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SANCHEZ-LLAMAS V. OREGON: THE GLASS IS HALF FULL

by
Janet Koven Levit*

Although the Supreme Court's recent decision in Sanchez-Llamas v. Oregon limited the remedies available under the Vienna Convention, all is not lost. First, by avoiding the question of the judicial enforceability of the treaty, the Court fundamentally preserved a role for courts in vindicating Vienna Convention transgressions. State courts, often the foreign national's initial touch point with the criminal justice system, will thus remain a significant venue for Vienna Convention claims. However, international legal scholars and practitioners often neglect the role of state courts in the making and enforcing of international law. Thus, the international legal community should focus additional attention on educating state court judges, as well as preparing practitioners to address such international issues that will inevitably arise in state court. Second, while the Sanchez-Llamas Court eliminated some criminal remedies, it did not curtail civil remedies that might be available for foreign nationals who have not been afforded Vienna Convention protections. Third, diffuse transnational legal processes, involving a multitude of judicial and non-judicial actors, have helped entrench Vienna Convention rights over the past decade; in maintaining a role for the judiciary and thus preserving the underlying institutional status quo, the Court did little to stymie or disrupt these constitutive processes.

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I. INTRODUCTION

On the day the Court decided *Sanchez-Llamas v. Oregon*, my Dean sent me condolences: "I know there was a tug on your heart earlier this week when the U.S. Supreme Court ruled adversely on the Vienna Convention issues that you care about so much."¹ My reply was, in my Dean's view, surprisingly

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¹ E-mail from Dean Robert Butkin to Janet Koven Levit, Associate Professor,

sanguine.

Certainly, on one level, the Court's decision was a defeat for Vienna Convention advocates, for it circumscribed viable remedies in the face of Vienna Convention transgressions.² Indeed, the Court concluded that the Vienna Convention does not demand suppression of incriminating statements in the wake of Article 36 violations and that the exclusionary rule is an appropriate remedy only when *domestic* law favors its application.³ Furthermore, the Court decided that Vienna Convention claims do not trump state procedural bar rules, thus resolving one issue left unanswered in last Term's *Medellin* case.⁴ Yet, at the same time, the Court conspicuously shies from the threshold question, "whether Article 36 of the Vienna Convention grants rights that may be invoked by individuals in a judicial proceeding."⁵ Instead, it simply assumes (without deciding) that the rights in Article 36 of the Vienna Convention are "judicially enforceable."⁶

Some may view *Sanchez-Llamas* as a glass that is half empty, interpreting the Court's tactics as a mere ploy, a strategic end-run that essentially enables the Court to curtail the practical utility of such rights through shaving remedies. I, on the other hand, choose to view the glass as half full. In this instance, the Court's ringing silence leaves room for state courts, federal courts, and a host of other sub-national and non-state actors to continue their Vienna-Convention-related efforts. Thus, *Sanchez-Llamas* leaves me cautiously optimistic about the integrity and longevity of Vienna Convention rights.

II. LEAVING THE COURT HOUSE DOORS OPEN

One practical effect of the Court's decision (or lack thereof) is that the "court house doors," for the time being, remain open (admittedly not wide open, but open nonetheless). Consider what could have happened had the Court decided that Article 36 was *not* judicially enforceable, but rather a mere diplomatic pact between states. In such a scenario, courts—judges, litigators, and, for the most part, individual defendants—would have been out of the Vienna Convention business all together. While I suggest in Part III that this eventuality would not have spelled doomsday for Vienna Convention

University of Tulsa College of Law (June 30, 2006) (on file with author).

² Article 36 of the Vienna Convention on Consular Relations provides that detaining officials must inform a foreign national "without delay" of his right to request that his consulate be informed of the detention. Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. In turn, foreign consulates must be free to communicate with, visit, and/or arrange legal representation for foreign nationals. *Id.* art. 36(1)(a), (c). State parties to the Convention must give "full effect" to the aforementioned rights. *Id.* art. 36(2).

³ *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2674, 2680–82 (2006).

⁴ *Medellin v. Dretke*, 544 U.S. 660 (2005) (per curiam). See generally Janet Koven Levit, *Medellin v. Dretke: Another Chapter in the Vienna Convention Narrative*, 41 TULSA L. REV. 193 (2005).

⁵ *Sanchez-Llamas*, 126 S. Ct. at 2677.

⁶ *Id.* at 2674.

protections largely due to the irrepressible transnational legal processes that have already been unleashed, such a decision would certainly have disenfranchised some transnational actors, shifted compliance incentives, and inexorably altered the advocacy geography.

Instead, the Court, in avoiding the threshold question of judicial enforceability, tacitly decides not to divest lower courts of a role in Vienna Convention matters. Granted, the Court's decision, by squeezing lower courts' remedial arsenal, limits the role that such courts may play. Yet, in the wake of *Sanchez-Llamas*, courts importantly retain a role. First, "[a] defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police."⁷ Furthermore, if a foreign national defendant "raises an Article 36 violation at trial," then the "court can make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance."⁸ A foreign national may be able to wrap the Vienna Convention transgression into a Sixth Amendment ineffective-assistance-of-counsel claim, particularly if trial counsel failed to inform a client of his rights under Article 36, and such claims may not be susceptible to procedural default rules.⁹ Albeit a formidable threshold, if a defendant has

⁷ *Id.* at 2682. See generally William G. Phelps, Annotation, *Duty of Court, in Federal Criminal Prosecution, to Conduct Inquiry into Voluntariness of Accused's Statement*, 132 A.L.R. FED. 415 (1986).

⁸ *Sanchez-Llamas*, 126 S. Ct. at 2682.

⁹ The availability of an ineffective assistance of counsel claim to vindicate Vienna Convention rights was a source of dialogue among the Justices. *Id.* at 2686; *id.* at 2690 n. 3 (Ginsburg, J., concurring in the judgment); *id.* at 2699 (Breyer, J., dissenting). Of particular note is *Valdez v. State*, 46 P.3d 703 (Okla. Crim. App. 2002). This case involved a Mexican national who was convicted of murder in 1989 and sentenced to death without any state official, or his attorney, informing him of his Article 36 rights. The Mexican consulate became involved, after Oklahoma set Mr. Valdez's execution date, only upon learning of the execution from Valdez's family. *Id.* at 705. During the course of Valdez's post-conviction appeals, the I.C.J. decided the *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27). On the basis of the *LaGrand Case*, Valdez filed a subsequent post-conviction petition for relief, arguing that the Oklahoma courts should waive the applicable procedural bar rules because of an intervening change in the law. *Valdez*, 46 P.3d at 708. While the Oklahoma Court of Criminal Appeals concluded that the legal basis for Valdez's Article 36 claim was "not new" and "was available at the time of" Valdez's first petition and thus does not satisfy Oklahoma's statutory standards for subsequent petitions for post-conviction relief, *id.* at 709, the court nonetheless granted petitioner's petition and remanded for resentencing on the basis of ineffective assistance of counsel. *Id.* at 710–11. The Oklahoma court found that counsel was "inexperienced in capital cases," and "did not have the financial resources available to properly investigate Petitioner's childhood, social history, or other aspects of his life." *Id.* at 710. The Oklahoma court further found that the Mexican consulate's involvement was pivotal in discovering significant and important evidence, including evidence of "severe organic brain damage" that "greatly contributed to and altered his behavior," *id.* at 706, 710, and that this evidence might have changed the sentencer's "balance of aggravating and mitigating circumstances" against the death sentence. *Id.* at 710 (citing *Strickland v. Washington*, 466 U.S. 668, 695 (1984)). While the decision is technically based on an ineffective assistance of counsel claim, the ineffectiveness of Valdez's counsel is inextricably linked to the Vienna Convention issues:

Although this Court has addressed claims relating to trial counsel's effectiveness in his prior appeals, in those appeals, this Court was not presented with a claim that trial court

defaulted Article 36 claims, such a defendant can overcome state procedural bar rules by demonstrating “cause” and “prejudice.”¹⁰ Some will undoubtedly retort that the aforementioned remedial options are vacuously narrow, with little functional utility. While this claim may be true, it is beyond the scope of this Essay to assess the breadth or depth of the judiciary’s ongoing role in mediating Vienna Convention disputes. My modest claim is that the analytic cadence of the Court’s decision preserves *some* role for courts.

A. State Courts

While Article 36 of the Vienna Convention may attach in some administrative settings, most Vienna Convention questions will arise in the criminal context.¹¹ Despite a “federalization” of some areas of criminal law,¹² state courts will remain a significant judicial “port of entry” for Article 36 claims.¹³ Thus, unless the Court answers the “unanswered question” of judicial enforceability of Vienna Convention rights in the negative, state courts will remain the initial touch point for many Vienna Convention issues.

Yet, until recently,¹⁴ international legal scholars and practitioners have

failed to discover evidence relating to Petitioner’s social, mental, and health history [history that the Mexican Consulate was able to discover]. This Court was not presented with a claim that trial counsel did not inform Petitioner he could have obtained financial, legal and investigative assistance from his consulate . . . In hindsight, and so many years following Petitioner’s conviction and direct appeal, it is difficult to assess the effect consular assistance, a thorough background investigation and adequate legal representation would have had. However, this Court cannot have confidence in the jury’s sentencing determination and affirm its assessment of a death sentence where the jury was not presented with very significant and important evidence bearing upon Petitioner’s mental status and psyche at the time of the crime.

Id. at 710.

¹⁰ *Sanchez-Llamas*, 126 S.Ct. at 2682 (citing *Massaro v. United States*, 538 U.S. 500, 504 (2003)).

¹¹ See Vienna Convention on Consular Relations and Optional Protocol on Disputes, *supra* note 2, art. 36 (when “the competent authorities of the receiving State” arrest, commit “to prison or to custody pending trial,” or otherwise detain a foreign national from a “sending State,” such authorities shall “without delay” inform such foreign national of his right to contact the consulate).

¹² See generally TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS’N, *THE FEDERALIZATION OF CRIMINAL LAW* (1998).

¹³ I borrow this useful term from Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006), available at <http://www.yalelawjournal.org/pdf/115-7/Resnik.pdf>.

¹⁴ For example, the International Law Association’s International Law Weekend recently hosted a panel titled, “State Courts and Transnational Decision-Making: The Road Ahead.” See Int’l Law Ass’n, *International Law Weekend 2006: The Evolving World of International Law 26* (Oct. 28, 2006), available at <http://www.omm.com/webcode/webdata/content/newsevents/ilw.pdf> (program describing the event). Also, see generally Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457 (2004); Thomas R. Phillips, *State Supreme Courts: Local Courts in a Global World*, 38 TEX. INT’L L.J. 557 (2003); Shirley S. Abrahamson & Michael J. Fischer, *All the World’s a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273 (1997).

largely overlooked the role of state courts in the making and implementing of international law. That international legal scholars have neglected state courts is likely just a specific manifestation of a much broader reality—in elite legal circles, state courts are generally treated as an afterthought. Furthermore, the role of state courts as transnational actors is regrettably caught in the crosswind of several contentious debates within the international legal academy.¹⁵

One real consequence of the academy's failure to recognize state courts as transnational actors is that state courts, state judges, and state bars remain ill-equipped to grapple with questions of international law, especially questions as complicated as those posed by the Vienna Convention. Thus, it is incumbent upon those who consider themselves part of any semblance of an "international legal community"—those who care about the enforcement and furtherance of international law and legal commitments—to recognize that in practice state courts are significant transnational actors and to educate state judges and state bars on the fundamentals of international law.

Supreme Court Justices have gained much appreciation for transnational law through their participation in international conferences and informal meetings with their foreign counterparts.¹⁶ Federal judges and foreign judges

¹⁵ In particular, I refer to those debates regarding the domestic legal status of customary international law (CIL), federal pre-eminence in foreign affairs and international law, and substantive limitations on the Article II Treaty power. Those who view international law as a process engaging a multitude of transnational actors (state courts presumably included among them) also tend to defend a view of the U.S. Constitution whereby the federal government and federal courts remain importantly dominant in questions of international law and diplomacy, concomitantly emphasizing federal courts and federal law in scholarship and advocacy. See, e.g., Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1849 (1998) ("One need not denigrate the ability or impartiality of state court judges to recognize that the federal judges have *structural* attributes that make them more appropriate adjudicators to rule on international matters that may embroil the nation in foreign policy disputes.") State courts thereby recede in the analysis, often out of benign neglect.

On the other hand, one might expect that those who have argued that customary international law is not part of any federal common law, see generally Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000), or those who have argued in favor of substantive limitations on the executive branch's ability to bind the states through treaties, see generally Bradley, *supra*, would champion the role of states, state courts in particular, in furthering international law. Yet these same scholars tend to reject a win-win, process-oriented view of international law in favor of a zero-sum view, whereby fiercely "competing sovereign"—states, the federal government, foreign states, and international bodies—vie for "the right to control America's judicial destiny." Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 56 (2004). These scholars see states and state courts not as transnational actors but rather as transnational detractors. See, e.g., Ku, *supra* note 14.

¹⁶ Many Justices have been traveling abroad with increasing frequency; on these trips, Justices typically meet with prominent foreign jurists who illuminate foreign approaches to the same legal issues that the Court confronts today. For example, in July 2003, Justices O'Connor, Kennedy, Thomas, Ginsburg, and Breyer met with European justices to discuss the now-abandoned European Constitution. See Tony Mauro, *Supreme Court Opening Up to World Opinion*, LEGAL TIMES, July 7, 2003, at 1; Joan Biskupic, *Supreme Court Citing More*

must recognize state court judges as co-participants in the making and shaping of international legal norms and should open their cross-border judicial conversations—both formal (opinion-writing and cross-citing of foreign and international law) and informal (hobnobbing at conferences and foreign study abroad programs)—to include their state counterparts.¹⁷ In addition, efforts such as the American Society of International Law's *International Law: A Handbook for Judges* are commendable, although in focusing on "problems and issues that federal judges may confront,"¹⁸ the *Handbook* inevitably misses a host of issues that may arise before state judges.¹⁹

The legal brief is a critical vehicle to educate state judges on issues of transnational law. While Supreme Court advocacy has "sizzle" in its prestige, nongovernmental organizations ("NGOs") and international law advocacy clinics should turn some energy from filing Supreme Court amicus briefs to filing amicus briefs before the state courts that will often be the first, or primary, judicial touch point with cutting edge issues of international law. For

Foreign Cases, USA TODAY, July 8, 2003, at A9. Likewise, in the summer of 2003, Justices Ginsburg, O'Connor, and Breyer discussed the death penalty and terrorism with President Chirac. See *O'Connor Praises International Law*, WORLDNETDAILY, Oct. 27, 2004, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=41143. See also Linda Greenhouse, *Heartfelt Words From the Rehnquist Court*, N.Y. TIMES, July 6, 2003, § 4, at 3 (noting that, in addition to the meeting with the European justices, Justice Kennedy met with Chinese justices, and Justice O'Connor has been active in the ABA's reform project for Eastern Europe). Through these discussions the Justices come to see foreign law less and less as a distant, disembodied pronouncement from the "black box" of a foreign institution, but rather as the legal fruits, sometimes quite innovative, of their intelligent and charming foreign *colleagues and friends*. See Charles Lane, *Thinking Outside the U.S.*, WASH. POST, Aug. 4, 2003, at A13 (noting that two legal scholars, one critical of the Court's use of international law and one quite supportive, agree that "the justices' interest in international law has probably been influenced by meetings with fellow jurists on their frequent visits abroad"); see also Mauro, *supra*, at 8 ("On their trips overseas, the justices learn much that helps explain their new internationalism, according to [Professor] Koh and others. For one thing, they find out that foreign courts and their judges are mature, sophisticated counterparts grappling with many of the same issues the justices face back at home.").

The U.S. Judicial Conference Committee on International Judicial Relations has been particularly instrumental in facilitating this type of trans-judicial dialogue, spearheading efforts "[t]o coordinate the federal judiciary's relationship with foreign judiciaries and with official and unofficial agencies and organizations interested in international judicial relations, and the establishment and expansion of the rule of law and the administration of justice" U.S. Courts, Jurisdiction of Committees of the Judicial Conference of the United States (Feb. 9, 2006), http://www.uscourts.gov/judconf_jurisdictions.htm#top.

¹⁷ In this regard, I commend the U.S. Judicial Conference Committee on International Judicial Relations for including a state supreme court justice as a member.

¹⁸ DAVID J. BEDERMAN ET AL., *INTERNATIONAL LAW: A HANDBOOK FOR JUDGES* 1 (2003).

¹⁹ Likewise, the American Society of International Law's (ASIL) Judicial Advisory Board, ASIL's judicial outreach arm that is responsible for the publication of *International Law: A Handbook for Judges*, *supra* note 18, is comprised of federal judges from each circuit, as well as "leading judiciary experts," and it does not appear from the limited public information available that any state court judge is among the Board's membership. Press Release, Am. Soc'y of Int'l Law, Justice Ginsburg New Chair of ASIL Judicial Advisory Board (Oct. 4, 2006), available at http://www.asil.org/pdfs/pr061004_000.pdf.

instance, the Oklahoma Court of Criminal Appeals relied heavily on an amicus brief in a recent Vienna Convention case,²⁰ as evidenced by the opinion itself echoing of many of the cases and arguments appearing in that brief.²¹ The law clerk involved in this case at once commended the amici on their invaluable assistance in sorting through the international law issues and lamented that amicus briefs were a stark aberration from standard practice.²² This anecdotal experience may reflect the reality that state courts have generally not been as welcoming to amicus participation as their federal counterparts;²³ and often state practice rules create obstacles that are particularly burdensome to those who wish to file amicus briefs regarding international law issues.²⁴

At even a more basic level, it is incumbent upon those training brief writers, namely legal educators, to begin approaching transnational law as integral, rather than peripheral, to the law school curriculum. Fortunately, some significant efforts are being made in this regard. In her public speaking on transnational law, Justice O'Connor repeatedly calls upon law schools to instill in students a duty "to respect not only domestic law, but also the law of nations."²⁵ The University of Michigan Law School requires all students who

²⁰ See Brief of International Law Experts & Former Diplomats as Amici Curiae in Support of Petitioner, *Torres v. Oklahoma*, No. PCD-2004-442 (Okla. Crim. App. Apr. 30, 2004), available at <http://www.asil.org/pdfs/TorresAmicabrief.pdf>. International law experts filed a similar amicus brief on behalf of Medellín. Brief of Former United States Diplomats as Amici Curiae in Support of Petitioner, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928) (on file with author).

²¹ See *Torres v. State*, No. PCD-2004-442 (Okla. Crim. App. May 13, 2004) (Chapel, J., concurring) (copy on file with author). This dynamic—an amicus brief argument finding its way into judicial opinions—was mentioned in Sean Murphy's *Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT'L L. 579, 584 n.13 (Sean D. Murphy ed.) (2004).

²² Interview with Lou Kohlman, Law Clerk, Chambers of the Honorable Charles Chapel, Okla. Court of Criminal Appeals, in Tulsa, Okla. (Oct. 21, 2004) (notes on file with author).

²³ Sarah F. Corbally et al., *Filing of Amicus Curiae Briefs in State Courts of Last Resort: 1960-2000*, 25 JUST. SYS. J. 39, 43 (2004) ("Historically, state courts were more likely than the U.S. Supreme Court to limit the role of amicus participation in appeals.").

²⁴ While a comprehensive review of state rules regarding the filing of amicus briefs is beyond the scope of this Essay, a brief perusal of some such rules lead to these initial observations. In some states, the prospective amici must ask the court, by application, motion, brief or otherwise, for permission to file an amicus brief. See, e.g., LA. UNIF. R. CT. APP. 2-12.11; MASS. R. APP. P. 17; MISS. R. APP. P. 29; WYO. R. APP. P. 7.12(a); OKLA. STAT. tit. 22, ch. 18, § III, App., Rule 3.4(F)(4). This is different from U.S. Supreme Court practice, for example, which allows prospective amici to file a brief if all parties consent or if the Court grants permission. SUP. CT. R. 37(3).

²⁵ Justice Sandra Day O'Connor, Keynote Address at the Southern Center for International Studies 3 (Oct. 28, 2003) (transcript available at http://www.southerncenter.org/OConnor_transcript.pdf). O'Connor adds:

Law schools must ensure that their students are well-versed in the increasingly international aspects of legal practice. Some schools have already taken up the challenge: For example, NYU Law School has brought foreign law professors to the United States to share their expertise and perspectives; Yale has established a seminar for members of constitutional courts from around the world; and the Michigan Law

have entered after the fall of 2001 take a two-credit course in transnational law,²⁶ Georgetown University Law School enrolls all first year students in “Law in a Global Context,”²⁷ and Harvard Law School just modified its first-year curriculum to require all first year students to take either Public International Law, International Economic Law, or Comparative Law.²⁸ Many law school textbooks in core classes (contracts, torts, property, constitutional law, etc.) now include notes and material on relevant international and foreign law,²⁹ and some text book companies are developing supplements for case books that would offer professors an easy-to-adopt transnational law module for their courses.³⁰ The American Association of Law Schools, the umbrella organization for law schools and faculty, sponsored a workshop at its 2006 Annual Meeting, entitled “Integrating Transnational Legal Perspectives into the First Year Curriculum”³¹ and has launched a sister organization—the International Association of Law Schools.³² In a similar vein, the University of the Pacific McGeorge School of Law hosted workshops on “Globalizing the

School requires all students to complete a two-credit course in transnational law.

Id.; see also Phillip Kurata, *Justice O'Connor Says U.S. Will Help Train Judges in Arab Countries*, USINFO (U.S. Dep't of State), Sept. 17, 2003, <http://usinfo.state.gov/mena/Archive/2004/Feb/02-995699.html> (“[S]everal American law schools, such as Yale University, New York University, and the University of Michigan, will provide training in commercial arbitration, and transnational judgments for both new and experienced judges.”). Given Justice O'Connor's commitment to transnational legal education, it is not surprising that she dedicated Georgetown's new Eric E. Hotung International Law Center Building. Press Release, Georgetown Univ. Law Sch., Georgetown Law Dedicates Hotung International Building (Oct. 27, 2004), <http://www.law.georgetown.edu/news/releases/october.27.2004.html>.

²⁶ University of Michigan Law School Course List, http://cgi2.www.law.umich.edu/_ClassSchedule/CourseList.asp#FirstYearRequired.

²⁷ Georgetown Law, Introduction to the JD Program, <http://www.law.georgetown.edu/curriculum/jdprog.cfm#First>.

²⁸ Press Release, Harvard Law Sch., HLS Faculty Unanimously Approves First-Year Curricular Reform (Oct. 6, 2006), http://www.law.harvard.edu/news/2006/10/06_curriculum.php.

²⁹ See, e.g., CHARLES L. KNAPP ET AL., *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 11 (4th ed. 1999) (noting that the United Nations Convention on the International Sale of Goods is a significant source of contract law); THOMAS D. ROWE, JR. ET AL., *CIVIL PROCEDURE* ch. 1 (2004) (discussing American civil procedure in comparative perspective); GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* (5th ed. 2005) (including note material throughout on foreign law).

³⁰ See University of the Pacific McGeorge School of Law, Globalizing the Curriculum Initiative, <http://www.mcgeorge.edu/international/global/globalizing/> (referencing a “Global Issues series” of books published by Thomson-West). Aspen Publishers are apparently considering a similar project. See E-mail from Hiram Chodosh, Dean, Univ. of Utah S.J. Quinney Coll. of Law, to Janet Levit, Professor, Univ. of Tulsa Coll. of Law (Sept. 26, 2006) (on file with author).

³¹ Association of American Law Schools, Workshop on Integrating Transnational Legal Perspectives into the First Year Curriculum (Jan. 4, 2006), <http://www.aals.org/am2006/program/transnational/index.html>.

³² International Association of Law Schools, <http://www.ialsnet.org>.

Curriculum.”³³ These steps are all positive, and, hopefully, will generate transformative momentum.

Finally, educating state court judges requires that international legal scholars and practitioners appreciate that most state judges do not have life tenure and must stand for periodic re-election. Thus, even if a state judge understands how international law may impact a particular case, that judge may be unwilling to grant international law deference if perceived as unpopular or politically problematic. This dynamic is a real problem in “red states,” or America’s heartland, where fears and misperceptions of international law run deep.³⁴ Thus, educating judges and lawyers, alone, may not be enough—international scholars and educators must better educate the constituents that will elect and retain judges. Here, I believe that we, as a discipline, have been rather near sighted. International law, for the most part, is a coastal enterprise—many of the great scholars, think tanks, and international law practices reside on the coasts, and logically so. Yet, for the most part, the international legal community does not reach out to middle America, and in such neglect, we have allowed talk-radio hosts to co-opt rhetoric and mold attitudes.³⁵ Thus, we must reconceive of legal advocacy as more than brief-writing and appellate arguments—it must also encompass broader efforts to educate the public through the media and through demonstrating how international law, if not obeyed, will have real consequences at home, in places like Oklahoma and

³³ University of the Pacific McGeorge School of Law, *supra* note 30.

³⁴ See Editorial, *Under Review Merits, Not Politics, Should Decide Case*, OKLAHOMAN, May 13, 2004, at 14A (“Those [state or federal appeals courts] are the courts the state must answer to in this case. Not the world court, which was criticized by two law professors . . . [as the] ‘International Court of Hubris.’”); Kim Cobb, *Parole Board Votes to Spare Life of Mexican*, HOUS. CHRON., May 8, 2004, at A3 (in response to the ICJ’s decision in *Avena and Other Mexican Nationals*, Robert Black, spokesman for Gov. Rick Perry, said “the governor respects the world court’s right to have an opinion, but the fact remains they have no standing and no jurisdiction in the state of Texas.”). In fact, in *Torres v. Oklahoma*, Governor Henry’s decision to commute Torres’ sentence to life in prison without parole was based on the *Avena* decision. Press Release, Office of Governor Brad Henry, State of Oklahoma, Governor Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), available at http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1. The clemency decision resurfaced in the fall 2006 gubernatorial campaign. In a last ditch effort to close a growing gap in the polls, Representative Ernest Istook, the Republican gubernatorial challenger, placed Governor Henry on the defensive by dragging out the *Torres* case as a sad instance of Oklahoma bowing “to pressure from the Mexican government,” as well as pressure from “liberal and international groups that oppose the death penalty.” See Barbara Hoberock, *Istook: Henry’s Soft on Crime*, TULSA WORLD, Nov. 2, 2006, at A14; Michael McNutt, *Henry, Istook Face-off in Debate*, OKLAHOMAN, Oct. 24, 2006, available at <http://newsok.com/article/2960723>; Barbara Hoberock, *Gubernatorial Debate: Health Care, Education, Public Safety: Henry, Istook Swap Barbs*, TULSA WORLD, Oct. 24, 2006, at A13.

³⁵ A speech by Deputy Secretary-General Mark M. Brown underscored this point, noting that “much of the public discourse that reaches the US heartland has been largely abandoned to its loudest detractors such as Rush Limbaugh and Fox News.” Mark Malloch Brown, Deputy Sec’y-Gen., United Nations, Address on Power and Super-Power: Global Leadership in the Twenty-First Century (June 6, 2006) (transcript available at <http://www.un.org/News/Press/docs/2006/dsgsm287.doc.htm>).

Texas, and not merely in Guantanamo or Iraq.

B. *Civil Suits*

In *Sanchez-Llamas*, the Court eliminated certain *criminal* remedies as an answer to Vienna Convention transgressions. *Sanchez-Llamas* raised his claim on direct criminal appeal, requesting that the court suppress incriminating statements, presumably as a means to shield his conviction or concomitantly reduce the length of the sentence.³⁶ Bustillo's claim involved a state court writ of habeas corpus in which he raised his Vienna Convention claims for the first time, thereby seeking habeas relief in spite of state procedural bar rules.³⁷ Yet, *Sanchez-Llamas* does not address, and thereby does not curtail, *civil* remedies.

Indeed, lower courts have occasionally considered civil damages as a means to redress Vienna Convention transgressions. Consider *Jogi v. Voges*,³⁸ in which the Seventh Circuit held that federal courts have jurisdiction over Article 36 claims under the treaty prong of the Alien Tort Statute (ATS).³⁹ Mr. Jogi, a national of India, was charged for aggravated battery with a firearm in Champaign, Illinois, on October 6, 1995.⁴⁰ Although the detaining officials knew that Jogi was an Indian national, "[a]t no time was Jogi ever informed of his right to contact the Indian consulate."⁴¹ Jogi pled guilty and served six years of a twelve year sentence, at which point he was released from his sentence, "removed from the United States and returned to India."⁴² While in prison, Jogi learned of the Vienna Convention and filed a pro se complaint against various law enforcement officials, "seeking compensatory, nominal, and punitive damages" for violation of his "International Rights" under the Vienna Convention; the ATS was the jurisdictional anchor.⁴³

Although the district court dismissed Jogi's claim for lack of subject matter jurisdiction,⁴⁴ the Seventh Circuit reversed.⁴⁵ The court initially notes that the ATS bestows jurisdiction on the federal courts for aliens' claims for torts committed in violation of "the law of nations" or "a treaty of the United States."⁴⁶ While the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain* created a formidable threshold for ATS claims raised pursuant to the "law of nations" or "customary international law,"⁴⁷ Jogi's claim, rooted instead in a

³⁶ *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2676 (2006).

³⁷ *Id.* at 2676–77.

³⁸ *Jogi v. Voges*, 425 F.3d 367 (7th Cir. 2005).

³⁹ 28 U.S.C. § 1350 (2000) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.")

⁴⁰ *Jogi*, 425 F.3d at 370.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 370–71.

⁴⁴ *Jogi v. Piland*, 131 F. Supp. 2d 1024, 1026–27 (C.D. Ill. 2001).

⁴⁵ *Jogi*, 425 F.3d at 367.

⁴⁶ *Id.* at 372.

⁴⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004) (creating a high threshold to

treaty, is not covered by the standard that *Sosa* creates.⁴⁸ The Seventh Circuit continues its analysis by asking whether Article 36 creates a private right of action for damages. The court first states that the Vienna Convention is a self-executing treaty and, concomitantly, Jogi's claim is not dependent on additional, implementing legislation at the national level.⁴⁹ The court then answers the question that the Supreme Court avoided in *Sanchez-Llamas*, concluding that Article 36 does not merely create obligations between state parties but also creates individual, judicially enforceable rights.⁵⁰ Furthermore, because the Vienna Convention itself demands that "full effect be given" to the rights set forth in Article 36,⁵¹ and because no alternative remedies are available given the rather unique confluence of circumstances in Jogi's case,⁵² the court holds that Article 36 creates an implied (or private) right of action for civil damages.⁵³ While the Seventh Circuit certainly recognizes that Jogi's claim for damages in this particular case is "extravagant," the court nonetheless concludes that this "is of no legal significance" because "even nominal damages are appropriate for the vindication of a right."⁵⁴

Admittedly, commentators have sharply criticized the Seventh Circuit's approach, particularly its establishing a private right of action for Article 36 breaches.⁵⁵ The critique centers, in great part, on the question which the Court left unanswered in *Sanchez-Llamas*—whether the Vienna Convention creates judicially enforceable rights (and the attendant question of whether it creates a private cause of action). Like the Court, I choose not to resolve this question in

segregate any violation of the "law of nations" or customary international law from a small class that, as part of federal common law, would create a private right of action for damages).

⁴⁸ *Jogi*, 425 F.3d at 373.

⁴⁹ *Id.* at 378.

⁵⁰ *Id.* at 382 (after conceding that there is some ambiguity in the text of the Vienna Convention, particularly in juxtaposing the language in Article 36 regarding "rights" and individual "requests" with the general language in the Preamble which notes that the purpose of the Vienna Convention is not to "benefit individuals" but rather to "ensure the efficient performance of functions by consular posts," the court "conclude[s] that even though many if not most parts of the Vienna Convention address only state-to-state matters, Article 36 confers individual rights on detained nationals.").

⁵¹ Vienna Convention on Consular Relations, *supra* note 2, art. 36.

⁵² The court concludes that there are no available "administrative remedies," especially because this case arises after Mr. Jogi was released from prison and returned to India. Furthermore, the Seventh Circuit had already decided that the U.S.'s Vienna Convention obligations do not require suppression of statements made without a foreign national having been granted Vienna Convention rights. *United States v. Chaparro-Alcantara*, 226 F.3d 616 (7th Cir. 2000).

⁵³ *Jogi*, 425 F.3d at 385 ("In the absence of any administrative remedy or other alternative to measures we have already rejected (such as suppression of evidence), a damages action is the only avenue left. . . . We conclude, therefore, . . . that there is an implied private right of action to enforce the individual's Article 36 rights.").

⁵⁴ *Id.* at 385 (citing *Kyle v. Patterson*, 196 F.3d 695, 697 (7th Cir. 1999)).

⁵⁵ See generally Case Comment, *Jogi v. Voges*, 119 HARV. L. REV. 2644 (2006); Anthony Jones, *Jogi v. Voges: Has the Seventh Circuit Opened the Floodgates to Vienna Convention Litigation in U.S. Courts?*, 15 MINN. J. INT'L L. 425 (2006).

this brief Essay. My purpose in highlighting the *Jogi* case is to celebrate the ingenuity and creativity of our profession, as well as the steadfast tenacity of certain international norms. As the Court squeezes remedial options under the Vienna Convention, lower courts and litigants will innovate and find remedial alternatives. This legal dynamism and elasticity is only viable as long as the Court maintains a role for the judiciary in Vienna Convention claims.

III. ON-THE-GROUND TRANSNATIONAL LEGAL PROGRESS

In limiting remedial options, the Court answers some of the vexing and recurring Vienna Convention questions that have emerged and reemerged on the Court's docket,⁵⁶ particularly in the wake of the International Court of Justice's decision in *Avena and Other Mexican Nationals*.⁵⁷ At a base level, however, in avoiding the threshold question of judicial enforceability, the Court fundamentally maintains the status quo—a status quo that, as this Essay discusses below, has offered fertile opportunity for a multitude of transnational actors to entrench Vienna Convention protections. First, the Court's analysis essentially echoes the cadence of most recent federal court decisions that have addressed similar Vienna Convention claims: (1) assume that the Vienna Convention creates judicially enforceable rights; and (2) reject remedies that involve suppression, dismissal, and/or "lowering" of procedural bars.⁵⁸

⁵⁶ See *Medellin v. Dretke*, 544 U.S. 660 (2005) (per curiam) (dismissing for improvidently granting the writ of certiorari; originally accepting cert. to determine whether U.S. courts must reconsider *Medellin's* Vienna Convention claims in light of the ICJ's *Avena* decision); *Breard v. Greene*, 523 U.S. 371, 376 (1998) (while the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest," the ICJ's provision order requesting a stay would not trump either state or federal procedural default rules); *Torres v. Mullin*, 124 S. Ct. 919 (2003) (mem.) (Stevens, J., respecting the denial of the petition for writ of certiorari); *Torres v. Mullin*, 124 S. Ct. 562 (2003) (mem.) (Breyer, J., dissenting from the denial of the petition for writ of certiorari).

⁵⁷ *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

⁵⁸ *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2674 (2006). Many federal circuit courts have approached Vienna Convention questions in a similar manner, avoiding the question of whether the Vienna Convention creates judicially enforceable rights and instead resolving the question whether such violations require suppression, "lowering" of procedural bars, or dismissing the indictment. See *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000) (en banc) ("We hold that irrespective of whether or not the treaties create individual rights to consular notification, the appropriate remedies do not include suppression of evidence or dismissal of the indictment."); *United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001) ("Even if we assume *arguendo* that *De La Pava* had judicially enforceable rights under the Vienna Convention—a position we do not adopt—the Government's failure to comply with the consular notification provision is not grounds for dismissal of the indictment."); *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (finding that "even if the Vienna Convention on Consular Relations could be said to create individual rights" the defendant could not obtain habeas relief because his claim was procedurally defaulted); *United States v. Page*, 232 F.3d 536, 540 (6th Cir. 2000) (concluding that "although some judicial remedies may exist, there is no right in a criminal prosecution to have evidence excluded or an indictment dismissed due to a violation of Article 36"); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 621 (7th Cir. 2000) ("It is sufficient for present purposes to assume that such an individual right is created by the Convention and to confront squarely whether the

Additionally, *Sanchez-Llamas* undoubtedly offered the Court a ripe opportunity to transform the Vienna Convention landscape by divesting courts of Vienna Convention claims and concomitantly leaving aggrieved foreign nationals with no remedial outlet other than the whims of geopolitical diplomacy (which, in most cases, would be tantamount to no remedy all together).⁵⁹ If the Court had pursued this route, it may have diminished extant incentives to promote and institutionalize law enforcement practices that comport with the consular notification provision of Article 36. Instead, however, the Court maintains the underlying relationship between courts, foreign nationals, and Vienna Convention rights. Thus, the Court preserves the on-the-ground, day-to-day relevance of Vienna Convention practice and, therefore, does not choke the Vienna Convention-related transnational legal processes that have already been unleashed.

Sanchez-Llamas must be understood as part of a dynamic, iterative process of international lawmaking. This “international law as process” approach has deep theoretical roots, beginning with Lasswell and McDougal’s New Haven School of International Law,⁶⁰ and evolving into Dean Harold Koh’s more contemporary Transnational Legal Process School.⁶¹ The international law of consular notification rights thus presents an evolving story, with the drafting and ratification of the Vienna Convention merely the first chapter, followed by a series of ICJ cases which not only interpret Article 36 rights and obligations

exclusionary rule is the appropriate sanction for a violation of that right.”); *United States v. Lawal*, 231 F.3d 1045, 1048 (7th Cir. 2000) (same); *United States v. Ortiz*, 315 F.3d 873, 886 (8th Cir. 2002) (“Even if we assume for present purposes that the Convention creates an individually enforceable right, it would not follow, on this record, that the statements should be excluded merely because the Convention has been violated.”); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000) (en banc) (declining to decide whether Article 36 creates an individually enforceable right but concluding that suppression of evidence is an inappropriate remedy); *United States v. Minjares-Alvarez*, 264 F.3d 980, 986–87 (10th Cir. 2001) (declining to decide whether the Vienna Convention creates individually enforceable rights, but concluding that suppression is not an appropriate remedy); *United States v. Duarte-Acero*, 296 F.3d 1277, 1282 (11th Cir. 2002) (holding that a violation of the Vienna Convention does not warrant dismissal of an indictment); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000) (per curiam) (same).

⁵⁹ Respondents, Oregon and the Virginia Department of Corrections, as well as the United States as amicus curiae, argued that Article 36 does not create judicially enforceable rights and therefore the only remedy for transgressions is a “political and diplomatic” one. *Sanchez-Llamas*, 126 S.Ct. at 2677 (citing Brief for the United States).

⁶⁰ MYRES S. MCDUGAL, *INTERNATIONAL LAW, POWER, AND POLICY: A CONTEMPORARY CONCEPTION* 8 (1953); Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967); Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law is Made*, 6 YALE STUD. WORLD PUB. ORD. 249 (1980); W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC’Y INT’L L. PROC. 101, 107 (1981).

⁶¹ See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2626 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995)); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995).

but also publicize the disjuncture between treaty obligations and on-the-ground practice,⁶² and now unfolding in a series of domestic cases which grapple with the complexities of honoring Vienna Convention rights in a diffuse federal system.⁶³ This process unleashed irrepressible forces, triggering transnational dialogue and energizing multiple transnational actors in state and local government, as well as in the private sector, in ways that transcend the outcome of any particular case. The results of this transnational legal process have been at once tangible, in the form of rules, regulations and protocols designed to embody Vienna Convention rights, and intangible, shaping and molding state actors' legal consciousness. The following is a brief perusal of some of these initiatives, with a focus on non-judicial actors and institutions.

At the national level, the U.S. Department of State, with a diplomatic corps spread throughout the globe, understands that its employees—diplomats—are a primary beneficiary of Vienna Convention rights. Thus, the State Department's institutional interests are linked to the integrity of Vienna Convention rights. The State Department's Consular Notification and Outreach Division deploys staff to interface with law enforcement officials throughout the country, delineating in easy-to-understand terms what the Vienna Convention requires of detaining officials.⁶⁴ This Outreach Division also disseminates (virtually and in hard copy): flow charts that essentially map the Vienna Convention requirements; model procedures and protocols that local law enforcement agencies can adopt; a Consular Notification and Access Reference Card that provides a Miranda-esque script that law enforcement officials can use upon detaining a foreign national; translation of a consular notification script into thirteen languages; phone numbers and addresses for consulates throughout the U.S.; and training videos.⁶⁵ Some of these State

⁶² Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9); LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27); *Avena*, 2004 I.C.J. 12. See also Janet Koven Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT'L L. 163, 166–74 (2004); Levit, *supra* note 4, at 194–97.

⁶³ See, e.g., *Medellín v. Dretke*, 544 U.S. 660 (2005) (per curiam); *Torres v. Okla.*, No. PCD-2004-442 (Okla. Crim. App. May 13, 2004) (Chapel, J., concurring) (copy on file with author).

⁶⁴ James Lawrence, a Public Affairs Specialist, is charged with traveling the United States to train and educate more than 700,000 local law enforcement officials in 19,000 jurisdictions on consular notification matters. Interview with James A. Lawrence, Pub. Affairs Specialist, Consular Notification & Outreach Div., U.S. Dep't of State, in Washington, D.C. (Jan. 5, 2006)

⁶⁵ See Consular Notification & Outreach Div., U.S. Dep't of State, State Department Consular Notification & Access Activities from January 1998 to January 2006 (2006) (copy on file with author); U.S. Dep't of State, Consular Notification & Access (Sept. 2005) (CD-ROM) (copy on file with author); Consular Notification & Outreach Div., U.S. Dep't of State, Consular Notification & Access Reference Card: Instructions for Arrest and Detentions of Foreign Nationals (2004) (copy on file with author); U.S. Dep't of 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, http://travel.state.gov/consul_notify.html; U.S. Dep't of State, Arresting a Non-U.S. Citizen: Consular Notification Process, *available at*

Department documents have been incorporated essentially verbatim in state and local laws, policies and programs.⁶⁶

Sub-national governments, states and municipalities, are emerging as prominent transnational actors,⁶⁷ as evidenced by their role in embedding Vienna Convention rights. For instance, California incorporated Article 36 into its penal code, essentially requiring “every peace officer, upon arrest and booking . . . for more than two hours of a known or suspected foreign national” to “advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country.”⁶⁸ While no other state legislature has yet followed California’s lead, state administrative agencies and offices of attorneys general are taking significant steps to heighten law enforcement community awareness of their Vienna Convention obligations.⁶⁹ Likewise, local police department operating procedures incorporate Vienna Convention obligations, often creating roadmaps and consular notification forms that functionally translate treaty requirements, stated in diplomatic legalese, into on-the-ground practice.⁷⁰

<http://travel.state.gov/pdf/CNAFlowcolor.pdf>.

⁶⁶ See e.g., CAL. PENAL CODE ANN. § 834c(a)(2) (West 2006) (“The law enforcement official who receives the notification request pursuant to paragraph (1) shall be guided by his or her agency’s procedures in conjunction with the Department of State Guidelines Regarding Foreign Nationals Arrested or Detained in the United States.”); Greg Abbott, Attorney Gen. of Tex., Magistrate’s Guide to Consular Notification Under the Vienna Convention (2006), available at http://www.oag.state.tx.us/AG_Publications/pdfs/vienna_guidebook.pdf.

⁶⁷ See generally EARL H. FRY, THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS (1998) (focusing on the *foreign policy* interests and activities of states, as opposed to states’ relationship to international law and lawmaking, and providing many statistics of the mounting economic impact of states in the foreign affairs arena).

⁶⁸ CAL. PENAL CODE ANN. § 834c(a)(1). Interestingly, international tribunals that have asked what Article 36 requires of detaining officials have concluded that notification should be given somewhere within the first 24–72 hours. California’s statute is much more stringent at 2 hours.

⁶⁹ See generally OR. DEP’T. OF CORR. POLICY 40.2.10 (2005) (setting forth a department-wide policy that “[d]uring the intake process, designated Intake staff will ask the inmate if he/she is a U.S. citizen. If the inmate is identified as a foreign national” then the foreign national should be granted the right to have an official “notify the consulate” of the detention, “communicate with their consuls”, and, in turn, permit consuls to “communicate with and have access to the foreign national inmate.”); Abbott, *supra* note 66; Mass. Attorney Gen., Consular Notification Requirements: Arrest or Detention of Foreign Nationals (Nov. 2003), available at www.ago.state.ma.us/filelibrary/cjn5.pdf. The Oklahoma Law Enforcement, Education, and Training Council, a quasi-public entity, offers live and online continuing education to law enforcement officers; one training video is dedicated to consular notification. See Oklahoma Council on Law Enforcement Education and Training (CLEET), Continuing Education: Consular Notification, http://www.cleet.state.ok.us/Continuing_Education.htm.

⁷⁰ See, e.g., LOUISVILLE, KY., STANDARD OPERATING PROCEDURES FOR THE LOUISVILLE METRO POLICE DEPARTMENT, No. 10.4.5 (2005) (“Upon knowingly arresting a foreign national, officers shall . . . [i]mmediately advise the foreign national of his right to consular notification.”). See also Michael Ramage, Emerging Immigration Issues for Local Law Enforcement: A Presentation to the International Association of Chiefs of Police Legal

Non-state actors are also part of such Vienna Convention processes. The American Bar Association's Guidelines for Defense Counsel in Death Penalty Cases deploy appointed counsel to protect Vienna Convention rights, calling upon counsel to: (1) "make appropriate efforts" to determine whether the client is indeed a foreign national; (2) "advise the client of his or her right to communicate with the relevant consular office;" and (3) "obtain . . . consent" to contact the consulate and, upon receiving such consent, "immediately contact the client's consular office."⁷¹ The Pegasus Research Foundation answered (in part) Congress' post-9/11 call to enhance local law enforcement agencies' ability to "talk to each other" by creating a local-to-local data communications network.⁷² One peripheral effect of this local-to-local network is electronic consular notification functionality, thereby offering local law enforcement agencies who subscribe the electronic capability to fulfill Vienna Convention obligations.⁷³

While Vienna Convention litigation made its way through various international, national, and state courts, non-judicial actors began institutionalizing processes that, if obeyed in a meaningfully pervasive manner, would cure Vienna Convention transgressions and obviate future litigation. Perhaps fear—fear that Article 36 breaches may somehow undermine law enforcement efforts in criminal cases—motivates such actors, particularly law enforcement officials. And, in maintaining *some* role for courts, *Sanchez-Llamas* importantly preserves "fear" as an underlying motivating force (although, in constricting some remedial options, the Court certainly reduces its potency).

However, I suspect that fear is not the only, or even the principal, trigger of such transnational legal process—the litigation, particularly high-profile international litigation, widely publicized Vienna Convention violations, heightening on-the-ground awareness of Vienna Convention obligations, as well as the reciprocal benefits that U.S. nationals enjoy. Certainly, a negative decision on the question of judicial enforceability may have shifted such dynamics. Yet, international norms are resilient and malleable, evincing a type of viscosity under top-down pressure. I am inexorably drawn to the image of my children's playdough factory—place the playdough in the top of a tube, push down on a type of stopper or plunger, and out the bottom, in all directions, stream laces of colorful playdough. Otherwise put, when some legal doors

Officers Section (Sept. 25, 2005), *available at* http://www.fdle.state.fl.us/OGC/Seminar_Info_%20et_%20al/ ("Make sure your troops know of the obligation to notify foreign consul whenever ANY foreign national is detained or arrested. Have a policy in place and assure your agency follows it.").

⁷¹ AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, GUIDELINE 10.6 (2003), *available at* <http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf>.

⁷² Lee Colwell, Pegasus Research Found., 2005 Annual Report to Congress on the Local-to-Local (L2L) Information Exchange Needs & Requirements of the Nation's Local Law Enforcement Agencies (June 30, 2005), *available at* http://www.pegasusresearch.org/2005_Annual_Report_to_Congress.pdf.

⁷³ *Id.* at 2.

appear to be closing, international norms find alternative, more welcoming outlets.⁷⁴ Elsewhere I have discussed this phenomenon in the context of international human rights and international environmental law, noting how clusters of transnational actors adopt and institutionalize norms that national, top-down decision makers reject or foreclose.⁷⁵ Likewise, in this instance, transnational actors continue to innovate—from a civil suit for damages to an electronic consular notification system—and find new answers to old problems. Thus, even if *Sanchez-Llamas* had closed the court house doors all together, certain transnational legal processes had already been unleashed, and, assuming that such efforts had reached a critical mass, many of the goals of Vienna Convention litigation would continue to be served.

IV. CONCLUSION

The pessimist will undoubtedly lament the Court's limiting the type of relief available to foreign national defendants who, due to official mistake and misstep, have not been informed of their right to contact their consulate. I remain an optimist because *Sanchez-Llamas* does not upset the fundamental, underlying dynamics that have generated broad-based Vienna Convention activity. Likewise, one who views the glass as half empty might unduly fixate on the Texas Court of Appeal's recent reliance on *Sanchez-Llamas* to deny a writ of habeas corpus in *Ex parte Medellin*.⁷⁶ Instead, this Essay focuses on a glass that the Court left half full,⁷⁷ at once appreciating that the Texas Court of Appeals' remains an open venue for Vienna Convention claims, welcoming Judge Price's concurring admonition that law enforcement officials become "well-versed in the language of Article 36" and "faithfully" apprise "foreign nationals of their rights under the treaty,"⁷⁸ and celebrating the Texas Attorney General's on-the-ground efforts to anoint local magistrates (who usually interface with detainees "without delay"⁷⁹) as backstop guarantors of Vienna

⁷⁴ I owe this general insight to Judith Resnik. See Resnik, *supra* note 13.

⁷⁵ Clusters of transnational actors have essentially adopted Kyoto-like climate change regulation despite the Bush administration's decision not to send the Kyoto Climate Change treaty to the Senate for ratification, most poignantly illustrated by California's adopting Kyoto targets as state law. See Janet Koven Levit, International Law Happens: Executive Power, American Exceptionalism, and Bottom-Up Lawmaking 13–15 (2006), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=7853&context=expresso>. Likewise, clusters of private parties, NGOs, government bureaucrats, labor unions and trade associations often negotiate codes of conduct, as well as industry-wide principles and standards, reinvigorating the very international human rights norms that the executive branch has essentially abandoned as dormant, such as the unratified or non-self-executing treaties. *Id.* at 16–18.

⁷⁶ ___ S.W.3d ___, 2006 WL 3302639, at *7 (Tx. Crim App. 2006).

⁷⁷ See also Posting of Janet Levit to Opinio Juris, http://www.opiniojuris.org/archives/archive_2006_11_12-2006_11_18.shtml (Nov. 16, 2006, 3:05 EST).

⁷⁸ *Ex parte Medellin*, ___ S.W.3d ___, 2006 WL 3302639, at *27-28 (Tx. Crim App. 2006) (Price, J., concurring).

⁷⁹ See Vienna Convention on Consular Relations and Optional Protocol on Disputes, *supra* note 2, art. 36(1)(b).

Convention rights.⁸⁰ Displaced international law, like displaced water, does not immediately evaporate—it first runs in multiple directions, often re-pooling in places where evaporation is unlikely or impossible. To focus on “top-down” Vienna Convention litigation, on the Court’s affirmative decision in *Sanchez-Llamas*, without also contemplating all that is transpiring on the ground-level, is to paint a woefully incomplete picture and, perhaps, to skew our scholarly and advocacy endeavors.

⁸⁰ See Abbott, *supra* note 66, at foreword (“This Magistrate’s Guide is designed to help ensure that foreign governments can extend appropriate consular services to their nationals in the United States and that the United States complies with its legal obligations to such governments. The instructions and guidance herein should be followed by all federal, state, and local government judicial officials, insofar as they pertain to foreign nationals subject to such officials’ authority or to matters within such officials’ competence.”).