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Comment

Jogi v. Voges: Has the Seventh Circuit Opened the Floodgates to Vienna Convention Litigation in U.S. Courts?

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INTRODUCTION

Tejpaul Jogi, an Indian citizen, was legally in the United States when he was charged with aggravated battery with a firearm on October 6, 1995 in Champaign County, Illinois.[1] Jogi turned himself in to Champaign County authorities on October 18, 1995.[2] Upon his surrender, the authorities took Jogi to a conference room where his mother[3] and two Champaign County investigators were waiting for him.[4] The detaining authorities advised Jogi of his *Miranda* rights, he promptly invoked them, and the interview immediately stopped.[5] At the time of his interview, at least one of the investigators knew Jogi was an Indian national.[6]

The United States, as a signatory to the Vienna Convention

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1. Jogi v. Voges, 425 F.3d 367, 370 (7th Cir. 2005).
2. *Id.*
3. Jogi was a minor at the time of his offense. *See id.*
4. *Id.*
5. Jogi v. Piland, 131 F. Supp. 2d 1024, 1025 (C.D. Ill. 2001).
6. *See Jogi*, 425 F.3d at 370.

on Consular Relations (Vienna Convention),[7] is required to inform a foreign national charged with a violation of its laws that Article 36 of the convention allows him to contact an official representative of his country. Jogi was never informed that he had the opportunity to contact the Indian consulate.[8] Eventually, Jogi was appointed a public defender, pled guilty, and received a twelve year prison sentence.[9] During his imprisonment, Jogi learned about the Alien Tort Statute (ATS),[10] which establishes federal jurisdiction in district courts over civil actions filed by aliens for torts committed in violation of a treaty of the United States.[11] Jogi filed suit in federal district court against the two investigators who interviewed him, the Champaign County sheriff, and the Champaign County state attorney who prosecuted him for violating his rights under the Vienna Convention.[12] Jogi sought monetary relief from the two county officials.[13] The United States District Court for the Central District of Illinois dismissed his action for lack of subject matter jurisdiction, finding that Jogi failed to sufficiently plead a tort.[14] The United States Court of Appeals for the Seventh Circuit reversed and remanded.[15] The Seventh Circuit held that Article 36 of the Vienna Convention provides an implied private cause of action for an individual to enforce his rights under Article 36 of the Vienna Convention and that subject matter jurisdiction was appropriate pursuant to the ATS or § 1331 of the U.S. Code.[16]

The Seventh Circuit's decision in *Jogi v. Voges* is the first

7. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention] ("The said authorities shall inform the person concerned without delay of his rights under this subparagraph . . . .").

8. *Jogi*, 425 F.3d at 370.

9. *Id.*

10. 28 U.S.C. § 1350 (2000) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

11. *Jogi*, 425 F.3d at 370 (citation omitted).

12. *Id.*

13. *Id.*

14. Jogi v. Piland, 131 F. Supp. 2d 1024, 1027 (C.D. Ill. 2001). ("[A] plaintiff may bring an action under section 1350 only for a tort committed in violation of a United States treaty, not for any violation of a treaty. In this case, the plaintiff has alleged a violation of a United States treaty . . . . He has not, however, alleged a tort." (internal citations omitted)).

15. *See Jogi*, 425 F.3d at 386.

16. *Id.* at 373 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." (quoting 28 U.S.C. § 1331 (2000)).

time a U.S. court has recognized a private civil claim under the ATS for a violation of the Vienna Convention.[17] The logic and holding of *Jogi v. Voges* opens the courthouse door to every foreign national who has not been informed of his ability to contact consul after being arrested or charged with a crime. There are currently over twenty million foreign nationals legally in the United States.[18] In addition, the Immigration and Naturalization Service (INS) has estimated that there are at least seven million illegal immigrants within U.S. borders.[19] While it is difficult to estimate the total number of foreign nationals charged annually with crimes by state and federal authorities, over twenty-eight percent of the federal prison population is comprised of foreign nationals,[20] and in 2003 alone, the INS removed more than 79,000 aliens for criminal violations.[21]

The INS statistics demonstrate that a sizeable number of foreign nationals are charged with crimes each year. It is unlikely that local law enforcement officials always follow the obligations the Vienna Convention imposes upon them. For example, Chief William McManus of the Minneapolis Police Department has stated that his officers only "normally" follow Vienna Convention protocols.[22] Given this backdrop, tens of thousands of foreign nationals conceivably are charged with crimes each year and are not informed of their Vienna Convention right to contact consul. The Seventh Circuit's holding has the potential to provide all of these foreign nationals with a

17. *Jogi*, 425 F.3d at 380 ("This court is the first one to be directly confronted with the question whether a private civil action independent of the criminal proceeding may be based on the Convention." (citation omitted)).

18. *See* U.S. CENSUS BUREAU, THE FOREIGN BORN POPULATION IN THE UNITED STATES: 2003, 1 tbl.1.1 (2004), http://www.census.gov/population/socdemo/foreign/ppl-174/tab01-01.pdf.

19. OFFICE OF POLICY & PLANNING, U.S. IMMIGRATION & NATURALIZATION SERVICE, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000 (2003), http://uscis.gov/graphics/shared/statistics/publications/Ill_Report_1211.pdf.

20. *See* FEDERAL BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, STATE OF THE BUREAU 2004, at 59 (2005), *available at* http://www.bop.gov/news/PDFs/sob04.pdf.

21. OFFICE OF IMMIGRATION STATISTICS, U.S. DEPT. OF HOMELAND SECURITY, 2003 YEARBOOK OF IMMIGRATION STATISTICS 150 (2004), *available at* http://uscis.gov/graphics/shared/aboutus/statistics/2003Yearbook.pdf.

22. In response to a question inquiring whether the Minneapolis Police Department follows the Vienna Convention, the Chief responded: "[W]e normally do that, especially if the individual requests that we notify the consular but that's different than asking someone for their immigration status." *Lou Dobbs Tonight* (CNN television broadcast Jan. 11, 2006) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0601/11/ldt.01.html).

cause of action in the already overburdened U.S. court system.

This Comment seeks to analyze the Seventh Circuit's reasoning and conclusions in *Jogi v. Voges*. Part I examines the ATS and the Vienna Convention.[23] Part II summarizes the Seventh Circuit's decision in *Jogi* and describes some of its policy implications.[24] Part III demonstrates why the Seventh Circuit's reasoning was flawed and explains why an individual foreign national should not be able to sue for civil damages for violations of the Vienna Convention.[25] This Comment concludes that Supreme Court precedent and the text of the ATS and Vienna Convention dictate that the decision to create a private right of action for Article 36 violations should be left to congressional, rather than judicial, discretion.

I. BACKGROUND

A. THE ALIEN TORT STATUTE: A LEGAL LOHENGRIN[26]

Judge Friendly once quipped that the ATS was a "legal Lohengrin" because "although it has been with us since the first Judiciary Act, no one seems to know whence it came."[27] Judge Wood, writing for the Seventh Circuit in *Jogi*, called the ATS "a model of brevity, if not clarity."[28] In its entirety, the statute reads, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[29] Courts and commentators have recognized that the ATS confers jurisdiction over two types of torts: those committed in violation of the law of nations and those committed in violation of a treaty of the United States. Since its inception in 1789,[30] the ATS has

23. *See infra* Part I.A–C.

24. *See infra* Part II.A–D.

25. *See infra* Part III.A–F.

26. Lohengrin is a character from medieval Arthurian literature known for his mysterious origin. *See generally* RONAN COGHLAN, THE ENCYCLOPEDIA OF ARTHURIAN LEGENDS 144 (1991). One common tale has Lohengrin rescuing a maiden on the condition that she not ask his name. *Id.*

27. Int'l Inv. Trust v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (internal citation omitted).

28. Jogi v. Voges, 425 F.3d 367, 372 (7th Cir. 2005).

29. 28 U.S.C. § 1350 (2000).

30. The relevant portion of section nine of the first Judiciary Act reads: "[The district courts] shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for

been modified by Congress on three occasions.[31] None of the changes affected the authority granted by Congress to the federal district courts.[32]

The origins of the ATS are shrouded in mystery. There are no surviving records of congressional debate on the section.[33] For the first 170 years after its enactment, the ATS provided jurisdiction in only one case.[34] As a result of the lack of early case law and original legislative history, scholars have concentrated on the text of the ATS and the historical backdrop in which it was drafted to discern what the first Congress intended when it originally passed the statute.[35]

A wide variety of interpretations have been proposed. Some commentators argue that the ATS is merely jurisdictional[36] while others claim it creates a statutory cause of action.[37] Even among those who agree that the ATS is jurisdictional, disagreement exists over what causes of action the ATS permits district courts jurisdiction to hear.[38] Suffice it to say, no clear

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a tort only in violation of the law of nations or a treaty of the United States." 1 Stat. 73, 77 (1789).

31. In the Revised Statutes of 1873, the text was changed to read: "[The district courts shall have jurisdiction] of all suits brought by any alien for a tort 'only' in violation of the law of nations, or a treaty of the United States." Revised Statutes tit. 13, ch. 3, § 563, para. 16 (1873). The act was next modified in 1911 to read: "[The district courts shall have jurisdiction] [o]f all suits brought by any alien for a tort only in violation of the laws of nations or of a treaty of the United States." 36 Stat. 1087, 1093 (1911). The act was changed to its current form in 1948. *See* 28 U.S.C. § 1350 (2000). *See generally* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 449 (1995) (explaining the changes in the text of the ATS).

32. *See* Sweeney, *supra* note 31, at 450.

33. Sosa v. Alvarez-Machain, 542 U.S. 692, 718 (2004) ("There is no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; there is no record even of debate on the section.").

34. *Id.* at 712 (citing Int'l Inv. Trust v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (citing Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795) (providing jurisdiction under the ATS))).

35. *See* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Sweeney, *supra* note 31.

36. *See, e.g.*, Casto, *supra* note 35, at 479–80.

37. *See, e.g.*, William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 689–90 (2002).

38. This disagreement is based primarily upon scholars' differing interpretations of the historical context in which the ATS was drafted. *Compare* Sweeney, *supra* note 31, at 451 (arguing that the word "tort" in the ATS only refers to wrongs under the law of prize), *with* Dodge, *supra* note 35, at 256 (arguing that the ATS is a

consensus has developed regarding Congress's original intent in passing the ATS.[39]

B. *SOSA V. ALVAREZ-MACHAIN*: SOME CLARIFICATION

In 2004, the Supreme Court interpreted the ATS for the first time and added clarity to the debate with its decision in *Sosa v. Alvarez-Machain*.[40] The Court concluded that the ATS was a jurisdictional statute that did not create new causes of action.[41] Next, the Court addressed the issue of what causes of action the ATS authorizes district courts to hear. Because the plaintiff's suit in *Sosa* was based on an alleged violation of the law of nations,[42] the Court focused on which causes of action the law of nations prong[43] of the ATS authorized. However, the Court's analysis provides lower courts some useful guidance on how to interpret the ATS in its entirety. In *Sosa*, the Court emphasized the importance of judicial restraint in recognizing new causes of action under the ATS.[44] Recognizing the obscure origins of the ATS,[45] the Court stressed the importance of looking

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dynamic provision that was intended by the framers to provide a federal remedy for all torts in violation of the law of nations).

39. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 719 (2004).

40. *See generally id.* at 710–34.

41. *See id.* at 712 ("Although we agree that the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.").

42. *Id.* at 734. Plaintiff alleged that the DEA instigated his abduction from Mexico so that he could face criminal charges in the United States. *Id.* at 698. Plaintiff alleged, among other things, that this conduct was in violation of the law of nations. *Id.*

43. The Court concluded the law of nations was composed of two elements at the time of the ATS's original enactment. The first element covers the "general norms governing the behavior of national states with each other." *Id.* at 714. The second element consists of "a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor." *Id.* at 715. Finally, there is "a sphere in which these rules binding individuals for the benefit of other individuals overlap with the norms of state relationships." *Id.* The Court concluded that it was this final sphere that the drafters of the ATS intended the word tort to include. *Id.* The Court found that this sphere was limited to three specific offenses at the drafting of the ATS: violations of safe conducts, infringements of the rights of ambassadors, and piracy. *See id.* However, the court did not rule out the possibility that further international norms may be judicially cognizable under the statute in some limited situations. *See id.* at 729.

44. *Id.* at 725 ("A series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute.").

45. *See* Sosa v. Alvarez-Machain, 542 U.S. at 726 ("It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in

for legislative guidance before exercising broad jurisdiction under the ATS.[46]

Applying these principles to the plaintiff's claim in *Sosa*, the Court found that it did not have subject matter jurisdiction under the ATS.[47] The plaintiff in *Sosa* was, in part, relying on alleged violations of the Universal Declaration of Human Rights[48] (Declaration) and the International Covenant of Civil and Political Rights[49] (Covenant) to confer jurisdiction to the federal district court under the ATS.[50] The Court reasoned that neither the Declaration nor the Covenant were the type of treaty that the ATS referred to in its text. The majority concluded that the Declaration was not even a treaty and that, while the Covenant was a treaty, it was not self-executing and therefore was not covered by ATS's use of the word treaty.[51] After concluding the treaty prong of the ATS was not implicated, the Court went on to hold that violations of these agreements did not trigger the law of nations prong of the ATS.[52]

C. ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS: AN INDIVIDUAL'S RIGHT TO CONSUL?

On December 24, 1969, the United States entered into the Vienna Convention.[53] The Vienna Convention is a seventy-nine article treaty[54] that codifies the then-existing international law on consular relations.[55] Over ninety countries have ratified the

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shadow for much of the prior two centuries.").

46. *See id.* at 723.

> [T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases. The creation of a private right of action raises issues beyond the mere consideration whether the underlying primary conduct should be allowed or not . . . . Accordingly, even when Congress has made it clear by statute that a rule applies to purely domestic conduct, *we are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly.*

Id. (emphasis added) (internal citations omitted).

47. *See id.* at 738.

48. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

49. International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, S. Exec. Doc. E 95-2, 999 U.N.T.S. 171.

50. *Sosa*, 542 U.S. at 734.

51. *Id.* at 735.

52. *Id.* at 738.

53. *See* Vienna Convention, *supra* note 7.

54. *See id.*

55. Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations:*

Vienna Convention. The Convention's stated purpose is to encourage "the development of friendly relations among nations," and it covers a wide variety of topics related to consular relations among nations.[56] Article 36 of the Vienna Convention deals with the communication between foreign nationals who have been detained by the authorities of a host country and officials from the consulates of those foreign nationals.[57]

According to the supremacy clause of the U.S. Constitution, "all Treaties made, under the authority of the United States, shall be the supreme Law of the Land."[58] Under federal law, treaties have the same legal effect as statutes.[59] Treaties are

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A Search for the Right to Consul, 18 MICH. J. INT'L L. 565, 568 (1997).

56. *See* Vienna Convention, *supra* note 7, at pmbl.

57. Article 36 (Communication and Contact With Nationals of the Sending State), in its entirety, provides:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph*;
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the *said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.*

Vienna Convention, *supra* note 7, 21 U.S.T. at 77, 596 U.N.T.S. at 261 (emphasis added).

58. U.S. CONST. art VI, cl. 2.

59. *See, e.g*, Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.").

presumed to be agreements between nation states.[60] As a general rule of interpretation, courts presume that treaties do not create rights which are privately enforceable in court;[61] however, in some situations the Supreme Court has held that treaties create individually enforceable rights.[62] To determine whether a treaty creates individually enforceable rights, courts first ask whether the treaty is self-executing.[63] Generally, a treaty is self-executing if it does not require any additional implementing legislation to take effect.[64] If a treaty is not self-executing, only further legislative action will make the agreement operative.[65] If a treaty does not require implementing legislation, courts will then look to the treaty itself to determine whether it creates a private right of action.[66]

When construing a treaty, courts first look to its text to determine its meaning.[67] If the text of a treaty is ambiguous, a court will then look towards a treaty's ratification history and other non-textual sources to resolve the ambiguity.[68] Additionally, the construction of a treaty by the political branches of gov-

60. *See, e.g.*, Edye v. Robertson, 112 U.S. 580, 598 (1884) [hereinafter The Head Money Cases] ("A treaty is primarily a compact between independent nations.").

61. *See, e.g., id.* ("[A treaty] depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it."); Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992) ("International treaties are not presumed to create rights that are privately enforceable."); Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990) ("It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved.").

62. *See, e.g.*, Unites States v. Alvarez-Machain, 504 U.S. 655, 667–68 (1992) (citing United States v. Rauscher, 119 U.S. 407 (1886)).

63. *See, e.g.*, Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); Foster v. Neilson, 27 U.S. 253, 314 (1829) ("[A treaty] is, consequently, to be regarded in the courts of justice as an equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."); Frovola v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985); Kadish, *supra* note 55, at 586.

64. *See* The Head Money Cases, 112 U.S. at 598–99; Kadish, *supra* note 55, at 586–90. Whether or not a treaty requires implementing legislation is a question of congressional and presidential intent. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 111 cmt. h (1987).

> In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action.

Id.

65. Whitney v. Robertson, 124 U.S. 190, 194 (1888).

66. *See Alvarez-Machain*, 504 U.S. at 667; *Frolova*, 761 F.2d at 373.

67. *Alvarez-Machain*, 504 U.S. at 663.

68. United States v. Stuart, 489 U.S. 353, 366 (1989).

ernment may be properly given weight by a court when determining a treaty's meaning.[69]

The general consensus amongst courts is that the Vienna Convention did not require any implementing legislation in order to take effect and is therefore self-executing.[70] The far more challenging inquiry is whether the Vienna Convention creates an individual right of action. This issue has arisen numerous times in the criminal context where defendants have sought remedies, such as evidentiary exclusion or the quashing of an indictment, for alleged violations of the Vienna Convention.[71] Most federal circuit courts addressing these claims have avoided deciding whether the Vienna Convention creates individual rights by assuming *arguendo* that it does and then concluding that the criminal remedies sought are not appropriate;[72] however, both the Fifth and Sixth Circuits have concluded that the Vienna Convention does not create judicially enforceable rights.[73] The Supreme Court has never addressed the issue of whether the Vienna Convention creates judicially enforceable private rights, but it has speculated in dicta that the Convention "arguably confers on an individual the right to consular assistance following arrest."[74]

II. *JOGI V. VOGES*

The Seventh Circuit stepped into the ATS fray with its de-

69. *See* Factor v. Laubenheimer, 290 U.S. 276, 295 (1933) ("[T]he construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight.").

70. *See* Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring); United States v. Torres-Del Muro, 58 F. Supp. 2d 931, 932 (C.D. Ill. 1999); Brief for the United States as Amicus Curiae Supporting Respondent at 26, Medellin v. Dretke, 125 S. Ct. 2088 (2005) (No. 04-5928), 2005 WL 504490 (noting "the accepted understanding that the Vienna Convention is self-executing.").

71. *See, e.g.*, United States v. Li, 206 F.3d 56 (1st Cir. 2000) (en banc).

72. *See id.* at 60; United States v. Ortiz, 315 F.3d 873, 886 (8th Cir. 2002); United States v. De La Pava, 268 F.3d 157, 165 (2d Cir. 2001); United States v. Minjares-Alvarez, 264 F.3d 980, 986–87 (10th Cir. 2001); United States v. Chaparro-Alcantara, 226 F.3d 616, 621 (7th Cir. 2000); United States v. Cordoba-Mosquera, 212 F.3d 1194, 1196 (11th Cir. 2000) (per curiam); United States v. Lombera-Camorlinga, 206 F.3d 882, 885 (9th Cir. 2000) (en banc); Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir. 1997).

73. *See* United States v. Jimenez-Nava, 243 F.3d 192, 198 (5th Cir. 2001); United States v. Emuegbunam, 268 F.3d 377, 394 (6th Cir. 2001).

74. Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam) ("The Vienna Convention—which arguably confers on an individual the right to consular assistance following arrest—has continuously been in effect since 1969.").

cision in *Jogi v. Voges*.[75] *Jogi* marks the first time a federal circuit court has decided the issue of whether a private civil action, independent of any criminal proceeding, may be brought under the Vienna Convention.[76] In reversing the district court's dismissal for lack of subject matter jurisdiction and remanding for further proceedings, the Seventh Circuit addressed three questions. First, does the district court have subject matter jurisdiction over Jogi's claim? Second, did Jogi raise a claim for which relief can be granted? Third, is Jogi's action barred by the Supreme Court's decision in *Heck v. Humphrey*?[77] In addition to answering these questions, the Seventh Circuit raised a few of its own. Specifically, the Court asked whether Jogi's claim was barred by the affirmative defenses of qualified immunity or statute of limitations.[78]

A. IS SUBJECT MATTER JURISDICTION APPROPRIATE UNDER THE ALIEN TORT STATUTE OR § 1331?

1. Subject Matter Jurisdiction Under the Alien Tort Statute

The Seventh Circuit began its analysis in *Jogi* with a discussion of the Supreme Court's decision in *Sosa*. It first noted that *Sosa* established that the ATS is a jurisdictional statute.[79] The Seventh Circuit then went on to distinguish Jogi's claims from those raised in *Sosa* on the grounds that Jogi's claim was based on the treaty prong of the ATS whereas the plaintiff in *Sosa* based his claim on the law of nations prong.[80] The Seventh Circuit reasoned that the restraints the Supreme Court placed upon causes of action that could be brought under the law of nations prong were of "marginal relevance" to Jogi's case.[81] It argued that subject matter jurisdiction under the ATS was "straightforward."[82] The Seventh Circuit concluded that Jogi alleged that he was victim of a tort committed in violation of a treaty of the United States—the Vienna Convention; therefore,

75. 425 F.3d 367 (7th Cir. 2005).
76. *See id.* at 380.
77. *See id.* at 371; *see also* Heck v. Humphrey, 512 U.S. 477 (1994).
78. *Jogi*, 425 F.3d at 386.
79. *Id.* at 372.
80. *See id.*
81. *Id.*
82. *Id.* at 373.

subject matter jurisdiction was appropriate under the ATS.[83] Notably, the Seventh Circuit did not define precisely which tort Jogi alleged, but assumed that a violation of the Vienna Convention in and of itself was sufficient.

2. *Subject Matter Jurisdiction Under § 1331*

After finding subject matter jurisdiction under the ATS, the Seventh Circuit found that § 1331[84] also conferred subject matter jurisdiction in the district court to hear Jogi's claims. Section 1331 grants jurisdiction upon the district courts to hear cases "arising under the Constitution, laws, or treaties of the United States."[85] The Court simply stated: "[W]e cannot imagine a case that an alien could bring under the 'treaty' branch of § 1350 that would not also fall within the 'treaty' jurisdiction of § 1331."[86]

B. HAS JOGI STATED A CLAIM UNDER THE VIENNA CONVENTION ON WHICH RELIEF CAN BE GRANTED?

The Seventh Circuit moved next to a discussion of whether the Vienna Convention could be given effect without further domestic legislative action.[87] The determination of whether the Vienna Convention is self-executing was a key step in the court's analysis, because Supreme Court precedent established that only self-executing treaties can provide the basis for private lawsuits.[88] After citing a string of cases applying different criteria to determine whether a treaty is self-executing, the court, without further elaboration, stated "[i]n our view, the duties imposed by Article 36 meet these criteria."[89] The Seventh Circuit supported its conclusion with State Department statements made in Senate hearings prior to the Convention's ratification. The State Department concluded that the treaty is "entirely self-executive [sic] and does not require any implementing or

83. *Id.*
84. 28 U.S.C. § 1331 (2000) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").
85. *Id.*
86. *Jogi*, 425 F.3d at 373.
87. *See id.* at 376–78.
88. *See supra* notes 61–66 and accompanying text.
89. *Jogi*, 425 F.3d at 378.

complementing legislation."[90]

Next, the Seventh Circuit analyzed the text of Article 36 of the Vienna Convention. Despite the preamble's express disclaimer that "[t]he purpose of such privileges and immunities [created by the Vienna Convention] is not to benefit individuals but to ensure the efficient performance of functions by consular posts,"[91] the Seventh Circuit held that the language of Article 36 confers individual rights on detained nationals.[92] The court specifically focused on ¶ 1(b)[93] of Article 36, which states that authorities "*shall* inform the person concerned without delay of *his rights* under this sub-paragraph."[94] The Court found that, given the unambiguous nature of this language, it would be a mistake to look towards the preamble for guidance in interpretation.[95] The Seventh Circuit supported its interpretation with references to the negotiation history of the Vienna Convention.[96] Specifically, the court focused on two actions reflected in the Official Records of the United Nations regarding the debate over the Vienna Convention.[97] The first was the withdrawal of an amendment by Venezuela which would have eliminated the consular communication language after "strong opposition" by member states.[98] The second was a one sentence reference to unidentified language proposed by the United States that was supposedly designed to "protect the rights of the national concerned."[99] Finally, the Court referenced the International Court of Justice's (ICJ)[100] decision in *Case Concerning Avena and Other Mexican Nationals* (Mexican Nationals)[101] as support.[102] In

90. *See id.* (quoting S. EXEC. REP. No. 91-9, at 5 (1969) (statement of Deputy Legal Adviser J. Edward Lyerly)).

91. Vienna Convention, *supra* note 7, at pmbl. ("Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States . . . .").

92. *See Jogi*, 425 F.3d at 382 ("[W]e conclude that even though many if not most parts of the Vienna Convention address only state-to-state matters, Article 36 confers individual rights on detained nationals.").

93. *See id.* at 380–81.

94. Vienna Convention, *supra* note 7, art. 36, para. 1(b) (emphasis added).

95. *See Jogi*, 425 F.3d at 381.

96. *Id.* at 382.

97. *Id.*

98. *Id.*

99. *Id.*

100. The legal effect of ICJ decisions, while a source of great debate, is beyond the scope of this Comment.

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

Mexican Nationals, the ICJ held that the United States has an obligation to permit detainees to raise their Article 36 claims in court.[103]

The Seventh Circuit concluded its analysis with a discussion of whether Jogi is entitled to enforce his individual right under the Vienna Convention in a private court action.[104] Ultimately, it held that Jogi was entitled to enforce his right via a civil suit in district court.[105] The court based its decision on a provision in Article 36 which provides,

> [T]he rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving state, *subject to the proviso, however, that the said laws and regulations must enable full effect to be given* to the purposes for which the rights accorded under this article are intended.[106]

The court reasoned that under this provision the United States may not reject every single path for vindicating an individual's treaty rights.[107] The court concluded that because damages were the only remaining remedy left to Jogi, he must be allowed to pursue his civil suit.[108]

C. IS JOGI'S CLAIM BARRED BY *HECK V. HUMPHREY*?[109]

The Seventh Circuit held that Jogi's claim was not barred under the *Heck* rule. In *Heck*, the Supreme Court held that in order to recover damages for an unlawful imprisonment, a plaintiff must first demonstrate that his conviction has been invalidated.[110] However, if an action will not lead to immediate or speedier relief, it is allowed under *Heck*.[111] The Seventh Circuit

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102. *Jogi*, 425 F.3d at 383.

103. *Avena*, 2004 I.C.J. at 65, ¶ 139 ("What is crucial in the review and consideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and consideration.").

104. *Jogi*, 425 F.3d at 384.

105. *Id.* at 385.

106. *Id.* (quoting Vienna Convention, *supra* note 7, at art. 36) (emphasis in original).

107. *Id.*

108. *See id.*

109. Heck v. Humphrey, 512 U.S. 477, 486–87 (1994) (holding that in order to recover damages stemming from an allegedly unconstitutional imprisonment or conviction a prisoner must first demonstrate that their conviction has been invalidated).

110. *Id.*

111. *See* Wilkinson v. Dotson, 125 S. Ct. 1242, 1248 (2005) (holding that if success in a lawsuit would not lead to immediate or speedier prisoner relief then the action is not barred under *Heck*).

reasoned that because Jogi's action will have "no effect whatsoever on his conviction or sentence," Jogi's claim was not barred under *Heck*.[112]

D. SOME PARTING THOUGHTS

In conclusion, the court flagged two issues likely to arise on remand. The first issue is whether Jogi's claim is barred by an applicable statute of limitations.[113] The second issue is whether the doctrine of qualified immunity bars the suit. The court noted that ordinarily the defense of qualified immunity would be waived because "the defendants have not even whispered the phrase thus far."[114] But the court went on to note that Jogi's case was unusual and it would be within the district court's "sound discretion" to allow the defendants to raise the issue of qualified immunity on remand.[115]

III. ANALYSIS

A. WHERE IS THE TORT?

The Seventh Circuit put forward the ATS as one of two alternate grounds for finding jurisdiction to hear Jogi's claim.[116] However, the court's reliance on the ATS for jurisdiction is misplaced because an Article 36 violation should not be considered a tort under the ATS. In order for the district courts to have original jurisdiction over civil actions filed under the ATS, three explicit requirements must be met. First, the action must be filed by an alien.[117] Second, the action must be for a "tort only."[118] Third, the tort must be committed in violation of the law of nations or a treaty of the United States.[119] In *Jogi*, the first and third requirements are easily met. Jogi is an Indian national and the detaining authorities' failure to inform Jogi of his right to contact consul was in violation of a treaty of the United States.

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112. *Jogi*, 425 F.3d at 386.
113. *Id.*
114. *Id.*
115. *Id.*
116. *See id.* at 373.
117. 28 U.S.C. § 1350 (2000).
118. *Id.*
119. *Id.*

What is less clear is whether a Vienna Convention violation should be considered a tort for the purposes of conferring jurisdiction under the ATS. At the outset, it is worth noting that the court in *Jogi* explicitly refrained from characterizing the Article 36 violation as a tort.[120] Instead of expressly defining what constitutes a tort for purposes of the ATS, the Seventh Circuit found that jurisdiction was appropriate under either the ATS or § 1331.[121] And yet the court went to great lengths to discuss its interpretation of the ATS.[122] The court's focus on the ATS is understandable given that Jogi pled jurisdiction under the ATS. What is less clear is why the court did not explicitly hold that jurisdiction was appropriate under the ATS given its lengthy discussion of the statute. Likely, it refrained from doing so because an Article 36 violation cannot meet the ATS's tort requirement.

The alleged tort committed in violation of a treaty in Jogi's case is a violation of Article 36. In other words, the alleged tort in violation of the Vienna Convention is a violation of the Vienna Convention. A plain reading of the ATS requires more than a violation of a treaty. The ATS confers jurisdiction over "tort[s] only, committed in violation of . . . a treaty of the United States."[123] Yet, if a treaty violation were sufficient to confer jurisdiction under the ATS, the statute's "tort only" language would be superfluous and the framers of the ATS could have simply drafted the statute to read: "The district courts shall have original jurisdiction of any civil action by an alien for a violation of the law of nations or a treaty of the United States." The framers, however, did not adopt this language. Accordingly, the best reading of the ATS is that its "tort only" language modifies "violation of a . . . treaty of the United States" so that in order for jurisdiction to be appropriate, an action must be both a common law tort recognized in 1789 and a violation of a treaty. Put simply, the Seventh Circuit's interpretation of the ATS ig-

120. *See Jogi*, 425 F.3d at 385 ("[W]e need not decide whether a violation of Article 36 is best characterized as a 'tort' (perhaps something along the lines of a breach of duty to disclose in the context of a special relationship) or a regulatory violation.").

121. *See id.* ("[W]e have found that jurisdiction is proper under either the ATS or the general federal question statutes . . . ."). Additionally, the court stated that jurisdiction would be proper under the ATS. *See id.* at 373 ("The ATS confers jurisdiction on the federal district courts to adjudicate this type of case."). This statement would seem to indicate that the court at least implicitly accepts that a Vienna Convention violation constitutes a tort under the ATS.

122. *See id.* at 373–85.

123. 28 U.S.C. § 1350 (2000).

nores the standard interpretative presumption that "every word and phrase [in a statute] adds something to the statutory command."[124]

The Supreme Court's decision in *Sosa* supports this construction of the ATS.[125] In the Supreme Court's analysis of what causes of action the law of nations prong authorizes, the Court focused on three torts.[126] The torts discussed by the Court were not torts *because* they violated the law of nations; rather, they were torts that also happened to be in violation of the law of nations. For example, one of the torts recognized as cognizable under the law of nations prong by the Supreme Court is piracy.[127] Even if the law of nations no longer existed, piracy would still constitute the tort of conversion. Piracy does not derive its tort status from being part of the law of nations; rather, it is a tort that happens to also be in violation of the law of nations.

Turning to Jogi's claim, the same cannot be said of the tort he alleges. If the United States had never entered the Vienna Convention, Jogi would clearly not have a cognizable tort claim. The right of a foreign national to be informed that he can contact his consul exists, if it exists at all, because of the Vienna Convention. Simply put, a foreign national did not have a common law tort action in 1789 if the detaining authorities failed to inform him of his right to contact consul. Accordingly, the Seventh Circuit was incorrect to conclude that the ATS gives the district court jurisdiction over Jogi's claim.

The case would be different if the Vienna Convention stated that detained foreign nationals shall be free from physical abuse and Jogi alleged that he was beaten by his interrogators. Had this been the case, Jogi would have alleged the common law tort of battery. A cause of action for battery was recognized as a tort by the common law in 1789. Common law battery may also be a violation of a treaty, but it would not derive its tort status from

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124. WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY 833 (3d ed. 2001); *see* Kungys v. United States, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion) (writing that a "cardinal rule of statutory interpretation [is] that no provision should be construed to be entirely redundant.").

125. *See generally* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

126. *See id.* at 724 ("[T]he First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond . . . violation of safe conducts, infringement of the rights of ambassadors, and piracy.").

127. *See id.*

that fact; therefore, jurisdiction for this claim would be appropriate under the ATS. This limiting interpretation of the ATS is also supported by the reasoning in *Sosa* which cautions courts against taking a "more aggressive role in exercising jurisdiction that remained largely in shadow for much of the prior two centuries."[128] In interpreting the ATS broadly to provide jurisdiction over Jogi's case, the Seventh Circuit disregarded both the text of the ATS and Supreme Court precedent.

B. WHAT ABOUT § 1331?

The question of whether § 1331 grants federal courts subject matter jurisdiction over Vienna Convention violations is dependent on whether the Vienna Convention creates a right belonging to an individual detainee rather than his home country.[129] For the reasons set forth in the following section, the Vienna Convention does not create a privately enforceable right; therefore, subject matter jurisdiction is not appropriate under § 1331.

C. THE VIENNA CONVENTION DOES NOT CREATE INDIVIDUALLY ENFORCEABLE RIGHTS

The Seventh Circuit was incorrect in holding that Article 36 creates individually enforceable rights. Treaties are primarily compacts between sovereign nations which rely on the "interest and honor" of signatories for their enforcement.[130] Courts presume that the rights created by an international treaty belong to the state rather than the individual.[131] Of course, this pre-

128. *Id.* at 726.

129. *See generally supra* notes 59–69 and accompanying text (explaining when a treaty can create a private right of action).

130. *See* The Head Money Cases, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations . . . .").

131. *See, e.g.*, United States v. Emuegbunam, 268 F.3d 377, 389 (6th Cir. 2001) ("In fact, courts presume that the rights created by an international treaty belong to a state and that a private individual cannot enforce them."); Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992) ("International treaties are not presumed to create rights that are privately enforceable."); Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990) ("It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 907 cmt. a (1987) ("International agreements, *even those directly benefiting private persons*, generally do not create private rights or

sumption can be overcome when a court determines that a treaty was intended to create a private right of action.[132] When determining that Article 36 of the Vienna Convention created a private right of action enforceable in U.S. courts, the Seventh Circuit focused on the intent of the treaty's drafters. In reaching its conclusion, the court paid particular attention to the "unambiguous text" of the treaty to support its position.[133] Specifically, the court relied on two sentences in Article 36 to conclude that the Vienna Convention created privately enforceable rights.[134] First, the Court looked at the last clause of ¶ 1(b) of Article 36, which provides that, "[t]he said authorities shall inform the person concerned without delay of his rights under this subparagraph."[135] The court interpreted this language as placing an affirmative duty on detaining officials to inform a detainee that he has a right under the Vienna Convention to contact officials from his consulate.[136] Second, the court analyzed the last clause of ¶ 2 of Article 36 which states, "the said laws and regulations [of an arresting state] must enable full effect be given to the purposes for which the rights accorded under this Article are intended."[137] From this language the court concluded that, because all other judicial remedies have been precluded, a suit for money damages must be allowed in order to give the Article full effect.[138]

The Seventh Circuit's reliance on selective portions of the Vienna Convention's text is misplaced. By focusing its analysis on two sentences of a complex seventy-nine article multilateral treaty, the Seventh Circuit lost sight of the duties and obligations addressed in the other seventy-eight articles of the Convention. The court's construction ignores the whole act rule[139] by

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provide for a private cause of action in domestic courts . . . ." (emphasis added)).

132. *See supra* notes 62–69 (explaining the circumstances in which a treaty can create a privately enforceable right).

133. Jogi v. Voges, 425 F.3d 367, 381 (7th Cir. 2005).

134. *See id.* at 373–75.

135. Vienna Convention, *supra* note 7, art. 36.

136. *See Jogi*, 425 F.3d at 382 ("[W]e conclude that even though many if not most parts of the Vienna Convention address only state-to-state matters, Article 36 confers individual rights on detained nationals.").

137. Vienna Convention, *supra* note 7, art. 36.

138. *See Jogi*, 425 F.3d at 385 ("In the absence of any administrative remedy or other alternative to measures we have already rejected (such as the suppression of evidence), a damages action is the only avenue left.").

139. ESKRIDGE, FRICKEY & GARRETT, *supra* note 124, at 830 ("From its earliest cases, the U.S. Supreme Court has followed the whole act rule in construing statutes."); *see* United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor."); Kokoszka v.

construing Article 36 with disregard to the rest of the convention which deals strictly with the functions of consular offices and officials rather than the treatment of detained nationals. The preamble of the Convention explicitly disclaims any intent to create individual rights.[140] Furthermore, Article 36 appears under Chapter II of the treaty, which is entitled "Facilities, Privileges and Immunities Relating to Consular Posts, Career Consular Officers and Other Members of a Consular Post."[141] Conspicuously absent from this title is any reference to the chapter creating privileges and immunities for an individual foreign national.[142] This absence and the explicit language of the preamble support the conclusion that the Vienna Convention refrains from creating privately enforceable rights.

The Seventh Circuit correctly observed that there is an "obvious tension" between the language contained in the preamble and the relevant language in Article 36.[143] However, the court failed to give appropriate weight to the natural construction of every other article in the Convention, which is at odds with the Seventh Circuit's interpretation of Article 36. In fact, the Sixth Circuit has pointed out that "[o]f the seventy-nine articles of the Vienna Convention, *only* Article 36 *arguably* protects individual non-consular officials."[144] Nothing in the text of Article 36 explicitly provides its judicial enforcement at the demand of pri-

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Belford, 417 U.S. 642, 650 (1974) ("When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law . . . ."). While the "whole act rule" is commonly used as a tool to interpret statutes, the same presumptions of coherence and internal consistency are applicable to the enterprise of treaty interpretation.

140. *See* Vienna Convention, *supra* note 7, pmbl. ("Realizing that the purpose of such privileges and immunities is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States . . . ." (emphasis added)). For a Supreme Court case in which a statute's preamble played an important role in the Court's interpretation, see *Sutton v. United Airlines, Inc.*, 527 U.S. 47 (1999). Like the interpretive importance of a treaty or statute's title, a treaty's preamble is valuable evidence of the treaty's purpose. *See* ESKRIDGE, FRICKEY & GARRETT, *supra* note 124, at 831–32 .

141. *See* Vienna Convention, *supra* note 7, art. 2.

142. While a statute or treaty's title does not trump the text, it is certainly good evidence of the drafters' intent in enacting the statute or treaty. ESKRIDGE, FRICKEY & GARRETT, *supra* note 124, at 831. See the famous case, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), for an example in which the Court found a statute's title to be important evidence of legislative purpose.

143. Jogi v. Voges, 425 F.3d 367, 374 (7th Cir. 2005).

144. United States v. Emuegbunam, 268 F.3d 377, 391 (6th Cir. 2001) (emphasis added).

vate litigants.[145] The text of Article 36 does refer to an individual's "rights" under the convention,[146] but this language does not necessarily create a privately enforceable right of action. When the Vienna Convention is understood as an agreement between sovereign nations—as precedent indicates the Convention is presumed to be—the language at issue in Article 36 should be interpreted as contractual language between states. Even though the language in Article 36 speaks of individual rights, these individual rights are merely the means of implementing a treaty obligation which exists between states.[147]

In other words, the language in Article 36 represents an agreement between signatories. The signatory nations are granting one another a right. Specifically, Article 36 establishes that a signatory nation who has one of its citizens detained by another signatory nation has a right to have its citizen informed that they can contact their consulate. This right *between nations* may impact individual detainees, but that impact is a secondary consequence of the right which exists between signatory nations. For example, in the present case India would be in the position to challenge a violation of the Vienna Convention because India has a right to have its citizens contact an Indian consulate when they have been detained, and the United States government violated this right when Jogi was not informed that he could contact his consulate. Jogi, as an individual, would not be able to challenge the violation because the right in the Convention is not conferred to him directly.

The communication of this obligation between states may be stated in terms of an individual's rights under Article 36, but any other phrasing is awkward and unnatural.[148] The possibility that Article 36 confers rights upon nations and not individuals is ignored by the Seventh Circuit in *Jogi* even though it is

145. *See* United States v. Li, 206 F.3d 56, 66 (1st Cir. 2000) (Selya and Boudin, JJ., concurring).

146. Vienna Convention, *supra* note 7, art. 36 ("The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.").

147. As explained in *Li*:

> Of course, there are references in the treaties to a "right" of access, but these references are easily explainable. The contracting States are granting each other rights, and telling future detainees that they have a "right" to communicate with their consul is a means of implementing the treaty obligations as between States. Any other way of phrasing the promise as to what will be said to detainees would be both artificial and awkward.

206 F.3d at 66 (Selya and Boudin, JJ., concurring) (emphasis in original).

148. *See id.*

supported by the presumption that a treaty is an agreement between states. This interpretation is also in line with the clear wording of the Vienna Convention's preamble and seventy-eight other articles of the Convention that speak in terms of one nation's obligation to another.[149]

Furthermore, the very text of Article 36—when viewed as a whole—supports the argument that Article 36 does not give unwarned detained nationals a privately enforceable right to contact consul. Article 36 is entitled "Communication and contact with nationals of the sending State."[150] This title, by its express terms, refers to a consulate's communication to a detained individual rather than a detained individual's communications with his consulate. The title speaks of communication *with* a national of a sending state. It does not reference communication made by a detainee to his consulate. The first sentence of Article 36 also supports this reading[151] and states that Article 36 was drafted "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State."[152] The explicit terms of this sentence and the title of Article 36 indicate that, contrary to the Seventh Circuit's interpretation, the purpose of Article 36 is to facilitate "consular functions" rather than to enforce the rights of individual detainees.

The precise consular functions to which the first sentence of Article 36 refers can be determined by reference to the title of Article 36, specifically, communication and contact with nationals of the sending state. In other words, the first sentence of Article 36, when read in conjunction with the Article's title, indicates that Article 36 of the Vienna Convention deals with the exercise of consular functions that relate to communication and contact with nationals of a consulate's home state. This provides further support to the argument that any individual right referenced by Article 36 is not a right that actually belongs to an individual detainee, but a right that in fact belongs to and is derived from a right conferred upon the detainee's consulate. Not only is this conclusion supported by a plain reading of the title and first sentence of Article 36, it is also supported by the presumption that treaties are agreements between nations that do

149. *See generally* Vienna Convention, *supra* note 7.

150. *Id.* art. 36. The sending state would be the home nation of the detained individual.

151. *See* State v. Martinez-Rodriguez, 33 P.3d 267, 273 (N.M. 2001); State v. Navarro, 659 N.W.2d 487, 491 (Wis. Ct. App. 2003).

152. *See* Vienna Convention, *supra* note 7, art. 36.

not create privately enforceable rights. With this in mind, it makes perfect sense that Article 36 would confer rights on signatory nations' consulates because these consulates are essentially the nations' representatives abroad. The creation of rights vested in consulates is merely another way for contracting nations to express rights or obligations that they have agreed to grant one another. Reading Article 36 as conferring individual rights on detainees is a drastic departure from this presumption.

Further militating against the Seventh Circuit's holding is the principle that "the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight."[153] Judicial deference to executive interpretation is proper because it is the executive, through the U.S. State Department, that bears the primary responsibility for negotiating and administering treaties.[154] Because of this responsibility, the executive branch maintains foreign affairs expertise and insight into the treaty's meaning that the judiciary does not possess. Deference is also justified on the ground that "when foreign affairs are involved, the national interest has to be expressed through a single authoritative voice."[155] While the court in *Jogi* supports its argument with references to the *travaux preparatoires*[156] of the Vienna Convention,[157] it places less weight on the executive branch's interpretation of the treaty. Perhaps the reason the Seventh Circuit gives little weight to the State Department's interpretation of the Vienna Convention is that it clearly contradicts the court's perception that the treaty creates an individual right.

For the past twenty-five years, "the State Department has

153. Factor v. Laubenheimer, 290 U.S. 276, 295 (1933); *see also* El Al Isr. Airlines v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

154. *See* United States v. Li, 206 F.3d 56, 67 (1st Cir. 2000) (Selya and Boudin, JJ., concurring). ("The other very powerful reason for reaching this conclusion is that the State Department in substance supports it. As we have held in other cases, the State Department's view is entitled to substantial weight in treaty interpretation.").

155. *Id.*

156. Black's defines "*travaux perparatoires*" as "[t]he draft or legislative history of a treaty." BLACK'S LAW DICTIONARY 1538 (8th ed. 2004).

157. *See* Jogi v. Voges, 425 F.3d 367, 382–83 (7th Cir. 2005).

consistently taken the view that the Vienna Convention does not create individual rights."[158] The State Department takes the position that the only remedies for violations of the Vienna Convention are diplomatic, political, or ones that exist between states under international law.[159] Historically, the State Department has enforced the Vienna Convention by investigating reports of violations, working with local law enforcement officials to prevent future violations, and apologizing to foreign governments for past violations.[160] This position—which precedent indicates should be given some deference by the court—indicates that the Vienna Convention should not create privately enforceable rights.

It is ironic that the Seventh Circuit in *Jogi* did not pay greater heed to the State Department's position because, by its own admission, the State Department's view is entitled to "great weight."[161] In fact, the Seventh Circuit disingenuously characterized the State Department as supporting the proposition that the Vienna Convention creates individually enforceable rights. Specifically, the Seventh Circuit cites the State Department's Foreign Affairs Manual,[162] which references U.S. Article 36 obli-

158. United States v. Emuegbunam, 268 F.3d 377, 392 (6th Cir. 2001); *see also Li*, 206 F.3d at 63–64 (outlining the State Department's consistently articulated position that the Vienna Convention does not create privately enforceable rights). The *Li* court focused on two statements relevant to the current discussion as evidence of the State Department's opposition to claim that the Vienna Convention creates privately enforceable rights. First, the court had asked the State Department whether the Vienna Convention creates a privately enforceable right. The State Department responded with the following:

> [T]he [Vienna Convention] and the US-China bilateral consular convention are treaties that establish state-to-state rights and obligations . . . . They are not treaties establishing rights of individuals. The right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protections to its nationals when consular relations exist between the states concerned.

Id. at 63. The State Department went on to conclude that "[t]he remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *Id.* Second, the court looked at a letter by the State Department sent to all U.S. governors shortly after the Convention's ratification. The letter stated that "the Department did not believe the Vienna Convention will require significant departures from the existing practice within the several states of the United States." *Id.* at 64 (internal quotations omitted).

159. *See Li*, 206 F.3d at 63.

160. *See* United States v. Lombera-Camorlinga, 206 F.3d 882, 887 (9th Cir. 2000).

161. When referring to the State Department's position on the self-executive nature of the Vienna Convention, the court stated, "[s]tatements of this type are entitled to great weight in our assessment of this question." *See Jogi*, 425 F.3d at 378.

162. U.S. DEPT. OF STATE, FOREIGN AFFAIRS MANUAL 7 FAM 421-1 (2004),

gations.[163] The court's citation of the Foreign Affairs Manual for the proposition that Article 36 creates privately enforceable rights is subject to criticism on two grounds. First, the isolated reference to the State Department Foreign Affairs Manual completely ignores the numerous instances in which the State Department has publicly stated that the Vienna Convention does not create individual rights.[164] Second, the reference to Article 36 in the Manual has been explained by one court as "this country's laudable determination to abide by the treaty" while noting that "the implementation of the treaty by the federal government is wholly different from the implication that it may be enforced in court by individual detainees."[165] In summation, if the court in *Jogi* had placed "great weight" on the State Department's true position regarding Article 36's enforcement in domestic courts through private causes of action, the court would have had to—at the very least—acknowledge that its opinion ran contrary to the expressed will of the executive.

D. EVEN ASSUMING THE VIENNA CONVENTION CREATES A PRIVATELY ENFORCEABLE RIGHT, A PRIVATE CIVIL ACTION IS NOT AN APPROPRIATE REMEDY

Even assuming the Vienna Convention confers a private right to contact consul upon a detained foreign national, the Seventh Circuit was wrong to conclude that the right is one which should be enforced through a private civil action in U.S. courts. As stated previously, there is a presumption against treaties creating privately enforceable rights.[166] This presumption may be overcome by explicit language.[167] It seems odd that the drafters of the Vienna Convention would place an article creating a privately enforceable right within a treaty dealing primarily with obligations between states without explicitly providing for a private right of action in a host nation's court.

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available at http://foia.state.gov/masterdocs/07fam/07m0420.pdf ("Article 36 of the [Vienna Convention] provides that the host government must notify a foreign national arrestee without delay of the arrestee's right to communicate with his or her consular officials, and must notify the consular officials without delay if the arrestee so requests.").

163. *See Jogi*, 425 F.3d at 383.

164. *See Li*, 206 F.3d at 63 (explaining that the State Department's opposition to the creation of individual rights by the Vienna Convention can be traced back to at least 1970).

165. United States v. Jimenez-Nava, 243 F.3d 192, 198 (5th Cir. 2001).

166. *See supra* notes 61–68.

167. *See Li*, 206 F.3d at 66 (Selya and Boudin, JJ., concurring).

Article 36 does provide that its regulations must be given "full effect" by a host nation.[168] The court in *Jogi* reasons that this provision of the Vienna Convention means that "a country may not reject every single path for vindicating the individual's treaty rights" and concludes that "in the absence of any administrative remedy or other alternative to measures we have already rejected (such as suppression of evidence), a damage action is the only avenue we have left."[169]

1. *The Meaning of "Full Effect"*

The court's conclusion that a damages action is the only remaining means to vindicate treaty rights is not persuasive. Even if Article 36 of the Convention creates individual rights, these rights can be given effect without creating a private right of action by allowing a foreign national's home government, rather than an individual detainee, to challenge the alleged treaty violation through diplomatic channels. Placing the onus on a foreign government to challenge any alleged treaty violation is consistent with the vast majority of the Vienna Convention, which, as its official title indicates, deals with *consular* relations.[170] It is entirely reasonable to assume that a State will enforce this right because a State can normally be expected to protect its own citizens in foreign lands, and consular access enhances its ability to do so.[171] It may be that some foreign nations will be unwilling to pursue their citizens' claims under the Vienna Convention for a variety of reasons, but this is ultimately a problem that a foreign national must address through his own nation's diplomatic and legal process rather than through the U.S. legal system.

Additionally, Article 36 does not require signatory nations to implement any specific enforcement scheme.[172] The treaty does mandate that Article 36 "shall be exercised in conformity

168. *See* Vienna Convention, *supra* note 7, art. 36, para. 2.

169. Jogi v. Voges, 425 F.3d 367, 385 (7th Cir. 2005).

170. The Supreme Court has twice held that foreign governments lack standing to challenge alleged violations of the Vienna Convention; however, in both cases the foreign sovereigns were seeking criminal remedies rather than civil remedies for violations of treaty rights. *See* Federal Republic of Germany v. United States, 526 U.S. 111, 111–12 (1999); Breard v. Greene, 523 U.S. 371, 377–88 (1998). These holdings, however, would not prevent a foreign government from vindicating violations of the Vienna Convention through traditional diplomatic measures.

171. *See Li*, 206 F.3d at 67.

172. United States v. Jimenez-Nava, 243 F.3d 192, 199 (5th Cir. 2001) ("The treaty leaves implementation to the discretion of each signatory state . . . .").

with the laws and regulations of the receiving State."[173] The only restriction on this mandate is that "full effect [is] to be given to the purposes for which the rights accorded under this Article are intended."[174] To give this language meaning, "full effect" should be defined. The Seventh Circuit answered this question by assuming that in order to give Article 36 "full effect," some court ordered remedy must be available to the injured detainee.[175] The flaw with the court's reasoning is that "remedy" and "effect" are not synonymous. It may be that a remedy vindicates an individual's rights under the treaty, but Article 36 does not require vindication; it simply requires that its provisions be given "full effect." Article 36, by its terms, does not require an inquiry into whether an individual's rights have been violated. In a sense, whether or not the specific requirements of Article 36 have been violated is beside the point. According to the text of Article 36, the key inquiry is whether the Article's purpose has been fully effectuated. This in turn raises a question about the fundamental purpose of Article 36.

2. *Miranda as an Alternative to Monetary Damages*

On one level the purpose of Article 36 is clear: to ensure that a detainee is aware of his right to contact consul. One obvious way of fully effectuating this purpose is to inform a detainee of his right to contact consul. Another less obvious way is to, as the Constitution requires, inform a detainee of his *Miranda* rights.[176] At least one federal circuit court has noted that "a reasonably diligent attorney" would discover the applicability of the Vienna Convention to a foreign detainee.[177] Thus, by informing a detainee of his *Miranda* rights, an arresting official opens a door through which a detainee can gain awareness of his right to consul. Of course, some attorneys may be unaware of a detainee's Vienna Convention rights; however, this is a problem of competent representation rather than proper effectuation of the treaty.

Additionally, the argument could be made that a detainee is

173. *See* Vienna Convention, *supra* note 7, art. 36 para. 2.

174. *Id.*

175. *See* Jogi v. Voges, 425 F.3d 367, 385 (7th Cir. 2005) ("[Paragraph 2 of Article 36] means that a country may not reject every single path for vindicating the individual's treaty rights. In the absence of any . . . other remedy . . . a damages action is the only avenue left.").

176. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

177. *See* Breard v. Pruett, 134 F.3d 615, 619–20 (4th Cir. 1998) (per curiam).

somehow less likely to invoke his *Miranda* rights than his rights under the Vienna Convention. Therefore, if a detainee is informed of his *Miranda* rights in lieu of his Vienna Convention rights, an arresting official lowers the likelihood that a detainee will gain actual knowledge of his right to contact consul. However, even if this argument is valid, it is unlikely that the few detainees who would be adversely affected by being informed of their *Miranda* rights would be harmed enough to give rise to the claim that Article 36 was not given "full effect." A report by the then chairman of the Senate Committee on Foreign Relations, which recommended ratification of the Vienna Convention, supports this argument. The chairman's report noted that "[t]he [Vienna] Convention does not change or affect present U.S. laws or practice."[178] The report supports the argument that at the time of the Vienna Convention's ratification, the Senate did not intend to alter the practice of law enforcement in regards to the arrest of foreign nationals. In other words, in ratifying the Vienna Convention, the Senate did not intend to create an obligation on the part of law enforcement officials to inform detainees of their Vienna Convention rights.

Alternatively, the purpose of Article 36 could be viewed as a way of ensuring that a foreign national in a strange land is provided with adequate representation and guidance through an unfamiliar legal system. If the purpose of Article 36 is to guide foreign nationals through an unfamiliar legal system, it is hard to imagine how informing a detainee of his *Miranda* rights in place of his Vienna Convention rights could ever constitute something less than providing "full effect" to Article 36. By informing a foreign national of his *Miranda* rights, an arresting officer is placing a detainee on the exact same footing as an arrested American citizen. While it is true that a detainee may not invoke his *Miranda* rights, an American arrestee may make the same choice. Ultimately, the constitutional requirement that a foreign national be informed of his *Miranda* rights at the time of his arrest should, without more, be sufficient to give "full effect" to Article 36.

E. CONGRESS SHOULD REVISIT THE ALIEN TORT STATUTE

For much of its history, the ATS has remained hidden in

178. United States v. Li, 206 F.3d 56, 65 (1st Cir. 2000) (citing SEN. EXEC. DOC. NO. E, 91st Cong., 1st Sess. (1969)).

the shadows of federal jurisdiction.[179] The original motivation for its enactment has been lost due to the passage of time.[180] In recent years, courts have struggled to determine the outer limits of the jurisdiction granted by ATS.[181] Commentators have made forceful arguments in favor of both broad and narrow interpretations of the statute.[182] As it stands now, the ATS is an ambiguous statute that gives courts an opportunity to create new causes of action based upon policy preferences under the guise of interpreting an ill-defined statute enacted in 1789. Congress needs to take action.[183]

The Supreme Court has stated on numerous occasions that the "decision to create a private right of action is one better left to the legislative judgment in most cases."[184] *Jogi v. Voges* represents a blatant refusal to heed this well-founded advice. Perhaps the underlying reason for the court's decision was to effectuate recent decisions made by the International Court of Justice (ICJ), which determined that Article 36 gives rise to individually enforceable rights.[185] The ICJ had "jurisdiction" to hear claims regarding Article 36 under the Optional Protocol of

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179. During its first 170 years, the ATS provided jurisdiction in only one case. *See supra* text accompanying note 34. It was not until 1980 that the ATS began its resurgence with the Second Circuit opinion in *Filartiga v. Pena-Irala*. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 880–81 (2d Cir. 1980) (finding jurisdiction under the law of nations prong of the ATS).

180. *See supra* notes 27–39 and accompanying text.

181. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

182. *See supra* notes 35–38 and accompanying text.

183. On October 17, 2005, Senator Feinstein of California introduced the "Alien Tort Statute Reform Act" which would have amended the ATS to read:

> The district courts shall have original and exclusive jurisdiction of any civil action brought by an alien asserting a claim of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading if a defendant is a direct participant acting with specific intent to commit the alleged tort. The district courts shall not have jurisdiction over such civil suits brought by an alien if a foreign state is responsible for committing the tort in question within its sovereign territory.

S. 1874, 109th Cong. § 2 (2005).

184. *Sosa*, 542 U.S. at 695 (citing Corr. Services Corp. v. Malesko, 534 U.S. 61, 68 (2001)).

185. *See Avena*, 2004 I.C.J. 12, 65 (March 31), ¶ 139 ("[W]hat is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention . . . ."); LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J.466, 494 (June 27) (Paragraph 77 of the opinion states, "Article 36, paragraph 1, creates individual rights, which . . . may be invoked in this Court by the national State of the detained person). Both of these cases were explicitly cited by the Seventh Circuit. *See* Jogi v. Voges, 425 F.3d 367, 383–85 (7th Cir. 2005).

the Vienna Convention,[186] from which the United States has since withdrawn.[187] The Seventh Circuit explicitly stated that, because the United States has signed onto the Convention's optional protocol, it was "of the opinion that the United States is bound by ICJ rulings where it consented to the court's jurisdiction" while acknowledging that the Supreme Court has refrained from taking this step.[188]

Whatever the court's motivation, its decision highlights the need for Congress to revaluate the ATS. Relying heavily on the ATS for jurisdiction, the Seventh Circuit has created a new cause of action for a treaty that has been in place for over thirty years. There are millions of foreign nationals in the United States, and thousands are arrested or detained every year.[189] While no reliable statistics exist, it is unlikely that Jogi's situation was unique. If upheld, the Seventh Circuit's *Jogi* decision will open the door to thousands of litigants each year. Furthermore, based upon the Seventh Circuit's reasoning, it is hard to imagine that any violation of a self-executing treaty would not give rise to a cause of action under the ATS. The Seventh Circuit's interpretation could potentially open the door to more than just Article 36 litigants. While the vindication of Vienna Convention rights may be good for detainees, the policy determinations involved in creating these causes of action are best left to the elected and accountable legislative and executive branches of government. As long as the ATS remains on the books, courts will continue to use it to justify exercising jurisdiction over claims that Congress has otherwise refrained from providing the courts jurisdiction to hear.

F. JOGI'S CLAIM ON REMAND

The Seventh Circuit flagged two issues likely to arise on remand that—despite its ruling—may prevent Jogi from recovering monetary relief. The first of these, qualified immunity, presents a substantial obstacle in the path of Jogi's suit. Ordinarily, the defendant would have waived this affirmative defense, but the court indicated that given the complexity of the case it would be well within the trial court's discretion to allow

186. *See* Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 596 U.N.T.S. 262.

187. *See* Charles Lane, *US Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A01.

188. *See Jogi*, 425 F.3d at 384.

189. *See supra* notes 18–21 and accompanying text.

the defendant to raise it on remand.[190] If raised, qualified immunity should defeat Jogi's claim. The Supreme Court has handed down a two-part test for determining the liability of government officials. First, taking the facts most favorable to the plaintiff, do they show that the officer violated a constitutional right? Second, is the right so clearly established that a reasonable officer would know that the conduct was unlawful in the situation?[191] Clearly, Jogi's claim would fail the first prong of this test because a foreign national's Article 36 rights are not constitutional rights. Even if the first prong was satisfied, it is unlikely that Jogi can satisfy the second prong because his alleged right to contact consul is far from being so clearly established that a reasonable officer should know that the officer must inform a detained foreign national of this right. Therefore, liability against individual governmental officers should be blocked on those grounds. This doctrine would not prevent future detainees from filing suit against local municipalities for Article 36 violations because local governments can still be held liable for implementing polices that violate the law.[192]

CONCLUSION

While the circumstances of Jogi's case are not unique, the Seventh Circuit's treatment of his case is. Every day in the United States untold numbers of foreign nationals are arrested or detained by state and federal officials. Although there are no statistics on point, it does not take a giant leap of logic to conclude that many of these officials do not follow their obligations under the Vienna Convention. Maybe this is a great injustice, maybe it is for the best. What is clear is that prior to the Seventh Circuit's holding in *Jogi v. Voges*, foreign nationals could not seek monetary damages through a private cause of action in U.S. courts for Article 36 Vienna Convention violations.

Arguments can be made in favor and against this policy, but it is the position of this Comment that the Seventh Circuit was wrong to hold that an Article 36 violation gives rise to a private cause of action. Perhaps the court was motivated by its own policy preference or by a desire to act in accordance with the International Court of Justice; however, neither of these rationales

190. *See Jogi*, 425 F.3d at 386.

191. Saucier v. Katz, 533 U.S. 194, 201–02 (2001).

192. *See* Erwin Chemerinsky, *Qualified Immunity Ruling Raises Hurdles for Plaintiffs*, TRIAL, Mar. 2005, at 66.

can justify the result reached by the court. The text of both the ATS and the Vienna Convention fail to support the Seventh Circuit's holding. Supreme Court precedent clearly indicates that a court should exercise great restraint when determining that a treaty violation gives rise to a private cause of action. For over thirty years, courts across the United States have refrained from discovering private rights of action for Vienna Convention violations. It may be that public policy dictates that foreign nationals should have some recourse for Article 36 violations in U.S. courts, but this is a decision that must be left to congressional, rather than judicial, discretion.