

Case No. 01-1657

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

**TEJPAUL S. JOGI,
Plaintiff-Appellant,**

v.

**TIM VOGES, RON CARPER,
DAVID MADIGAN, and JOHN PILAND
Defendants-Appellees.**

**Appeal From The United States District Court
For The Central District Of Illinois, Urbana Division
Case No. 00-2067
The Honorable Judge Harold A. Baker**

**Reply Brief of Plaintiff-Appellant
Tejpaul S. Jogi**

Oral Argument Requested

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INTRODUCTION AND SUMMARY OF ARGUMENT

The threshold issue in this case is whether Article 36 of the Vienna Convention on Consular Relations (“Vienna Convention” or “Treaty”) creates an individual right. The clear and unambiguous language of Article 36 shows that it does. The travaux preparatoires to the Vienna Convention and its subsequent operation and interpretation by its signatories further illustrate that it does. And a recent decision by the International Court of Justice – the international body to which the United States has voluntarily agreed to submit all disputes concerning interpretation of the Vienna Convention – squarely held that it does.

Once this initial issue is resolved, it becomes clear that this Court should allow Plaintiff-Appellant Tejpaal S. Jogi (“Jogi”) to proceed with his claim. Jogi may proceed under the Alien Tort Claims Act (“ATCA” or “Act”), which confers not only jurisdiction, but also creates an independent cause of action for an alien for *any* tort committed in violation of a treaty of the United States. Defendants argue that the ATCA is jurisdictional only, but that is a distinction without a difference; because the Vienna Convention confers an individual right and is therefore “self-executing,” Jogi can proceed even under a jurisdictional-only ATCA. Indeed, Jogi can proceed with his claim under Section 1983 because Defendants’ violation of his Vienna Convention right, which under the Supremacy Clause is the “Law of the Land,” constitutes a violation of a right secured by federal law. That claim is so clear that, assuming the Vienna Convention creates an individual right, Defendants themselves admit that Section 1983 may be applicable.

Realizing the trap that they have set for themselves, Defendants next rely on the strawman argument that Jogi has not been prejudiced in his criminal proceedings. But that ignores not only the nature of Jogi's civil damages claim, but also the very nature of the rights protected by the Vienna Convention. And in any event, Defendants ignore the fact that Jogi may still be entitled to both nominal and punitive damages, if not actual compensatory damages. Defendants' last stand is perhaps their most futile; because this Court has held that a violation of the Vienna Convention is not grounds for overturning a criminal conviction, *Heck v. Humphrey*, 512 U.S. 477 (1994), cannot constitute a bar to Jogi's damages claim. Defendants respond by admitting that a favorable outcome would not necessarily demonstrate the invalidity of Jogi's conviction, effectively conceding the inapplicability of *Heck*.

ARGUMENT

I. The Vienna Convention on Consular Relations Creates An Individual Right to Consular Notification.

Although Defendants' Brief ("Def. Br.") rehashes several *criminal* cases addressing the Vienna Convention, these cases merely establish that "drastic" remedies such as excluding evidence, dismissing an indictment, and reversing a conviction are not appropriate remedies for a violation of the Treaty. Defendants therefore fail adequately to reconcile their position with the two most important cases on the issue presented in this appeal: *Standt v. City of New York*, 153 F. Supp. 2d 417 (S.D.N.Y. 2001), which unequivocally held that Article 36 confers an individual right and that a plaintiff such as Jogi can pursue a civil suit for violation

of that right, and the LaGrand Case (Germany v. United States), 2001 I.C.J. 104, which “conclusively determines that Article 36 of the Vienna Convention creates individually enforceable rights, resolving the question most American courts (including the Seventh Circuit) have left open.” *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 979 (N.D. Ill.), *motion to reconsider denied*, No. 98 C 1866, 2002 WL 31386480 (N.D. Ill. Oct. 22, 2002).

But even in the criminal context, several courts have held that Article 36 confers an individual right (*see, e.g., United States v. Hongla-Yamche*, 55 F. Supp. 2d 74, 78 (D. Mass. 1999); *United States v. Superville*, 40 F. Supp. 2d 672, 678 (D.V.I. 1999); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999) (“In light of the language of Article 36 and the above cited authority, the Court finds that [defendants] have an individual right to consular notification”) *aff’d*, 226 F.3d 616 (7th Cir. 2000)), although most have explicitly declined to reach the issue. *See, e.g., Chaparro-Alcantara*, 226 F.3d at 621. Only two courts of appeal have held that Article 36 confers no individual right, with the Fifth Circuit deciding the issue pre-LaGrand, and the Sixth Circuit, in an opinion issued shortly after LaGrand, failing to discuss the decision’s significance. *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir.), *cert. denied*, 533 U.S. 962 (2001); *United States v. Emuegbunam*, 268 F.3d 377 (6th Cir. 2001), *cert. denied*, 535 U.S. 977 (2002).^{1/}

^{1/} Defendants suggest that the Eleventh Circuit has also held that the Vienna Convention confers no individual right. *See* Def. Br. at 14 (citing *United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir.), *cert. denied*, 123 S. Ct. 573 (2002)). However, while the Eleventh Circuit noted that the Vienna Convention

These decisions are inconsistent with and cannot survive the conclusion in LaGrand that the Vienna Convention creates individual rights because the “United States voluntarily submitted to the jurisdiction of the I.C.J. to resolve disputes over the interpretation of the Vienna Convention.” *Madej*, 223 F. Supp. 2d at 979. Indeed, “[a]fter LaGrand . . . no court can credibly hold that the Vienna Convention does not create individually enforceable rights.” *Madej*, 2002 WL 31386480, at *1.

Defendants cite *Bell v. Virginia*, 563 S.E.2d 695 (2002), to argue that LaGrand’s language that “Article 36 . . . creates individual rights, which, by virtue of Article I of the Optional Protocol, *may be invoked in [the ICJ] by the national State of the detained person*” (Def. Br. at 15 (quoting *Bell*, 563 S.E.2d at 706 (quoting LaGrand, 2001 I.C.J. 104, ¶ 77))) does not create individually-enforceable rights. But omitted from Defendants’ argument is the *Bell* court’s statement that “the ICJ recognized that the ‘obligation [created by the Vienna Convention] can be carried out in various ways’ and that ‘[t]he choice of means must be left to the United States.’” *Bell*, 563 S.E.2d at 706 (quoting LaGrand). Partially on that basis the *Bell* court rejected one such choice – the suppression of evidence. *See id.* at 707. But that holding has no bearing on whether other choices – such as monetary damages – are available for a Vienna Convention violation. Indeed, the *Bell* court merely concluded “that the ICJ . . . did not hold that Article 36 . . . creates legally

“disclaims any intent to create individual rights” (*Duarte-Acero*, 296 F.3d at 1281), the court merely “join[ed] [its] sister circuits by holding that a violation of Article 36 of the Vienna Convention on Consular Relations does not warrant the dismissal of an indictment.” *Id.* at 1282.

enforceable individual rights *that a defendant may assert in a state criminal proceeding to reverse a conviction.*” *Id.* at 706 (emphasis added). And in any event, Defendants’ reliance on *Bell* is fundamentally flawed for two reasons: 1) LaGrand’s language that Vienna Convention individual rights may be invoked in the ICJ by the sending state is not the least bit surprising, as the case involved proceedings by Germany against the United States in the ICJ; and 2) other language in LaGrand contains no limiting clauses and clearly and succinctly states that the Vienna Convention creates individual rights. *See* LaGrand, 2001 I.C.J. 104, ¶ 89.

Defendants tellingly relegate *Standt* and LaGrand to the back burner, and instead embark on a legal sojourn of largely unhelpful criminal cases (*see* Def. Br. at 5-15) to derive what they view as seven reasons why the Vienna Convention does not bestow individual rights. *See id.* at 16-17. None of these reasons hold any water:

The Preamble of the Vienna Convention does *not* “specifically disclaim[] any intent to confer individual rights.” *See* Def. Br. at 16.

Defendants’ assertion to the contrary simply misinterprets the Preamble’s “not to benefit individuals” language. *See* Vienna Convention, Apr. 24, 1963, 596 U.N.T.S. 262. As discussed in Plaintiff-Appellant’s Opening Brief (“Pl. Br.”), that language is best understood as referring to consular officials, *not* civilian foreign nationals. *See* Pl. Br. at 14-17; *see also Standt*, 153 F. Supp. 2d at 425; *United States v. Li*, 206 F.3d 56, 72 (1st Cir. 2000) (Torruella, C.J., concurring in part and dissenting in

part); Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 Mich. J. Int'l L. 565, 593-96 (1997).

Moreover, even assuming “individuals” in the Preamble does refer to detained foreign nationals, the fact that the “purpose” of the Vienna Convention as a whole is to promote consular efficiency should not preclude the possibility that it also protects individual rights (*see Standt*, 153 F. Supp. 2d at 425), especially given the unambiguous language of Article 36 requiring authorities to “inform the person concerned without delay of *his* rights.” Vienna Convention, art. 36.1(b), 596 U.N.T.S. at 292 (emphasis added). Thus, the language of Article 36 itself, certainly a “more persuasive source for determining the parties’ intent” than the Preamble to the entire 79-article treaty, “clearly refers to the existence of an individual right.” *Hongla-Yamche*, 55 F. Supp. 2d at 77.

The Vienna Convention grants each signatory discretion to craft appropriate remedies; its lack of a specifically prescribed remedy is irrelevant to question of whether it grants an individual right. *See* Def. Br. at 16. Given that 92 nations are signatories to the Convention (*see* Kadish, *supra*, at 568), it is not surprising that the treaty omits mention of specific remedies available in U.S. courts. Article 36 does, however, require that rights provided therein “be exercised in conformity with the laws and regulations of the receiving State” so as to give its purposes “full effect.” Thus, the treaty clearly contemplates some type of remedy other than purely diplomatic redress, which would not seem to be a part of “the laws and regulations of the receiving State.” If, as now seems

clear, no remedy is available in the criminal context, a civil remedy is *necessary* in order to give Article 36 rights “full effect.” *See Standt*, 153 F. Supp. 2d at 429 (citation omitted). Similarly, the Supreme Court has plainly held that civil remedies are available under Section 1983 for violations of individual statutory rights even when the relevant statutory provision does not itself create a private right of action. *See, e.g., Maine v. Thiboutot*, 448 U.S. 1, 5-6 (1980). And given that “a treaty is placed on the same footing, and made of like obligation, with an act of legislation” (*Whitney v. Robertson*, 124 U.S. 190, 194 (1888)), the fact that Article 36 does not itself prescribe a remedy simply does not suggest that it does not confer an individual right.

That the “Optional Protocol provides that disputes will be adjudicated at the International Court of Justice in actions between nations” is irrelevant to the question of whether the Vienna Convention confers an individual right. *See* Def. Br. at 16. It is unclear why Defendants believe this provision of the Treaty precludes finding an individual right. Jogi’s suit is not a “dispute[] between nations.” *Cf. Madej*, 223 F. Supp. 2d at 980 (distinguishing a dispute between nations, which is within the exclusive jurisdiction of the International Court of Justice, from a petition for a writ of habeas corpus, which is properly filed in federal court). It is, indeed, ironic that Defendants’ point to the jurisdiction of the International Court of Justice as evidence that no individual right exists, even though that court has clearly held that such an individual right does exist. *See* LaGrand, 2001 I.C.J. 104, ¶ 89 (“Article 36 . . .

creates individual rights for the detained person in addition to rights accorded the sending State, and . . . consequently the reference to ‘rights’ in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual”). In short, U.S. submission of *its* disputes with other nations to the exclusive jurisdiction of the International Court of Justice simply does not suggest that the treaty does not confer an individual, federally protected right.

The “general rule . . . that international treaties . . . do not create rights that are enforceable by an individual” does not apply where, as here, a treaty specifically confers individual rights. See Def. Br. at 16.

Although Defendants correctly state the “general rule,” courts have long recognized that “a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.” *Head Money Cases*, 112 U.S. 580, 598 (1884); see also, e.g., *United States v. Rauscher*, 119 U.S. 407, 418-19 (1886) (holding that an extradition treaty between the United States and Great Britain created individual rights enforceable in federal courts). “In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning.” *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992). Following this principle in *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998), Judge Butzner concluded:

The Vienna Convention is a self executing treaty – it provides rights to individuals rather than merely setting out the obligations of signatories. The text emphasizes that the right of consular notice and assistance is the citizen’s. The language is mandatory and unequivocal, evidencing the signatories' recognition of the importance of consular access for persons detained by a foreign government.

Id. at 622 (Butzner, J., concurring) (citation omitted); *see also Li*, 206 F.3d at 71-73 (Torruella, C.J., concurring in part and dissenting in part) (accord).

Moreover, under this Court’s six-factor test, the Vienna Convention is self-executing and, therefore, confers individual rights. This Court looks to:

(1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute.

Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985).

Most, if not all, of these factors weigh in favor of finding that the Vienna Convention is self-executing. First, the language of Article 36 plainly refers to the rights of the detained nationals. *Compare with id.* at 374 (U.N. Charter was “phrased in broad generalities, suggesting . . . declarations of principle, not a code of legal rights”).^{2/} Second, when the Treaty was executed, Congress was explicitly informed that the Vienna Convention was self-executing. *Compare with id.* at 376 (Before signing the Helsinki Accords, President Ford declared, “the document I will sign is neither a treaty *nor is it legally binding on any particular state.*”) (citation

^{2/} Of course, “if the parties’ intent is clear from the treaty’s language courts will not inquire into the remaining factors.” *Frolova*, 761 F.2d at 373.

omitted). Third, the obligations imposed by the Vienna Convention are precise and mandatory (“shall”). *Compare with id.* at 376 (Helsinki Accords vest signatories “with considerable discretion in deciding whether and when to allow” spousal reunification). Fourth, Article 36 provides that the rights provided therein “be exercised in conformity with the laws and regulations of the receiving State” so as to give its purposes “full effect,” thus making domestic enforcement of the treaty through the courts a necessary enforcement mechanism. *Compare with id.* at 376 (language leaving implementation of provisions at issue to discretion of nations concerned indicates Helsinki Accords are not self-executing). Fifth, recognizing a private right under the Vienna Convention in no way threatens U.S. foreign policy interests. *Compare with id.* at 375 (“judicial resolution of cases bearing significantly on sensitive foreign policy matters, like the case before us, might have serious foreign policy implications which courts are ill-equipped to anticipate or handle”). Finally, the right created by Article 36 is crystal clear and no less amenable to judicial enforcement than any federal constitutional or statutory right the courts adjudicate on a regular basis. Under *Frolova*, then, this Court should hold the Vienna Convention to be a self-executing treaty. The “general rule” cited by plaintiffs is simply irrelevant.

The Vienna Convention is *not* “ambiguous as to the issue of whether it creates individual rights,” so “the presumption against implying rights” does *not* control. *See* Def. Br. at 16. Simply put, Defendants’ fifth “reason” is no more than a restatement of their fourth. As discussed above, the plain language of

Article 36 is *not* ambiguous; rather, it clearly creates an individual right. And in any event, as discussed *infra*, the travaux preparatoires of the Vienna Convention demonstrate that its drafters intended to create an individual right, thus resolving any perceived ambiguity.

The State Department’s interpretation of the treaty is entitled to little, if any, deference given its self-serving nature and rejection by other Vienna Convention signatories. See Def. Br. at 16-17. “Respect is *ordinarily* due the reasonable views of the Executive Branch concerning the meaning of an international treaty.” *El Al Israel Airlines, Ltd. v. Tsui Yaun Tseng*, 525 U.S. 155, 168 (1999) (emphasis added). However, this deference is “not conclusive.” *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184 (1982). This principle, moreover, developed in a series cases in which the government was a disinterested party. See, e.g., *El Al Israel Airlines*, 525 U.S. 155 (tort suit by foreign national against foreign airline); *Sumitomo Shoji America*, 457 U.S. 176 (private Title VII action against foreign corporation); *Kolourat v. Oregon*, 366 U.S. 187 (1961) (inheritance dispute between foreign national and state). In the context of the Vienna Convention, however, the government has vigorously defended its interest in protecting convictions against foreign nationals. Courts generally do *not* defer to interpretations the government develops for purposes of litigation. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); see also *United States v. Lombera-Camerlinga*, 206 F.3d 882, 895 (9th Cir. 2000) (Thomas, J., dissenting)

(“The arguments advanced by an agency in litigation ought to rise or fall on their own weight.”).

The State Department’s interpretation of the Vienna Convention has been criticized as “both self-serving and directly contrary to [its] nonlitigation position.” *Li*, 206 F.3d at 74 n.4 (Torruella, C.J., concurring in part and dissenting in part); *see also* Kadish, *supra*, at 599-600 (accord). By demanding that other countries respect the rights of U.S. citizens abroad but failing to recognize the rights’ of foreign nationals detained in the United States, the government “establishes a repugnant double standard.” *Li*, 206 F.3d at 75 (Torruella, C.J., concurring in part and dissenting in part). Moreover, when interpreting treaties, a court should consider not only the understanding of the U.S. agency charged with its interpretation, but also that of all “contracting parties.” *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996). Other signatories to the Convention have consistently rejected the State Department’s interpretation and have filed briefs urging U.S. courts to hold that the treaty creates an individual right. *Standt*, 153 F. Supp. 2d at 428; Kadish, *supra*, at 601-02 & nn.223-26. Thus, given its self-serving nature and explicit rejection by other parties to the treaty, the government’s interpretation is simply due little, if any, deference.

The travaux preparatoires and legislative history regarding the Vienna Convention support the individual rights view. Defendants’ assertion to the contrary is simply incorrect. The history of Article 36 clearly

discloses that the signatory nations were primarily concerned with the rights of the individual. *See generally* Kadish, *supra*, at 596-99. For example, an amendment proposed by Venezuela that would have explicitly disclaimed the creation of individual rights was roundly rejected. *See Standt*, 153 F. Supp. 2d at 425-26 (citing 2 United Nations Conference on Consular Relations: Official Records, at 37, 38, 84, 85, 331-34, U.N. Doc. A/Conf. 25/6, U.N. Sales. No. 63.X.2 (1963). Several countries, in fact, desired that consular notification be made automatic, but the proposal was ultimately rejected on the grounds that it would undermine the autonomy of the individual. *See* Kadish, *supra*, at 597-98.

The interpretation of the Vienna Convention as conferring an individual right is further supported by the Report of the Senate Foreign Relations Committee, which states that “[t]he Convention is considered *entirely self-executive* and does not require any implementing or complementing legislation” (*Li*, 206 F.3d at 74 (Torruella, C.J., concurring in part and dissenting in part) (emphasis in original) (quoting Sen. Exec. Rep. No. 91-9 (1969) (testimony of Deputy Legal Advisor for Administration, J. Edward Lyerly))) “because executive, law enforcement, and *judicial authorities* can implement these obligations through their existing powers.” *Id.* at 75 (Torruella, C.J., concurring in part and dissenting in part) (quoting Government’s Supplemental Appendix on Rehearing En Banc, Vol. II at 484 (emphasis added)). “From these and other statements by the various national delegates there should be little doubt that the treaty under consideration concerned

not only consular rights but also the separate individual rights of detained nationals.” *Id.* at 73-74 (Torruella, C.J. concurring in part and dissenting in part) (citing statements of Vienna Convention delegates of some fourteen additional nations); *see also Standt*, 153 F. Supp. 2d at 427 (reaching the same conclusion); *Superville*, 40 F. Supp. 2d at 678 (same); Kadish, *supra*, at 600-02 (same).

* * *

The plain language of Article 36 supports the view that the Vienna Convention creates an individual right. The travaux preparatoires to the Vienna Convention further show that the intent of its drafters was to create an individual right. The Treaty was then presented to the Senate as a self-executing treaty, requiring no implementing legislation. Other signatories to the Treaty have interpreted Article 36 as conferring an individual right, an interpretation recently confirmed by the International Court of Justice. Finally, in a well-reasoned, thorough decision, *Standt* reviewed all of this evidence and concluded that Article 36 created an individual right and that a civil plaintiff could pursue a remedy for its violation. Accordingly, this Court should allow Jogi to proceed with his Vienna Convention claim.

II. Jogi May Sue Under The ATCA For Defendants’ Vienna Convention Violations.

A. Even Under Judge Bork’s More Restrictive Approach To The ATCA, Jogi May Proceed With His Vienna Convention Claim.

A clear majority of the federal courts that have addressed the issue have held that the ATCA provides both a jurisdictional basis and an independent cause of action. *See Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996). Defendants nevertheless argue the position espoused by Judge Bork's concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), that the ATCA is a jurisdictional statute only. According to Defendants, the ATCA, at most, "simply open[s] the Federal Courts for adjudication of the rights already recognized by international law." Def. Br. at 19. But that limited position cannot be squared with the plain language of the Act, which provides that an alien may sue for *any* tort committed "in violation . . . of a treaty of the United States." 28 U.S.C. § 1350. In fact, Judge Bork's position has been rejected by scholars because it effectively nullifies half the statute. *See, e.g.,* Anthony D'Amato, *Agora: What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 *Am. J. Int'l L.* 92, 98 (1985) (arguing that Judge Bork's view "would pretty much wipe out the invocation of customary international law in American courts"); *id.* at 104 (concluding that "Judge Bork . . . seriously misunderstood the law of nations as it was meant to be understood in the" ATCA).

But even assuming that Judge Bork's limited interpretation of the ATCA is correct, Jogi could still pursue his Vienna Convention claim because even Judge Bork recognized that a self-executing treaty creates a private cause of action enforceable under the ATCA. *See Tel-Oren*, 726 F.2d at 808 (Bork, J., concurring) (citations omitted). Defendants similarly agree that self-executing treaties are

enforceable under the ATCA. *See* Def. Br. at 24 (“if there is a private right of action under the [Vienna Convention], an action under the [Vienna Convention] with jurisdiction under the ATCA would be proper even under Justice [sic] Bork’s approach”). Assuming the Vienna Convention is self-executing, the question of whether the ATCA creates a private cause of action or is merely jurisdictional is simply irrelevant.

B. The District Court Erred In Applying A “Shockingly Egregious” Standard To Jogi’s ATCA Claim.

While Defendants persist in defending the district court’s reliance on *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983), a twenty-year-old decision^{2/} applying a shockingly egregious standard to “an unusually frivolous” ATCA claim concerning a lottery’s method of payment, they tellingly concede that “[i]t would have been more proper for the District Court to interpret the Treaty on which Plaintiff bases his claim as not conferring individual rights and leave it at that.” Def. Br. at 27. Indeed, defendants even go so far as to distinguish ATCA claims that “rest[] not on the solid footing of a treaty or statute” as requiring the application of some sort of “egregious violation” standard. *Id.* at 28. It is therefore inappropriate to impose

^{2/} In the twenty years since it was decided, *Zapata* has been cited by five other federal courts, never by the Second Circuit itself or any court in this circuit. Most recently, *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510, 523 (S.D.N.Y. 2002), clarified that “*Zapata* . . . did not establish ‘shockingly egregious’ as an independent standard for determining what constitutes a violation of international law” because such a standard “would displace the agreement of nations as the source of customary international law and substitute for it the consciences and sensibilities of individual judges.”

some sort of heightened standard where, as here, the claim involves the violation of a treaty. *See The Paquete Habana*, 175 U.S. 677, 700, 708 (1900) (only “where there is no treaty” should courts consult other jurisprudential materials for evidence of an international norm, and only “in the absence of any treaty” should those norms be given effect). Simply stated, by reading a “shockingly egregious” requirement into the ATCA, the district court substituted its own subjective appraisal of Defendants’ conduct for the considered judgment of the 92 signatories to the Vienna Convention.

C. Defendants Agree That A Self-Executing Vienna Convention May Be Enforced Through Section 1983.

Because the Vienna Convention is self-executing, Jogi should also be allowed to pursue his claims under Sections 1983 or 1331. The Treaty is intended to benefit individuals, the rights granted by the Treaty are clear and unambiguous, and the Treaty’s mandatory provisions are the “supreme Law of the Land” (U.S. Const. art. VI, cl. 2) that must be given “full effect.” Vienna Convention, art. 36.2, 596 U.N.T.S. at 293. Thus, Jogi has stated a cause of action under Section 1983 and, indeed, even Section 1331. *See* Pl. Br. at 31-33. Defendants agree that Section 1983 may provide an appropriate remedy for a self-executing Vienna Convention. *See* Def. Br. at 24 (assuming an individual right under the Vienna Convention, “[i]t seems an action under Section 1983 also would be proper” because “[t]here would be

a violation of a right provided for in federal law. The remedy in this instance would be that which is generally available in a Section 1983 action.”^{4/}

III. Jogi Has Sufficiently Alleged Compensable Harm For The District Court To Have Jurisdiction.

A. Jogi Has Suffered And Pled Concrete Injury.

As this Court has recognized, consular access, “*at a minimum, . . . provides a cultural bridge* for detained nationals who must otherwise navigate through an unfamiliar and often hostile legal system.” *Chaparro-Alcantara*, 226 F.3d at 622 (emphasis added) (quoting William J. Alceves, *Murphy v. Netherland*, 92 Am. J. Int’l L. 87, 89-90 (1998)). The district court nevertheless concluded that Jogi was not injured simply because he was informed of his *Miranda* rights and provided with counsel. However, the benefits of a “cultural bridge” extend far beyond any impact they may have on the resolution of a foreign national’s criminal proceeding. One need only imagine the distress a U.S. citizen would feel upon being arrested in an unfamiliar, perhaps hostile, country to recognize that the presence of a fellow national benefits a detainee in ways that a lawyer cannot, and that failure to inform the detainee of his rights under the Vienna Convention would thus cause injury.

^{4/} As discussed in the Opening Brief, the only mention of the ATCA in Jogi’s *pro se* complaint was in the first line, where he cites the ATCA as a jurisdictional statute. See Pl. Br. at 33; Compl. at 1; App. at 08. Accordingly, Jogi should be granted wide latitude as necessary to amend his Complaint to assert an alternative jurisdictional basis for his Vienna Convention claim.

Defendants ignore all of this and instead claim that “[p]laintiff has not alleged damages or injury sustained as a result of a failure to comply with the [Vienna Convention].” Def. Br. at 23. But in making that argument Defendants ignore that Jogi neither knew of nor was informed of his right to contact the Indian Consulate (*see* Compl. at 4; App. at 11) and that Jogi has alleged that he suffered harm from this deprivation, including mental anguish – an allegation that must be construed liberally in light of his *pro se* status. *See id.* at 5; App. at 12.

More significantly, the Defendants follow the lead of the district court in arguing that Jogi was informed of his *Miranda* rights and was appointed an attorney who “*presumably* assisted him at least as well as the Indian consulate would have.” Def. Br. at 23 (emphasis added); *see also Jogi v. Piland*, 131 F. Supp. 2d 1024, 1027 (C.D. Ill. 2001). But even setting aside Defendant’s impermissible *presumption in their own favor* on a motion to dismiss, Defendants (and the district court) conflate the right to consular access with *Miranda* rights. According to the district court’s and Defendants’ reasoning, local authorities may violate the Vienna Convention at will so long as they follow *Miranda* and provide counsel. That simply cannot be the rule, as it ignores both the distinct nature of the two sets of rights and the fact that a consulate’s mere presence is likely to provide reassurance even if he has no legal training whatsoever.

Defendants’ (and the district court’s) confusion ultimately stems from their inappropriate application of a prejudice standard to Jogi’s civil damages claim. *See*

Def. Br. at 23-24. “[T]he prejudice requirement was developed in the criminal and immigration contexts, and is not applicable here Instead, as in other § 1983 contexts, a plaintiff bringing suit under the [Vienna Convention] need only show that the violation injured him.” *Standt*, 153 F. Supp. 2d at 430. Similarly, whether Jogi has adequately alleged a tort is irrelevant if Jogi’s claim proceeds under Section 1983, a point recently explained in an action seeking damages for a violation of the Vienna Convention:

It is this requirement that a tort be committed in connection with the violation of a treaty that renders cases evaluating the existence of an Article 36 cause of action under § 1983 of limited import in the ATCA context, as § 1983 contains no comparable requirement.^{5/}

Bieregu v. Ashcroft, — F. Supp. 2d —, 2003 WL 1989661, at n.8 (D.N.J. May 1, 2003); *see also Ulmann v. Anderson*, No. Civ. 02-405-JD, 2003 WL 168653, at *5 (D.N.H. Jan. 21, 2003) (“Although [the plaintiff] offers a dearth of specifics with regard to the denial of consular visitation, generously construing his complaint I

^{5/} The district court in *Bieregu v. Ashcroft*, — F. Supp. 2d —, 2003 WL 1989661 (D.N.J. May 1, 2003), dismissed the plaintiff’s ATCA claim, substantially tracking the reasoning of the district court in *Jogi*, 131 F. Supp. 2d at 1026-27. In *Bieregu*, however, Section 1983 was not available because the defendants were federal, not state, officials, and the opinion suggests that the result might have been different had the plaintiff been able to proceed under Section 1983. *See Bieregu*, — F. Supp. 2d —, 2003 WL 1989661, at n.3 (“Section 1983 does not provide a cause of action against a federal official.”); *id* at *8 (suggesting that the plaintiff could not proceed under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), because he failed to allege a violation of constitutional rights); *Bieregu*, — F. Supp. 2d —, 2003 WL 1989661, at n.8 (noting that Section 1983 does not require plaintiff to plead “that a tort [was] committed in connection with the violation of a treaty”). Thus, even if the district court’s reasoning is upheld with respect to Jogi’s ATCA claim, *Bieregu* counsels that he should be allowed to proceed under Section 1983.

find that he has alleged the minimum facts necessary to allow the [Section 1983] claim to go forward at this time.”). Thus, at a minimum, Jogi has alleged sufficient facts to state a claim under Section 1983.

B. Even If Jogi Cannot Concretize His Harm, He Is Still Entitled To A Claim For Nominal Damages.

While Defendants ignore Jogi’s argument that he is at least entitled to nominal damages, they admit that, if the Vienna Convention is held to confer an individual right, “[t]he remedy . . . would be that which is generally available in a Section 1983 action.” *See* Def. Br. at 24-25. Jogi’s *pro se* Complaint has pled a cognizable injury sufficient to state a claim, at minimum, for nominal damages. For the undisputed reasons set forth in Jogi’s opening brief, such nominal damages may be appropriate here. *See* Pl. Br. at 40-41.

C. Punitive Damages Are Necessary To Enforce The Vienna Convention.

Also unaddressed by Defendants is Jogi’s argument that punitive damages are necessary to enforce the Vienna Convention. *See* Pl. Br. at 41-43 (discussing repeated violations of the Vienna Convention by U.S. law enforcement authorities and the effect of those violations on U.S. citizens who may wish to invoke their Vienna Convention rights when traveling or living abroad). Here, Jogi has plead not only that his Vienna Convention rights were violated, but also that Defendants’ failure to inform him of his rights may have been deliberate. *See* Compl. at 5; App. at 12 (referring to Defendants’ conduct as “mistakes or strategy”). At a minimum, discovery is necessary to determine whether Defendants have violated the

Convention in the past as well as whether Defendants' violation was part of a strategy to not inform Jogi of his rights. Punitive damages, moreover, are available even if Jogi is entitled to only nominal damages. *See Sahagian v. Dickey*, 827 F.2d 90, 100 (7th Cir. 1987) (holding that punitive damages do not depend on a showing of actual loss if there is proof of aggravating circumstances, malicious intent, or reckless or callous indifference to a plaintiff's rights). Given that state officials' repeated violation of the Convention not only violates important individual rights but also threatens U.S. foreign policy interests and the safety of U.S. citizens abroad, punitive damages may be an appropriate and necessary remedy in this case.^{6/}

^{6/} Again, Defendants' statement that, if the Vienna Convention confers an individual right, "[t]he remedy ... would be that which is generally available in a Section 1983 action" (Def. Br. at 24-25) suggests that Defendants now acknowledge that Jogi may be entitled to punitive damages, given that the Supreme Court has sanctioned the award of punitive damages in Section 1983 cases. *See, e.g., Smith v. Wade*, 461 U.S. 30, 56 (1983).

D. Because Jogi's Vienna Convention Claim Does Not Necessarily Implicate His Underlying Conviction, *Heck v. Humphrey* Is Inapplicable.

Tracking this Court's interpretation of *Heck v. Humphrey*'s exception for categories of claims that do not *necessarily* implicate an underlying conviction, Defendants now rightly concede that "a favorable outcome for Plaintiff in this litigation would not necessarily demonstrate the invalidity of his conviction." Def. Br. at 26. Indeed, it could not be clearer that Jogi's success here would not necessarily undermine his conviction, as this Court would refuse to vacate his conviction on the basis of Defendants' violation of his rights. *See Chaparro-Alcantara*, 226 F.3d 621-22 ("Because the Vienna Convention, by its terms, does not require the application of the exclusionary rule to violations of Article 36, we cannot require the suppression of statements made by defendants who have not been informed of their Article 36 rights."). One district court in this Circuit, in fact, declined to suppress evidence in part *because* it assumed that "suppression is not the *only* remedy available" and that the "[d]efendant might theoretically be able to seek monetary damages for the violation of his notification rights." *United States v. Torres-Del Murro*, 58 F. Supp. 2d 931, 934 (C.D. Ill. 1999).

Defendants' only response is to state that Jogi's case is barred because he "does not claim, and cannot show, injury from the [Vienna Convention] violation itself." Def. Br. at 27. But that not only ignores the harm Jogi is claiming for his lack of access to a cultural bridge (*see* Pl. Br. at 34-36), but also the law in this

Circuit that carves out an exception from *Heck* for *categories of cases* that do not necessarily implicate an underlying conviction. Defendants readily admit that this case not only falls into such a category, but even that a favorable outcome here would not necessarily demonstrate the invalidity of Jogi's conviction. *See* Def. Br. at 26.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision dismissing Jogi's Vienna Convention claim under the ATCA for lack of subject matter jurisdiction by holding that Jogi has stated a valid cause of action and should remand the case for discovery. In the alternative, this Court should find that Jogi is entitled to amend his complaint to pursue his Vienna Convention claim under Sections 1983 or 1331.

Respectfully submitted,

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Dated: June 27, 2003

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiff-Appellant Tejpaul S. Jogi, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this Reply Brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this Reply Brief is 6290 words.

Brad P. Rosenberg

Dated: June 27, 2003

CIRCUIT RULE 31(e)(1) CERTIFICATION

The undersigned, counsel of record for Plaintiff-Appellant Tejpaul S. Jogi, hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the Reply Brief.

Brad P. Rosenberg

Dated: June 27, 2003

PROOF OF SERVICE

I hereby certify that on this 27th day of June, 2003, I caused two copies of the Reply Brief for Plaintiff-Appellant Tejpaul S. Jogi, as well as a digital version of the Reply Brief, to be served by third-party commercial carrier for delivery within three calendar days upon:

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and fifteen (15) copies of the Reply Brief for Plaintiff-Appellant Tejpaul S. Jogi, as well as a digital version of the Reply Brief, to be delivered by third-party commercial carrier for delivery within three calendar days upon:

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Dated: June 27, 2003