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The U.S. Is Not Alone in Its Reluctance to Adhere to Supranational Decisions from the International Court of Justice

Kristin K. Beilke†

I. Introduction

On April 22, 1963, the United Nations Conference on Consular Relations adopted the Vienna Convention on Consular Relations (VCCR) in Vienna, Austria.[1] It entered into force on March 19, 1967 and currently 172 countries are parties to the Convention.[2] The VCCR offers foreign nationals who are arrested or detained consular notification rights. One of the more important elements of the VCCR is Article 36, Communication and Contact with Nationals of the Sending State, which states:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

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[1] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf [hereinafter VCCR].

[2] *Id.*; see also the United Nations Treaty Series ("U.N.T.S.") online database for general information relating to the VCCR, http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=III-6&chapter=3&lang=en#Participants (last visited May 20, 2010) [hereinafter U.N.T.S. Online Database, VCCR].

> 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.[3]

The United States has been party to some high-profile disputes involving Article 36 of the VCCR. The United States first instituted an action based on Article 36 on November 29, 1979 against Iran with the International Court of Justice (ICJ) for the seizure and holding of U.S. hostages.[4] The ICJ held that the Iranian Government, by making no effort to compel or even persuade militants to withdraw from the U.S. Embassy and free the hostages, was in serious violation of Article 36 of the VCCR, in addition to other provisions of international law.[5] The ICJ stated that Iran had an obligation to make reparation for the injury caused to the United States,[6] and further ordered Iran to immediately terminate their unlawful actions.[7] Iran eventually released the hostages approximately eight months later.

Almost two decades later, the U.S. Supreme Court found that VCCR claims could be barred by state default procedures.[8] In *Breard*, a citizen of Paraguay was convicted of attempted rape and capital murder but the authorities did not inform him of his rights under Article 36 of the VCCR.[9] After the conviction was finalized, Paraguay instituted an action with the ICJ against the United States based on violations of the VCCR.[10] The ICJ determined that there was prima facie evidence indicating that it had jurisdiction over both of the parties pursuant to the Optional Protocol to the VCCR Concerning the Compulsory Settlement of Disputes (Optional Protocol),[11] and that the United States should take all measures to ensure that Breard would not be executed pending the final decision of the ICJ proceedings.[12] However, the United States refused to abide by the ICJ's stay and held that Breard defaulted his claim under the VCCR by not raising it in

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[3] VCCR, *supra* note 1, art. 36.

[4] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 4 (May 24).

[5] *Id.* at 32.

[6] *Id.* at 41-42.

[7] *Id.* at 44-45.

[8] Breard v. Greene, 523 U.S. 371, 375 (1998).

[9] *Id.* at 373-74.

[10] Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 248 (Apr. 9) [hereinafter *VCCR*].

[11] The VCCR was accompanied by an Optional Protocol, which committed its signatories to compulsory ICJ jurisdiction. Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. 1, 21 U.S.T 325, 596 U.N.T.S. 487, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963_disputes.pdf [hereinafter Optional Protocol]. The United States withdrew from the Optional Protocol on March 7, 2005 stating that the United States would no longer recognize the jurisdiction of the ICJ reflected in that Protocol. .U.N.T.S. Online Database, Optional Protocol, http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=III-8&chapter=3&lang=en#Participants (last visited May 20, 2010).

[12] *VCCR*, 1998 I.C.J. at 257-58.

the state courts.[13] The Court went on to say that although ICJ decisions should be given "respectful consideration," the procedural rules of the forum State govern the implementation of the treaty pursuant to Article 36, paragraph 2 of the VCCR, and such rules likewise apply to claims based on the Constitution.[14]

When Germany filed an action against the United States with the ICJ a few years later, the United States once again found itself accused of another Article 36 VCCR violation.[15] In that case, two German citizens were arrested in the United States for attempted armed bank robbery and were never informed of their right to consular notification by the authorities.[16] The ICJ determined that failing to inform the detained of their consular rights was a violation of the United States' obligation to inform the detainees without delay and of the right of the foreign country to render assistance to their nationals, both of which are granted by the VCCR.[17] The U.S. federal court addressed the VCCR claim by finding that there was no cause shown for procedural default that was external to the defense, nor any actual prejudice.[18]

On January 9, 2003, Mexico filed an action against the United States with the ICJ for another violation of Article 36 of the VCCR.[19] In *Avena*, the ICJ held that detaining authorities have a duty to give Article 36 information to the individual once they realize the individual is a foreign national.[20] The ICJ further ruled that although the procedural default rules of the United States in-and-of themselves do not constitute a violation of the VCCR, a violation does occur when that default rule does not allow the detained individual to challenge a conviction and sentence claiming such a violation.[21] Despite the ICJ holding in *Avena*, the United States permitted the execution of one of the Mexican nationals that was named in the *Avena* decision without review or reconsideration, finding that the ICJ holding did not constitute directly enforceable federal law that would pre-empt state procedural limitations and that the VCCR did not provide, nor did the Optional Protocol require, direct enforcement of ICJ decisions.[22] These decisions indicate that the full effect of the VCCR treaty is not being given due weight in the U.S. courts. This article explores this issue and attempts to determine if other sovereigns are following the same trend as the United States.

Article 36 has spawned some controversial issues, especially in the United States, because, as demonstrated above, its compliance with the VCCR has not

[13] *Breard*, 523 U.S. at 374-75.

[14] *Id.* at 375.

[15] LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466, 470 (June 27).

[16] *Id.* at 475.

[17] *Id.* at 514.

[18] LaGrand v. Stewart, 133 F.3d 1253, 1261-62 (9th Cir. 1998).

[19] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 17 (Mar. 31).

[20] *Id.* at 43.

[21] *Id.* at 56.

[22] Medellin v. Texas, 552 U.S. 491, 522-23 (2008).

been strict.[23] Almost twenty-seven percent of the 200,020 federal inmates in the custody of U.S. Bureau of Prisons in 2007 were not U.S. citizens.[24] Considering there are even more inmates in the state systems, there is an indication that thousands of foreign nationals are arrested or detained in the United States. Data indicating how many of those inmates actually receive the benefit of consular notification required by Article 36 of the VCCR is difficult to obtain because of the lack of reporting logs;[25] but a great many of them will not have the benefit of the consular notification as mandated by the VCCR.[26]

As shown by U.S. cases, applying the VCCR raises questions of judicial independence and delegation of authority exercised by domestic governments, and it affects constitutional values of federalism, separation of powers, democratic accountability and procedural fairness.[27] Some of the themes present within U.S. case law that create controversy are whether there is jurisdiction over a violation of the VCCR, whether domestic procedural rules can bar VCCR claims, and whether there is an effective remedy for such a violation. The following sections will analyze in what context such issues have been raised, using the United States as an example. Next, the article will address the legal frameworks and decisions of other countries to determine whether these issues are in controversy across the board internationally. The article will conclude by introducing some policies or models that domestic and international legal systems can implement to make provisions, specifically Article 36, of the VCCR more effective.

II. Issues of Compliance with and Giving Full Effect to the VCCR

A. Jurisdiction

1. Self-executing Nature

Signatories to the Optional Protocol agree to submit to compulsory jurisdiction of the ICJ over disputes arising under the VCCR. However, domestic courts have still found that even signatories to the Optional Protocol are not required to give more than respectful consideration to ICJ decisions resulting from VCCR disputes.[28] On the other hand, without regard to the Optional Protocol, the VCCR still appears to be self-executing, meaning there is direct effect on domestic States without further action from the State's political branches.[29] Due to

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[23] Yury A. Kolesnikov, *Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solutions*, 40 McGeorge L. Rev. 179, 181 (2009).

[24] U.S. Dep't of Justice, Fed. Bureau of Prisons, State of the Bureau 2007: Bureau of Prisons Staff: Everyday Heroes 52 (2007), *available at* http://www.bop.gov/news/PDFs/sob07.pdf.

[25] Mark Warren, *Foreign Nationals: Part IV*, Death Penalty Info. Center, Feb. 15, 2005, http://www.deathpenaltyinfo.org/node/1473.

[26] *Id.*; *see Avena*, 2004 I.C.J. at 17 (where 51 Mexican nationals were argued to not have received benefit of VCCR rights to consular notification).

[27] Ernest A. Young, *Toward a Framework Statue for Supranational Adjudication*, 57 Emory L.J. 93, 94 (2007) [hereinafter Ernest].

[28] *See Breard*, 523 U.S. at 375.

[29] Kolesnikov, *supra* note 23, at 183; Ernest A. Young, *Supranational Rulings as Judgments and Precedents*, 18 Duke J. Comp. & Int'l L. 477, 510-11 (2008).

reasons relating to sovereignty, the determination of whether a treaty is self-executing in nature is left for the domestic courts to decide. Methods to determine if a treaty is self-executing may vary. For example, a State may look to the preamble to determine if the treaty should be self-executing or allow for individual rights. In the case of the VCCR, the preamble states that the purpose of the privileges and immunities of the VCCR is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.[30] But as is the case in the United States, when analyzing statutory and legal construction, the preamble and exterior text may only be relied upon when the language of the applicable provision is ambiguous.[31] Therefore, as Article 36 of the VCCR states, "the receiving State shall, without delay, inform the consular post of the sending State if, . . . a national of that State is arrested . . . or is detained in any other manner," the courts may view that as an unambiguous mandate without regard to what is stated in the preamble.[32]

The resistance to creating self-executing treaties is based on interests of sovereignty. The resistance for that reason is curious because even in the case of a determination that the VCCR is not self-executing, it is still unlikely that "walling off" would protect the State's interest of sovereignty or would insulate it from supranational decisions.[33] Violations of a treaty by a State will induce other countries and the international community to put pressure on the violating State's political branches to take the steps needed to bring that domestic law into compliance with the international agreement.[34] So in the case of the VCCR, its self-executing nature would require federal, state, and local law enforcement officers to provide consular notice even without the corresponding State implementing domestic legislation.[35] However, some argue that submitting to jurisdiction is very different from agreeing to be bound by supranational body decisions.[36] However, that seems to be a misleading conclusion. Agreeing to be bound by a supranational body's jurisdiction implies that the judgments created will also bind the State. Otherwise, submitting to jurisdiction would be meaningless without also agreeing to be bound by such decisions.

2. *Conferring Individual Rights*

Even if a treaty is found to be self-executing, the issue remains as to whether the rights are conferred onto individuals or if they are only conferred onto the States party to the international agreement. This is because treaties are usually

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[30] VCCR, *supra* note 1, pmbl.

[31] Ryan D. Newman, *Treaty Rights and Remedies: The Virtues of a Clear Statement Rule*, 11 TEX. REV. L. & POL. 419, 476 (2007); Kolesnikov *supra* note 23, at 194-95.

[32] *But see Medellin*, 552 U.S. at 491-93 (where the U.S. Supreme Court ruled that the ICJ *Avena* decision was not binding, and the VCCR was not self-executing. The Court went on to say that as further support for their holding, the parties did not list any other nations that treat it as directly binding).

[33] Ernest, *supra* note 27, at 103.

[34] *Id.*

[35] Young, *supra* note 29, at 510-11.

[36] Kolesnikov, *supra* note 23, at 208.

viewed solely as contracts between nation states that create international obligations. Creating a private right of action for individual plaintiffs is rare and controversial in international law.[37] Despite that trend, treaties can and do contain provisions that create certain rights for individuals that reside or act within the territorial limits of the signatory states, and are enforceable between private parties in domestic courts.[38] Also, the individual rights are not limited to causes of action between two private parties, but include rights between the domestic state and the individual.[39] Therefore, many scholars believe that the VCCR provides for individually enforceable rights that give rise to a private cause of action.[40] According to the VCCR, an individual who has been detained or arrested in a foreign country has the right to be informed of his or her rights under the VCCR. This ties into the fact that it may not just be a violation of the individual's rights, but also a violation of the country's rights that is a party to the VCCR in that it is deprived of the possibility of providing assistance to the individual.[41]

B. Effects of Domestic Procedure

Another common issue in relation to the VCCR is whether domestic procedural rules bar rights provided by the treaty. Article 36 states that the rights of the treaty must be exercised in conformity with laws and regulations of the receiving state, which usually also is meant to include procedural rules.[42] Although courts should attempt to reconcile the sources of law before precluding the VCCR, it may not always be feasible. For example, in the United States several cases have barred claims relating to the VCCR because they were barred by procedural default. In *Medellín*, the United States violated its VCCR obligations by not providing consular notification but the aggrieved party was prohibited from bringing a claim because he did not argue the issue at the lower court or on direct appeal.[43] The ICJ has held that although the procedural rules in themselves do not violate the VCCR, barring review and reconsideration of convictions and sentences for prolonged detentions and severe penalties is a serious violation of the VCCR because it impermissibly prevents domestic courts from giving VCCR rights full effect.[44]

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[37] Young, *supra* note 29, at 494.

[38] Kolesnikov, *supra* note 23, at 193.

[39] *Id.* at 194.

[40] *See id.* at 183, 191; *see* Newman, *supra* note 31, at 476.

[41] *LaGrand*, 2001 I.C.J. at 515.

[42] *See Avena*, 2004 I.C.J. at 56 (where the ICJ determined that procedural default rules did not themselves violate the VCCR).

[43] *Medellin*, 552 U.S. 491 (2008).

[44] *See, e.g.*, *LaGrand*, 2001 I.C.J. at 513-14.

C. Remedies Permitted by the VCCR

The VCCR does not provide a specific remedy for failure to notify a consulate.[45] This characteristic has given States difficulty because paragraph 2 of Article 36 states that the rights of paragraph 1 must be exercised in conformity with the laws and regulations of the receiving state.[46] It goes on to state that such laws and regulations of the receiving state must enable the full effect to be given to the purposes for which the rights under Article 36 are accorded.[47] Two interpretations can develop from that provision. It may be read to indicate that a country cannot reject every single path for indicating an individual's treaty rights, or it may mean that no domestic law may bar detained individuals from exercising their right to consular notification.[48] The first interpretation is more protective of State sovereignty, whereas the second gives more teeth to enforcement of the VCCR. From ICJ decisions discussing the effects of domestic procedures on the VCCR rights, it appears the ICJ would interpret the treaty to mean that not all methods of review may be denied to an aggrieved party. However, because the VCCR states that when a violation occurs, an aggrieved State may refer the issue to the UN Security Council, some argue that the referral is the only non-judicial remedy required; therefore, it is evident that such supranational judgments are not to be given mandatory enforcement in domestic courts.[49]

D. Other Policy Issues Hindering Full Compliance with the VCCR

With the increase of globalization, there is a movement for more involvement by and the creation of international institutions that have the individual authority to legislate, prosecute and adjudicate.[50] The above referenced issues make it easy for domestic courts to deny rights conferred by international agreements like the VCCR and, therefore, it is even more important for leading nations to emphasize the importance of international law by providing more enforcement.[51] Compliance with international agreements and with supranational decisions, such as those issued by the ICJ, requires some sacrifice by the domestic States.

It is hard to convince States to give more effect to supranational decisions when it appears to be comprehensively good policy to do just the opposite.[52] The duty of the courts to recognize the law of domestic States is at the heart of important interests like sovereignty and accountability.[53] Established legal doctrine indicates that sovereign powers are so important to the international legal system

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[45] *See* VCCR, *supra* note 3; Kolesnikov, *supra* note 23, at 182.

[46] VCCR, *supra* note 3, art. 36.

[47] VCCR, *supra* note 3, art. 36(2).

[48] Newman, *supra* note 31, at 477.

[49] Young, *supra* note 29, at 511-12.

[50] Ernest, *supra* note 27, at 94.

[51] Kolesnikov, *supra* note 23, at 225.

[52] Young, *supra* note 29, at 479.

[53] *Id.*

that surrendering them may not be possible.[54] Limiting the enforcement of supranational decisions would also protect the authority of political branches of domestic States to continually participate in the process of interpreting international law and developing how it should be implemented in the domestic system.[55] A main tenet, and the most important aspect of sovereignty, is that the domestic States are free to choose their own laws.

Another barrier preventing full compliance with international agreements like the VCCR is that newly created supranational bodies often have unproven democratic legitimacy or lack procedural transparency and integrity.[56] They seem to be less accountable for decisions they make.[57] This is in contrast to most democratic domestic courts that have an effective system of checks and balances, such as public deliberation and that the political branches of the domestic States have a stake in ensuring their courts do not treat foreign parties unfairly.[58] Supranational organizations also tend to suppress concurring and dissenting opinions, which may further create issues of transparency and willingness to submit to their decisions.[59]

Even if domestic states heed supranational body decisions from the ICJ, the issue of how much deference to give them arises. The need to respect international bodies for reasons relating to foreign relations and interests of creating uniformity and settled interpretations leads toward awarding supranational body decisions more weight than merely supporting authority, similar to law reviews or briefs.[60] However, there is still hesitancy to give such decisions full binding effect and doing so may be contrary to long-settled legal system procedures of precedence, jurisdiction, or res judicata. For example, in the United States, interpretation of a treaty by a supranational body would not bind federal courts because the foreign decision would not be within some of the domestic courts' jurisdictions.[61] Although domestic States may argue that supranational decisions do not bind them, the need to withdraw from the Optional Protocol that confers jurisdiction on the ICJ shows that the decisions do carry some weight and domestic influence.[62] If States thought the decisions were not binding, nor had any domestic effect, there would be no need to withdraw from the Optional Protocol. Furthermore, the Statute of the International Court of Justice declares that the ICJ's decisions have binding force as to the parties with respect to the particular

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[54] *Id.* at 504.

[55] *Id.* at 507.

[56] *Id.* at 479.

[57] *Id.* at 495.

[58] *Id.* at 494.

[59] Ernest, *supra* note 27, at 111.

[60] Young, *supra* note 29, at 502. *See also Sanchez-Llamas v. Oregon* where the U.S. Supreme Court addressed the degree of deference domestic courts should pay to ICJ interpretations, stating that although the ICJ's interpretation deserved respectful consideration, the Supreme Court has the power to interpret treaties and say what the law is. Sanchez-Llamas v. Oregon, 548 U.S. 331, 333-34 (2006).

[61] Young, *supra* note 29, at 507-08.

[62] *Id.* at 518.

case at bar.[63] This suggests that in cases like *Avena*, where the United States was a party to the case, it would have to accept the ICJ's decisions as binding authority.[64]

III. Are Other Countries Giving the VCCR Full Effect?

A. Australia

Australia appears to be following the example of the United States when it comes to adhering to the VCCR and ICJ decisions. Australia has held the VCCR as not self-executing.[65] In the case of *La Bara v. Minister for Immigration and Citizenship*, an Indonesian citizen came to Australia after the Australian Fisheries Management Authority boarded his fishing vessel, took him and his crew in custody, and destroyed the vessel.[66] Following the expiration of his Indonesian visa, the authorities commenced a removal action.[67] The Indonesian citizen claimed that his removal would contravene the VCCR.[68] The Australian court determined that the VCCR itself cannot be a source of rights under Australian law.[69] It is not self-executing because Article 36 of the VCCR was not incorporated into domestic law under the Consular Privileges and Immunities Act 1972.[70] Similar to the United States Supreme Court, the Australian court found that unincorporated treaties can be used as an extrinsic aid for domestic interpretation and further found that even if the VCCR rights were considered to be customary international law, it would not follow that they are domestically enforceable by the court.[71] This is especially important because Australia has ratified the Optional Protocol.[72] Without giving the VCCR full effect, the Australian court indicated that there is a presumption that the Parliament intended to legislate in conformity with international obligations and that any ambiguities will be construed in favor of the VCCR, if possible.[73]

This indicates that the VCCR does not create individual rights that will permit private causes of action. Without domestic implementation, individuals have no protection under the VCCR. However, this still leaves open the issue of whether ICJ decisions are binding in Australian courts and the types of remedies Australia may provide. Currently there is no ICJ decision with Australia as a direct party

63 Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, 1062.

64 Or at least would have before it withdrew from the Optional Protocol conferring mandatory jurisdiction.

65 La Bara v. Minister for Immigration and Citizenship (2008) F.C.A. 785, ¶ 10 (Austl.), *available at* http://www.austlii.edu.au/au/cases/cth/FCA/2008/785.html.

66 *Id.* ¶ 2.

67 *Id.*

68 *Id.* ¶ 5.

69 *Id.* ¶ 10.

70 *Id.*

71 *Id.*

72 U.N.T.S. Online Database, Optional Protocol, *supra* note 11.

73 *La Bara*, (2008) F.C.A. at ¶ 11.

that addressed violations of Article 36 of the VCCR and, therefore, it is impossible to say if Australia would treat such decisions as binding authority in its courts. Considering Australia's reluctance to implement domestic legislation enforcing the rights under the VCCR, it appears to follow the United States' trend and will not consider ICJ decisions as binding on its domestic courts or provide specific remedies for aggrieved individuals.

B. Canada

In the case of *R. v. Partak*, where a U.S. citizen was accused of murder, the Ontario Superior Court of Justice had an opportunity to analyze the VCCR.[74] After his detention, the U.S. citizen made some incriminating statements.[75] The accused claimed that he was not advised of his rights and that he would have not made such statements if he were in contact with the U.S. consulate.[76] The Canadian court stated that although the VCCR appears to deal with obligations between states as opposed to those owed to individuals, Article 36 of the VCCR does create an obligation on the authorities to advise the foreign national of his or her right of consular notification.[77] The court assumed that the appropriate authorities were obliged to fulfill the requirements contemplated by Article 36 of the VCCR.[78] Such a right, similar to the U.S. interpretation, arises at the time the authorities know or reasonably ought to know that the detainee is a foreign national.[79] This is remarkable because Canada has not signed or ratified the Optional Protocol.[80] At first glance, it appears that the Canadian court is willing to give full effect to the VCCR. However, the opinion goes on to state that denying the U.S. citizen of his VCCR rights was not so crucial that its omission rendered the situation oppressive. Therefore, the fact that he was not notified of his rights under the VCCR was nothing more than an oversight.[81]

A case from Alberta reached the same result, albeit through a different analysis. In *R. v. Van Bergen* the accused was never informed of his right to notify the Canadian consulate by U.S. authorities upon his arrest.[82] The Canadian court found that the VCCR creates obligations between states, not attributable to independent rights for nationals.[83] The court then determined that the purpose of Article 36 is to ensure that foreign nationals who are detained receive equal treatment to that of domestic nationals, with no disadvantage because they are not

[74] R. v. Partak, [2001] 160 C.C.C. (3d) 553, ¶¶3-4 (Ont. Super. Ct.).

[75] *Id.* ¶¶ 7-11.

[76] *Id.* ¶ 21.

[77] *Id.* ¶ 25.

[78] *Id.* ¶ 26.

[79] *Id.* ¶¶ 28-29.

[80] U.N.T.S. Online Database, Optional Protocol, *supra* note 11.

[81] *Partak*, 160 C.C.C. (3d) at ¶¶ 47-48.

[82] R. v. Van Bergen, [2000] 261 A.R. 387, ¶ 13 (Alta. Ct. App.).

[83] *Id.* ¶ 15.

familiar with or do not understand the proceedings against them.[84] The court held that the accused needed to establish serious prejudice in the process of the foreign state; thus, not relaying the foreign national's right to consular notification did not establish serious prejudice in the process.[85]

These different analyses underscore not only the fact that different countries vary as to the interpretation of the effect of Article 36 of the VCCR, but also that individual states within a federal framework of the same country also come to different conclusions. One nation state finds that the VCCR creates individual rights, whereas the other does not. Because the ICJ has not directly addressed a case based on Article 36 of the VCCR, Canadian decisions have been silent on the effect of ICJ decisions regardless of Canada being a direct party in the dispute. However, both of the decisions above did reach a similar result, the same result that U.S. courts have reached: that domestic procedural bars prohibit remedy of VCCR violations.

C. China[86]

Advocates of a more enforceable VCCR may not be surprised to find that China's stance on strict enforcement of Article 36 of the VCCR is murky.[87] Article 4 of Order 76 of China's Ministry of Justice states that for a country that has not specifically entered into a consular treaty with China, but is a member of the VCCR, interviews or communications of their diplomatic or consular officers must be handled in accordance with the VCCR.[88] The provisions of that Order do not specify what action Chinese officials should take when a foreign national is detained in China but does not apply for a consular interview.[89] That is consistent with Article 36 of the VCCR,[90] but may not be consistent with ICJ decisions that state consular information must be given to detainees even without their request. China is not a signatory to the Optional Protocol,[91] but nonetheless the case of Hiroshi Kato indicates that China's treatment of Article 36 may be promising. Kato, a Japanese citizen, was detained in China and even though Kato had not requested notification of his consulate, the appropriate authorities still noti-

[84] *Id.* ¶ 16.

[85] *Id.* ¶¶ 16-17.

[86] Published Chinese case law translated into English is difficult to obtain. This section is not based on explicit case law, but on articles that have been published referencing the particular cases.

[87] *See* Hu Qian, *Chinese Practice in Public International Law: 2002*, 2 CHINESE J. INT'L L. 667 (2003).

[88] Provisions Concerning the Interview of and the Communications with Foreign Criminals of Foreign Nationalities art. 4 (promulgated by the Order of the Ministry of Justice, Nov. 26, 2002, effective Jan. 1, 2003) LAWINFOCHINA (last visited May 20, 2010) (P.R.C.).

[89] *See id.* arts. 6-9.

[90] *See id.* (The VCCR states that if the national of the sending State so requests, competent authorities without delay will inform the consulate officials of the sending State.).

[91] U.N.T.S. Online Database, Optional Protocol, *supra* note 11, n.2 (while China's signature is on the Optional Protocol, it was never ratified, and a subsequent letter stated that the signature by the Chiang Kai-shek clique "usurped the name of China and is illegal, null and void").

fied the Japanese embassy at an early date.[92] This is an encouraging practice but, technically, visits by consular officers are subject to approval and discretion is left to provincial authorities responsible for prison administration, even though processing of the request is supposed to be done in accordance with the VCCR.[93]

This law may leave room for doubt about the level of Chinese compliance with the VCCR. The case of Huseyin Celil provides evidence of China's non-compliance.[94] Celil, a Canadian citizen, was detained in China and two months after his detention Chinese officials refused to allow Canadian diplomats to meet with him.[95] Even after a personal intervention by the Foreign Minister, Peter MacKay, China only informed MacKay that they would not seek the death penalty but did not provide details of Celil's status or allow MacKay to meet with Celil.[96]

China has not been a direct party in a case before the ICJ and therefore, it is uncertain if they will abide by such a supranational decision. However, because China's laws say that approval of communication with consular officials is discretionary and there is anecdotal evidence that they do not strictly comply with obligations imposed by Article 36 of the VCCR, it is on a similar path as the United States. China will most likely not adhere to supranational decisions and continue to allow their domestic rules to trump supranational interpretation of the VCCR.

D. Germany

Germany has ratified the VCCR and is a party to the Optional Protocol;[97] on September 19, 2006, the German Bundesverfassungsgericht (German Federal Constitutional Court) made its first judgment on the issue of interpretation of the VCCR.[98] In that case, a Turkish citizen residing in Germany was charged with murder.[99] The police did not apprise the Turkish citizen of his rights under Article 36 of the VCCR; his claims based on the violation of the VCCR were unsuccessful in ordinary courts and the Federal Court of Justice, which held that Article 36 does not grant any additional protection for the individual and could not possibly affect the outcome of the case.[100] The German court, on review, then held that Germany is under a constitutional obligation to adhere to the inter-

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92 Qian, *supra* note 87, at 693.

93 Chen Qiang, *Chinese Practice in Public International Law: 2003(II)*, 3 CHINESE J. INT'L L. 591, 604 (2004).

94 Editorial, *The Pacts China Signed*, GLOBE & MAIL, Aug. 30, 2006, at A14, *available at* LEXIS.

95 *Id.*

96 *Id.*

97 U.N.T.S. Online Database, VCCR, *supra* note 2; U.N.T.S. Online Database, Optional Protocol, *supra* note 11.

98 Jana Gogolin, Avena *and* Sanchez-Llamas *Come to Germany – The German Constitutional Court Upholds Rights under the Vienna Convention on Consular Relations*, 8 GERMAN L.J. 261, 261 (2007) (original decision 2 BvR 2115/01 (Sept. 19, 2006) in German of the Federal Constitutional Court *available at* http://www.bundesverfassungsgericht.de/en/decisions/rk20060919_2bvr211501.html).

99 *Id.* at 264.

100 *Id.*

pretation of treaties by competent international courts.[101] It further held that the only limitation on that obligation was in relation to violations of Basic Rights, or if the international court exceeds its authorized power.[102] Similar to the United States, German ratified international treaties have the status of federal law—the German court found the VCCR to be specific enough to qualify as self-executing.[103] Germany still maintains that domestic sovereignty cannot solely be overruled by ICJ decisions, but that the interrelation of ICJ decisions with German Basic Law obliges German Courts to follow ICJ interpretations.[104] The ICJ decisions are furthermore inextricably binding when Germany is a party to the actual dispute.[105] Furthermore, because German courts attempt to avoid judgments against them, they will comply with ICJ decisions against other states as well because those interpretations are consistent with the VCCR.[106] The German courts require review of the VCCR violation but the domestic courts still have the authority to determine if the procedural error was harmless.[107] Therefore, like almost all other countries, the issue of procedural default and remedy is still wide open for domestic courts to decide.

This dramatically different result in the case of Germany may be due to the culture and its participation in the European Union (EU). Western European countries are accustomed to being a part of a supranational organization and have more experience in deferring to such judgments. Geographical, historical, and cultural experiences may account for Germany's willingness to broadly incorporate Article 36 interpretations.

E. United Kingdom

Article 36 of the VCCR is not a provision that has the force of law within the United Kingdom,[108] but the United Kingdom is still a signatory to the Optional Protocol.[109] The United Kingdom takes the stance that international treaties, specifically the VCCR, do not generate individual rights capable of being declared and enforced in domestic courts.[110] However, "Her Majesty's Government" does note that the United Kingdom has the right to raise matters of consular protection with the foreign State even if there is no international treaty right or even if there is no clear right in customary international law.[111] However, even the right to

[101] *Id.* at 263.

[102] *Id.*

[103] *Id.* at 265.

[104] *Id.* at 269.

[105] *Id.*

[106] *Id.* at 270.

[107] *Id.* at 273-74.

[108] *See* Consular Relations Act, 1968, c. 18, § 1 (Eng.).

[109] U.N.T.S. Online Database, Optional Protocol, *supra* note 11.

[110] Regina (Abbasi & Juma) v. Sec'y of State for the Foreign & Commonwealth Office, [2002] EWHC Admin. 651, ¶ 21 (Eng., High Court, Q.B.D.) (finding on March 15, 2002 that a bilateral treaty between the U.S. and the U.K. trumped the VCCR).

[111] *Id.* ¶ 23.

raise the issue is a matter of policy and non-justiciable, including in cases where a clear treaty right exists.[112] This interpretation is consistent with principles of sovereignty.

The United Kingdom has not been directly involved in a case before the ICJ concerning Article 36 of the VCCR, but it nevertheless has found that the VCCR does not create individual rights.[113] This is an indication that if the issue were to arise in the United Kingdom, it would likely find that the individual would not have standing to bring a VCCR violation claim in their domestic courts. The United Kingdom differs dramatically from Germany's interpretation even though they are also part of the EU, a supranational organization. This is unsurprising considering the United Kingdom has a strong history of maintaining its sovereignty, as demonstrated when it opted to keep its own currency when joining the EU. The United Kingdom holds great individual power even as a member of the EU and, unfortunately, will most likely not give supranational decisions of the ICJ interpreting Article 36 of the VCCR full effect.

IV. What Can Be Done to Create Better Uniformity and Enforcement?

After a brief examination of treatment of the VCCR and ICJ decisions in other countries, it is apparent that the full effect envisioned during the drafting of the VCCR has not been uniformly effected in practice. One of the first things that domestic countries could do to better enforce the VCCR is amend their international agreements to create domestic direct effect.[114] This would include giving deference to applicable ICJ decisions.[115] That could be done by a single statute that gives binding authority to all ICJ determinations or drafting a specific statute for each decision that is issued in order to comply with the ICJ findings.[116] As demonstrated in the *Avena* and *LaGrand* decisions, domestic courts should allow review and reconsideration of conviction and sentencing when a violation of the VCCR has occurred.[117] In order to protect sovereignty, the method of review and reconsideration, and the determination as to whether the accused was prejudiced under the VCCR will be left up to the domestic courts, but it should not be subject to procedural defaults.[118]

Another implementation would be to allow concurrent jurisdiction of the domestic courts and the ICJ.[119] This method would emphasize that international agreements are shared law and that no single court has precedence over VCCR interpretation.[120] It would maintain interests of sovereignty because domestic

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112 *Id.*

113 *Id.* ¶ 21.

114 Ernest, *supra* note 27, at 102.

115 *See* Kolesnikov, *supra* note 23, at 218-225.

116 Kolesnikov, *supra* note 23, at 218-20.

117 *Id.* at 204.

118 *Id.* at 205-06, 220.

119 Ernest, *supra* note 27, at 102.

120 *Id.*

courts would be able to influence the development of international treaty interpretation.[121] Leaving it solely to the supranational body of the ICJ may leave such decisions vulnerable to interests that do not have the same perspectives as the domestic courts' interests and, in addition, would be a departure from historic practice.[122] The international community could create a procedural system whereby the domestic courts would be able to certify questions to the ICJ and would agree to defer to its determinations.[123] This would give the ICJ independent weight although it would not be conclusive in the outcome of particular domestic cases. It would also honor the need of the domestic courts to prohibit the ICJ from acting with the force of law.[124] However, this approach would still have the problem of creating uniformity over international treaties and may encourage parochialism.

The VCCR could also be amended to prohibit opting out of compulsory jurisdiction. If the text explicitly stated that the VCCR was self-executing and immediately enforceable in the domestic courts, it would create more clarity for States. Furthermore, it could make it explicitly clear that individuals do have rights under the treaty and that the provisions are not just for signatory States. Specific text could also be drafted to provide the possibility for appropriate remedies. Simply allowing domestic courts to decide whether filing an action with the ICJ is enough does not give full effect to the VCCR. Specifically stating that any violation of the VCCR provisions requires the host countries to provide an adequate remedy at law within the domestic framework, however, would create more effective results.

V. Conclusion

The application and adherence to Article 36 of the VCCR has varied over time and among the several nations. The United States' interaction with the VCCR is a prime example of the controversial issues that may arise in domestic courts stemming from the manner in which the supranational institutions interact with domestic systems. On the other hand, Germany is a great example of how domestic courts could give supranational decisions more binding effect. However, many States need to make changes within their domestic legal systems to give greater effect to supranational institutions such as the ICJ. Drafting a more specific text of the VCCR in order to guide domestic courts as far as applicability of the rights and what remedies may apply in the case of violations will encourage States to not see Article 36 of the VCCR as a meaningless text but, rather, as a mandate that prescribes action.

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[121] *Id.* at 103-04.

[122] *Id.*

[123] *Id.* at 107.

[124] *Id.* at 108.