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## Expanding the Vienna Convention on Consular Relations

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# Expanding the Vienna Convention on Consular Relations: Protecting Children by Protecting Their Parents

## ABSTRACT

*Article 37 of the Vienna Convention on Consular Relations (VCCR) aims to protect the interests of foreign national children by requiring consular notification whenever these children come into the custody of the state. Consular assistance can be invaluable for foreign national parents and children who may not understand the language or the culture and who may be subject to discrimination based on their nationality. However, the VCCR is currently inadequate in two major ways. First, the protections of Article 37 are only triggered when the child in custody is a foreign national, leaving vulnerable to unfair treatment families in which the child is a citizen but the parents are foreign nationals. Second, enforcement of the VCCR is inconsistent, and the remedy for violations is unclear. This Note proposes amendments to the VCCR that would provide broader and more consistent protection to foreign national families.*

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## I. INTRODUCTION

In the United Nations Convention on the Rights of the Child (CRC), 193 nations announced their conviction that “the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.”<sup>1</sup> This proclamation reflects the nearly universal respect that the family unit is afforded.<sup>2</sup> Given this respect, governments must be cautious when interfering with the family realm.

Child welfare laws generally reflect an attempt by the government to strike a balance between respecting the rights of parents to raise their children and protecting children when their parents are unable or unwilling to adequately care for them.<sup>3</sup> Although the central consideration is the best interests of the child, most child welfare systems presume that children are typically better off with their parents.<sup>4</sup> State intervention into familial life can traumatize all members of a family,<sup>5</sup> and this result is even more likely to occur when the family is living in a foreign country.<sup>6</sup>

1. United Nations Convention on the Rights of the Child pmb., *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

2. *Convention on the Rights of the Child: Status*, UNITED NATIONS TREATY COLLECTION (Oct. 23, 2013, 8:36 AM), [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (showing 193 States Party).

3. See HON. WILLIAM G. JONES, U.S. DEPT OF HEALTH AND HUMAN SERVS., WORKING WITH THE COURTS IN CHILD PROTECTION 13–14 (2006), *available at* <https://www.childwelfare.gov/pubs/usermanuals/courts/courts.pdf> (“The legal framework regarding the parent-child relationship balances the rights and responsibilities among parent, child, and State, as guided by Federal statutes.”).

4. See, e.g., TENN. CODE ANN. § 37-5-602 (2013) (“The department’s fundamental assumptions shall be that most children are better off with their own families than in substitute care . . . [W]henver possible, preservation of the family should serve as the framework for services, but, in any case, the best interests of the child shall be paramount.”); see also United Nations Convention on the Rights of the Child, *supra* note 1, at art. 7 (“The child . . . shall have . . . as far as possible, the right to know and be cared for by his or her parents.”).

5. For a description of the kinds of trauma that children removed from their parents face, see UPENN COLLABORATIVE ON CMTY. INTEGRATION, REMOVAL FROM THE HOME: RESULTING TRAUMA, *available at* [http://tucollaborative.org/pdfs/Toolkits\\_Monographs\\_Guidebooks/parenting/Factsheet\\_4\\_Resulting\\_Trauma.pdf](http://tucollaborative.org/pdfs/Toolkits_Monographs_Guidebooks/parenting/Factsheet_4_Resulting_Trauma.pdf) (last visited Oct. 23, 2013).

6. See discussion *infra* Part II.B.

In child welfare proceedings, parents have a fundamental right at stake: the right to the care and custody of their child.<sup>7</sup> If they are unable to adequately work with the government officials involved and fail to comply with judicial orders, they risk permanently losing their child.<sup>8</sup> When the parents are foreign nationals, they are on an unequal playing field.<sup>9</sup> Although the specifics of child welfare proceedings differ from country to country, a foreign national in any country would face similar challenges.

Consular assistance can effectively remedy these concerns because it provides someone to advocate for the rights of both parent and child.<sup>10</sup> More importantly, this advocate would come from the same cultural background as the family and would speak its native language. These characteristics allow the advocate to assist the family in ways that an attorney from the country in which the proceeding is taking place likely cannot.<sup>11</sup>

Recognizing these benefits, the United States and other countries entered into a number of international agreements providing for consular notifications when foreign nationals become involved in child welfare proceedings.<sup>12</sup> Most notably, Article 37 of the VCCR calls for automatic consular notification whenever the appointment of a guardian “appears to be in the interests of” a foreign national minor.<sup>13</sup> While this provision has the potential to provide substantial protections for families whose children are removed from them in foreign countries, it is flawed. Because Article 37 is triggered only when the child involved in the proceeding is a foreign national, it offers no protection to families of mixed citizenship status—families

7. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”).

8. See C. Elizabeth Hall, Note, *Where Are My Children . . . And My Rights? Parental Rights Termination as a Consequence of Deportation*, 60 DUKE L.J. 1459, 1470 (2011) (describing the most common grounds for termination of parental rights).

9. See generally *id.* at 1470; Caitlin Delphin, Comment, *Protecting the Interests of Foreign-National Minors in the United States Through Consular Notification*: In re Interest of Angelica L., 45 NEW ENG. L. REV. 941, 952 (2011) (“Consular involvement at the outset of legal actions involving custody or guardianship of a minor foreign national can help to eliminate some of the hurdles that may cause delays in the resolution of the case.”); Pamela Kemp Parker, *When a Foreign Child Comes into Care, Ask: Has the Consul Been Notified?*, 19 A.B.A. CHILD L. PRAC. 177 (2001).

10. See Parker, *supra* note 9, at 177 (“A consular officer speaks the family’s native language and can explain applicable child protection laws in the context of the customs and laws of the family’s home country.”).

11. See *id.* (“The rapport that consular staff can often establish with citizens from the home country can alter the outcome of a case.”).

12. See discussion *infra* Part III.

13. Vienna Convention on Consular Relations art. 37, Apr. 24, 1963, 596 U.N.T.S. 261 [hereinafter VCCR].

in which the immigrant parent is a foreign national, but the child is a citizen of the country of residence.<sup>14</sup> Furthermore, countries disagree about the proper interpretation and application of the VCCR, leading to poor enforcement.<sup>15</sup> These issues must be promptly resolved in order to ensure respect and protection for the fundamental rights of parents and the sanctity of the family.

This Note details the significance of consular involvement in child welfare proceedings involving foreign nationals, identifies the obstacles current international laws face, and proposes changes to make those laws more effective. Part II provides a background in child welfare law and the particular challenges facing foreign nationals in these proceedings as well as an explanation of the assistance that consular officials can provide. Part III summarizes the international agreements that provide for consular notification, focusing on the VCCR. Part III recognizes two major issues that impede these agreements from providing adequate protection of foreign nationals in child welfare proceedings. First, it identifies a gap in protection for foreign national parents whose children are citizens and argues that these parents deserve the VCCR's protection based on principles of parental rights found in approaches to child welfare around the world. Second, it describes the inconsistent enforcement of the VCCR due to international dispute over whether Articles 36 and 37 confer individual rights. Finally, Part IV proposes an amendment to the VCCR that would require state officials to notify all foreign national parents involved in child welfare proceedings of their right to consular assistance and would provide an individual cause of action for Article 37 violations.

## II. THE IMPORTANCE OF CONSULAR NOTIFICATION IN CHILD WELFARE PROCEEDINGS INVOLVING FOREIGN NATIONALS

### A. *What's at Stake: Child Welfare Proceedings Generally*

A basic understanding of the child welfare process is necessary to comprehend the unique difficulties facing foreign nationals. The details of this process vary from country to country, but an understanding of the United States' child welfare system will provide a sufficient framework for analyzing the need for consular assistance.<sup>16</sup>

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14. See Parker, *supra* note 9, at 178 (explaining that consular notice is not required when a foreign-born child is also a U.S. citizen).

15. See discussion *infra* Part IV.B.

16. Although the process can differ from country to country, family unity is a common goal. See SCOTTISH EXEC. CHILD PROTECTION REV., INTERNATIONAL PERSPECTIVES

If the state suspects that a child has been abused or neglected, the state court will hold an adjudicatory hearing at which both the state and the parent may put on evidence.<sup>17</sup> Once the judge determines that the child is dependent and neglected, child protective services (CPS) workers and the parent develop a case (or permanency) plan.<sup>18</sup> This plan discusses the problems that led to the state's involvement with the family, lists services to be provided for both parent and child, and includes specific improvements that the parent needs to make within the stated time frame.<sup>19</sup> While the parent works toward the goals of the permanency plan, the child remains in the legal custody of the state but can be placed with the parent, in kinship care, in foster care, or in a group home.<sup>20</sup>

The parent is primarily responsible for making progress on the permanency plan, but the state is required to make reasonable efforts to assist.<sup>21</sup> The ultimate goal is for all the components of the permanency plan to be achieved and for the child to be returned to the parent. However, if the state makes reasonable efforts and the parent fails to meet the requirements of the permanency plan, the state may petition to terminate the parent's rights.<sup>22</sup>

Termination of parental rights (TPR) is the most extreme action that the CPS arm of the state can take.<sup>23</sup> The most common grounds for TPR include abandonment, failure to remedy a persistent condition that led to the removal of the child, and substantial

ON CHILD PROTECTION 5–6 (Malcolm Hill, Anne Stafford & Pam Green Lister eds., 2002), available at <http://www.scotland.gov.uk/Resource/Doc/1181/0009926.pdf>. Canada, Australia, and the United Kingdom have child welfare systems that are similar to that of the United States. *Id.* Many Western European countries place an even greater emphasis on family unity. *Id.* In Sub-Saharan Africa, child protection is family and community oriented. See, e.g., TRAINING RESOURCES GROUP AND PLAY THERAPY AFRICA, STRENGTHENING CHILD PROTECTION SYSTEMS IN SUB-SAHARAN AFRICA 35 (Inter-Agency Grp. on Child Protection Sys. in Sub-Saharan Africa, Working Paper, 2012), available at [http://www.unicef.org/wcaro/english/strengthening\\_child\\_protection\\_systems\\_in\\_sub-Saharan\\_Africa\\_-\\_August\\_2012\\_pdf](http://www.unicef.org/wcaro/english/strengthening_child_protection_systems_in_sub-Saharan_Africa_-_August_2012_pdf) (“A research study in Sierra Leone showed that . . . [t]here is an interdependent relationship between parents and children in that children are needed to do family work and carry on the family name.”); see also *id.* at 36–37 (discussing Mauritania's community-based mechanisms that improve coordination and service); *id.* at 40–41 (describing the child welfare system in Ghana).

17. JONES, *supra* note 3, at 29–30.

18. *Id.* at 31.

19. *Id.*

20. *Id.* at 32.

21. See *id.* at 16 (“Federal law further requires that judges decide at each critical stage of an abuse or neglect case whether the agency has complied with the reasonable efforts requirement.”).

22. See *id.* at 36 (“Drafted by the CPS attorney, TPR petitions will allege facts that, if proven, would satisfy the grounds for termination in State law.”).

23. See *id.* at 35 (“Because of the seriousness and finality of the consequences, TPR has been called the ‘death penalty’ of family law.”).

noncompliance with the permanency plan.<sup>24</sup> Although state law controls TPR proceedings, the U.S. Constitution is also implicated because the Supreme Court in *Santosky v. Kramer* held that there are constitutional rights at stake.<sup>25</sup> Parents have a fundamental liberty interest in the “care, custody, and management of their children.”<sup>26</sup> Thus, the rights of parents cannot be terminated without due process of law.<sup>27</sup> In *Santosky*, the Supreme Court cautioned that this constitutional right “does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”<sup>28</sup>

### B. Additional Challenges for Foreign Nationals

The child welfare process is more complicated when the parent, the child, or both are foreign nationals. When the parent is a foreign national, English may not be his first language, making it difficult for him to communicate with other parties and understand the legal proceedings.<sup>29</sup> Cultural differences between the foreign national’s home country and the United States may result in misunderstandings or incorrect assumptions by the parent, state officials, or judges.<sup>30</sup>

If the parent is in immigration detention, it can be difficult for the child welfare agency to work with the parent to fix the problems that led to the child coming into state custody.<sup>31</sup> CPS workers are accustomed to implementing necessary adjustments to work with incarcerated parents;<sup>32</sup> however, immigration detention differs from prison in several key ways. Immigration detainees tend to be located

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24. See Hall, *supra* note 8, at 1470 (explaining that there are several basic actions that almost always constitute unfitness, including abandonment (failure to support or maintain contact with the child), failure to remedy a persistent condition that caused the removal of the child, and failure to comply with a reunification or rehabilitation plan).

25. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (requiring a heightened standard of proof in termination of parental rights proceedings to protect the due process rights of parents).

26. *Id.*

27. See *id.* (“When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.”).

28. *Id.*

29. See, e.g., Delphin, *supra* note 9, at 951 (recounting the experience of a foreign national mother who struggled to understand court proceedings because English was her third language).

30. See Hall, *supra* note 8, at 1481–86 (discussing how cultural biases can affect family law proceedings).

31. See Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 121–22 (2011) (describing the challenges a detained immigrant mother faced to participate in dependency proceedings).

32. *Id.*

farther away from home than prison inmates, making it hard for their attorneys and CPS caseworkers to visit them.<sup>33</sup> Typically, parents in prison receive services ordered by the permanency plan, such as counseling, alcohol and drug treatment, or parenting classes. Immigration detainees often do not receive comparable services, so these parents are unable to comply with those elements of the permanency plan.<sup>34</sup> Imprisoned parents are also frequently able to attend child welfare hearings and visit with their children.<sup>35</sup> On the other hand, according to officials involved in the child welfare system in one border county of Arizona, parents picked up by Immigration and Customs Enforcement often just “disappear.”<sup>36</sup>

Deported parents face similar problems. They are unable to come back into the United States to attend child welfare hearings, and they may have difficulty communicating with their caseworker, receiving necessary services, and staying in contact with their children.<sup>37</sup> Since permanency plans typically require that parents receive certain services, detained or deported parents may not be able to comply with the plan without great effort by the state.<sup>38</sup> Noncompliance with the permanency plan is a ground for termination of parental rights,<sup>39</sup> meaning foreign nationals involved in child welfare proceedings, especially those who have been detained or deported, bear a substantial risk of losing their children forever.

### C. Types of Consular Assistance

Getting the consulate involved can alleviate many of the unique difficulties that arise in child welfare proceedings involving foreign nationals and can be an “invaluable resource” to both the parent and the state officials.<sup>40</sup> Consular officers assist a parent involved in child

33. See Hall, *supra* note 8, at 1490 (explaining that illegal immigrants who are held pending deportation are “routinely transferred to more remote jails” and “may be moved from state to state without notice”).

34. See Rabin, *supra* note 31, at 121 (noting that psychological evaluations, parenting classes, and supervised visits are unavailable to detainees for as long as they remain detained).

35. *Id.*

36. See *id.* at 119 (“Across the board, judges, social workers, and attorneys all used strikingly similar language to describe the phenomenon of parents ‘disappearing’ after they are picked up by ICE.”).

37. See Hall, *supra* note 8, at 1476–78 (describing the case of a deported father whose parental rights were terminated due to his failure to maintain contact with his children and receive rehabilitative services, despite the state’s failure to assist).

38. In one case, the trial court found that it would be unreasonable to expect the state to provide services to a deported father. Hall, *supra* note 8, at 1476.

39. See *supra* Part II.A.

40. See Parker, *supra* note 9, at 177 (“A consular officer can [] contact social services in the home country, help search for relatives, request expedited home studies, obtain official documents, make travel arrangements, issue travel documents for a

welfare proceedings by supplying an attorney or a translator if necessary<sup>41</sup> and helping the parent understand the U.S. legal system.<sup>42</sup> Significantly, unlike an appointed attorney, the consular officers come from the same country and culture as the parent, providing the consular officers a better understanding of potential points of confusion for the parent.<sup>43</sup> According to experienced child welfare attorney Pamela Kemp Parker, "The rapport that consular staff can often establish with citizens from the home country can alter the outcome of a case."<sup>44</sup>

The consulate's connections in the parent or child's home country may also be beneficial. Consular officials can obtain helpful documents from their country, such as birth, marriage, or school records and assist the court in finding relatives who might be willing to take custody of the child.<sup>45</sup> If the child is being placed with a family member abroad, the consulate can issue travel documents or arrange for a consular official to accompany the child on a flight to the home country.<sup>46</sup>

Throughout the court proceedings, the consular officials can help to ensure that the judge is not making decisions based on cultural bias and can provide information about the conditions under which children are raised in the immigrant's country of origin.<sup>47</sup> If the parent is deported, the consulate can facilitate communication between the parent and the child welfare agency.<sup>48</sup> Consular officials can also connect the parent with the child welfare agency in the parent's home country, enabling the parent to obtain the services required by the permanency plan, complete a home study, and hopefully have her child returned to her.<sup>49</sup>

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child being placed abroad, and even arrange for someone to accompany a child on a flight to the home country.").

41. Delphin, *supra* note 9, at 953–55.

42. Parker, *supra* note 9, at 177.

43. See Delphin, *supra* note 9, at 953 ("Bridging the cultural gap between a foreign national's home country and the U.S. legal system is one of the main functions of a consulate . . .").

44. Parker, *supra* note 9, at 177.

45. See generally U.S. DEPT OF STATE, CONSULAR NOTIFICATION AND ACCESS 35 (3d ed. 2010), available at [http://travel.state.gov/pdf/cna/CNA\\_Manual\\_3d\\_Edition.pdf](http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf) [hereinafter DOS MANUAL].

46. Parker, *supra* note 9, at 177.

47. See Hall, *supra* note 8, at 1500–01 ("The involvement of foreign consular officers might cause the United States to treat the immigrant more fairly and with less bias against her country of origin.").

48. See Delphin, *supra* note 9, at 954 ("Had the consulate been involved at an earlier time, it could have facilitated better contact between [the parent] and DHHS [the child welfare agency].").

49. See Rabin, *supra* note 31, at 142 (describing the benefits of the Mexican Consulate's role in facilitating communication between the CPS and Mexico's child welfare agency).

Anecdotal evidence indicates that consular assistance has the potential to make a major difference in the outcome of child welfare proceedings. One often-cited case is *In re Angelica L.*, where a Guatemalan mother living in the United States had her children removed from her custody and was subsequently deported.<sup>50</sup> Due to her failure to “strictly comply with the case plan,” Maria’s parental rights were terminated.<sup>51</sup> Maria attempted to comply with her case plan after her deportation but was unsuccessful because of the difficulties of staying in touch with her caseworker and obtaining the services required by her case plan in her home country of Guatemala.<sup>52</sup> If the Guatemalan Consulate had been aware of the case, its officials could have facilitated communication between Maria and child welfare officials in the United States and possibly could have assisted Maria in complying with her case plan.<sup>53</sup> Furthermore, Maria’s first language was Quiché, but, during her trial, she was provided a Spanish interpreter.<sup>54</sup> This made it difficult for her to understand the proceedings or adequately explain the attempts she had made to comply with her case plan.<sup>55</sup> If the Guatemalan Consulate had been involved, it might have been able to assist with this language barrier.<sup>56</sup>

Cultural biases also played a role in the termination of Maria’s parental rights,<sup>57</sup> even though the Supreme Court has warned against allowing such biases to improperly affect TPR cases.<sup>58</sup> Maria had been deported to Guatemala, and the juvenile court did not want to send her children to Guatemala to live with her.<sup>59</sup> During the trial, the court heard testimony that Guatemala has a lower standard of living, poorer people, and fewer economic opportunities than the

50. See generally *State v. Maria L. (In re Interest of Angelica L.)*, 767 N.W.2d 74 (Neb. 2009).

51. See *id.* at 87 (discussing the state’s motion to terminate parental rights and the subsequent hearing).

52. See *id.* at 95 (describing Maria’s efforts to comply with her case plan and the state’s limited efforts to assist her).

53. Delphin, *supra* note 9, at 954.

54. See *Maria L.*, 767 N.W.2d at 80, 88 (“Maria also maintained that she had a difficult time understanding what people said at the termination hearings, because Spanish is her second language and everyone was talking too quickly.”).

55. See Delphin, *supra* note 9, at 954–55 (“If Maria were able to better understand the proceedings, she would have likely been able to explain to the juvenile court how she attempted to comply with her case plan.”).

56. *Id.*

57. See Hall, *supra* note 8, at 1482 (“[T]he Nebraska Juvenile Court, in terminating Ms. Luis’s parental rights, relied on testimony about the lack of ‘economic opportunities’ and the ‘unfamiliar. . . educational system [and] athletic opportunities available in Guatemala.’”).

58. See *id.* at 1485 (citing *Santosky v. Kramer*, 455 U.S. 745, 763 (1982)).

59. See *id.* at 1482 (describing the Nebraska Juvenile Court’s preference for placing Maria’s children in the “stable home” of the American adoptive parents rather than sending them back to Guatemala with Maria).

United States.<sup>60</sup> Guatemalan consular officials likely would have spoken up to give the court a better understanding of the country and prevent the court from basing its decision on cultural biases.<sup>61</sup>

On appeal, the Nebraska Supreme Court overturned the termination of Maria's parental rights.<sup>62</sup> In doing so, it recognized the benefits that consular involvement could have provided, noting that the state should have made "greater efforts to involve the Guatemalan consulate and keep the family unified."<sup>63</sup> A concurring judge indicated that consular involvement could have prevented the "rather startling departure from Maria's rights and the children's best interests" that occurred in this case.<sup>64</sup> Although terminations of parental rights made under the types of unfair circumstances present in Maria's case are "frequently reversed" on appeal,<sup>65</sup> they are not always.<sup>66</sup> Moreover, the frequency of appeal in these types of cases is low due to the parents' lack of funding to appeal or difficulty accessing the U.S. legal system after being deported.<sup>67</sup>

### III. CONSULAR NOTIFICATION REQUIREMENTS IN INTERNATIONAL LAW

#### A. *The VCCR*

The VCCR is a multilateral treaty that entered into force on March 19, 1967, and was ratified by the United States on December 24, 1969.<sup>68</sup> Currently, 173 countries are parties to the VCCR.<sup>69</sup> The U.S. State Department has said that the VCCR "establishes the baseline for most obligations with respect to the treatment of foreign nationals" and that the basic consular notification requirements of

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60. *Maria L.*, 767 N.W.2d at 85.

61. *See* Hall, *supra* note 8, at 1500 ("The involvement of foreign consular officers might cause the United States to treat the immigrant more fairly and with less bias against her country of origin.").

62. *Id.* at 1480.

63. *Maria L.*, 767 N.W.2d at 96.

64. *Id.* at 97 (Gerrard, J., concurring).

65. Hall, *supra* note 8, at 1462 (quoting Marcia Yablon-Zug, *Separation, Deportation, Termination* 26 n.129 (July 26, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1648999>).

66. *Id.*; *see* Perez-Velasquez v. Culpeper Cnty. Dep't of Soc. Servs., No. 0360-09-4, 2009 WL 1851017, at \*2 (Va. Ct. App. June 30, 2009) (upholding the termination of a deported father's parental rights on appeal); State Dep't of Children's Servs. v. Ahmad, No. M2004-02604-COA-R3-PT, 2005 WL 975339, at \*2 (Tenn. Ct. App. Apr. 26, 2005) (upholding the termination of a deported mother's parental rights on appeal).

67. Hall, *supra* note 8, at 1462.

68. DOS MANUAL, *supra* note 45, at 39.

69. *Vienna Convention on Consular Relations: Status*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-6&chapter=3&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en) (last updated Oct. 23, 2013).

the VCCR are a part of customary international law.<sup>70</sup> Consequently, the State Department, in its *Consular Notification and Access Manual*, urges officials to follow the procedures required by the VCCR even when dealing with foreign nationals of countries not party to the VCCR.<sup>71</sup>

The VCCR includes two consular notification provisions relevant to child welfare proceedings that involve foreign nationals. Article 36 states that a foreign national has the right to communicate with his consulate when he “is arrested or committed to prison or to custody pending trial or is detained in any other manner.”<sup>72</sup> Should he so request, the United States is required to notify his consulate “without delay.”<sup>73</sup> Significantly, Article 36 requires that the foreign national be notified of this right when he comes into custody;<sup>74</sup> thus, when a foreign national is placed in immigration detention, Article 36 is triggered.<sup>75</sup> When children are taken into state custody as a result of a parent being detained by immigration authorities, consular officials could become involved through an Article 36 notification.

Article 37 provides for consular notification when “the appointment of a guardian or trustee appears to be in the interests of a [foreign national] minor.”<sup>76</sup> Article 37 differs from Article 36 in that consular notification is triggered automatically, rather than upon request.<sup>77</sup> However, Article 37 has one major limitation: it is invoked only if the child is a foreign national.<sup>78</sup> No protection is provided for families in which the parent is a foreign national but the child is a citizen.<sup>79</sup> Given that most of the potential concerns expressed in Part II result from the parent being a foreign national, this represents a significant gap in protection.

### B. Additional Consular Notification Requirements

In addition to the VCCR, many countries are also party to bilateral consular conventions.<sup>80</sup> The vast majority of these bilateral

70. DOS MANUAL, *supra* note 45, at 40, 46.

71. *Id.* at 46. The State Department does make an exception for countries with which the United States “has not made arrangements for consular relations.” *Id.*

72. VCCR, *supra* note 11, at art. 36.

73. *Id.*

74. *Id.*

75. DOS MANUAL, *supra* note 45, at 19.

76. VCCR, *supra* note 13.

77. *See id.* (stating that authorities should “inform the competent consular post without delay” in any such case).

78. *Id.*; *see also* Parker, *supra* note 9, at 177 (explaining that consular notice is not required when a foreign-born child is also a U.S. citizen).

79. *See* Parker, *supra* note 9, at 177 (explaining that Article 37(b) is only triggered when the child is not a U.S. citizen).

80. DOS MANUAL, *supra* note 45, at 42–43.

agreements were created prior to the ratification of the VCCR, and since the VCCR's ratification, bilateral agreements have become less common.<sup>81</sup> However, the VCCR did not nullify any pre-existing treaties, meaning these bilateral consular conventions are still in force.<sup>82</sup> When two countries that are both party to the VCCR also have a bilateral treaty, the stricter consular notification requirements control.<sup>83</sup>

For example, the United States has bilateral agreements with fifty-seven "mandatory notification" countries, which require automatic consular notification when one of their foreign nationals is arrested or detained.<sup>84</sup> Unlike the VCCR, mandatory notification treaties compel consular notification even if the foreign national specifically asks that his or her consulate not be notified.<sup>85</sup> There are no major differences, however, between these bilateral conventions and Article 37. The only notable variation is a provision in some bilateral treaties specifying that a foreign national child's consulate may contact the receiving state and suggest an appropriate guardian for the child.<sup>86</sup>

A third type of international legal document regulating consular notification is the memorandum of understanding (MOU). MOUs have become popular between child welfare agencies in the United States and Mexican Consulates.<sup>87</sup> The primary purpose of these MOUs is to acknowledge each party's obligations under the VCCR and the bilateral consular convention between the parties and to facilitate compliance with these obligations.<sup>88</sup> An MOU generally does

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81. *Id.* at 42.

82. *Id.* at 42-43.

83. *Id.* at 43.

84. *Id.*

85. *Id.* at 28.

86. *See, e.g.*, Consular Convention Between the United States of America and the People's Republic of China art. 30, U.S.-China, Sept. 17, 1980, 33 U.S.T. 2973 (stating that "[a] consular officer of the sending State may . . . contact the appropriate authorities of the receiving State, and may propose appropriate persons to be appended to act as guardians"); Consular Convention Between the United States of America and the Union of Soviet Socialist Republics art. 11, U.S.-USSR June 1, 1964, 19 U.S.T. 5018, 655 U.N.T.S. 213 (entered into force July 13, 1968) (stating that "[a] consular officer may recommend to the courts or other competent authorities of the receiving state appropriate persons to act in the capacity of guardians or trustees for citizens of the sending state").

87. *See Sample Forms from Public Child Welfare Agencies*, FAMILY TO FAMILY CALIFORNIA, <http://www.f2f.ca.gov/sampleMOUs.htm> (last updated Nov. 9, 2012) (providing examples of MOUs that have been enacted).

88. *See, e.g.*, MEMORANDUM OF UNDERSTANDING ON CONSULAR PROTECTION OF MEXICAN NATIONALS BETWEEN THE COUNTY OF RIVERSIDE DEPARTMENT OF PUBLIC SOCIAL SERVICES, CALIFORNIA, AND THE CONSULATE OF MEXICO IN SAN BERNARDINO, CALIFORNIA 1 (2007), available at <http://www.f2f.ca.gov/res/pdf/RiversideMOUMexicanConsulate.pdf> (agreeing "[t]o comply with the provisions set forth by the Vienna Convention").

not impose additional consular notification requirements outside of the VCCR; instead it provides more detailed guidelines regarding how consular notification and involvement will be accomplished within the jurisdiction.<sup>89</sup>

In some cases, however, an MOU has imposed additional consular notification requirements outside the provisions of the VCCR.<sup>90</sup> One MOU provides for consular involvement in child welfare proceedings that involve both “Mexican national minors” and “Mexican American minors.”<sup>91</sup> While a Mexican national minor is a child who was born in Mexico, a Mexican American minor is a child who was born in the United States but “is eligible for Mexican nationality as the biological minor of a Mexican national.”<sup>92</sup> Another MOU calls for consular notification whenever the child has at least one Mexican national parent, regardless of the child’s citizenship status.<sup>93</sup> Thus, these two agreements provide greater protection than the VCCR, which is triggered only when the child is a noncitizen.

These MOUs demonstrate recognition among those working in the child welfare field of the benefits offered by consular notification and the need for greater protection than the VCCR provides. However, the advantages of MOUs are limited because, as “soft law,” they are unenforceable.<sup>94</sup> Ultimately, the VCCR has the greatest potential for safeguarding the rights of foreign national parents and

89. See generally MEMORANDUM OF UNDERSTANDING BETWEEN THE STATE OF ILLINOIS, DEPARTMENT OF CHILDREN AND FAMILY SERVICES AND THE CONSULATE GENERAL OF MÉXICO IN CHICAGO REGARDING CONSULAR NOTIFICATION IN CASES INVOLVING MINORS (2007), available at <http://www.f2f.ca.gov/res/pdf/IllinoisMOUMexicanConsulate.pdf> [hereinafter Illinois MOU] (providing an example of the detailed guidelines regarding the implementation of the VCCR); PROTOCOL OF COOPERATION BETWEEN THE CONSULATE GENERAL OF MEXICO IN LOS ANGELES, CALIFORNIA, AND THE LOS ANGELES JUVENILE DEPENDENCY COURT (2009), available at <http://www.f2f.ca.gov/res/pdf/ProtocolMexicanConsulateLAJuvenileCourt2009.pdf> (illustrating further the detailed guidelines within an MOU that describe how to implement the VCCR).

90. See generally Illinois MOU, *supra* note 89 (providing an example of when an MOU imposes additional consular notification requirements outside of the VCCR); MEMORANDUM OF UNDERSTANDING BETWEEN THE CONSULATE GENERAL OF MEXICO IN EL PASO, TEXAS AND THE CONSULATE OF MEXICO IN ALBUQUERQUE, NEW MEXICO, AND THE CHILDREN, YOUTH, AND FAMILIES DEPARTMENT OF THE STATE OF NEW MEXICO OF THE UNITED STATES OF AMERICA REGARDING CONSULAR FUNCTIONS IN CERTAIN PROCEEDINGS INVOLVING MEXICAN MINORS AS WELL AS MUTUAL COLLABORATION (2009), available at [http://www.f2f.ca.gov/res/pdf/MOU\\_MexicanConsulate.pdf](http://www.f2f.ca.gov/res/pdf/MOU_MexicanConsulate.pdf) [hereinafter New Mexico MOU] (providing an additional example of an MOU with provisions outside the VCCR).

91. Illinois MOU, *supra* note 89.

92. *Id.*

93. New Mexico MOU, *supra* note 90.

94. See JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 36 (Vicki Been et al. eds., 3d ed. 2010) (describing soft law as “declared norms of conduct understood as legally nonbinding by those accepting the norms”).

children because the majority of nations are parties to the convention.<sup>95</sup>

#### IV. INADEQUACIES OF THE VCCR

Although the VCCR's wide applicability is beneficial, the treaty as it is currently written is inadequate. There are two main problems with Article 37. First, Article 37 is triggered only in child welfare proceedings involving foreign national children, even though the same issues necessitating consular involvement exist when the child is a citizen with a foreign national parent.<sup>96</sup> Second, the text of the article does not provide a clear enforcement mechanism, leading to inconsistent and generally poor enforcement.<sup>97</sup> If the treaty is not enforced, it offers no protection at all.

##### A. Coverage Gap: Protecting Children but Not Parents

The text of Article 37 makes it clear that consular notification is triggered whenever a foreign national child is taken into state custody.<sup>98</sup> Consular officials help these children in a number of ways. For example, they can secure documents from the child's home country or find a relative who can take temporary custody of the child so the child does not have to live in a foster home.<sup>99</sup>

Consular officials primarily protect the rights of children by protecting the rights of their parents.<sup>100</sup> Given the goal of family unity, child welfare cases are not just about the children.<sup>101</sup> Government officials are charged with providing services to help resolve whatever problems led to the separation of the family.<sup>102</sup> Since parents are responsible for providing for and protecting their families, they bear the burden of achieving reunification. The VCCR's focus on the nationality of the child makes little sense given that

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95. *Vienna Convention on Consular Relations: Status*, *supra* note 69 (noting that currently 173 countries are party to the VCCR).

96. *See* discussion *infra* Part IV.A.

97. *See* discussion *infra* Part IV.B.

98. *See* VCCR, *supra* note 13, at art. 37 (stating that the authorities are to inform the consular without delay "in any case where the appointment of a guardian or trustee appears to be in the interests of a minor").

99. *See* discussion *supra* Part I.C.

100. *Id.*

101. *See* JONES, *supra* note 3, at 31 (discussing the efforts undertaken by CPS to help the parents and the family as a whole, not just the child).

102. *See id.* (discussing the steps that CPS will take to address the issues causing the separation of the family).

much of the assistance a consulate can provide benefits foreign national parents regardless of their child's citizenship.<sup>103</sup>

One might argue that foreign national parents should not be entitled to consular notification and assistance in child welfare proceedings, since the VCCR does not entitle foreign national adults to consular notification in most judicial proceedings. The one exception is Article 36, which requires that foreign nationals be informed of their consular notification rights when they are arrested or detained.<sup>104</sup> This exception is reasonable because when a foreign national is arrested or detained his or her fundamental interest in personal liberty is at stake.<sup>105</sup> However, the fundamental liberty interest that parents have in the care and custody of their children is analogous to the liberty interest at stake in a criminal trial.<sup>106</sup> Because this significant right is at stake in child welfare proceedings, the VCCR should protect foreign nationals involved in those proceedings the same way that it protects foreign nationals involved in criminal proceedings.

The importance of parents' rights is well established in U.S. jurisprudence.<sup>107</sup> The Supreme Court in *Troxell v. Granville* said, "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."<sup>108</sup> Similarly, in *Wisconsin v. Yoder*, the Court held that the "primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition."<sup>109</sup>

The tradition of treating parental rights as fundamental is not limited to the United States, as the Supreme Court tied the United States' adherence to the concept to the broader tradition of "Western

103. Consular assistance that is beneficial regardless of the child's citizenship includes, providing a translator for the parent and helping the court to be sensitive to the parent's culture.

104. VCCR, *supra* note 13, at art. 36.

105. See, e.g., Charter of Fundamental Rights of the European Union art. 6, 2000 O.J. (C 364) 1 (stating that "[e]veryone has the right to liberty and security of person").

106. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (describing the fundamental liberty interest that parents have in the care and custody of their children).

107. See, e.g., *id.* ("[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."); *Troxell v. Granville*, 530 U.S. 57, 65–66 (2000) (noting that liberty includes the right of parents to "establish a home and bring up children" and discussing, further, cases that have established the rights of parents regarding child rearing).

108. *Troxell*, 530 U.S. at 65.

109. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

civilization” as a whole.<sup>110</sup> The European Union also recognizes the significance of the parent-child relationship in its Charter of Fundamental Rights.<sup>111</sup> Article 14 acknowledges the right of parents to direct the education of their children,<sup>112</sup> and Article 24 states, “Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.”<sup>113</sup> Although Article 24 frames the right as that of the child’s, it represents the judgment that the parent-child relationship should not be severed except in extraordinary circumstances. The EU member countries recognized these fundamental rights by signing the Treaty of Lisbon, which entered into force on December 1, 2009.<sup>114</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>115</sup> applies to twenty additional countries that are not a part of the European Union.<sup>116</sup> This treaty recognizes a “right to respect for private and family life” and limits state interference with the family.<sup>117</sup>

Throughout Europe, the spirit of these two treaties is implemented through the laws of individual countries. For example, Germany’s Civil Code, while providing for judicial action in cases of child endangerment, includes a “principle of proportionality,” which states that “[m]easures which entail a separation of the child from its parental family are admissible only if the danger cannot be countered in another way.”<sup>118</sup> This principle means that parental rights will only be terminated in “extreme cases.”<sup>119</sup> Furthermore, care and education of their children is considered a “natural basic right” of

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110. See *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.”).

111. Charter of Fundamental Rights of the European Union, *supra* note 105, at arts. 7, 14, 24.

112. *Id.* at art. 14.

113. *Id.* at art. 24.

114. *Treaty of Lisbon: The Treaty at a Glance*, EUROPA, [http://europa.eu/lisbon\\_treaty/glance/index\\_en.htm](http://europa.eu/lisbon_treaty/glance/index_en.htm) (last visited Oct. 23, 2013).

115. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (amended by Protocols Nos. 11 & 14).

116. *Simplified Chart of Signatures and Ratifications: Human Rights*, COUNCIL OF EUROPE (Feb. 28, 2013), <http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG>.

117. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 115, at art. 8.

118. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, Bundesgesetzblatt 42, § 1666a (Ger.), available at [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p5635](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5635).

119. Nina Dethloff, *Parental Rights and Responsibilities in Germany*, 39 FAM. L.Q. 315, 327 (2005).

parents.<sup>120</sup> The French Civil Code recognizes “parental authority,” an interrelated set of rights and duties that “belong” to parents automatically by virtue of the filial relationship.<sup>121</sup> In Russia, the right to raise one’s child is considered to be a “personal inalienable right of every parent.”<sup>122</sup>

Recognition of the fundamental nature of parental rights exists outside of the European continent as well. Mexican law acknowledges a concept of parental authority similar to that of France. A Mexican court has described parental authority as granting “a series of correlative rights and obligations . . . such as custody of the minors, the authority to raise them, discipline them, represent them in legal acts, administer their property, feed and care for them, etc.”<sup>123</sup> Japanese courts, as early as 1964, accepted as essential the right of parents to be involved in the upbringing of their children, as well as the right of children to maintain relationships with their parents.<sup>124</sup>

The majority of African nations<sup>125</sup> have pledged to protect the parent–child relationship in the African Charter on the Rights and Welfare of the Child (the Charter).<sup>126</sup> The Charter requires States Party to respect the rights of parents to provide guidance to their children in areas such as education<sup>127</sup> and religion.<sup>128</sup> Article 19 provides that every child is entitled to “parental care and protection” and has “the right to reside with his or her parents” whenever

120. Andreas T. Hanke, *Custody and Visitation Rights in Germany After the Decisions of the European Court of Human Rights*, 45 FAM. L.Q. 353, 354 (2011).

121. Hugues Fulchiron, *Custody and Separated Families: The Example of French Law*, 39 FAM. L.Q. 301, 301 (2005).

122. Olga A. Khazova, *Allocation of Parental Rights and Responsibilities After Separation and Divorce Under Russian Law*, 39 FAM. L.Q. 373, 378 (2005).

123. Patricia Bégné, *Parental Authority and Child Custody in Mexico*, 39 FAM. L.Q. 527, 531 (2005) (internal citation omitted).

124. See Satoshi Minamikata, *Resolution of Disputes over Parental Rights and Duties in a Martial Dissolution Case in Japan: A Nonlitigious Approach in Chotei (Family Court Mediation)*, 39 FAM. L.Q. 489, 500 (2005) (“Although the Civil Code contains no provision providing a child with a right to contact with the nonresident parent, the right is regarded by lawyers as essential for the welfare of the child and has been recognized by court cases as early as 1964.”).

125. A total of forty-six countries out of fifty-three in the African Union have ratified the Charter. *Achievements of the ACERWC*, AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD, <http://acerwc.org/achievements> (last visited Oct. 23, 2013).

126. Organization of African Unity [OAU], African Charter on the Rights and Welfare of the Child, *published on* July 11, 1990, OAU Doc. CAB/LEG/24.9/49, (entered into force Nov. 29, 1999), *available at* <http://www.refworld.org/docid/3ae6b38c18.html>.

127. See *id.* at art. 11 (“States Party to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children’s schools . . .”).

128. See *id.* at art. 9 (“States Parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in the enjoyment of [the right to freedom of thought, conscience, and religion] subject to the national laws and policies.”).

possible.<sup>129</sup> Further, Article 19 states that children should not be separated from their parents against their will unless a judicial authority determines it is in their best interest.<sup>130</sup> Even when children are separated, they are entitled to “maintain personal relations and direct contact with both parents.”<sup>131</sup> Some of these provisions confer rights upon parents, while other provisions establish rights of children, but they all indicate a desire for minimal interference with the parent-child relationship.

The rights of parents were affirmed on an international level through the CRC, which promises to “respect the rights and duties of parents.”<sup>132</sup> The CRC also states that “a child shall not be separated from his or her parents against their will” unless it is in the child’s best interests.<sup>133</sup>

Increasingly, individual countries are recognizing the right of maintaining the parent-child relationship as a right conferred on the child.<sup>134</sup> Most relevant international treaties, such as the CRC, also frame this right as a right of the child.<sup>135</sup> Still, the recognition of a child’s right to a relationship with his or her parents does not automatically disavow a similar parental right. For example, in England, the focus of family law has shifted, with the concept of parental rights being replaced by the concept of “parental responsibility.”<sup>136</sup> Nevertheless, the country adheres to the decision of the European Court of Human Rights holding that Article 8 of the European Convention on Human Rights confers a right upon parents

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129. *Id.* at art. 19.

130. *Id.*

131. *Id.*

132. See United Nations Convention on the Rights of the Child, *supra* note 1, at art. 3.

133. *Id.* at art. 9.

134. See, e.g., Asha Bajpai, *Custody and Guardianship of Children in India*, 39 FAM. L.Q. 441, 456 (2005) (“Visitation is the right of the child to see the parent and not that of the parent to impose on the child.”); Tshepo L. Mosikatsana, *Children’s Rights and Family Autonomy in the South African Context: A Comment on Children’s Rights Under the Final Constitution*, 3 MICH. J. RACE & L. 341, 378 (1998) (“The right to parental care is the child’s right, not the parents’ right. . . . Parenting rights and the right to family life have not been constitutionalized in South Africa.”).

135. See United Nations Convention on the Rights of the Child, *supra* note 1, at art. 9 (“States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”); African Charter on the Rights and Welfare of the Child, *supra* note 126, at art. 19 (“Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.”).

136. See N.V. Lowe, *The Allocation of Parental Rights and Responsibilities – The Position in England and Wales*, 39 FAM. L.Q. 267, 267–68 (2005) (discussing the Children Act 1989 and the key substantive shift from the concept of parental rights to the concept of parental responsibility, including the abandonment of “rights of custody”).

to be reunited with their children when possible.<sup>137</sup> Thus, prohibiting contact between a parent and a child “is regarded as a very serious issue.”<sup>138</sup>

The foregoing examples illustrate a broad international consensus that the parent–child relationship should be preserved whenever possible. When a parent is not provided a fair opportunity to regain custody of her child before parental rights are terminated, the state violates the rights of both parent and child. Due to the disadvantages faced by foreign nationals in child welfare proceedings, terminating their parental rights without providing consular access will frequently result in an unjust process for these families.<sup>139</sup> Thus, the VCCR’s limitation of consular notification to proceedings in which the child is a foreign national without regard for the parent’s nationality constitutes a failure to recognize vital rights that are at stake. This failure should be remedied.

### B. *Inconsistent Enforcement*

Another failure of Article 36 and Article 37 of the VCCR is enforcement, which stems from the differences between these two articles and the remainder of the treaty. The VCCR primarily deals with the logistics of establishing consular posts and the rights of consular officials.<sup>140</sup> Articles 36 and 37 are distinct because they confer rights upon foreign individuals, as opposed to foreign governments or consular officials.<sup>141</sup> As a result, the methods of enforcement may be different.<sup>142</sup>

For example, Article 35 protects freedom of communication between consular officials and their sending country.<sup>143</sup> If this provision is violated, the dispute will most likely be resolved between higher level government officials with only diplomatic repercussions resulting from the violation.<sup>144</sup> When Articles 36 or 37 are violated,

137. See *id.* at 285 (“[A]s the European Court of Human Rights held . . . Article 8 of the Human Rights Convention, ‘includes a right for a parent to have measures taken with a view to his or her being reunited with the child and an obligation of national authorities to take measures’ both in public and private law proceedings.” (quoting *Glaser v. United Kingdom*, 1 F.L.R. 148, 168 (2001))).

138. *Id.* at 284–85.

139. See discussion *supra* Part II.B.

140. See generally VCCR, *supra* note 13.

141. See, e.g., Cindy Galway Buys et al., *Do Unto Others: The Importance of Better Compliance with Consular Notification Rights*, 21 DUKE J. COMP. & INT’L L. 461, 481–86 (2011) (discussing who may enforce consular notification rights).

142. There is international disagreement about what type of enforcement is appropriate, as discussed further in this Part.

143. VCCR, *supra* note 13, at art. 35.

144. See Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: The International Court of Justice in Mexico v. United States (Avena) Speaks Emphatically to the Supreme Court of the United States About the Fundamental*

the country whose citizen is involved generally will not know about the violations. Since these articles are consular notification provisions, a failure to comply inherently means that the consulate is *not* aware of the case and thus not aware of the violation. If the consulate finds out about the violation after the trial, it has missed the opportunity to meaningfully assist the defendant, and without an individual remedy the defendant is left with no real recourse.<sup>145</sup> Attempts to aid individual defendants through diplomatic channels have been largely unsuccessful.<sup>146</sup>

Some countries, recognizing the impracticality of a diplomatic remedy, argue that Articles 36 and 37 confer an individual right upon foreign nationals, creating an individual cause of action that may be resolved in a domestic court rather than at a diplomatic level.<sup>147</sup> Currently, with only diplomatic consequences at stake, states are able to violate the VCCR with virtual impunity.<sup>148</sup> An individual remedy would motivate prosecutors, CPS workers, and others directly responsible for notification under the VCCR to ensure future compliance.<sup>149</sup>

However, other countries, including the United States, have resisted granting individual rights.<sup>150</sup> For example, in *United States v. Li*, the First Circuit declined to provide a remedy for a foreign criminal defendant who had not been notified of his right to consular

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*Nature of the Right to Consul*, 36 GEO. J. INT'L L. 1, 26–28 (2004) (describing the U.S. position that diplomatic and political measures are generally the remedy for treaty violations).

145. See *id.* at 26–29 (using the *Avena* case to demonstrate the ineffectiveness of a diplomatic remedy to VCCR violations).

146. See *id.* at 28 (“For those foreign nationals on death row, whose rights under the Vienna Convention have been ignored, the United States’ ‘diplomatic remedy’ of execute first and apologize later is no remedy at all.”).

147. Both Mexico and Germany have made this argument in the ICJ. See *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 23 (Mar. 31) (“The Government of Mexico respectfully requests the Court to adjudge and declare . . . that the obligation in Article 36(1) of the Vienna Convention requires notification of consular rights and a reasonable opportunity for consular access before the competent authorities of the receiving State interrogate the foreign national or take any other action potentially detrimental to the foreign national’s rights.”); *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466, 472 (June 27) (“Germany asks the Court to adjudge and declare . . . that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36 . . . and by depriving Germany of the possibility of rendering consular assistance . . . violated its international legal obligations . . .”).

148. See, e.g., Kadish, *supra* note 144, at 28 (describing the United States’ tendency not to respond to diplomatic requests related to the VCCR).

149. Cf. Buys et al., *supra* note 141, at 483–84 (explaining that “if [VCCR] claims are not enforceable in [domestic] court, there may be less incentive for law enforcement authorities to comply”).

150. See Kadish, *supra* note 144, at 26 (“The United States continues to maintain that treaties are meant to benefit nations, not individuals . . .”).

access upon arrest.<sup>151</sup> The court stated that there is a strong presumption against allowing international treaties to create privately enforceable rights of action and held that defendants whose Article 36 rights are violated may not raise this violation in domestic criminal court.<sup>152</sup> Further, the VCCR's preamble expressly states, "[T]he 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 . . . ."<sup>153</sup> This language influenced the Fifth,<sup>154</sup> Sixth,<sup>155</sup> Ninth,<sup>156</sup> and Eleventh<sup>157</sup> Circuits, all of which declined to hold that Article 36 creates an individually enforceable right.

The disagreement over whether the treaty confers individual rights has led some countries to seek a resolution from international bodies.<sup>158</sup> In 1997, the Inter-American Court of Human Rights issued an advisory opinion declaring that Article 36 of the VCCR confers an individual right, despite wording in the preamble that suggests the contrary.<sup>159</sup> In fact, the Inter-American Court of Human Rights concluded that the rights conferred in Article 36 are "fundamental" and failure to comply with the treaty constitutes a violation of a detained foreign national's due process rights.<sup>160</sup> Therefore, the court held, reparations are required.<sup>161</sup> Four years later, the International Court of Justice (ICJ) provided its own interpretation of the VCCR in the *LaGrand* case.<sup>162</sup> Germany filed suit against the United States on behalf of two German brothers who were convicted and sentenced to death in the United States without being notified of their right to

151. United States v. Li, 206 F.3d 56 (1st Cir. 2000).

152. See *id.* at 60–61 (discussing the application of treaties in domestic courts).

153. VCCR, *supra* note 13, at pmb1.

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

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

156. Cornejo v. County of San Diego, 504 F.3d 853, 857 (9th Cir. 2007).

157. Gandara v. Bennett, 528 F.3d 823, 827–28 (11th Cir. 2008).

158. See, e.g., *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) (discussing Mexico's allegation of an Article 36 violation by the United States for failure to notify Mexican nationals of their right to consular notification in the cases of fifty-four nationals sentenced to execution in the United States); *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466 (June 27) (examining Germany's allegation of an Article 36 violation by the United States for failure to notify German nationals of their right to consular notification in the case of two brothers executed in the United States).

159. See generally *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999) ("[T]he Court decides . . . [t]hat Article 36 of the Vienna Convention on Consular Relations confers rights upon detained foreign nationals, among them the right to information on consular assistance, and that said rights carry with them correlative obligations for the host State.").

160. See *Kadish*, *supra* note 144, at 7 (discussing the Inter-American Court's Advisory Opinion OC-16/99, cited *supra*, note 159).

161. *Id.* at 7–8.

162. *Id.* at 8.

consular involvement as required by Article 36.<sup>163</sup> The ICJ opinion not only found that the United States had violated its Article 36 obligations, but it also rejected the United States' argument that the treaty merely confers rights upon the States Party.<sup>164</sup> Instead, the ICJ held that the VCCR provides "individual rights" to the States Party's nationals.<sup>165</sup>

More recently, the ICJ decided the *Avena and Other Mexican Nationals* case.<sup>166</sup> Similar to *LaGrand*, the *Avena* case was brought by Mexico, which alleged that the United States had violated the Article 36 rights of fifty-four Mexican nationals awaiting execution in the United States.<sup>167</sup> In its opinion, the ICJ reiterated its assertion from *LaGrand* that Article 36 confers individual rights and again held that the United States had violated these rights.<sup>168</sup> It ordered the United States to conduct a "review and reconsideration" of each Mexican national's case in order to determine whether the violation caused "actual prejudice."<sup>169</sup>

Ideally, the ICJ's interpretation of the treaty would be considered authoritative and would be respected by all parties to the VCCR, especially because many of the parties, including the United States, signed the VCCR's Optional Protocol Concerning the Compulsory Settlement of Disputes (the Optional Protocol).<sup>170</sup> The Optional Protocol calls for the ICJ to settle disputes arising from the

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163. See *id.* (discussing the ICJ's ruling in *LaGrand*); *LaGrand Case*, 2001 I.C.J. at 474–75.

164. See *LaGrand Case*, 2001 I.C.J. at 494 ("Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person. These rights were violated in the present case."). Cf. Kadish, *supra* note 144, at 8 (discussing the ICJ's ruling in the *LaGrand* case regarding violations of Article 36).

165. MICHAEL JOHN GARCIA, VIENNA CONVENTION ON CONSULAR RELATIONS: OVERVIEW OF U.S. IMPLEMENTATION AND INTERNATIONAL COURT OF JUSTICE (ICJ) INTERPRETATION OF CONSULAR NOTIFICATION REQUIREMENTS 12–13 (2004), available at <http://www.fas.org/sgp/crs/row/RL32390.pdf>.

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

167. GARCIA, *supra* note 165, at 14.

168. See *Avena*, 2004 I.C.J. 12 ¶ 153 (finding that the United States violated the individual rights of the Mexican nationals under Article 36 by failing to notify them of their right of consular access); see also GARCIA, *supra* note 165, at 14, 15 ("[T]he ICJ [in *Avena*] concluded that the United States had violated its obligations under the Vienna Convention by failing to properly notify Mexican nationals of their right to have Mexican consular officials notified of their arrest . . .").

169. See *Avena*, 2004 I.C.J. 12, ¶¶ 138, 153 ("The Court would emphasize that the 'review and reconsideration' prescribed by it in the *LaGrand* case should be effective. Thus it should . . . guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process.").

170. See GARCIA, *supra* note 165, at 1–2 (discussing the United States' signing of the VCCR and Optional Protocol).

VCCR.<sup>171</sup> Unfortunately, the ICJ's clear holdings in *LaGrand* and *Avena* have not resolved the conflict, as evidenced by two conflicting post-*Avena* court decisions of domestic courts in the United States and Germany.<sup>172</sup>

In 2006, Germany's Federal Constitutional Court, the *Bundesverfassungsgericht*, chose to adhere to the ICJ's interpretation of the VCCR.<sup>173</sup> It held that German public authorities were constitutionally bound by the ICJ decision by virtue of Germany's ratification of the Optional Protocol.<sup>174</sup> The court explained that because the ICJ's *Avena* decision created an international law obligation, failure to comply with the decision would violate the claimant's constitutional right to a fair process.<sup>175</sup>

In contrast, the U.S. Supreme Court in *Medellin v. Texas* held that the ICJ decision in *Avena* was not binding on U.S. domestic courts, absent implementing domestic legislation.<sup>176</sup> The Court analyzed the Optional Protocol, the United Nations Charter, and the ICJ Statute, and found that none of these international agreements made ICJ judgments directly enforceable in domestic courts.<sup>177</sup> Furthermore, "where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own."<sup>178</sup>

The *Medellin* case has had a chilling effect on VCCR enforcement in the United States.<sup>179</sup> Causing particular concern is a footnote from

171. See *id.* at 2 (defining the Optional Protocol as the agreement "under which Convention parties agree to accept the jurisdiction of the ICJ to resolve disputes between them concerning [Vienna] Convention implementation").

172. See generally Peter A. Heinlein, Note, *The U.S. and German Interpretations of the Vienna Convention on Consular Relations: Is Any Constitutional Court Really Cosmopolitan?*, 25 MD. J. INT'L L. 317 (2010) (discussing the different approaches taken by the Federal Constitutional Court of Germany and U.S. Supreme Court to questions about the VCCR).

173. Cf. *id.* at 329 (summarizing the finding of the Bundesverfassungsgericht that ICJ decisions regarding the VCCR are binding, a finding consistent with the ICJ's own interpretations of the VCCR).

174. *Id.*

175. *Id.* at 331–32.

176. See generally *Medellin v. Texas*, 552 U.S. 491 (2008) ("[W]hile the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law . . .").

177. *Id.* at 513 ("The pertinent international agreements, therefore, do not provide for implementation of ICJ judgments through direct enforcement in domestic courts . . .").

178. *Id.* at 513–14 (quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 347 (2006)).

179. See Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 70–71 (2012) (discussing the history of VCCR enforcement before and after *Medellin* and concluding that after *Medellin*, "Instead of presuming that treaties that create private rights necessarily create private rights of action, courts now generally presume that they do not, regardless of the type of treaty").

the case that states, “[T]he background presumption is that international agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.”<sup>180</sup> This footnote has already been cited in Second<sup>181</sup> and Eleventh<sup>182</sup> Circuit decisions denying a private remedy to individuals whose Article 36 rights were violated. As these cases demonstrate, the ICJ decision has not ameliorated the inconsistent enforcement of Article 36.

Enforcement of Article 37 is likely as inconsistent as that of Article 36. At least one U.S. court has used Article 36 precedent to decide an Article 37 case.<sup>183</sup> In *In re Interest of Antonio O.*, a father whose parental rights were terminated in a proceeding his consulate was never notified of sought a remedy for the Article 37 violation.<sup>184</sup> The Court of Appeals of Nebraska cited *Breard v. Greene*,<sup>185</sup> a Supreme Court case stating that Article 36 of the VCCR does not confer a private remedy for Article 36 violations, to justify its own denial of a remedy for the Article 37 violation.<sup>186</sup>

## V. PROPOSED AMENDMENTS TO THE VCCR

The VCCR does not sufficiently protect foreign nationals because its safeguards are too narrow in scope and it lacks an appropriate enforcement mechanism. The most effective way to remedy these deficiencies is through an amendment to the VCCR.

First, the treaty could be amended to ensure protection of foreign national parents, in addition to the protection already afforded foreign national children. Ideally, a provision could be added to Article 37 that would be similar to Article 36. The amended Article 37 could require state officials to notify foreign national parents of their right to consular assistance whenever their children are removed from their custody. If a parent requests consular notification, the

180. *Id.* at 70 (quoting *Medellin*, 552 U.S. at 506 n.3 (internal quotation marks omitted)).

181. *Mora v. New York*, 524 F.3d 183, 188 (2d Cir. 2008) (citing *Medellin*, 552 U.S. at 506 n.3).

182. *Gandara v. Bennett*, 528 F.3d 823, 833–34 (11th Cir. 2008) (citing *Medellin*, 552 U.S. at 506 n.3).

183. *See, e.g.*, *State v. Jose O. (In re Interest of Antonio O.)*, 784 N.W.2d 457, 464, 467 (Neb. Ct. App. 2010) (using *Breard v. Greene*, 523 U.S. 371 (1998), which is Article 36 precedent, in order to decide an Article 37 case).

184. *Id.* at 462–63.

185. *Breard v. Greene*, 523 U.S. 371 (1998).

186. *See In re Interest of Antonio O.*, 784 N.W.2d at 464 (citing *Greene*, 523 U.S. 371). In *Greene*, the court stated that “neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States’ courts . . . .” *Greene*, 253 U.S. at 377.

state officials would be required to inform the relevant consulate of the pending child welfare proceeding “without delay,” as is required for Article 36 notification.

The second component to the Article 37 amendment would aim to guarantee more effective enforcement of the provision. The best way to accomplish this goal is to explicitly state that the treaty confers an individual right and remedy. The existing language of the treaty is ambiguous, especially given the language in the preamble that the purpose of the treaty “is not to benefit individuals.”<sup>187</sup> The ICJ holdings in *Avena* and *LaGrand* dictate that Article 36 is an exception to this clause, and it is reasonable to infer that Article 37 would be treated in a similar manner.<sup>188</sup>

Given the refusal of the United States to afford the ICJ interpretation anything more than “respectful consideration,” a clear statement in the treaty itself would be more effective.<sup>189</sup> In *Mora v. New York*, a Second Circuit case denying a private remedy for VCCR violations, the court referenced a footnote from the *Medellin* decision to support its holding that “treaties do not create privately enforceable rights in the absence of express language to the contrary.”<sup>190</sup> This statement suggests that if a treaty does contain express language creating privately enforceable rights, those rights would be enforceable in U.S. domestic courts. Amending the VCCR will remove any ambiguity, disallowing countries to claim that their understanding of the treaty differs from the ICJ interpretation.

The amendment need not specify an exact remedy that is required when Article 37 is violated. Instead, the amendment could merely require some form of meaningful remedy, perhaps using the “review and reconsideration” language of *Avena*.<sup>191</sup> Admittedly, leaving the decision of what remedy to provide to the countries enables them to avoid enforcing the VCCR in a meaningful way. Nonetheless, the proposed amendment represents a compromise. The explicit requirement that states allow for a private cause of action

187. VCCR, *supra* note 13, at pmb1.

188. See *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, ¶ 40 (Mar. 31) (recognizing the individual rights of Mexican nationals under paragraph 1 (b) of Article 36 of the VCCR); *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466, 514 (June 27); *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) (recognizing the right of the individual under Article 36, paragraph 1, of the VCCR).

189. See *Heinlein, supra* note 172, at 332 (citing *Medellin v. Texas*, 552 U.S. 491, 513 n.9 (2008)) (noting that the U.S. Supreme Court’s position is that U.S. courts need only to afford a “respectful consideration” to an interpretation of a treaty rendered by an international court).

190. *Mora v. New York*, 524 F.3d 183, 201 (2d Cir. 2008) (quoting *Medellin*, 552 U.S. at 506 n.3 (2008)).

191. See *supra* text accompanying notes 166–69 (discussing *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31)).

and remedy is a significant step toward ensuring better enforcement, but the flexibility of constructing a remedy makes the amendment more palatable to the States Party.

Although the procedural requirements for amending the treaty may be time consuming and some states may not sign the amendment, an amendment is the best solution for the identified problems with the VCCR.<sup>192</sup> The plain language of Article 37 indicates that the article does not apply when the child is a citizen.<sup>193</sup> Thus, in order to remedy the gap in protection for mixed-citizenship families, the language must be amended.

The current language of the treaty is ambiguous with respect to enforcement and whether the treaty confers an individual right.<sup>194</sup> Although the ICJ has held that the treaty does bestow an individual right, the United States is no longer subject to the jurisdiction of the ICJ and refuses to recognize individually enforceable rights under a treaty unless the treaty's language expressly grants them.<sup>195</sup> The best way to counter the U.S. position is to amend the treaty to expressly provide for individually enforceable rights.

In the United States, amending the VCCR would provide an opportunity for Congress to speak clearly to the judicial branch. The courts have been unwilling to find an individually enforceable right in the absence of plain language within the treaty or implementing legislation by Congress.<sup>196</sup> If the VCCR amendments were ratified in the United States, the door would open for the courts to begin providing an individual remedy. The United States, of course, would have the option of not signing on to the amendment, but it would no longer be able to hide behind "ambiguous" language. By not signing the amendment, the United States would make it clear that it was refusing to provide a remedy to individuals whose Article 36 or 37 rights were violated by choice, rather than because of a disagreement about treaty interpretation. Forcing the United States and other countries that choose not to provide individual remedies for VCCR violations to be more explicit about this choice could lead to greater political and diplomatic pressure.

Although the multilateral treaty amendment process can be cumbersome, it is not unprecedented. In fact, the United States has

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192. For more information on the treaty amendment process, see Vienna Convention on the Law of Treaties art. 40, May 23, 1969, 1155 U.N.T.S. 331.

193. See VCCR, *supra* note 13, at art. 37 (applying only when the child is "a national of the sending state").

194. See discussion *supra* Part IV.B.

195. See discussion *supra* Part IV.B.

196. See *Medellin*, 552 U.S. at 513-14 ("[W]here a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own." (quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 347 (2006))).

signed on to amendments to multilateral treaties on a wide variety of topics, ranging from energy to finance.<sup>197</sup> Furthermore, scholars have recognized the importance of the multilateral treaty amendment process for remedying a treaty's unforeseen shortcomings.<sup>198</sup> Though an amendment may take time to gain consensus, each country that ratifies the amendment represents progress toward greater protection for foreign nationals.

## VI. CONCLUSION

The relationship between parent and child is one of the most fundamental and significant human relationships. Both parent and child have the right to maintain that relationship so long as it is not harmful to the child.<sup>199</sup> The essential nature of this relationship means that governments should and typically do take special care when making the decision to terminate it. Foreign national parents face a substantial risk of unfair treatment in child welfare proceedings. The consular notification requirement in Article 37 of the VCCR should level the playing field for these parents. Unfortunately, the VCCR's protections are lacking.

The problem is twofold. The VCCR provides no protection for foreign national parents of citizen children, even though these parents are equally at risk for unfair treatment.<sup>200</sup> Furthermore, the VCCR is inconsistently enforced, largely due to disputes about whether it confers an individual right and remedy or is only enforceable diplomatically. Diplomatic remedies do nothing for the individuals who are harmed by the failure of countries to comply with the VCCR, and for more powerful countries, the diplomatic repercussions of violating the VCCR are minimal.<sup>201</sup>

To solve these problems, Article 37 of the VCCR should be amended to provide consular notification rights to all foreign national parents, regardless of their children's citizenship status, and to provide for an individual remedy for violations. An amendment is the best solution because it goes to the root of the problem: the treaty

197. For a full list of treaties to which the United States is a party, see U.S. DEPT' OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2012 (2012), available at <http://www.state.gov/documents/organization/202293.pdf>.

198. See M.J. Bowman, *The Multilateral Treaty Amendment Process—A Case Study*, 44 INT'L & COMP. L.Q. 540, 558–59 (1995) (referencing the “importance, as well as the inherent complexity, of effective utilisation of the multilateral treaty amendment process”).

199. See discussion *supra* Part IV.A.

200. See discussion *supra* Part IV.A.

201. See discussion *supra* Part IV.B.

language. Amending the language of the VCCR is the only way to eliminate interpretive ambiguities and ensure broader protection for foreign national parents and children.

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