

PAPER SYMPOSIUM

INTRODUCTION

SANCHEZ-LLAMAS IN CONTEXT

by
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The Supreme Court's decision last term in *Sanchez-Llamas v. Oregon*¹ considered the extent to which foreign nationals arrested in the United States have enforceable rights and accompanying remedies in the U.S. pursuant to Article 36 of the Vienna Convention on Consular Relations (VCCR). Yet the decision involved more than a narrow question of treaty interpretation. The case came to the Supreme Court from state court proceedings in Oregon and Virginia.² As a result, it raised federalism questions about the manner in which state courts should interact not just with the VCCR but with public international law generally, as well as whether or how the Supreme Court should mandate state court engagement or compliance with international law.

Further, because the debate over the meaning of Article 36 turns in part on whether prisoners have enforceable rights under the VCCR, the case required the Court to consider the relationship among a host of overlapping issues concerning the domestic status of public international law and the role of federal courts in ensuring that status, whatever it may be. These issues include the question of when a treaty is self-executing, whether it creates private rights, and the ability of courts to give effect to such private rights, for example as a rule of decision under a preexisting cause of action or even as the basis for an implied cause of action.

Finally, *Sanchez-Llamas* did not stand alone. The Court's decision marked its fourth encounter with the VCCR in less than a decade. During the same period the International Court of Justice (ICJ) has issued three decisions about U.S. non-compliance with the VCCR. One of the critical issues in *Sanchez-Llamas* was how the Supreme Court would react to the ICJ decisions, a reaction

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¹ 126 S. Ct. 2669 (2006).

² *Sanchez-Llamas* resolved the claims of two petitioners whose cases were unrelated except for their common interest in enforcing the Vienna Convention on Consular Relations. The case of Moises Sanchez-Llamas, a Mexican national, came from the Oregon state courts, while the case of Mario Bustillo, a Honduran national, came from the Virginia state courts.

that has broader implications for the relationship between U.S. courts, both federal and state, and the proliferating number of international courts.³

Although *Sanchez-Llamas* takes a large step toward resolving the questions raised by individual claims under Article 36, it does not end the debate over the meaning and application of that provision. Not surprisingly, the decision also fails to provide definitive answers to the larger questions that hovered around the litigation. The essays in this symposium address many of these questions by analyzing the *Sanchez-Llamas* opinions, teasing out the implications of the decision, and identifying issues that remain unresolved (and, of course, suggesting resolutions). The result is an important intervention not only in the Article 36 controversy but also in the ongoing debate about the domestic status and enforcement of public international law.

My goal in this Introduction is to set the scene for the more detailed contentions of the various contributors. To that end, I will briefly describe the history of litigation over U.S. compliance with Article 36, note how the VCCR interacted with the state court proceedings below, and discuss the reasoning of the *Sanchez-Llamas* opinions.⁴ From there, the incisive, overlapping, and sometimes opposing arguments of the contributors—Julian Ku, Janet Levit, Margaret McGuinness, Paul Stephan, and Melissa Waters—will take center stage.

* * *

Article 36 of the VCCR provides:

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;

³ See, e.g., Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 430 (2003) (“[T]here are now more than fifty international courts, tribunals, and quasi-judicial bodies, most of which have been established in the past twenty years.”).

⁴ For another helpful overview and analysis of the case and its background, see Curtis A. Bradley, *International Decisions—Sanchez-Llamas v. Oregon*, 100 AM. J. INT’L L. 882 (2006).

(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 judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.⁵

Article 36 primarily concerns the activities of consular officers. One thus could read it simply and broadly as codifying and resolving a specific approach to certain consular issues on behalf of the signatories, even when it also impacts individual interests. The preamble to the Convention provides some support for this interpretation by stating that “the purpose of [the] privileges and immunities” it creates “is not to benefit individuals but to ensure the efficient performance of functions by consular posts.”⁶ If that were the correct reading, individuals would have difficulty making Article 36 claims in a judicial proceeding. Article 36 would end up being much like the other articles of the VCCR that “speak in terms of the rights of the member nations or consular officials.”⁷

Yet sub-paragraph b specifically refers to “the rights” of “the person concerned,” which plainly permits the conclusion that Article 36 creates individual rights in addition to addressing consular duties. The language of the preamble might describe the overall approach of the Convention, but perhaps we should not read it too broadly or absolutely, at least when doing so seems to fly in the face of the plain language of a specific article.

Still, before concluding that the VCCR does create individual rights, what about the fact that sub-paragraph c refers to “the right” of “consular officers”? Perhaps, one might argue, the word “right” in Article 36 is simply a convenient legal term and does not signal the creation of judicially enforceable rights. In

⁵ Vienna Convention on Consular Relations, art. 36, 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. The U.S. ratified the VCCR in 1969. See *Sanchez-Llamas*, 126 S. Ct. at 2691–2692 (Breyer, J., dissenting).

⁶ Vienna Convention on Consular Relations, *supra* note 5, pmbl. Article 31(2) of the Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.S. 331, provides that the preamble to a treaty is relevant to its interpretation.

⁷ *Sanchez-Llamas*, 126 S. Ct. at 2695 (Breyer, J., dissenting). In his assertion that Article 36 is not like the rest of the VCCR, Justice Breyer failed to discuss the preamble and also neglected to note that Article 36 to some extent is like the rest of the VCCR, because subsection c “speak[s] in terms of the rights . . . of consular officials,” as discussed in the text.

short, although the text exhibits concern for individual interests, the legal effect of that concern is not entirely clear.

Questions about the meaning of Article 36 have arisen in the domestic courts of several nations as well as before the ICJ, which has jurisdiction over “[d]isputes arising out of the interpretation or application of the Convention” pursuant to the Optional Protocol Concerning Compulsory Settlement of Disputes.⁸ With respect to the United States, these issues have often been litigated in death penalty cases.⁹

The first of the cases relating to the U.S. was *Paraguay v. United States*, which concerned the impending execution by Virginia of Angel Breard, a national of Paraguay. Paraguay initiated litigation before the ICJ under Article 36, and the court issued an order that “[t]he United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order”¹⁰

In the meantime, Breard and Paraguay commenced litigation in federal court, including efforts to invoke the Supreme Court’s original jurisdiction. There was no dispute that Breard’s Article 36 claim was procedurally defaulted under Virginia law and federal habeas doctrine, but he and Paraguay contended that his claim “may be heard in federal court because the Convention is the ‘supreme law of the land’ and thus trumps the procedural default doctrine.”¹¹ In *Breard v. Greene*, the Supreme Court disagreed and refused to stay the execution. Although the Supreme Court said that it “should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such,” it noted that rights under the Vienna Convention “shall be exercised in conformity with the laws and regulations of the receiving State,” which the Court interpreted to include procedural default rules.¹² The Court also observed that treaties stand on the same footing as statutes, so that the more recent of the two controls if there is conflict or inconsistency between them.¹³ Here, the Court found that Breard’s federal habeas petition was controlled by the more recent Antiterrorism and Effective Death Penalty Act, which generally forbids evidentiary hearings to

⁸ Vienna Convention on Consular Relations, Optional Protocol Concerning the Compulsory Settlement of Disputes art. 1, Apr. 24, 1963, 21 U.S.T. 325, T.I.A.S. No. 6820. The U.S. ratified the optional protocol in 1969 and withdrew from it in 2005. See *Sanchez-Llamas*, 126 S. Ct. at 2692 (Breyer, J., dissenting).

⁹ See Margaret E. McGuinness, *Sanchez-Llamas, American Human Rights Exceptionalism and the VCCR Norm Portal*, 11 LEWIS & CLARK L. REV. 47, 54–58 (2007) (discussing the reasons why Article 36 litigation in the U.S. has most often arisen in the death penalty context); see also *Medellin v. Dretke*, 544 U.S. 660, 674 (2005) (O’Connor, J., dissenting) (noting that “in 2003, over 56,000 noncitizens were held in state prisons” and that, “[a]s of February 2005, 119 noncitizens from 31 nations were on state death row.”).

¹⁰ *Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 248, 258 (Apr. 9).

¹¹ *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam).

¹² *Id.* (quoting Vienna Convention on Consular Relations, *supra* note 5, art. 36(2)).

¹³ *Id.* at 376. (citing *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion), and *Whitney v. Robinson*, 124 U.S. 190, 194 (1888)).

petitioners who fail to develop their claims in state court.¹⁴ Nor was it clear that Breard could show any prejudice from the violation of Article 36.¹⁵

The Court concluded its analysis by suggesting that it was but one of several forums in which Article 36 claims could be asserted:

It is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier. Nonetheless, this Court must decide questions presented to it on the basis of law. The Executive Branch, on the other hand, in exercising its authority over foreign relations may, and in this case did, utilize diplomatic discussion with Paraguay. Last night the Secretary of State sent a letter to the Governor of Virginia requesting that he stay Breard's execution. If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing law allows us to make that choice for him.¹⁶

Despite the Secretary of State's request, Virginia executed Breard.

The second set of proceedings revolved around Arizona's execution of two German nationals, Karl and Walter LaGrand. Germany sued the U.S. before the ICJ, alleging violations of Article 36. Once again the ICJ issued a preliminary order, this time requesting that Walter LaGrand not be executed while the case was pending before it.¹⁷ Germany then sought to file suit in the Supreme Court against the U.S. and the Governor of Arizona to ensure compliance with the ICJ order. In response, the Solicitor General argued that "an order of the International Court of Justice indicating provisional measures is not binding [on the federal courts] and does not furnish a basis for judicial relief."¹⁸ The Supreme Court rejected Germany's efforts to enforce the ICJ order, stressing the tenuous grounds for subject matter jurisdiction as well as the lateness of the request ("within only two hours of a scheduled execution").¹⁹ Arizona executed LaGrand the same day.

Germany continued to press its case before the ICJ. That court ultimately issued two important rulings. First, it held that Article 36(1)(b) "creates individual rights, which . . . may be invoked in this Court by the national State of the detained person."²⁰ Second, the court addressed the procedural default

¹⁴ *Id.* (citing 28 U.S.C. § 2254(a), (e)(2)).

¹⁵ *Id.* at 377. With respect to Paraguay's claims, the Court doubted that the Vienna Convention provided a right of action, suggested the Eleventh Amendment might also bar the claim, and held that Paraguay was not a "person" entitled to bring a claim under 42 U.S.C. § 1983. *See id.* at 377–78.

¹⁶ *Id.* at 378. The importance of the states with respect to VCCR compliance, as well as implementation of international law in general, is one of the topics pursued by Janet Koven Levit, *Sanchez-Llamas v. Oregon: The Glass is Half Full*, 11 LEWIS & CLARK L. REV. 29 (2007).

¹⁷ *See* *LaGrand Case (F.R.G. v. U.S.)*, 2001 ICJ 466, 479 (June 27). By the time Germany filed suit, Arizona had already executed Karl LaGrand.

¹⁸ *Id.* (quoting the Solicitor General's contention).

¹⁹ *Fed. Republic of Germany v. United States*, 526 U.S. 111 (1999).

²⁰ *LaGrand*, 2001 ICJ at 494. The court declared that "[t]he clarity of these provisions, viewed in their context, admits of no doubt," *id.*, but it did not discuss subsection c or the preamble.

rule. “In itself,” the court said, application of a procedural default rule “does not violate Article 36.”²¹ The court continued, however, by stressing,

The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming . . . that the competent national authorities failed to comply with their obligation to provide the requisite consular information ‘without delay’, thus preventing the person from seeking and obtaining consular assistance from the sending State.²²

In other words, the court agreed that individuals can waive their Article 36 rights, but it was unwilling to accept default where the individual was not informed of his rights. Although the court did not put it this way, it seems that failure to invoke Article 36 in such a case would not be knowing and voluntary.

Notably, the *LaGrand* court also described the “vast and detailed” efforts of the U.S. to comply with the VCCR by providing information to federal, state, and local law enforcement officials.²³ In part to avoid further litigation, and perhaps also in a good faith effort to comply with the VCCR—especially in light of the fact that multitudes of Americans abroad are also protected by its provisions—U.S. officials have prepared pamphlets and reference cards for law enforcement officials so that they can inform arrested individuals of their possible Article 36 rights in the same manner that they remind people of their *Miranda* rights.²⁴

The next case in the series is the ICJ’s *Avena*²⁵ decision. Mexico filed an Article 36 suit in the ICJ against the U.S. on behalf of fifty-four Mexican nationals, many of whom were on death row. The court’s decision in Mexico’s favor reiterated and expanded on the holdings of *LaGrand*. For example, the court provided its understanding of the basic structure of Article 36(1)(b), although not of Article 36 as a whole:

Article 36, paragraph 1(b), contains three separate but interrelated elements: the right of the individual concerned to be informed without delay of his rights under Article 36, paragraph 1(b); the right of the consular post to be notified without delay of the individual’s detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person.²⁶

The court also ruled that the phrase “without delay” “is not to be understood as necessarily meaning ‘immediately upon arrest,’” but that “there is nonetheless a duty upon the arresting authorities to give that information to an arrested person

²¹ *Id.* at 497.

²² *Id.*

²³ *Id.* at 512.

²⁴ *Id.* at 511–12; *see also* Levit, *supra* note 16, at 42–44 (discussing these efforts and the efforts of other actors in the criminal justice system); McGuinness, *supra* note 9, at 56 (discussing Article 36 litigation in the context of “norm internalization”).

²⁵ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

²⁶ *Id.* at 43.

as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.”²⁷

Perhaps most important, the court reaffirmed *LaGrand*'s conclusion that application of the procedural default doctrine to people who have not been informed of their Article 36 rights fails to give “full effect” to those rights.²⁸ The court went on to stress, as it had in *LaGrand*, that the appropriate remedy for violations of Article 36 is “review and reconsideration” of the conviction and sentence, which means “tak[ing] account of the violation of the rights” and “guarantee[ing] that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process.”²⁹

The impact of *Avena* quickly came before the Supreme Court in *Medellin v. Dretke*.³⁰ Medellín faces a death sentence in Texas and is one of the Mexican nationals specifically included in the *Avena* case.³¹ The Supreme Court agreed to decide in his case whether federal courts are bound by the ICJ's decision that U.S. courts must reconsider Medellín's Article 36 claim “without regard to procedural default doctrines,” and whether “federal court[s] should give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ's judgment.”³²

Several months after the Court granted certiorari in *Medellin*, President Bush issued a memorandum that purported to settle the issue of U.S. compliance with Article 36:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its inter-national obligations under the decision of the International Court of Justice [in *Avena*] . . . by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.³³

²⁷ *Id.* at 49.

²⁸ *Id.* at 57.

²⁹ *Id.* at 65.

³⁰ 544 U.S. 660 (2005).

³¹ See *Avena*, 2004 I.C.J. at 25. The ICJ specifically ruled that the U.S. violated Medellín's Article 36 rights. See *id.* at 53–54.

³² *Medellin*, 544 U.S. at 661–62.

³³ Memorandum from President George W. Bush to the Attorney General re: Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>. Note that the legal status and effect of this memorandum remains unclear. It is not an executive order; nor is it an executive agreement with the government of Mexico. For that reason, there is some basis to question its legal effect. Compare *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003) (suggesting foreign affairs preemption displaces state acts that are inconsistent with “express foreign policy of the National Government”) with *Ex parte Medellin*, No. AP-75207, 2006 WL 3302639 (Tex. Crim. App. Nov. 15, 2006) (holding the memorandum is an unconstitutional act).

A few days later, the U.S. withdrew from the optional protocol that gives the ICJ jurisdiction over VCCR disputes.³⁴

In light of the President's memorandum, Medellín filed a new habeas petition in Texas state court. The Supreme Court then dismissed the writ of certiorari in *Medellin* as improvidently granted, because the Texas proceeding "may provide Medellín with the very reconsideration of his Vienna Convention claim that he now seeks in the present proceeding," and because merits briefing "revealed a number of hurdles Medellín must surmount before qualifying for federal habeas relief in this proceeding"³⁵ The Court explained that violations of treaties may not be cognizable in federal habeas proceedings and that Medellín may not be able to show that the Texas courts' prior treatment of his claim "was contrary to, or an unreasonable application of, clearly established Federal law"³⁶ With the case back in state court, the Supreme Court would still have the option of reviewing Medellín's claims on direct review, and the federal habeas hurdles identified by the Court would no longer apply.

All of which brings us to *Sanchez-Llamas*. Moises Sanchez-Llamas is a Mexican national, but he is not a party to the *Avena* litigation and has not been convicted of a capital offense.³⁷ The other petitioner, Mario Bustillo, a Honduran national, also has not been convicted of a capital offense.³⁸ Neither man was informed of his Article 36 rights by Oregon or Virginia authorities at the time he was arrested.³⁹ In a pretrial motion, Sanchez-Llamas sought suppression of incriminating statements he made during interrogation, on the ground that they had been obtained in violation of Article 36.⁴⁰ Although Bustillo did not raise an Article 36 claim until state habeas—which meant that he defaulted the claim under state law—he conceded that his trial attorney was aware of his Article 36 rights.⁴¹ Both cases came to the Supreme Court on review of state court decisions.

Thus, neither case involved the intricacies of federal habeas corpus or the impact of the *Avena* litigation with respect to the specific individuals named in that case. Instead, the Court took the case to decide three questions:

First, does Article 36 create rights that defendants may invoke against the detaining authorities in a criminal trial or in a postconviction proceeding?

³⁴ Letter from Condoleezza Rice, Sec'y of State, to Kofi A. Annan, Sec'y-Gen. of the United Nations (Mar. 7, 2005), *cited in* *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2692 (2006) (Breyer, J., dissenting).

³⁵ *Medellin*, 544 U.S. at 662.

³⁶ *Id.* at 664. The Court also suggested that Medellín's claims might require the improper creation of a "new rule" of law, that he might not qualify for a certificate of appealability because an alleged treaty violation is not the same thing as "the denial of a constitutional right" required by federal law, and that his claims relating to the ICJ decision may not have been exhausted. *Id.* at 665–66.

³⁷ *See Sanchez-Llamas*, 126 S. Ct. at 2675–76.

³⁸ *See id.* at 2676.

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See id.*; *id.* at 2690 (Ginsburg, J., concurring in the judgment).

Second, does a violation of Article 36 require suppression of a defendant's statements to police? *Third*, may a State, in a postconviction proceeding, treat a defendant's Article 36 claim as defaulted because he failed to raise the claim at trial?⁴²

The Court dodged the first question and answered the second and third in favor of the states and against the petitioners.

Writing for a five justice majority, Chief Justice Roberts addressed the first issue in the following way:

Because we conclude that Sanchez-Llamas and Bustillo are not in any event entitled to relief on their claims, we find it unnecessary to resolve the question whether the Vienna Convention grants enforceable rights. [F]or purposes of addressing petitioners' claims, we assume, without deciding, that Article 36 does grant Bustillo and Sanchez-Llamas such rights.⁴³

Turning to the second question—whether suppression is the appropriate remedy for statements obtained in violation of Article 36—Roberts noted that the VCCR does not require any specific remedies, so that “the question of the availability of the exclusionary rule for Article 36 violations is a matter of domestic law.”⁴⁴ He then added—unnecessarily given the previous conclusion—that “[i]t would be startling if the Convention were read to require suppression.”⁴⁵ Roberts explained that the exclusionary rule is an American innovation and, engaging in a bit of comparative analysis, noted that “the automatic exclusionary rule applied in our courts is still ‘universally rejected’ by other countries,” with the result that the other signatories to the VCCR almost certainly did not contemplate a remedy that they refuse to apply in their own courts.⁴⁶

At this point, the federalism and separation of powers aspects of the case—and the accompanying scope of federal judicial authority in treaty interpretation—emerged. The Chief Justice first noted that the Supreme Court has no supervisory authority over the state courts and so can impose the exclusionary rule as a remedy only if the treaty provides the authority to do so.⁴⁷ Next, he declared that “where a [self-executing] treaty provides for a particular judicial remedy, there is no issue of intruding on the constitutional prerogatives of the States or the other federal branches.” “But,” he went on to say, “where a treaty does not provide a particular remedy, either expressly or

⁴² *Id.* at 2674 (majority opinion).

⁴³ *Id.* at 2677–78. Compare the Ninth Circuit's treatment of the issue in *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000) (en banc), in which the court reached the same result but only after an extended discussion that was more sympathetic to the claim that the VCCR establishes individual rights.

⁴⁴ *Sanchez-Llamas*, 126 S. Ct. at 2678.

⁴⁵ *Id.*

⁴⁶ *Id.* (quoting Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375 (2001)). For discussion of Chief Justice Roberts' use of foreign sources and his dialogue with the ICJ, see Melissa A. Waters, *Treaty Dialogue in Sanchez-Llamas: Is Chief Justice Roberts a Transnationalist, After All?*, 11 LEWIS & CLARK L. REV. 89 (2007).

⁴⁷ *Sanchez-Llamas*, 126 S. Ct. at 2679.

implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.”⁴⁸

Sanchez-Llamas argued that the VCCR implicitly requires exclusion because Article 36 requires domestic law to give “full effect” to the rights it protects. Roberts responded in two ways. First, he suggested—again relying on the practice of other countries—that Article 36 may not require any judicial remedies at all.⁴⁹ Second, he noted that the VCCR also requires Article 36 rights to be “exercised in conformity with the laws and regulations of the receiving State.”⁵⁰ What the Chief Justice meant is that Article 36 implicitly requires the exclusionary rule only in situations in which that rule would be applied under domestic law. And, as a matter of domestic law, “the exclusionary remedy is not a remedy we apply lightly” due to its “considerable” social costs.⁵¹ Exclusion deters violations of constitutional rights, but Article 36 does not implicate constitutional rights and “is at best remotely connected to the gathering of evidence.”⁵² Nor does a violation of Article 36 undermine the reliability of confessions. Whatever interests Article 36 serves are adequately protected, Roberts concluded, by due process and the privilege against self-incrimination, including the question whether a statement was voluntary (to which the failure to provide Article 36 notification might be relevant).⁵³

Worth noting with respect to the exclusionary rule issue is that the decision works in only one direction. As a matter of federal law, state courts are not required to apply the exclusionary rule for violations of Article 36, but the majority opinion appears to leave open the ability of state courts to suppress evidence as a matter of state law. This conclusion gains strength from the majority’s invocation of federalism, which it raised in the context of deciding not to burden the states with obligations that go beyond the treaty. At least at a general level, the federalism concern seems to forbid foreclosing remedies at least as much as it forbids requiring them.

The Court next considered the third question—whether a state may treat an Article 36 claim as procedurally defaulted. Roberts initially noted that

⁴⁸ *Id.* at 2680. Chief Justice Roberts also asserted that to require suppression without authority in the Convention “would in effect be supplementing [the terms of the Convention] by enlarging the obligations of the United States under the Convention.” *Id.* at 2679.

⁴⁹ *Id.* at 2680.

⁵⁰ *Id.* (quoting Vienna Convention on Consular Relations, *supra* note 5, art. 36(2)).

⁵¹ *Id.* This part of the opinion joins an array of relatively recent Supreme Court opinions that have undermined the exclusionary rule as a core remedy for violations of legal rights, including Justice Scalia’s opinion for the Court last Term in *Hudson v. Michigan*, 126 S. Ct. 2159, 2165–68 (2006).

⁵² *Sanchez-Llamas*, 126 S. Ct. at 2681.

⁵³ *Id.* at 2681–82. In addition, the Chief Justice gave short shrift to Sanchez-Llamas’s claim that violations of Article 36 give prisoners “a misleadingly incomplete picture of [their] legal options,” and that exclusion would create an incentive for officials to inform prisoners of their Article 36 rights. Roberts doubted that “it is the role of police generally to advise defendants of their legal options,” *Id.* at 2681, a statement that echoes recent Fourth Amendment jurisprudence as well as the Court’s treatment of Bustillo’s procedural default argument in the next part of *Sanchez-Llamas*.

Breard had addressed this question and ruled in the state's favor, and the Court rejected Bustillo's claim that *Breard's* treatment of the issue had been unnecessary and thus was not a controlling precedent.⁵⁴

Bustillo's more important argument was that *Breard's* acceptance of procedural default rules as a bar to Article 36 claims had been superseded by the ICJ decisions in *LaGrand* and *Avena*. The Court's rejection of this argument began with "first principles"—an invocation of Chief Justice Marshall's claim in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁵⁵ The Chief Justice's point was that the federal courts must determine the meaning of treaties to the extent they function as federal law. By contrast, the relationship of the ICJ to U.S. law is much weaker; "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts."⁵⁶ In fact, ICJ decisions "have 'no binding force except between the parties and in respect of that particular case . . .'"⁵⁷ Roberts then declared that if ICJ decisions do not have precedential value for that court—not to mention that they can only be enforced diplomatically—they cannot control the decisions of federal courts. And, he continued, the fact that the executive branch has withdrawn from the optional protocol that gave the ICJ jurisdiction over VCCR disputes further undermines the claim that they should dictate the outcome of federal court litigation, in part because "the meaning given [treaties] by the departments of government particularly charged with their negotiation and enforcement is given great weight."⁵⁸

In sum, the Court held that ICJ decisions are not controlling, but it also reaffirmed *Breard's* statement that they are entitled "to the 'respectful consideration' due an interpretation of an international agreement by an international court."⁵⁹ Yet having said that, the Chief Justice immediately asserted that the ICJ's reasoning in *LaGrand* and *Avena* "cannot overcome the plain import of Article 36."⁶⁰ In other words, the majority adhered to *Breard's* conclusion that otherwise valid procedural default rules are consistent with

⁵⁴ *Id.* at 2682–83.

⁵⁵ 5 U.S. (1 Cranch) 137, 177 (1803); see *Sanchez-Llamas*, 126 S. Ct. at 2684 (quoting this language).

⁵⁶ *Sanchez-Llamas*, 126 S. Ct. at 2684.

⁵⁷ *Id.* (quoting Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, T.S. No. 993).

⁵⁸ *Id.* at 2685 (quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)). Whether Chief Justice Roberts really gave meaningful weight to the executive branch's position is less clear, but his reference to that idea stands in contrast to a different majority's unwillingness to accord deference to the executive branch's interpretation of the Geneva Conventions in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), decided the following day.

⁵⁹ *Id.* (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998)); see also Julian G. Ku, *Sanchez-Llamas v. Oregon: Stepping Back from the New World Court Order*, 11 LEWIS & CLARK L. REV. 17 (2007) (discussing the Court's interaction with the ICJ).

⁶⁰ *Sanchez-Llamas*, 126 S. Ct. at 2685.

Article 36 rights because those rights must be exercised “in conformity with” domestic law.⁶¹

Nor was the Chief Justice impressed with the ICJ’s identification of the failure to notify as the crucial distinction between valid and invalid defaults. Here, the problem was that the ICJ failed to appreciate the distinctiveness of the adversary system, which relies on the parties to assert their rights.⁶² Roberts also analogized to the *Miranda* warnings: people placed under arrest have the burden of raising the violation of their Fifth Amendment rights whether or not they receive the warnings, so that police failure to give the warnings cannot excuse a defendant’s failure to claim a violation of those protections.⁶³

The Chief Justice did not mention—although he could have—the fact that apart from *Miranda*, the Constitution often does not guarantee a right to be informed of one’s rights. For example, when police officers ask someone to consent to a search, they do not have to inform that person that he or she has the right to refuse consent.⁶⁴ Nor is it even clear that law enforcement officials must inform a person at the time of arrest what he or she is being arrested for.⁶⁵ One could conclude that U.S. constitutional discourse at least sometimes prefers rights that are waived and even unknown rather than asserted, and the analysis in this section of *Sanchez-Llamas* plainly supports that theory.⁶⁶

Indeed, *Sanchez-Llamas* arguably goes a step further, because despite the formal similarity there is a significant practical difference between *Miranda* rights and Article 36 rights. As the Supreme Court itself has recognized, the

⁶¹ *Id.* at 2686.

⁶² *Id.*

⁶³ *Id.* at 2687 (citing *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)). Roberts also rejected Bustillo’s claim that the better analogy was to the prosecution’s obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose exculpatory evidence. He explained that, [i]n the case of a *Brady* claim, it is impossible for the defendant to know as a *factual* matter that a violation has occurred before the exculpatory evidence is disclosed. By contrast, a defendant is well aware of the fact that he was not informed of his Article 36 rights, even if the *legal* significance of that fact eludes him. *Sanchez-Llamas*, 126 S. Ct. at 2687 (emphasis in original).

Whether or not *Brady* really is a good analogy, the Chief Justice’s purported distinction exhibits a logic that has terrifying implications. The Court declared that Bustillo was “well aware” of something that not only never happened but also that a person in his situation likely would have no reason to expect. That kind of “awareness” can have legal significance for criminal justice purposes only under a formalism that is not only rigid in the extreme but that also seems to treat “rights” as a kind of paperwork or better yet as something neither seen nor heard. See *infra* note 66 and accompanying text. Roberts’ analysis only works if one remembers that Bustillo himself—or at least his lawyer—had some actual awareness of what the failure meant, and had that awareness at a meaningful time. See *Sanchez-Llamas*, 126 S. Ct. at 2690 (Ginsburg, J., concurring in the judgment). Whether subsequent courts will parse the Chief Justice’s assertion as carefully, or whether they will simply apply his conclusion in other contexts, remains to be seen.

⁶⁴ See *United States v. Drayton*, 536 U.S. 194, 206–07 (2002); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Florida v. Bostick*, 501 U.S. 429, 435 (1991).

⁶⁵ See *Devenpeck v. Alford*, 543 U.S. 146, 155 (2004).

⁶⁶ For additional discussion of this approach to rights, see John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. (forthcoming 2007).

Miranda warnings “have become part of our national culture,” so that a defendant who has not received them might realize that something is amiss.⁶⁷ Similarly, defense attorneys long have known that they need to determine whether the warnings were given or, if given, disregarded.⁶⁸ By contrast, foreign nationals are much less likely to know about their rights under Article 36, and until very recently the same was almost certainly true of their lawyers—although that has begun to change.⁶⁹ My point is simply that underneath the formal similarity between *Miranda* and Article 36, there is a world of practical difference, but the majority admitted none of it.⁷⁰

Justice Ginsburg concurred in the judgment. She agreed with the dissent that Article 36 creates individual rights that are enforceable in U.S. courts, but she nonetheless voted to deny relief. With respect to application of the exclusionary rule, she indicated that a defendant could almost never be entitled to suppression merely for violation of Article 36, and that *Miranda* and the due process voluntariness test would adequately protect foreign nationals.⁷¹ On the issue of procedural default, she accepted the majority’s analogy with *Miranda*. More critically she stressed the fact that Bustillo’s lawyer was aware at trial of his client’s Article 36 rights. Ginsburg’s emphasis on this fact led her to conclude that Bustillo did not fall within what she seemed prepared to accept—drawing on the dissent and *Avena*—as the proper scope of the VCCR: “Nothing the State did or omitted to do here ‘precluded counsel from . . . rais[ing] the question of a violation of the Vienna Convention in the initial trial.’”⁷²

In dissent, Justice Breyer first asserted that Article 36 creates individual rights. Whether or not it also supports an independent cause of action, he maintained that defendants at least may assert Article 36 rights in criminal cases “that might have been brought irrespective of the Vienna Convention claim.”⁷³ On this issue he wrote for four justices, while the majority was studiously noncommittal.⁷⁴ As with many questions before the Court today, the

⁶⁷ *Dickerson v. United States*, 530 U.S. 428, 443 (2000); see also Naomi Mezey, *Law as Culture*, in CULTURAL ANALYSIS, CULTURAL STUDIES, AND LAW 37, 53 (Austin Sarat & Jonathan Simon eds., 2003) (discussing the connection between the *Miranda* warnings and cultural practices and change).

⁶⁸ For a good overview of the successes and failures of *Miranda*, see WELSH S. WHITE, *MIRANDA’S WANING PROTECTIONS: POLICE PRACTICES AFTER DICKERSON* (2001).

⁶⁹ See *supra* notes 23–24 and accompanying text.

⁷⁰ Seen in this light, one could read the majority’s concluding statement—“It is no slight to the Convention to deny petitioners’ claims under the same principles we would apply to an Act of Congress, or to the Constitution itself,” *Sanchez-Llamas*, 126 S. Ct. at 2688—as a chilling assertion of a stance not just toward rights under international law but to all assertions of rights under any source of law.

⁷¹ *Id.* at 2688–89 (Ginsburg, J., concurring in the judgment).

⁷² *Id.* at 2690 (quoting *id.* at 2700 (Breyer, J., dissenting) (quoting *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 57 (Mar. 31))).

⁷³ *Id.* at 2694 (Breyer, J., dissenting).

⁷⁴ Justice Ginsburg joined only this part of the dissent, but Justices Stevens and Souter joined the entire dissent. See *id.* at 2690. For discussion of the private rights-private right of

issue of enforceable rights under the VCCR may thus reduce to the question, what will Kennedy do?

On the procedural default issue, Breyer contended that the best interpretation of the VCCR is that

a State's ordinary procedural default rules apply *unless* (1) the defendant's failure to raise a Convention matter . . . can itself be traced to the failure of the police (or other governmental authorities) to inform the defendant of those Convention rights, *and* (2) state law does not provide any other effective way for the defendant to raise that issue (say, through a claim of ineffective assistance of counsel).⁷⁵

He also asserted that the ICJ's *Avena* and *LaGrand* decisions "interpret the Convention similarly"—that is, "simply to require an effective remedy."⁷⁶ This last point was important, because even assuming that the ICJ's decisions are not binding, they still deserve "respectful consideration," especially when the issue is treaty interpretation.⁷⁷ In his view, the majority not only failed to give respectful consideration to the ICJ; it misrepresented the ICJ's reasoning and holdings.⁷⁸ A correct reading of the decisions, he claimed, would support his conclusion that Bustillo was entitled to an effective remedy of some kind.

On the question whether the exclusionary rule is the appropriate remedy, Breyer agreed that it should not be an automatic remedy, but he disagreed with the majority's broad conclusion that it is not an appropriate remedy at all under federal law. He suggested that there may be times when other doctrines, such as *Miranda*, will fail to protect the interests implicated by Article 36, and in such cases "suppression of a confession may prove the only effective remedy. I would not rule out the existence of such cases in advance."⁷⁹

As for the claim that the drafters of the VCCR would not have anticipated suppression, Breyer responded that they were "fully aware" of the differences among legal systems, including the different remedies that might be available, and that they responded to these differences by simply requiring some kind of effective remedy.⁸⁰ Where suppression is the only effective remedy, therefore, Article 36 demands it.⁸¹ Going further, he suggested that these differences among legal systems—particularly the difference between adversarial and inquisitorial criminal justice systems—explain why a formal exclusionary rule

action issue, see Paul B. Stephan, *Private Remedies for Treaty Violations after Sanchez-Llamas*, 11 LEWIS & CLARK L. REV. 65 (2007).

⁷⁵ *Sanchez-Llamas*, 126 S. Ct. at 2698 (Breyer, J., dissenting) (emphasis in original).

⁷⁶ *Id.* at 2699–2700.

⁷⁷ *Id.* at 2700 (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998)).

⁷⁸ *Id.* at 2702. He also disputed the majority's reliance on *Breard* because it was decided before the ICJ opinions, it concerned a federal procedural default rule rather than a state rule, and it was a per curiam decision that was issued in haste. See *id.* at 2703–05.

⁷⁹ *Id.* at 2706.

⁸⁰ *Id.* at 2706–07.

⁸¹ *Id.* at 2707.

is relatively rare in other countries, with the result that its rarity does not support refusing to apply it in the U.S.⁸²

* * *

Five months after *Sanchez-Llamas* was decided, the Texas Court of Criminal Appeals issued its decision in *Ex parte Medellín*.⁸³ Relying in part on *Sanchez-Llamas*, the court rejected Medellín's claims and, for good measure, held that President Bush's memorandum declaring that state courts would enforce the *Avena* decision was unconstitutional.⁸⁴ Yet Medellín was included in the *Avena* litigation, with the result that in his proceedings the ICJ's decision may be entitled to more than the "respectful consideration" it received in *Sanchez-Llamas*. This distinction, combined with the Texas court's presidential power holding, suggests that Medellín may soon have another chance to present his claims in the Supreme Court.

The debate over the meaning of Article 36, its application by and in U.S. courts, and the interaction between U.S. courts and international tribunals thus continues. *Sanchez-Llamas* commands an important place in this debate, in part for what it decides but also for the way in which the justices have joined issue on questions that remain open and will soon require their attention once again. The essays in this symposium point the way to resolution of some of these questions and provide the tools for engaging with all of them.

⁸² *Id.*

⁸³ *Ex parte Medellín*, No. AP-75207, 2006 WL 3302639 (Tex. Crim. App. 2006).

⁸⁴ *See id.*; Bush, *supra* note 33.