*, the United States argued that it had no authority over state court proceedings to suppress the evidence as a remedy for the Article 36 violation.<sup>161</sup> The U.S. Supreme Court concluded that it could only intervene when the wrongs are constitutional ones.<sup>162</sup> Other courts have too rejected suppression because it was "too extraordinary a remedy" for an Article 36 violation because these violations are less than fundamental constitutional rights.<sup>163</sup>

157. *Id.* at 585 n.128.

158. *Id.* at 585.

159. *Id.* at 611.

160. *Braynen v. Plumley*, No. 15-0334, 2016 W. Va. LEXIS 222, at \*7 (W. Va. Apr. 8, 2016) (suppression of evidence is a disproportionate remedy for an Article 36 violation); *see also Zavala v. State*, 739 N.E.2d 135, 140 (Ind. Ct. App. 2000) (holding that if Article 36 was an enforceable right, suppression of evidence is not justified).

161. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006).

162. *Id.*

163. *State v. Quentin*, No. 0504024519, 2007 Del. Super. LEXIS 327, at 9 (Oct. 30, 2007) (holding that the right to consular notification is not the same as a constitutional right); *see State v. Lopez*, 574 S.E.2d 210, 215 (S.C. Ct. App. 2002) (rights arising out of treaties are not the same as constitutional rights); *see also Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1994) (holding that

Furthermore, some courts have stated the reason for offering no remedy is that foreign nationals are protected by the constitutional rights and that to hold Article 36 as a right would be to allow “an additional right to foreign nationals beyond those granted to American citizens.”<sup>164</sup> In the end, the Supreme Court held that suppression of evidence was not warranted for an Article 36 violation because everyone—even foreign nationals—have the protections of the Constitution, and thus, Article 36 adds little to one’s protection.<sup>165</sup>

## 2. Procedural Default Barriers

A problem also exists when foreign nationals only learn of their right, or assert it, when it is too late. The barring of an Article 36 claim by procedural default rules was the basis of the ICJ decisions of *LaGrand* and *Avena*, where the United States was found in both cases to have violated Article 36 of the VCCR.<sup>166</sup> The purposes of the procedural default rules are to incentivize parties to raise claims promptly and advance the finality of judgments.<sup>167</sup> However, procedural default rules can sometimes be an unfair barrier to relief for foreign nationals because they bar an Article 36 claim in which a foreign national would have the opportunity to show that the failure to be informed of that right to consular notification caused them to have an unfair trial, *i.e.*, by not presenting pertinent or mitigating evidence that would have been available with the help of a consular officer).

A federal procedural default, mainly the AEDPA enacted in 1996, bars a habeas petition stating that the defendant is being held in violation of “treaties of the United States if the claim was not raised in state proceedings.”<sup>168</sup> A state procedural default rule bars a defendant’s habeas petition when he or she did not raise the claim at the state level.<sup>169</sup>

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while treaty obligations should be kept, the right to consular notification should not be equated with fundamental rights like the right to counsel, which traces its origins to due process); *United States v. Esparaza-Ponce*, 7 F. Supp.2d 1084, 1096-97 (S.D. Cal. 1998) (holding that a violation of consular notification is not a constitutional equivalent); *State v. Jamison*, 20 P.3d 1010, 1017 (Wash. App. 2001) (VCCR rights are not constitutional ones).

164. *State v. Homdziuk*, 848 A.2d 853, 860 (N.J. Super. Ct. App. Div. 2004).

165. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006) (“Article 36 adds little to these “legal options,” and we think it unnecessary to apply the exclusionary rule where other constitutional and statutory protections—many of them already enforced by the exclusionary rule—safeguard the same interests Sanchez-Llamas claims are advanced by Article 36.”).

166. See *Avena*, 2004 I.C.J. at ¶ 153; *LaGrand*, 2001 I.C.J. at ¶ 128.

167. *Sanchez-Llamas*, 548 U.S. at 356.

168. *Breard v. Greene*, 523 U.S. 371, 376 (1998); see Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

169. *Breard*, 523 U.S. at 375-76 (citing *Wainwright v. Sykes*, 443 U.S. 72, 97 (1977)).

However, the problem with Article 36 is that it is being violated by U.S. law officials, and that foreign defendants (and their defense lawyers) do not have knowledge of it. So, unfortunately, foreign defendants cannot raise a claim they are not aware of at the state proceedings, and when they do learn of it (if ever), it is usually much later and they are thus deemed to have defaulted.

A Supreme Court case regarding procedural default rules and Article 36 of the Vienna Convention on Consular Relations was *Breard v. Greene*.<sup>170</sup> In that case, Breard, a foreign national of Paraguay, was convicted of murder and sentenced to death.<sup>171</sup> He argued for the first time of the failure to be advised of his right to consular notification in a federal habeas petition.<sup>172</sup> The Court ruled that the procedural rules of the state of Virginia and the AEDPA barred application of an Article 36 violation.<sup>173</sup>

In another case, a Honduran national, Mario Bustillo, was also arrested and convicted of murder and sentenced to thirty years in prison.<sup>174</sup> He appealed his conviction because he was not informed of his Article 36 right.<sup>175</sup> The lower courts denied his claim as he procedurally defaulted on the VCCR claim by not raising it at the state level.<sup>176</sup> The Supreme Court granted certiorari, though it came to the same conclusion.<sup>177</sup>

Defendants in both Breard and Bustillo's situations have argued that the procedural default rules infringe on the Article 36 provision that declares that the Convention shall be exercised in accordance with the laws and regulations of the State and that the Convention must be given its full effect.<sup>178</sup> However, under domestic law, the Convention could not both be exercised under the laws of the United States (including procedural default rules) and have the Convention be given the full effect of its purpose (allowing foreign nationals to have their consulate

170. 523 U.S. 371 (1998).

171. *Id.* at 372-73.

172. *Id.* at 373.

173. *Id.* at 375-76. The Court also held that Breard's ability to obtain relief was subject to the Anti-Terrorism and Effective Death Penalty Act (AEDPA)'s federal procedural default rule just as any claim arising under the Constitution would be. *Id.* at 276. Thus, he was prevented from establishing that the violation prejudiced him. *Id.*

174. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 351 (2006). This case was consolidated with the *Sanchez* case by the Supreme Court. *Id.* at 337.

175. *Id.* at 351.

176. *Id.* at 351. A defendant who fails to raise a claim at the state level is barred from raising it at the federal court level. *See id.*

177. *Id.*

178. VCCR, *supra* note 3, art. 36(2).

notified of their detention in a foreign nation) because the procedural default rules bar a foreign national from seeking relief for such a violation.

Although a self-executing treaty like the VCCR should, in principle, overcome any inconsistent state law, a treaty is interpreted in conformity with the procedural rules of the forum state, and thus, the state procedural default rules would bar a claim of an Article 36 violation.<sup>179</sup> Further, constitutional violations are also subject to the procedural default rule – and while treaties are higher than state law, so is the Constitution.<sup>180</sup> And it would be incredible to hold that a treaty deserves such an exception to the procedural default rules and the Constitution does not.<sup>181</sup>

Because the AEDPA was enacted in 1996, it was a statute enacted after the VCCR treaty in 1969. Thus, under the “last-in-time” doctrine, the AEDPA trumps the Vienna Convention.<sup>182</sup> Further, under state procedural laws, the only exception is for “cause and prejudice.”<sup>183</sup>

### 3. Summary

Thus, under the current law, it seems as if the foreign defendants have no hope for relief if they fail to raise an issue in a timely manner. Even though the United States clearly has international obligations of informing foreign nationals of their right to consular notification and that remedies for a violation of that right are left for each nation who ratified the VCCR to decide, it should be noted that U.S. law as it stands does not provide for relief. Suppression of evidence is used for violation of constitutional rights (not treaty rights) and procedural default rules leave no opportunity for a court to hear review.

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179. *Breard v. Greene*, 523 U.S. 371, 375 (1998). (“[I]t has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.”).

180. U.S. CONST. art. VI, § 2.

181. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) (holding that the Constitution is “the fundamental and paramount law of the nation”).

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

183. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977) (“The ‘cause’-and-‘prejudice’ exception . . . will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice.”).

C. Importance of Article 36

What the United States fails to realize is that a consular official who visits a foreign national detained or imprisoned in a strange country is the foreign national's only ally,<sup>184</sup> for only the consular officer, not the foreign national's counsel (generally), can bridge the possible cultural gap between the U.S. legal system and the foreign national. The right to consular notification is intertwined specifically with the constitutional rights of due process and a fair trial. And due process and a fair trial are not just "American rights."<sup>185</sup> International human rights law has considered the right to due process to be fundamental as evident in the Preamble of the International Covenant on Civil and Political Rights which states that the states party to the Covenant agreed on the Articles (including Article 14) in order "to promote universal respect for, and the observance of, human rights and freedoms."<sup>186</sup>

184. See *United States v. Hongla-Yamche*, 55 F. Supp.2d 74, 79 (D. Mass. 1999) ("The purpose of [the consular notification] requirement is to ensure that a government does not place an alien in a situation in which the alien cannot receive assistance from his/her own government." (quoting U.S. Dep't State, *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*, TRAVEL.STATE.GOV 19 (Jan. 2003), <http://www.travel.state.gov/law/notify.html>)); see also *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 367 (2006) ("[O]ne of the basic functions of a consular officer has been to provide a 'cultural bridge' between the host community and the [U.S. national]. No one needs that consular bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail." (citing U.S. DEP'T STATE, 7 FOREIGN AFFAIRS MANUAL § 401 (1984))).

185. *United States v. Martinez-Rodriguez*, 33 P.3d 267, 274-75 (N.M. 2001).

186. See International Covenant on Civil and Political Rights, pmbl., art. 14, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The text explains the basic notions of due process:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law . . .
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . .
  - (c) To be tried without undue delay;
  - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him,
  - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - ..
  - (g) Not to be compelled to testify against himself or to confess guilt . . .

Also, as a comparative analysis, several countries have equated the right to consular notification with the rights of due process, attorney representation, and the right to remain silent.<sup>187</sup> In the Brazilian Constitution, the arrested foreigner must be told of the right to consular notification upon arrest along with the right to remain silent and to have legal assistance.<sup>188</sup> In Bahrain, at the time of arrest, the foreigner is presented with a writing that states the right to communicate with his or her consulate and the right to an attorney.<sup>189</sup> The Criminal Procedure Codes of Poland, Indonesia, Ecuador, Australia, the UK, and Lithuania require advising foreign detainees of their consular rights simultaneously with other legal rights.<sup>190</sup> In Switzerland and Guatemala, foreign nationals are provided with forms that state their right to an attorney and consular notification.<sup>191</sup> In Mexico, violation of Article 36 is deemed “so serious that it undoubtedly affect[s] the performance of the fundamental right of due process by the responsible authorities.”<sup>192</sup> Moreover, foreign nationals in Iceland, Ireland, and Kenya are routinely informed of their consular rights prior to interrogation.<sup>193</sup> In South Korea, the foreigner must sign a form stating that he or she waives consular notification.<sup>194</sup> In the United Kingdom and Australia, the consulate is notified immediately after arrest.<sup>195</sup>

The United States, therefore, appears to be in the minority of not equating consular notification with fundamental rights. The consular notification requirement was meant to ensure that foreign nationals detained or imprisoned abroad would have adequate legal representation “with principles of justice generally recognized in the international community by allowing consular officers to consult with the defendant

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5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. . . .

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. *Id.* at art. 14.

169 countries have ratified the treaty. *Status of Treaties International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION (Jan. 16, 2018), [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en) (listing state parties).

187. *See* Warren, *supra* note 139.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

and with attorneys, court officials and prosecutors.”<sup>196</sup>

## V. REMEDIES

The text of Article 36 does not identify a remedy for breach of the right of consular notification.<sup>197</sup> The State Department has held that the only remedy for failure to notify a foreign national of his or her right to consular notification is that of diplomatic channels.<sup>198</sup> However, what the courts fail to realize is that Article 36(2) states that the rights from Article 36(1) are to be exercised in accordance with the laws and regulations of the receiving state.<sup>199</sup> Thus, the remedy was left for domestic law to govern.<sup>200</sup>

### A. Preventive Measures

Because the main cause of an Article 36 violation is the lack of knowledge of its existence, the easiest and most effective remedy would be to enact preventive legislation. The State Department’s website offers the following information regarding consular notification assistance:

As a non-U.S. citizen who is being arrested or detained, you may request that we notify your country’s consular officers here in the United States of your situation. You may also communicate with your consular officers. A consular officer may be able to help you obtain legal representation, and may contact your family and visit you in detention, among other things. If you want us to notify your consular officers, you can request this notification now, or at any time in the future. Do you want us to notify your consular officers at this time?<sup>201</sup>

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196. *People v. Madej*, 739 N.E.2d 423, 431-32 (Ill. 200) (Heiple, J., dissenting).

197. *United States v. Li*, 206 F.3d 56, 61 (1st Cir. 2000) (citing *United States v. Ademaj*, 170 F.3d 58, 67 (1st Cir. 1999) (“[T]he Vienna Convention itself prescribes no judicial remedy or other recourse for its violation.”)).

198. *Li*, 206 F.3d at 63 (quoting the State Department’s view that “[t]he [only] remedies for failure of consular notification [under the Vienna Convention] are diplomatic, political, or exist between states under international law.”) (citing U.S. Dept’ of State, Legal Advisor, Department of State Answers to the Questions Posed by the First Circuit in *United States v. Nai Fook Li*, attachment A, par. 2 (1999)).

199. VCCR, *supra* note 3, at art. 36(2).

200. See *Kolesnikov*, *supra* note 2, at 200 n.119 (stating for every remedy, there is a right).

201. ENGLISH Statement 1: For All Foreign Nationals Except Those from “Mandatory Notification” Countries, TRAVEL.STATE.GOV, [https://travel.state.gov/content/dam/travel/cnastatementspdf/English\\_CNASTatement.pdf](https://travel.state.gov/content/dam/travel/cnastatementspdf/English_CNASTatement.pdf) (last visited Apr. 11, 2017) [hereinafter Consular Notification Statement].

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Legislation could be enacted ordering every law enforcement official—both federal and state—to give this card in writing and have it read by an officer (or an interpreter), thereby tremendously reducing the possibility of any violations and issues concerning Article 36. Further, reducing problems will also create less hostile foreign relations in these circumstances. Referring to the aftermath of the *LaGrand* decision, Baker insists that by not enforcing the ICJ decision, the reputation of the United States regarding international relations is hurt.<sup>202</sup> Further, Baker states that because the United States would not extend the right to consular notifications to foreigners in the United States, U.S. citizens abroad would be hurt as other countries would not extend the right to consular notifications to them.<sup>203</sup> This notification would be given to all arrestees/detainees, whether it is apparent or not that they are foreigners.<sup>204</sup> A proposed statute for Congress to enact may be similar to the following:

It is the legally binding obligation of all federal and state law enforcement officials to give instructions and a written copy of consular notification information from the State Department to anyone arrested or detained.

However, even with such legal obligations, foreign nationals might still not receive their Article 36 right (although with much less frequency).

Also, the United States, through the efforts of the government or by private interest groups and lobbyists for the rights of foreigners in the United States, should make the public aware of their rights under the VCCR. In addition to the U.S. State Department's online information system regarding consular notification for non-U.S. citizens,<sup>205</sup> one example of how to notify the public would be to have video and paper transcripts available in all languages on incoming planes, trains, ships, and other transportation into the United States from foreign countries, which states the rights of foreigners in the United States under VCCR. This would at least help spread the knowledge of Article 36. One example of such a notification is the following:

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202. Stephanie Baker, *Germany v. United States in the International Court of Justice: An international Battle Over the Interpretation of Article Thirty-Six of the Vienna Convention on Consular Relations and Provisional Measures Orders* 30 GA. J. INT'L & COMP. L. 277, 302 (2002).

203. *Id.* at 301-02.

204. This is the best way to increase efficiency and simplicity because sometimes it is difficult to tell if an arrestee is a foreigner. See *LaGrand*, 2001 I.C.J. at ¶ 13 (stating that the LaGrand brothers, while German citizens, lived in the United States for most their lives).

205. See Consular Notification Statement, *supra* note 201.

If you find yourself detained by any law enforcement official while in the United States of America, you have a personal right to contact the consulate of your home country; please make sure you convey this to the U.S. official with you, who will then be obligated to comply with such request.

Alternatively, commercials on local television channels could also help spread awareness. This proposed solution is similar to what foreign ministries have been found to do in order to make the public more aware of the right to consular notification.<sup>206</sup> However, because consular notification might not always be successful, protection through legislation should still be enacted as an additional safeguard.

### B. *Giving Full Effect to Article 36*

The Seventh Circuit's interpretation of the *Sanchez-Llamas* opinion does allow for Article 36 to be given its "full effect" through the Constitution and still conform to U.S. laws. In that case, the Seventh Circuit stated that the Supreme Court of the United States expressed a preference for merging Vienna Convention claims with "broader constitutional attacks."<sup>207</sup> While a constitutional claim and an Article 36 claim represent separate rights, the violation of Article 36 infringes constitutional rights,<sup>208</sup> thus giving domestic courts the power to remedy an Article 36 violation.<sup>209</sup>

The remedy for a violation of consular notification can be effectively separated into two stages: 1) from the time of arrest to right before

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206. See QUIGLEY ET. AL., *supra* note 39, at 12 ("Foreign ministries also issue written material aimed at the general public so that nationals will know what they can expect from consuls should they be arrested abroad. This material may be in the form of printed brochures or electronic postings on a foreign ministry website.").

207. *Osagiede v. United States*, 543 F.3d 399, 408 (7th Cir. 2008); see also *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006) ("[S]uppression is not the only means of vindicating Vienna Convention rights. A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police.").

208. See Valerie Epps, *Violations of the Vienna Convention on Consular Relations: Time for Remedies*, 11 WILLAMETTE J. INT'L L. & DISP. RESOL. 1, 35-36 (2004) ("When a statute or treaty protect Constitutional rights, or rights closely akin to Constitutional rights, courts should provide a suppression remedy.").

209. The ICJ ruled in *Avena* that remedies for Article 36 violations should not arise under the U.S. Constitution, but under the treaty itself. *Avena*, 2004 I.C.J. at ¶ 139. However, the United States cannot abide by giving both "full effect" to Article 36 and complying with national laws. And, given the hostility of the *Avena* (and *LaGrand*) decision by U.S. courts, the following remedies can serve as a compromise.

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conviction; and 2) any appeal or habeas—whether state or federal—after conviction. Congress should enact the following proposed statute:

- (1) Foreign nationals have the right of consular notification accorded to them in Article 36 of the Vienna Convention on Consular Relations, and U.S. law enforcement and government officials are obligated to comply with it.
  - (a) A foreign national is defined as one who is a citizen of a country other than the United States of America.
- (2) In cases where a foreign national, at the time of arrest/detention, is not advised or has not expressly waived of the right explained above in (1), and
  - (a) the failure to inform is raised by the defendant foreign national before judgment, then:
    - (i) Statements made to law enforcement when the foreign national is not told of his or her Article 36 right must be excluded if an evidentiary hearing finds that its obtainment was prejudicial to the defendant and/or
    - (ii) the trial must be halted for a reasonable time for the defense to prepare a fair and through defense strategy with the help of his or her consulate.
    - (iii) The burden to prove prejudice under (2)(a)(i) is on the defendant who must show that had he been aware of his right to consular notification, he would not have acted the way he did.
  - (b) the failure to inform is raised by defendant after judgment in any subsequent appeal – habeas petition included – the Court must grant an evidentiary hearing to determine if defendant was prejudiced.
    - (i) The burden to prove prejudice under (2)(b) is on the defendant who must show that had he been aware of his right to consular notification, there would have been evidence so that he would not have been convicted beyond a reasonable doubt or his conviction may have resulted in a lesser sentence.
- (3) Under (2)(a)(i), if prejudice is found, it is the court’s discretion to either suppress the evidence obtained in violation of Article 36 or to order a new trial depending on the progression of the case at the time and the possibility of

prejudice by the jury after already hearing illegally obtained evidence as per the Federal Rules of Evidence (or state equivalent).

- (4) Under (2)(b), it is the court's discretion at the evidentiary hearing to either order a new trial with the evidence obtained in violation of Article 36 suppressed and/or a new trial with newly obtained evidence.
- (5) Under (2)(b), any state procedural default rules will not bar defendant's claim of an Article 36 violation.

### 1. Overview of Proposed Statute

This new statute would allow for foreign nationals to have redress when their Article 36 right is violated. The following sections describe the constitutional reasoning behind the imposition of such a statute. The "first stage" of the statute is structured around a foreign national's right against self-incrimination and the right to a fair trial and examples of how he or she can be prejudiced without the proposed state's protections. Then, national and international treatment of Article 36 when prejudice is found is discussed. The "second stage" of the statute is based on a foreign national's right to counsel, based on the Seventh Circuit decision, *Osagiede v. United States*, where the Court found that the defendant was prejudiced by his counsel not raising his right to consular notification. Next, the reasoning behind not administering procedural rules to bar Article 36 claims is discussed.

#### a. *First Stage*

In the first stage, the foreign national defendant (after showing he/she is a foreign national) must show he or she was prejudiced regarding the violation of a foreign national's right to consular notification. Prejudice can be found in such a violation because the assistance a consular officer can give a foreign national defendant include functions that are imperative for a foreign national's protection and for a thorough defense strategy. Thus, the right to consular notification is inextricably intertwined with due process so that in certain situations a foreign national may be prejudiced and cheated out of a fair trial without knowing of this right. The very purpose of consular notification is to allow an accused foreign national the resources to prepare an effective defense.<sup>210</sup>

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210. Inter-American Court of Human Rights Advisory Opinion, *supra* note 135, ¶ 106.

i. Right Against Self-Incrimination

In *Sanchez-Llamas v. Oregon*, Sanchez was arrested after being involved in a shooting with police where one officer was injured.<sup>211</sup> He was not made aware of his consular right and during the interrogation, he made several incriminating statements.<sup>212</sup> His motion to suppress the statements he made without being advised of his Article 36 rights was denied.<sup>213</sup> Eventually, the case came before the Supreme Court, which ruled suppression of evidence was not a proper remedy to a VCCR violation.<sup>214</sup>

While prejudice does not exist in every case involving a foreign national making incriminating statements to the police, cultural misunderstandings can cause a detained foreign national to make bad decisions and/or legal mistakes, especially when his or her actions are based on his perceptions of his own legal system.<sup>215</sup> Justice Breyer correctly notes that a confession – or statement – by a foreign national to police cannot be considered voluntary when one understands what the right to remain silent means, but does not understand what the implications of these rights mean.<sup>216</sup> Understanding words is not the same as understanding their meaning and consequences.

A case that illustrates Justice Breyer's point, while from the United Kingdom, shows the concept of prejudice. In that case, defendants from Lebanon were charged with importing cannabis, but not told of their right to consular notification.<sup>217</sup> Both spoke

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211. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 339 (2006). *Sanchez-Llamas* was mirandized. *Id.* at 361.

212. *Id.* at 340.

213. *Id.*

214. *Id.* at 350.

215. *Osagiede*, 543 F.3d at 403.

Foreign nationals who are detained within the United States find themselves in a very vulnerable position. Separated from their families and far from their homelands, they suddenly find themselves swept into a foreign legal system. Language barriers, cultural barriers, lack of resources, isolation and unfamiliarity with local law create “an aura of chaos” around the foreign detainees, which can lead them to make serious legal mistakes. . . . This [consular] assistance can be invaluable because cultural misunderstandings can lead a detainee to make serious legal mistakes, particularly where a detainee’s cultural background informs the way he interacts with law enforcement officials and judges. *Id.*

216. *See Sanchez-Llamas*, 548 U.S. at 393 (Breyer, J., dissenting) (“A person who fully understands his Miranda rights but does not fully understand the implications of these rights for our legal system may or may not be able to show that his confession was involuntary under Miranda, but he will certainly have a claim under the Vienna Convention.”).

217. QUIGLEY ET. AL., *supra* note 39, at 169.

only basic English and had both stated they did not need a solicitor.<sup>218</sup> They made incriminating statements during the interrogation and they both asked several times what the function of a solicitor was.<sup>219</sup> The Court held that they were wrongfully deprived of their right to consular notification as a consular officer would have told them the function of a solicitor and thus the court excluded the interview as evidence.<sup>220</sup>

Another example of how a defendant can truly be prejudiced without being notified of the right to a consular also comes from the United Kingdom, but again illustrates the basic idea. Defendants were nationals from Holland and arrested for suspicion of importation and distribution of heroin.<sup>221</sup> The police did not tell them of their right to contact the Netherlands consulate.<sup>222</sup> The Court excluded the interviews because they were given out-of-date rights in Dutch and that if a consular officer had been notified, he would have advised the Defendants to ask for a solicitor who spoke Dutch (one of the defendants had also asked what a solicitor was).<sup>223</sup>

Further, in *Sanchez-Llamas*, the U.S. Supreme Court held that a foreign national defendant “can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to the police.”<sup>224</sup> In an article written by Linda Jane Springrose, she explains that in Russia, it is common for a defendant to make statements he or she would not otherwise make out of fear of physical force from law enforcement.<sup>225</sup> Thus, if a Russian foreign national was arrested in the United States, he or she would do the same when questioned by the police because he or she would be fearful of police brutality.<sup>226</sup>

Thus, there are many instances where statements given to the police are not voluntary, whether from police coercion or just an unfair cultural/language barrier that is taken advantage of (whether purposely or accidentally) that can have negative consequences in the trial

218. *Id.*

219. *Id.*

220. *Id.* at 170.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006).

225. Linda Jane Springrose, *Strangers in a Strange Land: The Rights of Non-Citizens Under Article 36 of the Vienna Convention on Consular Relations*, 14 GEO. IMMIGR. L.J. 185, 195-96 (1999).

226. *Id.*

proceedings.<sup>227</sup> Thus, it is important that should an Article 36 claim be raised, the interrogation is examined to see if had a consular officer been with the foreign national, the confession/statements would not have been given.

ii. Fair Trial

Consular officers have many tasks and functions that can easily be taken for granted. It has been held that evidence that could be obtained by consular agents was the same as what a defense lawyer could obtain.<sup>228</sup> However, that is not accurate. Consular officers know how to obtain evidence from the foreign national's home country, can aid with the transportation of witnesses from the home country, and assure that the defendant has an interpreter.<sup>229</sup> Also, a consular officer is aware of laws of the foreign national's home country and can, thus, inform the defendant and the defense attorney.<sup>230</sup> A defense attorney will have a hard time being able to prepare a sufficient defense for the foreign national if he or she does not know the procedures to gather evidence or witnesses located in the defendant's country.

For example, a foreign national from the Dominican Republic was sentenced to death and although there was mitigating evidence available, it was in the Dominican Republic.<sup>231</sup> However, defendant did not know he could provide this information to his attorney, which a consular officer would have told him to do, and his attorney was not aware the right of consular notification existed.<sup>232</sup> The defendant was sentenced to death.<sup>233</sup>

Another example is Martinez Villareal, who was a Mexican national arrested and not informed of his right to consular notification.<sup>234</sup> The

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227. See *supra* Section IV.A for Fierro and Loza examples of prejudice.

228. *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996).

229. *In re Martinez*, 209 P.3d 908, 912-13 (Cal. 2009); Sarah H. Lee, *Strangers in a Strange Land: The Threat to Consular Rights of Americans Abroad After Medellin v. Texas*, 70 OHIO ST. L.J. 1519, 1546-47 (2009).

230. Lee, *supra* note 229, at 1548.

231. Springrose, *supra* note 225, at 196-97; see also Matthias Lehmpful, 1999: *Walter LaGrand, a German gassed in America*, EXECUTEDTODAY.COM (Mar. 3, 2008), <http://www.executedtoday.com/2008/03/1999-walter-lagrand/>. In the *LaGrand* case, had the German consulate been contacted from the onset of the ordeal, it could have helped obtain evidence of the LaGrand brothers' childhood and unorthodox upbringing. While it probably would not have overturned their murder convictions (as the State had an eyewitness putting both brothers at the scene of the bank robbery), it may have gotten the jury more sympathetic as to not pursue the death penalty.

232. Springrose, *supra* note 225, at 197.

233. *Id.*

234. QUIGLEY ET. AL., *supra* note 39, at 147.

defendant was not familiar with the U.S. legal system and he did not understand who in the courtroom was the jury – or what a jury’s purpose was.<sup>235</sup> He did not speak English and his defense attorney did not speak Spanish.<sup>236</sup> The Inter-American Commission on Human Rights held that the State’s (U.S.) failure to notify Martinez Villareal of his right to consular notification violated his rights to due process and to a fair trial.<sup>237</sup>

Also, in *Gutierrez v. State*, the defendant, a Mexican national, was not informed of his consular right.<sup>238</sup> The interpreter for the court (Gonzales) at defendant’s trial was later found to have committed perjury because he was not a certified Spanish interpreter, as he had sworn he was.<sup>239</sup> Thus, the Court held that defendant “suffered actual prejudice due to the lack of consular assistance.”<sup>240</sup> Gonzales relied on Cuban-Spanish for his interpretation, not Mexican-Spanish, which is what the witnesses spoke.<sup>241</sup> Thus, the interpretations were not accurate. The court ordered an evidentiary hearing to see if Gonzales’s actions compromised Gutierrez’s defense to the point of prejudice.<sup>242</sup> If a Mexican consular officer was present, maybe Gonzales’s deception would have been revealed or a tape-recorder used, because one was not used at the trial.<sup>243</sup> Thus, there are many situations where a consular officer can be very useful to a foreign national in preparing for trial, and without such assistance, there may not be a fair amount of evidence/witnesses in favor of the defendant as there would have been with a consular officer.

### iii. National and International Practice

Suppression of evidence in an Article 36 violation—contrary to other domestic courts—is not completely new to U.S. jurisprudence. For example, while courts in the United States have held that there is no history of evidence suppression for an Article 36 violation in this

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235. *Id.*

236. *Id.*

237. Ramón Martinez Villareal v. United States, Case 11.753, Inter-Am. Comm’n H.R., Report No. 52/02,

OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 84 (2002).

238. *Gutierrez v. State*, No. 53506, 2012 Nev. Unpub. LEXIS 1317, at \*5 (Sept. 19 2012).

239. Gonzales was found to have fabricated his certification as well as all his education background, all of which were requirements to be an interpreter. *See id.* at \*6 n.3.

240. *Id.* at \*5.

241. *Id.* at \*11.

242. *Id.* at \*12.

243. *Id.* at \*12-13.

country nor in any country party to the VCCR, that is not an accurate statement.<sup>244</sup> A Texas Court did find suppression of evidence was an appropriate remedy for a violation of Article 36. In *Molando v. State*, the issue was whether defendant's statements could be suppressed under a jury instruction that stated that any evidence obtained in violation of the laws of Texas, the laws of the United States, or the Constitution, could be suppressed.<sup>245</sup> The court held that under its state law, any violation of a federal or state statute or constitutional provision would allow evidence obtained from that violation to be suppressed.<sup>246</sup> The Court concluded that because the VCCR was a self-executing treaty, it was the "Supreme law of the land" and thus a violation of Article 36 allowed for the remedy of suppression of evidence.<sup>247</sup> Also, a Delaware court found that suppression of evidence was an appropriate remedy for violation of Article 36.<sup>248</sup>

Further, other common law countries have ruled that evidence obtained in violation of the right to consular notification must be suppressed if it was obtained in a manner grossly unfair to the defendant, such as the police interrogating the defendant, who in turn makes incriminating statements. In that situation, had a consular official been notified, he or she would have highly advised and explained the role of an attorney before the defendant waived the right to an attorney and answered any questions.<sup>249</sup> In Australia, courts have held that suppression of evidence is a remedy for failing to notify a foreign national of his or her right to consular notification.<sup>250</sup> In the United Kingdom,

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244. *United States v. Rodrigues*, 68 F. Supp. 2d 178, 185 (E.D.N.Y. 1999); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006).

245. *Maldonado v. State*, 998 S.W.2d 239, 246 (Tex. Crim. App. 1999).

246. *Id.* at 246-47.

247. *Id.* at 247. Though the court did not suppress the evidence in the end, the reason was that there was no evidence that the defendant was not a U.S. national and thus did not qualify as a foreign national, which is what was required for the authorities to have been obliged to notify him of his consular right. *But see Rocha v. State*, 16 S.W.3d 1 (Tex. Crim. App. 2000) (holding that the treaties did not fall under the statute's exclusionary rule as "laws" so suppression of evidence was not permitted).

248. *State v. Reyes*, 740 A.2d 7, 26 (Del. Super. Ct. 1999) *overruled by State v. Vasquez*, Del. Super. LEXIS 209, at 4 n.6 (Del. Super. Ct. May 23, 2001) (stating that *Reyes* was based on a decision that had been overruled by *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000)). So, the Court, if faced with another case concerning consular notification, would not have followed the *Reyes* precedent calling for suppression of evidence anymore.

249. See United Kingdom case examples *supra* Section V.B.1.a.i.

250. See *Tan Seng Kiah v R* [2000] 10 NTLR 128 (Austl.) (holding that the police have an obligation to inform foreign national detainee of his right to consular notification and by not doing so, defendant acted in a way he would not have had he known his rights); see also *R. v Tan*

suppression has been granted, regardless of whether the detainee was informed of his rights to an attorney.<sup>251</sup>

In civil law countries, although formal suppression is not as common, in practice, judges disregard improperly obtained evidence or discount its significance.<sup>252</sup> Also, in Germany, a civil law country, the admittance or suppression of evidence obtained by police procedural violations are balanced against the importance of the defendant's privacy rights and the seriousness of the offense charged.<sup>253</sup>

Lastly, the United States Department of State reported that when U. S. citizens that are detained in Australia and New Zealand ask to consult with the U.S. consulate, the law enforcement officials stop the questioning.<sup>254</sup> Also, in Denmark, after being informed of the right to contact the consulate, if the detainee "does not wish the interrogation to continue," law enforcement stopped until the consulate is notified.<sup>255</sup>

Thus, other countries do suppress evidence or at least consider whether a foreign national is prejudiced when not informed of the right of consular notification. And, the U.S. Supreme Court has stated that when interpreting a multilateral treaty, the interpretations of other member states must be given "considerable weight."<sup>256</sup> Further, the Restatement (Third) on Foreign Relations states that "treaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed as to achieve uniformity of result despite difference between national legal systems."<sup>257</sup> Thus, for both comity, uniformity, and constitutional protection, review for prejudice and suppression of evidence if prejudice is found is essential.

#### iv. Summary

When evidence is obtained in the absence of consular notification, there is a high probability that a foreign national is prejudiced by

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[2001] WASC 275 (Austl.) (holding that violation of the right to consular notification was unfair to detainee and thus excluded the evidence).

251. See *Individual Consular Rights: Foreign Law and Practice*, FOREIGN NATIONALS, CONSULAR RIGHTS & THE DEATH PENALTY (June 2015), <http://users.xplornet.com/~mwarren/foreignlaw.html> (citing a British case holding that any statements made to police without speaking to a consular officer were to be excluded).

252. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 395 (2006).

253. *Id.* at 395-96 (citing Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1065 (1982)).

254. Warren, *supra* note 139.

255. *Id.*

256. *Air France v. Saks*, 470 U.S. 392, 404 (1985) (citing *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978)).

257. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §325 cmt. d (AM. LAW INST. 1987).

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statements they made or the progression of a trial without the aid of a consular official. Thus, there must be an evidentiary hearing to see if prejudice existed and the trial must be halted for a foreign national to speak with a consular officer to prepare his or defense.

### b. *Second Stage*

#### i. Sixth Amendment of the Constitution

Under this Second Stage, a foreign national denied his Article 36 right can raise his/her Sixth Amendment to counsel in order to overcome state procedural hurdles. From the time of conviction to any appeal or habeas petition, whether state or federal, a foreign national, under the newly proposed statute, must get an evidentiary hearing to see if he or she was prejudiced by not being notified of his consular right. The burden would be on the foreign national defendant to prove that had he or she been informed of the right to consular notification, he or she would not have been found guilty beyond a reasonable doubt, or that the conviction would have resulted in a lesser sentence. At this evidentiary hearing, the foreign national defendant would have to bring evidence to prove prejudice, such as new witnesses or evidence.

Procedural default rules will not bar the evidentiary hearing because of the reasoning adopted by the Seventh Circuit in *Osagiede*. In that case, a Nigerian national, appealed his conviction based on ineffective counsel assistance of counsel, as his attorney did not raise the government's violation of his consular notification at trial.<sup>258</sup> The Court held that an Article 36 violation would override procedural default rules when "the attorney's overall representation falls below what is required by the Sixth Amendment."<sup>259</sup>

The Court then reviewed the counsel assistance under the *Strickland* standard.<sup>260</sup> Under the first part of the test, an attorney should have known of Article 36 as it was "the law on the books" and "simple" research would have revealed its existence.<sup>261</sup> Further, a lawyer is

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258. *Osagiede*, 543 F.3d at 405.

259. *Id.* at 407 ("[T]he Court noted that an attorney's failure to raise an Article 36 violation would not be "cause" for overriding a state's procedural default rules, unless 'the attorney's overall representation falls below what is required by the Sixth Amendment.'" (citing *Sanchez-Llamas v. Oregon*, 548 U.S. 357 & 357 n. 6 (2006))).

260. *Id.* at 408 (To prove ineffective counsel, defendant must prove: "(1) his counsel's performance fell below an objective standard of reasonableness when measured against 'prevailing professional norms,' and (2) but for the deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different." (citing *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984))).

261. *Id.* at 409.

“expected to know the laws applicable to their client’s defense.”<sup>262</sup> Thus, when the defense does not raise a violation of Article 36, the defendant has recourse and a chance to prove prejudice.<sup>263</sup>

Prejudice in the *Osagiede* case most likely would have been found at the evidentiary hearing. The Government had nine tapes, but only one of the tapes could be translated and though it was revealed not to have the defendant’s voice, the others allegedly did.<sup>264</sup> Also, the defendant was mistaken with another man who was presumably in Nigeria at the time of trial.<sup>265</sup> Had the Nigerian consulate been contacted, it could have translated the tapes and understood the strong Nigerian accents, perhaps showing that none of the tapes contained the voice of the defendant.<sup>266</sup> The Nigerian consulate also could have worked with the Nigerian government to find the man whose identity was mistaken for the defendant.<sup>267</sup> Thus, *Osagiede* (the defendant foreign national) most likely was prejudiced by not being informed of his right to consular notification. Thus, by raising an Article 36 violation through the Sixth Amendment, a foreign national defendant can overcome the procedural default barriers and question the lawfulness of his or her detention in the United States.

## ii. Non-Application of the Procedural Default Rules to Article 36 Claims

Furthermore, not applying the procedural default rules to a treaty is not implausible.<sup>268</sup> With regards to federal statutes, there is a

262. *Id.* Research would have revealed the several cases involving the Vienna Convention in the United States as well as ICJ cases *LaGrand* and *Avena*. Thus, an attorney—a reasonable competent attorney—would have discovered Article 36. *See also* 28 C.F.R. § 50.5 (2018) (establishing a uniform procedure for consular notification where foreign nationals are arrested by the Department of Justice); FED. R. CRIM. P. 5(d)(F) (providing that a defendant who is not a U.S. citizen may request consular notification).

263. *See Osagiede*, 543 F.3d at 412-13. In *Osagiede*, the Court found that the defendant did deserve to have an evidentiary hearing to see if he could show he was prejudiced by failure to be informed of Article 36. *Id.* at 413. In that case, there were nine tape recordings, only one of which was translated (not containing the defendant’s voice), but the other untranslated ones were said to. *Id.* at 404. A consular officer could have helped with dialect detections and translate more efficiently, and help find a witness in Nigeria who was often mistaken for defendant. *Id.* at 413.

264. *Id.* at 413.

265. *Id.*

266. *Id.*

267. *Id.*

268. *See* RESTATEMENT (FOURTH) ON FOREIGN RELATIONS § 108 Reporters’ Notes No. 1 (AM. LAW INST., Tentative Draft No. 2, 2016); *see also* Estate of Graf Droste Zu Vischering, 782 N.W.2d 141 (Iowa 2010) (holding The Hague Service Convention prevailed over state procedural rules).

presumption that Congress does not intend to displace state law, unless the statute concerns foreign affairs,<sup>269</sup> which the VCCR does. Because the Vienna Convention is a self-executing treaty, thus having the same status as a federal statute, the same reasoning can apply. Because the VCCR involves international relations – and it can be said there are few greater intrusions on a country than the detention and imprisonment of its own foreign nationals by another country – the state procedural default rules should not apply because serious foreign relations concerns are implicated otherwise.

In regard to the AEDPA, similar reasoning exists in the form of the Charming Betsey doctrine, which states “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>270</sup> The Restatement (Third) states that a U.S. statute should not be construed as to conflict with international law or agreement of the United States.<sup>271</sup> The Act was enacted after the bombing of the World Trade Center on February 26, 1993, which led to Congress enacting the AEDPA with the purposes of “simply[ing] the prosecution of people charged with committing or planning terrorist attacks” and deport[ing] more non-citizen criminals.<sup>272</sup> Thus, the purpose of the Act was not to bar recovery for a foreign national whose Article 36 rights were violated. Further, there would be no contradiction or harm to the AEDPA if an Article 36 claim would be allowed to proceed notwithstanding the procedural default rules.

Thus, after a conviction, each case where a foreign national defendant raises a violation of Article 36 of the VCCR, will be reviewed individually in an evidentiary hearing to decide if there was prejudice, and if so, what the remedy would be (whether a new trial with evidence suppressed and/or new evidence, or a lesser sentence of the upheld conviction). This will enable the “full effect” to be given to Article 36 and still conform to U.S. domestic laws.

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269. See RESTATEMENT (FOURTH) ON FOREIGN RELATIONS, *supra* note 268, Reporter’s Notes No. 2 (“In determining whether a state law obstructs the purposes of a federal statute, ‘it is of importance that this legislation is in a field which effects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.’” (citing *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941))).

270. CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 16 (2d ed. 2015).

271. *Id.*

272. Yen H. Trinh, *The Impact of New Policies Adopted After September 11 on Lawful Permanent Residents Facing Deportation Under the AEDPA and IIRIRA and the Hope of Relief Under the Family Reunification Act*, 33 GA. J. INT’L. & COMP. L. 543, 548 (2005).

VI. FEDERALISM ISSUES

The proposed statute is for Congress to enact. The Tenth Amendment declares that the powers not given to the federal government in the Constitution, nor prohibited to the states in the Constitution, are given to the states.<sup>273</sup> States have always exercised their police power regarding safety, health, and morals of their respective state territory without much intrusion from the federal government especially with its criminal justice system and educational systems. Thus, it could be argued that this proposed statute would exceed the bounds of congressional authority, thereby interrupting the balance of federalism. However, while states have historically had control over their criminal justice systems, foreign affairs and constitutional concerns have always remained under the power of the federal government, as have treaties.

First, it should be noted that the right to consular notification and the remedies proposed in the statute are very important to international comity and the protection of U.S. citizens abroad. If the United States continues to fail at enforcing Article 36 and continues with its lack of remedies for such a violation, foreign relations will continue to deteriorate. Further, parties that have ratified the VCCR will begin to disregard the right of consular notification of U.S. citizens in their countries.<sup>274</sup>

Another problem with the United States' lack of consular notification and enforcement of violations is regarding the death penalty. Of the thirty-two foreign nationals executed since 1988, twenty-four of them had raised the claim of violation of consular notification.<sup>275</sup> Those violations involve the relations of thirteen different countries.<sup>276</sup> For example, after the LaGrands were executed, at the 55<sup>th</sup> Session of the Commission on Human Rights in Geneva, German Foreign Minister Joschka Fischer stated, "States whose justice system kill are not

273. U.S. CONST. amend. X.

274. Woodman, *supra* note 4, at 48 (citing *United States v. Carillo*, 70 F. Supp.2d 854, 859-60 (N.D. Ill. 1999)).

275. Mark Warren, *Death Penalty Information Center, Foreign Nationals, Part II*, DEATH PENALTY INFORMATION CENTER (Dec. 23, 2017), <https://deathpenaltyinfo.org/foreign-nationals-part-ii>.

276. *Id.* (listing the Dominican Republic, Mexico, Paraguay, Honduras, Thailand, Germany, Philippines, Canada, Iraq, Pakistan, Viet Nam, Jamaica, and Cuba, while noting that Thailand, Iraq, Pakistan, Vietnam, Jamaica, and Cuba still retain the use of the death penalty in their legal systems); see also Oliver Smith, *Mapped: The 58 countries that still have the death penalty*, TELEGRAPH (Sept. 1, 2016), <http://www.telegraph.co.uk/travel/maps-and-graphics/countries-that-still-have-the-death-penalty/>. It should be noted that international relations are still affected when one country imposes the death penalty on another country's national.

meeting their responsibility to set an example to society.”<sup>277</sup> Europeans believe that the death penalty cannot be justified either ethically or legally and has not proved to be an effective means of combating crime.”<sup>278</sup> While this refers slightly to European countries’ disapproval of America’s continuation to allow the death penalty, it also stems from the fact that the prisoners executed were German nationals, who were not informed of their right to contact the German consulate when arrested by U.S. officials and then executed under the laws of a foreign country. Thus, in the interest of international relations, not only does the United States need to recognize consular notification as an enforceable right, it needs to enforce it and provide remedies when that right is breached.

Also, while certain areas have been left for states, that does not mean the federal government has not stepped in. In *Missouri v. Holland*, 252 U.S. 416 (1920), the United States enacted a statute pursuant to a treaty entered two years before with Great Britain to protect migratory birds between the United States and Canada.<sup>279</sup> Missouri argued that the regulation of the migratory birds was left for the states to govern under the Tenth Amendment, so the statute was thereby unconstitutional.<sup>280</sup> However, the Supreme Court ruled that “[i]f the treaty is valid there can be no dispute about the validity of the statute under 8 Article I, § 8, as a necessary and proper means to execute the powers of the Government.”<sup>281</sup> Further, this case “stands for the proposition that the treaty power can be used to regulate matters that Congress could not regulate in the absence of a treaty.”<sup>282</sup> Thus, regarding Article 36, even if this area were left to the states, as it implicates the criminal justice system, Congress would still have a way to justify its actions for enacting the proposed statute through its treaty making power.

However, the justification need not be taken that far as areas involving the Constitution, like here, has always been left for Congress. As explained above, the violation of a foreign nationals right to consular notification can have severe ramifications on their constitutional rights. And under *Wong Wing v. United States*, 163 U.S. 228 (1896), foreign

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277. Lehmphul, *supra* note 231.

278. *Id.*

279. *Missouri v. Holland*, 252 U.S. 416, 431 (1920).

280. *Id.* at 431-32.

281. *Id.* at 432.

282. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 112 Reporter’s Note No. 2 (AM. LAW INST., Tentative Draft No. 2, March 22, 2016).

nationals are protected under the Fifth and Sixth Amendments.<sup>283</sup> Thus, any infringement – or even possible infringement – of the Constitution gives the federal government the power to remedy despite a state’s protest of the federalism balance.

## VII. CONCLUSION

In conclusion, Article 36 of the Vienna Convention on Consular Relations does convey an individually enforceable right. Returning to the hypothetical at the beginning of this paper, Martin would be able to exercise that right. Martin would most likely not get a fair trial because unless he was able to contact his consulate, he would be unable to present mitigating evidence that most likely could have acquitted him. If he were to contact the San Marquette Consulate in New York, the consular officer would inform him immediately that the right to defend others is a defense in the U.S. legal system. He then would get assistance from the consular officer in finding an attorney for representation and have someone help his sister Tanya explain to the police what happened. Also, should the prosecution insist on a trial, Martin’s statements of confession (being the initial aggressor) would be suppressed because he was not made aware of his right to speak to a consular officer, who would have explained to him what an initial aggressor was and that Martin was not the initial aggressor.

The Proposed Statute allows courts to review an Article 36 violation and see if a foreign national’s Fifth and Sixth Amendment rights were infringed. If so, the courts have the power to remedy such a violation, making sure foreign nationals have a fair trial and preserving justice so that innocent people are not imprisoned because they were prejudiced by gaps in legal systems and customs in the world.

Ultimately, if not for the sake of the Constitution or foreign relations, the United States needs to change its stance on consular notification

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283. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

[The Fourteenth Amendment] says: “Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.” These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws.’ Applying this reasoning to the fifth and sixth amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law. *Id.*

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for the safety of U.S. citizens abroad. Without continuous and diligent recognition and adherence to Article 36 of the VCCR, foreign countries may reciprocate the hostility and deny U.S. nationals abroad access to U.S. consulates.