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The ICJ and Municipal Law: The Precedential Effect of the *Avena* and *Lagrand* Decisions in U.S. Courts

Philip V. Tisne

Abstract

This Note argues that neither the framers of the Optional Protocol (“the Framers”), nor the U.S. Senate that ratified it, intended to delegate to the ICJ the authority to interpret the Vienna Convention as a matter of U.S. law. Part I of this Note describes the role and function of international law in the U.S. domestic legal system. Part I then presents the structure and history of the Permanent Court of International Justice (“PCIJ”) and the ICJ (collectively, “the World Courts”). Part I also describes the history and relevant provisions of the Vienna Convention and the Optional Protocol. Part II introduces the conflict that has arisen between the ICJ and U.S. courts regarding the interpretation of Vienna Convention Article 36. Part II then surveys some statements and decisions of the PCIJ, ICJ, and other courts that bear on the scope of the authority of the World Courts to interpret municipal law. Finally, Part II introduces the self-executing approach. In Part III, this Note argues that the Optional Protocol is ambiguous regarding the authority it confers on the ICJ. Part III then asserts that the prevailing consensus, both in the United States and abroad, held that the ICJ was not authorized to interpret municipal law. The U.S. Supreme Court should resolve the Optional Protocol’s ambiguity in accordance with this prevailing consensus and hold that the Optional Protocol does not grant authority to interpret municipal law.

THE ICJ AND MUNICIPAL LAW: THE PRECEDENTIAL
EFFECT OF THE AVENA AND LAGRAND
DECISIONS IN U.S. COURTS

*Philip V. Tisne**

INTRODUCTION

In the United States, the Supremacy Clause of the U.S. Constitution makes treaties the supreme law of the land.¹ As supreme U.S. federal law, final authority to interpret treaties falls emphatically within the province of the judicial department.² However, what if the U.S. Congress delegated that interpretive authority to some non-U.S. tribunal?³ Would U.S. courts be

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1. See U.S. CONST. art. VI, cl. 2 (defining supreme federal law as U.S. Constitution, U.S. laws made in pursuance thereof, and all treaties made under U.S. authority); see also John Quigley, *Toward More Effective Judicial Implementation of Treaty-Based Rights*, 29 *FORDHAM INT'L L. J.* 522, 522 (2006) (recognizing that Supremacy Clause makes treaties supreme federal law in United States).

2. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) (stating that courts alone have duty among organs of U.S. federal government to interpret law); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 326 cmt. b (1987) [hereinafter RESTATEMENT (THIRD)] (observing that courts have final authority to interpret treaties as supreme U.S. federal law). See generally *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (holding that decisions of U.S. federal courts are final and cannot be reopened by U.S. Congress); *Case of Hayburn*, 2 U.S. (2 Dal.) 408 (1792) (holding that decisions of U.S. federal courts cannot be conditioned upon approval by Executive branch officials).

3. See Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes art. 1, done Apr. 24, 1963, 596 U.N.T.S. 487 (entered into force for United States Dec. 24, 1969) (United States withdrew March 7, 2005) [hereinafter Optional Protocol] (granting International Court of Justice ("ICJ") authority to settle disputes arising from Vienna Convention on Consular Relations ("Vienna Convention")); see also Single Convention on Narcotic Drugs art. 48, done March 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204 (entered into force for United States June 24, 1967) (granting ICJ jurisdiction if diplomatic negotiations fail to resolve disputes arising under multilateral treaty concerning international narcotics control); International Convention Against the Taking of Hostages art. 16, done Dec. 17, 1979, T.I.A.S. No. 11,081 (entered into force for United States Jan. 6, 1985) (granting ICJ jurisdiction if diplomatic negotiations and arbitration fail to resolve disputes arising under treaty for prevention and prosecution of hostage taking); accord LUKE LEE, *CONSULAR LAW AND PRACTICE* 632 n.10 (1991) (observing that treaty provision granting ICJ jurisdiction over that particular treaty ("compromissory clause") has appeared in nearly all U.S. treaties of friendship, commerce, and navigation since end of World War II); William H. Bishop & Denys P. Myers, *Unwarranted Extension of Connally Amendment-Think-*

bound to accept that tribunal's interpretations?⁴

The United States has been a party to the Vienna Convention on Consular Relations ("Vienna Convention") since 1969.⁵ Until 2005,⁶ the United States was also party to another agreement called the Optional Protocol to the Vienna Convention Concerning Compulsory Settlement of Disputes ("Optional Protocol"), which grants jurisdiction to the International Court of Justice ("ICJ") to entertain disputes arising out of the interpretation or application of the Vienna Convention.⁷ Pursuant to that jurisdiction, the ICJ adopted an interpretation of the Vienna Convention that conflicts with the interpretation adopted by most U.S. courts.⁸ In the case of *Sanchez-Llamas v. Oregon*, the

ing, 55 AM. J. INT'L L. 135, 144 (1961) (listing treaties that include compromissory clauses).

4. Compare *Torres v. Mullin*, 540 U.S. 1035, 1041 (2003) (mem.) (Breyer, J., dissenting) (quoting *Buchanan v. Rucker* (1908) 103 Eng. Rep. 546 (K.B.)) (stating that "[t]he answer to Lord Ellenborough's famous rhetorical question, 'Can the Island of Tobago pass a law to bind the rights of the whole world?' may well be yes, where the world has conferred such binding authority through treaty"), with Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. INT'L L. & POL. 35, 36-43 (1995) (indicating that vesting decision-making authority in international tribunal might violate Article III of U.S. Constitution).

5. See Vienna Convention on Consular Relations, done Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force for United States Dec. 24, 1969) [hereinafter Vienna Convention]; see also LEE, *supra* note 3, *passim* (examining incorporation of customary State practices regarding consular relations in Vienna Convention).

6. See United Nations, Status of Multilateral Treaties Deposited with the Secretary General, ch. III, § 8 n.1 (2006), available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty33.asp#N1> (reporting March 7, 2005 letter from U.S. Secretary of State to United Nations (U.N.) Secretary-General that withdrew United States from Optional Protocol); see also John R. Crook, *Contemporary Practice of the United States Relating to International Law: U.S. Strategy for Responding to ICJ's Avena Decision*, 99 AM. J. INT'L L. 489, 489-90 (2005) (discussing U.S. withdrawal from Optional Protocol); Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A1 (describing U.S. withdrawal from Optional Protocol).

7. See Optional Protocol, *supra* note 3, art. 1 (stating that ICJ shall have jurisdiction over disputes arising out of Vienna Convention); see also LEE, *supra* note 3, at 632-35 (examining framing of Optional Protocol).

8. Compare *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 35-36 (Mar. 31) (holding that Vienna Convention creates individual rights that States may invoke in ICJ on behalf of individual nationals and that United States violated such Vienna Convention by allowing doctrine of procedural default to bar appellate review of Vienna Convention claims), and *Lagrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 494 (June 27) (holding that Vienna Convention creates rights for individuals which States may invoke in ICJ on behalf of their individual citizens and that United States violated Vienna Convention by applying procedural default rules to bar review of Vienna Convention claims), with *Breard v. Greene*, 523 U.S. 371, 373 (1998) (per curiam) (holding that procedural default rule could bar review of Vienna Convention claim), and *Carde-*

U.S. Supreme Court confronts these conflicting interpretations of the Vienna Convention—specifically, does Vienna Convention Article 36 create individual rights?⁹ The ICJ says it does and the U.S. courts say it doesn't.¹⁰

There is a lively academic debate concerning whether the U.S. Congress may constitutionally transfer authority to interpret U.S. law to an international tribunal.¹¹ Some suggest that Article III and other provisions of the U.S. Constitution prohibit such international delegations, arguing that only U.S. courts may interpret treaties as a matter of U.S. law.¹² Others suggest that international delegations involve no inherent constitutional infir-

nas v. Dretke, 405 F.3d 244, 253 (5th Cir. 2005) (Vienna Convention does not create individual rights and state procedural default doctrine can bar review of Vienna Convention claims). *See generally* Brief of Respondent at 1-2, *Bustillo v. Johnson*, No. 05-51 (Jan. 31, 2006) [hereinafter *Bustillo Respondent's Brief*] (collecting U.S. state decisions holding that Vienna Convention does not create individual rights). *But see* *Jogi v. Voges*, 425 F.3d 367, 382 (7th Cir. 2005) (holding that Vienna Convention creates individual rights); *see also* *Bustillo Respondent's Brief*, *supra*, at 1 n.1 (collecting U.S. court decisions holding that Vienna Convention creates individual rights).

9. *See* *Sanchez-Llamas v. Oregon*, 126 S. Ct. 620, 620 (2005) (mem.) (granting certiorari on question does Vienna Convention convey individual rights of consular access to individual non-U.S. nationals detained in United States); *see also* Martin S. Flaherty, "External" Versus "Internal" in *International Law*, 29 *FORDHAM INT'L L. J.* 447, 453 n.26 (2006) (indicating U.S. Supreme Court will address constitutionality of international delegations of judicial authority in *Sanchez-Llamas*).

10. *Compare* *Avena*, 2004 I.C.J. at 35-36 (concluding that Vienna Convention creates individual rights that States may invoke in litigation before ICJ), *with* *United States v. Jimenez-Nava*, 243 F.3d 192, 195-98 (5th Cir. 2001) (holding that Vienna Convention creates no individual rights), *and* *United States v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001) (holding that Vienna Convention does not create individual rights).

11. *See, e.g.*, Curtis Bradley & Lori Fisler Damrosch, *Medellin v. Dretke: Federalism and International Law*, 43 *COLUM. J. TRANSNAT'L L.* 667, *passim* (2005) (discussing constitutional implications of possibility that ICJ's *Avena* decision is binding on U.S. Supreme Court); *see also* Panel No. 3, *Federalist Society Student Symposium: International Law and the State of the Constitution* (Feb. 25, 2006) (considering constitutional implications of international delegation of judicial authority).

12. *See, e.g.*, Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 *STAN. L. REV.* 1557, 1564-66, 1595-96 (2003) (observing serious constitutional problems with international delegations and arguing for non-self-execution presumption regarding decisions of international tribunals); Julian G. Ku, *International Delegations and the New World Order*, 81 *WASH. L. REV.* 1, 7 (2006) (arguing that U.S. Supreme Court should employ "super-strong clear statement" rule before concluding that treaty-makers intended international decisions to be self-executing and asserting that Optional Protocol framing lacks such clear statement); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 *MINN. L. REV.* 71, 121-30 (2000) (asserting that democratic deficiencies inherent to international delegations supports taking strict structural approach to assessing constitutionality of international delegations).

mity and argue that such delegations should be reviewed with the same standard that is applied to similar domestic delegations of judicial authority.¹³ Both approaches, however, share at least one thing in common: they proceed from the assumption that Congress intended to delegate the authority to interpret U.S. law to an international tribunal.

This Note argues that neither the framers of the Optional Protocol (“the Framers”), nor the U.S. Senate that ratified it, intended to delegate to the ICJ the authority to interpret the Vienna Convention as a matter of U.S. law.¹⁴ Thus framed, the question in *Sanchez-Llamas* is one of *authority*.¹⁵ In international legal theory, there is a fundamental distinction between international law and State internal (“municipal”) law.¹⁶ It is clear that the Framers intended to make the ICJ the authoritative interpreter of the Vienna Convention as that agreement exists in international law.¹⁷ It is not clear, however, that the Framers also

13. See, e.g., T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 *TEX. L. REV.* 1989 (2004) (assessing argument that delegating law-making authority to international bodies would violate constitutional values of popular sovereignty and democratic self-rule, concluding that some international delegations do not violate those constitutional values and suggesting criteria to judge which delegations are unconstitutional); David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 *STAN. L. REV.* 1697, 1747-48 (2003) (stating that history supports taking pragmatic approach to assessing constitutionality of international delegations); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 *COLUM. L. REV.* 1492, 1532-33 1611-14 (2004) (suggesting that international delegations may promote constitutional value of federalism by diffusing U.S. federal authority).

14. See *Sanchez-Llamas*, 126 S. Ct. at 620 (granting certiorari on question does Vienna Convention convey individual rights of consular access to individual non-U.S. nationals detained in United States); see also Transcript of Oral Argument at 13, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 817409 at *12 (transcribing colloquy between counsel and Justice Scalia about whether U.S. treaty could delegate U.S. court judicial authority to ICJ).

15. Compare Certain German Interests in Polish Upper Silesia, 1926 P.C.I.J. (ser. A) No. 7 at 19 (May 25) (indicating that Permanent Court of International Justice (“PCIJ”) exercises only limited authority over State internal (“municipal”) law), with *Panevezys-Saldutiskis Railway Case*, 1939 P.C.I.J. (ser. A/B) No. 76 at 19 (Feb. 28) (declining to determine, in course of international litigation, unsettled question of Lithuanian municipal law).

16. See, IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 31-36 (6th ed. 2003) (exploring nature of relationship between international law and municipal law); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 63 (1995) (stating that distinction between international and municipal law is implicit in the state system).

17. See, e.g., 1 United Nations Conference on Consular Relations, Vienna, Austria, Mar. 4–Apr. 22, 1963, *Official Records*, at 249, U.N. Doc. A/CONF.25/16 [hereinafter Vienna Convention Official Records] (reporting statements of various delegates pre-

intended to confer on the ICJ authority to interpret the Vienna Convention as a matter of municipal law.¹⁸ Indeed, custom suggests that the ICJ's authority does not extend to matters of municipal law.¹⁹ This Note argues, therefore, that the Optional Protocol as it was conceived and ratified was only meant to confer on the ICJ authority to interpret the Vienna Convention as a matter of international law. Thus, while authoritative in international relations, the ICJ's interpretation of Vienna Convention Article 36 is largely irrelevant when U.S. courts interpret that provision as a matter of U.S. law.²⁰

This Note also questions the value of an alternate understanding of the Optional Protocol, dubbed herein the "self-executing approach."²¹ That approach holds that, because the Vienna Convention is self-executing and became supreme U.S. federal law upon ratification,²² so too do the ICJ's interpreta-

sent at Optional Protocol's framing that it was designed to bring uniformity to international law concerning consular relations); *see also* LEE, *supra* note 3, at 631-32 (observing that concerns for uniform application of consular relations law motivated supporters of Optional Protocol).

18. *See* Optional Protocol, *supra* note 3, art. 1 (granting ICJ jurisdiction but remaining silent as to nature of authority attendant to that jurisdiction). *See generally* 1-2 Vienna Convention Official Records, *supra* note 17 (reporting no discussion of ICJ authority at framing of Optional Protocol); LEE, *supra* note 3 (discussing framing of Vienna Convention and Optional Protocol without any assertion that Framers considered ICJ authority).

19. *See, e.g.*, Elihu Root, Sanction of International Law, Presidential Address at the Second Annual Meeting of the American Society of International Law (Apr. 24, 1908), *in* ADDRESSES ON INTERNATIONAL SUBJECTS BY ELIHU ROOT 145-52 (Robert Bacon & James Brown Scott eds., 1969) at 25-32 (indicating that international judgments do not have direct legal effect in States municipal legal systems); STEPHEN SCHWEBEL, JUSTICE IN INTERNATIONAL LAW 598-601 (1994) (attributing Root's position to principle that reciprocity holds structure of international law together).

20. *But see* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that U.S. courts should not interpret U.S. statutes to violate international law if any other possible construction remains); *see also* RESTATEMENT (THIRD) § 114 reporters' notes 1 (collecting decisions where U.S. courts have employed *Charming Betsy* canon).

21. *See* Bradley & Damrosch, *supra* note 11, at 677 (transcribing remarks of Professor Lori Fischler Damrosch that ICJ decisions about Vienna Convention are self-executing as supreme U.S. federal law because Vienna Convention itself is self-executing); *see also* Lori Fislser Damrosch, *Treaties and International Regulation*, 98 AM. SOC'Y INT'L L. PROC. 349, 350 (2004) (stating that U.S. courts are required to apply ICJ judgments about Vienna Convention for same reason they are required to apply Vienna Convention).

22. *See* S. Exec. Rep. 91-9, at 5 (1969) (recording statements of United States Department of State Deputy Legal Advisor for Administration Edward Lyerly ("Deputy Legal Advisor Lyerly") that Vienna Convention was self-executing and would not need

tions of the Vienna Convention automatically become supreme U.S. federal law.²³ This Note argues, however, that the self-executing approach attributes to the ratifying U.S. Senate an intent that cannot be reasonably found in its silence on the issue of ICJ authority.²⁴

Part I of this Note describes the role and function of international law in the U.S. domestic legal system. Part I then presents the structure and history of the Permanent Court of International Justice (“PCIJ”) and the ICJ (collectively, “the World Courts”). Part I also describes the history and relevant provisions of the Vienna Convention and the Optional Protocol. Part II introduces the conflict that has arisen between the ICJ and U.S. courts regarding the interpretation of Vienna Convention Article 36. Part II then surveys some statements and decisions of the PCIJ, ICJ, and other courts that bear on the scope of the authority of the World Courts to interpret municipal law. Finally, Part II introduces the self-executing approach. In Part III, this Note argues that the Optional Protocol is ambiguous regarding the authority it confers on the ICJ. Part III then asserts that the prevailing consensus, both in the United States and abroad, held that the ICJ was not authorized to interpret municipal law. The U.S. Supreme Court should resolve the Optional Protocol’s ambiguity in accordance with this prevailing consensus and hold that the Optional Protocol does not grant authority to interpret municipal law.

implementing legislation); *see also* *Torres v. Mullin*, 540 U.S. 1035, 1035 (2003) (mem.) (Breyer, J., dissenting) (observing with approval holdings of lower courts that Vienna Convention is self-executing).

23. *See* Bradley & Damrosch, *supra* note 11, at 692 (transcribing remarks of Professor Damrosch that Optional Protocol was conscious choice to make ICJ interpreter of Vienna Convention as matter of U.S. municipal law); *see also* *Medellin v. Dretke*, 544 U.S. 660, 683 (2005) (per curiam) (recounting argument of petitioner Medellin that ICJ’s interpretation in *Avena* should control U.S. Supreme Court’s resolution of his case because Vienna Convention is self-executing).

24. *See* *Jordan v. K. Tashiro*, 278 U.S. 123, 127 (1928) (stating that treaties should be construed liberally to effect parties’ intent); *see also* *United States v. Texas*, 162 U.S. 1, 36-37 (1896) (asserting that intent of parties controls interpretation of treaty in U.S. domestic law).

I. *THE INTERNATIONAL COURT OF JUSTICE ("ICJ") AND THE CONFLICT BETWEEN INTERNATIONAL AND MUNICIPAL LAW*

This Part introduces several principles and institutions in international law that lie at the foundation of the conclusion presented in Part III. First, this Part explores the distinction between international law and municipal law and surveys some ways in which U.S. jurisprudence has incorporated that distinction.²⁵ This Part then discusses the history of the World Courts, with an emphasis on their reception in the United States.²⁶ Finally, this Part examines the relevant provisions and framing of the Vienna Convention and Optional Protocol.²⁷

A. *International Law as U.S. Law*

International legal theory is marked by the distinction between international law and municipal law.²⁸ One can distinguish among State municipal legal systems by observing the way in which they take account of that distinction.²⁹ Thus, the more

25. See, e.g., BROWNLIE, *supra* note 16, at 31-36 (describing dualist and monist theoretical approaches to relationship between international law and municipal law; HENKIN, *supra* note 16, at 71 (discussing U.S. doctrine of self-execution as manifestation of dualist/monist distinction in international legal theory).

26. See generally MICHAEL DUNNE, *THE UNITED STATES AND THE WORLD COURT 1920-1935* (1988) (surveying history of U.S. consideration of PCIJ Statute); THOMAS FRANCK, *JUDGING THE WORLD COURT* (1986) (recounting history of U.S. consideration of and adherence to ICJ Statute).

27. See Vienna Convention, *supra* note 5, art. 36 (establishing procedures governing communication between consular officials of signatory States and their nationals who are detained by authorities of another signatory state); see also Optional Protocol, *supra* note 3, art. 1 (providing that ICJ shall have jurisdiction over disputes arising out of Vienna Convention).

28. See BROWNLIE, *supra* note 16, at 31-36 (exploring nature of relationship between international law and municipal law); see also HENKIN, *supra* note 16, at 63 (stating that distinction between international and municipal law is implicit in State system); J.G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 63 (11th ed. 1994) (opining that understanding relationship between international and municipal law is essential to understanding international legal theory).

29. See, e.g., BROWNLIE, *supra* note 16, at 31-36 (asserting that clash between municipal and international law is characterized by monist and dualist doctrines, and explaining those two theoretical approaches); HENKIN, *supra* note 16, at 63-74 (describing States' legal systems as occupying different points on spectrum between pure monism and total dualism); MALCOLM N. SHAW, *INTERNATIONAL LAW* 120-24 (5th ed. 2003) (discussing various ways in which States' municipal law incorporates international law); STARKE, *supra* note 28, at 67-78 (surveying different States' incorporation of international law into their municipal legal systems).

dualist a State tends to be, the more its system will recognize a complete separation between international law and municipal law.³⁰ Conversely, a monist system will treat international and municipal law as aspects of a single unitary system of law governing the State.³¹

Though it may be unclear which theory predominates as a matter of international legal theory,³² U.S. jurisprudence has long taken account of the dualist distinction between international and municipal law.³³ The doctrine of self-execution is a principle example.³⁴ Although the Supremacy Clause states that all treaties are the supreme law of the land in the United States,³⁵ the self-execution doctrine provides that not all treaties

30. See BROWNLIE, *supra* note 16, at 31-36 (observing that dualist doctrine recognizes essential difference between international law and municipal law); see also HENKIN, *supra* note 16, at 65 (noting that dualist approach treats international and municipal obligations as distinct).

31. See HENKIN, *supra* note 16, at 64 (explaining that monism incorporates both international and municipal law into unified legal system with international law supreme); see also SHAW, *supra* note 29, at 122 (characterizing monism as encompassing unitary conception of international and municipal law, as contrasted with strict division posited by dualist approach).

32. Compare HENKIN, *supra* note 16, at 5, 66 (identifying dualist distinction as traditional and calling contemporary international system essentially dualist), with STARKE, *supra* note 28, at 64-65 (asserting that dualist approach arose in Nineteenth Century and may not have existed before then).

33. See *Edye v. Robertson*, 112 U.S. 580, 254 (1884) (emphasizing that treaties are compacts between nations whose enforcement is matter for international relations and not for judicial courts); see also HENKIN, *supra* note 16, at 71 (noting that United States has hybrid system, but is closer to dualist end of dualist/monist spectrum); MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 85 (4th ed. 2003) (calling dualism prevalent theoretical approach); Curtis Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 531 (1999) (arguing that most commentators agree that dualism was prevailing view in latter half of this century); Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 41 (1995) (stating that "the dualists soundly thrashed the monists"); James A.R. Nafziger & Edward M. Wise, *The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. 421, 422-23 (1998) (observing that dualist theory is constitutional axiom in contemporary United States jurisprudence).

34. See *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (stating that, under U.S. approach, treaties do not become supreme U.S. federal law without implementing legislation where terms of treaty import nature of contract which legislature must execute); see also RESTATEMENT (THIRD) § 111 (identifying *Foster* as origin of self-execution doctrine and discussing that doctrine).

35. See U.S. CONST. art. VI, cl. 2 (defining supreme U.S. federal law as U.S. Constitution, U.S. laws made in pursuance of Constitution, and all treaties made under U.S. authority); see also JORDAN PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 51 (1996) (calling self-execution doctrine most glaring deviation from specific constitutional text).

automatically become supreme U.S. federal law.³⁶ A treaty that does not automatically become supreme U.S. federal law is non-self-executing and U.S. courts cannot give it legal effect without some implementing legislation.³⁷ On the other hand, a self-executing treaty has all the force and attributes of constitutionally-enacted U.S. federal laws.³⁸

Whether a treaty is self-executing in the United States is largely a matter of judicial interpretation.³⁹ Unlike private agreements, U.S. courts possess significant latitude to interpret treaties to conform to the intent of the signatory parties.⁴⁰ While it is not entirely clear which intent controls for the purposes of interpretation—the intent of the United States or the intent of

36. See *Foster*, 27 U.S. at 314 (stating that treaty will not be self-executing when terms indicate that either party intended to engage to perform a particular act which must be executed later); see also RESTATEMENT (THIRD) § 111(4) (asserting that treaty is non-self-executing if treaty manifests intention that it requires implementing legislation, if U.S. Senate requires implementing legislation, or if U.S. Constitution requires implementing legislation). Compare John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2091-94 (1999) (suggesting original understanding supports presumption against treaty self-execution), with Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2098-99 (1999) (critiquing Yoo's historical evidence and arguing for self-executing presumption).

37. See *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373-74 (7th Cir. 1985) (holding that U.N. Charter Articles 55 and 56 are not self-executing and violations thereof cannot be vindicated by U.S. courts); see also *United States v. Postal*, 589 F.2d 862, 884 (5th Cir. 1979), cert. denied 444 U.S. 832 (1979) (mem.) (holding that High Seas Convention is not self-executing and United States retains jurisdiction under pre-treaty regime absent congressional implementing legislation).

38. See *Bacardi Corp. v. Domenech*, 311 U.S. 150, 161 (1940) (holding that Inter-American Trade-Mark Convention is self-executing and preempts contrary Puerto Rican statute); see also *Asakura v. Seattle*, 265 U.S. 332, 341-42 (1924) (holding that treaty ensuring equal right to trade in United States is self-executing and preempts contrary local ordinance); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 277 (1796) (holding that treaty protecting British creditors is self-executing and preempts contrary state law).

39. See *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (stating that question of self-execution is matter of interpretation to be determined by U.S. courts); see also RESTATEMENT (THIRD) § 111 cmt. h (explaining that question of self-execution is one that U.S. courts must decide when parties seek to invoke that agreement as law).

40. See *Air France v. Saks*, 470 U.S. 392, 396 (1985) (observing that treaties are construed more liberally than private agreements and U.S. courts may look beyond the text to ascertain the meaning of the treaty); see also *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943) (noting that U.S. courts are empowered to look beyond treaty's text to its history, parties' negotiations, and practical construction of signatories to interpret treaty); RESTATEMENT (THIRD) § 325 cmt. g (asserting that U.S. courts are generally more willing to look beyond the text of treaty to determine its meaning than are other States' courts).

the signatories⁴¹—it is clear that U.S. courts will give substantial weight to the views of the U.S. Government.⁴² Additionally, U.S. courts interpreting a treaty often look to a word's common usage among the international community.⁴³

Another relevant aspect of U.S. jurisprudence involves the question of "individual rights."⁴⁴ That jurisprudence holds that some self-executing treaties, although supreme U.S. federal law, do not create judicially-cognizable rights that are enforceable by individuals in U.S. courts.⁴⁵ Instead, such treaties create judicially-cognizable rights only for the signatory States themselves.⁴⁶ Thus, U.S. courts have recognized that the Vienna Convention is self-executing and thus "entered" U.S. law at ratification.⁴⁷ This is distinct, however, from the question who can claim Vienna

41. Compare RESTATEMENT (THIRD) § 111 cmt. h (explaining that U.S. intent controls question whether agreement is self-executing in U.S. courts), with *Diggs*, 555 F.2d at 851 (stating that U.S. courts should look to signatories' intent to determine whether treaty is self-executing).

42. See *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (affording U.S. Executive branch treaty interpretation great, but not conclusive, weight); see also *Factor v. Laubheimer*, 290 U.S. 276, 295 (1933) (giving weight to interpretation of U.S. Executive branch); RESTATEMENT (THIRD) § 326, reporters' notes 1 (observing that U.S. courts take account of views of ratifying U.S. Senate but not subsequent U.S. Senates).

43. See *Eastern Airlines v. Floyd*, 499 U.S. 530, 534 (1991) (stating that words in treaty are interpreted in context in which they are used); see also *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (commanding that treaty words should be interpreted as understood by public law of nations); *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (establishing that treaty language should be interpreted as it is understood by law of nations).

44. See RESTATEMENT (THIRD) § 111 cmt. h (observing that question of self-execution is distinct from question whether treaty creates private rights); see also Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892, 896-97 (1980) (distinguishing between question whether treaty is self-executing, becoming supreme U.S. federal law automatically, and question whether treaty creates individual rights that can be invoked in U.S. courts by individuals).

45. See *Unites States v. Jimenez-Nava*, 243 F.3d 192, 196-98 (5th Cir. 2005) (holding that Vienna Convention does not create individual rights enforceable in U.S. courts); see also *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 937-38 (D.C. Cir. 1988) (holding that U.N. Charter Article 94 does not create individual rights enforceable in U.S. courts).

46. See *United States v. Williams*, 617 F.2d 1063, 1090 (5th Cir. 1980) (stating that treaties create rights for signatory States, not individuals); see also RESTATEMENT (THIRD) § 907 (restating that some treaties may create rights that accrue to individuals).

47. See *Jogi v. Voges*, 425 F.3d 367, 378 (7th Cir. 2005) (concluding that Vienna Convention is self-executing); see also *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring) (noting that Vienna Convention is self-executing); David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1482 (1999) (observing that, in litigation, United States has not disputed that Vienna Convention is self-executing).

Convention rights in U.S. litigation: signatory States or individual citizens of those States.⁴⁸

Aside from self-execution, there are other legal mechanisms by which U.S. law incorporates or otherwise takes account of international law.⁴⁹ One of these mechanisms is the *Charming Betsy* canon, a doctrine of statutory interpretation.⁵⁰ That doctrine holds that U.S. courts should avoid interpreting a U.S. statute to violate international law if another interpretation is possible.⁵¹ In addition to the *Charming Betsy* canon, certain norms of customary international law may bind U.S. courts as a form of U.S. federal common law.⁵² Certain principles of international law

48. See *Sanchez-Llamas v. Oregon*, 126 S. Ct. 620, 620 (2005) (mem.) (granting certiorari on question does Vienna Convention convey individual rights of consular access to individual non-U.S. nationals detained in United States); see also *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 35-36 (Mar. 31) (concluding that Vienna Convention creates individual rights that States may invoke in litigation before ICJ).

49. See THOMAS M. FRANCK & MICHAEL J. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY* ch. 2 (1987) (surveying mechanisms by which international law enters the U.S. domestic legal system); see also CURTIS A. BRADLEY & JACK GOLDSMITH, *FOREIGN RELATIONS LAW 427-94* (2003) (discussing U.S. jurisprudential doctrines that allow incorporation of international law into U.S. legal system).

50. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (announcing rule that U.S. courts should not interpret act of Congress to violate international law if any other possible construction remains); see also RESTATEMENT (THIRD) § 114 reporters' notes 1 (collecting decisions where U.S. courts have employed *Charming Betsy* canon); Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, *passim* (1997) (surveying history and theory of *Charming Betsy* canon; arguing that, among others, changes in nature of customary international law ("CIL") and redefinition of federal court power after *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), compel reevaluation of *Charming Betsy* canon).

51. See *Schooner Charming Betsy*, 6 U.S. at 118 (stating rule that U.S. laws should not be construed to violate international law if another interpretation is possible). See, e.g., *Cook v. United States*, 288 U.S. 102 (1933) (holding that subsequent statute did not abrogate treaty obligation where its intent to do so was not clear); *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339 (Fed. Cir. 2004) (employing *Charming Betsy* canon to interpret 19 U.S.C. § 1677 so as to avoid unnecessary conflict between U.S. law and U.S. international obligations).

52. Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, *passim* (1997) (arguing that position which favors viewing CIL as federal law is inconsistent with U.S. representative democracy, U.S. federal common law, separation of powers, and federalism concerns), with Harold H. Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, *passim* (1998) (arguing that history, doctrine, U.S. Constitution, and democratic theory do not support Bradley's and Goldsmith's opposition to treating CIL as federal law), and Bradley & Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, *passim* (1998) (criticizing Professor Koh's re-

may also be enforceable in U.S. courts pursuant to the Alien Tort Statute (“ATS”).⁵³

B. *The History⁵⁴ and Structure of the Permanent Court of International Justice (“PCIJ”) and ICJ (collectively, “the World Courts”)*

In an effort to promote world peace after World War I, the international community created the League of Nations (“League”), an international organization based upon the Covenant of the League of Nations (“League Covenant”) and composed of the Assembly and an executive Council (“League Council”).⁵⁵ The international community also created the PCIJ⁵⁶ to function as an international judicial tribunal to resolve international disputes according to international law.⁵⁷ The Statute of

sponse for (1) mistaken use of history, (2) conflation of traditional CIL with new CIL that regulates way Nation treats its citizens, (3) broad conception of U.S. federal court common law authority, and (4) assumption that all international law must be incorporated into domestic law).

53. See 28 U.S.C. § 1350 (providing federal court jurisdiction over civil actions by non-U.S. citizens for torts committed in violation of international law); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004) (holding that ATS provides cause of action for international law torts recognized at time of adoption of that statute and such international law torts of similar specificity that the international community now recognizes).

54. This Note concedes the difficulties inherent in historical generalization. See, e.g., *New York v. United States*, 505 U.S. 144, 207 n.3 (1992) (White, J., concurring in part and dissenting in part) (questioning legitimacy of using “selective quotation” from history as anything more than “elaborate window dressing”); Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 526 (1995) (stating that legal profession employs standards for use of historical scholarship that often fall below standards of undergraduate history writing).

55. See SHAW, *supra* note 29, at 30, 1099-1100 (discussing founding of League of Nations (“League”)); see also BROWNLIE, *supra* note 16, at 647 (observing that League provided for more developed notion of universal peace-keeping). See generally ALFRED ZIMMERN, *THE LEAGUE OF NATIONS AND THE RULE OF LAW: 1918–1935 passim* (1998) (detailing structure and history of League).

56. See MOHAMED SAMEH AMR, *THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPLE JUDICIAL ORGAN OF THE UNITED NATIONS* 12 (2003) (discussing establishment of Permanent Court of International Justice (“PCIJ”) after World War I); see also REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE, *THE INTERNATIONAL COURT OF JUSTICE 14-16* (1979) [hereinafter REGISTRAR] (discussing PCIJ founding).

57. See Covenant of the League of Nations art. 14 [hereinafter League Covenant] (calling for tribunal competent to hear and determine disputes of international character); see also Statute of the Permanent Court of International Justice art. 38, Dec. 13, 1920, 6 L.N.T.S. 390 [hereinafter PCIJ Statute] (authorizing PCIJ to apply: (1) international conventions; (2) international custom; (3) general principles of law recognized by civilized nations; and (4) judicial decisions subject to provisions of Article 59);

the Permanent Court of International Justice ("PCIJ Statute"), which entered into force in 1921, defined the authority of the PCIJ.⁵⁸ The PCIJ Statute allowed only sovereign States to appear before that tribunal as litigants⁵⁹ and limited the binding authority of individual PCIJ decisions to the specific parties in question and with respect to the specific dispute.⁶⁰ This last provision notwithstanding, scholars have argued that the PCIJ employed a doctrine of *stare decisis*.⁶¹

The PCIJ Statute established three ways in which the PCIJ could obtain jurisdiction.⁶² It would have jurisdiction to resolve

SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 3-20 (5th ed. 1995) (surveying history of international adjudication and arbitration preceding creation of PCIJ).

58. See AMR, *supra* note 56, at 13 (indicating PCIJ Statute took effect only after majority of States ratified it, which occurred in September 1921); see also ANTONIO S. DEBUSTAMANTE, *THE WORLD COURT* 108 (Elizabeth F. Read trans., 1983) (discussing various proposals for how PCIJ Statute would enter into force); ALEXANDER FACHIRI, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 330 (1932) (calling PCIJ Statute sole source of PCIJ's legal existence and authority).

59. See PCIJ Statute, *supra* note 57, art. 34 (providing that only States or League members can be parties before PCIJ); see also DEBUSTAMANTE, *supra* note 58, at 193-94 (1983) (stating that PCIJ jurisdiction never extends to individuals except where States represent interests of individuals before PCIJ); FRANCES KELLOR & ANTONIA HATVANY, *THE UNITED STATES SENATE AND THE INTERNATIONAL COURT* 53-54 (1925) (asserting PCIJ drafters intended against providing PCIJ jurisdiction over suits by private individuals against States because such would imperil state sovereignty); Manley Hudson, *The Permanent Court of International Justice*, 35 HARV. L. REV. 245, 258 (1922) (asserting that PCIJ would not entertain suits by individuals).

60. See PCIJ Statute, *supra* note 57, art. 59 (providing that PCIJ decisions have no binding force except between parties and with respect to each particular case); see also *Certain German Interests in Polish Upper Silesia (Ger. v. Pol.) (merits)*, 1926 P.C.I.J. (ser. A) No. 7, at 18-19 (May 25) (observing that PCIJ Statute Article 59 was designed to prevent legal principles accepted by PCIJ in one case from binding States in other disputes).

61. See DEBUSTAMANTE, *supra* note 58, at 239 (noting similarities between PCIJ Statute Article 59 and municipal legal systems, where judgment has no binding force except over parties between which it was given); see also FACHIRI, *supra* note 58, at 103-04 (arguing that, though making judgments binding only on parties to judgment, PCIJ Statute Article 59 does not rule out authority of PCIJ decisions as precedents); MANLEY HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND THE QUESTION OF AMERICAN PARTICIPATION* 198, 206 (2005) (explaining that PCIJ Statute Article 59 was designed to obviate the necessity of third party intervention and asserting that PCIJ Statute Article 59 does not preclude doctrine of *stare decisis* in PCIJ); I J.H.W. VERZIJL, *THE JURISPRUDENCE OF THE WORLD COURT: A CASE BY CASE COMMENTARY* 21-23, 155 (1932) (pointing out that PCIJ Statute Article 59 was not included in version of PCIJ Statute drafted by international jurists but rather was inserted later by League Council, and expressing incredulity that rules accepted in one case would not be binding in other cases).

62. See PCIJ Statute, *supra* note 57, art. 36 (establishing (1) PCIJ jurisdiction in

disputes referred to it by the parties and would have such jurisdiction as was conferred on it by treaty.⁶³ States could also accept the PCIJ's "compulsory jurisdiction."⁶⁴ Under that provision, the PCIJ would have jurisdiction to entertain disputes between two States if (1) both States had accepted the PCIJ's compulsory jurisdiction, and (2) their dispute concerned, among other things, interpretation of a treaty or a question of international law.⁶⁵ The PCIJ Statute also authorized the issuance of advisory opinions in matters referred to the PCIJ by the League Council.⁶⁶

The PCIJ Statute created no role for the PCIJ in the en-

matters referred to it, (2) PCIJ jurisdiction as such is conferred by treaty or convention, and (3) PCIJ "compulsory jurisdiction"); *see also* FACHIRI, *supra* note 58, at 5, 71 (stating that PCIJ jurisdiction was crafted considering universally recognized principle that jurisdiction over sovereign States cannot obtain unless sovereign has accepted tribunal's jurisdiction); KELLOR & HATVANY, *supra* note 59, at 64-67 (noting that PCIJ jurisdiction is characterized by requirements of voluntary submission of disputes and consent of both parties).

63. *See* PCIJ Statute, *supra* note 57, art. 36 (allowing such jurisdiction as is conferred by treaty or convention); *see also* KELLOR & HATVANY, *supra* note 59, at 77-91 (discussing nature of treaty-conferred PCIJ jurisdiction); LEE, *supra* note 3, at 632 n.10 (observing longstanding and widespread use of compromissory clauses by United States).

64. *See* FACHIRI, *supra* note 58, at 7, 70-72 (explaining tension between PCIJ Statute drafting committee and League Council over drafting committee's proposal that would have made acceptance of PCIJ compulsory jurisdiction mandatory for accession to PCIJ Statute and noting that resulting PCIJ Statute was compromise measure making acceptance of compulsory jurisdiction voluntary); *see also* KELLOR & HATVANY, *supra* note 59, at 64-68 (stating that compromise about PCIJ's compulsory jurisdiction recognized principle that PCIJ Statute should include some measure giving PCIJ jurisdiction *ex ante* over all international disputes but that such measure should be binding upon States only pursuant to some act beyond accession to PCIJ Statute).

65. *See* PCIJ Statute, *supra* note 57, art. 36 (establishing PCIJ compulsory jurisdiction as between States accepting that jurisdiction and over "legal disputes" concerning (a) interpretation of a treaty, (b) any question of international law, (c) existence of any fact which, if established, would constitute a breach of an international obligation, and (d) nature or extent of reparation to be made for breach of an international obligation); *see also* DEBUSTAMANTE, *supra* note 58, at 204-05 (querying whether identification of disputes as legal for compulsory jurisdiction purposes will pose definitional problems); KELLOR & HATVANY, *supra* note 59, at 67 (stating PCIJ decides in each case whether it has compulsory jurisdiction).

66. *See* League Covenant, *supra* note 57, art. 14 (authorizing issuance of advisory opinions upon any dispute or question referred by League Council or Assembly); *see also* PCIJ Statute, *supra* note 57, ch. IV (establishing PCIJ jurisdiction to issue advisory opinions on questions referred to it by Assembly or League Council); FACHIRI, *supra* note 58, at 78-84 (observing criticism of PCIJ advisory jurisdiction but assuring that PCIJ is a judicial body that applies legal principles as contra-distinguished from political expediency).

forcement of its decisions.⁶⁷ Instead, the League Covenant included provisions to ensure State compliance with the PCIJ's decisions.⁶⁸ It imposed an obligation on Member-States to comply with PCIJ judgments and authorized the League Council to propose remedial measures in the event of State non-compliance.⁶⁹

A State did not have to join the League to become a party to the PCIJ Statute,⁷⁰ and thus the United States considered joining the PCIJ.⁷¹ Support for international adjudication in the United States was in part an outgrowth of longstanding U.S. support for international arbitration.⁷² That history recognized that if inter-

67. See DEBUSTAMANTE, *supra* note 58, at 259-62 (stating that PCIJ statute makes no provision for PCIJ-imposed sanctions); see also JAMES BROWN SCOTT, *SOVEREIGN STATES AND SUITS BEFORE ARBITRAL TRIBUNALS AND COURTS OF JUSTICE* 238-39 (2004) (musing that it was wise that PCIJ Statute does not contain any provision for enforcing PCIJ judgments and asserting that public opinion would be greatest force in ensuring compliance with PCIJ judgments); KELLOR & HATVANY, *supra* note 59, at 213 (noting that PCIJ Statute makes no provision for enforcement of PCIJ judgments and that parties are not required to accept or execute in good faith PCIJ decisions).

68. See HUDSON, *supra* note 61, at 220 (explaining that only League Covenant provides sanctions for violation of PCIJ judgments and that there would be no PCIJ sanctions for United States except opinion because it was not party to Covenant of the League of Nations ("League Covenant")); see also KELLOR & HATVANY, *supra* note 59, at 213 (noting that sanctions for PCIJ decisions are provided by League Covenant).

69. See League Covenant, *supra* note 57, art. 13 (imposing good-faith obligation on Member-States to carry out any PCIJ award or decision and granting League Council authority to propose remedial measures for non-compliance); see also DEBUSTAMANTE, *supra* note 58, at 245-47 (explaining League Council's role in enforcing PCIJ judgments); HUDSON, *supra* note 61, at 206-07 (describing League's role in enforcing PCIJ judgments); KELLOR & HATVANY, *supra* note 59, at 214-17 (surveying role of League Council in proposing what steps shall be taken and calling such action sanction for PCIJ judicial decision).

70. See PCIJ Statute, *supra* note 57, art. 35 (stating that PCIJ is open to League Member-States and to other States that have accepted PCIJ Statute by procedures established by League Council); see also REGISTRAR, *supra* note 56, at 16 (recounting that PCIJ was open to all States).

71. See generally DUNNE, *supra* note 26, (discussing history of U.S. consideration of PCIJ Statute adherence and arguing that many factors, including U.S. perceptions of relationship between PCIJ and League, influenced U.S. failure to join).

72. See, e.g., President William McKinley, First Presidential Inaugural Address (March 4, 1897) (expressing long-standing U.S. approval of arbitration as true method of dispute settlement that had long been applied as leading feature of U.S. international policy), available at <http://www.bartleby.com/124/pres40.html> (last visited June 6, 2006); see also HUDSON, *supra* note 61, at 182 (recounting history of U.S. participation in international arbitration and calling such participation constant feature of U.S. international policy); SCOTT, *supra* note 67, at 215-220 (discussing U.S. promotion of international arbitration); THOMAS FRANCK, *JUDGING THE WORLD COURT* 13-18 (1986) (acknowledging that idea for World Court originated primarily in United States, and characterizing history of U.S. participation in international arbitration as marked by conflict between unilateralist and multilateralist approaches to U.S. international relations). See

State relations were governed by rational rules, unilateralism would no longer be the source of conflict that it had traditionally been.⁷³ Thus, in the words of noted PCIJ supporter Elihu Root, responsible democratic Nations were less likely to resort to conflict if they knew what the international community expected of them.⁷⁴ Moreover, PCIJ supporters thought that international adjudication, as opposed to international arbitration, would engender widespread participation in the PCIJ among the international community and would most directly advance the prospects of international peace.⁷⁵ Such advocacy nonetheless recognized

generally 1-6 JOHN BASSETT MOORE, *HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY*, *passim* (1898) (collecting in six volumes documents and reports of arbitrations to which United States was party).

73. *See, e.g.*, Letter from Elihu Root to Lassa Oppenheim (March 6, 1915) (observing that creation of international court to apply definite rules to uncertain field of international relations would eliminate wretched policies and plans, intrigues and suspicions responsible for contemporary dreadful condition in international relations), *reprinted in* DUNNE, *supra* note 26, at 20; *see also* DUNNE, *supra* note 26, at 21 (stating that Root typified one line of U.S. thought about PCIJ); FRANCK, *supra* note 72, at 14 (suggesting that U.S. history of relying upon judges for dispute resolution was responsible for prominent U.S. rhetoric about international peace through law and tribunals); SCOTT, *supra* note 67, at 85 (lauding movement towards international arbitration as positive step in progression away from political adjustment to judicial decision, obtaining latter of which was goal of contemporaries).

74. *See* Elihu Root, *A Requisite for the Success of Popular Diplomacy*, 1 *FOREIGN AFF.* 3, 4-5 (1922) (asserting that international conflict in age of modern democratic systems results solely from diplomatic relations founded on contrasting understandings of international obligations); *see also* Elihu Root, 1912 Nobel Peace Prize Address, *in* *ADDRESSES ON INTERNATIONAL SUBJECTS*, *supra* note 19, at 158-61 (identifying international disputes of law and fact as causes of war and asserting that progress towards elimination of this cause is made by creating impartial tribunals for peaceable settlement of international controversies); Elihu Root, *The Importance of Judicial Settlement*, Address before the International Conference of the American Society for Judicial Settlement of International Disputes (Dec. 15, 1920), *in* *ADDRESSES ON INTERNATIONAL SUBJECTS*, *supra* note 19, at 145-52 (contrasting unfavorably diplomatic resolution of international conflict with more readily peaceable judicial resolution of such conflict); Letter From Elihu Root to American Society for Judicial Settlement of International Disputes, *in* *ADDRESSES ON INTERNATIONAL SUBJECTS*, *supra* note 19, at 151 (stating that, in PCIJ, disputes between Nations would be settled by judges rather than by diplomats, who act under different obligations than judges and are less capable of reaching impartial settlement of disputes); DUNNE, *supra* note 26, at 29, *passim* (acknowledging widespread perception that Elihu Root was PCIJ's founding father and observing traditional historical acceptance of Root's dominant role in U.S. consideration of and participation in PCIJ but questioning that premise; citing as other influential theoreticians: Antonio DeBustamante, Antony Fachiri, Antonia Hatvany, Manley O. Hudson, and Frances Kellor).

75. *See* SCOTT, *supra* note 67, at 219 (quoting Elihu Root that States were reluctant to participate in international alternative dispute resolution because of perceived partiality of arbitration generally and asserting that States' apprehension could be overcome

the features of international law that distinguish it from municipal law and conceded that international law lacked the binding authority of municipal law.⁷⁶

The United States ratified the PCIJ Statute, but in such a limited a manner that the League could not accept U.S. ratification as effective.⁷⁷ Some that opposed the PCIJ Statute thought that accession would create a relationship with the League, indicating U.S. ratification of League policies and drawing the United States into unwanted international engagements.⁷⁸ Other opponents focused on concerns about U.S. sovereignty.⁷⁹ For such individuals, it was enough that non-U.S. judges would be empowered to sit in judgment of the United States.⁸⁰ They

by creating impartial judicial tribunal); *see also* DEBUSTAMANTE, *supra* note 58, 151-54 (discussing distinction between adjudication and arbitration skeptically with regard to international law, but stating that judicial power of international law is arbitral in nature); DUNNE, *supra* note 26, at 12 (calling distinction between arbitration and adjudication tenuous but stating that all students of World Court know that contrast was often drawn). *But see* HUDSON, *supra* note 61, at 204-05 (questioning appropriateness of distinction between international arbitration and adjudication).

76. *See* Elihu Root, Sanction of International Law, Presidential Address at the Second Annual Meeting of the American Society of International Law (April 24, 1908), in ADDRESSES ON INTERNATIONAL SUBJECTS, *supra* note 19, at 25-32 (observing that there is no mechanism to ensure compliance with international law like there is in municipal law but asserting that condemnation from increasingly interconnected international community would have coercive effect to ensure compliance similarly to stigmatic effect of violating municipal law); *see also* SCHWEBEL, *supra* note 19, at 598-601 (1994) (examining Root's position and attributing to it principle that reciprocity is cement that holds structure of international law together).

77. *See* DUNNE, *supra* note 26, *passim* (surveying history of U.S. failure to ratify PCIJ Statute); *see also* MICHLA POMERANCE, THE UNITED STATES AND THE WORLD COURT AS A 'SUPREME COURT OF THE NATIONS': DREAMS, ILLUSIONS AND DISILLUSION 78-132 (1996) (discussing history of U.S. failure to effectively ratify PCIJ Statute).

78. *See* DUNNE, *supra* note 26, at 261 (asserting that United States failed to join PCIJ because of PCIJ's perceived intimate connection with League); *see also* POMERANCE, *supra* note 77, at 66, 68 (indicating that perceived intimate connection between PCIJ and League fueled U.S. impression that U.S. participation in PCIJ would embroil United States in "ills of irredeemable Europe").

79. *See* DUNNE, *supra* note 26, at 263-64 (asserting that even PCIJ proponents exhibited unilateralist attitudes insofar as they exalted U.S. opportunity to pursue U.S. international interests with no external restraints); *see also* FRANCK, *supra* note 72, at 13-25 (adopting multilateralist/unilateralist distinction to describe history of U.S. consideration of World Courts); POMERANCE, *supra* note 77, at 67 (observing opponents' fear that PCIJ adherence would bring U.S. disputes before PCIJ circuitously and without U.S. consent).

80. *E.g.* Statement of Sen. Trammell (D-FL), 79 CONG. REC. 1146 (1935), in FRANCK, *supra* note 72, at 19-20 (stating: "I am not willing to vote to have the United States enter this Court and go into a trial before judges representing nations which, generally speaking, are unsympathetic to America"); Statement of Sen. Long (D-LA), 79

perceived the PCIJ's advisory jurisdiction as an opportunity for "foreigners" to pass judgment on U.S. international policy without U.S. consent.⁸¹ Indeed, three U.S. Presidents attempted unsuccessfully to assuage such concerns by remarking that the United States could not be forced to appear before the PCIJ.⁸²

The PCIJ issued thirty-two judgments and twenty-seven advisory opinions before closing its doors at the outbreak of World War II.⁸³ Even before that conflict ended, the Allied Powers had agreed to create a new international tribunal modeled after the PCIJ.⁸⁴ They convened a committee of jurists and charged that committee with the development of a model statute to guide the U.N. Conference on International Organization in drafting an official Statute of the International Court of Justice ("ICJ Statute").⁸⁵ The official ICJ Statute was annexed to the Charter of the United Nations ("U.N. Charter").⁸⁶ During its consideration of the U.N. Charter and the ICJ Statute, the U.S. Senate Committee on Foreign Relations ("Foreign Relations Committee" or

CONG. REC. 1132 (1935), *in* FRANCK, *supra* note 72, at 20 (remarking: "[W]e are being rushed in pell-mell to get into this World Court so that Senor Ab Jap or some other something from Japan can pass upon our controversies").

81. *See* DUNNE, *supra* note 26, at 139-40 (remarking that advisory jurisdiction was essential matter before U.S. Senate); *see also* POMERANCE, *supra* note 77, at 68-69 (asserting that, to PCIJ opponents, PCIJ advisory jurisdiction invoked image of alien, hostile PCIJ judges, who would use it to produce opinions attacking U.S. international policies without U.S. consent); Michael Dunne, *American Judicial Internationalism in the United States*, 90 AM. SOC'Y INT'L L. PROC. 139, 151 (1996) (stating that PCIJ's advisory jurisdiction was most controversial aspect of that tribunal in United States).

82. *See* DUNNE, *supra* note 26, at 264 (quoting President Roosevelt's sentiment that adherence to PCIJ would not diminish U.S. sovereignty); *see also* FRANCK, *supra* note 72, at 19 (reprinting remarks of U.S. Presidents Calvin Coolidge, Herbert Hoover and Theodore Roosevelt that participation in PCIJ would not sacrifice U.S. sovereignty).

83. *Compare* ROSENNE, *supra* note 57, 16-17, app. V (collecting statistics indicating PCIJ issued thirty two judgments and twenty seven advisory cases), *with* REGISTRAR, *supra* note 56, at 16 (stating PCIJ dealt with twenty-nine contentious cases and delivered twenty-seven advisory opinions between 1922 and 1940).

84. *See* REGISTRAR, *supra* note 56, at 17-18 (identifying 1942 as beginning of renewed interest in World Court and discussing international cooperation to create ICJ); *see also* ROSENNE, *supra* note 57, at 22-26 (stating that interest in future of PCIJ began to revive during mid-1942 and discussing creation of ICJ).

85. *See* Statute of International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute]; *see also* ROSENNE, *supra* note 57, at 24 (stating that Committee of Jurists was convened to complete technical work, not political issues).

86. *See* FRANCK, *supra* note 72, at 21 (observing that ICJ Statute was integral part of U.N. Charter, thus obviating need for separate ratification); *see also* ROSENNE, *supra* note 57, at 24-25, 26 (discussing drafting of ICJ Statute; observing that all U.N. Members States are automatically parties to ICJ Statute).

“the Committee”) observed that U.N. Security Council action would be the only way to secure the enforcement of ICJ judgments.⁸⁷ It also reported its satisfaction that ratifying the ICJ Statute would preserve U.S. sovereignty,⁸⁸ whereupon the full Senate ratified both the U.N. Charter and the appended ICJ Statute with little controversy.⁸⁹

The ICJ Statute relies explicitly on the PCIJ Statute.⁹⁰ Specifically, the jurisdictional provisions of the successor statute remain fundamentally unchanged.⁹¹ The ICJ Statute also includes two other provisions that are nearly identical to their PCIJ counterparts: one prohibits individuals from appearing as parties before the ICJ (“Article 34”),⁹² while another limits the binding

87. See POMERANCE, *supra* note 77, at 195-98, 198 n.277 (reprinting U.S. Senate Committee on Foreign Relations (“Foreign Relations Committee”) hearing testimony about necessity of U.N. Security Council action to enforce ICJ judgments); see also A. Mark Weisburd, *International Judicial Decisions, Domestic Courts, and the Foreign Affairs Power*, 2004-2005 CATO SUP. CT. REV. 287, 300 (2005) (observing Foreign Relations Committee consideration of U.N. Charter and ICJ Statute elicited clear executive branch testimony that ICJ judgments could only be enforced by the U.N. Security Council).

88. See 1 ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT*, 1920-1996, at 184-85 (1997) (discussing U.S. Senate consideration of ICJ Statute and quoting Foreign Relations Committee as satisfied that Member-State municipal jurisdiction was amply safeguarded from intervention by U.N.); see also Statement of Sen. Connally (D-TX), S. Doc. No. 79-58, at 4, 9-10 (1945) (stating opinion of U.S. delegation that rights and sovereignty of the United States were not imperiled by adherence to U.N. Charter); Statement of Sen. Vandenberg (R-MI), S. Doc. No. 79-59, at 10 (1945) (remarking that adherence to U.N. Charter would sacrifice no essential U.S. sovereignty).

89. See FRANCK, *supra* note 72, at 21 (recording U.S. Senate vote in favor of adherence to ICJ Statute as eighty-nine to two); see also POMERANCE, *supra* note 77, at 206 (stating that United States consented to ICJ Statute with little more than passing debate).

90. See U.N. Charter art. 92 (stating that the ICJ statute is based upon the Statute of the Permanent Court of International Justice); see also Report to Commission IV of Committee IV/1, 13 UNCIO 381-83, in 1 ROSENNE, *supra* note 88, at 68-69 (calling ICJ successor to PCIJ and observing that creation of ICJ would preserve continuity of development of international judicial process).

91. See ICJ Statute, *supra* note 85, art. 38 (authorizing ICJ to apply international law in language identical to that used in PCIJ Statute Article 38); see also REGISTRAR, *supra* note 56, at 17-18 (describing ICJ statute as not completely fresh text because it was based upon PCIJ Statute); Manley O. Hudson, *The Twenty-Fourth Year of the World Court*, 40 AM. J. INT'L L. 1, 14-45, 30 (1946) (observing no fundamental changes between PCIJ and ICJ Statute provisions dealing with jurisdiction, and providing textual comparison of PCIJ and ICJ Statutes).

92. See ICJ Statute, *supra* note 85, art. 34 (establishing that only States may be parties in cases before ICJ); see also Hudson, *supra* note 91, at 30-31 (noting that ICJ Statute Article 34 deviated from PCIJ Statute Art. 34 only so far as provision of standing to international organizations).

effect of ICJ decisions ("Article 59").⁹³ As was the case with the PCIJ Statute, it is unclear whether this latter provision has in fact limited the ICJ's use of *stare decisis*.⁹⁴ Thus, the ICJ has suggested that its judgments may have a broader effect than just as between the parties,⁹⁵ especially in the context of multilateral treaties,⁹⁶ leading some scholars to argue that ICJ judgments that operate essentially in *rem* are binding against all States.⁹⁷

Additionally, like the PCIJ, the ICJ has no formal role in enforcing its decisions.⁹⁸ Instead, U.N. Charter Article 94 im-

93. See ICJ Statute, *supra* note 85, art. 59 (stating that ICJ decisions have no binding force except between the parties and in respect of each particular case); see also Hudson, *supra* note 91, at 41 (observing that PCIJ Statute Article 59 and ICJ Statute Article 59 are identical).

94. See BROWNIE, *supra* note 16, at 20-23 (exploring PCIJ and ICJ cases bearing on question of role of precedent in World Court jurisprudence and observing that ICJ practice has not treated its own prior decisions in such a narrow spirit as seemingly required by ICJ Statute Article 59); see also 2 SIR GERALD FITZMAURICE, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE* 584-86 (1986) (observing that "constant practice" in World Court jurisprudence is particularly strong with those judges trained in common law tradition); SIR HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 8 (1958) (opining that Article 59 likely has less to do with judicial precedent than third-party intervention and suggesting statements of ICJ Statute drafting committee support conclusion that Article 59 refers only to operative part of ICJ judgments and not to reasoning behind those judgments); 3 ROSENNE, *supra* note 88, at 1637-43 (discussing uncertain role of ICJ Statute Article 59 on ICJ's use of precedent and discussing cases tending to show that ICJ has had recourse to doctrine of precedent); ROSENNE, *THE INTERNATIONAL COURT OF JUSTICE: AN ESSAY IN POLITICAL AND LEGAL THEORY* 425 (1961) (stating that ICJ, like all tribunals, has exhibited tendency to recognize judicial decisions as precedents notwithstanding ICJ Statute Article 59).

95. See BROWNIE, *supra* note 16, at 21 (discussing PCIJ and ICJ cases that illustrate judicial precedent in practice); see also 3 ROSENNE, *supra* note 88, at 1662-63 (asserting that World Court cases demonstrate principle that ICJ judgments may have wider sphere of application than as between parties to case and discussing those cases).

96. See *Aegean Sea Continental Shelf Case* (Greece v. Turk.), 1978 I.C.J. 3, at 16-17 (Dec. 19) (recognizing that, ICJ Statute Article 59 notwithstanding, interpretation of treaty in one case will necessarily effect rights of States not parties to suit); see also 3 ROSENNE, *supra* note 88, at 1634-35 (noting that *Aegean Sea Continental Shelf Case* recognizes that ICJ judgments have broader implications particularly in context of multilateral treaty).

97. See 1 ROSENNE, *supra* note 88, at 216-217 (arguing that World Court judgments that apply to territory or status of State are effective against all other States); see also 3 ROSENNE, *supra* note 88, at 1634-35 (indicating that ICJ has recognized limited application of ICJ Statute Article 59 at least with respect to multilateral treaties); CONSTANZE SCHULTE, *COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE* 31 (2004) (observing that scope of obligation stemming from World Court judgment may depend largely upon form of pleadings).

98. See *East Timor* (Port. v. Austl.), 1995 I.C.J. 90, at 219 (June 30) (Dissenting Opinion of Judge Weeramantry) (musing that ICJ's jurisdiction is adjudication and

poses an obligation on States to comply with ICJ decisions.⁹⁹ Furthermore, like was the case with the PCIJ, the U.N. Charter authorizes the Security Council to take certain measures to enforce the ICJ judgments in the event of State non-compliance.¹⁰⁰

A year after ratifying the ICJ Statute, the U.S. Senate considered legislation ("S. Res. 196") to accept the ICJ's compulsory jurisdiction.¹⁰¹ States accepting the ICJ's compulsory jurisdiction consent *ex ante* to the ICJ's jurisdiction to entertain any dispute *inter se* that involves, among others, a matter of international law.¹⁰² Moreover, the ICJ determines what is a matter of international law for the purposes of its compulsory jurisdiction.¹⁰³ Alluding to that provision, U.S. opponents of compulsory jurisdiction argued that the ICJ would expand its jurisdic-

clarification of law, not enforcement and implementation of judgments); 1 ROSENNE, *supra* note 88, at 205 (stating that neither League Covenant nor U.N. Charter provide for automatic enforcement through international court and that U.N. Charter and League Covenant both assume that non-compliance is political matter that should be settled by political means); Hudson, *supra* note 91, at 12 n.19 (quoting report of ICJ Statute drafting committee that ICJ should not concern itself with ensuring execution of its judgments).

99. See U.N. Charter art. 94(1) (imposing obligation on U.N. Member-States to undertake to comply with ICJ decisions); see also POMERANCE, *supra* note 77, at 192-98 (observing that original U.S. draft of ICJ Statute lacked any obligation similar to what was eventually included in Article 94). Compare 1 ROSENNE, *supra* note 88, at 211-14, 249-52 (describing and contrasting U.N. Charter Article 94 obligations and League Covenant Article 13 obligations and arguing that U.N. Charter Article 94 imposes compliance obligation on each State internal governmental organs, including judiciary), with A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877, *passim* (2000) (asserting that U.N. Charter Article 94 does not impose obligation on U.S. judiciary to comply with ICJ judgments).

100. See U.N. Charter art. 94(2) (authorizing recourse to U.N. Security Council in event of non-compliance with ICJ judgment); see also 1 ROSENNE, *supra* note 88, at 252-58 (discussing nature and scope of Security Council authority under U.N. Charter Article 94).

101. See POMERANCE, *supra* note 77, at 211-17 (noting that Senator Morse introduced legislation to accept the ICJ's compulsory jurisdiction ("S. Res. 196") and discussing adoption of S. Res. 196) (internal quotations omitted); 1 ROSENNE, *supra* note 88, at 184-87 (indicating U.S. acceptance of ICJ's compulsory jurisdiction).

102. See ICJ Statute, *supra* note 85, art. 36 (establishing that ICJ compulsory jurisdiction exists automatically between States accepting ICJ compulsory jurisdiction in disputes concerning (1) treaty interpretation, (2) any question of international law, (3) existence of any fact which, if established, would constitute breach of international obligations, or (4) nature or extent of reparation to be made for breach of international obligations).

103. See ICJ Statute, *supra* note 85, art. 36(6) (stating that ICJ shall settle any dispute regarding whether ICJ has jurisdiction); see also LAUTERPACHT, *supra* note 94, at 94 (stating that all ICJ cases of unilateral application involved jurisdictional challenges); 2 ROSENNE, *supra* note 88, at 841 (providing statistical comparison of jurisdiction chal-

tion to take cognizance of matters that were not international disputes.¹⁰⁴ To protect against that possibility, they proposed a reservation called the Connally Amendment,¹⁰⁵ which stated that the United States would retain the right to determine whether a particular dispute involving the United States was one of international law for the purposes of the ICJ's compulsory jurisdiction.¹⁰⁶

The Foreign Relations Committee specifically objected to subjective reservation provisions like the Connally Amendment,¹⁰⁷ arguing that the ICJ lacked authority to take cognizance of matters that did not involve international law.¹⁰⁸ This conclusion followed from the nature of international law, which the Committee defined as the body of rights and duties governing States in their relations with each other and, therefore, completely distinct from matters of municipal law.¹⁰⁹ In addition to

lenges in PCIJ and ICJ); 1 VERZIJL, *supra* note 61, at 8 (stating that one half of all PCIJ cases from 1922-1926 involved challenges to PCIJ's jurisdiction).

104. *E.g.*, Statement of Sen. Connally, 92 CONG. REC. 10,624, 10,695-96 (1946), reprinted in POMERANCE, *supra* note 77, at 228-230 (expressing concern that ICJ might construe its compulsory jurisdiction to include matters traditionally not considered international in character, such as questions relating to immigration or tariffs); *see also* POMERANCE, *supra* note 77, at 228 (stating that U.S. Senate consideration of Connally Amendment invoked nationalist and xenophobic themes); Adam Smith, "Judicial Nationalism" in *International Law: National Identity and Judicial Autonomy at the ICJ*, 40 TEX. INT'L L.J. 197, 209-10 (2005) (calling Connally Amendment motivated by fear of non-U.S. judges).

105. *See* 92 Cong. Rec. 10,624 (1945), described in POMERANCE, *supra* note 77, at 228 n.71 (reproducing text of Connally Amendment); *see also* Francis O. Wilcox, *The United States Accepts Compulsory Jurisdiction*, 40 AM. J. INT'L L. 699, 699-70 (1946) (reprinting text of S. Res. 196 reflecting changes adopted by full U.S. Senate).

106. *See* POMERANCE, *supra* note 77, at 222-37 (exploring U.S. Senate debate about and adoption of Connally Amendment); *see also* 2 ROSENNE, *supra* note 88, at 778-85 (discussing Connally Amendment and other subject reservation of domestic jurisdiction declarations).

107. *See* S. Rep. 1835, at 5 (1946) (stating that subjective reservation provision would defeat purposes of compulsory jurisdiction); *see also* POMERANCE, *supra* note 77, at 227 (noting that Foreign Relations Committee opposed subjective reservation provisions).

108. *See* S. Rept. 1835, at 5 (1946) (asserting subjective reservation provision is superfluous in light of ICJ Statute Article 38 and U.N. Charter Article 2(7)); *see also* POMERANCE, *supra* note 77, at 227 (observing that Foreign Relations Committee correctly assumed that definition of municipal jurisdiction was inherent in task of determining scope of international law).

109. *See* S. Rept. 1835, at 5 (1946) (defining international law as body of rights and duties governing States in their relations with each other and therefore wholly unconcerned with matters of municipal law); *see also id.* at 9-11 (failing to observe any conflict between U.S. Constitution Article III and acceptance of ICJ's compulsory jurisdiction);

the Committee's concerns, others objected that the Connally Amendment was unnecessary in light of Article 2(7) of the U.N. Charter, which prohibits the United Nations ("U.N.") from intervening in the domestic affairs of States.¹¹⁰ Nevertheless, the Senate adopted the Connally Amendment overwhelmingly.¹¹¹

C. The Vienna Convention on Consular Relations ("Vienna Convention") and the Optional Protocol to the Vienna Convention Concerning Compulsory Settlement of Disputes ("Optional Protocol")

In an effort to codify the principles and practice of the international community regarding consular relations,¹¹² the U.N. International Law Commission ("ILC") prepared a draft international convention on consular affairs ("ILC Draft Articles").¹¹³ The U.N. subsequently convened a conference in Vienna, Austria, ("Vienna Conference") to produce an international agreement based on the ILC Draft Articles.¹¹⁴ The result was the Vienna Convention, a multilateral treaty comprising seventy-nine articles and completed on April 24, 1963.¹¹⁵ Vienna Convention

POMERANCE, *supra* note 77, at 211-17 (discussing constitutional issues involved in U.S. acceptance of ICJ compulsory jurisdiction).

110. See U.N. Charter art. 2(7) (prohibiting United Nations intervention into matters which are within States' domestic jurisdiction); see also Lawrence Preuss, *The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction*, 40 AM. J. INT'L L. 720, 722-25 (1946) (invoking U.N. Charter Article 2(7) as provision making express domestic reservation superfluous).

111. See POMERANCE, *supra* note 77, at 222-37 (calling adoption of Connally Amendment decisive); see also Hubert H. Humphrey, *The United States, the World Court and the Connally Amendment*, 11 VA. J. INT'L L. 310, 312 (1971) (stating that Connally Amendment negated whole purpose of accepting ICJ compulsory jurisdiction).

112. See LEE, *supra* note 3, at 17-20 (discussing historic amalgam of international treaties governing consular relations; recounting earlier failed attempts to codify law); see also 1 SIR ARTHUR WATTS, *THE INTERNATIONAL LAW COMMISSION: 1949-1998*, at 1-2, 227 (1999) (contrasting law of diplomatic and consular relations and observing that consular relations did not benefit from clear rules applicable as customary international law).

113. See Int'l Law Comm'n, *Draft Articles on Consular Intercourse and Immunities*, [1961] 2 Y.B. INT'L L. COMM'N 1, 89-129, U.N. Doc. A/4843 [hereinafter ILC Draft Articles] (reporting ILC Draft Articles designed to codify principles of international law concerning consular relations); see also WATTS, *supra* note 112, at 230-309 (reprinting text of ILC Draft Articles and commenting that job of drafting committee was complicated because international law of consular affairs was not well established).

114. See G.A. Res. 1685 (XVI), at 1, U.N. Doc. A/RES/1685(XVI) (Dec. 18, 1961) (deciding to convene conference of States to draft multilateral treaty governing consular relations based upon ILC Draft Articles); see also LEE, *supra* note 3, at 24-25 (describing operation of conference and stating that ninety-two States participated).

115. See Vienna Convention, *supra* note 5, pmb. (stating that one purpose of Vi-

Article 36 governs the freedom of consular officers of one signatory State ("sending State") to communicate with nationals of the sending State who have been arrested or detained within the territory of another signatory State ("receiving State").¹¹⁶ Of particular relevance here, Article 36.1(b) provides that officials of a receiving State must inform without delay any arrested or detained national of a sending State that she may, at her discretion, have her consulate informed of her arrest or detention.¹¹⁷

The Optional Protocol is a separate international agreement that was completed and opened for signature concurrently with the Vienna Convention.¹¹⁸ The Optional Protocol states, and signatory States agree, that the ICJ will have jurisdiction to entertain any dispute arising out of the interpretation or application of the Vienna Convention.¹¹⁹ The delegates at the Vienna Conference considered essentially two proposals concerning dispute resolution.¹²⁰ One proposal would have inserted a dispute

enna Convention was to contribute to development of friendly relations among nations, irrespective of their differing constitutional and social systems); *see also* LEE, *supra* note 3, at 26 (calling Vienna Convention undoubtedly single most important event in the entire history of consular institution).

116. *See* Vienna Convention, *supra* note 5, art. 36 (establishing procedures governing communication between signatory State consular officials and nationals of that State who have been detained receiving State). *See generally* LEE, *supra* note 3, at 138-43 (discussing drafting and adoption of Vienna Convention Article 36 and noting that entry into force of Vienna Convention Article 36 significantly strengthened legal basis for consular right of access).

117. *See* Vienna Convention, *supra* note 5, art. 36 (providing (1) that detained national of signatory State may request that detaining authorities inform detainee's consular officials of her detention, (2) that such request be forwarded by detaining authorities without delay, and (3) that detaining authorities inform detainee of her right to consular communication); *see also* LEE, *supra* note 3, at 142 (noting that Vienna Convention Article 36 was designed to avoid possible abuse by local authorities).

118. *See* Optional Protocol, *supra* note 3, pmbl. (recounting signatories' intent to resort to ICJ for resolution of disputes arising out of Vienna Convention unless some other form of settlement has been agreed upon within a reasonable period); *see also* LEE, *supra* note 3, at 24-27 (discussing work of Vienna Conference and observing that settlement of consular disputes can no longer be had without recourse to Vienna Convention).

119. *See* Optional Protocol, *supra* note 3, art. 1 (establishing ICJ jurisdiction over disputes arising out of Vienna Convention); *see also* LEE, *supra* note 3, at 633 (observing that Optional Protocol grants ICJ jurisdiction under ICJ Statute Article 36(1) compulsory clause provision).

120. *See* 2 Vienna Convention Official Records, *supra* note 17, at 61, 72 (reporting (1) U.S. proposal for article within Vienna Convention ("U.S. Proposal"), (2) Belgian proposal for separate protocol ("Belgian Proposal"), (3) Ghanan and Indian proposal for separate protocol, and (4) Swiss proposal adding new article allowing recourse to ICJ only if arbitration attempts first failed and including ICJ dispute resolution opt-out

resolution clause directly into the text of the Vienna Convention itself ("the U.S. proposal"),¹²¹ while the other would have annexed such a provision to the Vienna Convention as a separate optional protocol ("the Belgian proposal").¹²² Supporters of the U.S. proposal argued that ad hoc diplomatic negotiation to resolve disputes about the Vienna Convention's interpretation would undermine the Vienna Conference's goal of achieving uniformity in consular relations law.¹²³ Supporters of the Belgian Proposal thought that the U.S. Proposal unduly limited States' opportunity to resolve consular disputes through other dispute resolution mechanisms, like arbitration and diplomatic negotiation.¹²⁴ Noticeably, the Indian delegation questioned whether the ICJ was the appropriate mechanism for resolving consular disputes at all¹²⁵ in light of the absence of any effective

provision); *see also* LEE, *supra* note 3, at 631-36 (discussing various dispute resolution proposals introduced at Vienna Conference).

121. *See* 1 Vienna Convention Official Records, *supra* note 120, at 249 (reporting introduction of American proposal and statements of Mr. Cameron (U.S.) that issue of dispute settlement was one of most important issues at convention); *see also* LEE, *supra* note 3, at 631-32 (explaining that U.S. proposal would have inserted dispute resolution article into Vienna Convention).

122. *See* 1 Vienna Convention Official Records, *supra* note 120, at 250 (reporting introduction of Belgian proposal and statements of Mr. Van Heerswijngheles (Belg.) calling Belgian proposal a measure of conciliation and compromise); *see also* LEE, *supra* note 3, at 633 (explaining that Belgian proposal would have created separate protocol governing dispute settlement).

123. *See, e.g.*, 1 Vienna Convention Official Records, *supra* note 120, at 249 (reporting statement of Mr. Cameron (U.S.) that U.S. delegation thought it appropriate that measure designed to codify international law, such as Vienna Convention, should be accompanied by measures to ensure uniform compliance with those codified rules); *id.* at 249-50 (reporting statements of Mr. Ruegger (Switz.) that disputes clause was corollary to codification of international law and that ICJ participation in uniformity in international law was paramount); *id.* at 250 (reporting statement of Mr. de Menthon (Fr.) that judicial settlement provision would advance goal of progressive development of international law); *id.* at 251 (reporting statement of Mr. Ruda (Italy) that legal rules should be uniformly applied, even if parties refused to comply those rules).

124. *See, e.g.*, 1 Vienna Convention Official Records, *supra* note 114, at 251-52 (reporting statement of Mr. Khlestov (U.S.S.R.) that disputes should only be submitted to ICJ at request of both parties); *id.* at 252 (reporting statement of Mr. Cristescu (Rom.) that sovereignty required a dispute resolution mechanism which would allow States to consent to ICJ jurisdiction on a case-by-case basis); *id.* at 253 (reporting statement of Mr. Petrželka (Czech.) that direct negotiation between States was best method of settling disputes arising under Vienna Convention); *id.* at 253 (reporting statement of Mr. Rabasa (Mex.) explaining Mexican opposition to U.S. proposal because that proposal restricted States' choice of means of settling disputes).

125. *See* 1 Vienna Convention Official Records, *supra* note 120, at 87-88 (reporting statement of Mr. Krishna Rao (India) expressing doubt about the proposition that ICJ was perfect instrument for resolving legal disputes); *see also* LEE, *supra* note 3, at 633-34

mechanism for enforcing ICJ decisions.¹²⁶ Ultimately, the delegates decided to adopt an optional protocol along the lines of the Belgian Proposal.¹²⁷

The United States ratified both the Vienna Convention and the Optional Protocol in 1969.¹²⁸ The report of the Foreign Relations Committee to accompany the Vienna Convention recognized that the purpose of the Vienna Convention was to codify the relevant principles of international law,¹²⁹ and indicated that ratification of the Vienna Convention would not change contemporary U.S. laws or practice.¹³⁰ Nonetheless, the State Department's representative testified before the Committee that the Vienna Convention would be self-executing.¹³¹ The report makes little mention of the Optional Protocol but notes that it is virtually identical to an optional protocol ("Diplomatic Relations Pro-

(observing that Indian delegate noted four main weaknesses of using ICJ as dispute resolution mechanism in context of consular affairs: (1) uncertainty of laws governing consular affairs, (2) possibility of judicial legislation, (3) inability of judicial methods to resolve all dispute, and (4) absence of effective enforcement mechanisms).

126. See 1 Vienna Convention Official Records, *supra* note 120, at 88 (reporting statement of Mr. Krishna Rao that absence of ICJ enforcement mechanism was critical weakness of ICJ); see also LEE, *supra* note 3, at 634 (recounting Indian concerns about absence of any effective enforcement machinery to ensure compliance with ICJ judgments).

127. See 1 Vienna Convention Official Records, *supra* note 120, at PIN (indicating that delegates adopted optional protocol on dispute resolution); see also LEE, *supra* note 3, at 635-36 (discussing final dispute resolution mechanism adopted by delegates).

128. See United Nations, Status of Multilateral Treaties Deposited with the Secretary General, ch. III, § 6 (2006) (indicating deposit of U.S. ratification of Vienna Convention on Nov. 24, 1969); *id.* at § 8 n.1 (indicating U.S. ratification of Optional Protocol on November 24, 1969 and reporting receipt of letter from U.S. Secretary of State on March 7, 2005, indicating U.S. withdrawal from Optional Protocol).

129. See, e.g., S. Exec. Rep. 91-9, at 5-6 (1969) (recording statements of Deputy Legal Advisor Lyerly that aim of Vienna Convention is codification of international law regarding consular relations); Letter of Transmittal from U.S. President Nixon to U.S. Senate, at iii (1969) (on file with author) (indicating purpose of Vienna Convention is to codify international law); Letter of Submittal from United States Secretary of State William Rogers to U.S. President Nixon, at v (1969) (on file with author) (observing that Vienna Convention was designed to codify principles of international law regarding consular affairs); Report of the United States Delegation to the United Nations Conference on Consular Relations at 41 (1969) (on file with author) (reporting that Vienna Convention codifies international law principles governing consular affairs).

130. See S. Exec. Rep. 91-9, *supra* note 129, at 2 (listing as one factor that weighed in Foreign Relations Committee's decision to recommend ratification of Vienna Convention that it would not change or affect present U.S. law).

131. See S. Exec. Rep. 91-9, *supra* note 129, at 5 (quoting statements of Deputy Legal Advisor Lyerly introducing Vienna Convention and Optional Protocol, and stating that Vienna Convention was considered self-executing).

ocol”) annexed to an earlier treaty called the Vienna Convention on Diplomatic Relations (“Diplomatic Relations Convention”).¹³² With respect to that agreement and protocol, a State Department representative testified in hearings before a Senate subcommittee that the Diplomatic Relations Convention and the Diplomatic Relations Protocol were in fact separate treaties.¹³³ The State Department’s representative also observed that decisions of the ICJ pursuant to the Diplomatic Relations Protocol could only be enforced through U.N. Security Council action.¹³⁴

II. WORLD COURT JUDGMENTS AND MUNICIPAL LAW: A QUESTION OF AUTHORITY

This Part introduces the international and U.S. litigation that has produced conflicting interpretations of Vienna Convention Article 36.¹³⁵ This Part then explores the scope of the World Court’s authority over municipal law to determine the extent to which that tribunal is authorized to interpret treaties as a matter of U.S. law. This Part thus surveys the decisions of States’ national courts and examines some decisions of the World Courts themselves.¹³⁶ Finally, this Part explains the self-execut-

132. See S. Exec. Rep. 91-9, *supra* note 129, at 2 (reporting Foreign Relations Committee’s understanding that Optional Protocol is “virtually identical” to Optional Protocol accompanying Vienna Convention on Diplomatic Relations (“Diplomatic Relations Optional Protocol”)); see also *id.* at 8 (reporting remarks of Deputy Legal Advisor Lyerly that Optional Protocol to Vienna Convention is “similar to” Diplomatic Relations Optional Protocol).

133. See *Hearing Before the Subcomm. of the Comm. on Foreign Relations on the Vienna Convention of Diplomatic Relations Together with the Optional Protocol Concerning the Compulsory Settlement of Disputes*, 88th Cong. 75 (1965) [hereinafter *Diplomatic Relations Hearing*] (reporting U.S. State Department’s assertion that Vienna Convention on Diplomatic Relations and Diplomatic Relations Optional Protocol are two separate treaties that could be ratified through one U.S. Senate resolution).

134. See *Diplomatic Relations Hearing*, *supra* note 133, at 17 (reporting statement of U.S. State Department Legal Advisor Leonard C. Meeker that enforcement of ICJ judgments made pursuant to Diplomatic Relations Optional Protocol obtains only pursuant to U.N. Security Council action under U.N. Charter Article 94).

135. Compare *State v. Sanchez-Llamas*, 338 Or. 267, 276-77 (2005) (holding that Vienna Convention does not create individual rights), with *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 35-36 (Mar. 31) (concluding that Vienna Convention creates individual rights that States may invoke in litigation before ICJ).

136. See, e.g., *Socobel v. Greek State*, 18 I.L.R. 3 (Belgium, Tribunal Civil de Bruxelles, 1951) (holding that Belgian courts could not enforce PCIJ judgment directly in Belgian legal system absent some legislative executory decree); *Certain German Interests in Polish Upper Silesia*, 1926 P.C.I.J. (ser. A) No. 7 at 19 (May 25) (stating that World Courts interact with municipal law as facts in international litigation).

ing approach to the Optional Protocol, which holds that the U.S. Senate that ratified the Optional Protocol intended to delegate to the ICJ the authority to interpret the Vienna Convention as a matter of U.S. law.¹³⁷

A. *A Case Study in the Conflicting Interpretations of Vienna Convention Article 36: Medellin v. Dretke*

The recent history of the Vienna Convention in the United States reveals a consistent disagreement between U.S. courts and the ICJ about whether the Vienna Convention creates individual rights.¹³⁸ The litigation concerning the conviction of Jose Ernesto Medellin presents a fitting case study of that conflict.¹³⁹ On September 16, 1994, a Texas jury convicted Medellin—a Mexican national—of rape and first degree murder and sentenced him to death.¹⁴⁰ After losing both on direct appeal¹⁴¹ and in state habeas corpus proceedings,¹⁴² Medellin filed a peti-

137. See Bradley & Damrosch, *supra* note 11, at 692 (transcribing remarks of Professor Damrosch that Optional Protocol was conscious choice to make ICJ interpreter of Vienna Convention as matter of U.S. municipal law); see also *Medellin v. Dretke*, 544 U.S. 660, 683 (2005) (per curiam) (recounting argument of petitioner Medellin that ICJ's interpretation in *Avena* should control U.S. Supreme Court's resolution of his case because Vienna Convention was self-executing).

138. Compare *Avena*, 2004 I.C.J. at 40 (holding that Vienna Convention creates individual rights that States may invoke on behalf of their nationals in litigation before ICJ), with *Cardenas v. Dretke*, 405 F.3d 244, 253 (5th Cir. 2005) (holding that Vienna Convention does not create individual rights).

139. See *Medellin*, 544 U.S. at 666-67 (2005) (dismissing as improvidently granted writ of certiorari in case challenging validity of convictions where convicted non-U.S. citizen was not informed of his Vienna Convention Rights); see also *The Supreme Court, 2004 Term—Leading Cases*, 119 HARV. L. REV. 327, *passim* (2005) [hereinafter *Leading Cases*] (describing U.S. Supreme Court's decision in *Medellin* and preceding litigation).

140. See Brief for Petitioner at 6, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928) [hereinafter *Medellin Petitioner's Brief*] (indicating that jury convicted Medellin of capital murder on September 16, 1994 and trial court sentenced Medellin to death on October 11, 1994); see also *Leading Cases*, *supra* note 139, at 328 (2005) (describing facts of *Medellin*).

141. See *Medellin Petitioner's Brief*, *supra* note 140, at 6 (indicating that Texas Court of Criminal Appeals affirmed Medellin's conviction and sentence on direct appeal on March 16, 1997); see also *Leading Cases*, *supra* note 139, at 329 (recounting history of Medellin's trial and appeal in Texas state courts).

142. See *Medellin Petitioner's Brief*, *supra* note 140, at 7 (observing that Medellin filed a habeas petition in Texas state court alleging that local law enforcement's failure to notify Medellin of his Vienna Convention rights required vacatur of his conviction and sentence and noting that state trial court denied Medellin's petition as procedurally barred); see also *Leading Cases*, *supra* note 139, at 329 (indicating that Medellin first raised his Vienna Convention claim in his state habeas proceedings).

tion for habeas corpus in U.S. District Court for the Southern District of Texas ("Texas District Court"). In that petition, Medellín argued for the first time that his convictions should be overturned because police officers failed to inform him of his Vienna Convention right to consult with Mexican consular officials at the time of his arrest.¹⁴³ The Texas District Court denied Mr. Medellín's petition because he had procedurally defaulted that claim by not raising it at trial, and because the Vienna Convention does not create individual rights that he could raise on his own behalf.¹⁴⁴ Medellín appealed the Texas District Court's decision to the U.S. Circuit Court of Appeals for the Fifth Circuit ("Fifth Circuit").¹⁴⁵

While Medellín's appeal was pending with the Fifth Circuit, the ICJ decided *Avena and Other Mexican Nationals*, a case instituted by Mexico against the United States.¹⁴⁶ In that case, Mexico claimed that the United States had violated the Vienna Convention with respect to fifty-two Mexican nationals then awaiting execution in the United States, including Medellín.¹⁴⁷ The ICJ

143. See Medellín Petitioner's Brief, *supra* note 140, at 7-8 (observing that Medellín filed federal habeas petition on November 28, 2001 in U.S. District Court for Southern District of Texas ("Texas district court") alleging that violation of his Vienna Convention rights required vacatur of his conviction and sentence); see also *Leading Cases*, *supra* note 139, at 329 (discussing Medellín's argument before Texas district court that violation of his rights under Vienna Convention required reexamination of Medellín's conviction and sentence).

144. See Medellín Petitioner's Brief, *supra* note 140, at 8 (explaining that Texas district court held that (1) Medellín had defaulted his Vienna Convention claim under Texas procedural rule, and (2) Vienna Convention did not create individual rights enforceable by U.S. courts); see also *Leading Cases*, *supra* note 139, at 329-30 (noting that Texas district court denied Medellín's federal habeas petition because Vienna Convention does not create individual rights and because Texas procedural default rule barred review of Medellín's Vienna Convention claims).

145. See *Medellin v. Dretke*, 544 U.S. 660, 662 (2005) (indicating that Medellín sought certificate of appealability ("COA") from U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit")); see also Medellín Petitioner's Brief, *supra* note 140, at 13 (stating that Medellín sought COA from Fifth Circuit). See generally 28 U.S.C. § 2253(c)(1)(A) (establishing that COA is required to appeal denial of habeas petition that is predicated on allegedly illegal detention arising from State process); 28 U.S.C. § 2253(c)(2) (providing that COA may issue only on substantial showing of denial of constitutional right).

146. See *Avena and Other Mexican Nationals*, 2004 I.C.J. 12, 19-20 (Mar. 31) (stating that Mexico sought remedy for violations of its Vienna Convention rights and of Vienna Convention rights of its nationals then-detained in United States); see also Dinah L. Shelton, *International Decision*, 98 AM. J. INT'L L. 559, 559-60 (observing that Mexico claimed both violations of its own rights and rights of its nationals).

147. See *Avena*, 2004 I.C.J. at 17, 23-25 (indicating proceedings involved fifty-two

decided that, in addition to Mexico's sovereign treaty rights, the Vienna Convention also creates rights for individual Mexican nationals which Mexico could raise in proceedings before the ICJ.¹⁴⁸ The ICJ further concluded that, by allowing U.S. state procedural default rules to bar judicial review of individual Vienna Convention claims, the United States violated Vienna Convention Article 36.¹⁴⁹ Noticeably, the ICJ explicitly relied on its prior decision in the *LaGrand Case* to reach its decision in *Avena*.¹⁵⁰ In light of the U.S. violations, the ICJ concluded that the United States must provide some review of the individual Vienna Convention claims for Mexican nationals.¹⁵¹

Notwithstanding the ICJ's decision in *Avena*, the Fifth Circuit refused to review Medellin's Vienna Convention claims and denied his habeas petition.¹⁵² First, the Fifth Circuit held that

Mexican nationals, including Jose Ernesto Medellin); *see also* Elizabeth Samson, *Revisiting Miranda After Avena: The Implications of Mexico v. United States of America for the Implementation of the Vienna Convention on Consular Relations in the United States*, 29 *FORDHAM INT'L L.J.* (forthcoming 2006) (stating Mexican filings originally included claims respecting fifty-four individuals but were later amended to include claims respecting fifty-two individuals).

148. *See Avena*, 2004 I.C.J. at 34-36 (holding that Mexico may invoke rights conferred on Mexican nationals under Article 36 of Vienna Convention) (citing *LaGrand Case* (Germany v. U.S.), 2001 I.C.J. 466, 494 (June 27)); *see also Leading Cases*, *supra* note 139, at 330 (stating that *Avena* held that Vienna Convention creates individual rights for Mexican nationals).

149. *See Avena*, 2004 I.C.J. at 57 (holding that application of procedural default rule violated Vienna Convention Article 36(2), which requires laws of each state to give full effect to rights created by Vienna Convention Article 36) (citing *LaGrand Case* (Germany v. U.S.), 2001 I.C.J. 466, 494 (June 27)); *see also* Samson, *supra* note 147 (observing that *Avena* held that application of procedural default rule to bar review of Vienna Convention rights violates Vienna Convention).

150. *See LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 446, 477-78 (June 27) (holding that Vienna Convention creates rights for individuals which may be invoked by States in ICJ on their behalf and that United States violated Vienna Convention by allowing procedural default rules to bar review of claims that U.S. state authorities had violated Vienna Convention with respect to two German nationals convicted and sentenced to death in Arizona); *see also Avena*, 2004 I.C.J. at 36, 57 (stating that ICJ's decision in *LaGrand Case* was equally applicable in *Avena*); Samson, *supra* note 147 (observing that *Avena* decision relied explicitly on prior holding in *LaGrand Case*).

151. *See Avena*, 2004 I.C.J. at 65-66, 138 (discussing nature of review required by *Avena* and *LaGrand Case* decisions but stating that United States retained discretion to craft those review procedures); *see also Leading Cases*, *supra* note 139, at 330 (exploring nature of judicial review required by *Avena* decision).

152. *See Medellin v. Dretke*, 371 F.3d 270, 275, 281 (5th Cir. 2004) (rejecting Medellin's COA petition because Medellin failed to establish that reasonable jurists could disagree with Texas district court's denial of his habeas petition and thus had failed to establish substantial showing of denial of constitutional right as required by 28 U.S.C.

the Texas procedural default rule could and did bar review of Medellin's Vienna Convention claim.¹⁵³ Taking specific note of the conflict on this point between the ICJ's decisions in *Avena* and *LaGrand* and the Supreme Court's decision in *Breard v. Greene*,¹⁵⁴ the Fifth Circuit observed that only the Supreme Court can overrule a Supreme Court decision and that the ICJ's contrary opinion had no binding effect in U.S. courts.¹⁵⁵ Second, even assuming there was no procedural default, the Fifth Circuit held that Medellin was not the proper party to assert the Vienna Convention claim because that treaty does not create individual rights.¹⁵⁶ Again observing the ICJ's *LaGrand* and *Avena* holdings to the contrary, the Fifth Circuit nonetheless concluded that its own precedent¹⁵⁷ controlled Medellin's case, the ICJ's decisions

§ 2253(c)(2)); see also *Leading Cases*, *supra* note 139, at 330 (stating that Fifth Circuit decided to reject Medellin's COA because he had procedurally defaulted on his Vienna Convention claim).

153. See *Medellin*, 371 F.3d at 279-80 (refusing to consider merits of Medellin's Vienna Convention arguments because Medellin had procedurally defaulted on those arguments by not raising them in state trial court proceedings); see also *Leading Cases*, *supra* note 139, at 330 (stating that Fifth Circuit denied Medellin's Vienna Convention claim as procedurally defaulted).

154. See *Breard v. Greene*, 523 U.S. 371, 375-77 (1998) (per curiam) (holding that: (a) procedural default rule could bar review of Vienna Convention claim because forum State's procedural rules generally govern the implementation of a treaty in that forum, and (b) subsequently-enacted statute barred review of treaty claims); see also *Samson*, *supra* note 147 (discussing twin rationales of *Breard* that review of Vienna Convention claims were barred by Virginia's procedural default rule and by subsequently-enacted U.S. federal statute).

155. See *Medellin*, 371 F.3d at 280 (stating that only U.S. Supreme Court may overrule Supreme Court decision and concluding that Fifth Circuit is bound to follow Supreme Court precedent until taught otherwise by the Supreme Court); see also *Leading Cases*, *supra* note 139, at 330 (explaining that Fifth Circuit concluded that decisions of ICJ in *Avena* and *LaGrand* did not supercede U.S. Supreme Court decision in *Breard*).

156. See *Medellin*, 371 F.3d at 280 (invoking prior Fifth Circuit holding that Vienna Convention does not create individual rights and refusing to entertain Medellin's Vienna Convention claims because Vienna Convention does not create rights for individuals that are enforceable in U.S. courts); see also *Leading Cases*, *supra* note 139, at 330 (noting that Fifth Circuit did not consider merits of Medellin's Vienna Convention claims because Vienna Convention does not create individual rights that are judicially enforceable in U.S. courts).

157. See *United States v. Jimenez-Nava*, 243 F.3d 192, 196-99 (5th Cir. 2001) (examining language of Vienna Convention and holding that Vienna Convention does not create individual rights); see also Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: The International Court of Justice in Mexico v. United States (Avena) Speaks Emphatically to the Supreme Court of the United States About the Fundamental Nature of the Right to Consul*, 36 *Geo. J. Int'l L.* 1, 15-16 (2004) (discussing facts and holding of *Jimenez-Nava*).

notwithstanding.¹⁵⁸

The U.S. Supreme Court granted certiorari to decide whether U.S. courts must apply the ICJ's *Avena* judgment or whether they are free to follow contrary U.S. precedent.¹⁵⁹ However, on February 28, 2005, U.S. President George W. Bush issued a memorandum stating that the United States would comply with the ICJ's *Avena* decision by having U.S. state courts review the Vienna Convention claims raised by the Mexican nationals in question.¹⁶⁰ Relying on the presidential memorandum, Medellin filed a second state habeas petition in the Texas state courts¹⁶¹ and the U.S. Supreme Court subsequently dismissed its writ of certiorari as improvidently granted.¹⁶²

The U.S. Supreme Court did not wait long to revisit the issue, granting certiorari in *Sanchez-Llamas* on November 7, 2005.¹⁶³ In that case, Oregon police officers arrested Mexican national Moises Sanchez-Llamas for attempted murder, informed him of his Miranda rights, and interrogated him for sev-

158. See *Medellin*, 371 F.3d at 280 (stating that U.S. courts in Fifth Circuit must apply *Jimenez-Nava*, subsequent *LaGrand* decision notwithstanding, until Fifth Circuit or U.S. Supreme Court requires otherwise); see also *Leading Cases*, *supra* note 139, at 330 (stating that Fifth Circuit followed prior Fifth Circuit case law in rejecting Medellin's Vienna Convention claim).

159. See *Medellin v. Dretke*, 125 S. Ct. 686 (mem.) (granting certiorari); see also *Petition for Writ of Certiorari at 1, Medellin v. Dretke*, 125 S. Ct. 686 (No. 04-5928) (stating question presented as whether U.S. court must follow prior ICJ adjudication of rights under Vienna Convention).

160. See Memorandum for the Attorney General (Feb. 28, 2005) (on file with author); see also Linda Greenhouse, *Bush Decision to Comply With World Court Complicates Case of Mexican on Death Row*, N.Y. TIMES, Mar. 29, 2005, at A14 (speculating about impact on pending Medellin litigation of U.S. Presidential action to comply with *Avena* decision).

161. See *Medellin*, 544 U.S. at 663-64 (observing Medellin's contemporaneous state habeas proceeding); see also *Ex parte Medellin*, 2005 WL 1532996 *3 (Tex. Crim. App. June 22, 2005) (ordering briefing in Medellin's state habeas proceedings initiated pursuant to U.S. President's order).

162. See *Medellin*, 544 U.S. at 662 (dismissing writ of certiorari because intervening Presidential action gave Medellin opportunity to obtain adequate remedies elsewhere and because case raised serious constitutional issues); see also Linda Greenhouse, *Justices Drop Capital Case Ruled On by World Court*, N.Y. TIMES, May 24, 2005, at A17 (discussing U.S. Supreme Court's decision in *Medellin*).

163. See *Sanchez-Llamas v. Oregon*, 126 S. Ct. 620 (2005) (mem.) (granting certiorari on question whether the Vienna Convention conveys individual rights of consular notification to non-U.S. citizen detainees); see also *Bustillo v. Johnson*, 126 S. Ct. 621 (2005) (mem.) (granting certiorari on question whether U.S. state courts may refuse to consider violations of Vienna Convention Article 36 because that treaty does not create individually rights).

eral hours, during which time he made several incriminating statements.¹⁶⁴ Before trial, Sanchez-Llamas moved to suppress those statements because police officers had not informed him of his Vienna Convention rights at the time of his arrest.¹⁶⁵ The Oregon trial court denied the motion¹⁶⁶ and a jury convicted Sanchez-Llamas and sentenced him to 246 months in prison.¹⁶⁷ On direct appeal, Sanchez-Llamas argued, among other things, that the trial court erroneously denied his motion to suppress.¹⁶⁸ The Oregon Supreme Court rejected that argument and upheld the conviction without reference to the *LaGrand* or *Avena* decisions, concluding that the Vienna Convention does not create individual rights that Sanchez-Llamas could invoke at trial.¹⁶⁹

B. *International Practice and ICJ Authority*

Antecedent to the question presented in *Sanchez-Llamas* remains the question: does the ICJ possess authority to interpret

164. See Brief for Petitioner Moises Sanchez-Llamas at 3-6, *Sanchez-Llamas v. Oregon*, No. 04-10566 (Dec. 22, 2005) [hereinafter *Sanchez-Llamas Petitioner's Brief*] (recounting Medellin's arrest and subsequent interrogation); see also Brief for Respondent State of Oregon at 1, *Sanchez-Llamas v. Oregon*, No. 04-10566 (Jan. 31, 2006) [hereinafter *Sanchez-Llamas Respondent's Brief*] (stating that Sanchez-Llamas made incriminating statements during his initial interrogation, which occurred between 4:15 a.m. and 2:30 p.m.).

165. See *Sanchez-Llamas Petitioner's Brief*, *supra* note 164, at 6 (observing that before trial, Sanchez-Llamas moved to suppress his statements to police as involuntarily and obtained in violation of Vienna Convention); see also *Sanchez-Llamas Respondent's Brief*, *supra* note 164, at 1 (noting that Sanchez-Llamas moved to suppress his post-arrest statements because (1) his Miranda waiver and statements were not voluntary, and (2) police failed to comply with Vienna Convention).

166. See *Sanchez-Llamas Petitioner's Brief*, *supra* note 164, at 7 (stating trial court denied Sanchez-Llamas' motion to suppress and advised defense counsel that it did not want to hear argument on Vienna Convention issue); see also *State v. Sanchez-Llamas*, 338 Or. 267, 270 (Or. 2005) (quoting trial court's denial of motion to suppress as premised on ground that Vienna Convention violations do not require suppression).

167. See *Sanchez-Llamas Petitioner's Brief*, *supra* note 164, at 7 (observing Sanchez-Llamas' sentence of 20.5 years); see also *Sanchez-Llamas Respondent's Brief*, *supra* note 164, at 2 (indicating Sanchez-Llamas' sentence of 246 months).

168. See *Sanchez-Llamas Petitioner's Brief*, *supra* note 164, at 7 (explaining Sanchez-Llamas' argument on appeal that trial court erroneously denied his motion to suppress); see also *Sanchez-Llamas Respondent's Brief*, *supra* note 164, at 5-6 (noting only argument on appeal to Oregon Supreme Court was propriety of trial court's denial of Sanchez-Llamas' motion to suppress).

169. See *State v. Sanchez-Llamas*, 338 Or. 267, 276-77 (Or. 2005) (holding that Vienna Convention does not create individual rights and that trial court's denial of Sanchez-Llamas' motion to suppress was therefore appropriate); see also *State v. Sanchez-Llamas*, 191 Or. App. 399 (Or. Ct. App. 2004) (upholding Sanchez-Llamas conviction without opinion).

the Vienna Convention as a matter of U.S. law that U.S. courts are required to follow?¹⁷⁰ This section reviews some decisions of States' national courts, as well as some decisions of the World Courts themselves that suggest a traditional conception of the scope of the ICJ's authority.¹⁷¹ That conception generally holds that World Court judgments are only effective as a matter of international law and do not have legal effect in municipal legal systems.

While the decisional law of non-U.S. national courts regarding the domestic effect of international judgments is sparse, a few observations bear repeating.¹⁷² There are at least two reported decisions in which a non-U.S. national court explicitly refused to recognize an ICJ order as binding domestic precedent.¹⁷³ In *Socobel v. Greek State*, a Belgian court refused to give effect to a prior PCIJ judgment that a Belgian company sought to enforce against Greece in the Belgian courts.¹⁷⁴ The Belgian court reasoned that PCIJ judgments were without binding force in the Belgian domestic legal system absent an agreement giving

170. See Transcript of Oral Argument at 13, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 817409 at *12 (querying whether U.S. courts are bound to accept ICJ judgments); see also Flaherty, *supra* note 9, 453 n.26 (predicting that U.S. Supreme Court will address issue whether U.S. courts should automatically apply ICJ's Vienna Convention judgments in *Sanchez-Llamas*).

171. See, e.g., *Socobel v. Greek State*, 18 I.L.R. 3 (Belgium, Trib. Civil de Bruxelles, 1951) (holding that Belgium courts could not enforce PCIJ judgment directly in Belgium legal system absent some legislative executive decree); Certain German Interests in Polish Upper Silesia, 1926 P.C.I.J. (ser. A) No. 7 at 19 (May 25) (stating that World Courts interact with municipal law as facts in international litigation).

172. See C. WILFRED JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 706-15 (1964) (discussing possibility of enforcement of World Court judgments by municipal courts and reviewing cases); see also Weisburd, *supra* note 99, at 885-88 (reviewing municipal court decisional law concerning precedential effect of PCIJ and ICJ judgments in domestic law).

173. See *Socobel*, 18 I.L.R. at 3 (refusing to enforce PCIJ judgment directly in Belgian domestic courts absent independent executory instrument); see also *Mackay Radio and Telegraph Company v. Lal-la Fatma Bent si Mohammed el Khadar*, 21 I.L.R. 136, 136 (Tangier, Ct. App. Int'l Trib., 1954) (stating that ICJ judgment was not binding in Tangier domestic court).

174. See *Socobel*, 18 I.L.R. at 3 (reporting that *Socobel* plaintiff sought to attach certain Greek funds held in Belgium in satisfaction of debts owed by Greece to plaintiff pursuant to judgment by PCIJ); see also William W. Bishop, Jr., *Judicial Decisions Involving Questions of International Law*, 47 AM. J. INT'L L. 492, 508-09 (1953) (discussing facts of *Socobel* litigation); 1 ROSENNE, *supra* note 88, at 221-26 (discussing facts of and criticizing the *Socobel* decision for not treating PCIJ judgment as evidence of title in Greece's attached Marshall Plan funds).

such judgments executory force.¹⁷⁵ Again, in *Mackay Radio and Telegraph Co. v. Lal-la Fatma Bent si Mohammed el Khadar and Others*, a court in the International Zone of Morocco explicitly held that ICJ decisions were not binding on its domestic courts.¹⁷⁶ The Moroccan Court reasoned that judgments of the World Courts are not applicable in municipal tribunals because the World Courts resolve questions of international relations that are given legal effect only through appropriate internal legislation.¹⁷⁷

In addition to these cases, some courts have given ICJ decisions persuasive effect short of binding authority.¹⁷⁸ Thus, in *Anglo-American Oil Co. v. Idimitsu Kosan Kabushiki Kaisha*, the District Court of Tokyo cited and followed an earlier ICJ decision¹⁷⁹ in concluding that an agreement between the Anglo-Iranian Oil Company and Iran was not an international treaty.¹⁸⁰ In another

175. See *Socobel*, 18 I.L.R. at 4 (stating that Belgian courts could not enforce judgment of PCIJ absent independent power of execution); see also Weisburd, *supra* note 99, at 886 (stating that court in *Socobel* rejected argument that a PCIJ decision could have direct legal effect in Belgian legal system).

176. See *Mackay Radio*, 21 I.L.R. at 137 (stating that ICJ decision could only provide guidance, though not because ICJ judgments have binding force in municipal courts); see also Weisburd, *supra* note 99, at 886-87 (observing that Tangier court relied on three grounds for denying applicability of ICJ judgment, one of which was that ICJ judgments are not binding on Tangier domestic courts).

177. See *Mackay Radio*, 21 I.L.R. at 137 (stating that ICJ's judgment is not binding on Tangier Zone court because ICJ judgments resolve differences arising between States and those decisions are only binding only upon High Contracting Parties; stating that enforcement of ICJ judgments obtains only through States' internal legislative measures to carry out ICJ decisions); see also Oliver J. Lissitzyn, *Judicial Decisions Involving Questions of International Law*, 49 AM. J. INT'L L. 396, 413-14 (1955) (discussing facts of *Mackay Radio* case and observing that court in that case refused to enforce ICJ judgment as matter of municipal law).

178. See *Mackay Radio*, 21 I.L.R. at 137 (stating that international decisions could only provide inspiration and guidance, but were not binding); see also *Anglo-American Oil Co. v. Idimitsu Kosan Kabushiki Kaisha*, 20 I.L.R. 305, 308 (Japan, High Ct. Tokyo 1953) (citing and following ICJ determination that Anglo-Iranian Oil Company agreement with Iranian government was in nature of private contract); *Anglo-American Oil Company v. S.U.P.O.R. Company*, 22 I.L.R. 23, 41 (Italy, Civ. Ct. Rome 1954) (concluding that Anglo-Iranian Oil Company agreement with Iranian government was not international agreement and citing to prior ICJ decision concluding same).

179. See *Anglo-Iranian Oil Co. Case (U.K. v. Iran)*, 1952 ICJ 93, 112 (July 22) (holding that Anglo-Iranian Oil Company was not British government actor); see also Weisburd, *supra* note 99, at 887 (observing that Italian and Japanese courts had relied on prior ICJ decision but had not treated it as determinative).

180. See *Idimitsu Kosan Kabushiki Kaisha*, 20 I.L.R. at 308 (treating as persuasive authority ICJ determination that Anglo-Iranian Oil Company agreement with Iranian Government was private contract); see also Weisburd, *supra* note 99, at 887 (observing

suit, *Anglo-American Oil Co. v. S.U.P.O.R. Co.*, the Civil Court of Rome followed the same ICJ decision.¹⁸¹

Indeed, only one national court has treated a decision of the ICJ as controlling a question of municipal law.¹⁸² That case—*Administration des Habous v. Deal*—involved a suit against a U.S. citizen living in French-held Morocco over which the U.S. Government asserted consular jurisdiction.¹⁸³ The Moroccan Court of Appeal of Rabat (“*Deal* Court”) held that the ICJ’s conclusion in *Rights of Nationals of the United States of America in Morocco* compelled the conclusion that consular jurisdiction was not appropriate in suits against U.S. citizens.¹⁸⁴ The validity, however, of that holding is questionable: two years later, another court in Tangier explicitly held that the same ICJ judgment was not binding as a matter of municipal law.¹⁸⁵

that Japanese court had relied on prior ICJ decision but had not treated it as determinative).

181. See *S.U.P.O.R. Co.*, 22 I.L.R. at 41 (noting that ICJ determination that Anglo-Iranian Oil Company agreement with Iranian government was private contract but not controlled by that determination); see also Weisburd, *supra* note 99, at 887 (observing that Italian court had relied on prior ICJ decision but had not treated it as determinative).

182. See *Administration des Habous v. Deal*, 19 I.L.R. 342 (Morocco, Ct. App. Rabat, 1952) (exercising jurisdiction over U.S. citizen consistent with ICJ interpretation of applicable treaty in *Rights of Nationals of the United States of America in Morocco*, 1952 I.C.J. 176 (Aug. 27)); see also Weisburd, *supra* note 99, at 886 (referring to *Deal* decision as only case treating ICJ decision as binding precedent).

183. See *Deal*, 19 I.L.R. at 342-43 (stating that case involved action to evict U.S. citizen from property in Casablanca); see also Weisburd, *supra* note 99, at 886 (noting that *Deal* decision involved an eviction suit in Moroccan courts).

184. See *Deal*, 19 I.L.R. at 342-43 (holding that ICJ decision in *Rights of Nationals of the United States of America in Morocco* dispositively answered question whether United States could invoke consular jurisdiction over suits against U.S. citizens in Morocco). But see *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.) 1952 I.C.J. 176, 212 (Aug. 27) (finding that United States entitled to consular jurisdiction in all disputes between U.S. citizens and in all cases, civil or criminal, brought against U.S. citizens); see also Weisburd, *supra* note 99, at 886 (stating that *Deal* decision relied on ICJ judgment in reversing lower court determination that U.S. consular jurisdiction was appropriate).

185. Compare *Deal*, 19 I.L.R. at 343 (considering ICJ decision in *Rights of Nationals of the United States of America in Morocco* to be binding authority), with *Mackay Radio and Telegraph Company v. Lal-la Fatma Bent si Mohammed el Khadar*, 21 I.L.R. 136 (Tangier, Ct. App. Int’l Trib., 1954) (concluding that ICJ decision in *Rights of Nationals of the United States of America in Morocco* was not binding in municipal law and referring to ICJ decision as persuasive but not binding). See 1 ROSENNE, *supra* note 88, at 226-27 n.48 (questioning continuing validity of *Deal* decision in light of *Mackay Radio*); see also Weisburd, *supra* note 87, at 304 (arguing that *Mackay Radio* decision rejected *Deal* decision’s rationale that international judgments are precedent for municipal courts).

The PCIJ and the ICJ have never squarely addressed the effect of their own judgments in State municipal legal systems.¹⁸⁶ Nonetheless, they have announced several principles that bear on the issue. First, while acknowledging their authority to determine matters of international law,¹⁸⁷ the World Courts have indicated that they only interact with municipal law as facts in international litigation.¹⁸⁸ The leading case is *Certain German Interests in Polish Upper Silesia (Ger. v. Pol.)*, a suit which Germany initiated in the PCIJ alleging that certain Polish laws effected an expropriation of German estates without compensation in violation of various treaty provisions.¹⁸⁹ The PCIJ saw no discernible impediment in the fact that resolving the dispute would require interacting with Polish Law.¹⁹⁰ Instead, the PCIJ observed that municipal laws operate as facts in international proceedings and that the PCIJ would therefore not be interpreting Polish Law “as such.”¹⁹¹ Although there is debate about the precise meaning of

186. See 1 ROSENNE, *supra* note 88, at 206 (observing that ICJ has not directly addressed issue of compliance with ICJ orders); see also Weisburd, *supra* note 99, at 885 (stating PCIJ and ICJ cases are too few to provide much guidance).

187. See *Tunis Nationality Decrees*, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7) (finding issue of international law sufficient to support PCIJ jurisdiction over dispute about nationality decrees in French-controlled Tangier); see also *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A) No. 2, at 11-12 (Aug. 30) (finding that case presented dispute sufficient to support PCIJ jurisdiction).

188. See *Certain German Interests in Polish Upper Silesia*, 1926 P.C.I.J. (ser. A) No. 7 at 19 (May 25) (stating that municipal laws are facts that constitute activities of States in international litigation); see also *Payment of Various Serbian Loans Issued in France/Payment in Gold of the Brazilian Federal Loans Issued in France*, 1929 P.C.I.J. (ser. A) No. 20/21 at 19-20 (judgment no. 14) (July 12) (observing that operation of municipal law may serve as matter of fact for review by PCIJ); BROWNIE, *supra* note 16, at 38-40 (exploring extent and validity of principle that World Court only interacts with municipal law as factual matter); 1 VERZIJL, *supra* note 61, at 155, 321-22 (calling principle that World Courts interact with municipal laws as facts in international litigation “established” PCIJ jurisprudence).

189. See *Polish Upper Silesia*, 1926 P.C.I.J. (ser. A) No. 7 at 5-7 (indicating German allegation that Polish law constituted act of expropriation of German property in violation of Articles 92 and 297 of Treaty of Versailles and various articles of Geneva Convention); see also 1 VERZIJL, *supra* note 61, at 149-63 (discussing facts and holding of *Polish Upper Silesia* case and observing German allegation that Poland had acted contrary to provisions of Geneva Convention).

190. See *Polish Upper Silesia*, 1926 P.C.I.J. (ser. A) No. 7 at 19 (asserting PCIJ’s ability and authority to interact with States’ municipal law as factual matter); see also 1 VERZIJL, *supra* note 61, at 155 (characterizing “factual matter” language in *Polish Upper Silesia* case as veritable axiom of international law).

191. See *Polish Upper Silesia*, 1926 P.C.I.J. (ser. A) No. 7 at 19 (stating that in interacting with Polish municipal law, PCIJ does not interpret Polish law “as such”); see also *Judgments of the Admin. Tribunal of the ILO Upon Complaints Made Against*

the statement in *Polish Upper Silesia*,¹⁹² it is clear that the World Courts must follow the municipal court interpretations of municipal law¹⁹³ and cannot supply municipal decisions on disputed issues of municipal law.¹⁹⁴ It is equally clear, however, that States' municipal laws cannot excuse violations of international law.¹⁹⁵

Second, while acknowledging that States are under an obligation to comply with the decisions of the World Courts¹⁹⁶ and

UNESCO, 1956 I.C.J. 77, 165 (Oct. 23) (Dissenting Opinion of Judge Córdova) (restating that ICJ does not apply municipal law and observing that municipal law only concerns World Court incidentally); *Nottebohm Case (Liech. v. Guat.)* 1955 I.C.J. 4, 51 (April 6) (Dissenting Opinion of Judge Guggenheim) (asserting that international tribunals consider municipal law for the purpose of exercising competence conferred on it by international law and that international tribunals do not exercise same authority as State's court of appeal with regard to municipal law); *Phosphates in Morocco*, 1938 P.C.I.J. (ser. A/B) No. 74, at 26 (June 14) (stating that certain French legislation were essential facts for affixing date of injury of which Italy complained); *Payment of Various Serbian Loans Issued in France/Payment in Gold of the Brazilian Federal Loans Issued in France*, 1929 P.C.I.J. (ser. A) No. 20/21 (judgment no. 15), at 124 (July 12) (stating that PCIJ must apply municipal law as it would be applied by municipal courts).

192. See JENKS, *supra* note 172, at 548-53 (1964) (calling principle that World Courts only interact with municipal law as facts debatable); see also BROWNLEE, *supra* note 16, at 38 (quoting Jenks for proposition that "municipal law is mere fact" principle is dubious).

193. See *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116, 134 (Dec. 18) (considering Norwegian Supreme Court conclusions authoritative and holding ICJ bound to accept those conclusions); see also *Payment of Various Serbian Loans Issued in France/Payment in Gold of the Brazilian Federal Loans Issued in France*, 1929 P.C.I.J. (ser. A) No. 20/21 (judgment no. 14), at 46 (July 12) (observing that it would not be in conformity with PCIJ's task for PCIJ to undertake its own construction of municipal law that contradicts the construction adopted by the State's highest court); JENKS, *supra* note 172, at 593 (calling principle that World Courts will adopt municipal court interpretations of municipal law well established).

194. See *Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6, 28 (Mar. 21) (declining to anticipate U.S. domestic court decision on U.S. domestic justiciability of international agreement in question); see also *Panevezys-Saldutiskis Railway Case*, 1939 P.C.I.J. (ser. A/B) No. 76 at 19 (Feb. 28) (declining to reach contention that Lithuanian courts lacked jurisdiction in certain cases because that question depended on unresolved issue of Lithuanian law that Lithuanian courts alone could resolve); JENKS, *supra* note 172, at 594 (stating that there are certain cases in which the World Courts will not anticipate decisions of competent municipal court).

195. See 1 ROSENNE, *supra* note 88, at 221-23, 222 n.43 (observing that international judgments are binding on all organs of State; asserting that States cannot avoid international obligations by recourse to federalist principles; contrasting his assertion with *Socobel* decision); 2 VERZIJL, *supra* note 61, at 304-05 (discussing Judge Lauterpacht's rationale in *Application of the Convention of 1902 Governing the Guardianship of Infants (Neth. v. Swed.)* 1958 I.C.J. 55, 79-102 (Nov. 28)).

196. See "*Société Commerciale de Belgique*," 1939 P.C.I.J. (ser. A/B) No. 78, at

recognizing that creditor States may dispose of their rights as they please,¹⁹⁷ the World Courts have observed that the specific manner of compliance with international judgments is within the discretion of the State parties.¹⁹⁸ As a corollary to that principle, both courts have stated that they do not consider the likelihood of State compliance in reaching a judgment.¹⁹⁹ The leading litigation on this point is the *Asylum/Haya de la Torre* litigation, instituted by the mutual agreement of Colombia and Peru.²⁰⁰ Victor Raul Haya de la Torre sought asylum in the Co-

175-76 (June 15) (stating that Greek government was under obligation to execute arbitral awards against it as they stand); see also 1 ROSENNE, *supra* note 88, at 206 (citing "*Société Commerciale de Belgique*" for principle that State against which a definitive judgment has been rendered is bound to execute it).

197. See Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunis. v. Libyan Arab Jamahiriya), 1985 I.C.J. 192, 218 (Dec. 10) (observing that absent Parties' mutual agreement about continental shelf delimitation that does not correspond to ICJ's determination, terms of ICJ's judgment are definitive and binding); see also Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, at 37 (Dec. 2) (stating that use which judgment creditor makes of ICJ judgment is political, not judicial matter); Free Zones of the Upper Savoy and the District of Gex (Second Phase), 1930 P.C.I.J. (ser. A) No. 24, at 11 (Dec. 6) (affirming that States are free to dispose of their rights under ICJ judgments); 1 ROSENNE, *supra* note 88, at 220 (noting that judgment creditor has complete freedom to decide to what extent it will require satisfaction of rights adjudicated to it in ICJ decisions).

198. See *Northern Cameroons*, 1963 I.C.J. at 37 (stating that ICJ cannot concern itself with choice among various practical steps which States may take to comply with ICJ judgments); see also *Haya de la Torre Case* (Colom. v. Peru), 1951 I.C.J. 71, 83 (June 13) (observing that manner of compliance with earlier ICJ judgment was in Parties' discretion and therefore not a judicial matter); 1 ROSENNE, *supra* note 88, at 221 (remarking that choice about manner of compliance with ICJ judgments is political operation outside scope of ICJ's judicial function).

199. See *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. United States of America), 1984 I.C.J. 392, 437-38 (Nov. 26) (stating that ICJ should not consider likelihood of compliance with its own decisions in resolving disputes); see also *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457, 477 (Dec. 20) (stating court should not contemplate whether parties will comply with its orders); *Factory at Chorzow* (merits), 1928 P.C.I.J. (ser. A) No. 17 (judgment no. 13), at 62-63 (Sept. 13) (reiterating above principle from *S.S. Wimbledon* that PCIJ should not consider likelihood of enforcement in formulating judgment); *S.S. Wimbledon*, 1923 P.C.I.J. (ser. A) No. 1, at 32 (Aug. 17) (explaining that PCIJ award of interim interest at low rate was not attributable to consideration of non-compliance and stating that PCIJ neither can nor should contemplate such contingencies).

200. See generally *Asylum* (Colom. v. Peru) (merits), 1950 I.C.J. 266 (Nov. 20) (rendering initial judgment on whether Haya de la Torre asylum was consistent with international obligations); see also *Request for Interpretation of the Judgment of November 20, 1950 in the Asylum Case* (Colom. v. Peru), 1950 I.C.J. 395 (Nov. 27) (declining to interpret *Asylum* judgment finding no actual dispute between Parties); *Haya de la Torre Case* (Colom. v. Peru), 1951 I.C.J. 71 (June 13) (holding that *Asylum* judgment did not

Colombian Embassy in Lima after the Peruvian Government filed charges in Peruvian court against him for complicity in a failed military rebellion.²⁰¹ Colombia granted the asylum and demanded that Peru ensure Haya de la Torre's safe conduct from that country.²⁰² In its first judgment on the issue, the ICJ held that Colombia had no unilateral right to determine Haya de la Torre's eligibility for asylum,²⁰³ and that Peru was not obligated to provide safe conduct.²⁰⁴ Colombia and Peru disagreed about the effect of the ICJ's judgment—specifically, whether it obligated Colombia to surrender Haya de la Torre to Peruvian authorities—and they petitioned the ICJ for clarification.²⁰⁵ After successive filings,²⁰⁶ the ICJ held that it could provide no gui-

include, nor would ICJ presently set forth, specific manner of compliance with *Asylum* judgment); *Asylum Case (Colom. v. Peru)*, 1950 INT'L CT. JUST. Y.B. 77, 77-85 [hereinafter ICJ YEARBOOK SUMMARY—ASYLUM CASE] (discussing facts and holdings of *Asylum* decisions and indicating that ICJ obtained jurisdiction through mutual agreement between Peru and Colombia).

201. See *Asylum*, 1950 I.C.J. at 272-73 (recounting facts of Haya de la Torre's indictment and escape to Colombian Embassy); see also ICJ YEARBOOK SUMMARY—ASYLUM CASE, *supra* note 200, at 79 (indicating Haya de la Torre sought asylum in Colombian Embassy as result of summons charging him with complicity in failed military rebellion).

202. See *Asylum*, 1950 I.C.J. at 270 (stating Colombia's requests that ICJ find various treaties authorized Colombia to determine asylum status and to compel Peru to provide safe conduct); see also ICJ YEARBOOK SUMMARY—ASYLUM CASE, *supra* note 200, at 77 (reporting that Colombia sought ICJ confirmation that Colombia had authority to unilaterally determine Haya de la Torre's asylum status and that Peru was required to provide Haya de la Torre's safe conduct from Peru).

203. See *Asylum*, 1950 I.C.J. at 278 (concluding that Colombia did not have unilateral authority to determine Haya de la Torre's asylum status in manner that was binding on Peru); see also ICJ Yearbook Summary—*Asylum Case*, *supra* note 200, at 81 (explaining ICJ's conclusion that Peru was not bound to accept Colombian determination of nature of Peruvian charges against Haya de la Torre for asylum purposes).

204. See *Asylum*, 1950 I.C.J. at 288 (rejecting both Colombian submissions); see also SCHULTE, *supra* note 97, at 102 (observing ICJ's holding that Colombian asylum determination was not binding on Peru and that Peru need not guarantee safe conduct).

205. See *Request for Interpretation*, 1950 I.C.J. at 399 (recounting Colombian query whether *Asylum Case* judgment requires Colombia to surrender Haya de la Torre to Peruvian Authorities); see also *Request for Interpretation of the Judgment of November 20, 1950 in the Asylum Case (Colom. v. Peru)*, 1950 INT'L CT. JUST. Y.B. 86, 86 [hereinafter ICJ YEARBOOK SUMMARY—ASYLUM REINTERPRETATION] (reporting that Colombian Government immediately petitioned ICJ to interpret whether its judgment in *Asylum Case* required Colombian surrender of Haya de la Torre).

206. See *Request for Interpretation*, 1950 I.C.J. at 401 (observing that temporal proximity of ICJ judgment and request for reinterpretation thereof belied any claim to actual dispute); see also ICJ YEARBOOK SUMMARY—ASYLUM REINTERPRETATION, *supra* note 205, at 87 (reporting conclusion of ICJ that there was no dispute between Peru and Colombia sufficient to merit reinterpretation of judgment in *Asylum Case*).

dance as to the manner of the execution of the judgment because such would be incompatible with the ICJ's essentially judicial function.²⁰⁷

C. *The Self-Executing Approach*

Some suggest that U.S. courts are required to enforce ICJ judgments the authority for which arises under a treaty that is self-executing.²⁰⁸ In the context of the Vienna Convention, proponents of the self-executing approach argue that the ratifying U.S. Senate knew the Vienna Convention would automatically become supreme U.S. federal law and consciously made the ICJ the authoritative interpreter of the Vienna Convention as a whole.²⁰⁹ Therefore, the ratifying Senate affirmatively intended to make the ICJ the authoritative interpreter of the Vienna Convention both as a matter of international and municipal law.²¹⁰ In response, at least one scholar has argued that U.S. Courts

207. See *Haya de la Torre Case (Colom. v. Peru)*, 1951 I.C.J. 71, 78-79, 83 (June 13) (stating that possible manners of compliance are conditioned by facts which States are alone in position to appreciate and observing that choice amongst them could not be based on legal considerations but only on considerations of political expediency and therefore holding that ICJ was unable to give practical advice regarding various ways of terminating the asylum); see also *Haya de la Torre Case (Colom. v. Peru)*, 1950 INT'L CT. JUST. Y.B. 94, 96 (observing that ICJ would not decide manner of execution for parties); 1 ROSENNE, *supra* note 88, at 221 (stating *Haya de la Torre Case* can be cited for proposition that ICJ cannot tell parties how to dispose of their rights).

208. See Bradley & Damrosch, *supra* note 11, at 677 (reprinting statements of Professor Damrosch that judgments that arise under self-executing treaties should require no implementing legislation to have direct effect in U.S. municipal law because underlying treaty had such direct effect); see also Damrosch, *supra* note 21, at 350 (stating that U.S. courts are required to apply ICJ judgments about Vienna Convention for same reason they are required to apply Vienna Convention); Note, *Too Sovereign But Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?*, 116 HARV. L. REV. 2654, 2669-70 (2003) [hereinafter *Too Sovereign*] (arguing that contractual nature of Vienna Convention sanitizes constitutional issues in that delegation).

209. See Bradley & Damrosch, *supra* note 11, at 677 (finding that voluntary nature of delegation to ICJ in context of Vienna Convention mitigates constitutional concerns); see also Flaherty, *supra* note 9, at 453 n.26 (suggesting constitutional problems regarding international delegations of judicial authority are diminished where U.S. Senate has consented to such delegation); *Too Sovereign*, *supra* note 208, at 2669-70 (2003) (finding merit in argument that contractual nature of Vienna Convention mitigates constitutional issues).

210. See Bradley & Damrosch, *supra* note 11, at 692 (arguing that ratification of Optional Protocol portends affirmative intent to make ICJ interpreter of Vienna Convention both as matter of U.S. and international law); see also Damrosch, *supra* note 21, at 350 (asserting that U.S. courts must apply ICJ judgments about Vienna Convention because Vienna Convention is self-executing).

should demand a heightened “super clear statement” of congressional intent before finding a purported international delegation of judicial authority.²¹¹

III. *THE OPTIONAL PROTOCOL AND THE AUTHORITY OF THE ICJ*

In *Sanchez-Llamas*, the U.S. Supreme Court confronts an unusual type of “circuit split” between the ICJ and U.S. courts regarding the interpretation of Vienna Convention Article 36.²¹² It is unclear what effect the Supreme Court should give to the Optional Protocol, which grants jurisdiction to the ICJ in cases arising out of the Vienna Convention.²¹³ Does the Optional make the ICJ the authoritative interpreter of the Vienna Convention, requiring U.S. courts to adopt its interpretation?²¹⁴ This Note argues that it does not because, as a matter of judicial authority, the ICJ typically does not possess, and the Optional Protocol did not intend to convey authority to interpret the terms of the Vienna Convention as a matter of municipal law.

Thus framed, the question in *Sanchez-Llamas* is one of authority. The text of the Optional Protocol does not speak to the nature of ICJ authority,²¹⁵ and the Framers did not explicitly address that issue.²¹⁶ In the context of treaty interpretation, however, U.S. courts have considerable flexibility to look beyond these materials, with special regard for the views of the United States and the prevailing conception of the international community.²¹⁷ This Note argues that the prevailing conception of

211. See *Ku*, *supra* note 12, at 7 (suggesting that, because of constitutional problems with international delegations, U.S. courts should employ “super-strong clear statement” rule before concluding that treaty-makers intended international decisions to be self-executing).

212. See *supra* notes 138-169 and accompanying text (describing history of U.S. and international litigation that has culminated in disagreement between ICJ and U.S. courts regarding Vienna Convention’s interpretation).

213. See *supra* notes 7, 119 and accompanying text (discussing Optional Protocol’s grant of jurisdiction to ICJ in cases arising out of Vienna Convention).

214. See *supra* note 14 and accompanying text (indicating that, in prior litigation similar to *Sanchez-Llamas*, U.S. Supreme Court questioned whether Optional Protocol required U.S. courts to accept ICJ’s interpretations of Vienna Convention).

215. See *supra* notes 7, 119 and accompanying text (noting that Optional Protocol text only refers to ICJ jurisdiction).

216. See *supra* notes 123-126 and accompanying text (surveying framing of Optional Protocol and noting no discussion of ICJ authority).

217. See *supra* notes 39-43 and accompanying text (observing that U.S. courts have

ICJ authority at the time of the Optional Protocol's framing, both in the United States and the international community, was that the ICJ did not have authority to resolve questions of municipal law in lieu of municipal courts.²¹⁸ Under that conception, while authorized to dispositively resolve questions of international law,²¹⁹ the World Courts only interpret municipal law as a factual matter for the purposes of international legal proceedings.²²⁰ Given the Optional Protocol's ambiguity, the U.S. Supreme Court should conclude that the Optional Protocol only confers that traditional modicum of ICJ authority and should hold, therefore, that the ICJ's interpretation of the terms of the Vienna Convention is largely irrelevant to the task of interpreting those provisions as they exist in U.S. law.²²¹

A. U.S. Conceptions of World Court Authority

It appears from U.S. consideration of the PCIJ and ICJ Statutes that the United States did not think that World Court authority extended to matters of municipal law.²²² Supporters in the United States portrayed the World Courts as tribunals created specifically to resolve international disputes in a more peaceable manner than diplomacy.²²³ They also emphasized

greater flexibility to interpret treaties than other private agreements, including ability to look to treaty's framing and to common meaning of words accepted by international community).

218. See *supra* notes 71-82, 104-111, 172-185, 187-199 and accompanying text (discussing U.S. accession to PCIJ and ICJ Statutes, as well as acceptance of ICJ compulsory jurisdiction, that evinces conception of World Court authority as limited to international law; reviewing decisions of national courts regarding World Court authority; analyzing jurisprudence of World Courts indicating that they are not authorized to interpret municipal law).

219. See *supra* notes 57, 129, 187 and accompanying text (noting that both PCIJ and ICJ were specifically empowered to decide matters of international law).

220. See *supra* note 188-191 and accompanying text (observing that World Courts possess some authority to interact with matters of municipal law, but that authority is only incidental to international litigation and that; reviewing World Court decisions that liken its interaction with municipal law to interaction with matters of fact).

221. But see *supra* notes 50-51 and accompanying text (explaining *Charming Betsy* canon, under which ICJ's interpretation of Vienna Convention as international law may effect U.S. court's interpretation of Vienna Convention as matter of U.S. law).

222. See *supra* notes 72-76, 78-82, 89, 104-111 and accompanying text (discussing U.S. opposition to and support for accession to PCIJ Statute, recounting U.S. unanimity regarding accession to ICJ Statute, and presenting U.S. opposition to and support for ICJ compulsory jurisdiction).

223. See *supra* notes 73-75 and accompanying text (paraphrasing statements of PCIJ proponents advocating use of tribunals to resolve international disputes and indi-

that international law possessed a legal character distinct from that of municipal law, and that international judgments could only be enforced through the coercion of the international community.²²⁴ Thus conceived, the World Courts were to be uniquely *international* legal organisms. That World Court judgments would not be enforceable in municipal courts simply recognizes the dualist distinction in international legal theory: the ICJ and its products, being organs of international law, would be categorically different from their municipal law counterparts.²²⁵ Together, these facts suggest a vision of the World Courts as exercising a legal authority distinct from and short of the authority exercised by municipal law courts.

The tenor of the U.S. opposition to the PCIJ further suggests a conception of World Court authority as confined to matters of international law.²²⁶ The main objection to U.S. participation in the World Courts seems to have been that it would limit U.S. ability to act unilaterally in international affairs.²²⁷ It was argued that a relationship with the World Court would unavoidably involve the United States in the disputes of Europe.²²⁸ The more xenophobic opponents²²⁹ simply distrusted “foreign judges” and thought that participation would give them too much opportunity to pass judgment on U.S. international policy.²³⁰ Either way, it was precisely the World Courts’ authority

cating their concern that diplomatic resolution of international disputes was inadequate to maintain international peace and stability).

224. *See supra* note 76 and accompanying text (observing comments of PCIJ supporters that international law is fundamentally different from municipal law because it lacks source of authority and can only be enforced through collective coercion of international community).

225. *See supra* notes 28-31, 49-52 (discussing distinction in international legal theory between municipal law and international law and reviewing manner in which United States incorporates that distinction).

226. *See supra* notes 78-82 and accompanying text (recounting arguments made by U.S. opponents of PCIJ Statute).

227. *See supra* notes 79-82 and accompanying text (observing in PCIJ opposition concern that accession would limit U.S. sovereignty by allowing ICJ to sit in judgment of U.S. international policies without U.S. consent, thereby eliminating U.S. opportunity to act in international affairs without being subject to World Court scrutiny).

228. *See supra* note 78 (indicating U.S. opposition to PCIJ on ground that participation would involve U.S. in Europe’s disputes).

229. *See supra* note 80 and accompanying text (transcribing xenophobic remarks of Senators Long and Trammell).

230. *See supra* notes 79-82 and accompanying text (describing how PCIJ opposition objected to prospect of “foreign judges” using ICJ as opportunity to attack U.S. international policies).

over international law—not any potential authority over municipal law—that lay at the foundation of U.S. opposition to the World Courts. It seems reasonable to assume that opponents of the World Court would also have objected to the more progressive contention that the World Courts should exercise authority over U.S. law. Their silence suggests that there was no such contention.²³¹

Though some might claim that the Connally Amendment itself recognizes the ICJ's authority to interpret municipal law, a closer analysis reveals that the Connally Amendment addresses only the ICJ's *jurisdiction*, not its *authority*.²³² The Connally Amendment reserves to the United States the sole right to determine whether a dispute involving the United States is one of international law, coming within the ICJ's compulsory jurisdiction, or whether the dispute is one of domestic law, over which the ICJ has no jurisdiction.²³³ The Connally Amendment does this not because its authors in the United States thought that ICJ decisions about U.S. law would be binding in U.S. courts.²³⁴ If they thought the ICJ possessed such *authority*, consistency dictates that they would have objected to every grant of ICJ jurisdiction. Of course, the Connally Amendment rationale only surfaced with respect to the ICJ's compulsory jurisdiction.²³⁵ Instead, the Connally Amendment speaks to the concern that, if the ICJ is allowed to decide the scope of its own jurisdiction, the United States could be forced to defend suits to which it had not specifi-

231. See *supra* notes 78-82 and accompanying text (surveying U.S. opposition to PCIJ Statute and finding no argument against PCIJ on ground that it would be empowered to interpret and apply U.S. law).

232. See *supra* note 104 and accompanying text (noting that Connally Amendment was designed to keep matters of U.S. domestic law from falling within ICJ's jurisdiction).

233. See *supra* notes 105-106 and accompanying text (explaining that Connally Amendment allows United States to determine what disputes are considered international law disputes for purposes of ICJ compulsory jurisdiction).

234. See *supra* notes 107-110 and accompanying text (presenting arguments of Connally Amendment opponents addressing nature of ICJ jurisdiction and suggesting that Connally Amendment proponents were thus concerned with ICJ jurisdiction, not ICJ authority).

235. See *supra* notes 104-106, 128-134 and accompanying text (explaining how Connally Amendment operates to limit ICJ compulsory jurisdiction and observing that U.S. Senate did not express Connally Amendment-type concerns during its consideration of Optional Protocol's grant of ICJ jurisdiction, indicating that not all grants of ICJ jurisdiction implicate Connally Amendment concerns).

cally consented.²³⁶ Thus, the Connally Amendment was an attempt to reign in the scope of the ICJ's *jurisdiction*. This is far from a concession, however, that the ICJ has authority to interpret U.S. law.

B. *International Conceptions of World Court Authority*

Certain facts indicate that the international community shared a vision of World Court authority as limited to international law. For instance, the very structure of the World Courts suggests that they were uniquely international legal organisms, specially designed to accommodate concerns of international law that are not present in the municipal law context.²³⁷ Moreover, the enforcement provisions of the League Covenant and the U.N. Charter are strong indications that World Court interpretations of municipal law were not considered equivalent to interpretations rendered by municipal courts.²³⁸

In addition to these structural clues, the World Courts themselves have indicated that they are not authorized to make binding interpretations of municipal law.²³⁹ Thus, the World Courts have characterized their interaction with municipal law as akin to dealing with matters of fact and have stated that they do not apply municipal law "as such."²⁴⁰ The World Courts have said that they are bound by the determinations of municipal law rendered by municipal courts and have observed that it would undermine the purpose of the World Courts if they were to supply their own contrary interpretations of municipal law.²⁴¹

236. *See supra* note 104 and accompanying text (noting that Connally Amendment supporters were concerned with possibility that ICJ would interpret its compulsory jurisdiction to be broader than originally conceived by United States).

237. *See supra* notes 59-60, 62, 90-93 and accompanying text (indicating that World Courts cannot entertain suits by individuals, can only obtain jurisdiction pursuant to some voluntary form of submission, and issue decisions with limited precedential value).

238. *See supra* notes 67-69, 98-100, 196-199 and accompanying text (describing how World Courts and their judgments have no independent authority, but rather can only be enforced by League Council or U.N. Security Council).

239. *See supra* notes 187-207 and accompanying text (surveying jurisprudence of World Court regarding their authority to interact with municipal law).

240. *See supra* notes 188-191 and accompanying text (discussing decisions that compare World Court's interaction with municipal law to its interaction with facts and that, therefore, World Court does not apply municipal law "as such").

241. *See supra* notes 193-195 and accompanying text (reviewing decisions stating that World Courts are bound by municipal court interpretations of municipal law and that supplying their own interpretation of municipal law that was contrary to that an-

These statements yield the conclusion that the World Courts are authorized to interact with municipal law—even interpret it, if necessary—but that such authority is only incidental to reaching a judgment in the underlying international dispute and extends only so far as the international litigation.

Finally, it is illustrative that most national courts that have addressed the question have refused to consider World Court judgments as binding precedent in municipal litigation.²⁴² There exists only one reported instance where a national court treated a decision of the ICJ as binding precedent and the value of that decision is itself the subject of international criticism.²⁴³ While this evidence may be too scant to demonstrate any prevailing opinion that World Court authority does not extend to matters of municipal law, it is strong evidence against any argument to the contrary.

While it is certainly not enough to support any single interpretation of the Optional Protocol, the sole remarks regarding ICJ authority at the framing of the Optional Protocol also seem to recognize the understanding that the ICJ did not possess authority to resolve matters of municipal law in a way that would be binding in municipal litigation.²⁴⁴ Criticizing the choice of the ICJ as a preferred method of dispute resolution, the Indian delegate observed that ICJ judgments were not automatically enforceable in State municipal courts.²⁴⁵ As has been argued, the recognition that ICJ judgments do not have direct effect in municipal legal systems concedes the limited scope of the ICJ's authority and indicates that its interpretations of municipal law do not carry dispositive authority in municipal litigation. To the extent that the remarks of the Indian delegate incorporate that understanding of ICJ authority, they illustrate the assumption,

nounced by municipal courts would undermine function and purpose of World Courts).

242. See *supra* notes 173-181 and accompanying text (exploring national court jurisprudence on World Court authority and discovering that most courts have concluded that World Court judgments are not binding precedent in municipal legal systems).

243. See *supra* notes 182-185 and accompanying text (recounting *Deal* decision and observing subsequent criticism of that decision in *Mackay Radio*).

244. See *supra* notes 123-126 and accompanying text (surveying framing of Optional Protocol and noting only discussion of ICJ authority from remarks of Indian delegate).

245. See *supra* notes 125-126 and accompanying text (reproducing Indian delegate's criticism of ICJ that its judgments were not automatically enforceable in State municipal courts).

largely unstated at the framing, that the ICJ exercised only limited authority over municipal law.

C. The Self-Executing Approach to the Optional Protocol

In light of the previous Sections, this Note suggests a simple syllogism. First, the Optional Protocol is ambiguous about the nature of the authority it confers on the ICJ.²⁴⁶ Second, the customary conception of the ICJ's authority, in both the United States and elsewhere, suggests that ICJ authority does not extend to matters of municipal law.²⁴⁷ Third, the framing of the Optional Protocol indicated no intent to deviate from that customary conception, and may have incorporated it.²⁴⁸ Therefore, the U.S. Supreme Court should construe the Optional Protocol accordingly and hold that the *Avena* decision does not interpret the Vienna Convention as a matter of U.S. law in a way that U.S. courts are bound to apply.

The self-executing approach rejects this conclusion, arguing instead that the ratifying U.S. Senate itself intended to confer authority on the ICJ to decide issues as a matter of U.S. law.²⁴⁹ Proponents of the self-executing approach thus offer a competing syllogism. Under that view, the ratifying Senate knew the Vienna Convention was self-executing and would automatically become supreme U.S. federal law.²⁵⁰ Cognizant of that fact, the Senate affirmatively granted jurisdiction to the ICJ to interpret the Vienna Convention.²⁵¹ Therefore, the ratifying Senate in-

246. See *supra* note 7, 119 and accompanying text (observing that Optional Protocol refers only to ICJ jurisdiction, not ICJ authority).

247. See *supra* notes 71-82, 104-111, 172-185, 187-199 and accompanying text (presenting evidence suggesting that traditional conception of World Court authority did not extending to matters of municipal law).

248. See *supra* notes 123-126 and accompanying text (noting that only discussion of ICJ authority at Optional Protocol framing consisted of remarks of Indian delegate, which tend to illustrate that ICJ judgments do not operate directly on municipal law).

249. See *supra* notes 208-210 and accompanying text (explaining the self-executing approach to Optional Protocol, which holds that ICJ interpretations of Vienna Convention issued pursuant to Optional Protocol automatically become supreme U.S. federal law because Vienna Convention itself automatically became supreme U.S. federal law upon ratification).

250. See *supra* note 209 and accompanying text (indicating that proponents of self-executing approach rely on assumption that ratifying U.S. Senate was aware that Vienna Convention would automatically become supreme U.S. federal law without requiring implementation).

251. See *supra* note 209 and accompanying text (observing that proponents of self-executing approach argue that by ratifying Optional Protocol, U.S. Senate intended to

tended to confer authority on the ICJ to interpret the Vienna Convention as a matter both of international and of U.S. law.²⁵²

This approach is unconvincing primarily because it strains the meaning of the word intent. It appears that the ratifying U.S. Senate regarded the Optional Protocol and the Vienna Convention as separate international agreements.²⁵³ Although the Senate Foreign Relations Committee considered whether the Vienna Convention would be self-executing, it did not address whether the Optional Protocol would also be self-executing.²⁵⁴ It seems reasonable to expect some discussion of the self-executing status of the Optional Protocol if the ratifying Senate intended ICJ judgments to be self-executing. Nor was there any discussion of the putative effect in U.S. courts of the ICJ's decisions pursuant to the Optional Protocol.²⁵⁵ The self-executing approach nonetheless divines an intent to delegate authority to interpret municipal law from the ratifying Senate's silence. It does so notwithstanding indications that the prevailing conception of World Court authority generally precluded such arrangements.²⁵⁶ Perhaps a stronger case could be made with regard to a contemporary Senate, which operates in an academic and political environment familiar with the possibility of international

grant jurisdiction over whole Vienna Convention, both as it exists in international and municipal law).

252. See *supra* note 210 and accompanying text (restating conclusion of self-executing approach that U.S. Senate intended to confer jurisdiction to interpret Vienna Convention both as international and U.S. law because it knew Vienna Convention would automatically become U.S. law upon ratification).

253. See *supra* notes 132-133 and accompanying text (recounting testimony before Senate Foreign Relations Committee that Optional Protocol was identical to earlier optional protocol annexed to treaty on diplomatic relations, and that, in testimony about that earlier treaty, U.S. State Department representative told Committee that diplomatic treaty and optional protocol were separate, distinct international agreements).

254. See *supra* note 131 and accompanying text (reviewing testimony of U.S. State Department representative introducing Vienna Convention and Optional Protocol, and stating that Vienna Convention was self-executing without mention of Optional Protocol).

255. See *supra* notes 128-134 and accompanying text (surveying U.S. Senate consideration of Vienna Convention and Optional Protocol absent any discussion of ICJ's authority to interpret U.S. law).

256. See *supra* notes 71-82, 104-111, 172-185, 187-199 and accompanying text (presenting evidence that customary conception of World Court authority, shared by both United States and international community, limited that authority to matters of international law and did not include authority to interpret municipal law in manner that would be binding in municipal litigation).

delegations of judicial authority.²⁵⁷ In this case, however, it strains credulity to argue that the Senate intended, in 1969, to accomplish such extraordinary goals through silence.

CONCLUSION

The *Sanchez-Llamas* case presents the question whether the Optional Protocol grants the ICJ authority to render interpretations of the Vienna Convention that U.S. courts must apply. Because the Optional Protocol is ambiguous, the U.S. Supreme Court should interpret that agreement in light of the customary international and U.S. conceptions of ICJ authority. As this Note demonstrates, those conceptions suggest that ICJ authority does not extend to conclusions of municipal law. The U.S. Supreme Court should interpret the Optional Protocol accordingly and conclude that U.S. courts need not apply the ICJ's interpretations of the Vienna Convention.

257. *See supra* notes 11-13 and accompanying text (citing voluminous recent scholarship about propriety of delegating judicial authority of U.S. courts to international tribunals).