

The Law of Consular Access

A documentary guide

**John Quigley, William J. Aceves
and S. Adele Shank**



Routledge Research in International Law



The Law of Consular Access

Over the past decade, there has been an explosion of litigation at the international and domestic levels concerning consular access for foreign nationals charged with a criminal offence. The issue has complicated relations between countries, with the majority of litigation involving the United States, which has adopted a restrictive view of the consular access obligation.

This book brings together for the first time relevant documentary sources on the law of consular access. The book includes significant excerpts alongside commentary on the documents, allowing readers to draw their own conclusions. While presenting information on the Vienna Convention on Consular Relations, the book presents other sources, including bilateral consular agreements, multi-lateral treaties, and key court cases from various jurisdictions. Many of these sources are not readily accessible.

The Law of Consular Access will be of interest to scholars of international law, human rights, and international relations. It will also be of interest to private and government lawyers, as well as diplomats and consuls.

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Preface

This volume is the product of the authors' activity and analysis on consular access since the early 1990s. S. Adele Shank, a criminal defense lawyer specializing in capital cases, represented foreign nationals in 1993 who had been convicted of capital offences in Texas and were nearing execution. Up to that time, violation of consular access obligations had rarely been raised in any country in a court of law, as a claim that might merit judicial relief. Along with other defense lawyers working in Texas, she developed a legal strategy for judicial relief. In addition, they sought executive relief via the clemency process. These efforts met with little immediate results, but over the ensuing decade many other foreign nationals sought relief in courts of the United States, resulting eventually in decisions by higher courts, and even by international courts.

It is this body of litigation, as well as administrative and legislative treatment of consular access, that forms the material for this volume. William J. Aceves was instrumental in raising consular access in courts of the United States, by authoring appellate briefs on behalf of the International Law Association (U.S. branch). In addition, Aceves prepared case notes for the *American Journal of International Law*, as U.S. and international courts rendered decisions on consular access. Some of these notes form the basis of the analysis of consular access litigation presented in the closing chapters of this volume.

S. Adele Shank and John Quigley raised consular access issues before the Inter-American Commission on Human Rights, an agency of the Organization of American States, leading to one of its two major opinions (*Fierro v. U.S.A.*), which is excerpted in several chapters of this volume. They have also authored briefs for the European Union when it has intervened as *amicus curiae* in consular access cases before the United States Supreme Court. Quigley has served as an expert witness on consular access issues in courts in the United States. He also consulted on consular access litigation in the International Court of Justice.

Over time the authors, as participants and as analysts, have observed an increase of judicial, executive, legislative, and administrative activity on consular access issues throughout the world, in both domestic and international proceedings. The aim of this volume is to apprise participants in criminal justice litigation

of the range of activity concerning consular access in courts around the world. Indeed, state practice is an important reflection of the status of international law. Accordingly, what is decided in one country is relevant for what is done in other countries. The decisions of international institutions have relevance too for the courts of individual countries.

The authors' task has been facilitated by publications of Mark Warren, of Human Rights Research, who tracks and analyzes litigation and statutory and administrative developments on consular access, and of Anne James, Executive Director of the International Justice Project, who has prepared extensive explanatory materials on consular access for the practicing bar.

The authors have received invaluable assistance on the technical side. Katherine Hall and Melanie Oberlin, reference librarians at the Michael E. Moritz College of Law of the Ohio State University, located hard-to-find documents. Jenny Pursell, of the College staff, provided invaluable assistance on word processing and formatting. At California Western School of Law, Sandra Moreau and Joyce Stallworth assisted with the manuscript. California Western students Kyung Eun Latimer and Tina Liu conducted research, reviewed citations, and read the manuscript, offering valuable comments.

The authors are grateful to two London barristers who raised consular access early on in trial courts, in the cases of foreign nationals they represented. Simon Farrell, QC, of Gray's Inn, and Gwilym Harbottle, of Lincoln's Inn, wrote about their cases for publication and have kindly granted permission to reprint their articles (see Chapter 17). Mark Andre Goodfriend, Acting U.S. Consul-General in London, provided insight into consular access implementation when he kindly received a class of John Quigley's students at his consular post.

The authors are grateful to the Department of Foreign Affairs and Trade of the Government of Canada for providing documents on Canadian consular practice.

For assistance keeping abreast of German legislation and court decisions, the authors are grateful to Professor Stefan Talmon, of St. Anne's College, University of Oxford, and to Anne Dienelt and Professor Andreas Paulus of the University of Göttingen. Professor Cindy Buys, of Southern Illinois University School of Law, kept the authors apprised of the Illinois Supreme Court's consideration of a rule she drafted on consular access.

The authors were fortunate to have assistance in translating materials into English. Surmila Ghorai and Andreas Weiss, LL.M. candidates at California Western, assisted with German decisions; Tomas Kasparaitis, B.A. Candidate in linguistics at the Ohio State University, with Lithuanian statutes; Dr. Irma Murvanishvili, of the Department of Slavic Languages and Literatures of the Ohio State University, with Georgian statutes.

The authors wish to acknowledge an intellectual debt to Luke T. Lee, who pioneered the analysis of consular law through its entire range, in his treatise *Consular Law and Practice*, now in its third edition (Oxford University Press 2008, co-authored with John Quigley). Lee's first edition, published in 1961, systematized the subject of consular law and quickly became the standard reference work.

A single volume cannot include all possible documents relevant to the topic of consular access. The authors hope that they have chosen judiciously and that this volume will serve as a useful guide on the many issues that arise in implementation of the law relating to consular access.

William J. Aceves
S. Adele Shank
John Quigley
March 2009



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Abbreviations

AJIL	American Journal of International Law
ALR	Australian Law Reports
CCC	Canadian Criminal Cases
F	Federal (citation to cases in U.S. federal courts of appeals, the appellate level in the federal system of courts, either as "F" alone, or, for two subsequent series of cases; F2d or F3d)
FCO	Foreign and Commonwealth Office (United Kingdom)
FLR	Federal Law Reports (Australia)
F Supp	Federal Supplement (citation to cases in U.S. district courts, the trial court in the federal system of courts, either as "F Supp" alone, or, for two subsequent series of cases, F Supp 2d or F Supp 3d)
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice. Cases are cited as "ICJ" preceded by year and followed by number of first page.
ILC	International Law Commission (United Nations)
NSWLR	New South Wales Law Reports (Australia)
NTCCA	Northern Territories Court of Criminal Appeals (Australia)
OC	Opinión consultiva (Spanish for "advisory opinion," used in citation to advisory opinions of the Inter-American Court of Human Rights)
PACE	Police and Criminal Evidence Act (United Kingdom)
SCt	Supreme Court of the United States, used to cite its cases
Stat.	Statutes at Large, U.S. Congress (publishes text of treaties)
UN	United Nations
UNTS	United Nations Treaty Series. Treaties are cited as "UNTS" preceded by volume number and followed by number of first page.
U.S.	United States of America
UST	United States Treaties and Other International Agreements (official publication of treaties of the United States of America)
VCCR	Vienna Convention on Consular Relations
VCLT	Vienna Convention on the Law of Treaties
WCB	Weekly Criminal Bulletin (Canada)

Part I

Introduction to consular access

If in a criminal investigation the suspect is a foreign national, a variety of complications may arise for the police, for the prosecuting authorities, for defense counsel, and for the judiciary. For the individual being investigated or prosecuted, their status as a foreign national may heighten the difficulties typically associated with defending a criminal charge. The criminal justice system of a foreign state is likely to be unfamiliar to the individual. Proceedings may be conducted in a language not understood, or only poorly understood. There is a risk of discrimination – overt or subtle – for the foreign national.

The mechanism that the international community has devised for protection of the individual in this situation is assistance by the foreigner's state of nationality. States – in the sense of nation states – appoint representatives, called consuls, to protect their nationals and monitor local authorities. The task of consuls is to assist their nationals under arrest, not only by monitoring the local authorities but also by helping them mount a defense. Rules mutually agreed at the international level require the local authorities to allow for communication and contact between consuls and their nationals.

Not infrequently, however, the system breaks down in individual cases. Local authorities do not always observe the rules that require them to facilitate contact and communication between a foreign national and a consul. As a trial unfolds, a national may challenge the introduction into evidence of seized items, or the national's own statements, arguing that they were obtained in violation of rules on contact and communication with consular officials. If the national is convicted and sentenced to a term of imprisonment, or perhaps sentenced to death, the question then arises whether the failure to comply with consular access requirements renders the conviction or sentence subject to challenge.

This volume provides documentation on consular access issues, in the hope that exposure to relevant documents may assist those involved in the criminal process. At the same time, the book provides analysis on the key issues that give rise to controversy as a criminal case proceeds. Since consular access is based on international law, these obligations are generally the same, regardless of whether the foreign national is arrested in India, Uruguay, Italy, or Zambia. How particular cases play out in one state is relevant to how such cases should play out

2 *Introduction to consular access*

elsewhere. Hence, the case law and statutory materials included in this volume are instructive regardless of the point of origin.

Consular access is examined by first providing, in Part I, background on the consular institution and consular law, and basic information about what consuls do in aid of a national under arrest. Part II covers the key obligations that fall on the local authorities when they make an arrest. Part III addresses the question of whether the foreigner has rights resulting from those obligations. Next, the consequences of a violation are explored. Part IV asks whether international obligations relating to consular access translate into the domestic legal sphere, so as to become law that courts should apply. Part V addresses remedies available in those courts. Part VI examines remedies available at the international level when domestic proceedings prove insufficient in a particular case. Finally, Part VII analyzes the litigation of recent years on consular access at the international level.

1 Overview of consular access

Protection of nationals when they are abroad is accepted as an important function of government. States recognize each other's right to exercise protection over their own nationals. Protection is effected through a consular official assigned by the state of origin. The state that appoints a consul is called the "sending" state, while the state in which the consul works is called the "receiving" state. Sending-state consuls visit sending-state nationals in receiving-state jails. They may help find legal counsel, attend and observe court proceedings, or assist in locating exculpatory information.

1.1 Consuls and their work

Understanding what consuls do in criminal cases is best approached against the background of what consuls are and what functions they perform. The roots of consuls as an institution go back to the city-states of ancient Greece. In foreign areas, officials called "*prostates*" acted as intermediaries between Greek colonists and local governments.¹ As an effective political institution, the consular office emerged only with the dawning of the commercial age during the early Middle Ages. Initially, the major function of consuls related to commercial relations. According to one commentator:

In the commercial towns of Italy, Spain, and France the merchants used to elect one or more of their fellow merchants as arbitrators in commercial disputes, and these were called *juges consuls* [judge consuls] or *consuls marchands* [merchant consuls]. When, between and after the Crusades, Italian, Spanish, and French merchants established themselves in Near Eastern countries, they brought the institution of consuls with them, merchants from the same nation electing their own consul. The competence of these consuls became gradually enlarged through treaties, called "capitulations," between the home states of the merchants and the mohammedan monarchs in whose territories they had settled. The competence of

1 Luke T. Lee & John Quigley, *Consular Law and Practice* 3-4 (2008).

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consuls came to comprise all civil and criminal jurisdiction over, and protection of, the privileges, life, and property of their countrymen.²

Such a broad role for consuls – allowing them to exempt their co-nationals from local jurisdiction – had waned by the early twentieth century. The functions of consuls became limited to assisting co-nationals in more defined ways. A set of rules came into being in the international community for the consular institution, as part of a body of law referred to as “customary” law. Customary law is made up of norms that are accepted by states as necessary for international intercourse.

In modern times, consular relations came to be regulated as well by treaties between states. By 1900, approximately 200 treaties contained provisions on consular relations, and by the 1930s the number reached 900.³ These were bilateral agreements, that is, treaties between pairs of states. These bilateral treaties addressed a variety of issues in the relations between the two states. One or two provisions addressed consular relations. Provisions relating to consuls in bilateral treaties were typically brief so that customary rules continued as the major body of relevant rules. As time passed, some pairs of states began to conclude entire treaties devoted to consular matters.

Consular relations were also impacted by so-called “most favored nation” provisions, found in a bilateral treaty. Most favored nation treatment involves an obligation to treat a foreign state no less favorably than what is afforded to the state with the widest scope, in regard to a defined set of activities. The most common use of this device is in regard to tariffs, whereby states admit each other’s goods at the lowest tariff imposed on goods from any other state. Some bilateral treaties used this device for consular obligations, requiring that the two states afford to consuls of the other the same scope of rights that they afforded to consuls of any third state. For example, the 1859 Treaty of Friendship between the United States and Paraguay provided: “the Diplomatic Agents and Consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions and immunities are, or may be, there granted to Agents of any other Nation whatever.”⁴

Immunities are an important aspect of the consular institution. In order to prevent the receiving state from interfering with their work, consuls enjoy certain privileges. The confidentiality of their files and documents must be respected by the authorities of the receiving state. Consuls may not be compelled to testify in a receiving-state court about matters relating to their official functions. Consuls may not be sued, or prosecuted criminally, for acts relating to their official functions. Consuls are exempt from paying taxes in the receiving state.

2 *Oppenheim's International Law* 1: 1132, 1992.

3 Graham H. Stuart, *American Diplomatic and Consular Practice* 292 (2d ed. 1952) (citing 2 A H. Feller & Manley O. Hudson, *Diplomatic and Consular Laws and Regulations* 1419-71 (1933)).

4 *Treaty of Friendship, Commerce, and Navigation*, Feb. 4, 1859, U.S.-Paraguay, art. 12, 12 Statutes at Large 1091.

Consuls are accredited to the receiving state by a process that involves submitting the individual's name and the acceptance of that individual by the receiving state. There are two types of consuls who function on behalf of sending states. A "career consul" is an official of the sending state, typically a member of its foreign service. This type of consul is dispatched by the sending state to a consulate in a particular foreign state. Consuls may serve in a particular receiving state for a period of years and then may be re-assigned elsewhere.

A career consul works out of an office referred to in treaties as a "consular post," or more popularly a "consulate." In capital cities, consulates are usually housed in the building complex of the sending state's embassy. They are referred to as the consular section of the embassy. In cities other than the capital city, consulates are self-standing. A building may be purchased or leased by a sending state as its consulate, or space may be rented in an office building. In larger consulates, one finds not a single consul but an entire staff of consuls, distinguished by various ranks. The head of a consulate may be called the "consul general."

Maintaining a consulate is an expensive proposition for a sending state. A device that sending states use to economize is the sharing of consular services. By pre-arrangement, the consul of one state will assist nationals of another in localities in which the former has no consular representation. Some pairs of states have bilateral agreements specifying the localities in which each will assist nationals of the other. Sharing may be done on a multilateral basis. The European Union has an arrangement whereby consuls of member states assist nationals of any of the others, if the state of nationality has no consul in the particular locality.

One other device is widely used to economize. Many states engage a local resident, particularly in outlying areas of a receiving state, to perform consular work on a part-time basis. Such a person, called an "honorary consul," may even be a national of the receiving state. An honorary consul may have some connection in her or his background to the sending state. Honorary consuls typically practice a profession of their own and work out of the office they use in that profession. Some sending states never engage honorary consuls, but those that do find it a convenient way to provide at least a minimal level of assistance to their nationals in localities in which it does not make financial sense to establish a consulate staffed by career consuls.

Consuls, whether career or honorary, are responsible for a given territory. These territories are called "consular districts" and would be sectors of the territory of the receiving state determined by the sending state. Nowadays, sending states typically post on a website the contact information for both their career and honorary consuls. Receiving states may also post contact information for sending-state career and honorary consuls accredited in their territory.

Despite the various types of arrangements, it can happen that a sending state has no one available in a particular receiving state to assist its nationals. To determine whether consular services are available, it may be necessary to contact the sending state directly.

1.2 Protection activity of consuls

For both career and honorary consuls, assistance to sending-state nationals is a major activity. The scope of functions is typically greater for career consuls than for honorary consuls. In general, however, certain functions are typical. A consul may provide advice and information to sending-state nationals who seek to do business in the receiving state. Consuls attest to the validity of documents issued in the receiving state that a national may need to use in the sending state.

Consuls perform a variety of functions for sending-state nationals who encounter difficulties in the receiving state. If a sending-state national dies while in the receiving state, a consul may facilitate arrangements for repatriation for burial. If a national dies abroad with property in the receiving state, the consul may assist in settling the estate. Consuls inquire about sending-state nationals who go missing, or are victims of crime, particularly if the sending state is concerned that the receiving state is not doing all that it should in the case. If persons suspected of crime are to be extradited – either from the sending state to the receiving state or vice versa – the consul may facilitate that process.

The assistance that consuls provide to nationals who find themselves in situations of difficulty is referred to as “protection” activity. A member of a consulate responsible for assisting nationals may be called the consulate’s “protection officer.”

The nexus of nationality is key to the protection activity of consuls. The term “nationality” is used in international practice for the connection between an individual and a state. An individual who holds a state’s nationality may be represented and protected by that state over and against other states. The state of nationality is considered to have a right to represent the interests of a national. The term “nationality” is often used synonymously with “citizenship.” At the international level, “nationality” is the accepted term to indicate an individual’s connection to a state. In documents on consular law, it is the term used to refer to a foreigner under arrest. In domestic law, the term “citizenship” is used for the circle of persons who enjoy rights of political participation. Individuals who reside in territories over which the state holds sovereignty but who do not enjoy the right to participate in government are “nationals,” but not “citizens.” For international purposes, the state represents them and would provide them with consular protection.

1.3 Vienna Convention on Consular Relations

By the mid-twentieth century, the patchwork of bilateral treaties on consular matters had come to be regarded as inadequate. While consular matters were the subject of rules of customary law, those rules, being unwritten, were often unclear. Protection of foreign nationals, and the activity of consuls in general, would presumably be better served if uniform rules were devised, and if those rules could be reduced to writing. In that way, receiving states could more efficiently comply with their obligations to sending states. The matter was eventually taken up by the United Nations.

In 1949, the United Nations designated the subject of consular relations as an area ripe for a multilateral treaty.⁵ UN Secretary-General Trygve Lie explained that "in view of the continual expansion of international trade, the legal position and functions of consuls should be regulated on as universal a basis as possible."⁶ The idea was to devise a single treaty that would provide uniform regulation for consular work throughout the world.

The task of drafting a treaty was given to the International Law Commission (ILC), a treaty-drafting agency operating under the General Assembly of the United Nations. The ILC began examining the issue in 1955. In 1961, it submitted to the General Assembly a set of Draft Articles on Consular Relations.⁷ The General Assembly called a conference to finalize the text of a multilateral treaty based on the Commission's draft. The United Nations Conference on Consular Relations met in Vienna from March 4 until April 22, 1963, attended by most UN member states. On April 24, 1963, the Conference adopted a text, which it called the Vienna Convention on Consular Relations (VCCR), naming the Convention, as is often done, for the city where its drafters met.⁸

At the same time, the UN Conference adopted the text of two ancillary treaties. One was the Optional Protocol Concerning Acquisition of Nationality, which seeks to prevent the acquisition of local nationality by consuls and members of their families. The other was the Optional Protocol Concerning Compulsory Settlement of Disputes, which requires states party to the VCCR to submit to the jurisdiction of the International Court of Justice (ICJ) if sued by another state party for a violation of the VCCR.

This second Optional Protocol would prove significant in regard to consular access. It provided an enforcement mechanism to which a state whose consular access rights are violated may have recourse. The ICJ, to which this Optional Protocol refers, was established as part of the United Nations. Under Chapter 14 of the UN Charter, the ICJ may hear cases brought by one state against another, and its decisions are binding. However, a defendant state is subject to ICJ jurisdiction only if both it and the plaintiff state have submitted themselves to that jurisdiction. Some states, but not most, have submitted themselves to ICJ jurisdiction for any and all international law claims that might be brought by other states that similarly have submitted themselves to ICJ jurisdiction for any and all international law claims. For most states, however, ICJ jurisdiction for violations of the VCCR will obtain only if it is party to the Optional Protocol.

The adoption of the text of the VCCR and of the two Optional Protocols by the delegates at Vienna did not put these instruments into legal force. Each instrument, by its terms, needed to be ratified by a certain number of states. Their

5 Report of the International Law Commission, paras. 16 & 20, U.N. Doc. A/925 (1949).

6 U.N. Secretary General, *Survey of International Law in Relation to the Work of Codification of the International Law Commission* 54-56 (1949).

7 Report of the International Law Commission, U.N. Doc. A/4843 (1961).

8 21 *UST* 77, 596 *UNTS* 261.

legal force is based on ratification. Multilateral treaties enter into force when ratified by a number of states specified in an article of the treaty itself. Each state has its own process for ratification of treaties. In many states, the legislative branch of government plays a role, as a check on the executive branch's discretion to enter into agreements with other states.

The VCCR was duly ratified and entered into force on 19 March 1967, as were the two Optional Protocols. To date, the VCCR has been ratified by 172 states, which means that nearly all states in the international community are bound by it. The text of the VCCR is given in full in the Appendix. The text of the Optional Protocol Concerning Compulsory Settlement of Disputes is in Chapter 24.

States submit their ratifications to the UN Secretary-General, who maintains a registry for treaties concluded under the auspices of the United Nations. The Secretary-General publishes a document called *Multilateral Treaties Deposited with the Secretary-General*, listing all treaties for which that office is responsible, and giving the names of each ratifying state and the date of ratification. Current information as to the status of any particular state in regard to the VCCR or its Optional Protocols can be found in this document, which is available electronically, and updated frequently, on the UN website, www.un.org.

The VCCR defines and guarantees consular rights, privileges, and duties. VCCR Article 5 lists a number of consular functions, including many of those that consuls have traditionally performed: development of commercial, economic, cultural, and scientific relations; issuance of passports and travel documents; notary activity; transmission of judicial documents; execution of letters rogatory; the taking of evidence for courts of the sending state; and supervision and inspection of vessels and aircraft of the sending state. VCCR Article 5(e) provides that consular functions include "helping and assisting nationals, both individuals and bodies corporate, of the sending State."

In addition to the VCCR, there is one regional multilateral treaty on consular matters, the European Convention on Consular Functions, but its provisions on consular access do not differ substantially from that in the VCCR.⁹ Moreover, the European Convention on Consular Functions has not been ratified by a sufficient number of countries to put it into force. It thus is binding on no state.

1.4 Protection of nationals under arrest

Access between a consul and a national under arrest was the subject of intense debate during the 1963 Vienna drafting conference. The ILC draft would have required a receiving state to notify consular officials whenever a sending-state national is detained. Many states, however, objected to such a general notification requirement. The text as amended, only two days before the end of the Conference, took a different approach. It requires that a consul be notified by the receiving state only if the sending-state national so desires. To ensure that a

9 European Convention on Consular Functions, European Treaty Series, No. 61, Art. 6.

sending-state national would be aware of this right, so as to be able to take advantage of it, the drafters added a requirement that the authorities advise the sending-state national about consular access.

These stipulations are contained in VCCR Article 36, which begins with a clause on communication between consuls and nationals not linked to detention. Article 36(1)(a) provides for a mutual right of communication between consuls and sending-state nationals:

- (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

The next sub-paragraph addresses communication and contact in the situation of an arrest. The mutual right of communication between consul and national as guaranteed in VCCR Article 36(1)(a) is guaranteed as well when a national is arrested. VCCR Article 36(1)(b) provides:

- (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

To ensure the consul's capacity to assist the national, VCCR Article 36(1)(c) grants consular officers the following rights:

- (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Finally, VCCR Article 36(2) contemplates that the indicated rights of consuls and nationals are to be effectuated within the legal structure of the receiving state, but that the receiving state must ensure that the rights can be realized:

The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Prior to the final approval of the text of Article 36(2) at the 1963 Vienna drafting

conference, the USSR expressed concern that that provision would require a receiving state to elevate the Article 36(1) obligations over domestic law, in the event of a conflict between the two. The Soviet delegate argued that Article 36(2) might force states to alter their criminal laws and allow consular officials to interfere with the legal process in order to protect aliens. It proposed an amendment that would have allowed a receiving state's domestic law to prevail over Article 36(1) rights. The amendment was rejected by the Conference.¹⁰

The conclusion of the VCCR, as the first multilateral treaty on consular relations, has been referred to as "undoubtedly the single most important event in the history of the consular institution."¹¹ Despite the widespread ratification of the VCCR, bilateral treaties continue to be a feature of consular relations. Some bilateral consular treaties concluded prior to the VCCR remain in force. Even since conclusion of the VCCR, many states have contracted new bilateral treaties with other states. In determining the content of consular rights and obligations as between any pair of states, one must determine not only whether they are party to the VCCR, but as well whether they have a bilateral consular treaty.

These bilateral treaties may specify rights of consuls that are not stated expressly in the VCCR but are understood to be covered by it, for example, a right of consuls to attend the criminal trial of a sending-state national. The primary reason for concluding a bilateral consular treaty, however, has been to make provision to require receiving states to notify a sending-state consul whenever a sending-state national is arrested, in line with the original proposal of the ILC. This topic is covered in Chapter 7.

Verifying the current status of these bilateral treaties is more difficult than checking the current status of UN-generated multilateral treaties like the VCCR. The text of bilateral treaties can be found in the *United Nations Treaty Series*, a treaty collection to which all UN member states are required submit their treaties for publication. As well, major states publish collections, often available electronically, of their bilateral treaties with other states. Governmental websites on consular notification issues may provide references to the bilateral consular treaties to which that state is a party. However, there is no central source for information on the current status of bilateral consular treaties, to determine, for example, whether a particular treaty remains in force or whether it may have been terminated or superseded by another treaty. Some states, the United States being an example, maintain a publication that provides this information. The U.S. publication, called *Treaties in Force*, lists bilateral treaties currently in force with all other states. It is available both in print and electronically on the website of the U.S. Department of State, www.state.gov.

Treaties are usually identified by the date of adoption of the text, rather than the date of entry into force. Thus, the date given in a citation to a treaty is not the

10 1 United Nations Conference on Consular Relations, Vienna, 4 March 22 April 1963, 40 (12th plen. mtg., Agenda Item 10), U.N. Doc. A/CONF.25/16 (1963).

11 Luke T. Lee & John Quigley, *Consular Law and Practice* 25 (2008).

date of entry into force, unless the date is specified as being the date of entry into force.

1.5 Consequences of a violation of consular access obligations

Controversial legal issues arise when receiving-state authorities fail to comply with their obligations after a sending-state national is arrested. The violation that most frequently leads to conflict is a failure to advise the foreign national about the right of access to a consul. The sending state may file a diplomatic protest (Chapter 23) or even sue at the international level (Chapter 24). The foreign national may try to raise the violation in the context of the criminal prosecution, demanding a remedy. That question raises not only questions of what remedies are required but also questions of the scope of the basic obligations of a receiving state. One key issue is that of whether the foreign national has rights that can be asserted, or whether, on the contrary, the only rights run between the sending state and the receiving state (Chapters 8, 9).

The issue of the consequences of a receiving state's failure to comply with its consular access obligations is not fully addressed in the VCCR. It is not even addressed fully in the law relating to treaties. The consequences of a treaty violation are addressed in a separate body of international law called the law of state responsibility. This body of law spells out the consequences of a violation, much as the law of remedies spells out the consequences of a contract breach in the law of common law states. The basic precept of that body of law is a requirement to return a situation to the *status quo ante*, that is, to eliminate, to the extent possible, the harm that follows from a violation. How that body of law plays out in the situation of a consular access violation is considered in Chapter 14.

Before domestic courts reach the issue of how properly to apply treaty-based norms, they must concern themselves with the preliminary question of how those norms get translated into law at the domestic level. That issue is considered in Chapter 12.

1.6 Sources of the law on consular access

The law relating to consular access is found in a variety of documents issued at the international and national levels. This book draws together documents from both levels, with the various chapters focusing on particular aspects of consular access.

At the national level, one finds a variety of documentary sources on consular access emanating from the different branches of government: legislation adopted by parliamentary bodies, regulations issued by the executive branch, and opinions rendered by courts. In some states, the parliament adopts a general statute on consuls and their functions. This practice is widely followed in Eastern Europe. This legislation often includes provisions on consular access for arrested nationals. Many other states have no such general statute, but provide prescriptions relating to consular access in criminal procedure laws about arrest. Since police agencies

are found in different states at different levels of government, such regulations may be national or local in scope. Police agencies may issue regulations directed to their own officers, instructing them how to deal with foreign nationals when they arrest them. Foreign ministries may issue similar instructions to police for the same purpose.

Foreign ministries also issue instructions to the consuls they appoint at consular posts abroad. These instructions inform consuls on how to cope with the various situations that may confront them as they assist nationals under arrest. Such instructions may be published in book form, or made available electronically to anyone who wishes to access them. Or they may be issued for internal distribution only. Instructions excepted in this book include, prominently, those of Switzerland, Canada, and the United States. The instructions of Switzerland and the United States are posted electronically by the respective governments.

Foreign ministries also issue written material aimed at the general public so that nationals will know what they can expect from consuls should they be arrested abroad. This material may be in the form of printed brochures or electronic postings on a foreign ministry website.

Since consular access is an issue raised in criminal courts, one finds treatment of the issue in the proceedings of national courts at all levels of the judicial hierarchy. In trial courts, transcripts reflect the argumentation of counsel. They may also reflect the testimony of the expert witnesses, who are sometimes called to testify about consular access, or of consuls, who on occasion appear as witnesses to explain the services they provide to their nationals. The rulings of trial courts on consular access issues may be published. More frequently it is the rulings of appellate courts that are published, and these provide important insight into how a particular state copes with the situation in which police authorities fail to comply with consular access obligations. In Europe, where the judicial hierarchy often includes a constitutional court at its pinnacle, consular access may fall within its competence.

Treaties bring into play a body of law relating not only to their entry into force, but to the construction of their provisions, to possible denunciation, and to breach that may allow another party to evade its obligations. The generally accepted statement of these norms is a multilateral treaty, the Vienna Convention on the Law of Treaties (VCLT).¹² In construing treaties, it is customary to refer to the drafting history to resolve ambiguities in the text. For bilateral consular conventions, such material is rarely available. For the VCCR, the United Nations recorded and published documentation on the conference that led to its adoption, including the oral proceedings, the text of amendments proposed by different countries, and the votes on such amendments.¹³ This documentation includes considerable discussion that reflects views on the meaning of the VCCR's

¹² 1155 UNTS 331.

¹³ United Nations Conference on Consular Relations, Vienna, 4 March-22 April 1963, *Official Records* (2 volumes, United Nations, New York, 1963).

consular access provisions. It is frequently cited in support of a particular asserted construction of the consular access provisions of the VCCR.

Treaties may become the subject of litigation between states. As will be recounted in Chapter 26, the VCCR consular access provision has been the subject of four cases filed in the International Court of Justice. Excerpts of this Court's rulings, as they relate to particular aspects of consular access, are included in various chapters of this volume. These rulings are important in two respects. They are binding on the states that are parties to the particular case. Additionally, the Court's rulings are viewed as authoritative, or at least persuasive, constructions of the VCCR consular access provisions.

International courts also are authorized, depending on the particular provisions of the statutes creating them, to issue advisory opinions at the request of the organization of which they are a part, or at the request of a state member of that organization. An opinion requested by Mexico from the Inter-American Court of Human Rights, as will be explained in Chapter 27, resulted in an extensive ruling on various points of the law of consular access. In both the International Court of Justice and the Inter-American Court of Human Rights, judges may deliver separate or dissenting opinions.

Beyond treaties and the litigation they may generate, one also finds an important source on consular access in diplomatic protests that one state dispatches to another, alleging a violation. In these documents, a state may take a position on what it views as required to correct a violation. In that way, the protesting state contributes to the *corpus* of practice construing the relevant treaty or treaties.

In recent years, states alleging a violation have occasionally sought to participate in court litigation in the receiving state to urge a result that, in their view, is required by the law of consular access. In such litigation, the state similarly takes a position on what is required to correct a violation. The state may intervene as a party in a case involving its national if that is permitted by the rules of the receiving-state's courts (Chapter 21). Or it may file a brief as *amicus curiae* in a proceeding to which its national is a party. Alternatively, a state may file a civil suit against the receiving state to require the latter to act in accord with its view of what is required to correct a violation (Chapter 22).

Still another international source of law is documents relating to the international law of remedies. In international law, the issue of consequences of a breach is found in the law of state responsibility. A principal document in this regard is a set of articles on the subject of the responsibility of a state for an internationally wrongful act, adopted by the International Law Commission of the United Nations.¹¹ This document is often cited in arguments over the consequences of a breach of consular access obligations to determine what a receiving state must do to provide a remedy. Although not a treaty, it is regarded as

14 United Nations, Official Records of the General Assembly, 56th session, Supplement No. 10 (A/56/10).

a statement of the customary law of state responsibility. It has been commended to the attention of governments by the UN General Assembly.¹⁵

The documents excerpted in this book are current as of the date of publication. Website references are given for many of the documents, in order to facilitate access. Some of the websites referenced are, however, in languages other than English. Instructions to consuls and other governmental documents are amended from time to time. Treaties are subject to being denounced or amended, or to being superseded by later treaties. While the VCCR has not been amended since its adoption in 1963, new bilateral treaties are constantly being concluded. Court decisions may be affected by later decisions. As of the time of publication, German and U.S. courts in particular are grappling with basic issues relating to the consequences of a consular access violation. Their future decisions need particularly to be watched, as they may affect the continuing validity of the decisions excerpted in this volume.

Court decisions are cited in this volume by the title of the reporter for the particular court, preceded by the volume number and followed by the page number and year. Where a volume number is not used for the particular reporter, the year precedes the title.

1.7 Language of the documents

All documents are presented in the English language. For most, English is the original. Some of the documents were issued in languages other than English. In a few instances, official translations into English were published. In most instances, however, the authors have translated from the original language. The authors have translated German court decisions (German), the Italy-Argentina Convention on Consular Functions (Italian and Spanish), the Consular Statute of Republic of Moldova (Romanian), the Consular Convention between the Russian Federation and the Islamic Republic of Pakistan (Russian), the Regulation of the Law on the Mexican Foreign Service (Spanish), Norway's Instructions for the Foreign Service (Norwegian), the Lithuania Consular Statute (Lithuanian), and the Georgia Consular Statute (Georgian).

The treaties given in English as an authentic English text of the treaty may have been concluded in some other language in addition to English. The VCCR, for example, was concluded in all five official languages of the United Nations: English, French, Russian, Spanish, and Chinese. On any fine point of interpretation, one should consult the text in all these languages, to ascertain consistency. If there is a discrepancy, the principle of interpretation, per VCLT Article 33, calls for reconciling the texts, that is, reading them in such a way that none are excluded.

Unless otherwise noted, the bilateral treaties excerpted in this book are the authentic English text. The treaty may have been issued in another authentic

¹⁵ UN General Assembly Resolution 56/83, 12 December 2001.

language. In particular, if a bilateral treaty is between an English-speaking country and a non-English-speaking country, there will typically be an authentic text in the language of the other country. On any fine point of interpretation, both texts should be consulted to ascertain consistency and to determine possible discrepancies.

With both multilateral and bilateral agreements, a treaty clause typically coming near the end of the treaty identifies the language, or languages, in which the treaty is being concluded. If one finds a text in some other language, it would mean that the treaty was translated into that language, but that text would not be authentic. For example, the Italy-Argentina Convention on Consular Functions, excerpted in several chapters, was concluded in Spanish and Italian. The English text that the authors give herein is their own translation, hence not authentic. The Russia-Pakistan Consular Convention excerpted in several chapters was concluded in English and Russian. The authors translated from the authentic Russian text because the authentic English text was not available.

2 Role of consuls in assisting a national

2.1 Introduction

This chapter and those that follow provide documents on various aspects of consular access. The documents included in this chapter reflect the types of services a consul may provide to a national who has been arrested. Knowledge of what consuls do for an arrested national is critical to understanding what consular access means to a national. It is also critical to determining what consequences should follow when consular access is not respected by the authorities of the receiving state. A court considering whether to provide a remedy for a violation of consular access obligations may want to know what services would have been provided had a consul been involved.

The VCCR says little about the services a consul is to perform. It provides for a consul and an arrested national to have contact and communication but does not explain precisely what a consul may do for the national. It is up to the sending state to determine what services are required in each case. Some bilateral treaties mention particular activities and require a receiving state to allow them, for example, attendance by a consul at court proceedings. Nonetheless, certain types of assistance are typically rendered by sending states.

The disabilities that often attach to a foreign national under arrest and that call for consular assistance are described by a judge of the Inter-American Court of Human Rights as a preface to his consideration of the consequences of a failure on the part of a receiving state to afford consular access (Document 2). A listing of services consuls may provide is found in a brief filed by Mexico on behalf of a Mexican national sentenced to death (Document 3), and by a group of Latin American states (Document 4), and the European Union (Document 5) in similar cases. The significance of aid a consul may give is described by the United States in a diplomatic note to Syria, in support of a U.S. request for access to two detained U.S. nationals (Document 6a). Types of assistance are spelled out in instructions sent by governments to their consuls, so that consuls will understand what they are expected to do. U.S. and Canadian instructions are particularly detailed (Documents 6b, 7).

Many states provide general notice to nationals about the range of services they provide in the event of arrest abroad, as does Kenya in a website aimed at Kenyans

in the United States (Document 8). Ireland, by statute, specifies that a foreign consul assist in finding legal counsel for foreign nationals arrested in Ireland (Document 10). Moldova, by statute, specifies that its consuls may assist in finding legal counsel and interpreters for Moldovans arrested abroad (Document 11).

Sending states routinely assist their nationals in finding legal counsel, as reflected in Canada's consular instruction (Document 7), and in public notices posted by Kenya (Document 8) and South Africa (Document 9). In the UK, lawyers based in the UK have been recruited to assist the local lawyers who represent UK nationals (Document 12).

Consuls attend court proceedings, to ensure that the rights of their nationals are respected and to monitor for any discrimination they may be facing as foreigners. Bilateral treaties may specify a right to be informed about criminal charges, a right to attend a trial, and a right for the individual to be provided, where necessary, with language interpretation (Documents 13, 14, 15, 16).

Consuls may assist in ascertaining facts relevant to the disposition of a national's case. In one instance, U.S. consular personnel attended the trial in Austria of a U.S. national. Following a conviction, the U.S. national sought to raise as error the fact that the indictment, as read aloud at the start of the trial, was not read in English. Consular officials, having attended the trial, were able to corroborate the fact that the indictment had not been read aloud in English. Unfortunately for Kamasinski, they also acknowledged that Kamasinski had waived a reading in English (Document 6c).

In another instance, a consul, in assisting a national, also assisted the receiving-state court. A Kenyan national had pleaded guilty to a criminal charge in the U.S. State of Ohio, and was serving a sentence. He moved to withdraw the plea. Before the issue was resolved, his mental state deteriorated to the point that it was unclear whether he was in a position to make an intelligent choice, since a withdrawal might lead to a new trial, and potentially a more severe sentence. The Kenyan national was, at the time, refusing to, or was unable to, communicate with anyone. A consular officer from Kenya's embassy in Washington, DC, went to the prison hospital, but the Kenyan national refused to meet with him. The officer then attended a court hearing in the case, where the Kenyan national's attorney arranged with the judge for the officer and the national to meet. The officer, speaking in the Swahili language, tried to engage the Kenyan national in conversation but was unable to elicit any response. He then testified to the court on his efforts (Document 8b).

Ukrainian officials conducted an assessment of the work of Ukrainian consuls in several receiving states and found that the consuls had uncovered numerous instances of abuse of the rights of Ukrainian nationals (Document 17).

2.2 Inter-American Court of Human Rights

The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, 1 October 1999, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999), Cançado Trindade, J., concurring, para. 23

23. Foreigners under detention, in a social and juridical *milieu* and in an idiom different from their own and that they do not know sufficiently, experience often a condition of particular vulnerability; which the right to information on consular assistance, inserted into the conceptual universe of human rights, seeks to remedy.

2.3 Mexico

United Mexican States, *Brief Amicus Curiae*, filed in United States Court of Appeals, Fourth Circuit, *Murphy v. Netherland*, 116 F.3d 97 (1997)

Without the assistance of the consul, a foreign national can be at a severe disadvantage when facing criminal charges. A foreign national may be unfamiliar with the arresting nation's customs, police policies, or criminal proceedings. As such, the foreign national may not be able to take full advantage of the benefits of the criminal justice system due either to ignorance or lack of resources. For instance, at the sentencing stage in a capital proceeding in the United States, an accused is typically permitted great latitude to present mitigating evidence, which might consist of information about the accused's character, background, reputation, physical and mental disabilities, or potential for rehabilitation. For a foreigner on U.S. soil, it may be difficult or impossible to assemble strong mitigating evidence because needed witnesses or documentation may be located in the accused's home country. Without the assistance of the consul, the foreign national may not be able to overcome this disadvantage.

These sorts of disadvantages are the inevitable result of being a foreign national. Sometimes, however, the disadvantage a foreign national faces is of a more invidious nature: discrimination on account of national origin. Article 36 provides protection against that disadvantage, too. By his watchful presence, the consul can discourage a biased prosecutor from acting on his prejudice.

2.4 Latin American states

Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Paraguay, Peru, Uruguay, Venezuela, *Brief of Foreign Sovereigns as Amici Curiae in Support of Petitioner Jose Ernesto Medellin*, at 9, filed in Supreme Court of the United States, *Medellin v. Dretke*, 544 U.S. 660 (2005)

[P]rior to trial, consular officials may address the prosecuting authorities regarding the case. In capital cases, this may include presenting reasons for the prosecutor not to seek the death penalty, such as mitigating evidence, criminal history (or lack thereof), and the accused's personal circumstances. Missing the chance to present this evidence, which may be located in the home country and thus inaccessible to domestic counsel, significantly increases the foreign national's chance of a death sentence . . .

2.5 European Union

European Union, *Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioners*, filed in Supreme Court of the United States, *Sanchez-Llamas v. Oregon, Bustillo v. Johnson*, 548 U.S. 331 (2006)

EU Member States consider consular access to be of critical importance. A foreign national faces unique disadvantages when left to navigate the foreign country's legal system in the absence of support from his home nation, even if he is represented by competent legal counsel. Article 36 [of the VCCR] reflects agreement among the States parties that foreign nationals require special assistance when they are detained on a criminal charge.

Participation by a consul provides greater assurance that a Sending State's national will understand the rights afforded by the law of the Receiving State, and correspondingly that the proceedings will be conducted as intended under the law of the Receiving State.

In a particular case, a consul may be able to assure that the accused is represented by a competent attorney who possesses a cultural understanding of the national's specific circumstances and background. Consuls may also be able to acquaint their nationals with the basic procedures under the local legal system.

Accurate translation may also be of importance. A consul may be able to assist in securing expert translation, the result of which could provide both an effective understanding by the national of his legal rights and the assurance for the arresting authority of a thorough and accurate comprehension of the national's statements.

A consul may assist in locating witnesses or documentary evidence available in the Sending State. The information thus gained may be critical in a determination of guilt, and, in the event of a conviction, in the assignment of an appropriate sentence.

2.6 United States

a. Department of State, *Digest*, 1975, at 250

The consul, while fully complying with the law of the detaining state, is able to assist these nationals in securing and preserving their rights, often by helping them to obtain local counsel. The consul's presence may also help assuage the distress of detained nationals.

b. Department of State, *Foreign Affairs Manual*, vol. 7 (<http://www.state.gov/m/a/dir/regs/fam/c22164.htm>)

§412: Our most important function as consular officers is to protect and assist private U.S. citizens or nationals traveling or residing abroad. Few of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail.

- (1) Neither arrest nor conviction deprives a U.S. citizen of the right to the consular officer's best efforts in protecting the citizen's legal and human rights. As consular officers we must assist arrested or imprisoned U.S. citizens with dedicated professionalism, regardless of any private views as to their guilt or the heinousness of the crime.
- (2) You must also remember that there are potential flaws in any judicial system, and must remain alert for them. If you have valid reason to believe that a U.S. citizen or national has been arrested or charged unjustly, for political, monetary or other reasons, you should continue to handle the case as an arrest case. You should also bring your opinion and information to the attention of the Department and post senior management immediately, since this adds a dimension to the case that may demand unusual action in the political or judicial arena.

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§415.3: Legal systems vary greatly, particularly outside common law areas. Arrested U.S. citizens or nationals often have an imperfect understanding of American criminal procedure and less or no understanding of the legal procedures of the country in which they are detained. Each mission (or where variations in local conditions warrant, each constituent post) must develop and keep updated informational material for delivery to each arrested U.S. citizen regarding the judicial process the arrestee is likely to face. Posts should prepare a packet of information covering: (1) Initial arrest (2) Remand procedure (3) Trial procedure (4) Appeal process (5) Penal conditions (6) Rules established by prison administration.

§415.5: . . .

(10) Personal items for Prisoner: If local circumstances warrant, and if allowed, consider putting some necessities in a clear plastic bag to give to prisoner on your first visit. . . . This could include: Soap; Toothbrush and toothpaste; Comb; Deodorant/antiperspirant; Hygiene products; Writing paper, pen or pencil; Magazine or other reading material; Dry food, such as an energy bar, granola bar, etc.

§423.4: Provide the arrestee with a current list of attorneys that might be available to him/her. Explain you cannot recommend an attorney, but that you can point out those on the list who speak English, and those who either have some past experience in, or who have indicated a willingness to, defend a U.S. citizen or national accused of the same or similar crimes.

§423.5: Briefly explain to the prisoner the highlights of the judicial system within which the arrestee must work, and provide a written description that covers this topic in detail, including initial arrest, remand procedure, trial procedure, appeal process, and penal conditions and rules.

§423.7: Advise the prisoner you will contact his or her next of kin, or other family or friends the arrestee designates.

§423.8: In most countries, it is the practice of arresting officials to confiscate the personal property (such as money, clothing, watches, rings, computers, automobiles) of newly arrested persons. Often no receipts are given for these items, and, with no records, the items may disappear.

- a. During the initial visit to a U.S. citizen or national arrestee, you should ask the prisoner if the arresting authorities took any personal property, including a passport, and, if so, whether a signed and dated receipt was given in exchange.
- b. If the arresting authority did not follow these procedures, you should take immediate steps to determine the whereabouts of the confiscated items and to obtain a receipt acknowledging custody from the local authorities. Prompt action is necessary if the items are to be located and retrieved.
- c. You should not assume responsibility for holding or storing personal property or money on behalf of an arrestee.

§423.10: a. Although not a requirement, the Department strongly recommends taking a few photos of the arrestee. This is assuming that the host country authorities permit and the arrestee consents. These photos often prove useful for a number of reasons:

- (1) They may serve as evidence in validating and protesting any allegations of physical abuse.

- (2) They may help in identification and citizenship verification when there is reason to suspect the prisoner is using a false identity.
- (3) They can provide some reassurance to family members regarding the arrestee's health and welfare.

§424.4: It is imperative that you submit prompt and comprehensive reports by priority or immediate telegram on the arrest and detention of any U.S. citizen or national that involves any one of the following factors:

- a. Detention over 24 hours,
- b. Physical abuse or denial of human rights, or
- c. Circumstances that in your judgment involve special public relations or human rights considerations.

§443.1: U.S. citizen/national prisoners are considered eligible to receive paid medical treatment if:

- (1) Adequate treatment for a physical or psychiatric condition cannot or will not be provided by prison authorities or the host government;
- (2) All reasonable attempts to tap private resources have failed, or such resources do not exist; and
- (3) There are medical indications that the emergency medical assistance is necessary to prevent, or attempt to prevent, the loss of life or limb, or that failure to provide service may cause permanent disability.

§444.1: a. A prisoner is considered eligible for the short term full diet program if:

- (1) The prisoner is to be or has been held in excess of 1 day in a holding jail or other facility;
 - (2) The incarcerating officials do not provide food for the prisoner; and
 - (3) Food is not available from any other source, including private funding from family or friends.
- b. Prisoners must demonstrate genuine attempts to obtain from other sources;
 - c. Post must verify these efforts by contacting the individuals;
 - d. The names, addresses, and telephone numbers of all contacts provided by the prisoner, and verified by post, must be included in the EMDA [a reference to the Emergency Medical and Dietary Assistance Program, 22 U.S.C. §2670(j)] request cable; and
 - e. The prisoner is willing to sign a promissory note for funds expended, since the assistance is normally on a reimbursable basis.

§453: Whenever you encounter discrimination against U.S. citizen or national prisoners in the judicial system, you should take immediate action to counter this discrimination at whatever level appears most effective.

c. European Court of Human Rights, *Kamasinski v. Austria* Application No. 9783/82, Judgment, 19 December 1989, para. 24

The trial before the Innsbruck Regional court, sitting as a court with lay assessors (Schöffengericht), took place on 2 April 1981. . . . It is the applicant's [a reference to Kamasinski in his capacity as applicant for relief in the European Court of Human Rights]

contention, as corroborated by the United States consular observers, that the indictment read out at the beginning of the trial was not interpreted into English. However, according to the consular observers, the applicant, when asked, said that he understood the charges and he and his counsel waived interpretation of the indictment.

2.7 Canada

Department of Foreign Affairs and International Trade, Consular Affairs Bureau,
Manual of Consular Instructions

§2.4.4 ARRESTS, DETENTIONS, CHARGES

The rights of consular officers to communicate with and visit their citizens in prison are basic to their protective functions. It is important that consular officers learn of all arrests or detentions of Canadians, and every attempt should be made to arrange for such notification by the local police authorities. Persons detained, arrested or imprisoned have the right under the *Vienna Convention on Consular Relations* to have their diplomatic or consular mission notified without delay of their arrest, and detaining authorities are obliged under international law to inform prisoners of this right. Missions may also learn of arrests from other prisoners or from friends or relatives in the area or in Canada. In countries with which Canada may conclude a bilateral consular convention, special rules would apply whereby local authorities will be obliged to inform our missions of the arrest or detention of Canadians within certain time limits.

The system of justice in some countries may be complex, slow moving or possibly venal. Local laws may differ greatly from our own and, with the addition of language barriers, may be difficult for Canadians to understand. Conditions of incarceration may be much harsher than in Canada; there may be a lack of health care; and brutality, corruption, violence, thievery and narcotics may be prevalent. In some countries, prisoners may be expected to pay for their own bed, food and medical services.

- (1) Information Required by the Mission or Headquarters. When information is received that a Canadian has been arrested or charged and seeks assistance, or when a consular officer decides that the circumstances of detention, arrest, trial, conviction, or sentence warrant consideration, detailed information should be submitted to Headquarters (Consular Operations Division). The following information may be sought from the complainant, his or her lawyer, family or friends, and the local police, court, prison, municipal, provincial or state authorities (Annex B gives a checklist which consular officers may find useful to prepare on the first visit to a detainee and place on file at the mission for reference, with a copy to Consular Operations Division):
 - (a) basis and evidence of the person's claim to Canadian citizenship and whether he is also a citizen of the receiving (or any other) country;
 - (b) specific complaint and evidence, if any, of unlawful discrimination, denial of justice or infringement of basic human rights;
 - (c) whether relatives or friends have been notified of the arrest; whether the accused wishes them to be informed of his or her whereabouts and of the arrest;
 - (d) reason for arrest, nature of offence, charge, timetable of legal proceedings, name and address of court, defence facilities available to the accused, possibility of release on bail, sentence, section of code under which accused was charged or

- convicted, severity of sentence in relation to offence, date of eligibility for conditional release.
- (e) when, why and how the person came to the receiving country;
 - (f) whether he is able to provide financially for his defence;
 - (g) any special circumstances bearing on a decision to grant or refuse assistance, such as age, health, family circumstances, possibility of deportation, nature of activities abroad;
 - (h) medical problems, if relevant.
- (2) Investigation. Having determined entitlement to protection the consular officers should investigate the circumstances of the arrest or detention. It may be decided further investigation is not called for if the standards of justice and care during incarceration are such as to ensure protection of basic human rights. An investigation, if undertaken, should be designed to reveal whether there was unlawful discrimination or denial of justice, harsh treatment during arrest, denial of due process of law, discrimination because of Canadian citizenship or for other reasons, or excessive sentence or fine by local standards. The consular officer should ensure that the accused has access to the services of legal counsel, that he or she is in touch with relatives or friends (if desired), or has assistance in obtaining bail. (See Chapter 1, "Admonitory Note".)
- (3) Intervention. A person under arrest must rely on local judicial procedures. Consular officers however may, with prudence, intervene informally with the authorities and seek relief from unfair or harsh treatment. Care should be taken to avoid any implication that Canadian officials have already concluded that the local authorities have maltreated the prisoner; or that the courts have been unjust. (See 2.4.9).
- (4) Canadian required to leave country. The local authorities may be prepared to release an imprisoned Canadian provided he or she leaves the country promptly. Similarly, Canadians released from prison on parole or on completion of their sentences may, if they are not deported, be required to leave the country forthwith.
- (a) Consular officers have no authority to assume responsibility for the custody of the offender or ex-prisoner, or for his or her prompt departure.
 - (b) When the Consular officer and Head of Mission are satisfied that the offender is a Canadian (criminals may carry passports to which they have no right), they must do what they can to assist including repatriation on undertaking to repay (if indigent), and with prior approval of Headquarters (Consular Operations Division) unless departure is required forthwith. They must not solve their problem by transferring it to a Canadian mission in a neighbouring country. If an offender has adequate means to leave the country, little or no help from the mission should be required.

§2.4.5 LEGAL AID

A person seeking legal assistance may be referred to the local Law Society or its equivalent. Consular officers should normally be prepared to provide the names of several reputable lawyers, making it clear that no recommendation is implied. . . . If the enquirers are destitute, they may be referred to the local Legal Aid Society or its equivalent; in many countries, a person on trial who is destitute will be provided with legal counsel by the Court. If free legal aid is not available the mission may seek Headquarters (Consular Operations Division) authority to pay for legal assistance as a relief measure, informing

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Consular Operations Division of the steps it took to secure legal aid. An Undertaking to Repay must be obtained.

§2.4.6 PURCHASE OF COURT RECORDS OR OTHER LEGAL DOCUMENTS

When purchase of records is essential to a destitute defendant, missions may seek Headquarters (Legal Advisory Division, JLA) authority to purchase the records, on a recoverable basis.

...

§2.4.8 TESTIMONY IN FOREIGN COURT

If consular officers are called upon to testify in a foreign court regarding matters concerning Canadians, they must seek guidance from Headquarters (Legal Advisory Division) before accepting.

§2.4.9 ASSISTANCE TO CANADIANS IN JAIL

- (1) Principle. In general, missions should render such assistance as is possible to ameliorate the conditions of detention where necessary, to facilitate communication with relatives or friends, and to seek to ensure that there is no discrimination in the conditions of incarceration because the person is a Canadian; this applies regardless of whether a case has resulted from cooperation between the local and Canadian authorities.

...

- (4) Costs covered by the Department. In special cases, it may be necessary to provide non-recoverable support to Canadian prisoners in foreign countries to cover the cost of non-elective or emergency medical or dental care, dietary or nutritional supplements, or other basic needs such as clothing or medicines. (In certain instances, missions may also be authorized or instructed to obtain at the Department's expense a legal opinion or advice concerning prisoner-related consular services.)
- (5) Eligibility. To receive this type of assistance, the prisoner must be both destitute and in a situation of demonstrable hardship. In all instances the consular official should be guided by humanitarian and compassionate considerations in making this determination. However, to ensure that this type of assistance will not undermine or displace funds from alternative sources, such support may only be provided as a last resort in cases where all other potential sources have been exhausted, or ruled out for other reason.
- (6) Budgetary approvals. Missions are responsible for recommending and delivering assistance (this may be done through intermediaries where appropriate), while approvals are the responsibility, in both budgetary and decision-making terms, of Headquarters (Consular Operations Division) who will provide the necessary financial coding. Receipts for the goods and services purchased must be retained and submitted to Headquarters with the Mission Financial Return. Cash may not be provided directly to prisoners.
- (7) Discontinuance of services. Assistance will cease immediately upon the fulfilment of any of the following conditions:

- (a) when funds from private or alternative sources become available on a regular basis;
 - (b) where circumstances in a particular prison have improved to the extent that the assistance is considered no longer necessary;
 - (c) when the prisoner is released or repatriated.
- (8) Annual report. Consular officials are required to provide a brief annual report on the effectiveness of the assistance and to certify that it contributes to the well-being of the prisoner. In the absence of such certification, this form of support will terminate automatically.

...

§2.5.1 TYPES OF ASSISTANCE NOT GRANTED

... Missions cannot be expected to have local laws set aside on behalf of Canadians implicated in an offence, or interfere with the course of local justice, or provide legal advice. In no circumstances are missions authorized to post bail or pay fines.

Annex D-2 A guide to services provided to Canadians detained or imprisoned in foreign countries

...

3. HIRING A FOREIGN LAWYER

The search for suitable legal representation in the country of arrest is a task of critical importance and should be approached with care and caution. It is not at all uncommon, for instance, for foreign lawyers to request payment of large retainers, frequently in exchange for vague promises, and there have been many cases in which such promises have been ignored, abandoned or forgotten. Regrettably, the victimization of foreign clients has become a systematic and highly refined practice in certain parts of the world. While Canadian representatives abroad will do their best to provide a list of lawyers who may specialize in particular types of cases, no individual lawyers can be recommended. The decision on hiring counsel is the responsibility of the prisoner or the prisoner's representatives. If possible, several lawyers should be canvassed in order to determine who is most competent to handle the case. Some factors worth considering include the following:

- (a) the experience of the individual in a particular area of law (e.g. narcotics offences);
- (b) the experience of the individual in defending Canadians or other foreigners (track record, success rate);
- (c) reputation;
- (d) contacts;
- (e) ability to converse in the client's mother tongue;
- (f) the range of fees in relation to the client's ability to pay;
- (g) willingness to accept payment on a fee for service basis.

Depending upon circumstances, Canadian consular officials in Ottawa or abroad may be in a position to assist in facilitating communication between prisoners or their families and the lawyer selected. They cannot however, become materially involved in any way.

2.8 Kenya

a. Embassy of Kenya, Washington, DC, *Consular functions in cases of arrest and/or detention of Kenyan nationals in the United States*, www.kenyaembassy.com/incasearrest.html

Upon receipt of notification of arrest/detention of Kenyan nationals, the Embassy may provide a range of consular services including the following:

- Attempt to ensure that they receive a fair and speedy trial.
- Visit them in prison to ensure that they are receiving humane treatment.
- Converse and correspond with them and assist in arranging for legal representation.
- Facilitate communications with their families both within the U.S. and in Kenya.

Consular officers are required to refrain from acting on behalf of a foreign national, if the national opposes their involvement. In addition, consular officers are precluded from acting as attorneys for their nationals. As such the embassy's consular officers do not provide legal representation. We will offer basic legal advice and if necessary, assist in identifying a suitable attorney. It is to be noted, however, that the embassy does not provide any financial assistance or provide bond facilities for detained Kenyans.

b. Ohio, Franklin County, Court of Common Pleas, Criminal Division, *State v. Oluch*, Case No. 02CR-773, Partial Transcript of Proceedings, 28 August 2008

[The speaker referred to as "the court" is the Hon. David W. Fais. "Ms. Shank" is S. Adele Shank, attorney for Oluch.]

THE COURT: May I have him come to the table there, please. And may I have a spelling of his name, please.

MS. SHANK: Macharia, M-a-c-h-a-r-i-a, first name is Peter.

THE COURT: And, Sir, would you give us the nature of your position, please.

MR. MACHARIA: Yes. I come from the Embassy of Kenya, Secretary to the Embassy, dealing with consular issues. I . . . will purposely find out what is going on with . . . Mr. Oluch.

MS. SHANK: Tell the judge what you saw.

[Mr. Macharia is sworn as a witness.]

THE WITNESS: . . . I talked to him in Swahili. He's been in the same position for about five minutes, I talked to him in detail, and I asked him if [he] could shake his head and see what I can. . . . He didn't respond.

THE COURT: Any response from him?

THE WITNESS: No, there was no response from him. . . .

THE COURT: And you had an opportunity to try and speak with him today as well; is that correct?

THE WITNESS: Yes, I did. This morning.

THE COURT: What took place then? That was in the courtroom, wasn't it?

THE WITNESS: Yes.

THE COURT: There was nobody in the courtroom but you?

THE WITNESS: Just the four of us. Me . . .

THE COURT: Ms. Shank.

THE WITNESS: And security.

THE COURT: But no others?

THE WITNESS: Yes. So that has been the position, I haven't gotten any answer. By the look of things, it doesn't look very well to me. Either something is wrong, I don't really know.

THE COURT: Did he respond in any way?

THE WITNESS: No. I could see the blinking of the eyes from the position I was, but nothing else. . . .

THE WITNESS: I will be traveling back tomorrow morning to Washington D.C. But I also will try and see him this afternoon again. I did tell him in Swahili I will be back after lunch to see whether he will accept to talk to me. So I am still going back to the hospital again this afternoon for my final talk with him, if he so accepts.

THE COURT: Okay. Thank you, sir. I appreciate you being here.

2.9 South Africa

Department of Foreign Affairs, official website, *Advice to South African Citizens in the Event a South African is Arrested or Jailed Abroad*, www.dfa.gov.za/consular/arrest.htm

What Consular Officers can do for South Africans detained/arrested abroad: . . . Provide general information about the legal system of the country of arrest. Information may include details on legal aid (if available) and prosecution, a list of lawyers (no recommendations may be made for a specific lawyer), remand, bail and appeal procedures so that he/she understands his/her rights and the processes involved; . . .

2.10 Ireland

Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987, Statutory Instrument 119/1987, para. 14(2)

Consular officers shall be entitled to visit one of their nationals, or a national of another State for whom, by formal or informal arrangement, they offer consular assistance, who is an arrested person and to converse and correspond with him and to arrange for his legal representation.

2.11 Moldova

Consular Statute, confirmed by Decision of the Government of the Republic of Moldova, No 368, 28 March 2002 (Monitorul Oficial [Official Monitor] of the Republic of Moldova, no. 50-52/484, 11 April 2002), Article 52

Consular officials have the right to communicate with citizens of the Republic of Moldova deprived of liberty, with respect for international treaties and for the laws of the state of residence. They have the right to intervene with the authorities to appoint an attorney or an interpreter and thereby to see that the procedural rights envisaged by the laws of the state of residence are enjoyed.

2.12 United Kingdom

Foreign and Commonwealth Office, *Consular Work: Annual Review 2002*, at 8

The UK established a Pro Bono Legal Panel of lawyers to assist local lawyers representing UK nationals. If a UK national faces capital punishment abroad, UK consuls and other officials make representations to avoid execution. They may assist the national in compiling documentation or other evidence available in the sending State that may be favourable to the national as a sentencing decision is being made.

The FCO Pro Bono Panel of lawyers was launched in September 2001 to provide free legal assistance to local lawyers representing British nationals imprisoned overseas. The panel comprises 53 qualified barristers and solicitors, selected for their wide range of experience in all areas of law, particularly in criminal matters. There are a number of cases where panel members are currently providing assistance to the prisoner's defence team. We are preparing guidelines for our Posts on the procedures for the involvement of UK pro bono lawyers.

2.13 Mexico-United States

Memorandum of Understanding on Consular Protection of Mexican and United States Nationals, 7 May 1996, Dept. of State File No. P96 0065-0984/0987

The Government of the United Mexican States and the Government of the United States of America . . . [a]dopt the following principles and measures: . . .

4. To allow and to facilitate, consistent with the relevant laws of each country, consular officials to be present at all times at the trials or judicial procedures concerning their respective nationals, including those legal procedures relating to minors.

2.14 China-Canada

Consular Agreement between the Government of Canada and the Government of the People's Republic of China, Ottawa, 28 November 1997, Article 8

5. In the case of a trial or other legal proceedings against a national of the sending State in the receiving State, the appropriate authorities shall make available to the consular post information on the charges against that national. A consular officer shall be permitted to attend the trial or other legal proceedings.
6. In the case of a trial or other legal proceedings against a national of the sending State, the appropriate authorities of the receiving State shall make available adequate interpretation to that national when necessary.

2.15 China-Australia

Agreement on Consular Relations between Australia and the People's Republic of China, Canberra, 8 September 1999, 2169 UNTS 494, Article 11

COMMUNICATION AND CONTACT WITH NATIONALS OF THE SENDING STATE

...

- (f) in the case of a trial or other legal proceeding against a national of the sending State in the receiving State, the appropriate authorities shall make available to the consular post information on the charges against that national. A consular officer shall be permitted to attend the trial or other legal proceedings;
- (g) in the case of a trial or other legal proceedings against a national of the sending State, the appropriate authorities of the receiving State shall make available adequate interpretation to that national when necessary.

2.16 Italy-Argentina

Convention on Consular Functions, Rome, 9 December 1987, 1577 UNTS 264, Article 14(2)

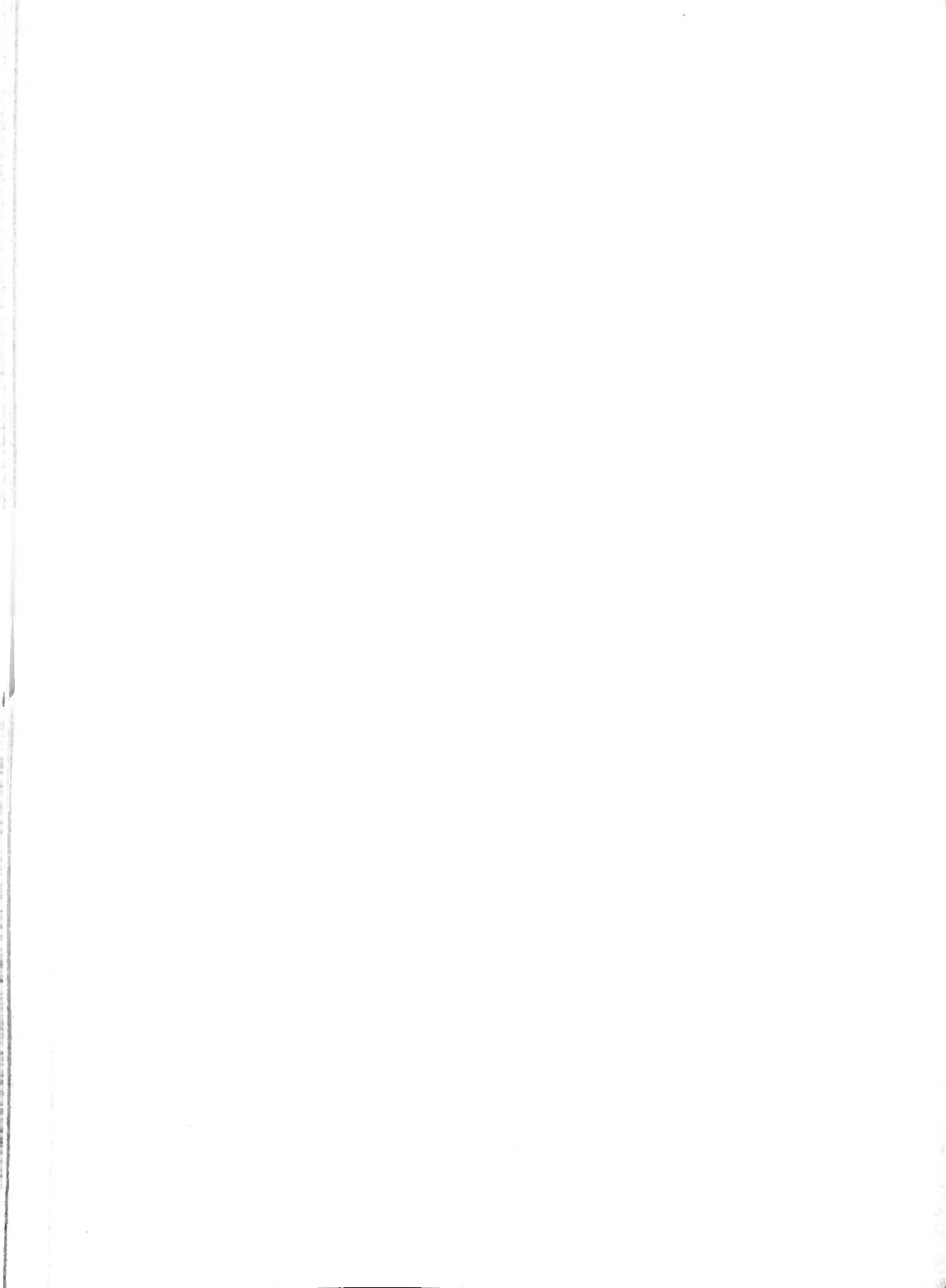
In all cases where a national of the sending State is subjected to any form of deprivation or limitation of personal freedom, the authorities of the receiving State shall so inform a consular officer of the sending State within three days and provide him with a due account of the facts which have given rise to such measures.

2.17 Ukraine

Parliament Commissioner for Human Rights, *Observance of the Rights of Ukrainian Citizens Deprived of Liberty Abroad*, 2003, reproduced by permission of Office of Ombudsman, Ukraine

An analysis of the complaints addressed to the Commissioner for Human Rights as well as the information provided by the Ministry of Foreign Affairs of Ukraine proved that our citizens deprived of liberty abroad suffer from a number of serious violations of their rights and freedoms, such as:

- violations of the requirements of the Vienna Convention on Consular Relations 1963 and Ukraine's bilateral consular treaties as to informing Ukrainian consular posts about the detention (arrest) of Ukrainian citizens on the territory of the host country;
- violation of our citizens' rights concerning prompt notification of Ukrainian consular posts;
- gross violations of laws on criminal procedure during arrest (detention), pretrial investigation, and trial, in particular:
 - delay in notifying the reasons and grounds for detention (arrest)
 - biased and discriminatory attitude to Ukrainian citizens by legal investigators and judicial bodies of the host country;
 - long periods of pretrial investigation and judicial review of criminal cases;
 - unsatisfactory conditions of custody (specifically violations of sanitary and hygienic standards, bad food and medical services);
 - abuse by enforcement bodies of foreign states: threats, torture, inhuman or degrading treatment, demand for bribes.



Part II

Consular access obligations of a receiving state

A number of legal and factual circumstances determine the scope of the obligations of a receiving state in regard to consular access. Obligations arise both under the VCCR and, where applicable, bilateral treaties. Bilateral treaties may, in particular, call for blanket notification to a sending state consul about all arrests (with one important exception) of a sending-state national (Chapter 7). Under the VCCR, a basic obligation is to advise the foreign national about consular access. That obligation arises upon arrest or detention. Whether that circumstance is present is sometimes not obvious (Chapter 3). A receiving state's obligations are premised on there being a certain connection between the individual and a particular sending state. That premise raises issues of nationality or other connection between the individual and a sending state that may give rise to a right of the sending state to provide protection (Chapter 4).

If there is an arrest or detention, and if the individual is one whose arrest or detention gives rise to consular access obligations, the question arises as to how soon the receiving state must fulfill those obligations, whether the obligation is to advise the foreign national (VCCR Article 36) or to notify a consul (per a bilateral treaty). This issue is examined in Chapter 5. Another issue that arises is that of the requirements for contact between a consul and a sending-state national, in particular as to the confidentiality of their communication. This issue is examined in Chapter 6.



3 Situations requiring advice about consular access

3.1 Introduction

A receiving state's obligation to inform a foreign national about consular access comes into play only if the circumstance specified in VCCR Article 36 obtains, namely, that the foreign national is under arrest or detention. The most usual situation is an arrest on suspicion of a criminal offense. VCCR Article 36 does not further define "arrest" or "detention." Canada's instructions encourage consuls to seek information of any arrest or detention of a Canadian national (Document 1).

A foreign national stopped by traffic police on a highway for exceeding the speed limit for automobiles, for example, need not be given advice about consular access, if the officer is merely verifying the individual's right to operate a motor vehicle and issuing a traffic citation (Document 4a). An Australian case excerpted in this chapter involved a questioning by customs officials upon an Austrian national's arrival from abroad at an Australian airport. The Austrian was questioned at a second location at the airport, where he made an incriminating statement. The statement was used at his trial, where he was convicted. On appeal, he challenged the admissibility of the statement for what he claimed was a violation of the obligation to advise about consular access. The appellate court decided, however, that the interaction did not amount to an arrest or detention that would bring into play VCCR Article 36 (Document 3).

The criterion of "detention" may be met in situations not involving suspicion of crime. U.S. information published for its own officials indicates that a foreign national detained for immigration purposes must be advised about consular access (Document 4a). A Mexico-U.S. agreement also specifies that the obligation to inform about consular access applies to a foreign national detained for immigration purposes (Document 5). In an Austrian case involving the propriety of arrest and detention of a foreign national pending deportation, Austrian authorities submitted to the court a form used by Austria to advise a person being arrested for deportation of the right of consular access (Document 6).

Detention on grounds of mental illness also qualifies. A statute in the U.S. State of Oregon addresses this situation (Document 4b). As that statute suggests, a detention on mental health grounds may impact a criminal prosecution, because the individual may make statements of an incriminating nature.

A receiving state's obligation to respect consular access in the deportation context does not relate directly to the criminal process. However, violation in the deportation context may impact a criminal prosecution, if the individual is subsequently prosecuted for unlawful entry after being deported. The deportation that is an element of the offense of re-entry after deportation may not be present if the deportation was tainted by a failure to advise about consular access (Chapter 16).

The detention need not be a lawful detention to trigger consular access obligations. If a foreign national is detained under a preventive detention statute, as exist in some states, consular access obligations apply. The same is true if a foreign national is detained on no basis provided by the law of the receiving state, that is, a completely unlawful arrest, even if the person is kept at a secret location. The criterion of "detention" is also met, although cases have not reached the courts, if a foreign national is subjected to house arrest, or if a foreign national is detained as a material witness, a type of detention allowed in some states of the world.

By the VCCR, consular access applies to detentions within the territory of a receiving state. However, sending states have viewed receiving states as obligated to allow consular access when the receiving state detains a sending-state national at a location outside the territory of the receiving state. As will be indicated in Chapter 11, courts in Canada and the United Kingdom found consular access applicable to the detention of Canadian and UK nationals by the United States at its Guantanamo, Cuba, naval base. The United States granted access for consular visits there.

The circumstance of arrest or detention gives rise to the receiving state's obligation to advise the foreign national about consular access. However, under VCCR Article 36(1)(a), a consul as a general matter has a right to communicate with co-nationals, and co-nationals have a right to communicate with a consul. These rights are not qualified by the circumstance of arrest or detention. Thus, even if it is unclear whether the sending-state national is under detention, a consul who seeks to communicate is entitled to do so, and similarly the national is entitled to communicate with the consul. For example, take the hypothetical situation of a sending-state national flying into the receiving state who, upon arrival at the airport, is denied entry into the receiving state for not possessing a proper visa. If that individual is prevented from proceeding through passport control while awaiting a flight out of the receiving state that is scheduled to depart shortly, the situation probably does not qualify as an "arrest" or "detention." However, if the individual desires to communicate with a consul, perhaps to complain about the denial of entry, the receiving state must not obstruct the communication. Similarly, if in that situation a consul sought to communicate with the individual, the receiving state would be obliged to allow such communication.

3.2 Canada

Department of Foreign Affairs and International Trade, Consular Affairs Bureau, *Manual of Consular Instructions*, §2.4.4: Arrests, Detentions, Charges

The rights of consular officers to communicate with and visit their citizens in prison are basic to their protective functions. It is important that consular officers learn of all arrests or detentions of Canadians, and every attempt should be made to arrange for such notification by the local police authorities.

...

(5) *Access to Canadian arrested or detained.* Article 36(1)(c) of the *Vienna Convention on Consular Relations (VCCR)* provides that “consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse or correspond with him and to arrange for his legal representation”. Consular officers should immediately report to the Diplomatic Mission or Headquarters if they are refused access, or if Canadian detainees are refused communication with them. Consular officers should impress upon the police the necessity for interviews with Canadians under arrest or in detention; such interviews should preferably be in private, consistent with normal security precautions. A detainee may express the wish not to have relatives notified or to receive visits of the consular officer. The detainee’s wishes should be respected but the consular officer should be satisfied that the best interests of the detainee are considered by at least one visit, and if necessary, the consular officer should consult Headquarters if some action seems appropriate.

3.3 Australia

New South Wales Court of Criminal Appeals, *R v. Abbrederis*, 36 ALR 109, 51 FLR 99, 1 NSWLR 530 (1981)

The objection [by Abbrederis to the admission of his statement], in my view, has no merit. Even giving the fullest weight to the prescriptions in art 36 I do not see how it can be contended that they in any way affect the carrying out of an investigation by interrogation of a foreign person coming to this country. The article is dealing with freedom of communication between consuls and their nationals. It says nothing touching upon the ordinary process of an investigation by way of interrogation. In my view this ground of appeal is not made good.

3.4 United States

a. Department of State, *Consular Access and Notification: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them* (http://travel.state.gov/law/consular/consular_636.html)

QUESTIONS ABOUT WHEN CONSULAR NOTIFICATION SHOULD BE GIVEN

Q. What kinds of detentions are covered by this obligation?

A. The VCCR provides for informing the foreign national of the right to consular notification and access if the national is “arrested or committed to prison or to custody pending trial or is detained in any other manner.” While there is no explicit exception for short detentions, the Department of State does not consider it necessary

to follow consular notification procedures when an alien is detained only momentarily, e.g., during a traffic stop. On the other hand, requiring a foreign national to accompany a law enforcement officer to a place of detention may trigger the consular notification requirements, particularly if the detention lasts for a number of hours or overnight. The longer a detention continues, the more likely it is that a reasonable person would conclude that the Article 36 obligation is triggered.

Q. Do we have to inform and notify even when the detention is only while a traffic citation is written, or for a similar brief time?

- A. No. The VCCR on its face requires informing a foreign national that a consular official may be notified whenever a foreign national is arrested or detained in any manner, without distinguishing arrests that do not result in a significant detention. The purpose of this requirement, however, is to ensure that a government does not place an alien in a situation in which the alien cannot receive assistance from his/her own government. When an alien is cited and immediately released, this consideration is not relevant because the alien is free to contact consular officials independently. The Department of State therefore does not consider brief routine detentions, such as for traffic violations or accident investigations, to be the type of situation contemplated by the VCCR.

Q. If we have a foreign national detained in a hospital, do we have to provide consular notification?

- A. Yes, if the foreign national is detained pursuant to governmental authority (law enforcement, judicial, or administrative) and is not free to leave. He/she must be treated like a foreign national in detention, and appropriate notification must be provided.

Q. Are aliens in immigration detention covered by the consular notification requirement?

- A. Yes, as a general matter. Consular notification is provided for in the Bureau of Citizenship and Immigration Services in the Department of Homeland Security's regulations (8 C.F.R. 236.1(e)). The Department of State does not, however, ordinarily consider aliens who are found inadmissible at a port of entry and required to remain there until they can depart to be detained within the meaning of the VCCR. Immigration officials may permit such aliens access to consular officials as a matter of discretion, however – e.g., in situations where the detention becomes prolonged because onward transportation is significantly delayed.

b. Oregon Statutes §426.228 (as revised 2003 c.109 §2)

- (1) A peace officer may take into custody a person who the officer has probable cause to believe is dangerous to self or to any other person and is in need of immediate care, custody or treatment for mental illness. As directed by the community mental health and developmental disabilities program director, a peace officer shall remove a person taken into custody under this section to the nearest hospital or nonhospital facility approved by the Department of Human Services.

...

- (9) (a) When a peace officer takes a person into custody under this section, and the peace officer reasonably suspects that the person is a foreign national, the peace officer shall inform the person of the person's right to communicate with an official from the consulate of the person's country.
- (b) A peace officer is not civilly or criminally liable for failure to provide the information required by this subsection. Failure to provide the information required by this subsection does not in itself constitute grounds for the exclusion of evidence that would otherwise be admissible in a proceeding.

3.5 Mexico-United States

Memorandum of Understanding on Consular Protection of Mexican and United States Nationals, 7 May 1996, Dept. of State File No. P96 0065-0984/0987

The Government of the United Mexican States and the Government of the United States of America . . . [a]dopt the following principles and measures: . . .

2. To provide any individual detained by migration authorities with notice of his/her legal rights and options, including the right to contact his/her consular representatives, and to facilitate communication between consular representatives and their nationals.

3.6 Austria

European Court of Human Rights, *Rusu v. Austria*, Application No. 34082/02, 2 October 2008

Section A

You are hereby informed that you have been arrested by law-enforcement officers (federal police/customs officers/Austrian federal army) in accordance with section 43(1)(2) of the Aliens Act because you entered Austria *without reporting to the Border Control Office* and were apprehended immediately afterwards.

You are entitled to have a relative or other person close to you advised of your arrest, at your request, without unnecessary delay and according to your choice. In addition, the consular representation of your country of nationality will be immediately informed of your detention.

You will be immediately brought before the authority responsible, namely the Neusiedl am See District Administrative Authority, which will issue the subsequent orders.

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Section B

I . . . (Name) . . . (Date of birth) . . . , would like the following person to be advised of my arrest: . . .

Would you like your consular representation in Austria to be informed of your arrest?

Yes

No

By signing, I also confirm receipt of information sheet I.

(Signature)

4 Individuals who must be advised

4.1 Introduction

Before a receiving state is required to advise about consular access, the individual must fall into the category of “foreign national.” Whether an individual falls into this category is sometimes questioned by receiving state officials if the individual is a long-time resident of the receiving state. That circumstance, however, is irrelevant as regards the obligation to advise about consular access, as consular access applies on the basis of nationality, regardless of residency. Germany’s Federal High Court found that the obligation to advise applied in cases before it because the individuals in question held foreign nationality, even though their lives were “centered in Germany” (Document 2). In the *LaGrand* case before the ICJ, the United States acknowledged that it had violated the obligation to advise two German nationals about consular access, even though they were long-time residents of the United States (Document 3a).

A question that has been controversial is whether the authorities of the receiving state must be aware of the fact that the individual is a foreign national. If they fail to advise an individual about consular access, being unaware of the individual’s foreign nationality, is the receiving state in violation of its obligation to advise about consular access? A foreign national may, in response to questions about identity and nationality, try to conceal the foreign nationality for fear of being mistreated or deported. It is even possible that a foreign national may not, at the time of arrest, be aware of the foreign nationality. In the *LaGrand* case, the two individuals, who had lived in the United States since childhood, may not have known that they were nationals of Germany.

In the *Avena* case, the ICJ said that the obligation to advise about consular access arises when the authorities become aware of the individual’s foreign nationality, or once there are “grounds” to think that the individual is a foreign national (Document 3b). That position would require awareness, or at least reason to be aware, before a receiving state must advise about consular access. VCCR Article 36 is, however, silent on the issue, leading one member of the ICJ to take the contrary position. Judge Tomka, writing separately in *Avena* (also in Document 3b), says that the obligation is based on the factual circumstance of the foreign nationality of the individual, and therefore that the obligation to inform is not

dependent on awareness on the part of receiving-state authorities of the individual's foreign nationality, or even on the presence of facts that would constitute "grounds" to suspect foreign nationality.

A situation may arise that an individual arrested is a national of more than one state. The VCCR does not address this circumstance but leaves it to the general international law on nationality as it affects the capacity of a state to claim a right of protection. If the individual is a national of more than one state, but not including the receiving state, little difficulty arises. It is accepted that any of the states of nationality may represent the person. The United States has issued an instruction to consuls to this effect (Document 4a). If a bilateral treaty calling for automatic notification exists with any of the states of nationality (see Chapter 7), the receiving state must notify consuls of those states. South Africa takes the position that if the individual is a dual national of South Africa and of some other state (not including the receiving state), it will provide protection only if the individual traveled to the receiving state on a passport of South Africa, rather than on another state of nationality (Document 5).

More complex is the situation in which one of the individual's states of nationality is the receiving state, that is, the individual is a national both of the sending state and the receiving state. Many sending states do not seek to provide consular protection in these circumstances. South Africa is an example (Document 5). Some sending states do seek to provide protection. The United States does so if the individual resides in the United States and traveled to the receiving state on a U.S. passport (Document 4b). Canada has concluded agreements with several other states providing for access to such individuals (Document 6).

The traditional view in international law is that a receiving state need not permit consular protection if the individual is a national of both the receiving and sending states. The matter is in some flux, however. In 2006, the ILC adopted the Draft Articles on Diplomatic Protection, which focus on the strength of each of the nationalities: "A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim."¹ That draft treaty, not yet in force, relates to claims for injuries on behalf of a national, for example where an individual's property is nationalized, rather than to consular access in the arrest situation. The concept underlying the Draft Articles may, however, have relevance for consular access.

Yet another situation that leads to uncertainty is that of an individual who does not hold the nationality of the sending state but who has some connection to the sending state, perhaps being a relative of sending-state nationals who ask the sending state to assist (Document 4c). Sending states sometimes seek to provide protection in such circumstances. The situation is more compelling, but still uncertain, if the individual, while not a national of the sending state, is

1 UN Document A/G1/10, Supplement No. 10, art. 7 (2006).

a permanent resident there. The United States (Document 4c) and Canada (Document 6), addressing the ambiguity of this situation, do not rule out seeking to provide protection.

One other circumstance may impact the issue of which state provides protection to a particular foreign national. As indicated in Chapter 1, some states share consular duties under agreements that require them to provide protection for nationals of other states. Certain pairs of states do so by bilateral agreement, whereby each provides consular services in localities in which the other has no consulate. A U.S. instruction to consuls reflects their obligation to protect nationals of states for whom the United States has accepted responsibility (Document 4d). The member states of the European Union share consular services with all the other member states. Any national of an EU member state who does not have access to a home-state consul may receive protection from a consulate of another EU member state in the locality (Document 6). In such situations, the receiving state's obligation is to inform the foreign national of a right to contact a consul of the appropriate state. Estonian legislation reflects the practice of sharing of consular services in the European Union (Document 7).

4.2 Germany

Federal High Court, Fifth Criminal Senate, *Case of S., F., Sa., D., & T.*, 5 StR 116/01, 5 StR 475/02, 25 September 2007, para. 19

The obligation to inform is connected to the foreign nationality of the suspect and to the situation of being detained. This applies even if the suspect's life is centered in Germany.

4.3 International Court of Justice

a. *LaGrand Case (Germany v. USA)*, 2001 ICJ 466, paras. 13–15

13. Walter LaGrand and Karl LaGrand were born in Germany in 1962 and 1963 respectively, and were German nationals. In 1967, when they were still young children, they moved with their mother to take up permanent residence in the United States. They returned to Germany only once, for a period of about six months in 1974. Although they lived in the United States for most of their lives, and became the adoptive children of a United States national, they remained at all times German nationals, and never acquired the nationality of the United States. However, the United States has emphasized that both had the demeanour and speech of Americans rather than Germans, that neither was known to have spoken German, and that they appeared in all respects to be native citizens of the United States.
14. On 7 January 1982, Karl LaGrand and Walter LaGrand were arrested in the United States by law enforcement officers on suspicion of having been involved earlier the same day in an attempted armed bank robbery in Marana, Arizona, in the course of which the bank manager was murdered and another bank employee seriously injured. They were subsequently tried before the Superior Court of Pima County, Arizona, which, on 17 February 1984, convicted them both of murder in the first degree,

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attempted murder in the first degree, attempted armed robbery and two counts of kidnapping. On 14 December 1984, each was sentenced to death for first degree murder and to concurrent sentences of imprisonment for the other charges.

15. . . . It is not disputed that at the time the LaGrands were convicted and sentenced, the competent United States authorities had failed to provide the LaGrands with the information required by this provision of the Vienna Convention, and had not informed the relevant German consular post of the LaGrands' arrest. The United States concedes that the competent authorities failed to do so, even after becoming aware that the LaGrands were German nationals and not United States nationals, and admits that the United States has therefore violated its obligations under this provision of the Vienna Convention.

b. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2004 ICJ 12

63. The Court finds that the duty upon the detaining authorities to give the Article 36, paragraph 1 (b), information to the individual arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national. Precisely when this may occur will vary with circumstances. The United States Department of State booklet, *Consular Notification and Access – Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nations in the United States and the Rights of Consular Officials to Assist Them*, issued to Federal, state and local authorities in order to promote compliance with Article 36 of the Vienna Convention points out in such cases that: “most, but not all, persons born outside the United States are not [citizens]. Unfamiliarity with English may also indicate foreign nationality.” The Court notes that when an arrested person himself claims to be of United States nationality, the realization by the authorities that he is not in fact a United States national, or grounds for that realization, is likely to come somewhat later in time.

Judge Tomka, Separate Opinion

...

II. INTERPRETATION *RATIONE TEMPORIS* OF THE OBLIGATION TO INFORM UNDER ARTICLE 36, PARAGRAPH 1 (b)

14. I have misgivings as to the interpretation by the Court of Article 36, paragraph 1 (b). According to that interpretation, which is set out in paragraph 63 of the Judgment, the obligation under this subparagraph to provide information to the individual arises only once it is realized by the arresting authorities that the person is a foreign national, or once there are grounds to think that person is probably a foreign national. I consider that this interpretation is not well founded. Were such an approach to the interpretation of the norms of international law to be applied more widely, there is a danger that it might weaken the protection accorded to certain subjects (for example, children) under the procedures for safeguarding human rights or under international humanitarian law.
15. The obligation laid on the receiving State by Article 36 of the Vienna Convention does not depend on the authorities of the said State knowing that the person arrested is a foreigner. The obligation to provide information arises as soon as a foreigner is

detained. Such an arrest constitutes an objective fact sufficient in itself to activate the receiving State's obligation.

16. Knowledge of the facts plays no role, either in respect of the existence or applicability of the obligation to provide information under Article 36, paragraph 1 (*b*), or in respect of the violation of that obligation. Ignorance is not a circumstance precluding wrongfulness. *Ignorantia non excusat*. The State authorities must show due diligence in the exercise of their powers, and there is nothing to prevent them from making enquiry, as soon as the arrest is made, in regard to the nationality of the person detained. If that person claims to be a national of the country in which he has been arrested, he can no longer rely on the fact that he was not informed of his rights under Article 36, paragraph 1, of the Vienna Convention. Informing a person in custody that the Vienna Convention accords him certain rights if he is a national of another State is undoubtedly the best way of avoiding any breach of the obligations incumbent upon the authorities of the receiving State under Article 36 of the Convention. But those authorities cannot justify their omissions by relying on their own mistakes or errors of judgment.

4.4 United States

a. Department of State, *Foreign Affairs Manual*, vol. 7 (<http://www.state.gov/m/a/dir/regs/fam/c22164.htm>)

§416.3-2 Dual national arrestees in a third country. It is the Department's position that a dual national traveling in a third country on a U.S. passport is entitled to the full range of consular services. Anything less requires appropriate representations to the host government, in consultation with the Department.

- (1) A dual national traveling abroad on a passport of that person's other country of nationality may not, however, be entitled to the protective services of the United States consul in a third country.
- (2) You should show an interest in any difficulties that such a person may encounter and be as helpful as possible should relatives inquire about the case.
- (3) If the second country of nationality is providing protective services to a dual national, the U.S. consular officer need not become directly involved but should continue to follow developments in the case and report them to the Department.
- (4) In case of doubt as to the consular officer's responsibility in providing protective services to a dual national in a particular case, the post should refer the matter to the Department (CA/OCS/ACS) for an advisory opinion.

b. Department of State, *Foreign Affairs Manual*, vol. 7 (<http://www.state.gov/m/a/dir/regs/fam/c22164.htm>)

§416.3-1 Dual national arrestees in the non-US country of nationality. The most complex problems regarding provision of protective services to dual nationals arise when the holder of dual nationality experiences difficulties with the law in his/her other (non-US) country of nationality. In these cases, in order to determine what representations you may be able to make on that person's behalf, and what your chances of success may be, you need to examine certain factors:

4-4 *Consular access obligations of a receiving state*

- (1) Is the person physically residing in the host country, or physically residing in the United States and only visiting or traveling through the host country?
- (2) Did the person enter the host country on a U.S. passport?
- (3) Is there reason to assume that the person may have not known of his/her foreign nationality?
- (4) Is the host country one that does not allow its citizens to divest themselves of that nationality?
- (5) It is a generally recognized rule, often regarded as a rule of international law, that when a person who is a dual national is residing in either of the countries of nationality, the person owes paramount allegiance to that country, and that country has the right to assert its claim without interference from the other country. While you should attempt to provide consular services, you should make it clear to the prisoner (if possible) and to any family members that consular access and services may be severely limited.
- (6) If the arrestee's primary physical residence is in the United States, and particularly if he or she entered the host country on his or her U.S. passport, you should press very hard for consular access and visitation rights. If the arrestee may not have known of the second nationality, or had no legal recourse to renounce that nationality, these factors should also be used in persuading local authorities to allow U.S. consular services.

c. Department of State, *Foreign Affairs Manual*, vol. 7 (<http://www.state.gov/m/a/dir/rcgs/fam/c22164.htm>)

§417 U.S. legal permanent resident aliens. At times, you will come across arrest cases of individuals who are not U.S. citizens or nationals but who are legal permanent residents with strong ties to the United States. Their arrest may come to your attention from other family members in the United States, other prisoners, congressional offices, or even host government officials who on occasion are not quite clear on the exact status of a U.S. "green card" holder [a reference to a card, green in color, issued by the United States to a non-national to whom it grants the status of permanent resident]. The Department's general guidance in such cases is:

- (1) Consular officers have neither the right nor the responsibility under the Vienna Consular convention or any existing bilateral consular conventions to formally request access and visitation to such prisoners, nor to host governments have any legal obligation to accede to such requests.
- (2) Under international law, U.S. Legal Permanent Resident Aliens (LPRs) must turn to the country of their nationality or citizenship to request and receive consular services.

§417.1 Exceptions. As a practical matter, however, there are cases in which you may become involved, to varying degrees, often on humanitarian grounds or because of the arrestee's strong U.S. ties. These cases may include arrestees that meet some or all of the following profiles:

- (1) An LPR who is not a citizen of the arresting country
- (2) An LPR whose country of nationality does not have consular representation in the arresting country

- (3) An LPR whose immediate family members (spouse, parents, children) are American citizens
- (4) An LPR who is a national of the arresting country, but has been raised in the United States, does not speak the host country language, and has no remaining significant ties to the country of nationality
- (5) An LPR whose arrest has been reported to you by host government officials, with the express or implied expectation that you will take some interest in the case
- (6) An LPR in whose case the Department has a specific interest.

d. Department of State, *Foreign Affairs Manual*, vol. 7 (<http://www.state.gov/m/a/dir/regs/fam/c22164.htm>)

§416.1 *Responsibilities.* As consular officer your clientele in Arrest cases includes: . . .

- (6) A “third country” national (TCN) for whom the United States has formally accepted responsibilities as protecting power.

4.5 South Africa

Department of Foreign Affairs, *Advice to South African Citizens in the Event a South African is Arrested or Jailed Abroad* (<http://www.dfa.gov.za/consular/arrest.htm>)

Dual nationals arrested/detained in the country of their other nationality will not receive assistance from South African Consular Representatives. If a dual national is arrested/detained in another country, of which he/she is not a national, and he/she did not travel on a South African passport but on the passport of his/her second nationality, the dual national must contact the consular representative of the country on which passport he/she travelled.

4.6 Canada

Department of Foreign Affairs and International Trade, Consular Affairs Bureau, *Manual of Consular Instructions*, Chapter 2, Protection and Assistance. §2.4.4(6)

[Annex C, mentioned in this document, lists Bulgaria, China, Hungary, Mexico, Romania, and Russia.]

Access to arrested or detained Canadian with dual nationality. The VCCR is silent on consular access when a dual national is detained or arrested in the country of other citizenship. A number of countries (See Annex C) have entered into bilateral undertakings with Canada which grant some limited protection for Canadian dual nationals while visiting their country of other citizenship. In countries with which we do not have such undertakings, if the arrested or detained Canadian is also a citizen of the country concerned, the local authorities may not recognize a formal right to intervene; consular officers may be limited to making informal representations, which may require consultations with Headquarters. Scope for effective action may be even more limited when a permanent resident (landed immigrant) who has not yet become a Canadian citizen is arrested in the country of

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nationality. Formal representations should normally not be undertaken without instructions from Headquarters . . .

4.7 European Union

Consolidated Version of the Treaty Establishing the European Community, Article 20, *Official Journal* C325, 24 December 2002, as implemented by Decision of EU Council, 19 December 1995, Decision 95/553/EC, *Official Journal* L314, 28 December 1995

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State.

4.8 Estonia

Consular Act, 3 December 2003, as amended 25 February 2004 (RT I 2004, 14, 92) (<http://www.legaltext.ee/text/en/X80005.htm>)

§47. Provision of consular assistance pursuant to international agreement: In a foreign state where Estonia does not have a representation, the representation of a third state may provide consular assistance to Estonian nationals on the basis of an international agreement and with the consent of the receiving state. A representation of Estonia may provide consular assistance to nationals of a third state on the basis of an international agreement and with the consent of the receiving state.

. . .

§58. Provision of consular assistance to European Union national

- (1) A representation of the Republic of Estonia shall protect the interests of a European Union national with the consent of the receiving state if the Member State of the European Union of which the person is a citizen does not have a representation in the receiving state.
- (2) At the request of a Member State of the European Union, consular assistance shall be provided if a national of the Member State is in distress, detained or serving a sentence, if he or she dies or if any other unforeseeable or extraordinary circumstances arise.

5 Timing of consular access

5.1 Introduction

VCCR Article 36 says that a foreign national who is arrested or detained must be informed about consular access “without delay.” If a foreign national is not informed quickly, much of the benefit of consular access may be lost. The issue of timing is particularly relevant to situations in which police interrogate a foreign national shortly after arrest. If they do not, before interrogating, advise about consular access, and if an incriminating statement is then made, the foreign national may later seek to have the statement excluded from evidence. In such situations, it may have been the case that police were unaware of their obligation to advise about consular access. It is also possible that they were aware, but feared that informing about consular access might lead the foreign national to decline to be interrogated. The issue of suppression of statements, or of material evidence seized after arrest, is examined in Chapter 17. This chapter examines the timing requirement.

The ILC, in its draft of what became the VCCR, provided that a consul should be notified “without undue delay.” The draft was revised, however, at the Vienna conference of states that finalized the text of the VCCR. There the United Kingdom expressed concern over the word “undue,” fearing that a receiving state might contrive reasons to avoid consular access.¹ As a result of this concern, the term “undue” was deleted. At the conference as well, as already noted, a clause was inserted in Article 36 requiring advice to the foreign national. The phrase “without delay” was also used for that requirement.

The Soviet delegate at the conference objected that if the phrase read simply “without delay,” a detainee would have a right to consular access as soon as detention began. “The new wording,” he said, “seemed to imply an obligation to supply the information immediately.” To this the Soviet delegate objected, saying that “when a national of the sending State was committed to prison because he had committed an offence the authorities of the receiving State must have time to

¹ 2 *Official Records: United Nations Conference on Consular Relations* 85, U.N. Doc. A/CONF/25/16.Add.1 (1963).

collect the necessary documents with a view to informing the consul.² Other delegates did not question the Soviet delegate's interpretation of "without delay" as meaning immediately upon arrest. By their silence they appeared to accept his view that the phrase "without delay" meant immediately upon arrest.

As set out in this chapter, in its *Avena* judgment (at paragraph 86), the ICJ read the drafting history a bit differently on this point (Document 2). The ICJ did not mention the statement of the Soviet delegate or the apparent acceptance of the interpretation that "without delay" meant "immediately." The ICJ says, in paragraph 86, that "[t]he shortest specific period suggested was by the United Kingdom, namely 'promptly' and no later than '48 hours' afterwards." The ICJ uses this reading of the drafting history to suggest that the advice to a foreign national detainee need not be given immediately upon arrest. However, the United Kingdom never made a formal proposal about 48 hours as a permissible period to wait before notifying. Rather, it mentioned 48 hours as a time period it might be able to accept, given that some states were suggesting longer periods.³ Germany did formally propose 48 hours after it became clear that its earlier proposal of 30 days had no chance of acceptance. The conference then voted on Germany's 48-hour proposal and rejected it.⁴

In the *Avena* judgment, in any event, the ICJ did not suggest that any substantial period of hours or even days might have been contemplated, because it also says (paragraph 63, repeated paragraph 88) that, once there is reason to believe the detainee is a foreign national, the information must be provided at that time. Its view, hence, is that as soon as there is reason to believe that the individual is a foreign national, the advice must be given.

The Inter-American Court of Human Rights, in its Advisory Opinion excerpted in this chapter, interprets the phrase "without delay" by using a technique of treaty interpretation that the ICJ did not use, namely by inquiring into the purpose served by the advice given to a foreign national. Analyzing from that purpose, the Inter-American Court says that advice about consular access must be given at the time of arrest, and in any event prior to interrogation (Document 3).

In assessing compliance by the United States in the case of one of the Mexican nationals named by Mexico (at paragraph 97, included in this chapter), the ICJ says that three working days suffice. However, the ICJ noted that at the time of the man's arrest there was no reason to believe he was a foreign national. The U.S. Supreme Court omits mention of this fact and takes the ICJ as having said that three days is adequate time for informing "without delay," even, apparently, when the foreign nationality is known (Documents 5a, 5b).

In a publication prepared for police agencies, the U.S. Department of State, like the U.S. Supreme Court, says that advice to a foreign national about consular access can be provided as long as 72 hours after arrest (Document 5d). That

2 1 *Official Records: United Nations Conference on Consular Relations* 37, U.N. Doc. A/CONF.25/16 (1963).

3 1 *Official Records: United Nations Conference on Consular Relations* 340, U.N. Doc. A/CONF.25/16 (1963).

4 2 *Official Records: United Nations Conference on Consular Relations* 131, U.N. Doc. A/CONF.25/16.Add.1 (1963).

position is repeated by the Attorney General of Texas in information posted on his website as information for police agencies in the State of Texas (Document 5e).

To the contrary, the Republic of Korea, in a Ministry of Justice directive to Korean police, says that advice to a foreign national about consular access must be given immediately upon arrest (Document 8). Similarly, a Canadian trial judge construed VCCR Article 36 to require that the advice be given immediately upon arrest (Document 4b).

A number of states in their instructions to consuls stress the importance of gaining access to a national as soon as possible after arrest, in order to be able to protect the person's rights and to give advice at a time at which it may provide the greatest benefit. The Canadian and U.S. instructions, excerpted in this chapter, make clear that consuls are to be available after business hours, in order to be ready to visit nationals quickly (Documents 4a, 5c).

The timing issue is mentioned in a number of multilateral treaties that require a state to arrest persons suspected of committing acts made criminal by a treaty. Excerpted in this chapter are provisions of treaties on terrorist offenses and on torture. If a person arrested on these offenses is a foreigner, these treaties require that consular access be afforded. They refer to consular access as required "immediately" upon arrest (Document 7). The significance of these treaties, beyond their application to the cases of foreign nationals suspected of the particular offense, is that the frequent inclusion of a clause requiring that advice be given immediately upon arrest suggests that this is how states understand the obligation to advise any foreign national.

Finally, under the Convention Against Torture, state parties are required to report periodically to the Committee Against Torture about their compliance with the Convention. Brazil, reporting to the Committee, acknowledged the obligation to allow immediate consular access. Tunisia, also reporting to the Committee, said that its domestic law provided for immediate consular access, presumably not only for foreign nationals arrested on suspicion of torture, but for any foreign national taken into custody (Document 9). These states apparently construe the obligation to advise a foreign national about consular access to apply immediately upon arrest.

5.2 International Court of Justice

Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 ICJ 12

83. The Court now addresses the question of the proper interpretation of the expression "without delay" in the light of arguments put to it by the Parties. The Court begins by noting that the precise meaning of "without delay", as it is to be understood in Article 36, paragraph 1(b), is not defined in the Convention. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

84. Article 1 of the Vienna Convention on Consular Relations, which defines certain of the terms used in the Convention, offers no definition of the phrase "without delay".

Moreover, in the different language versions of the Convention various terms are employed to render the phrases "without delay" in Article 36 and "immediately" in Article 14. The Court observes that dictionary definitions, in the various languages of the Vienna Convention, offer diverse meanings of the term "without delay" (and also of "immediately"). It is therefore necessary to look elsewhere for an understanding of this term.

85. As for the object and purpose of the Convention, the Court observes that Article 36 provides for consular officers to be free to communicate with nationals of the sending State, to have access to them, to visit and speak with them and to arrange for their legal representation. It is not envisaged, either in Article 36, paragraph 1, or elsewhere in the Convention, that consular functions entail a consular officer himself or herself acting as the legal representative or more directly engaging in the criminal justice process. Indeed, this is confirmed by the wording of Article 36, paragraph 2, of the Convention. Thus, neither the terms of the Convention as normally understood, nor its object and purpose, suggest that "without delay" is to be understood as "immediately upon arrest and before interrogation".

86. The Court further notes that, notwithstanding the uncertainties in the *travaux préparatoires*, they too do not support such an interpretation. During the diplomatic conference, the conference's expert, former Special Rapporteur of the International Law Commission, explained to the delegates that the words "without undue delay" had been introduced by the Commission, after long discussion in both the plenary and drafting committee, to allow for special circumstances which might permit information as to consular notification not to be given at once. Germany, the only one of two States to present an amendment, proposed adding "but at latest within one month". There was an extended discussion by many different delegates as to what such outer time-limit would be acceptable. During that debate no delegate proposed "immediately". The shortest specific period suggested was by the United Kingdom, namely "promptly" and no later than "48 hours" afterwards. Eventually, in the absence of agreement on a precise time period, the United Kingdom's other proposal to delete the word "undue" was accepted as the position around which delegates could converge. It is also of interest that there is no suggestion in the *travaux* that the phrase "without delay" might have different meanings in each of the three sets of circumstances in which it is used in Article 36, paragraph 1 (b).

87. The Court thus finds that "without delay" is not necessarily to be interpreted as "immediately" upon arrest. It further observes that during the Conference debates on this term, no delegate made any connection with the issue of interrogation. The Court considers that the provision in Article 36, paragraph 1 (b), that the receiving State authorities "shall inform the person concerned without delay of his rights" cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36.

88. Although, by application of the usual rules of interpretation, "without delay" as regards the duty to inform an individual under Article 36, paragraph 1 (b), is not to be understood as necessarily meaning "immediately upon arrest", there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.

...

97. Mr. Hernandez (case No. 34) was arrested in Texas on Wednesday 15 October 1997.

The United States authorities had no reason to believe he might have American citizenship. The consular post was notified the following Monday, that is five days (corresponding to only three working days) thereafter. The Court finds that, in the circumstances, the United States did notify the consular post without delay, in accordance with its obligation under Article 36, paragraph 1(b).

5.3 Inter-American Court of Human Rights

The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, 1 October 1999, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999)

103. The legislative history of that article [Article 36] reveals that inclusion of the obligation to inform a detained foreign national of his rights under that article "without delay", was proposed by the United Kingdom and had the support of the vast majority⁵ of the States participating in the Conference as a means to help ensure that the detained person was made duly aware of his right to request that the consular officer be advised of his arrest for purposes of consular assistance. It is clear that these are the appropriate effects (*effet utile*) of the rights recognized in Article 36.

104. Therefore, and in application of a general principle of interpretation that international jurisprudence has repeatedly affirmed, the Court will interpret Article 36 so that those appropriate effects (*effet utile*) are obtained.

105. The Court's finding as to the second question of the request (*supra* 97)⁶ is very relevant here. There the Court determined that the enforceability of the rights conferred upon the individual in Article 36 of the Vienna Convention on Consular Relations was not subject to protests from the State of the individual's nationality. It is, therefore, incumbent upon the host State to fulfill the obligation to inform the detainee of his rights, in accord with the finding in paragraph 96.⁷

106. Consequently, in order to establish the meaning to be given to the expression "without delay," the purpose of the notification given to the accused has to be considered. It is self-evident that the purpose of notification is that the accused has an effective defense. Accordingly, notification must be prompt; in other words, its timing in the process must be

5 [Court's Footnote 75] The record of the voting shows that 65 States voted in the affirmative, 13 abstained and two voted against (*A/CONF.25/16, Vol. I, p. 87*). Later, Czechoslovakia, which had abstained, stated that the amendment proposed by the United Kingdom, was a "perfectly reasonable proposal" (*A/CONF.25/16, Vol. I, p. 87*).

6 In paragraph 97, the Court determined that the rights accorded a foreign national under VCCR Article 36 are not dependent on a protest being made by the sending state.

7 Paragraph 96 reads as follows: "The foregoing does not alter the principle that the arresting State has a duty to know the identity of the person whom it deprives of his freedom. This will enable it to discharge its own obligations and respect the detainee's rights promptly. Mindful that it may be difficult to ascertain a subject's identity immediately, the Court believes it is no less imperative that the State advise the detainee of his rights if he is an alien, just as it advises him of the other rights accorded to every person deprived of his freedom."

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appropriate to achieving that end. Therefore, because the text of the Vienna Convention on Consular Relations is not precise, the Court's interpretation is that notification must be made at the time the accused is deprived of his freedom, or at least before he makes his first statement before the authorities.

5.4 Canada

a. Department of Foreign Affairs and International Trade, Consular Affairs Bureau, *Manual of Consular Instructions*, Chapter 2, Protection and Assistance. §2.1 Consular Services – Quiet Hours

It is important that Canadians in distress or in an emergency have prompt access to a responsible officer of the mission if necessary during quiet hours. Arrangements must be in place at different missions to facilitate such communication, and each mission should review its procedures semi-annually to ensure that they are adequate and responsive to local conditions. It is a matter for mission discretion to develop procedures such as the following examples, which are not exhaustive:

- (1) Security guards at mission. Missions with Canada-based security guards will have standing arrangements whereby an urgent or emergency call can be dealt with by a quiet hours duty officer according to a prearranged duty roster.
- (2) Without security guards at mission. Missions without security guards may resort to:
 - (a) a bilingual sign at the entrance of the Chancery (or separate consular office) which informs the general public of the hours of operation, and notes an office telephone number which can be used for emergencies when offices are closed;
 - (b) a commercial telephone answering service, or electronic automatic telephone answering service for calls during the quiet hours. (Telecommunications Division (MST) can advise missions on the latter equipment);
 - (c) a duty officer system so that all officers (not just consular officers) share the responsibility equitably, with appropriate instructions available as to what action should be taken in the event of an urgent consular case;
 - (d) publication of the office's quiet hours telephone number in the local telephone directory and other publications (e.g. tourist guide books) in circulation amongst Canadian visitors or residents.
- (3) Home telephone numbers. For security reasons, it is not recommended that the home telephone numbers of consular officers be listed on Chancery signs or in local directories, or given directly to those who call during quiet hours. See Section 5.8 of this manual for instructions concerning the duty officer's handbook and log.

b. Ontario Superior Court of Justice, *Regina v. Partak*, 160 C.C.C. 3d 553 (2001)

[In this pre-trial proceeding, the defence sought exclusion at the impending trial of statements Partak made to police without having been advised of the right of consular access. The Court here inquires as to the point in time at which the obligation to advise arises. On its conclusion as to the request for exclusion of statements, see Chapter 17.]

... [B]oth the Crown and defence counsel proceeded from the following common ground. The authorities were obliged to fulfill the requirements contemplated by art. 36 of the Vienna Convention. Mr. Partak was a foreign national and was entitled to be advised of his rights to have the U.S. consulate notified. He was not so advised.

An issue was raised concerning when the obligation arose. Defence counsel submits that the obligation arose at the time of arrest. The Crown argues that there is nothing in the wording of art. 36 that imposes the obligation at any particular time other than the wording that the authorities shall inform the person concerned of their consular rights "without delay".

In my view, a foreign national's entitlement to be advised of his or her consular rights arises at the time that the authorities know or reasonably ought to be aware that the detainee is a foreign national.

I draw this conclusion for a number of reasons. First, the words "without delay" in art. 36 para. 1(b) have to be given some meaning. They suggest an immediacy that would be consistent with a finding that the notification obligation arises upon the authorities having reasonably available to them information that the detained person is a foreign national. In Mr. Partak's circumstances, this was at the time of his arrest. While Officers Pearson and Ryta did not know that Mr. Partak was a U.S. citizen, the Toronto police did know. The failure of the police to include this information on the mugshot form or to advise the officers of this fact before they went out on duty does not absolve the arresting officers of their obligations under art. 36 of the Vienna Convention. It is reasonable to require that the authorities exercise a certain degree of diligence which, in this case, would have amounted to nothing more than including a reference to Mr. Partak's citizenship on the mugshot form or to have advised the officers before they went out on duty that the person they were looking for was an American citizen.

Secondly, I find assistance in para. 2 of art. 36 that provides as follows: 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

To be in conformity with Canada's laws concerning advising the accused of his or her rights, the timing should be that of the time of arrest. Section 10 of the Charter requires that the right to be informed promptly of the reasons for arrest, the right to counsel and the right to have the validity of the detention determined, all arise upon arrest or detention. In *R. v. Manninen* [1987] 1 S.C.R. 1233 at p. 1243, 34 C.C.C. (3d) 385, Laner J. wrote, "[f]or the right to counsel to be effective, the detainee must have access to this advice before he is questioned or otherwise required to provide evidence". While the right in issue is not a Charter right, it is appropriate, having regard to the wording of para. 2 of art. 36, to interpret the timing of the right to be advised of consular rights in conformity with Charter principles. Such an interpretation enables full effect to be given to the purposes for which the rights are intended.

5.5 United States

a. Supreme Court of the United States, *Medellin v. Texas*, 128 SCt 1346 (2008), footnote 1

The requirement of Article 36(1)(b) of the Vienna Convention that the detaining state notify the detainee's consulate "without delay" is satisfied, according to the ICJ, where

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notice is provided within three working days. *Avena*, 2004 I.C.J. 12, 52, ¶97 (Judgment of Mar. 31).

b. Supreme Court of the United States, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), at 362

Ginsburg, J., concurring:

In contrast to *Miranda* [a reference to a requirement in U.S. law to provide certain advice prior to interrogation] warnings, which must be given on the spot before the police interrogate, Article 36 of the Vienna Convention does not require the arresting authority to contact the consular post instantly. See *Case Concerning Avena and other Mexican Nationals (Mex. v. U. S.)*, 2004 I. C. J. No. 128, P 97 (Judgment of Mar. 31) (*Avena*) (United States's notification of Mexican consulate within three working days of detainee's arrest satisfied Article 36(1)(b)'s "without delay" requirement); . . .

c. Department of State, *Foreign Affairs Manual*, vol. 7 (<http://www.state.gov/m/a/dir/regs/fam/c22164.htm>)

§121

In order for you to perform your consular protective functions in an efficient and timely manner, it is essential that you obtain prompt notification whenever a U.S. citizen or national is arrested. Prompt notification is the necessary first step in obtaining early access to the arrestee.

§121.2-2

Clarify [to local authorities] that, for purposes of notification, the Department [of State] considers a U.S. citizen or national "under arrest" from the moment he or she is deprived of liberty by a foreign governmental agency or authority and is not free to leave.

§121.2-4

Make certain local authorities can reach an appropriate officer quickly and easily. Remember, arrests do not just occur during business hours. Local authorities should have easy access to consular officers during the workday and to the appropriate duty officer contact after hours.

§122

Consular officers must make every effort to gain prompt personal access to an arrested U.S. citizen or national for a number of reasons:

- a. Experience demonstrates that requesting prompt, personal access to the U.S. citizen or national assures both the arrestee and the host authorities of the serious interest of the U.S. Government in the case.
- b. Anything less than your full efforts to obtain prompt access undermines our insistence

that host country arresting authorities notify a U.S. consular officer without delay following the arrest.

- c. Experience shows that abuse of a prisoner is most likely during the early arrest and pre-trial detention stages. Your prompt access to the detainee can often forestall physical abuse of the prisoner by the arresting and/or investigating authorities.
- d. In instances where abuse has, or is alleged to have, already occurred, your prompt access to the prisoner permits possible visible verification and puts you in the best position to demand medical attention and/or verification, as well as demand a prompt investigation by appropriate authorities.
- e. You can provide the arrestee with a list of reputable lawyers or information concerning local legal aid before the arrestee selects a lawyer who may prove to be a charlatan.
- f. You have the opportunity to explain the legal and judicial procedures of the host government and the detainee's rights under that government at a time when such information is most useful.

§122.1-1

As consular officer, you are required to visit the arrestee as soon as possible following receipt of consular notification or information about the arrest from another source, such as the arrestee's family or the media. Otherwise the sincerity and credibility of the U.S. Government about its concern for its arrested citizens' welfare and rights will surely be questioned, and obtaining the cooperation of host-country officials on prisoner matters will be more difficult.

d. Department of State, *Consular Access and Notification: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*, www.state.gov

Q. How quickly do I need to inform the detainee of the right to consular notification?

- A. The VCCR requires that a foreign national be notified "without delay" of the right to consular assistance. There should be no deliberate delay, and notification should occur as soon as reasonably possible under the circumstances. Once foreign nationality is known, advising the national of the right to consular notification should follow promptly.

In the case of an arrest followed by a detention, the Department of State would ordinarily expect the foreign national to have been advised of the possibility of consular notification by the time the foreign national is booked for detention. The Department encourages judicial authorities to confirm during court appearances of foreign nationals that consular notification has occurred as required.

Q. If the foreign national requests that consular officials be notified, how quickly do I have to do so?

- A. This notification should also occur "without delay" after the foreign national has requested that it be made. The Department of State also considers "without delay" here to mean that there should be no deliberate delay, and that notification should occur as soon as reasonably possible under the circumstances. The Department of State would normally expect notification to consular officials to have been made within 24 hours, and certainly within 72 hours. On the other hand, the Department

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does not normally consider notification of arrests and detentions to be required outside of a consulate's regular working hours. In some cases, however, it will be possible and convenient to leave a message on an answering machine at the consulate or to send a fax even though the consulate is closed. (If a message is left on an answering machine, the Department of State encourages a follow-up call during normal business hours to ensure that it was received.) In addition, in cases of emergencies (such as deaths or serious accidents), efforts should be made to contact consular officials outside of normal hours.

e. State of Texas, Attorney General, *Magistrate's Guide to Consular Notification under the Vienna Convention* (www.oag.state.tx/AG_Publications/pdfs/vienna_guidebook.pdf)

Q. If the foreign national requests that consular officials be notified, how quickly do I have to do so?

A. This notification should also occur "without delay" after the foreign national has requested that it be made. The federal, state, and local authorities consider "without delay" here to mean that **there should be no deliberate delay, and that notification should occur as soon as reasonably possible under the circumstances.** The federal, state, and local authorities would normally expect notification to consular officials to have been made within 24 hours, and certainly within 72 hours. On the other hand, judicial authorities do not normally consider notification of arrests and detentions to be required outside of a consulate's regular working hours. In some cases, however, it will be possible and convenient to leave a message on an answering machine at the consulate or to send a fax even though the consulate is closed. (If a message is left on an answering machine, you are encouraged to make a follow-up call during normal business hours to ensure that it was received.) In addition, in cases of emergencies (such as deaths or serious accidents), efforts should be made to contact consular officials outside of normal hours.

5.6 United Kingdom

House of Commons Parliamentary Debates, 1987/1988 (Hansard), 19 May 1988, Written Answers col. 570

Mr. Corbyn: To ask the Secretary of State for Foreign and Commonwealth Affairs what is the total number of United Kingdom citizens known to his Department held in foreign prisons; and what guidelines govern visits by his officials to such prisoners.

Mr. Eggar: . . . Standing instructions for British consular officers overseas are that British nationals should be visited as soon as possible after their arrest or detention.

5.7 Multilateral Criminal Law Treaties

a. Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963, 704 UNTS 219

ARTICLE 9

1. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal law of the State of registration of the aircraft. . . .

ARTICLE 13

1. Any Contracting State shall take delivery of any person whom the aircraft commander delivers pursuant to Article 9, paragraph 1. . . .

3. Any person in custody pursuant to the previous paragraph shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.

b. Convention for the Suppression of the Unlawful Seizure of Aircraft, 16 December 1970, 860 UNTS 105, 22 UST 641

Article 1. Any person who on board an aircraft in flight: (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or (b) is an accomplice of a person who performs or attempts to perform any such act commits an offence

Article 6. (1) Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, shall take him into custody

(3) Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.

c. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State party in whose territory a person alleged to have committed any offence referred to in article 4 [an offence involving the commission of torture] is present shall take him into custody

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

5.8 Korea (Republic of)

Guidelines for the Ministry of Justice of the Republic of Korea (BOP KOMI No. 01129-299), *Directives for the Investigation of Crimes Committed by Foreigners*, 30 April 1993 (as reported by Republic of Korea to the Committee Against Torture, Doc. CAT/C/32/Add.1, paragraph 132, 30 May 1996)

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- (a) When investigative agencies arrest or detain a foreigner, they shall immediately inform him that he is entitled to freely interview and communicate with consular or honorary consular officers of his home State stationed in the Republic of Korea, and that at his request, the consular officers or the honorary consular officers shall be immediately notified of his arrest or detention;
- (b) In addition, if the person arrested or detained so requests, the investigative agencies shall send a communiqué containing the detainee's personal data and the particulars of his case, including his commission of a crime, the date and location of his arrest or detention, his current location, etc. to the head of honorary head of the consular post.

5.9 State Reports under Convention Against Torture

a. Committee Against Torture, Summary record of the first part (public) of the 471st meeting: Greece, Brazil, para. 13, Doc. CAT/C/SR.471, 21 May 2001, Statement of Mr. Pinta Gama, representing Brazil [paraphrase]

13. Turning to articles 6 to 9 of the Convention, he said that Brazil, as a party to the Vienna Convention on Consular Relations, was bound to allow a detainee to communicate immediately with the nearest appropriate representative of the State of which he was a national.

b. Committee Against Torture, Second periodic reports of States parties due in 1993: Tunisia, para. 61, Doc. CAT/C/20/Add.7, 22 December 1997

61. Article 6, paragraphs 3 and 4, of the convention complements the rules of procedure of Tunisian law; insofar as an alien taken into custody is authorized not only to communicate at any time with his counsel (i.e. his lawyer, in accordance with article 70 of the code of Criminal Procedure) – who in most cases is appointed to defend the accused by the diplomatic or consular authorities of his country – but also to “communicate immediately with the nearest appropriate representative of the state of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides,” as provided in article 6, paragraph 3, of the Convention.

6 Confidentiality of communication

6.1 Introduction

The VCCR does not deal expressly with the question of the privacy of communication between a consul and a detained national. When a consul converses with a national at a jail facility, may jail officials remain within hearing distance? When a national speaks by telephone with a consul, may they listen in? When a national writes a letter to a consul, may they read it? Must they allow the letter to be dispatched immediately to the consul?

The mutual right of a consul and a detained national to communicate arguably implies a right to communicate without obstruction and in private. Several states have indicated that they regard any monitoring of the content of communication as a violation of the right of access and contact as between a consul and a national. The United Kingdom and Norway, by statute, require that the communication be private (Documents 2, 3). The U.S. Department of State takes that same position, arguing that the purpose behind consular access can be achieved only if the communication is private. It has so stated in instructions to U.S. police (Document 4a). It has said the same in instructions to its own consuls, to let them know whether they can legitimately demand that their conversations with detained U.S. nationals be conducted in such a way as not to be overheard (Document 4b).

A detainee may want to communicate to a consul the fact that police are mistreating him or her. The detainee may fear reprisal if the police know of this communication. A detainee may discuss with a consul the situation that led to the arrest in such a way as either to admit guilt, or to admit facts short of guilt that nevertheless would be incriminating, for example, admitting presence at or near the scene of a crime. If privacy of communication is not assured, the purpose for having such communication may be vitiated.

The issue arose between Canada and the United States in 1935. When U.S. consular officers visited U.S. nationals, Canadian prison officials were apparently remaining close enough to overhear. The United States demanded visits out of their hearing. In that connection, the U.S. Secretary of State asked the U.S. Attorney General about the practice followed in U.S. federal prisons regarding visits by consuls when visiting foreign nationals incarcerated there. The Attorney

General reported that visits were typically permitted out of the hearing of prison officers (Document 4c).

Mexico and the United States have dealt with the issue by bilateral agreement. In a 1996 "understanding," they agreed that consular communication should be conducted under circumstances that allow a full and free exchange, a formulation that implies privacy of communication (Document 5).

Just as communication must be confidential, communication may not be prevented. The right of communication as between a consul and a foreign national, as guaranteed in VCCR Article 36, implies that such communications, for example a letter, may not be impeded. A number of bilateral treaties address this issue. They may specify that a receiving state may not obstruct a communication that a foreign national seeks to dispatch to a consul (Document 6). Or they may specify that a receiving state may not obstruct a communication in either direction between a consul and a foreign national (Document 7).

The European Court of Human Rights considered a situation in which prison authorities in Austria delayed three weeks in forwarding a U.S. national's letter to a U.S. consul. Not having jurisdiction to address violations of the VCCR, the European Court analyzed the situation as a possible violation of the right of privacy, which is guaranteed under the Convention for the Protection of Fundamental Freedoms and Human Rights (European Human Rights Convention). The Court decided that the delay was reasonable under the circumstances, but said that had the facts been different – had the delay been longer, or had there been urgency to the communication to the consul – it might have found a violation (Document 8).

6.2 United Kingdom

Police and Criminal Evidence Act 1984, s. 66: Code of Practice C: Detention, Treatment and Questioning of Persons by Police Officers, paragraph 7 (Citizens of independent Commonwealth countries or foreign nationals)

7.3 Consular officers may visit one of their nationals in police detention to talk to them and, if required, to arrange for legal advice. Such visits shall take place out of the hearing of a police officer.

6.3 Norway

Act Relating to the Execution of Sentences, 20 January 2004 (Act applies to pre-trial custody as well as to sentences pursuant to a conviction). Source: Norway, Ministry of Justice and the Police (http://www.regjeringen.no/nb/dcp/jd/dok/lover_regler/reglement/2004/Act)

§31. *Visits . . .* A public defence counsel and a representative of a public authority, including a diplomatic or consular representative, may be inspected pursuant to section 27, second to fifth paragraphs. Such a visit shall not be controlled by listening to a conversation.

§32. *Telephone calls . . .* A telephone call to or from a public defence counsel or a representative of a public authority, including a diplomatic or consular representative, may be investigated pursuant to section 27, sixth paragraph before the call begins. There shall be no listening in to or tape-recording of the call.

6.4 United States

a. Department of State, *Consular Access and Notification: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them* (http://travel.state.gov/law/consular/consular_636.html)

QUESTIONS ABOUT HOW CONSULAR NOTIFICATION SHOULD BE GIVEN

Q. Is a consular officer entitled to meet privately with a detained foreign national?

A. Yes, as a general rule. The VCCR entitles consular officers to converse with their nationals. It does not explicitly state that such conversations may be private, but some of the bilateral agreements do contain such explicit requirements. The Department of State believes that consular officers should normally be able to converse in private. This does not mean, however, that the conversation cannot be observed for security reasons. If a consular officer insists upon a private meeting but the detained national objects to meeting privately, you should seek guidance from the Department of State.

b. Department of State, *Digest of United States Practice in International Law 1973* (Arthur W. Rovine ed. 1974), at 162

The Department can locate no official precedent or binding rule of international law requiring that all such conversations be held in absolute privacy, free of all supervision or observation by receiving state authorities. However in the Department's view a strong argument can be made that the right embodied in Article 36 paragraph (1)(c) of the Vienna Convention on Consular Relations may only be enjoyed in a meaningful way if the consular officer is allowed the benefit of privacy with the national to whom he is extending consular protection. For example, the right to arrange for legal representation of the national and the corollary right to discuss relevant legal issues involved in connection with the detention could not be exercised effectively if the receiving state authorities had the right to monitor the contents of the conversation.

On the other hand, Article 36(2) provides that the rights contained in that Article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso that these laws and regulations must enable full effect to be given to the purposes for which the rights in question are accorded. If, for example, a particular national is detained in a maximum security prison, in which all prisoners may be visited only under the condition that a guard be in attendance, the Department does not feel that any violence would be done to rights of a detainee or consular officer under international law if such a security officer is in the same room, within sight, although not necessarily within hearing, of the individuals involved. In view of the varieties of experiences which are possible in this regard, it would be extremely difficult to construct a definite rule applicable under any and all circumstances.

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c. *The Acting Attorney General (Stanley) to the Secretary of State, Washington, 7 June 1934, in 2 Foreign Relations of the United States: Diplomatic Papers 1935, at 57*

My Dear Mr. Secretary: This is in reply to your communication of June 2, 1934, in which you request to be advised as to the rule in existence in American prisons governing the visits of consular officers.

In reply thereto I am giving you the full text of the rule governing in Federal penal institutions:

Whenever it has been determined to the satisfaction of the warden that a prisoner is a citizen of a foreign country, visits by the consular representative of such foreign country, or other duly accredited delegates having legitimate business with such prisoner, shall be permitted by the warden at reasonable hours. This privilege shall not be withheld even though the inmate is undergoing punishment by solitary confinement or under other disciplinary control.

You will observe that no special instructions appear in this rule as to the presence of an officer during the interview. That would be determined by conditions in the institution, by the character of the prisoner and perhaps would be affected by the request of the consular representative.

In the Federal prison system all ordinary visits to inmates are made in the presence of a guard, not only for the purpose of protecting the visitor but of preventing the introduction of contraband. In most cases the Guard does not make any effort to and does not actually hear the conversation between the prisoner and his visitor.

In rare cases where government prosecuting agencies have suspicions or for other reasons, it is deemed advisable to have a special officer present at the interview in order that no important communications may take place between them.

While there is no separate rule, I am confident that it would be the disposition of our wardens and superintendents to permit interviews by prisoners with their consular representatives in the presence of a guard but not within his hearing, unless it had been established that the prisoner had previously abused such a privilege. . . .

Yours very truly, William Stanley

6.5 Mexico-United States

Memorandum of Understanding on Consular Protection of Mexican and United States Nationals, 7 May 1996, Dept. of State File No. P96 0065-0984/0987

The Government of the United Mexican States and the Government of the United States of America . . . [a]dopt the following principles and measures: . . .

3. To endeavor to provide settings conducive to full and free exchange between consular representatives and detained individuals in order to allow, consistent with the relevant laws of each country, consular officials to interview their respective nationals when they are detained, arrested, incarcerated or held in custody in accordance with Article VI, paragraph 2, section (c) of the Consular Convention between the United Mexican States and the United States of America of August 12, 1942, and in accordance with Article 36, first paragraph, of the Vienna Convention on Consular Relations of 1963

6.6 United Kingdom-United States

Convention between the United States and the United Kingdom of Great Britain and Northern Ireland relating to Consular Officers, 6 June 1951, 3 UST 3426, 165 UNTS 121, Article 16(1)

A consular officer shall be permitted to visit without delay, to converse privately with and to arrange legal representation for, any national of the sending state who is so confined or detained. Any communication from such a national to the consular officer shall be forwarded without delay by the authorities of the territory.

6.7 Italy-Argentina

Convention on Consular Functions, Rome, 9 December 1987, 1577 UNTS 264, Article 14(4)

Any written communication between a national of the sending State subjected to deprivation or limitation of personal freedom and a consular officer shall be transmitted to the addressee without delay by the authorities of the receiving State.

6.8 European Court of Human Rights

Case of Silver and Others v. United Kingdom, Application nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment, Strasbourg, 25 March 1983, para. 104

Finally, Mr. Noe's letter no. 12, to the United States Consul, was delayed for three weeks before being posted. . . His counsel questioned the necessity for this interference, whereas the Commission, in arriving at its conclusion that there had here been no violation of Article 8 (art. 8) [on privacy of communication] found that there was no evidence that the interference was not justified as being "necessary" for one or more of the aims set out in paragraph 2 (art. 8-2) thereof.

The Court is of the view that when in any particular instance subordinate prison authorities are in doubt as to how they should exercise their supervisory functions regarding prisoners' correspondence, they must be able to seek instructions from higher authority. In the case of Mr. Noe's letter no. 12, the prison authorities found it necessary in the light of the law and practice applicable at the time to refer the letter to the Home Secretary for instructions; he decided that it should not be stopped. In these circumstances and bearing in mind that the subject-matter of the letter was not really urgent, the court does not consider that the resultant delay of three weeks in dispatching the letter was so serious as to constitute a violation of Article 8 (art. 8).

7 Automatic notification under bilateral treaties

7.1 Introduction

Whereas the VCCR makes notification to a consul an option to be exercised by an arrested national, quite a few pairs of states provide for notification to a consul in every instance of the arrest of a sending-state national, irrespective of the wishes of the national. Such requirements are found in bilateral treaties, some concluded prior to the VCCR and some more recently. Examples are included in this chapter (Documents 2, 3, 4, 5, 6, 7, 8). These treaties sometimes mention a time period within which the notification must be given.

The reason that various pairs of states decide on this approach is not always clear. One possible reason is concern that police may claim, falsely, that the arrested national declined to initiate consular contact. During the Cold War, in East-West relations, there was concern that police might make arrests for political reasons and conceal the fact from the sending state. But such requirements are found even as between states that are politically close, for example the United Kingdom and United States (Document 5).

States that are party to such a bilateral treaty are, typically, also parties to the VCCR. They therefore fall under a dual requirement when they arrest a national of a state with which they have a bilateral treaty calling for automatic notification. They must notify a consul under the bilateral treaty but must advise the sending-state national under VCCR Article 36. Any time period specified in the bilateral treaty does not affect the timing requirement under VCCR Article 36. An Italy-Argentina bilateral consular treaty calling for automatic notification reiterates the VCCR Article 36 requirement about informing the national, presumably to make it doubly clear that automatic notification does not relieve the receiving state of the obligation to inform the national (Document 3).

It may seem strange that states that are party to the VCCR, which aimed at regularizing consular law, nonetheless conclude bilateral treaties dealing with the same issues. The VCCR, however, anticipates that states may do so. Albeit with a caveat, the VCCR specifically allows states that are party to it to have, at the same time, bilateral treaties that treat consular issues. VCCR Article 73 states: "(1) The provisions of the present Convention shall not affect other agreements in force as between States Parties to them. (2) Nothing in the present Convention

shall preclude States from concluding international agreements confirming or supplementing or extending or simplifying the provisions thereof.”

Thus, a bilateral treaty is not to contain provisions that contradict the VCCR. In one respect, a bilateral obligation for automatic notification is at variance with VCCR Article 36, namely, that when notification to a consul is given automatically under a bilateral treaty, the arrested national's option to initiate consular contact is lost. Nonetheless, the two obligations are not viewed as inconsistent, since it is possible for a receiving state to notify both a consul and the arrested national. A U.S. instruction to police officials explains the dual obligation (Document 9).

One category of foreign nationals is protected against having a consul informed absent the national's consent, namely, political refugees. A state has an obligation under international law to grant asylum to a person who fears persecution by the state of nationality. The 1951 Convention on the Status of Refugees provides: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹ It is considered inconsistent with a state's obligation to an asylum seeker to notify the state of nationality, unless the asylum seeker consents to the notification. That is so even under a bilateral treaty that otherwise would require automatic notification. Included in this chapter are a UK regulation (Document 10) and a statute of Ireland (Document 11) adopting this position.

7.2 United States-USSR (now Russian Federation)

Consular Convention, 1 June 1964, 19 UST 5018, 655 UNTS 213

ARTICLE 12 ...

2. The appropriate authorities of the receiving state shall immediately inform a consular officer of the sending state about the arrest or detention in other form of a national of the sending state.
3. A consular officer of the sending state shall have the right without delay to visit and communicate with a national of the sending state who is under arrest or otherwise detained in custody or is serving a sentence of imprisonment.

Protocol to the consular convention

1. It is agreed between the Contracting Parties that the notification of a consular officer of the arrest or detention in other form of a national of the sending state specified in paragraph 2 of Article 12 of the Consular convention between the Government of the United States of America and the Government of the Union of Soviet Socialist

1 Convention Relating to the Status of Refugees, 189 UNTS 150, art. 33.

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Republics of June 1, 1964, shall take place within one to three days from the time of arrest or detention depending on conditions of communication.

2. It is agreed between the Contracting Parties that the rights specified in paragraph 3 of Article 12 of the Consular Convention of a consular officer to visit and communicate with a national of the sending state who is under arrest or otherwise detained in custody shall be accorded within two to four days of the arrest or detention of such national depending upon his location.

7.3 Italy-Argentina

Convention on Consular Functions, Rome, 9 December 1987, 1577 UNTS 264, Article 14

1. Consular officers shall have the right to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the right to communicate with consular officers and to have access to them.
2. In all cases where a national of the sending State is subjected to any form of deprivation or limitation of personal freedom, the authorities of the receiving State shall so inform a consular officer of the sending State within three days and provide him with a due account of the facts which have given rise to such measures. In addition, the authorities of the receiving State shall at the same time inform the national of the sending State of his right to communicate with a consular officer in order to obtain assistance.
3. Consular officers shall have the right to take appropriate action to provide a national subjected to deprivation or limitation of personal freedom with assistance and defence before the courts, unless the national in question expressly rejects such action. . . .
5. A consular officer or a consular employee designated by him shall have the right to visit a national of the sending State subjected to deprivation or limitation of personal freedom and to communicate with him in any language, even when the national in question is under arrest or serving a sentence of imprisonment.
The exercise of this right shall be granted within a maximum period of three days from the moment when the national is arrested, detained or deprived of his personal freedom.
6. The rights referred to in this article shall be exercised in accordance with the laws and regulations in force in the receiving State, it being understood, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

7.4 Russia-Pakistan

Consular Convention between the Russian Federation and the Islamic Republic of Pakistan, Moscow, 8 July 1997, in *Sobranie zakonodatel'stva Rossiiskoi Federatsii* [Collected Legislation of the Russian Federation], No. 47, item 4636, 25 November 2002

Article 39(1). If a citizen of the sending state is arrested in the territory of a consular district, the responsible agencies of the receiving state shall straight away inform the consular post of the sending state.

7.5 United Kingdom-United States

Convention between the United States and the United Kingdom of Great Britain and Northern Ireland relating to Consular Officers, 6 June 1951, 3 UST 3426, 165 UNTS 121, Article 16(1)

A consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district.

7.6 China-Vietnam

Consular Convention between the Socialist Republic of Vietnam and the People's Republic of China, Beijing, 19 October 1998, S.S. No. 5 TO Gazette No. 37/2001 at E513, Article 39(1)

If a national of the sending state is detained within the consular district, the competent authorities of the receiving state shall inform the consular post of the sending state as soon as possible.

7.7 China-Canada

Consular Agreement between the Government of Canada and the Government of the People's Republic of China, Ottawa, 28 November 1997, Article 8, *Notification of Detention, Arrest and Visit*

1. If a national of the sending State is detained, arrested or deprived of freedom by any other means in the consular district by the competent authorities of the receiving State, the said authorities shall notify the consular post of the matter without delay from the date of the detention, arrest or deprivation of freedom. If it is not possible to notify without delay the consular post of the sending State because of communication problems, the competent authorities of the receiving State shall provide notification as soon as possible. The said authorities shall inform the consular post of the reasons for which a national has been detained, arrested or deprived of freedom by any other means.

2. A consular officer shall be entitled to visit a national of the sending State who is under detention, arrest or deprived of freedom in any other means, to converse or communicate with him in the language of the sending State or the receiving State and to arrange for interpretation and legal assistance. The competent authorities of the receiving State shall make arrangements for a consular officer to visit the said national. This visit shall take place as soon as possible, but at the latest, shall not be refused after two days from the date on which the competent authorities have notified the consular post that the said national has been placed under any form of detention. Visits may be made on a recurring basis. No longer than one month shall be allowed to pass between visits requested by a consular officer.

3. A consular officer shall be allowed to provide to a national, to whom these provisions apply, parcels containing food, clothing, medicaments and reading and writing materials.

4. The competent authorities of the receiving State shall inform the above-mentioned national of the sending State of the provisions contained under paragraphs 1, 2, and 3 of this Article.

...

7. A consular officer shall comply with the law of the receiving State in performing the functions provided for in this Article. Nevertheless, the application of the law of the receiving State shall not restrict the implementation of the rights provided for in this Article.

7.8 China-Australia

Agreement on Consular Relations between Australia and the People's Republic of China, Canberra, 8 September 1999, 2169 UNTS 494

ARTICLE 11. COMMUNICATION AND CONTACT WITH NATIONALS OF THE SENDING STATE

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

...

(e) the competent authorities of the receiving State shall within three days inform the consular post of the sending State if, within its consular district, a national of the sending State is arrested or committed to prison or to custody pending trial or is detained in any other manner, unless that person expressly requests that the consular post of the sending State should not be informed. The authorities of the receiving State shall inform the consular post of the reasons for which a national has been arrested or committed to prison or to custody pending trial or detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the detained person concerned without delay of his or her rights under this subparagraph;

...

(h) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him or her, and to arrange for his or her legal representation. They shall also have the right to visit, to converse and correspond with any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Access to detained nationals of the sending State shall be guaranteed by the competent authorities of the receiving State to a consular officer of the sending State within two days of initial notification of arrest or detention as specified in paragraph 1 (e) of this Article, and at least once a month thereafter. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he or she expressly opposes such action.

2. The rights and obligations referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, provided however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

7.9 United States

Department of State, *Consular Access and Notification: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them* (www.state.gov)

Q: If the foreign national is from a “mandatory notification” country and I notify the consulate as required, should I tell the foreign national?

A. Yes. The alien should always be told that his consulate has been notified. While the mandatory notification agreements generally do not expressly require that the national be informed of such notification, informing the national is provided for in the VCCR. Most countries with which the United States has a bilateral agreement also belong to the VCCR.

7.10 United Kingdom

Police and Criminal Evidence Act 1984, s. 66: Code of Practice C: Detention, Treatment and Questioning of Persons by Police Officers, para. 7 (Citizens of independent Commonwealth countries or foreign nationals)

7.4 Notwithstanding the provisions of consular conventions, if the detainee is a political refugee whether for reasons of race, nationality, political opinion or religion, or is seeking political asylum, consular officers shall not be informed of the arrest of one of their nationals or given access or information about them except at the detainee’s express request.

7.11 Ireland

Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987, Statutory Instrument 119/1987, para. 14(4)

If the member in charge has reasonable grounds for believing that an arrested person who is a foreign national is a political refugee or is seeking political asylum, a consular officer shall not be notified of his arrest or given access to or information about him except at the express request of the foreign national.



Part III

The rights of a foreign national

VCCR Article 36 arguably gives rights to a foreign national, rights opposable to the receiving state. The matter has been contested, however. This issue becomes relevant when a violation is raised before the authorities of the receiving state (see Parts IV, V), or at the international level (Part VI). If a foreign national has a right over and against the receiving state, the foreign national may have standing to raise the matter, such that the receiving state may be required to provide a remedy for the violation. The question of whether a foreign national under arrest has rights against the receiving state is examined in Chapter 8.

In recent years, a further question has been raised. Can a right of the foreign national, beyond being a right under consular conventions, be regarded as an issue of due process of law? Is consular access a right of the individual, alongside other due process rights found in domestic and international law for a person suspected of a criminal offense?

Due process rights opposable to states entered international practice after World War II, with the development of a body of norms called the law of human rights. In recent decades references to consular access as a due process guarantee are to be found in treaties, in adjudicatory decisions at the domestic and international levels, and in the domestic legislation of some states. This issue is addressed in Chapter 9.

Even more delicate has been the question of whether a foreign national has a right to assistance over and against the sending state. If a foreign national is arrested or detained but the sending state, for whatever reason, is not willing to assist, does the foreign national have recourse against the sending state? Can a foreign national legitimately demand that a consul make contact and provide normal consular assistance? As will be seen in Chapter 10, legislation in a number of states characterizes consular assistance as an obligation of consuls, giving rise to the implication that a corresponding right exists for a national.

In some states one finds no such legislation about a consul's obligation to assist a national under arrest or detention, yet one finds instructions to consuls that enjoin them to assist, in language that implies obligation. Many states, moreover, proclaim to their citizenry that in the event of being arrested or detained abroad, a consul will assist. Nationals who did not receive assistance to which they thought they were entitled have sued the sending state to compel it to assist. This matter is addressed in Chapter 11.



8 Rights assertable against the receiving state

8.1 Introduction

Treaties are concluded between states, and they create rights and obligations between states. However, treaties may provide for rights of individuals, to be exercised by them as individuals. Human rights treaties are the most obvious example. Also common are bilateral treaties that give nationals of each state a right to engage in business in the territory of the other. Whether a treaty gives a right to individuals depends on its wording. VCCR Article 36 may, or may not, confer a right on a foreign national, over and beyond rights conferred on a sending state, depending on how one construes its text.

With VCCR Article 36, the issue of a right attaching to the foreign national as an individual has arisen when a foreign national who was not informed about consular access seeks a judicial remedy. The question of the availability of a judicial remedy that might impact the validity of a criminal conviction or sentence is considered in Chapter 14. In considering whether there is such a remedy, courts have asked themselves as a preliminary issue whether there is a right that attaches to the foreign national. They have also addressed the issue of a right, again as a preliminary issue, when a foreign national sues for money damages for a consular access violation. Such suits will be examined in Chapter 20. The current chapter addresses the issue of a right.

Two international courts have construed VCCR Article 36 to provide such a right. When Germany argued that the United States was required under VCCR Article 36 to afford relief to two German nationals who were not advised about consular access, the ICJ said that the German nationals had rights (Document 2). In issuing an advisory opinion on consular access, the Inter-American Court of Human Rights said the same (Document 3). Both courts came to that conclusion on their reading of the text of VCCR Article 36.

In 1980, the United States took the position that such a right exists when it used VCCR Article 36 to sue Iran in the *Tehran Hostages* case. It argued that Iran, by virtue of the sequestration of U.S. consuls, violated the rights under consular law of U.S. nationals in Iran who might need consular assistance. The United States based jurisdiction in the ICJ on the VCCR and its Optional Protocol concerning Compulsory Settlement of Disputes, arguing that the taking

of consuls as hostages violated the right of the United States to perform consular functions, and the right of U.S. nationals to avail themselves of consular services (Document 4a).

More recently, the U.S. Department of State has taken the contrary position, arguing that VCCR Article 36 does not create a right for a foreign national. Its argument to this effect is referenced, though without attribution to the United States, by the Inter-American Court of Human Rights in paragraph 73 of its advisory opinion (Document 3). The U.S. Supreme Court has avoided deciding the question. In a 2006 case, a foreign national asserted that error had been committed when statements he made following his arrest were admitted into evidence, even though he had not been advised about consular access. The U.S. Supreme Court said that even if the man enjoyed rights under VCCR Article 36, which for purposes of argument it would assume, his claim did not merit relief (Document 4b). The Court thus resolved the claim without deciding whether a right exists.

Lower courts in the United States have considered the issue and are divided on it. A few examples among many are included in this chapter. One circuit of the U.S. Court of Appeals, in a civil case, decided that VCCR Article 36 provides no right to a foreign national. A Mexican national sued the County of San Diego on behalf of himself and other foreign nationals who were arrested but allegedly were not advised about consular access. A U.S. district court dismissed the suit on grounds that VCCR Article 36 does not provide for a private right of action. The U.S. Court of Appeals affirmed (Document 4c).

However, another circuit of the U.S. Court of Appeals, also in a civil case, said precisely the opposite. In a case decided a few months earlier, it said that VCCR Article 36 creates a right for a detained foreign national (Document 4d).

Consular access issues have also been addressed in the courts of the states of the United States. These courts have generally decided against there being any rights for a foreign national under VCCR Article 36. The Supreme Court of the State of New Mexico, for example, in addressing the contention of a Mexican national that statements he made to police should not have been admissible at his trial, since he was not advised about consular access upon arrest, said that VCCR Article 36 creates no rights for a foreign national (Document 4e).

In Germany, the Constitutional Court has taken the same position as the two international courts. In a case overruling a decision to the contrary by Germany's Federal High Court, it ruled that consular access is a right of a foreign national under arrest or detention (Document 5).

8.2 International Court of Justice

LaGrand Case (Germany v. USA), 2001 I.C.J. 466

77. The Court notes that Article 36, paragraph 1(b), spells out the obligations the receiving State has towards the detained person and the sending State. It provides that, at the request of the detained person, the receiving State must inform the consular post

of the sending State of the individual's detention "without delay". It provides further that any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State "without delay". Significantly, this subparagraph ends with the following language: "The said authorities shall inform the person concerned without delay of *his rights* under this subparagraph" (emphasis added). Moreover, under Article 36, paragraph 1(c), the sending State's right to provide consular assistance to the detained person may not be exercised "if he expressly opposes such action". The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand . . . 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.

8.3 Inter-American Court of Human Rights

The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, 1 October 1999, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999)

[The Court refers in para. 73 to an argument, made to it by the United States, that language in the VCCR's preamble negated any individual right of a foreign national to be advised about consular access.]

73. Some briefs of [i.e., written] comments submitted to the Court observed that the preamble to the Vienna Convention on Consular Relations notes that in the drafting process, the States Party realized that:

. . . the purpose of [consular] 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 [Footnote omitted]

Thus, the Vienna Convention on Consular Relations would not appear to be intended to confer rights to individuals; the rights of consular communication and notification are, "first and foremost", rights of States.

74. Having examined the *travaux préparatoires* for the preamble of the Vienna Convention on Consular Relations, the Court finds that the "individuals" to whom it refers are those who perform consular functions, and that the clarification cited above was intended to make it clear that the privileges and immunities granted to them were for the performance of their functions.

75. The Court observes, on the other hand, that in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, the United States linked Article 36 of the Vienna Convention on Consular Relations with the rights of the nationals of the sending State.¹

¹ [Court's Footnote 63] I.C.J. Pleadings, United States diplomatic and consular staff in Tehran; I.C.J. Pleadings, Oral Arguments, Documents, p. 173-174.

76 *The rights of a foreign national*

The International Court of Justice, for its part, cited the Universal Declaration in the respective judgment.² . . .

77. The discussions of the wording of Article 36 of the Vienna Convention on Consular Relations turned on the common practice of States in the matter of diplomatic protection. That article reads as follows:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
 - a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication and access to consular officers of the sending State; . . .

78. The sub-paragraph cited above recognizes the right to freedom of communication. The text in question makes it clear that both the consular officer and the national of the sending State have that right, and does not stipulate any qualifications as to the circumstances of the nationals in question. Further, the most recent international criminal law recognizes the detained foreign national's right to communicate with consular officers of the sending State.

79. Therefore, the consular officer and national of the sending State both have the right to communicate with each other, at any time, in order that the former may properly discharge his functions. Under Article 5 of the Vienna Convention on Consular Relations, consular functions consist, *inter alia*, in the following:

- a) protecting in the host State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law; . . .
- e) helping and assisting nationals, both individuals and bodies corporate, of the sending State; . . .
 - i) subject to the practices and procedures obtaining in the host State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the host State, for the purpose of obtaining, in accordance with the laws and regulations of the host State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests; . . .

80. Taking the above-cited texts as a whole, it is evident that the Vienna Convention on Consular Relations recognizes *assistance* to a national of the sending State for the defense of his rights before the authorities of the host State to be one of the paramount functions of a consular officer. Hence, the provision recognizing consular communication serves a dual purpose: that of recognizing a State's right to assist its nationals through the consular officer's actions and, correspondingly, that of recognizing the correlative right of the national of the sending State to contact the consular officer to obtain that assistance.

81. Sub-paragraphs (b) and (c) of Article 36(1) of the Vienna Convention on Consular Relations concern consular assistance in one particular situation: deprivation of freedom. The Court is of the view that these sub-paragraphs need to be examined separately. Sub-paragraph (b) provides the following:

² [Court's Footnote 64] *United States diplomatic and consular staff in Teheran, judgment, I.C.J. Report 1980*, pp. 3 and 42.

if he so requests, the competent authorities of the host State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

This text recognizes, *inter alia*, a detained foreign national's right to be advised, without delay, that he has

- a) the right to request and obtain from the competent authorities of the host State that they inform the appropriate consular post that he has been arrested, committed to prison, placed in preventive custody or otherwise detained, and
- b) the right to address a communication to the appropriate consular post, which is to be forwarded "without delay".

82. The bearer of the rights mentioned in the preceding paragraph, which the international community has recognized in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment³ is the individual. In effect, this article is unequivocal in stating that rights to consular information and notification are "accorded" to the interested person. In this respect, Article 36 is a notable exception to what are essentially States' rights and obligations accorded elsewhere in the Vienna Convention on Consular Relations. As interpreted by this Court in the present Advisory Opinion, Article 36 is a notable advance over international law's traditional conceptions of this subject.

8.4 United States

a. Memorial of United States of America, International Court of Justice, *United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*, 12 January 1980, ICJ Pleadings, at 173–174

(a) *The obligation.* Pursuant to Article 36 of the Vienna Convention on Consular Relations, the Government of Iran is under an international legal obligation to the United States to ensure that United States consular officers "shall be free to communicate with nationals of the sending State and to have access to them", that United States nationals in Iran "have the same freedom with respect to communication with and access to consular officers of the sending State", and that United States consular officers have the right to visit United States nationals who are in "prison, custody or detention".

3 [Court's Footnote 6B] *Cf. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by the United Nations General Assembly, Resolution 43/173 of 9 December 1988, Principle 16.2; *Cf. Rules governing the detention of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; as amended on 17 November 1997; IT/38/REV.7*, Rules 65; *Declaration on the human rights of individuals who are not nationals of the country in which they live*, adopted by the United Nations General Assembly, Resolution 40/144 of 13 December 1985, Art. 10.

The right of consular officers in peacetime to communicate freely with co-nationals has been described as implicit in the consular office, even in the absence of treaties (L.T. Lee, *Consular Law and Practice*, p. 269; B. Sen, *op. cit.* [*A Diplomat's Handbook of International Law and Practice*], p. 257; Satow, *op. cit.* [*Guide to Diplomatic Practice*], p. 218). As Article 5 of the convention makes plain, a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations (*I Yearbook of the International Law Commission 1961*, pp. 32–38; L.T. Lee, *Consular Law and Practice*, p. 269). Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others.

(b) *The breach.* The government of Iran has violated, and continues to violate, its obligations under Article 36 in that it has failed to ensure that the United States consular officers at the United States diplomatic mission in Tehran may communicate with or have access to other United States nationals in Iran, including those United States nationals who are currently held hostage. It has also failed to ensure that such other United States nationals in Iran may communicate with or have access to these consular officers. It has encouraged and supported a situation in which, in fact, United States nationals are held essentially incommunicado in the grossest violation of consular norms and accepted standards of human rights.

b. Supreme Court of the United States, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006)

As a predicate to their claims for relief, Sanchez-Llamas and Bustillo each argue that Article 36 grants them an individually enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification. Respondents and the United States, as *amicus curiae*, strongly dispute this contention. They argue that “there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts.” Brief for United States 11; *ibid.* (quoting *Head Money Cases*, 112 U.S. 580, 598, . . . (1884) (a treaty “is primarily a compact between independent nations,” and “depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it’ ”)). Because we conclude that Sanchez-Llamas and Bustillo are not in any event entitled to relief on their claims, we find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights. Therefore, for purposes of addressing petitioners’ claims, we assume, without deciding, that Article 36 does grant Bustillo and Sanchez-Llamas such rights.

c. United States Court of Appeals, Ninth Circuit, *Cornejo v. County of San Diego*, 504 F.3d 853 (2007)

This appeal requires us to resolve an issue left open in our en banc decision in *United States v. Lombra-Camorlinga*, 206 F.3d 882, 884 (9th Cir. 2000): whether Article 36 of

the Vienna Convention on Consular Relations creates judicially enforceable rights that may be vindicated in an action brought under 42 U.S.C. §1983.⁴ . . .

Entitled "Communication and contact with nationals of the sending State," Article 36 appears in Section I of Chapter II of the Convention. Chapter II governs "Facilities, Privileges and Immunities Relating to Consular Posts, Career Consular Officers and Other Members of a Consular Post," while Section I concerns "Facilities, Privileges and Immunities Relating to a Consular Post." The lead sentence in paragraph 1 of Article 36, which is the paragraph that obliges authorities of a receiving State to notify a detained foreign national of "his rights" under sub-paragraph 1(b), declares that the rights set forth in that section are "[w]ith a view to facilitating the exercise of *consular functions* relating to nationals of the sending State." (emphasis added). As defined in Article 5, "consular functions" consist in, among other things, "(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law; . . . [and] (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State." Thus, the "rights" accorded under Article 36 are meant to facilitate the exercise of consular functions, an important one of which is to help nationals who run afoul of local law.

Accordingly, sub-paragraph 1(a) gives consular officials the right "to communicate with nationals of the sending State and to have access to them." The exchange of information provided for in sub-paragraph 1(b) supports the consular function and the rights conferred in sub-paragraph 1(a) upon consular officers to communication and access. And sub-paragraph 1(c) guarantees consular officials the right to visit a national of the sending State who is detained or incarcerated, as well as to converse and correspond with him and to arrange for his legal representation – if the national wants that kind of help and if the consulate wants to give it.

These "rights" are consistent with the articulated purpose of facilitating the exercise of consular functions, not with awarding compensation to individual detainees who receive no notification from their arresting officers. Requiring a receiving State to notify a foreign national that, if he wishes, it will inform the local consular post of an arrest or detention, and forward communications, enhances the ability of sending States to assist or protect their nationals. In this way, notification is "a means of implementing the treaty obligations *as between States*. Any other way of phrasing the promise would be both artificial and awkward." *Li*, 206 F.3d at 66 (Selya & Boudin, JJ., concurring). This, in turn, allows the sending State to decide what, if any, assistance it will provide. But at the end of the day, the right of assistance, as Article 36(1)(c) makes clear, belongs entirely to the sending State.

We conclude, therefore, that the unmistakable focus of Article 36 is on *consular functions*. The privileges discussed are explicitly those relating to *the consular post*. They are manifestly important, because Article 36 provides for communication and contact by sending States with their nationals who are in trouble in a foreign country. However, the signatory States did not choose to delegate enforcement of Article 36 – even to their own consular officials.⁵ They plainly did not do so to individual foreign nationals. For all these reasons, we cannot

4 42 U.S.C. §1983 provides for an action to redress violations of the Constitution or laws of the United States. "Laws" has been read by the courts to include treaties. Carlos Vazquez, Treaty-Based Rights and Remedies of Individuals, 92 *Columbia Law Review* 1082, 1147 (1992).

5 [Court's Footnote 11] There are two routes for remedying violations of Article 36: diplomatic channels through which governments may protest failure to observe the terms of Article 36, and dispute resolution through The Optional Protocol Concerning the Compulsory Settlement of

see unambiguous clarity in the language of Article 36 implying that the States parties to the Convention conferred a private, judicially enforceable right upon individuals. . . .

This conclusion is buttressed by the Convention as a whole, the contemporaneous understanding of Congress in ratifying it⁶ as well as the view of the Department of State, and the uniform practice of States implementing it over the years.⁷

The Vienna Convention on Consular Relations is an agreement among States whose subject matter – “Consular Relations” – is quintessentially State-to-State. Except for its final provisions, the Convention’s articles all have to do with consular posts. Indeed, the Preamble notes the belief of the States parties that “an international convention on consular relations, privileges and immunities would . . . contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems”; and their realization that “the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.”⁸ . . . As the International Court of Justice explained, the Convention establishes an “interrelated regime” of international legal obligations in order to protect, and facilitate the work of, consular officers. *LaGrand Case* (Germany v. U.S.), 2001 I.C.J. 466, 492 P 74 (June 27).

Cornejo suggests that the proviso in paragraph 2 manifests an intent to create privately enforceable rights. Nowhere does it say so. If anything, the fact that it talks in terms of how “rights referred to in paragraph 1 of this article shall be exercised” indicates the opposite, for it does not also say “and be compensated.”⁹ Moreover, just as paragraph 2 recognizes that the “rights” are to be exercised in conformity with the laws and regulations of the receiving

Disputes, April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487. Diplomacy is obviously a mechanism belonging to *States*. The Protocol likewise applies only to *parties*, and only States are parties. It provides that disputes arising out of the interpretation or application of the Convention shall be within the compulsory jurisdiction of the International Court of Justice (ICJ) and may be brought before the ICJ “by an application made by any party to the dispute being a Party to the present Protocol,” art. I, or to an arbitral tribunal by agreement of “[t]he parties”, art. II. Only States are parties to the Convention, and only States may bring proceedings before the ICJ. The United States joined the Protocol, but has since noticed its withdrawal. Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (March 7, 2005).

- 6 The Court spoke imprecisely by referring to Congress ratifying. Under the U.S. Constitution, the President, not Congress, ratifies treaties. Congress plays a role, in that the President must obtain the consent of the Senate.
- 7 [Court’s Footnote 12] The dissent faults us for buttressing our conclusion with “extratextual sources,” dissenting op. at 13004-015, but the terms of a treaty are by canon and international convention construed in light of the treaty’s object and purpose, including its preamble. Treaty Convention, art. 31(2); Restatement §325(1). Because it is a treaty that is being interpreted, the meaning given to its terms by the Department of State is entitled to great weight. *Sanchez-Llamas*, 126 S.Ct. at 2685. And subsequent practice also matters. Restatement §325(2).
- 8 [Court’s Footnote 13] We rely on the Preamble not to create an ambiguity, as the dissent implies, dissenting op. at 13006 (quoting *Jogi* that to do so is a mistake), but to provide context for the terms of Article 36(1)(b). This is perfectly proper, for a treaty must be interpreted as a whole in light of its object and purpose, including the preamble. Treaty Convention art. 31(2), Restatement §325(1). As the Preamble to the Vienna Convention specifically says, this particular treaty was meant to facilitate consular functions. Article 36(1)(b) does this, by allowing consular officials to aid their nationals.
- 9 [Court’s Footnote 14] As Judge Thomas put it, dissenting from our refusal to apply the exclusionary rule in *Lambert-Camorslingu*, “The Treaty does not provide expressly for private damage actions. Rather, the plain words of the Treaty provide that the notification right ‘shall be exercised,’ not that failure to notify should be compensated. Thus, the Treaty would not seem to contemplate

State, it provides that those laws and regulations "must enable full effect to be given to the purposes for which the rights accorded under this article are intended." The only articulated purpose is in paragraph 1, and it is to facilitate the exercise of consular functions relating to nationals of the sending State.

To the extent that Congressional intent in ratifying the Convention may be discerned, it, too, supports our interpretation. For example, the Report of the Committee on Foreign Relations recommending that the Senate give its advice and consent to ratification of the Convention emphasizes the preamble: "The general functional approach of the Convention is pointed up by the following preambular statement: '* * * the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.'" S. Exec. Rep. 91-9, at 2 (1969). The Report also emphasizes the focus of Articles 28 to 57 on consular functions: "Consular facilities, privileges and immunities of consular officers and other members of a consular post are stated in Articles 28 to 57. Among other things, these articles concern inviolability of consular premises, archives, and documents, freedom of movement and of communication, personal inviolability of consular officers, privileges and immunities, including exemptions from social security regulations, taxation, customs duties and inspection." *Id.* Further, the Report identified several factors that "weighed in the Committee's decision." The first was: "The Convention does not change or affect present U.S. laws or practices."¹⁰ *Id.* Had Article 36 been thought to create enforceable individual rights, it is unlikely the Committee would have said this; creating a right in a foreign national to sue for violations of an international treaty in American courts would have been unprecedented in 1969. Another factor weighing in favor of its recommendation was that "[a]s a sending state, it is important that the United States obtain for its consular service the prerogatives necessary for it to function effectively abroad." *Id.* at 3. Again, the focus was on obtaining rights to enable its *consular service* to function effectively; there is no comment, or focus, at all on obtaining for its nationals a right of any sort that would be privately enforceable in the courts of receiving States.

The contemporaneous position of the United States Department of State, which is entitled to "great weight," . . . also reinforces the view that the Convention as a whole, and Article 36 in particular, were not intended to create individually enforceable rights. For example, when the Senate was considering ratification, one of the deputy legal advisers to the State Department informed the Foreign Relations Committee that, "[i]f problems should arise regarding the interpretation or application of the convention, such problems would probably be resolved through diplomatic channels." S. Exec. Rep. 91-9, app., at 19. Failing that, he represented, disputes would be submitted to the ICJ pursuant to the Optional Protocol. *Id.* Since then, the Department has repeatedly asserted that "the only

private damage actions, and it would not be sound judicial policy to conjure legal theory that would expose individual officers to liability for breaches of international treaties. The decision on whether to attach individual liability for such violations should be left to Congress." 206 F.3d at 895.

10 [Court's Footnote 15] *Li* additionally notes that a 1970 letter sent by a State Department legal adviser to the governors of the fifty states after the Convention was ratified advised that the Department did "not believe that the Vienna Convention will require significant departures from the existing practice within the several states of the United States." 206 F.3d at 64. As the court remarked: "Needless to say, the creation of rights on par with those guaranteed by the Fourth, fifth, and Sixth Amendments to the United States Constitution would constitute just the sort of 'significant departure[']' disclaimed by this letter." *Id.*

remedies for failures of consular notification under the Vienna Convention are diplomatic, political, or exist between states under international law," *Emegbunam*, 268 F.3d at 392, and that "[t]he right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals," *Li*, 206 F.3d at 63.

Cornejo points out that in his Letter of Transmittal to the President, Secretary of State William P. Rodgers [*sic*] stated that Article 36 "requires that authorities of the receiving State inform the person detained of his right to have the fact of his detention reported to the consular post concerned and of his right to communicate with that consular post." *Li*, 206 F.3d at 74 (Torruella, C.J., concurring in part, dissenting in part, quoting the Secretary's letter transmitting the certified copy of the Convention). This statement, however, simply mirrors the provision itself, which unquestionably refers to "rights," without shedding light on whether its intent was (or was not) to create privately enforceable rights. By the same token, the Report of the United States Delegation to the Conference that resulted in the Convention states of Article 36 that it "is useful to the consular service of the United States in the protection of our citizens abroad." *Id.* (quoting Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963). This comports with our construction, and the apparent understanding of the ratifying Congress.

Given that Article 36 does not unambiguously confer a right in individual detainees to support a cause of action under §1983, we see no need for resort to the *travaux préparatoires*. Treaty Convention, art. 32(a), (b) (declaring that recourse to the *travaux préparatoires* is appropriate only where interpretation under Article 31 of the Treaty Convention leaves the meaning ambiguous or leads to a "result which is manifestly absurd or unreasonable"); see 1-2 Official Records, United Nations Conference on Consular Relations, Vienna, March 4 - April 22, 1963. Suffice it to say, the *travaux préparatoires* is consistent with the State Department's position; there is no indication that States intended the enforcement of a "right" to consular notification in the courts of the receiving State. To the extent the *travaux préparatoires* is susceptible to different interpretations, it is too ambiguous under domestic law - which controls the exercise of rights pursuant to paragraph 2 of Article 36 - to create a privately enforceable right not explicitly found in the text.

Finally, the government represents that none of the 170 States parties has permitted a private tort suit for damages for violation of Article 36. See also *Li*, 206 F.3d at 65 (relating similar advice from the State Department with respect to remedying failures of notification through a domestic criminal justice process). This is consistent with the State Department's position that the remedies "are diplomatic, political, or exist between states under international law." *Id.* at 63 (quoting the Department of State Answers to the Questions posed by the First Circuit in *United States v. Nai Fook Li* at A-3).¹¹

Accordingly, we hold that Article 36 does not unambiguously give Cornejo a privately enforceable right to be notified. For sure, he should have been notified. The government

11 [Court's Footnote 16] In *LaGrand*, for example, Germany brought a claim in the ICJ for breach of Article 36 by the United States and, invoking its right of diplomatic protection, also contended that the breach violated the individual rights of the LaGrand brothers who had not been informed of their rights under Article 36, paragraph 1. The ICJ concluded that the individual rights could be invoked in that court by the national State of the detained person. 2001 I.C.J. at 494, ¶177. By invoking diplomatic protection, and espousing the claim of its national in the ICJ, Germany was in reality "asserting its own rights." *The Matromnatis Palestine Concessions*, 1924 P.C.I.J. (ser. A) No. 2, at 11-12 (August 30) (emphasis added).

agrees; the State Department and the Department of Homeland Security have regulations in place that track the requirements of Article 36. So does the State of California. It is important to the United States that its treaty obligations be fulfilled, otherwise reciprocity is jeopardized. However, the "rights" in Article 36 were intended to facilitate the exercise of consular functions. That is how the treaty was understood by the United States Department of State and Congress. And it is how the treaty has been understood in practice by all its signatories. . . .

D.W. NELSON, DISSENTING:

. . . .
As originally formulated, Article 36(1)(b) did not confer rights onto individuals. Instead, it imposed a state obligation to notify the consulate of the sending State when a national of the sending State was deprived of his liberty. The delegates to the Vienna Convention did not approve this version because of concerns about the burden on receiving States, particularly those with large tourist or immigrant populations to inform consular officials from the sending State in all cases. [Footnote omitted] See 1 Official Record, Twelfth Plenary Meeting at 42, P 38 (April 20, 1963). Therefore, to lessen the burden, delegates sought and received approval of an amendment to Article 36(1)(b) that eliminated the automatic notification requirement and instead established an opt-in mechanism such that the detained foreign national had the right to request that consul be informed of his arrest or detention. [Footnote omitted] To ensure that the foreign national knew of this right, the delegate from the United Kingdom sought and received approval of an additional amendment that established the right of the detained foreign national to be informed of his right to request consul be notified of his decision.¹²

On the basis of the evidence of the clear text of Article 36(1)(b), which specifies that it is the foreign national who has the right to be informed of the requirement that the detaining authorities must notify his consul if he so requests, it is clear that Article 36(1)(b) confers an individual right. Insofar as it is relevant, the language in the preamble of the Vienna Convention, the congressional intent of the ratifying Senate, the contemporaneous position of the United States Department of State and the *travaux préparatoires* does not undermine this interpretation. In fact, the contemporaneous position of the United States Department of State and the discussion of Article 36(1)(b) in the *travaux préparatoires* supports my conclusion that Article 36(1)(b) confers an individual right. . . .

The Vienna Convention is silent on private, judicially enforceable remedies for violation of individual rights. As such, the drafters did not express any intention to foreclose domestic remedies that would overcome the presumptive remedy under §1983. The means

12 [Judge Nelson's Footnote 6] Specifically, the delegate from the United Kingdom was concerned that the proviso as originally stated ("unless he expressly opposes it") or as proposed by the delegate of the United Arab Republic ("if he so requests") could give rise to abuses and misunderstandings. To address the potential for abuse, the delegate felt that "it was essential to introduce a provision to the effect that the authorities of the receiving State should inform the person concerned without delay of his rights under sub-paragraph (b). *Id.* at ¶73. In other words, to ensure that the foreign national knew of his right to request that his consul could be informed of his detention under Article 36(1)(b), he needed to be informed of his right to make the request. Article 36(1)(b) with the proviso, "if he so request" and the inclusion of the amendment suggested by the United Kingdom delegate ("The said authorities shall inform the person concerned without delay of his rights under this subparagraph"), which is the last sentence of Article 36(1)(b) as currently written, received a two-thirds vote.

of enforcement identified by the ratifying Senate, which included diplomatic channels and the Optional Protocol, are far from the “comprehensive enforcement scheme” that would be incompatible with individual enforcement under §1983. Finally, the Vienna Convention does not include a more restrictive enforcement remedy that was intended to preclude enforcement under §1983.

Thus, Article 36(1)(b) confers individual rights that are presumptively enforceable under §1983. This presumption has not been defeated and therefore Article 36(1)(b) should be interpreted as conferring an individual right that is enforceable under §1983. For these reasons, I respectfully dissent.

d. United States Court of Appeals, Seventh Circuit, *Jogi v. Ióges*, 480 F.3d 822 (7th Cir. 2007)

Article 36 ¶ 1(b) states, plainly enough, that authorities “shall inform the person concerned without delay of his rights under this sub-paragraph.” (Emphasis added). Justice O’Connor, noting this language, has observed that, “if a statute were to provide, for example, that arresting authorities ‘shall inform a detained person without delay of his right to counsel,’ I question whether more would be required before a defendant could invoke that statute to complain in court if he had not been so informed.” *Medellin v. Dreke*, 544 U.S. 660, 687 . . . (2005) (O’Connor, J., dissenting from dismissal of writ of *certiorari* as improvidently granted). A number of judges have noted that “the text emphasizes that the right of consular notice and assistance is the citizen’s” and that this language is “mandatory and unequivocal.” *Breard v. Pruett*, 134 F.3d 615, 622 (Butzner, S.J., concurring); see *Li*, 206 F.3d at 72 (Torruella, C.J., concurring in part, dissenting in part) (“I have some difficulty envisioning how it is possible to frame language that more unequivocally establishes that the protections of Article 36(1)(b) belong to the individual national, and that the failure to promptly notify him/her of these rights constitutes a violation of these entitlements by the detaining authority.”); *United States v. Hongla-Yámche*, 55 F.Supp. 2d 74, 77 (D.Mass. 1999) (“The language of Article 36 clearly refers to the existence of an individual right.”).

. . . Faced with its unambiguous language, the defendants attempt to introduce doubt by looking at the Convention’s Preamble, which we reproduced above. They place special weight on the fifth paragraph of the preamble, which says: “Realizing that *the purpose of such privileges and immunities is not to benefit individuals* but to ensure the efficient performance of the functions by consular posts on behalf of their respective States. . . .” Vienna Convention, pmb. (emphasis added). That statement is a perfectly good reflection of almost every other article of the Convention. It does not, however, describe Article 36. Indeed, there is little reason to think that it has any application at all to Article 36. We are inclined to agree with *Jogi* that the most reasonable understanding of this language is as a way of emphasizing that the Convention is not designed to benefit diplomats in their individual capacity, but rather to protect them in their official capacity. See *United States v. Rodrigues*, 68 F.Supp.2d 178, 182 (E.D.N.Y. 1999) (“[I]t appears that the purpose of [the Preamble] is not to restrict the individual notification rights of foreign nationals, but to make clear that the Convention’s purpose is to ensure the smooth functioning of consular posts in general, not to provide special treatment for individual consular officials.”); Kadish, *supra*, 18 Mich.J. Int’l L. at 594 (“The privileges and immunities granted in the Vienna Convention are to enable the consul to perform his enumerated functions, not to benefit the consul personally. Thus, the preamble language refers to the individual consul, not individual foreign nationals.”).

Whether or not we are reading the Preamble correctly, there is a broader principle at

stake. It is a mistake to allow general language of a preamble to create an specific statutory or treaty text where none exists. Courts should look to preambles and titles only if the text of the instrument is ambiguous. . . . See Sutherland, *Statutes and Statutory Construction* § 47.04, at 146 (5th ed. 1982), *Singer ed.* (“The preamble cannot control the enacting part of the statute the enacting part is expressed in clear, unambiguous terms.”).

. . . We conclude that even though many if not most parts of the Vienna Convention address only state-to-state matters, Article 36 confers individual rights on detained nationals. . . . The negotiation history of Article 36 is filled with concern about the question of individual rights. For example, as the *Standt* court recalled:

[A] proposed amendment by Venezuela that would have eliminated the individual right of consular communication was withdrawn after it received strong opposition from other member states. 2 United Nations Conference on Consular Relations: Official Records [“Official Records”], at 37, 38, 84, 85, 331-34, U.N. Doc. A/Conf. 2 5/6, U.N. Sales No. 63.X.2 (1963).

153 F.Supp.2d at 425-26. The United States itself proposed language intended to “protect the rights of the national concerned.” Official Records at 337; see *Li*, 206 F.3d at 73-74 (Torruella, C.J., concurring in part, dissenting in part).

It is also revealing that the regulations issued by the Department of Justice and (now) the Department of Homeland Security that address the subject of consular notification highlight the right of the individual alien to notification. See 28 C.F.R. §50.5 (DOJ); 8 C.F.R. §236.1(e) (DHS). The regulations in fact draw an interesting distinction between notifications: under the DOJ regulation, §50.5(a)(1), the alien has the right to request the authorities *not* to notify his or her home country, unless some other treaty takes that right away from him or her; the DHS regulation also acknowledges that particular treaties may require notification. By careful design, as the *travaux préparatoires* reveal, Article 36 of the Vienna Convention was worded in a way to ensure that only “if [the alien] so requests” would the receiving authorities of the state that had him in custody notify his home country’s consular post. This indicates that the right conferred by Article 36 belongs to the individual, not to the respective governments.

The State Department sends regular notices to state and local officials reminding them of their notification obligations under the treaty. . . . The Foreign Affairs Manual issued by the State Department says that “Article 36 of the Vienna Consular Convention provides that the host government must notify the arrestee without delay of the arrestee’s right to communicate with the American consul.” (Emphasis added.) Courts have observed that the United States has repeatedly invoked Article 36 on behalf of American citizens detained abroad who have not been granted the right of consular access. *United States v. Superville*, 40 F.Supp.2d 672, 676 & n.3 (D.V.I., 1999) (noting United States interventions in Iran in 1979 and Nicaragua in 1986); see Gregory Dean Gisvold, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 Minn. L. Rev. 771, 792-94 (1994).

We conclude, for all these reasons, that Article 36 of the Vienna Convention by its terms grants private rights to an identifiable class of persons – aliens from countries that are parties to the Convention who are in the United States – and that its text is phrased in terms of the persons benefited.

e. Supreme Court of New Mexico, *State v. Martinez-Rodriguez*, 33 P.3d 267 (2001)

With regard to the VCCR, the State Department has consistently taken the position that although implementation of the treaty may benefit foreign nationals, it does not create

judicially enforceable individual rights that can be remedied in the criminal justice systems of the member states. *Li*, 206 F.3d at 63-64. According to the State Department, “[t] he [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law. . . . For these reasons, we do not find Defendant’s arguments persuasive and thus determine that the provisions of the VCCR do not create legally enforceable individual rights. . . . The VCCR, after all, is an agreement negotiated among sovereign states, including the United States and Mexico, not New Mexico and Mexico. Accordingly, we hold that Defendant does not have standing to enforce the provisions of the VCCR. The trial court did not abuse its discretion when it refused to suppress Defendant’s statement”

Pamela B. Minzner, Justice (specially concurring)

It is true that the preamble to the VCCR states that “the purpose of such privileges and immunities . . . is not to benefit individuals but to ensure the efficient performance of functions by consular posts” It is also true that the first sentence of Article 36 contains language that suggests a limited administrative purpose. I do not believe, however, that either the preamble or the introductory language to Article 36 are necessarily inconsistent with the creation of an individual right in Article 36(1)(b).

As a number of courts have recognized, “when taken in the context of the treaty as a whole, the Preamble’s reference to ‘individuals’ is best understood as referring to consular officials rather than civilian foreign nationals.” . . . The records of the committee and plenary meeting debates suggest that Article 36 of the VCCR was intended to confer individual rights Based upon the text and legislative history of Article 36(1)(b), I believe that we ought to construe the VCCR to have created individual rights. The fact that no judicial remedy is provided makes the task of defining and enforcing such rights more difficult but does not make me doubt their existence. Many of our most fundamental constitutional rights are not protected by remedies provided within the constitution itself. See, e.g., U.S. Const. amend. IV. The scope of the rights created by the VCCR and the appropriate remedy for violation of those rights seem to me to be proper subjects for judicial interpretation and construction.

8.5 Germany

Constitutional Court, *Case of F. & T.*, 2 BvR 2115/01, Judgment of 19 September 2006, para. 65

This interpretation [by the Federal High Court] is not consistent with those of the International Court of Justice in the *LaGrand* and *Avena* cases. Unlike the Federal High Court, the International Court of Justice concluded that VCCR Art. 36(1) grants a subjective right to consular assistance for the effective protection of individual defense rights. All prosecuting authorities, including police officers who interrogate during the preliminary proceedings are required to provide information about this right. A violation of this right renders the criminal conviction subject to being reversed, under international law. The purpose of the advice under VCCR Art. 36(1)(b)(3) is that the individual may take advantage of the assistance of his home country under Art. 36(1)(c). Art. 36(1) establishes a closed legal system that will guarantee a full defense of a sending-state national who is deprived of freedom in the receiving state. VCCR Art. 36(1) thus provides for the possibility of defense, hence for the procedural posture of the accused.

9 Consular access as a due process right

9.1 Introduction

Although the VCCR was not a human rights treaty, it did, in Article 36, speak in the language of rights attaching to an individual foreign national. As seen in Chapter 8, VCCR Article 36 has been widely construed as providing a right to an individual. The right is one of access to a consul. The nature and scope of assistance that may result varies from one receiving state to another, and may depend on circumstances, or on resources and personnel available at the particular time. Nonetheless, in a variety of contexts, consular access has come to be viewed as a necessary ingredient of fair proceedings when an accused person is a foreign national.

The issue emerged in a 1927 case in the General Claims Commission established by Mexico and the United States under a 1923 treaty. The treaty gave the Commission the power to decide claims of Mexican nationals against the United States, and of U.S. nationals against Mexico. Although the case pre-dates the development of human rights as a body of law restraining states in their treatment of individuals, the Commission developed and applied norms of minimal due process required to be afforded under international law. The Commission ruled that a U.S. national's rights were violated by virtue of a failure to facilitate consular access. In 1915 Walter H. Faulkner, a U.S. national on a business trip in Mexico, was arrested there on suspicion of circulating counterfeit currency. He was released by a judge after twelve days for lack of evidence. The United States brought a claim on his behalf against Mexico. One of Faulkner's claims (para. 2(d) of the Opinion) was that "[h]e was denied for several days communication either with the American consul or with his friends." In para. 10 of their Opinion, the Commissioners indicate that they are applying international standards to assess Mexico's liability. In para. 7, the Commissioners find the facts uncertain on Faulkner's claim of denial of consular access, because they think he may have been allowed access quite soon after being arrested. They state a view, however, about a receiving state's obligation and a correlative right of the foreign national. Their view is limited to the facts of the case, which involved a foreigner only temporarily resident in the receiving state, and one unfamiliar with its laws (Document 2a).

In an exchange with Canada in 1933, however, the United States took the principle stated by the Commissioners in the Faulkner case to read broadly as a right attaching to any foreign national. In discussions with Canada over visits by U.S. consuls to U.S. nationals imprisoned in Canada, U.S. Assistant Secretary of State Harry F. Payer, wrote, on behalf of the U.S. Secretary of State, to a U.S. officer in Canada to explain the U.S. view on Canada's obligation and the correlative right of imprisoned U.S. nationals. In that letter, Payer quoted from a comment attached to a provision on consular access to incarcerated nationals, written by Professor Quincy Wright as Reporter for a Draft Convention on the Legal Position and Functions of Consuls, reprinted in 26 *American Journal of International Law* 270 (Supplement 1932). Wright, and Payer after him, read the Opinion in the Faulkner case to mean that access to a consul is a right attaching to a foreign national under detention (Document 2b).

After World War II, when human rights law came into being, due process of law came to be regarded as owed by states to any person they subjected to the criminal process. Consular access as one aspect of due process received extended analysis in the advisory opinion issued by the Inter-American Court of Human Rights. Mexico raised with the Court the question of whether a denial of consular access, and in particular a failure to advise about consular access, might bring into question the receiving state's compliance with the international obligations to provide due process of law and a fair trial, at least when the criminal case might lead to capital punishment. The Court is an organ of the Organization of American States. It deals with human rights either with one state suing another, or by way of advisory opinions. Its competence to issue advisory opinions includes providing interpretation of human rights treaties that apply in the Americas, which the Court takes to include universal treaties like the VCCR, because OAS member states are signatories. In its advisory opinion, the Court found consular access to be an element of due process (Document 3). A fuller account of the proceedings leading to issuance of this advisory opinion is given in Chapter 27.

The Inter-American Commission on Human Rights, which is also part of the OAS human rights system, subsequently applied the Inter-American Court's analysis of consular access as a due process matter in the cases of particular individuals regarding whom complaints had been filed. Like the Inter-American Court, the Commission found that a consular access violation constitutes a due process violation under human rights instruments (Document 4).

The ICJ has not addressed consular access as a due process matter. In a case raised by Mexico against the United States, it said that it could only decide under consular law since its jurisdiction in that case was based on the VCCR (Chapter 26).

An argument against viewing consular access as a due process issue is that the right provided in VCCR Article 36 is one of contact and communication, not one of any actual assistance. VCCR Article 36 requires a receiving state to facilitate access, but it does not require a sending state to provide assistance. Thus, unlike a right to an attorney, where domestic law requires that an attorney actually assist, a right to consular access does not necessarily require consular assistance.

Nonetheless, those bodies that have found a due process aspect to consular access have stressed the disability typically suffered by foreign nationals as they seek to defend themselves. Sending states typically do provide assistance and may view themselves as being under an obligation to do so (see Chapters 10, 11). Some judges have equated the right to access to a consul with a right to an attorney (see Chapter 16).

Rights-related agencies at the United Nations have referred to consular access as a due process matter, calling for its observance in regard to the arrest of various categories of individuals. The UN Human Rights Commission, in a resolution encouraging states to observe due process in capital cases, referred to consular access as a right that needs to be respected (Document 5a). The UN General Assembly adopted a resolution asking governments to observe certain precepts in regard to the activity of police officers. The precepts were listed in an annex to the resolution. Each article of the Annex was followed by a "commentary" that explained the particular article in order "to facilitate the use of the Code within the framework of national legislation or practice." Article 2 of the Annex dealt with the observance of human rights by police officers and referenced consular access in that regard.

A number of treaties that deal with the arrest of persons call for consular access as a due process right if the person is a foreign national (Document 6). The Organization of American States, in resolutions on the rights of migrant workers, has called for respect for the right of consular access (Document 7).

Two states – Venezuela and Guatemala – have written consular access into their constitutions as a right to be accorded to any foreign national under arrest (Documents 8, 9).

Germany's constitutional court has interpreted Germany's constitutional provision on a fair trial to include a right of consular access (Document 10).

9.2 United States-Mexico (General Claims Commission)

a. *The United States of America, on Behalf of Walter H. Faulkner, Claimant v. The United Mexican States*, Docket No. 47, Opinion rendered 2 November 1926, in *Opinions of Commissioners under the Convention concluded September 8, 1923 between the United States and Mexico, February 4, 1926, to July 23, 1927*, U.S. Government Printing Office, Washington, 1927, at 86, reprinted in 21 AJIL 349 (1927)

7. The allegation of the claimant (allegation d) that he was not allowed for several days to communicate with his consul would, if proven, also have weight with the Commission. The Commission holds that a foreigner, not familiar with the laws of the country where he temporarily resides, should be given this opportunity. It is not clear, however, from the record when and how the liberty to communicate was given the claimant; his letter of October 4, 1915, to the consul appearing, from its wording, not to have been the first communication tendered.

b. *The Secretary of State to the Minister in Canada (Robbins)*, 17 August 1933, 2 *Foreign Relations of the United States: Diplomatic Papers 1933* at 86 (communication from U.S. Secretary of State Harry F. Payer, written on behalf of the U.S. Secretary of State, quoting Quincy Wright)

The opportunity to visit nationals personally may be essential if the consul is to give them effective protection, especially if they are imprisoned. This function may be exercised especially during a period when the person is held incommunicado. . . . Opportunity of a person imprisoned to communicate with his consul has been recognized as a right of the person by the United States and Mexico general claims commission (U.S. (Walter H. Faulkner) and Mexico November 2, 1926 . . .)

9.3 Inter-American Court of Human Rights

The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, 1 October 1999, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999)

115. The *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law.

116. The International Covenant on Civil and Political Rights recognizes the right to the due process of law (Article 14) as a right that "derives[s] from the inherent dignity of the human person." That article enumerates a number of guarantees that apply to "everyone charged with a criminal offence," and in that respect is consistent with the principal international human rights instruments.

117. In the opinion of this Court, for "the due process of law" a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants. It is important to recall that the judicial process is a means to ensure, insofar as possible, an equitable resolution of a difference. The body of procedures, of diverse character and generally grouped under the heading of the due process, is all calculated to serve that end. To protect the individual and see justice done, the historical development of the judicial process has introduced new procedural rights. An example of the evolutive nature of judicial process are the rights not to incriminate oneself and to have an attorney present when one speaks. These two rights are already part of the laws and jurisprudence of the more advanced legal systems. And so, the body of judicial guarantees given in Article 14 of the International Covenant on Civil and Political Rights has evolved gradually. It is a body of judicial guarantees to which others of the same character, conferred by various instruments of international law, can and should be added.

...

119. To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of

equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.

120. This is why an interpreter is provided when someone does not speak the language of the court, and why the foreign national is accorded the right to be promptly advised that he may have consular assistance. These measures enable the accused to fully exercise other rights that everyone enjoys under the law. Those rights and these, which are inextricably inter-linked, form the body of procedural guarantees that ensures the due process of law.

121. In the case to which this Advisory Opinion refers, the real situation of the foreign nationals facing criminal proceedings must be considered. Their most precious juridical rights, perhaps even their lives, hang in the balance. In such circumstances, it is obvious that notification of one's right to contact the consular agent of one's country will considerably enhance one's chances of defending oneself and the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried out in accord with the law and with respect for the dignity of the human person.

122. The Court therefore believes that the individual right under analysis in this Advisory Opinion must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial.

123. The inclusion of this right in the Vienna Convention on Consular Relations – and the discussions that took place as it was being drafted – are evidence of a shared understanding that the right to information on consular assistance is a means for the defense of the accused that has repercussions – sometimes decisive repercussions – on enforcement of the accused's other procedural rights.

124. In other words, the individual's right to information, conferred in Article 36(1)(b) of the Vienna Convention on Consular Relations, makes it possible for the right to the due process of law upheld in Article 14 of the International Covenant on Civil and Political Rights, to have practical effects in tangible cases; the minimum guarantees established in Article 14 of the International Covenant can be amplified in the light of other international instruments like the Vienna Convention on Consular Relations, which broadens the scope of the protection afforded to those accused.

PARTIALLY DISSENTING OPINION, JUDGE OLIVER JACKMAN

9. In my view, the concepts of relevance, proportionality, adequacy, and, above all, necessity, are indispensable tools in assessing the role which a given right plays in the totality of the structure of due process. On this analysis it is difficult to see how a provision such as that of Article 36.1.(b) of the Convention – which is essentially a right on the part of an alien accused in a criminal matter to be informed of a right to take advantage of the possible availability of consular assistance – can be elevated to the status of a fundamental guarantee, universally exigible as a *conditio sine qua non* for meeting the internationally accepted standards of due process. This is not to gainsay its undoubted utility and

importance in the relatively specialised context of the protection of the rights of aliens, nor to relieve States parties to the Convention from their duty to comply with their treaty obligation.

9.4 Inter-American Commission on Human Rights

Martinez Villareal v. USA, Report No. 52/02, Case 11.753, 10 October 2002, <https://www.cidh.oas.org/annualrep/2002eng/USA.11753.htm>. [The Commissioner's footnotes are omitted.]

62. Moreover, the Commission considers that compliance with the rights of a foreign national under the Vienna Convention on Consular Relations is particularly relevant to determining whether a state has complied with the provisions of the American Declaration [of the Rights and Duties of Man] pertaining to the right to due process and to a fair trial as they apply to a foreign national who has been arrested, committed to prison or to custody pending trial, or is detained in any other manner by that state.

63. More particularly, in accordance with the Commission's previous jurisprudence as well as the terms of pertinent international instruments and general principles of international law, the requisite due process and fair trial protections guaranteed under Articles XVIII and XXVI of the American Declaration include most fundamentally the right of a defendant to be presumed innocent until proven guilty according to law, the right to prior notification in detail of the charges against him, the right to adequate time and means for the preparation of his defense, the right to be tried by a competent, independent and impartial tribunal previously established by law, the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing and to communicate freely and privately with his counsel, and the right not to be compelled to be a witness against himself or to plead guilty.

64. The Commission considers that these protections in turn are of such a nature that, in the absence of access to consular assistance, a foreign national may be placed at a considerable disadvantage in the context of a criminal proceeding taken against him or her by a state. This could arise, for example, by virtue of a foreign national's inability to speak the language of the state, a lack of familiarity with its legal system, or an inability to gather relevant information, such as mitigating evidence, from his or her home country. Disadvantages of this nature could in turn undermine the effectiveness of the foreign national's due process rights to, for example, understand the charges against him and to adequately prepare his or her defense. It is also apparent that access to consular assistance could potentially mitigate such disadvantages by such means as the provision of linguistic and legal assistance as well as the identification and collection of pertinent information from the defendant's state of nationality.

9.5 United Nations

a. Human Rights Commission Resolution 2001/68, 25 April 2001, U.N. Document E/CN.4/RES/2001/68

The Commission on Human Rights

...

Concerned that several countries, in imposing the death penalty, do not take into account the Safeguards guaranteeing protection of the rights of those facing the death penalty,

...

4. Urges all States that still maintain the death penalty:

...

(d) To observe the Safeguards guaranteeing protection of the rights of those facing the death penalty and to comply fully with their international obligations, in particular with those under the Vienna Convention on Consular Relations.

b. Code of Conduct for Law Enforcement Officials, UN General Assembly Resolution 34/169 (1979), Annex: Code of Conduct for Law Enforcement Officials.

The General Assembly

...

Adopts the Code of Conduct for Law Enforcement Officials set for in the annex to the present resolution and decides to transmit it to Governments with the recommendation that favourable recommendation should be given to its use within the framework of national legislation or practice as a body of principles for observance by law enforcement officials.

Annex

...

Article 2: In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

Commentary:

(a) The human rights in question are identified and protected by national and international law. Among the relevant international instruments are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Prevention and Punishment of the Crime of Genocide, the Standard Minimum Rules for the Treatment of Prisoners and the Vienna Convention on Consular Relations.

9.6 Multilateral treaties

a. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, Article 6. [This Convention requires states to prosecute persons who commit torture.]

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 [an act of torture] is present shall take him into custody or take other legal measures to ensure his presence. . . .

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

b. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 1035 UNTS 167, Article 6.

[This Convention requires states to prosecute or extradite persons who attack diplomats, consuls, and other international officials. Article 6 requires that such a person upon being arrested must be afforded consular access.]

1. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the alleged offender is present shall take the appropriate measures under its internal law so as to ensure his presence for the purpose of prosecution or extradition. . . .

2. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled:

- a. to communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to protect his rights or, if he is a stateless person, which he requests and which is willing to protect his rights, and
- b. to be visited by a representative of that State.

c. International Convention on the Protection of the Rights of All Migrant Workers and Their Families, text adopted by UN General Assembly Resolution 45/158 (1990), Article 16(7)

[This provision addresses the right of migrant workers upon being arrested.]

7. When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner:

- (a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefor;
- (b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be

forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay;

- (c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.

d. International Convention for the Protection of All Persons from Enforced Disappearance, text adopted by UN General Assembly Resolution 61/177 (2006)

Article 17(2). Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation: . . .

- (d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family; counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;

9.7 Organization of American States

- a. Organization of American States, General Assembly Resolution 1717 (XXX-O/00), 5 June 2000, *The Human Rights of All Migrant Workers and Their Families*

REAFFIRMS

...
emphatically, the duty of states to ensure full respect and observance of the 1963 Vienna Convention on Consular Relations, particularly with regard to the right of foreign nationals, regardless of their immigration status, to communicate with a consular officials of their own state in case of detention and the obligation of the state in whose territory the detention occurs to inform the foreign national of that right.

- b. Organization of American States, General Assembly Resolution 2224 (XXXVI-O/06), 6 June 2006, *The Human Rights of All Migrant Workers and Their Families*

The General Assembly

...
Resolves

...

2. To reaffirm the duty of states parties to the 1963 Vienna Convention on Consular Relations to comply with that Convention, including the right to communication between consular officers and their nationals in cases of detention and the obligation of the states parties in whose territory the detention occurs to inform the foreign national of that right; and, in that connection, to call the attention of states to Advisory Opinion OC-16/99 of the Inter-American Court of Human Rights and to

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the ruling of the International Court of Justice of March 31, 2004, in the case *Avena and Other Mexican Nationals*, on the obligation to comply with Article 36 of the Vienna Convention.

9.8 Venezuela

Constitution of the Bolivarian Republic of Venezuela, *Official Gazette*, 30 December 1999, No 36.860

Title III. Duties, Human Rights and Guarantees

CHAPTER III: CIVIL RIGHTS, ARTICLE 44

The competent authorities shall keep a public record of every arrest made, including the identity of the person arrested, the place, time, circumstances and the officers who made the arrest. In the case of the arrest of foreign nationals, applicable provisions of international treaties concerning consular notification shall also be observed.

9.9 Guatemala

Political Constitution as revised by Legislative Agreement No. 18-93 of 17 November 1993.

Article 19. Penal system. The penal system must serve the social reintegration and reeducation of prisoners and comply in their treatment with the following minimum norms: . . . (c) they have a right to communicate, when they so request, . . ., where relevant, with a diplomatic or consular representative of their nationality.

9.10 Germany

Constitutional Court, *Case of F. & T.*, 2 BvR 2115/01, Judgment of 19 September 2006, para. 47

The constitutional claims [relating to violation of consular access] are obviously well founded. The challenged determinations of the Federal High Court damaged the complainant in his basic right to a fair trial under Art. 2, para. 1, of the Constitution in relation to the principle of the rule of law.

10 Statutory right to sending state protection

10.1 Introduction

Bilateral and multilateral consular treaties do not deal with the relationship between a sending state and its national, or specify any obligation on the part of a sending state to assist its national. By the text of these treaties, a sending state has a right to assist, but no obligation to do so. The issue may arise, however, that a sending-state national under arrest desires assistance but that the sending state, for whatever reason, chooses not to provide any. It may also arise that the sending state is willing to provide some assistance, but not the specific type of assistance that the national deems appropriate.

Even though the law of consular relations is silent on the matter, there may be a sending-state obligation to its own nationals arising from other bodies of law. In some states, one finds constitutional provisions that require the government to protect citizens when they are abroad. These provisions are not specific to the situation of arrest or detention but do cover all situations in which a national requires consular assistance (Documents 2, 3, 4). In other states, an obligation is imposed on consuls by statute to assist nationals under arrest or detention (Documents 5 through 12). In Mexico, an obligation of consuls to assist nationals under arrest or detention is found in an administrative regulation adopted under a statute on the foreign service (Document 13).

The issue of whether a national has any remedy under these constitutional or statutory provisions if the sending state fails to provide consular assistance has received little attention. To date, there is no litigation to report on the point. The only litigation has been in states (see Chapter 11) that have no constitutional or statutory provision but nonetheless are considered to have recognized an obligation to assist nationals.

10.2 Hungary

Hungary, Constitution (as amended 1989)

Article 69(3). Every Hungarian citizen is entitled to enjoy the protection of the Republic of Hungary, during a lawful stay abroad.

10.3 China

China, Constitution (1982)

Article 50. The People's Republic of China shall protect the legitimate rights and interests of Chinese nationals residing abroad.

10.4 Russia

a. Constitution (1993)

Article 61(2). The Russian Federation shall guarantee to its citizens defense and protection beyond its borders.

b. Statute on Consular Posts of the Russian Federation, Decree of the President of the Russian Federation, No. 1330, 5 November 1998, in *Sobranie zakonodatel'stva Rossiiskoi Federatsii* [*Collected Legislation of the Russian Federation*], No. 45, item 5509, 9 November 1998

Article 2. A consular post shall carry out its activity in conformity with the Constitution of the Russian Federation . . . and also the Vienna Convention on Consular Relations . . .

Article 8. The basic tasks and functions of a consular post are: . . . to perform, within the limits of its jurisdiction, functions related to civil, family and criminal matters, in conformity with the statutes of the receiving state.

10.5 Kazakhstan

Consular Statute, Presidential Edict No. 217, 27 September 1999, Article 37 (<http://www.pavlodar.com/zakon/index.html?dok=00584&oraz=00&noraz=0>)

A consul is obliged to see that receiving state legislation international treaties are observed in regard to a citizen of the Kazakhstan Republic held under guard (arrested), or detained on suspicion of committing a crime, or subjected to other measures limiting the freedom of a citizen of the Kazakhstan Republic, or serving punishment in a penal institution, or subjected to other measures of judicial or administrative coercion.

A consul is obliged, upon the request of interested persons or at the consul's own initiative, to visit citizens of the Kazakhstan Republic who are in places of confinement, and to ascertain the conditions under which they are being held. A consul is obliged to see that such citizens are held in conditions conforming to hygienic and sanitary standards, and that they are not subjected to treatment that is cruel or degrading to human dignity.

10.6 Ukraine

Consular Statute, Decree of the President of Ukraine, No. 127/94, 2 April 1994 (with amendments to 1999), Article 39 (<http://www.ukrchicago.com/laws/statut.html>)

In regard to any Ukraine citizen taken under guard (arrested), detained under suspicion of committing a crime, or subjected to other measures that restrict the freedom of a Ukraine citizen, or serving punishment by way of deprivation of freedom, or subjected to other measures of judicial or administrative compulsion, a consul is required to see that the legislation of the receiving state, treaties concluded by Ukraine with this state, and international agreements in which Ukraine and the receiving state are parties are observed.

A consul is required at the request of interested persons or at his own initiative to visit Ukraine citizens who are under arrest, detained, or deprived of freedom in some other form or who are serving punishment.

A consul is required to see that such citizens are held in conditions that satisfy necessary hygiene and sanitation, and that they not experience treatment that is cruel or degrading to human dignity.

In any event a consul is required to demand a personal meeting with a Ukraine citizen, in order to make certain that the rights and interests of such a citizen are not violated.

10.7 Estonia

Consular Act, 3 December 2003, as amended 25 February 2004 (RT I 2004, 14, 92), §57 (<http://www.legaltext.ee/text/en/X80005.htm>)

- (1) If an Estonian national is detained or is serving a sentence in a consular district, the consular officer or honorary consul shall meet him or her upon a reasoned request from the national or his or her authorized representative, family or other persons close to him or her.
- (2) An Estonian national who has been detained or is serving a sentence shall be represented by the consular officer or honorary consul before the authorities of the consular district at the request of the national and in justified cases.

10.8 Georgia

Law of the Georgian Republic on Consulates, No. 605-Is, 22 November 1994 (http://www.parliament.ge/index.php?lang_id=GEO&sec_id=69&kan_det=det&kan_id=271)

Article 38. A consul must look after Georgian nationals who are arrested or temporarily detained, suspected of having committed a crime, or who have had their rights limited by administrative measures. The law of the host government must be respected, as well as those agreements and documents signed between Georgia and the host government. At the consul's initiative, or when other individuals take an interest in the detainee, a consul is obliged to visit the detainee and to check on his living accommodations. A consul is obliged to ensure that the national is being maintained in good hygienic and sanitary conditions, and that he is not being subjected to violence that violates his human rights.

10.9 Switzerland

Switzerland, Federal Council, Regulation of the Swiss Diplomatic and Consular Service, 24 November 1967 (http://www.admin.ch/ch/f/rs/191_1/index.html)

Article 17. Assistance to Swiss Persons Deprived of Liberty. When the representative offices [defined in Article 1 of the Regulation as being diplomatic missions or consular posts] learn that a Swiss national has been deprived of liberty without their being informed by the authorities of the receiving state, they shall inquire of these authorities concerning the reasons. If it appears appropriate, or if the interested person requests, they shall seek to enter into communication with that person or to visit that person; they shall see that the person's defense is assured before any authority.

10.10 Germany

Law on Consular Officers, Their Functions and Powers (Consular Law), 11 September 1974 (Bundestag, with approval of Bundesrat, official translation)

Article 7. Assistance to Prisoners. Consular officers shall care for Germans remanded in custody pending trial or serving a prison sentence within their consular district and especially provide them with legal protection if so required by such persons.

10.11 Norway

Ministry of Foreign Affairs, Instructions for the Foreign Service, 13 December 2002 (in force 1 January 2003), chapter 8, §8, subsection 1 (http://www.regjeringen.no/nb/dep/ud/dok/lover_regler/reglement/2003instruks_for_utenriksdepartementet)

If a Norwegian citizen is under criminal proceedings abroad for a crime or serious infraction, the foreign service post shall afford the help that subsequent circumstances show to be appropriate and possible, in regard to legal assistance in the matter.

10.12 Lithuania

Consular Statute, 25 May 2006, State gazette No. 68-2492, 17 June 2006, Article 18 (http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=278145)

- (1) If a citizen of the Lithuanian Republic is detained or is serving a sentence or is suspected of crime in the consular district, a consular officer, acting within the laws of the state in question, shall contact or if needed meet with this person upon his request or that of his authorized representative, spouse (domestic partner) or relatives.
- (2) A consular officer shall ascertain the request of a citizen of the Lithuanian Republic to be afforded an attorney or other legal assistance in conformity with local law or to be provided with an interpreter and, if needed, shall see that such legal assistance is afforded or an interpreter provided.

10.13 Mexico

Regulation under the Law on the Mexican Foreign Service, Diario Oficial de la Federación, 23 August 2002 (presidential enactment), Article 65 (http://www.diputados.gob.mx/LeyesBiblio/regley/Reg_LSEM.pdf)

It is a priority obligation of members of the Foreign Service to protect the interests of Mexicans abroad. To this end they shall lend their good offices, provide consular assistance and protection, and, when the situation arises, inform the Secretary [of Foreign Affairs] about the relevant facts so that the Secretary can determine if the Mexican state will grant diplomatic protection.

Consular assistance shall be afforded when necessary to tend to Mexicans and to advise them in their relations with foreign authorities. For these purposes members of the foreign service must . . . visit Mexicans who are detained, imprisoned, hospitalized or in any other form of difficulty, in order to ascertain their needs and to take action . . .

11 Non-statutory right to sending state protection

11.1 Introduction

A consul who arbitrarily refuses to assist a particular arrested national would widely be considered to be in breach of a duty owed to the sending state. Some states that have no constitutional or statutory provision requiring consuls to assist a detained national nonetheless instruct their consuls to do so (Documents 2, 3). Many states advertise the availability of consular assistance in the event a national is arrested abroad (Documents 4, 5).

Whether such statements reflect a recognition by sending states of an obligation to their nationals in case of arrest abroad is a question that has led to litigation in two states. Suits have been instituted in Canada and in the United Kingdom by nationals seeking to force those governments to provide consular assistance. In both instances, the national was incarcerated by the United States in a facility at Guantanamo Bay, Cuba. In both instances, courts concluded that the government bears an obligation to assist, an obligation emanating from the general duties of administrative agencies, and from public announcements promising assistance (Documents 6, 7). A Canadian court took the additional step of ordering the government not only to assist but to ask for a detainee's release (Document 6c).

11.2 United States

Department of State, *Foreign Affairs Manual*, vol. 7 (<http://www.state.gov/m/a/dir/regs/fam/c22164.htm>)

§423.3 . . . b. Explain [during first visit to a national under arrest] that a U.S. citizen or national is entitled to claim consular protection abroad, regardless of evidence of guilt, the nature of the alleged crime, or the status of the citizen.

11.3 Brazil

Ministry of Foreign Relations, *Manual de Serviço Consular e Jurídico* [Manual of the Consular and Legal Service] (as at 2 June 2000), §3.1.23 (<http://www.Casadobrasil.info/UserFiles/Files/pdfs/manconsular.pdf>)

It shall also fall to the consular post, in the exercise of what is provided by Article 36 of the Vienna Convention on Consular relations: (1) to lend assistance to Brazilians who are involved in criminal processes.

11.4 Norway

Ministry of Foreign Affairs, Advice to Norwegians Travelling Abroad (updated January 2003) (<http://www.regjeringen.no/en/dep/ud/Documents/veiledninger/2003/Assistance-to-Norwegians-travelling-abroad/6.html?id=419433>)

Arrest: In the event that a Norwegian national is arrested in a foreign country, a representative of the local Norwegian foreign service mission will normally visit the person in prison in order to safeguard his or her interests. The main purpose of this is to see to it that the arrested person receives adequate legal assistance.

In most countries, defence counsel will be appointed and paid by the authorities. The foreign service mission may assist by finding a private lawyer if desired, but the detainee will have to pay for such legal services out of his or her own pocket.

Foreign service missions may notify family members at home in Norway, arrange for visits in prison, and assist in a range of practical matters that the detainee is prevented from dealing with. Foreign service missions may also communicate requests to the local authorities if the situation should require this.

However, it must be borne in mind that local laws and regulations will always apply and will therefore determine, along with applicable international law, what Norwegian officials or representatives may or may not be able to do.

11.5 Australia

Government of Australia, *If you are arrested or jailed overseas* (<http://www.smartravel.gov.au/tips/gaolos.html>), copyright Commonwealth of Australia reproduced by permission

Consular visits

If you are arrested, detained or jailed overseas and request consular assistance, an Australian consular officer will attempt to visit you as soon as possible after notification of your arrest and if permission is granted by the local authorities.

Australian consular officers will not make assumptions about your guilt or innocence. Their primary interest is your welfare. In visiting you and providing consular assistance to you as a detainee, consular officers will aim to ensure, to the extent possible, that you:

- are able to have regular contact with an Australian consular officer
- have access to appropriate legal defence and receive a fair trial under local law
- are treated no less favourably than local citizens detained for similar offences
- are subject to humanitarian standards of prisoner welfare and your basic needs are met.

11.6 Canada

a. Department of Foreign Affairs and International Trade, Consular Affairs Bureau, *Manual of Consular Instructions*, Annex D-2: A Guide to Services Provided to Canadians Detained or Imprisoned in Foreign Countries: Foreword

It must be understood at the outset that the Department is under no legal obligation to provide services to Canadians incarcerated overseas, but does so for humanitarian and compassionate reasons. It accordingly retains in each case the right to determine the range and frequency of services and the option to withdraw them in part or completely.

b. Federal Court of Canada, *Khadr v. Canada* (Minister of Foreign Affairs), 2004 F.C. 1145, 18 August 2004 (von Finckenstein, J.)

Legitimate expectation

With regards to the first ground advanced by the Applicants, the language of the DFAITA [Department of Foreign Affairs and International Trade Act] is quite straightforward. It states that the Minister shall conduct all diplomatic and consular relations on behalf of Canada. There is clearly an obligation to carry out these functions and not merely an authorization to do so.

The publication "A Guide for Canadians Imprisoned Abroad" reflects this state of affairs. It asserts that the government will "make every effort to ensure that" a Canadian detained abroad receives "equitable treatment" including ensuring that he or she is not penalized for being a Canadian. In addition, it states:

... Consular officials will facilitate communication between you, or someone you designate, and your lawyer . . .

The range of services provided by Canadian consular officials varies from case to case and from country to country. Services appropriate to your case and situation will be discussed with you and/or those you designate. At your request, officials can:

- Notify your family or friends of your situation and let them know whether – and how – they can help;
- help you communicate with your representative, family or friends;
- seek to ensure equitable treatment under local laws upon your arrest or detention, consistent with the standards of the host country;
- obtain information about the status of your case and encourage authorities to process the case without undue delay;
- provide you, your representative or family with information on the local judicial and prison systems, approximate times for court action, typical sentences in relation to the alleged offence and bail provisions;
- make every effort to ensure that you receive adequate nutrition, and medical and dental care;
- arrange for the purchase, at your expense and if permitted, of necessary food supplements, essential clothing and other basic items not available through the prison system;
- deliver mail and provide permitted reading material if normal postal services are unavailable;

- convey messages to you if telephone or postal services are unavailable or impractical;
- contact relatives or friends on your behalf and ask them to send you funds as required;
- facilitate the transfer of funds to you if other means are unreliable or unavailable (fees apply); and
- attempt to locate missing personal property.

In addition to making a commitment with regards to future action, the language of the Guide suggests that it has, in fact, been the Minister's practice to provide these services to most overseas detainees in the past.

Based upon the foregoing, there is a persuasive case that both the DFAITA and the Guide create a legitimate and reasonable expectation that a Canadian citizen detained abroad will receive many of the services which Omar Khadr has requested. Indeed, Canadians abroad would be surprised, if not shocked, to learn that the provision of consular services in an individual case is left to the complete and unreviewable discretion of the Minister.

c. Canada, Federal Court, Vancouver, British Columbia, *Khadr v. Canada*, Judgment of 23 April 2009, O'Reilly, J.

13. While Mr. Khadr was at Guantánamo Bay, Canadian consular officials made inquiries about him beginning in November 2003. They also sought assurances that the death penalty would not be imposed on Mr. Khadr and that detainees generally would be treated in accordance with international law. Canada also expressed its concern about allegations that Mr. Khadr and other detainees were being mistreated. Beginning in 2005, Canadian officials visited Mr. Khadr a number of times to check on his welfare. In general, they found that he appeared to be healthy and well fed.

When he complained that his gunshot wounds were bothering him and still bleeding, Canadian officials requested medical treatment for him, and it was provided.

14. In addition, Canadian officials, including agents of the Canadian Security and Intelligence Service (CSIS), visited Mr. Khadr a number of times and questioned him. In particular, in February 2003, CSIS agents and an officer from the Department of Foreign Affairs and International Trade (DFAIT) interviewed Mr. Khadr over the course of four days. Additional interrogations followed in September 2003 and March 2004. These visits were for purposes of law enforcement and intelligence gathering, not consular assistance to Mr. Khadr. Indeed, Canadian officials told Mr. Khadr in 2003 that they could not do anything to help him.

15. A report on the March 2004 visit by a DFAIT official states (referring to Mr. Khadr as "Umar"): In an effort to make him more amenable and willing to talk, [blank] has placed Umar on the "frequent flyer program."

[F]or the three weeks before [the] visit, Umar has not been permitted more than three hours in any one location. At three hours intervals he is moved to another cell block, thus denying him uninterrupted sleep and a continued change of neighbours. He will soon be placed in isolation for up to three weeks and then he will be interviewed again.

Certainly Umar did not appear to have been affected by three weeks on the

“frequent flyer” program. He did not yawn or indicate in any way that he was tired throughout the two-hour interview. It seems likely that the natural resilience of a well-fed and healthy seventeen-year-old are keeping him going.

16. Even before it came to light that Mr. Khadr had been subjected to sleep deprivation, Justice Konrad von Finckenstein had issued an interim injunction preventing further interviews with Mr. Khadr in order “to prevent a potential grave injustice” (Khadr v. Canada, 2005 FC 1076, at para. 46).

17. By the spring of 2004, then, Canadian officials were knowingly implicated in the imposition of sleep deprivation techniques on Mr. Khadr as a means of making him more willing to provide intelligence. Mr. Khadr was then a 17-year-old minor, who was being detained without legal representation, with no access to his family, and with no Canadian consular assistance.

18. It cannot fairly be said, however, that Canada abandoned Mr. Khadr entirely. Clearly, officials were concerned about his treatment and welfare and, beginning in 2005, checked on him regularly.

...

23. Mr. Khadr has launched a number of other proceedings in Federal Court. In 2004, he commenced an action for damages and a declaration that his Charter rights had been infringed. Justice Konrad von Finckenstein granted him an injunction against further interrogations by Canadian officials, but no further action was taken in the proceedings (Khadr v. The Attorney General of Canada and the Minister of Foreign Affairs, 2005 FC 1076, T-536-04).

...

THIS COURT ORDERS that

1. The application for judicial review be allowed, with costs.
2. The respondents request that the United States return Mr. Khadr to Canada as soon as practicable.

11.7 United Kingdom

Court of Appeal (Civil Division), R (on the application of Abassi and another) v Secretary of State for Foreign and Commonwealth Affairs, 2002 EWCA 1598, paras. 87–94

87. The second consideration is that, to a degree, the Foreign and Commonwealth Office have promulgated a policy which, so it seems to us, is capable of giving rise to a legitimate expectation.

88. The practice of the United Kingdom Government in respect of diplomatic protection was explained in 1999, in comments presented to the United Nations General Assembly, as part of the discussion of a report of the International Law Commission (reproduced in British Yearbook of International Law 1999 at p. 526). Under the heading “Diplomatic protection: United Kingdom Practice”, the paper notes that this is a matter “falling within the prerogative of the Crown” and that “there is no general legislation or case law govern-

ing this area in domestic law". It distinguishes between "formal claims" and "informal representations".

89. In relation to formal claims, "a considered statement of the Government's policy, contained in "rules" issued by the Foreign Office, based on "general principles of customary international law". It is said, citing *Mutasa v Attorney General* [1980] 1 QB 14 (see below), that the rules are "a statement of general policy and have no direct effect in domestic law". We have been shown the current version of the rules (reproduced in (1988) 37 ICLQ p.1006). It is not suggested that any are directly relevant to this case, but we note rule VIII, which provides:

"If, in exhausting any municipal remedies, the claimant has met with prejudice or obstruction, which are a denial of justice, HMG may intervene on his behalf in order to secure justice."

90. In relation to informal representations, the 1999 British Year Book of International Law records two further Ministerial statements of policy. The first refers to a "review of our policy" on making such representations about convictions and sentencing of British prisoners abroad:

"At present we consider making representations if, when all legal remedies have been exhausted, the British national and their lawyer have evidence of a miscarriage or denial of justice. We are extending this to cases where fundamental violations of the British national's human rights had demonstrably altered the course of justice. In such cases, we would consider supporting their request for an appeal to any official human rights body in the country concerned, and subsequently giving advice on how to take their cases to relevant international human rights mechanisms."

91. This review was further explained in a Parliamentary Answer on 16th December 1999 by Baroness Scotland. Having referred to the revised policy, she said:

"We are very conscious of the other government's obligations to ensure the respect of the rights of British citizens within their jurisdiction. This includes the right to a fair trial. In cases where a British citizen may have suffered a miscarriage of justice we believe that the most appropriate course of action is for the defendant's lawyers to take action through the local courts. If concerns remain, their lawyers can take the case to the United Nations Human Rights Committee, where the State in question has accepted the right of individual petition under the ICCPR. The UK Government would also consider making direct representations to third governments on behalf of British citizens where we believe that they were in breach of their international obligations."

92. Taken together, these statements indicate a clear acceptance by the government of a role in relation to protecting the rights of British citizens abroad, where there is evidence of miscarriage or denial of justice. In the present case none of the avenues suggested in the last quotation is available. The words emphasised contain no more than a commitment "to consider" making representations, which will be triggered by the "belief" that there is a breach of the international obligations. This seems to imply that such consideration will at least start from a formulated view as to whether there is such a breach, and as to the gravity of the resulting denial of rights.

93. The traditional view, repeated in the comments to the General Assembly, is that the practice reflected in these statements has no effect or relevance in domestic law, but we are not persuaded that this is correct. In this context it is relevant to give further consideration to *Butt*, a decision upon which, as we observed at paragraph 37, Mr Greenwood [counsel for the Crown] relied. In that case the applicant sought an order that the Foreign and Commonwealth Office should make representations to the President of the Yemen that a flawed criminal trial in progress in the Yemen should be halted and a retrial ordered before the verdict was given. In the leading judgment in the Court of Appeal Henry LJ recorded the following concession by the Secretary of State:

“Much has been done for those who are on trial. This is because, as is accepted by the Secretary of State before us, there lies on the respondent a common law duty to protect its citizens abroad. The extent and the limits of that duty are set out in a leaflet that is available for those who travel abroad.”

94. The leaflet referred to was one of two, which set out the assistance to be expected by British subjects abroad from a British consul. These expressly excluded intervention in a criminal trial, which was fatal to the application. But it seems to us that, in the light of the concession made by the Secretary of State it would have been difficult, in that case at least, for him to have denied that there was a legitimate expectation that such assistance as was proffered in the leaflets would be provided.

Part IV

Consular access in domestic law

The VCCR requires states parties to implement consular access in legal proceedings in their own courts. The process of transfer to the domestic level of legal obligations undertaken at the international level is handled variously by different states of the world. Chapter 12 explores the mechanisms whereby consular access obligations enter domestic law. Some states have adopted administrative regulations on consular access to guide the various governmental agencies responsible for implementing the state's consular access obligations (Chapter 13).

Whether the courts of a receiving state must remedy a violation of consular access obligations by that state is an issue that has led to controversy and litigation. The issue is examined in Chapter 14. One question that has arisen in that context is whether the courts of a receiving state are bound by decisions of the ICJ on various aspects of the consular access obligation. This question is examined in Chapter 15.



12 Incorporation into domestic law

12.1 Introduction

Consular access is implemented in domestic law by whatever procedures are used in a particular state for the incorporation of treaty-based obligations. Under the constitutional law of many states, a treaty-based obligation enters domestic law and becomes law for the courts only when the parliament legislates to incorporate it. The United Kingdom, Ireland, and Australia are such states and have enacted laws to incorporate the consular access obligation (Documents 2, 3, 4).

In other states, treaty-based obligations enter domestic law automatically, without a need for incorporation by the parliament. The Netherlands, the United States, and Germany are such states. Included in this chapter are their constitutional provisions on automatic incorporation of treaties (Documents 5, 6a), and court decisions (Documents 6b, 7) that make clear that treaty obligations can enter domestic law without a need for legislative action.

12.2 United Kingdom

a. Police and Criminal Evidence Act 1984, s. 66: Code of Practice C: Detention, Treatment and Questioning of Persons by Police Officers, para. 7 (Citizens of independent commonwealth countries or foreign nationals)

(a) Action

7.1 Any citizen of an independent Commonwealth country or a national of a foreign country, including the Republic of Ireland, may communicate at any time with the appropriate High Commission, Embassy or Consulate. The detainee must be informed as soon as practicable of

- this right;
- their right, upon request, to have their High Commission, Embassy or Consulate told of their whereabouts and the grounds for their detention. Such a request should be acted upon as soon as practicable.

7.2 If a detainee is a citizen of a country with which a bilateral consular convention

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or agreement is in force requiring notification of arrest, the appropriate High Commission, Embassy or Consulate shall be informed as soon as practicable, subject to paragraph 7.4. . . .

7.5 A record shall be made when a detainee is informed of their rights under this section and of any communications with a High Commission, Embassy or Consulate.

b. Her Majesty's Prison Service, Prison Service Order No. 4630: Immigration and Foreign Nationals in Prison, 11 January 2008 (applicable to persons incarcerated on remand or pursuant to a conviction) (http://pso.hmprisonerservice.gov.uk/PSO_4630_immigration_and_foreign_nationals.doc)

All Foreign National prisoners: All prisons must inform prisoners on first reception of their right to consular notification. This must be done by the first receiving establishment and must be recorded on the prisoner's record.

Nationals of those countries with a Bilateral Convention [annex listing those countries omitted] whether or not the country in question is also a signatory to the Vienna Convention: Prisons must notify embassies upon first reception of nationals of a country where a bilateral Consular Convention has been signed, and provide all appropriate information.

Those countries who have signed the Vienna Convention but where no bilateral consular convention is in place. [Annex listing those countries omitted.]:

In the absence of a request from a prisoner to have his/her embassy informed, prisons must not pass on the prisoner's details to his/her embassy.

Where a foreign embassy requests information on a prisoner or prisoners the prisoners' permission for details to be released must be secured by prison staff before information is disclosed.

If the prisoner refuses then the prison must inform the embassy of the prisoners' right of anonymity under Article 36(1)(c) of the Convention.

The only exception is where a consular official is detained. Under these circumstances prisons must inform the Embassy either through the consulate or through diplomatic channels.

12.3 Ireland

Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987, Statutory Instrument 119/1987, para. 14(1)

The member in charge shall without delay inform or cause to be informed any arrested person who is a foreign national that he may communicate with his consul and that, if he so wishes, the consul will be notified of his arrest. The member in charge shall, on request, cause the consul to be notified as soon as practicable. Any communication addressed to him shall be forwarded as soon as practicable.

12.4 Australia

Crimes Act 1914 as amended, Sec. 23P

(1) Subject to section 23L, if a person who is under arrest or a protected suspect is not an Australian citizen, an investigating official must, as soon as practicable:

- (a) Inform the person that if he or she requests that the consular office of:
 - (i) the country of which he or she is a citizen; or
 - (ii) the country to which he or she claims a special connection;be notified that he or she is under arrest or a protected suspect (as the case requires), that consular office will be notified accordingly; and
- (b) if the person so requests – notify that consular office accordingly; and
- (c) inform the person that he or she may communicate with, or attempt to communicate with, that consular office; and
- (d) give the person reasonable facilities to do so; and
- (e) forward any written communication from the person to that consular office; and
- (f) allow the person a reasonable time to, or to attempt to, communicate with that consular office.

(2) Without limiting subsection (1), an investigating official must not start to question the person unless paragraphs (1)(c), (d) and (f) have been complied with.

12.5 Netherlands

Constitution, 17 February 1983, Article 93

Provisions of treaties and resolutions of international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.

12.6 United States

a. Constitution of the United States (1787), Article 6, section 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

b. Supreme Court of the United States, *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829)

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political,

not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

12.7 Germany

Constitutional Court, *Case of F. & T.*, 2 BvR 2115/01, Judgment of 19 September 2006, paras. 52–53

52. Fair proceedings will to be sure be set out not only in the norms of criminal procedure law, but as well in treaty provisions. . . . It is an international law norm that arises by way of customary law; hence the administrative authorities and courts of the German Republic under article 25 of the Basic Law¹ are bound by it. It is used and explained as a norm of domestic law.

53. VCCR Art. 36, which in the German legal order is of the rank of federal legislation, includes points that are directly relevant to German criminal procedure, including pre-trial proceedings, when nationals of another state party are being prosecuted. This norm suffices of itself, to apply to the criminal prosecution authorities; there is no need for executing legislation, rather it is self-executing (cf. Supreme Court of the United States, *Sanchez-Llamas v. Oregon*, Dissenting Opinion Justice Breyer of 28 June 2006 . . . [a reference to the Breyer dissent at 548 U.S. 331, at 372–375]).

¹ Basic Law (Constitution), art. 25 reads: “The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.”

13 Subsidiary regulation and legislation

13.1 Introduction

Even in a state like the United States, where consular access obligations enter domestic law without legislation, more detailed provision may be deemed appropriate, through legislation or regulation, to ensure that police agencies are aware of their consular access obligations and to instruct on the practical issues that arise as consular access is implemented. In the United States, the federal executive has enacted administrative regulations applicable to the federal police (Federal Bureau of Investigation) and to federal immigration authorities. Excerpts from the former set of regulations are included in this chapter. It applies to the arrest of a foreign national by federal authorities in the United States on a criminal charge (Document 2).

As well, at the level of the constituent states of the United States, action has been taken both to ensure compliance and to provide guidance. The State of California, in its penal code, makes clear to police agencies the need to abide by the VCCR (Document 3). The State of Oregon, also in its penal code, requires that police receive training in consular access obligations (Document 4). A number of attorneys general of the states of the United States post information about consular access obligations electronically, in an effort to encourage enforcement agencies to comply.

Several of the U.S. states have sought to ensure that the judges before whom arrestees are brought for an initial court appearance inform them about consular access, a procedure viewed as appropriate in the event that the police failed to do so. The State of Texas has posted an extensive guide, excerpted in this chapter, aimed at these judges. This guide has no legislative force but is rather an explanation of the requirements that flow from international law (Document 5).

In the Supreme Court of the State of Illinois, a rule was under consideration for adoption as of 2009 applicable to initial court appearances of persons arrested on felony charges. The rule would require the presiding judge to inform such persons about consular access (Document 6).

At the local level as well in the United States, one finds implementing documents on consular access, aimed at instructing local police. Prince George's County, Maryland, adopted regulations applicable to police of the county, to

reinforce the obligation to comply with consular access (Document 7). The City of Truro, in the state of Massachusetts, has devised a statement that Truro police are to read to a foreign national about consular access (Document 8). The New York City Police Department adopted a detailed regulation to explain how consular access is to be implemented. The New York regulation outlines the role of the arresting officer in conjunction with that of the officers who oversee the booking and detention of persons under arrest (Document 9).

13.2 United States: federal

Department of Justice: 28 Code of Federal Regulations §50.5

§50.5 Notification of Consular Officers upon the arrest of foreign nationals

- (a) This statement is designed to establish a uniform procedure for consular notification where nationals of foreign countries are arrested by officers of this Department on charges of criminal violations. It conforms to practice under international law and in particular implements obligations undertaken by the United States pursuant to treaties with respect to the arrest and detention of foreign nationals. Some of the treaties obligate the United States to notify the consular officer only upon the demand or request of the arrested foreign national. On the other hand, some of the treaties require notifying the consul of the arrest of a foreign national whether or not the arrested person requests such notification.
- (1) In every case in which a foreign national is arrested the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given. If the foreign national does not wish to have his consul notified, the arresting officer shall also inform him that in the event there is a treaty in force between the United States and his country which requires such notification, his consul must be notified regardless of his wishes and, if such is the case, he will be advised of such notification by the U.S. Attorney.
 - (2) In all cases (including those where the foreign national has stated that he does not wish his consul to be notified) the local office of the Federal Bureau of Investigation or the local Marshal's office, as the case may be, shall inform the nearest U.S. Attorney of the arrest and of the arrested person's wishes regarding consular notification.
 - (3) The U.S. Attorney shall then notify the appropriate consul except where he has been informed that the foreign national does not desire such notification to be made. However, if there is a treaty provision in effect which requires notification of consul, without reference to a demand or request of the arrested national, the consul shall be notified even if the arrested person has asked that he not be notified. In such case, the U.S. Attorney shall advise the foreign national that his consul has been notified and inform him that notification was necessary because of the treaty obligation.

13.3 United States: California

California Penal Code, sec. 834c (added by Stats. 1999, c. 268 (S.B. 287), §1)

- (a) (1) In accordance with federal law and the provisions of this section, every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country, except as provided in subdivision (d). If the foreign national chooses to exercise that right, the peace officer shall notify the pertinent official in his or her agency or department of the arrest or detention and that the foreign national wants his or her consulate notified.
- (2) The law enforcement official who receives the notification request pursuant to paragraph (1) shall be guided by his or her agency's procedures in conjunction with the Department of State Guidelines Regarding Foreign Nationals Arrested or Detained in the United States, and make the appropriate notifications to the consular officers at the consulate of the arrestee.
- (3) The law enforcement official in charge of the custodial facility where an arrestee subject to this subdivision is located shall ensure that the arrestee is allowed to communicate with, correspond with, and be visited by, a consular officer of his or her country.
- (b) The 1963 Vienna Convention on Consular Relations Treaty was signed by 140 nations, including the United States, which ratified the agreement in 1969. This treaty guarantees that individuals arrested or detained in a foreign country must be told by police "without delay" that they have a right to speak to an official from their country's consulate and if an individual chooses to exercise that right a law enforcement official is required to notify the consulate.
- (c) California law enforcement agencies shall ensure that policy or procedure and training manuals incorporate language based upon provisions of the treaty that set forth requirements for handling the arrest and booking or detention for more than two hours of a foreign national pursuant to this section prior to December 31, 2000.
- (d) Countries requiring mandatory notification under Article 36 of the Vienna Convention shall be notified as set forth in this section without regard to an arrested or detained foreign national's request to the contrary. Those countries, as identified by the United States Department of State on July 1, 1999, are as follows:
- (1) Antigua and Barbuda. (2) Armenia. (3) Azerbaijan. (4) The Bahamas. (5) Barbados. (6) Belarus. (7) Belize. (8) Brunei. (9) Bulgaria. (10) China. (11) Costa Rica. (12) Cyprus. (13) Czech Republic. (14) Dominica. (15) Fiji. (16) The Gambia. (17) Georgia. (18) Ghana. (19) Grenada. (20) Guyana. (21) Hong Kong. (22) Hungary. (23) Jamaica. (24) Kazakhstan. (25) Kiribati. (26) Kuwait. (27) Kyrgyzstan. (28) Malaysia. (29) Malta. (30) Mauritius. (31) Moldova. (32) Mongolia. (33) Nigeria. (34) Philippines. (35) Poland (nonpermanent residents only). (36) Romania. (37) Russia. (38) Saint Kitts and Nevis. (39) Saint Lucia. (40) Saint Vincent and the Grenadines. (41) Seychelles. (42) Sierra Leone. (43) Singapore. (44) Slovakia. (45) Tajikistan. (46) Tanzania. (47) Tonga. (48) Trinidad and Tobago. (49) Turkmenistan. (50) Tuvalu. (51) Ukraine. (52) United Kingdom. (53) U.S.S.R. (54) Uzbekistan. (55) Zambia. (56) Zimbabwe.

However, any countries requiring notification that the above list does not identify because the notification requirement became effective after July 1, 1999, shall also be required to be notified.

13.4 United States: Oregon

Oregon Revised Statutes § 181.642. Training relating to Vienna Convention and crimes motivated by prejudice or that constitute abuse.

The Board on Public Safety Standards and Training shall ensure that all police officers and certified reserve officers are trained to:

...

- (2) Understand the requirements of the Vienna Convention on Consular Relations and identify situations in which the officers are required to inform a person of the person's rights under the convention.

13.5 United States: Texas

Texas Attorney General, *Magistrate's Guide to Consular Notification under the Vienna Convention*, www.oag.state.tx/AG_Publications/pdfs/vienna_guidebook.pdf

This Magistrate's Guide contains instructions and guidance relating to the arrest and detention of foreign nationals and related issues pertaining to the provision of consular services to foreign nationals in the United States. This Magistrate's Guide is designed to help ensure that foreign governments can extend appropriate consular services to their nationals in the United States and that the United States complies with its legal obligations to such governments. The instructions and guidance herein should be followed by all federal, state, and local government judicial officials, insofar as they pertain to foreign nationals subject to such officials' authority or to matters within such officials' competence.

The continued cooperation of federal, state, and local judicial officials in ensuring that foreign nationals in the United States are treated in accordance with these instructions will permit the United States to comply with its consular legal obligations domestically. Additionally, it will help ensure that the United States can insist upon rigorous compliance by foreign governments with respect to United States citizens abroad. The Office of the Attorney General of Texas appreciates the assistance of all judicial officials in helping to achieve these objectives.

...

Q. Can I comply with consular notification requirements by simply letting the detained foreign national have access to a telephone?

- A. Not necessarily. It is the responsibility of the government officials responsible for the detention to ensure that consular notification is made. If the foreign national is from a mandatory notification country, you must ensure that notification is given to the consular officials; permitting the foreign national access to a phone, without taking further action, will not be sufficient for this purpose. If the foreign national is not from a mandatory notification country but wants consular notification, simply making a phone available also may not be sufficient. There must be adequate arrangements to ensure that the foreign national is actually able to make contact with his or her consular officials, and the responsible state and local officials must be able to confirm that contact was in fact made.

Q. What if the foreign national has an attorney?

- A. Even though the foreign national may have an attorney, procedures for consular notification must still be followed, especially when the foreign national is a citizen of a “mandatory notification” country.

13.6 United States: Illinois

Supreme Court Rule 404. Consular Notification for Foreign Nationals (proposed rule as of 2009)

At the initial appearance in a felony case, the circuit court must advise the defendant in open court that any foreign national who is arrested or detained has the right to have notice of the arrest or detention given to his or her country’s consular representatives and the right to communicate with these consular representatives. The court must make a written record of so advising the defendant. This rule creates no judicial remedy for the violation of consular notification or communication rights, nor for the violation of this rule.

13.7 United States: Maryland, Prince George’s County

General Order Manual, §4/254.10: Notifying Legation

When an officer arrests or detains a foreign national, he shall contact the U.S. State Department to determine whether the host country requires a notification of the action. He shall also inform the detainee of his right to have his government informed.

Where an agreement with the arrestee’s country mandates notification of the arrest or detention, the officer shall make the notification and advise the foreign national that notification has been made.

Notification optional

If the foreign national exercises this right, the officer shall inform the appropriate foreign mission immediately and make a written record of such notification on the departmental report.

Subject to security considerations in holding facilities, consular officers shall be permitted to visit, speak and correspond with the foreign national and to arrange for their legal representation. The consular officer may be prohibited from these contacts if the foreign national opposes them.

13.8 United States: Massachusetts, City of Truro

Arrest of Foreign Nationals, Policy Number OPS 6.01A, 18 September 2006, revised 16 November 2007

[This policy statement makes provision for automatic notification under bilateral treaties requiring such. With respect to nationals of states to which no such bilateral treaty applies, it states as follows.]

It shall be the policy of the Truro Police Department, that whenever a foreign national, as defined herein, is arrested or detained, they must be advised of the right to have their consular officials notified. See *Consular Notification Form*.

...

Consular Notification Form

Please use the following Statement to facilitate this purpose: "As a non-U.S. citizen who is being arrested or detained, you are entitled to have us notify your country's consular representatives here in the United States. A consular official from your country may be able to help you obtain legal counsel, and may contact your family and visit you in detention, among other things. If you want us to notify your country's consular officials, you can request this notification now, or at any time in the future. After your consular officials are notified, they may call or visit you. Do you want us to notify your country's consular officials?"

If the foreign national asks that consular notification be given, notify the nearest consular officials of the foreign national's country without delay using the *Consular Notification Fax Cover Sheet*. For phone and fax number for foreign embassies see the linked document to this policy titled *Consular Notification*.

13.9 United States: New York City

New York City Police Department Patrol Guide Manual (2006), Patrol Guide 208-56

Notifications for Arrests of Aliens: Interim Order 39 Issued 11-03-00 . . .

PURPOSE:

To process arrests of aliens.

DEFINITION:

ALIEN – Any person who is not a citizen of the United States, regardless of immigration status or length of residency

COUNTRIES WHOSE EMBASSIES OR CONSULATES MUST BE NOTIFIED WHEN ONE OF THEIR CITIZENS/NATIONALS IS ARRESTED:

Albania	China (See Note)	Gambia, The	Kyrgyzstan
Antigua & Barbuda	Costa Rica	Georgia	Malaysia
Armenia	Cyprus	Ghana	Malta
Azerbaijan	Czech Republic	Grenada	Mauritius
Bahamas	Dominica	Guyana	Moldova
Barbados	(NOTE: This country is NOT the Dominican Rep.)	Hong Kong	Mongolia
Belarus		Hungary	Nigeria
Belize		Jamaica	Philippines
Brunei		Kazakhstan	Poland (See Note)
Bulgaria	Fiji	Kiribati	Romania
		Kuwait	Russia

St. Kitts & Nevis	Singapore	Trinidad &	Ukraine
St. Lucia	Slovakia	Tobago	United Kingdom
St. Vincent &	Tajikistan	Tunisia	USSR (See Note)
Grenadines	Tanzania	Turkmenistan	Uzbekistan
Seychelles	Tonga	Tuvalu	Zambia
Sierra Leone			

NOTE: British dependencies also covered in this agreement are Anguilla, British Virgin Islands, Bermuda, Montserrat, and the Turks and Caicos Islands. The notification for permanent resident of the United States from Poland is not mandatory. The China designation does not include Republic of China (Taiwan) passport holders. Although the USSR has been dissolved these passports may still be in use. . . .

PROCEDURE:

When a person arrested is an alien, comply with appropriate arrest processing procedures and:

ARRESTING OFFICER:

1. Enter all of the following information in the "Narrative" portion of the ON LINE BOOKING SYSTEM ARREST WORKSHEET (PD244-159): (a) Country of nationality, (b) Port or place of entry and status upon entry to the United States (e.g. resident, visitor, student, etc.), (c) Method of entry (airplane, auto, boat, etc.), (d) Date entered the United States

NOTE: If doubt exists as to the status of the prisoner, enter "suspected alien" under "Narrative."

ARRESTING OFFICER:

2. Determine from the above list if prisoner's embassy or consular must be notified.

NOTE: If the prisoner is from one of the countries listed, the embassy or consulate concerned must be notified, regardless of the prisoner's wishes to the contrary. This notification must also be made even though a DESK APPEARANCE TICKET may be issued.¹

WHEN NOTIFICATION MUST BE MADE: ARRESTING OFFICER

3. Contact the Inter-City Correspondence Unit.
4. Provide member at Inter-City Correspondence Unit with the following information: (a) Prisoner's name and address, (b) Date of arrest, (c) County of arrest, (d) Major charge(s), (e) Exact location where prisoner is being detained, (f) Telephone numbers of both the command of arrest and the borough court section.

1 According to Patrol Guide 20B 27, a "desk appearance ticket" is "an appearance ticket issued in lieu of detention, at the direction of a desk officer, for misdemeanors, violations and certain Class 'E' felonies for hospitalized prisoners."

5. Obtain from the Inter-City Correspondence Unit the following: (a) The name of the member contacted, (b) A log number
6. Enter this information in the "Narrative" portion of the ON LINE BOOKING SYSTEM ARREST WORKSHEET.

INTER-CITY CORRESPONDENCE UNIT MEMBER

7. Notify the embassy or consulate concerned.

WHEN NOTIFICATION IS NOT MANDATED (THE PRISONER IS NOT FROM A COUNTRY LISTED ABOVE):

8. Inform prisoner of right to have embassy or consulate notified.
9. Follow steps 3, 4, 5, and 6 if prisoner requests that embassy or consulate be notified. (a) Should the prisoner elect not to have the embassy or consulate notified, enter this information in the "Narrative" portion of the ON LINE BOOKING SYSTEM ARREST WORKSHEET.

DESK OFFICER/BOROUGH COURT SECTION SUPERVISOR

10. Ensure that arresting officer has contacted the Inter-City Correspondence Unit when notification to the prisoner's embassy or consulate is required or in other cases when an arrested alien has so requested.

ADDITIONAL DATE:

Arresting officers will contact the intelligence Division if they experience any unusual circumstances or have questions regarding the arrest processing of an alien. . . .

14 Availability of a judicial remedy

14.1 Introduction

When a foreign national under arrest is not advised about consular access but is prosecuted for a crime, the question arises whether that failure has any significance for the prosecution. This issue raises questions of international law and of the law of the receiving state. A state that violates an international obligation must, in general, make good the loss. If it is physically possible to do so, the state must provide a remedy in kind, that is, it must restore the situation to that which preceded the violation (*status quo ante*). This obligation is found in a branch of international law called "state responsibility," which provides norms on the consequences of breach of international obligations. The basic postulates of that branch of law have been written into a document prepared by the ILC, under the title Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Document 2).

The proposition that the law of state responsibility sets rules for the consequences of a treaty breach is stated by the ICJ in a case in which it had to deal with the consequences of a denunciation of a treaty, where, as the ICJ found, the denunciation was not lawful. Hungary had denounced (withdrawn from) a treaty with Slovakia. The ICJ said that it would determine the consequences of the unlawful denunciation under the law of state responsibility (Document 3a).

Precisely what the obligation to restore the prior existing situation means for a violation of the obligation to advise a detained foreign national about consular access has been the subject of controversy. One possibility is that it means the cessation of any criminal proceeding against the foreign national, or the reversal of any conviction entered. The ICJ, in the *LaGrand* case, took a more measured view of what is required, saying that a conviction following upon a failure to advise about consular access must be "reviewed" and "reconsidered," taking into account the violation (Document 3b). That position falls short of requiring reversal in every instance but leaves it unclear as to just what it means to "take account." The issue of consequences also arises where the foreign national seeks to exclude evidence or statements. That issue is considered in Chapter 17.

In the *Avena* case, the ICJ did not clarify the standard for reversal but did indicate that the obligation to provide "review" and "reconsideration" falls on the

courts (Document 3c). Under that view, a court must entertain and consider a foreign national's request for "review" and "reconsideration." The ICJ explained, however, in subsequent proceedings initiated by Mexico, that the ultimate responsibility of the United States, as a receiving state, was to bring about the "review" and "reconsideration," whether this be done directly by the courts, or whether it be done on the basis of legislation requiring judicial "review" and "reconsideration" (Document 3d).

Since the issuance of the *LaGrand* and *Avena* judgments by the ICJ, the highest courts of two states – Germany and the United States – have considered the issue of the requirement that courts provide "review" and "reconsideration." Germany's Constitutional Court says that the conviction and sentence must be reviewed in light of the violation (Document 4).

The U.S. Supreme Court in *Sanchez-Llamas v. Oregon* rejects that approach. Ignoring the law of state responsibility, it says that there is no need to consider the consequences of a violation unless the VCCR itself provides a specific remedy. It finds that the VCCR provides no remedy (Document 5a). In that case, however, the Court focused primarily on the suppression of an incriminating statement as a possible remedy, which was the issue in the case: hence, its broad statement against remedies may not necessarily apply to other remedies (see Document 5d).

In 1980, in its case against Iran in the ICJ, the United States argued that under international law a remedy was required for the violation involved in the sequestration of consuls (Document 5b).

One state of the United States has, by statute, addressed the consequences of a violation of the obligation to advise about consular access. Florida's statute provides that such a violation is not a defense or a cause for relief from custody (Document 5c). The legality of Florida's statute has not been judicially tested. If a federal court were to find that a remedy is required, Florida's statute would not be an impediment to a remedy.

The U.S. Court of Appeals (Seventh Circuit) reads the U.S. Supreme Court decision in *Sanchez-Llamas v. Oregon* as foreclosing the remedy of suppression of an incriminating statement but not other possible remedies. Osagiede, a Nigerian national, pleaded guilty to distribution of heroin and was sentenced to a much harsher sentence than he had anticipated, based on introduction for sentencing purposes of tape recordings in which he supposedly spoke with others about distributing large amounts of heroin. Osagiede disputed that the voice on the recordings was his. The U.S. district court (trial court) accepted the prosecution evidence and set a substantial sentence. Osagiede appealed, asserting that his attorney had provided constitutionally defective assistance for failing to raise the fact that Osagiede had not been advised about consular access. In the opinion excerpted in this chapter, the U.S. Court of Appeals, relying on language in *Sanchez-Llamas v. Oregon*, finds that Osagiede's counsel may have been deficient for not raising the consular access issue with the trial judge, as that may have led to useful assistance. The Court of Appeals returned the case to the U.S. District Court for a possible evidentiary hearing to determine whether Osagiede had been prejudiced (Document 5d).

A defense issue on which a consular access claim may be relevant is a failure of proper translation by police authorities. In many instances a foreign national will require translation for oral interchange and for documents. The issue may arise in regard to translation, or lack of translation, in conveying the admonitions that are legally required upon arrest. It may also arise in regard to an interrogation that leads to the making of an incriminating statement, where poor translation, or a lack of translation, may make the foreign national's words appear more incriminating than they actually were. In a case from the U.S. State of Ohio, an appellate court found that a lack of consular assistance contributed to error in regard to the translation of legally required admonitions, where the foreign national subsequently made an incriminating statement. The defense challenged the statement's admissibility on the basis of a consular access violation and on the basis that the admonitions, although conveyed to him in his native Spanish, were conveyed in Spanish that was so deficient as to be unintelligible. The court said that it need not rule on the defense request to suppress based on the consular access violation, since the statement had to be suppressed for the failure to give the other required admonitions (Document 5e).

A prosecuting attorney faced with a consular access violation claim along with other claims must therefore be attentive to the consular access claim on its own merits, but also as it may incline a court to rule for the defense on the other claims. In the same way, judges asked to rule for the defense based on a consular access claim along with other claims may find that the consular access claim, whatever merit it may have on its own, may reinforce some other defense claim.

14.2 United Nations

General Assembly, International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, UN Document A/56/10 (2001), as confirmed by UN General Assembly Resolution 56/83, 12 December 2001 [in which the General Assembly "commends" the documents "to the attention of Governments"]

Article 35. *Restitution*. A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) Is not materially impossible;
- (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

14.3 International Court of Justice

a. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 1997 I.C.J. 7

47. Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is

distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility:

b. *LaGrand Case (Germany v. USA)*, 2001 ICJ 466

125. . . . The Court considers in this respect that if the United States, notwithstanding its commitment referred to in paragraph 124 above, [a commitment made to the ICJ by the United States to improve its compliance with consular access obligations] should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.

c. *Avena and Other Mexican Nationals (Mexico v. USA)*, 2004 I.C.J. 12

140. [T]he Court is of the view that, in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 (*b*), of the Convention has resulted, in the sequence of judicial proceedings that has followed, in the individuals concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task.

141. The Court in the *LaGrand* case left to the United States the choice of means as to how review and reconsideration should be achieved, especially in the light of the procedural default rule. [On procedural default, see Chapter 18.] Nevertheless, the premise on which the Court proceeded in that case was that the process of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant concerned.

. . .

153(9). The appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the [Vienna] Convention [on Consular Relations] and of paragraphs 138 to 141 of this Judgment.

d. *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America)*, Judgment of 19 January 2009

44. The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153(9). The obligation laid down in that paragraph is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law.

14.4 Germany

Constitutional Court, *Case of F. & T.*, 2 BvR 2115/01, Judgment of 19 September 2006, para. 68

In regard to the legal consequences of a violation of the obligation to provide information under VCCR Art. 36(1)(b)(3), the International Court of Justice specified on the basis of Art. 36(2), second clause, that the failure to inform renders a criminal conviction subject to revision in its totality, that is, regarding both the question of guilt and that of sentence. A procedure must be open to the accused that guarantees that the violation of the Convention will be considered regardless of the actual outcome of the examination of the full accounting ("which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration", ICJ. *Avena*, para. 139).

14.5 United States

a. Supreme Court of the United States, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006)

We also agree with the State of Oregon and the United States that our authority to create a judicial remedy applicable in state court must lie, if anywhere, in the treaty itself. Under the Constitution, the President has the power, "by and with the Advice and Consent of the Senate, to make Treaties" Art. II, §2, cl. 2. The United States ratified the Convention with the expectation that it would be interpreted according to its terms. See Restatement (Third) of Foreign Relations Law of the United States §325(1) (1986) ("An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose"). If we were to require suppression for Article 36 violations without some authority in the Convention, we would in effect be supplementing those terms by enlarging the obligations of the United States under the Convention. This is entirely inconsistent with the judicial function. Cf. *The Amiable Isabella*, 6 Wheat. 1, 71 (1821) (Story, J.) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty").

...

Sanchez-Llamas argues that the language of the Convention implicitly requires a judicial remedy because it states that the laws and regulations governing the exercise of Article 36 rights "must enable full effect to be given to the purposes for which the rights . . . are intended," Art. 36(2), 21 U.S.T., at 101 (emphasis added). In his view, although "full

effect” may not automatically require an exclusionary rule, it does require an appropriate judicial remedy of *some* kind. There is reason to doubt this interpretation. In particular, there is little indication that other parties to the Convention have interpreted Article 36 to require a judicial remedy in the context of criminal prosecutions. See Department of State Answers to Questions Posed by the First Circuit in *United States v. Nai Fook Li*, No. 97-2034 etc., p A-9 (Oct. 15, 1999) (“We are unaware of any country party to the [Vienna Convention] that provides remedies for violations of consular notification through its domestic criminal justice system”).

b. Memorial of United States of America, International Court of Justice, *United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*, 12 January 1980, ICJ Pleadings, at 187-188

. . . Iran is engaged in continuing, damaging, illegal conduct, of an irreparable character, and it is therefore incumbent on the court to prescribe, in a judgment on the merits binding upon Iran, the specific steps which Iran must take to cease its violations of its international obligations. This Court should declare not only that the existing situation is illegal, but that Iran must bring that situation to an end – and at once.

c. Florida Statutes §901.26 (effective 9 June 2001)

Failure to provide consular notification under the Vienna Convention on Consular Relations or other bilateral consular conventions shall not be a defense in any criminal proceeding against any foreign national and shall not be cause for the foreign national’s discharge from custody.

d. United States Court of Appeals, Seventh Circuit, *Osagiede v. USA*, 543 F.3d 399 (2008)

While the [U.S. Supreme] Court rejected the argument that the treaty itself required suppression as a remedy, the Court stressed that there were other means of “vindicating Vienna Convention rights.” Sanchez-Llamas, 548 U.S. at 350, 126 S. Ct. 2669. Specifically, the Court stated that a defendant could raise an Article 36 violation as a part of a broader constitutional challenge, such as a challenge to the voluntariness of a statement under the Fifth Amendment [privilege against self-incrimination]. . . .

More importantly, the Court suggested that the Sixth Amendment could also serve as a vehicle for vindicating Article 36 rights. In a telling passage, the Court noted that an attorney’s failure to raise an Article 36 violation would not be “cause” for overriding a state’s procedural default rules, unless “the attorney’s overall representation falls below what is required by the Sixth Amendment.” . . . The Court went on to explain that the attorneys in that case were aware of their clients’ Vienna Convention rights and had made a strategic decision not to pursue them. . . . Thus, “nothing [had] prevented [the defendant] from raising an ineffective-assistance-of-counsel claim predicated on his trial counsel’s failure to assert the State’s violation of those rights” . . . (Ginsburg, J., concurring). Because the defendants had abandoned their ineffective assistance of counsel claims, however, the issue was not before the Court. . . . The inclusion of this discussion in the Court’s opinion was no accident: the viability of ineffective assistance of counsel claims had been discussed extensively at oral argument. Indeed, Justice Ginsburg stated that it was “critical” for her

that the defendant did not raise an ineffective assistance of counsel claim along with his direct Vienna Convention claim. . . . Through ineffective assistance of counsel claims, " 'full effect' could [be] given to Article 36." . . .

Thus, we reject the notion that Sanchez-Llamas forecloses foreign nationals from bringing ineffective assistance of counsel claims based on Article 36 violations. In fact, Sanchez-Llamas appears to express a preference for subsuming Vienna Convention claims in broader constitutional attacks, rather than basing relief entirely on the treaty itself. . . .

. . . Osagiede argues that his lawyer should have been aware of his legal rights under Article 36 and should have acted to protect them . . . The Government does not contest the fact that it failed to notify Osagiede of his right to contact his consulate. This failure to notify violated Article 36 of the Vienna Convention, as well as federal regulations promulgated to ensure compliance with Article 36. See 28 C.F.R. § 50.5. The law was on the books; the violation was clear. Simple computer research would have turned it up.

...

The Government argues, however, that Article 36 does not create any individual rights that could have been invoked by counsel as a basis for relief. . . . In fact, a reasonable Illinois lawyer would have known that this Court has never held that Article 36 did not create individual rights; instead, we have always assumed that it did. . . . Thus, it was clearly established across the country that either the Vienna Convention created individual rights or courts would proceed as if it did.

...

Further, at the time of Osagiede's sentencing, the Illinois Institute for Continuing Legal Education's Guide for Defending Illinois Criminal Cases stated in unequivocal terms: "Attorneys should advise all non-citizen clients that they have the right to consular notification of their arrest under the Vienna Convention and that such notification request should be made as part of any assertion of rights to silence and counsel. . . . [A]ttorneys representing non-citizens clients should advise them to invoke the Vienna Convention rights to the police and prosecutors at the police station and to the judge at the initial court appearance and should raise the issue during any motion to suppress statements" DEFENDING ILLINOIS CRIMINAL CASES § 4.2 (2003). As the Supreme Court has stated, "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." . . .

. . . The Government seems to assume that the only recourse available to Osagiede's counsel would have been to file a motion for suppression or for dismissal, or perhaps to let the proceedings run their course and then raise the Article 36 violation on appeal. The Government focuses inordinately on backward-looking remedies and ignores the fact that the trial court judge is in a unique position to remedy an Article 36 violation before prejudice has occurred. . . . Osagiede's counsel failed to seek this modest remedy. This failure precluded Osagiede from exercising his right to consular assistance and may well have been prejudicial.

...

To show that concrete prejudice flowed from the deprivation of his right to notification, Osagiede must explain the nature of the assistance he might have received had he been alerted to his Article 36 rights. The record does reveal that Osagiede had a special need for services typically within the power of the consulate. Here, at the relevant conduct hearing, the Government presented nine tape recordings that allegedly contained Osagiede's voice. The tapes were difficult to decipher, however, because the speakers had strong Nigerian accents. In the end, only one of these recordings was properly analyzed. The Nigerian consulate might, perhaps, have provided the funds for a proper analysis of these tapes. The

Nigerian consulate might have been able to identify regional dialects, offer an accurate voice analysis or even translated the wiretaps itself. The consulate could presumably have also located Lasisi, who was by then in Nigeria, and taken a statement from him. . . . Lasisi was, after all, the man who had been previously mistaken for Osagiede and the man who may have been speaking on the tape recordings. The Nigerian consulate appears to have been well situated and well equipped to provide Osagiede with this kind of assistance. Thus, Osagiede has gone a long way toward showing that he deserves an evidentiary hearing.

Osagiede, however, faces another obstacle: having shown that the Nigerian consulate could have assisted him, he must also show that the Nigerian consulate would have assisted him. The decision to render assistance to a foreign detainee, which gives significance to the obligations imposed by the Convention, rests in the discretion of the Nigerian consulate. Perhaps the Nigerian consulate does not get involved in criminal matters; perhaps it would not have been persuaded that Osagiede deserved its assistance; perhaps it would have declined for other reasons. Osagiede must provide the district judge with a credible indication that the Nigerian consulate was in fact ready to render assistance in his case. These indications do not necessarily have to come in the form of an actual presentation in advance of the hearing of official documents, statements or affidavits from the Nigerian consulate, although such evidence might well be presented later at the hearing. In the case before us, a credible assertion of the assistance the consulate would have provided would entitle the petitioner to an evidentiary hearing.¹

e. Ohio, Court of Appeals, Eleventh District, *State v. Ramirez*, 135 Ohio App.3d 89, 732 N.E.2d 1065 (1999)

There is no doubt that the warnings given to appellant by Ms. Rodriguez were insufficient to adequately apprise appellant of his rights. . . . [T]he trial court erred in denying appellant's motion to suppress since he was clearly not apprised of his Miranda rights. Thus, appellant's first assignment of error is sustained.

In the second assignment of error, appellant contends that he was denied his rights under Article 36 of the Vienna Convention on Consular Relations . . .

It is appellant's contention that "Article 36(1) of the Vienna Convention on Consular Relations, April 24, 1963, TIAS 6820, 21 U.S.T. 77, guarantees an alien arrested on a criminal charge a right to be informed of the right to contact the consul of his home nation." It is undisputed that appellant was never informed of his right to contact the Mexican consulate.

However, based upon our decision regarding appellant's first assignment of error, all remaining assignments of error are moot and need not be addressed . . . Any opinions offered with respect to any other issues raised would be merely advisory. We note that if the Vienna Convention had been complied with in this case, the errors detailed in appellant's first assignment of error would have been avoided. First, a competent translator would have been present to ensure that appellant's rights were not violated. Second, the American

¹ [Court's footnote] Of course, if Osagiede obtains an evidentiary hearing, he will then have to do more than show a credible indication of the services the consulate would have provided. He will have to provide evidence sufficient to prove he was prejudiced by the failure to notify him of his Article 36 rights.

legal system would have been explained to appellant who, as a Mexican national, had not been exposed to nuances of our justice system the way that most Americans are through the intense media saturation that exists in this country. Finally, the Mexican consul could have assisted in tracking down potential witnesses who had returned to Mexico between the time of the incident and the time of trial. As the Supreme Court of Ohio stated long ago, it is "the imperative duty of the judicial tribunals of Ohio to take cognizance of the rights of persons arising under a treaty to the same extent as if they arose under a statute of the state itself." *State v. Vanderpool* (1883), 39 Ohio St. 273, 276-277.

Accordingly, for the reasons stated herein, the trial court erred in overruling appellant's motion to suppress the statements he gave to the police.

15 Domestic effect of international decisions

15.1 Introduction

National governments and their courts have varied widely in their reactions to ICJ decisions on consular access. Some national courts view them as highly persuasive authority, whereas others view them as only one datum among many in reaching a legal conclusion. The posture of the case matters considerably. With judgments of the ICJ, a state that has been a party to a proceeding in which the judgment is rendered is required by its membership in the United Nations to comply. The UN Charter, Article 94, says that a state that is a party to an ICJ case must implement the decision.

Following the ICJ *Avena* judgment that required the United States to review the convictions of Mexican nationals whose consular access rights had been violated, the President of the United States directed the state-level courts in the states that produced the convictions to undertake such a review (Document 2a). The U.S. Supreme Court decided, however, that the state-level courts are not required to do so (Document 2b).

Another matter is whether a domestic court must accept the ICJ's interpretation of the VCCR. In *Bustillo v. Virginia*, a case that was heard together with *Sanchez-Llamas v. Oregon*, the U.S. Supreme Court was asked to ignore the procedural default rule (discussed in Chapter 18) because, among other reasons, the ICJ said in the *LaGrand* and *Avena* judgments that using it to block a VCCR Article 36 claim violated the VCCR Article 36(2) prescription that "full effect" be given to the purposes for which consular access is granted. The Supreme Court divided on the deference to be accorded to these two ICJ judgments, the majority according considerable analysis to the ICJ judgments, while ultimately rejecting their conclusion. The dissenters viewed the ICJ judgments as requiring review of prior Supreme Court case precedent on procedural default in VCCR Article 36 cases (Document 3).

Even if a state is not a party to the proceedings that produced the decision, courts may nonetheless follow the decision. The highest court in Germany has said that German courts must follow an ICJ decision even if Germany was not a party to the case, if Germany is party to the treaty (in this case the VCCR) and is also subject to ICJ jurisdiction for disputes concerning the treaty (in this case the Optional Protocol to the VCCR) (Document 4).

A closely related issue is compliance with an interim order in which the ICJ asks a state not to execute persons who are the subject of VCCR Article 36 proceedings, until final judgment in the case. As excerpts in this chapter show, Angel Breard was executed in the face of an interim order asking that his execution be postponed. Walter LaGrand was executed under similar circumstances. In the *LaGrand* case, the matter went to final judgment as to whether the United States had violated international law by allowing the execution of Walter LaGrand to proceed, while the case was pending before the ICJ. The ICJ, in excerpts of its judgment included in this chapter, said that the United States was in violation of international law (Document 5). To reach that conclusion, the ICJ had first to decide, in paragraphs not included in this chapter, that interim orders it issues are binding on the states to which they are directed. The ICJ had never before decided this issue.

In the case of Angel Breard, the U.S. Secretary of State by a letter urged the Governor of Virginia to stop the impending execution, in light of the ICJ interim measures order, although she referred to the order as non-binding (Document 6a). Both Breard and Paraguay took the matter to the U.S. Supreme Court in an effort to stop the execution. The Supreme Court, aware of the Secretary of State's letter to the Governor of Virginia, declined to stay the execution and indicated its view that the Governor was under no obligation to comply with the ICJ interim measures order (Document 6b). The Governor, also viewing the ICJ interim measures order as non-binding, declined to stop the execution (Document 6c).

Some months later, on the day after Paraguay dismissed its ICJ suit against the United States, the United States issued a statement in Paraguay, apologizing to the Government and people of Paraguay for Breard's execution (Document 6d).

15.2 United States

a. Presidential Directive to Comply with Judgment of International Court of Justice

White House
Washington
February 28, 2005

MEMORANDUM FOR THE ATTORNEY GENERAL

Subject: Compliance with the Decision of the International Court of Justice in *Avena*

The United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention's Optional Protocol concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the "interpretation and application" of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its

international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* (*Avena*), 2004 ICJ 12 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Signed George Bush

b. Supreme Court of the United States, *Medellin v. Texas*, 128 SCt 1346 (2008)

[N]either *Avena* nor the President's memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions.

15.3 United States: ICJ interpretation

Supreme Court of the United States, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006)

He [Bustillo] argues that since *Breard*, the ICJ has interpreted the Vienna Convention to preclude the application of procedural default rules to Article 36 claims. The *LaGrand Case* (*F. R. G. v. U. S.*), 2001 I. C. J. 466 (Judgment of June 27) (*LaGrand*), and the *Case Concerning Avena and other Mexican Nationals (Mex. v. U. S.)*, 2004 I. C. J. No. 128 (Judgment of Mar. 31) (*Avena*), were brought before the ICJ by the governments of Germany and Mexico, respectively, on behalf of several of their nationals facing death sentences in the United States. The foreign governments claimed that their nationals had not been informed of their right to consular notification. They further argued that application of the procedural default rule to their nationals' Vienna Convention claims failed to give "full effect" to the purposes of the Convention, as required by Article 36. The ICJ agreed, explaining that the defendants had procedurally defaulted their claims "because of the failure of the American authorities to comply with their obligation under Article 36." *LaGrand*, *supra*, at 497, ¶ 91; see also *Avena*, *supra*, ¶ 113. Application of the procedural default rule in such circumstances, the ICJ reasoned, "prevented [courts] from attaching any legal significance" to the fact that the violation of Article 36 kept the foreign governments from assisting in their nationals' defense. *LaGrand*, *supra*, at 497, ¶ 91; see also *Avena*, *supra*, ¶ 113.

Bustillo argues that *LaGrand* and *Avena* warrant revisiting the procedural default holding of *Breard*. In a similar vein, several *amici* contend that "the United States is *obligated* to comply with the Convention, *as interpreted by the ICJ*." Brief for ICJ Experts 11 (emphases added). We disagree. Although the ICJ's interpretation deserves "respectful consideration," *Breard*, *supra*, at 375, 118 S. Ct. 1352, 140 L. Ed. 2d 529, we conclude that it does not compel us to reconsider our understanding of the Convention in *Breard*.¹

Breyer, J., dissenting:

[T]hey [the ICJ judgments in *LaGrand* and *Avena*] interpret Article 36(2) to require state

1 [Court's Footnote 4] The dissent, in light of *LaGrand* and *Avena*, "would read *Breard* . . . as not saying that the Convention *never* trumps any procedural default rule." . . . (opinion of Breyer, J.). This requires more than "reading an exception into *Breard*'s language, . . . amounting instead to overruling *Breard*'s plain holding that the convention does not trump the procedural default doctrine. While the appeal of such a course to a *Breard* dissenter may be clear, 523 U.S. at 380 . . . (Breyer, J., dissenting), "respectful consideration" of precedent should begin at home.

procedural default rules *sometimes* to give way to the Convention, namely, when those rules prevent effective remedy by barring assertion of a claim because of a delay caused by the Convention violation itself. I would read *Breard* as consistent with this interpretation, *i.e.*, as not saying that the Convention *never* trumps any procedural default rule.

The Court complains that this treatment of *Breard* fails to give our own opinions “‘respectful consideration.’” . . . In fact, our opinions are entitled to far more than respectful consideration; they are entitled to full *stare decisis* effect. But, as I have explained, reading *Breard* not to decide the outcome in this case would neither overrule *Breard*'s holding, nor reject outright its reading of the Convention. And, in any event, as a matter of the law of *stare decisis*, a modified reading of *Breard* is appropriate in light of the fact that the ICJ's later decisions amount to a “significant . . . subsequent development” of the law sufficient to lead to a reconsideration of past precedent. . . . Indeed, the Court seems to recognize as much, in that it spends a full six pages explaining why the ICJ's interpretation of the Convention is incorrect, . . . rather than simply rejecting Bustillo's argument on the ground that “‘respectful consideration’ of precedent should begin at home.”

15.4 Germany

Constitutional Court, *Case of F. & T.*, 2 BvR 2115/01, Judgment of 19 September 2006, paras. 60–61.

60. (2) In this regard it follows from the interplay of the compulsory jurisdiction of the International Court of Justice in the field of consular law, the limited material validity of its decisions, the status of the German Republic as a state party of the Consular Law Convention and the Optional Protocol, plus the domestic reception of these international treaties, that national courts must in any event consider such decisions of the International Court in the field of consular law in concrete law cases involving the German Republic. This conclusion is compelling on the basis of the constitutional binding force on the representatives of German public authority of the German Republic's treaties as they are interpreted by the authorized international courts (Art. 59, para 2 of the Constitution; Art. 20 para. 3 of the Constitution). If on the other hand the German Republic has not submitted to the jurisdiction of the International Court of Justice in a certain area of law, there is no constitutional law duty to take into account its decisions in that area.

61. (3) The effect in domestic law of the decisions of the International Court of Justice is not limited however under Article 20 para. 3 together with Article 59 para. 22 of the Constitution to a narrow duty to take these decisions into consideration with regard to the specific circumstances underlying these decisions. Especially in light of the Constitution's receptivity to international amity, any limitation on an obligation for consideration in cases with German participation raises doubts. For states that are not party to a case, the decisions of the International Court of Justice have an orientational effect – the interpretation given therein has authority as the interpretation of the Convention. The special meaning of the decisions flows rather from the institutional position of the International Court of Justice as the “supreme judicial organ of the United Nations.” (UN Charter Article 92), which under Article 1 of the Optional Protocol of the Consular Convention applies to judicial settlement of lawsuits concerning the interpretation or application of the Convention. In a *de facto* sense, the states parties, which must already avoid future claims of violation of the Convention, must be governed as well by the decisions rendered against other states.

15.5 International Court of Justice: effect of interim measures order

LaGrand Case (Germany v. USA), 2001 ICJ 466

[The ICJ considered whether the United States committed an international wrong by allowing the execution of Walter LaGrand despite the Court's Order of 3 March 1999, asking it to stay the execution until the conclusion of proceedings.]

111. As regards the question whether the United States has complied with the obligation incumbent upon it as a result of the Order of 3 March 1999, the Court observes that the Order indicated two provisional measures, the first of which states that "the United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order."

The second measure required the Government of the United States to "transmit this Order to the Governor of the State of Arizona." The information required on the measures taken in implementation of this Order was given to the Court by a letter of 8 March 1999 from the Legal Counsellor of the United States Embassy at The Hague. According to this letter, on 3 March 1999 the State Department had transmitted to the Governor of Arizona a copy of the Court's Order. "In view of the extremely late hour of the receipt of the Court's Order," the letter of 8 March went on to say, "no further steps were feasible."

The United States authorities have thus limited themselves to the mere transmission of the text of the Order to the Governor of Arizona. This certainly met the requirement of the second of the two measures indicated. As to the first measure, the Court notes that it did not create an obligation of result, but that the United States was asked to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings." The Court agrees that due to the extremely late presentation of the request for provisional measures, there was certainly very little time for the United States authorities to act.

112. The Court observes, nevertheless, that the mere transmission of its Order to the Governor of Arizona without any comment, particularly without even so much as a plea for a temporary stay and an explanation that there is no general agreement on the position of the United States that orders of the International Court of Justice on provisional measures are non-binding, was certainly less than could have been done even in the short time available. The same is true of the United States Solicitor General's categorical statement in his brief letter to the United States Supreme Court that "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief" (see paragraph 33 above). This statement went substantially further than the amicus brief referred to in a mere footnote in his letter, which was filed on behalf of the United States in earlier proceedings before the United States Supreme Court in the case of *Angel Francisco Breard* (see *Breard v. Greene*, United States Supreme Court, 14 April 1998, *International Legal Materials*, Vol. 37 (1988), p. 824; *Memorial of Germany*, Ann. 34). In that amicus brief, the same Solicitor General had declared less than a year earlier that "there is substantial disagreement among jurists as to whether an ICJ order indicating provisional measures is binding . . . The better reasoned position is that such an order is not binding."

113. It is also noteworthy that the Governor of Arizona, to whom the Court's Order had been transmitted, decided not to give effect to it, even though the Arizona Clemency Board had recommended a stay of execution for Walter LaGrand.

114. Finally, the United States Supreme Court rejected a separate application by Germany for a stay of execution, "given the tardiness of the pleas and the jurisdictional barriers they implicate." Yet it would have been open to the Supreme Court, as one of its members urged, to grant a preliminary stay, which would have given it "time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved . . ." (Federal Republic of Germany et al. v. United States et al., United States Supreme Court, 3 March 1999).

115. The review of the above steps taken by the authorities of the United States with regard to the Order of the International Court of Justice of 3 March 1999 indicates that the various competent United States authorities failed to take all the steps they could have taken to give effect to the Court's Order. The Order did not require the United States to exercise powers it did not have; but it did impose the obligation to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings . . ." The Court finds that the United States did not discharge this obligation.

Under these circumstances the Court concludes that the United States has not complied with the Order of 3 March 1999.

15.6 United States: Reaction to ICJ interim measures order in *Case Concerning Vienna Convention on Consular Relations (Paraguay v. USA)*

a. *Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia, 13 April 1998*

The United States has throughout vigorously defended Virginia's right to go forward with the sentence imposed on Mr. Breard by Virginia's courts. Counsel for the U.S. Government argued strongly before the International Court that the Court should not issue the relief sought by Paraguay. We maintain, for the reasons we presented to the Court at its hearing last week, that consular notification would not have changed the outcome and that the Vienna Convention on Consular Relations does not require that Mr. Breard's conviction and sentence be vacated.

The International Court, however, was not prepared to decide the issues we raised in its urgent proceedings last week. Using non-binding language, the Court said that the United States should "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings." The Court concurrently set an expedited briefing schedule in the case, apparently intending to hold its final hearing this fall.

In light of the Court's request, the unique and difficult foreign policy issues, and other problems created by the Court's provisional measures, I therefore request that you exercise your powers as Governor and stay Mr. Breard's execution. It is only with great reluctance that I make this request, especially given the aggravated character of the crime for which Mr. Breard has been convicted and sentenced and our view of the merits of Paraguay's

legal claims. As Secretary of State, however, I have a responsibility to bear in mind the safety of Americans overseas.

I am particularly concerned about the possible negative consequences for the many U.S. citizens who live and travel abroad. The execution of Mr. Breard in the present circumstances could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention.

The immediate execution of Mr. Breard in the face of the Court's April 9 action could be seen as a denial by the United States of the significance of international law and the Court's processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or traveling abroad.

b. Supreme Court of the United States, *Breard v. Greene*, 523 U.S. 371 (1998)

It is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier. Nonetheless, this Court must decide questions presented to it on the basis of law. The Executive Branch, on the other hand, in exercising its authority over foreign relations may, and in this case did, utilize diplomatic discussion with Paraguay. Last night the Secretary of State sent a letter to the Governor of Virginia requesting that he stay Breard's execution. If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him.

c. Commonwealth of Virginia, Office of the Governor, Press Office, *Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard* (14 April 1998)

It has been stipulated by both the prosecution and Mr. Breard that he was not notified of his ability to contact his consulate as required under the Vienna Convention on Consular Relations. The Republic of Paraguay has brought a proceeding in the International Court of Justice, claiming that foreign tribunal has jurisdiction to stay his execution, void his conviction, and order a new trial. The International Court of Justice has issued an "indication of provisional measures" to have Mr. Breard's execution delayed while it considers the merits of Paraguay's claims. It is my understanding that the International Court's proceeding could take years to reach conclusion.

Both Mr. Breard and the Republic of Paraguay filed cases concerning this matter before the U.S. Supreme Court. At the request of the Court, the U.S. Department of Justice has argued forcefully that the rulings of the International Court of Justice are not enforceable by the courts of the United States, that the International Court of Justice has no authority to intervene in the criminal justice system of the Commonwealth of Virginia or any other state, and that the Supreme Court should not intervene in this matter. At the same time, the Secretary of State has requested that I stay Mr. Breard's execution. The Secretary specifically raises concern "about the possible negative consequences for the many U.S. citizens who live and travel abroad."

The concerns expressed by the Secretary of State are due great respect and I have given them serious consideration. However, it is but one of the various concerns that I must take into consideration in reaching my decision.

As Governor of Virginia my first duty is to ensure that those who reside within our borders – both American citizens and foreign nationals – may conduct their lives free from the fear of crime. Our criminal justice system is designed to provide the greatest degree of

safety for law abiding citizens and foreign visitors alike while ensuring substantial procedural safeguards to those accused of crime. Indeed, in this case Mr. Breard received all of the procedural safeguards that any American citizen would receive.

I am concerned that to delay Mr. Breard's execution so that the International Court of Justice may review this matter would have the practical effect of transferring responsibility from the courts of the Commonwealth and the United States to the International Court. Should the International Court resolve this matter in Paraguay's favor, it would be difficult, having delayed the execution so that the International Court could consider the case, to then carry out the jury's sentence despite the rulings [of] the International Court.

The U.S. Department of Justice, together with Virginia's Attorney General, make a compelling case that the International Court of Justice has no authority to interfere with our criminal justice system. Indeed, the safety of those residing in the Commonwealth of Virginia is not the responsibility of the International Court of Justice. It is my responsibility and the responsibility of law enforcement and judicial officials throughout the Commonwealth. I cannot cede such responsibility to the International Court of Justice.

Mr. Breard having committed a heinous and depraved murder, his guilt being unquestioned, and the legal issues being resolved against him, and the U.S. Supreme Court having denied the petitions of Breard and Paraguay, I find no reason to interfere with his sentence. Accordingly, I decline to do so.

d. U.S. Department of State, Office of the Spokesman, Press Statement, *Press Statement by James P. Rubin, Spokesman*, 4 November 1998

Text of statement released in Asuncion, Paraguay

The following is the text of a statement released on behalf of the United States of America by the U.S. Embassy in Asuncion, Paraguay, on November 3, 1998:

On Tuesday, April 14, 1998, a Paraguayan national was executed by the State of Virginia after exhausting his legal appeals to the courts of the United States.

Mr. Breard had not been told that Paraguay's consular officials could be notified of his arrest, and that he could seek their assistance. Such notification was required by the Vienna Convention on Consular Relations and should have been made by competent United States authorities. That failure to notify Mr. Breard was unquestionably a violation of an obligation owed to the Government of Paraguay.

The Government of the United States of America fully recognizes the violation of the Vienna Convention in this case, and conveys its apologies to the Government and people of Paraguay.

Recognizing that United States compliance with the requirements of the Vienna Convention must improve, the Government of the United States has undertaken efforts to better educate officials throughout the United States of the consular notification requirements. The United States intends through these efforts to ensure that the consular rights of foreign nationals in the United States are respected, and that Paraguayan and other foreign nationals in the United States are properly notified of their right to request consular assistance if they are arrested or detained. Consular notification is no less important to Paraguayan and other foreign nationals in the United States than to U.S. nationals outside the United States. We fully appreciate that the United States must see to it that foreign

nationals in the United States receive the same treatment that we expect for our citizens overseas. We cannot have a double standard.

Finally, we wish to express that the Government of the United States values and appreciates the ties of friendship that join us to the Republic of Paraguay. In this respect, we express our intent to continue to work together to further strengthen the positive dialogue and cooperation between our two nations.

Part V

Remedies at the domestic level

Remedies in criminal court present a number of issues. A key question is whether, when consular access has been violated, a remedy is required simply because there was a violation, or whether it must appear that the foreign national suffered prejudice in some identifiable fashion. This issue is examined in Chapter 16. Not infrequently a foreign national has sought to suppress either a statement or material evidence gained by police authorities who did not first advise about consular access. Suppression as a possible remedy is examined in Chapter 17. An issue that has caused considerable controversy is whether a foreign national claiming a remedy must do so before the point in the procedure by which procedural claims must normally be raised, or whether the fact that the claim is treaty-based takes it out of that procedural framework. This issue is examined in Chapter 18.

One way in which a consular access claim may be resolved is through reduction of the sentence that was imposed. As will be seen in Chapter 19, this may be done by a court, or it may be done by way of clemency through the executive branch of government.

Monetary damages is another possible remedy for a foreign national whose consular access rights were not respected. This may be done either in connection with the criminal case or through the filing of a civil action by the foreign national (Chapter 20).

When a foreign national seeks a remedy for a consular access violation, the sending state may seek to participate in that litigation in support of the foreign national. The modalities of such participation are examined in Chapter 21.

Finally, the sending state may attempt to sue in its own name in a court of the receiving state, seeking redress for its national (Chapter 22).



16 Prejudice as a prerequisite for a judicial remedy

16.1 Introduction

A key issue when a VCCR Article 36 claim is made is whether it must appear that the foreign national suffered prejudice before a court gives a remedy in connection with a criminal conviction. There is a range of possible solutions. At one extreme, the rule might be that the lack of consular assistance kept the foreign national from pursuing a particular line of defense that would have resulted in an outcome favorable to the foreign national. At the other extreme, it might not be necessary to show any prejudice at all.

An argument for the latter solution can be made on the basis of the law of state responsibility, which, as indicated, requires restoration of the prior existing situation when an obligation of a state under international law is violated. If the prior existing situation must be restored, then one arguably should take the situation back to the point in time of the violation, which would mean reversing any intervening criminal conviction, or suppressing any incriminating statements made by the foreign national.

The United Kingdom took this view as it urged a U.S. court to reverse the murder conviction of a UK national. Authorities had not advised the man about consular access. Nor had they notified a UK consul, as required under a UK-US bilateral treaty (see Chapter 7 for text of bilateral treaty). Referring to the bilateral treaty, the UK said that once there is a violation, an ensuing conviction must be reversed (Document 2). The Court of Appeals, however, affirmed the conviction on grounds that Maharaj had procedurally defaulted his claim.

Some judges have found a prejudice requirement inappropriate. One U.S. judge, dissenting from a ruling that prejudice was required, focused on the need to honor the treaty commitment involved in participation in the VCCR (Document 6b). In another case, a U.S. judge, also dissenting, focused on the reciprocity aspect of consular access to call for a remedy without a finding of prejudice. A national of Jordan was convicted of murder in a court of the State of Ohio and was sentenced to death. On appeal of his conviction and sentence, he argued, for the first time, that he had not been advised of his right to contact a consul of Jordan and that an incriminating statement he made before trial should not have been used as evidence against him. The Ohio Supreme Court affirmed the

conviction on grounds that he had procedurally defaulted a VCCR claim by not raising it at trial. Dissenting, Judge Lundberg-Stratton equated a failure to advise about consular access with a denial of the assistance of an attorney and expressed concern that a failure to remedy a consular access violation would jeopardize implementation of consular access obligations by other states party to the VCCR. Without mentioning prejudice, she indicated that she would reverse the conviction (Document 6g).

Still another U.S. judge, also dissenting, similarly focused on reciprocity. The Supreme Court of Illinois denied relief to a Polish national who challenged his conviction and death sentence for violation of VCCR Article 36. Dissenting, Chief Justice Heiple said that the conviction and sentence should have been reversed. In reaching that conclusion, he did not find it necessary to raise the issue of prejudice (Document 6h).

The argument that any remedy should depend on a finding of prejudice is that a conviction should not be overturned for a defect in the proceedings unless that defect somehow affected the outcome. The difficulty one confronts with this approach, however, is that a search for aspects of a trial that might have ended differently necessarily involves speculation about unknowns. It can never be established with certainty that a consul's participation might have had some particular effect on the proceedings. One can never know what a consul might have done by way of advising the foreign national, monitoring police conduct, observing court proceedings, gathering evidence. In the ICJ case filed against it by Paraguay, the United States used this point to argue against the need for any judicial remedy. It said that if a judicial remedy were required, it would be impossible to determine what impact a consul's participation might have had (Document 6a).

The ICJ has not analyzed the situation in detail but has come to a resolution between the two extremes. It says that a conviction must be "reviewed" and "re-examined" taking the violation into account (Document 3). The meaning of that injunction is less than obvious. The Inter-American Commission on Human Rights, which is the only international adjudicatory body that to date has decided consular access cases relating to specific convicted persons, recites aspects of the cases on which a consul might have played a role had one been involved (Documents 4a, 4b). In each of the two cases, the Commission viewed the failure to advise about consular access as a violation of due process. It did not require a showing that the failure to advise harmed the individual's defense in some particular fashion.

Nor did the Commission ask itself anything about the certainty that the individual had committed the crime charged. It is sometimes suggested by judges that if guilt is obvious, then a failure to advise about consular access was not prejudicial. Even in instances of obvious guilt, however, there remains a range of possible judicial outcomes to a criminal case, and consular assistance may influence them.

A Canadian appellate court suggested that prejudice needs to be shown before a remedy is required and that it may fall to the individual to prove prejudice. Van Berge, a Canadian national, was being sought by the United States under a

Canada-US extradition treaty after fleeing from the United States, where he had pleaded guilty, in the State of Florida, to criminal charges. Van Bergen asked the Minister of Justice of Canada to refuse extradition because Florida authorities had not advised him about consular access. The Minister refused Van Bergen's argument, on the ground that the failure to inform Van Bergen about consular access had caused him no prejudice in the Florida proceeding. Van Bergen asked the Canadian court to overrule the Minister. The court declined to do so (Document 5).

The Canadian court did not make clear whether the individual would need only to go forward with evidence of prejudice, or whether the individual would bear the ultimate burden of persuasion. In several U.S. decisions, courts have suggested that the burden of persuasion should rest on the state, so long as the individual produces enough evidence to raise the issue.

In a case involving criminal charges of illegal re-entry following an earlier deportation against two Mexican nationals, Rangel-Gonzales and Calderon-Medina, a U.S. District Court dismissed the charges on the ground that the underlying deportations had been invalid because when the two men were detained for deportation they were not advised about access to a consul of Mexico, as required by an Immigration and Naturalization Service regulation adopted to implement VCCR Article 36. The U.S. Court of Appeals reversed, saying that the district judge had not ascertained that the two men were prejudiced in the deportation proceeding by the fact that they were not informed about the right of consular access. The Court of Appeals sent the cases back to the District Court for a determination of whether there was prejudice. A dissenting judge considered a prejudice requirement inappropriate (Document 6b).

The District Court then decided that no prejudice could be shown. Upon a new appeal, the Court of Appeals reversed, finding on the facts that prejudice was present. The Court of Appeals said, however, that it need not be shown that the outcome would have differed, or that a consul might have assisted in any particular way. It said that what was required to find prejudice was that the foreign national was unaware of the right of consular access, that the foreign national would have asked for access had he been properly advised by the authorities, and that the sending-state consul would have provided some assistance. It did not require a finding as to what the nature of that assistance might have been (Document 6c).

In subsequent cases, other courts have used this same standard. In two cases, the standard was applied to reach a finding of no prejudice. In one, a Mexican national, charged with illegal re-entry after deportation, challenged the underlying deportation on the ground that he had not been advised of the right to contact a Mexican consul at the time he was detained for deportation. The court decided that the man, upon being detained for deportation, wanted to be deported quickly, hence that consular assistance would not have served him (Document 6d). In the other, the court thought that consular assistance would have focused on the penalty (a capital case) but not on the issue of guilt. By the time the court heard the case, the man was no longer under a sentence of

death, hence it said that the consular assistance would not have helped him (Document 6e).

In another case, application of this standard resulted in allowing a foreign national to withdraw a guilty plea. A Mexican national was charged with manslaughter under the law of the State of Oklahoma after the vehicle he was driving collided head-on with another vehicle. He pled guilty for lack of funds to hire an expert witness to challenge the blood alcohol test results that would be introduced in evidence against him. After being sentenced to forty-five years imprisonment, he moved to withdraw his plea on the ground that he had not been advised of his right of consular access, and that a Mexican consul might have assisted him in retaining an expert. In an opinion written over one dissent, the Court of Criminal Appeals granted his motion (Document 6f).

If a prejudice requirement is employed, the scope of consuls' activity, examined in Chapter 2, comes into play. As will be seen in Chapter 21, courts at times entertain testimony, either in person or by affidavit, from a consul, who explains what a consul might have done had one been notified.

16.2 United Kingdom

Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Petitioner-Appellant Krishna Maharaj's Appeal from a Denial of His Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254, filed in United States Court of Appeals, Eleventh Circuit, *Maharaj v. Moore*, 432 F.3d 1292 (2005)

In the context of its decisions providing remedies for violations of the Vienna Convention, the International Court of Justice declined to impose a presumption that "partial or total annulment of the conviction or sentence provides the necessary and sole remedy." See *Avena* ¶ 123. Rather, the Court determined that the United States must provide review and reconsideration of the convictions and sentences "by means of its own choosing." *Id.* ¶ 131. The Court emphasized, however, that the "means" selected must be meaningful taking into account both the nature of the rights violated and the legal consequences of the violation:

"It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification: as [the *LaGrand Case*] makes abundantly clear, such review and reconsideration has to be carried out 'by taking account of the violation of the rights set forth in the [treaty]' (*I.C.J. Reports 2001*, p. 514, para. 125), including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation."

Avena ¶ 131.

In determining the means for review and reconsideration, therefore, the United Kingdom submits that the nature of the rights and violations in question must be considered. The rights set forth in the Bilateral Treaty are mandatory and unqualified. The United States and the State of Florida had a clear and unambiguous obligation to inform United Kingdom consular officials "immediately" of Mr. Maharaj's arrest and detention. See Bilateral Treaty, Art. 16.

Such clear and unequivocal language in a treaty requires a remedy that is equally clear and unequivocal. Therefore, the United Kingdom invites the Court to consider that, in this case, review and reconsideration should be accomplished by ordering a new trial.

16.3 International Court of Justice

Avena and Other Mexican Nationals (Mexico v. USA), 2004 ICJ 12

138. The Court would emphasize that the “review and reconsideration” prescribed by it in the *LaGrand* case should be effective. Thus it should “tak[e] account of the violation of the rights set forth in [the] Convention” (*I. C. J. Reports* 2001, p. 516, para. 128 (7)) and 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. Lastly, review and reconsideration should be both of the sentence and of the conviction.

139. Accordingly, in a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of “harm to a particular right essential to a fair trial” – a concept relevant to the enjoyment of due process rights under the United States Constitution – but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

16.4 Inter-American Commission on Human Rights

a. *Martinez Villareal v. USA*, Case No. 11.753, Report No. 52/02, 10 October 2002 (<https://www.cidh.oas.org/annualrep/2002eng/USA.11753.htm>)

82. Further, the Commission finds that in the context of Mr. Martinez Villareal’s case, the absence of notification under Article 36(1)(b) of the Vienna Convention on Consular Relations could on the information available have had a significant effect on the fairness of Mr. Martinez Villareal’s criminal proceedings. According to the record, Mr. Martinez Villareal was a Mexican national who was arrested and tried in the United States, but who did not speak English and was represented by an attorney who did not speak Spanish. The record also indicates that Mr. Martinez Villareal was not familiar with the U.S. legal system and that this, together with his linguistic limitations, affected his understanding of and participation in the criminal proceedings against him despite the presence of a translator. The Petitioners claim, for example, that Mr. Villareal did not understand which people in the courtroom comprised the jury or what the purpose of the jury was, and that the *voir dire* proceedings were not translated into a language that he could understand. The record also indicates Mr. Martinez Villareal’s attorney failed to contact his family in Mexico and, moreover, personally attested through an affidavit as to his overall inexperience and ineffectiveness in handling Mr. Martinez Villareal’s case. Further, there is evidence suggesting

that Mr. Martinez Villareal suffered from some degree of mental deficiency during at least certain stages of the criminal proceedings against him.

83. These circumstances strongly suggest that the quality of due process afforded to Mr. Martinez Villareal suffered as a consequence of his status as a foreign national, a circumstance that compliance with the notification requirements under Article 36(1)(b) of the Vienna Convention on Consular Relations may well have mitigated. The Commission also cannot find that the standard of due process owing to Mr. Martinez Villareal under the American Declaration and under general principles of international law was satisfied based upon the State's contentions in this matter as to the possible state of knowledge or involvement of Mexican consular officials.

84. Based upon the foregoing analysis, the Commission concludes that Mr. Villareal's right to information under Article 36(1)(b) of the Vienna Convention on Consular Relations constituted a fundamental component of the due process standards to which he was entitled under Articles XVIII and XXVI of the American Declaration, and that the State's failure to respect and ensure this obligation constituted serious violations of Mr. Martinez Villareal's rights to due process and to a fair trial under these provisions of the Declaration.

85. Accordingly, should the State execute Mr. Martinez Villareal based upon the criminal proceedings for which he is presently convicted and sentenced, the Commission finds that this will constitute an arbitrary deprivation of Mr. Martinez Villareal's life contrary to Article I of the Declaration.

86. In a case such as the present, where a defendant's conviction has occurred as a result of proceedings that fail to satisfy the minimal requirements of fairness and due process, the Commission considers that the appropriate remedy includes a re-trial in accordance with the due process and fair trial protections prescribed under Articles XVIII and XXVI of the American Declaration or, where a re-trial in compliance with these protections is not possible, Mr. Martinez Villareal's release.

b. *Fierro v. USA*, Case No. 11.331, Report No. 99/03, 29 December 2003 (<https://www.cidh.oas.org/annualrep/2003eng/USA.11331.htm>)

38. In the present case, the Petitioners have alleged, and the State has not contested, that Mr. Fierro was at all relevant times a Mexican national and that he was in the custody of the El Paso, Texas Police on August 1, 1979 when he was interrogated in connection with the murder of Nicolas Castanon. Mr. Fierro has also stated that he was never informed of his right to consular notification under Article 36 of the Vienna Convention on Consular Relations during the period of his detention or interrogation. Mr. Fierro was subsequently prosecuted, convicted and sentenced to death for Mr. Castanon's murder based to a significant extent upon a confession elicited from him by the police during his interrogation.

39. It is also not apparent, from the State's observations or otherwise, that Mr. Fierro's proceedings were fair notwithstanding the State's failure to comply with the consular notification requirements. To the contrary, it is evident to the Commission, based upon the information available, that the State's failure in this regard had a potentially serious impact upon the fairness of Mr. Fierro's trial. In particular, Mr. Fierro's confession was taken at a time when consular notification and assistance may have been highly significant in the circumstances. The consulate could, for example, have verified the status of Mr. Fierro's mother and step-father, who were being held in Mexico by the Mexican police, and thereby

mitigated any detrimental impact that their detention may have had on Mr. Fierro's interrogation and the veracity of the resulting confession. The conclusion that Mr. Fierro's lack of consular assistance may have adversely affected the fairness of his criminal proceedings is reinforced by the finding of the Texas District Court following its January 1995 evidentiary hearing that there was a "strong likelihood" that Mr. Fierro's confession was coerced and its corresponding recommendation that he be re-tried by another jury, as well as the statements of the prosecuting attorney suggesting that he would not have relied on the confession had he been fully aware of the manner in which it was elicited.

40. Based upon the foregoing, the Commission concludes that Mr. Fierro's right to information under Article 36(1)(b) of the Vienna Convention on Consular Relations constituted a fundamental component of the due process standards to which he was entitled under Articles XVIII and XXVI of the American Declaration, and that the State's failure to respect and ensure this obligation constituted serious violations of Mr. Fierro's rights to due process and to a fair trial under these provisions of the Declaration.

41. Accordingly, should the State execute Mr. Fierro based upon the criminal proceedings for which he is presently convicted and sentenced, the Commission finds that this will constitute an arbitrary deprivation of Mr. Fierro's life contrary to Article I of the Declaration.

42. In a case such as the present, where a defendant's conviction has occurred as a result of proceedings that fail to satisfy the minimal requirements of fairness and due process, the Commission considers that the appropriate remedy includes a re-trial in accordance with the due process and fair trial protections prescribed under Articles XVIII and XXVI of the American Declaration or, where a re-trial in compliance with these protections is not possible, Mr. Fierro's release.

16.5 Canada

Alberta Court of Appeal, *R. v. Van Bergen*, 47 WCB (2d) 131 (2000)

The second ground of review is:

2. The Minister failed to consider that Mr. Van Bergen was never informed of his right to contact the Canadian consulate authorities upon arrest in the United States of America and failed to investigate his allegation that he was advised to flee the United States by representatives of the Canadian Government. . . . The alleged right of a foreign national to contact his embassy or consulate when arrested in a foreign country arises by reason of Article 36 of the Vienna Convention. The Vienna Convention creates an obligation between states and is not one owed to the national. Nonetheless, the Minister did consider this argument under her general discretion and found there was in any event no proven prejudice to Mr. Van Bergen.

The Minister responded to Mr. Van Bergen's counsel on this issue as follows, again in her May 31, 2000, letter:

The purpose of Article 36 is to ensure that foreign detainees receive equal treatment under the local criminal justice system and are not disadvantaged because they are not familiar with and do not understand the proceedings against them. In my view, in order to justify a refusal in the face of Canada's treaty obligation to the United States,

Mr. Van Bergen would need to establish serious prejudice to him in the process in the foreign state. Such prejudice has not been established in this case. Counsel for Mr. Van Bergen agrees, as do we, that the purpose of Article 36 was correctly stated by the Minister. That being so, the Minister considered the merits of Mr. Van Bergen's argument in detail, referring to the fact of his having been represented by counsel when he pleaded guilty to the Florida charges and the extensive questioning of Mr. Van Bergen's understanding of the process by the Florida judge who accepted the guilty pleas.

We therefore conclude there are no grounds upon which this Court can interfere with the decision of the Minister in this case.

16.6 United States

a. ICJ, *Vienna Convention on Consular Relations (Paraguay v. USA)*, oral sitting of 7 April 1998, argument of counsel for USA

2.18. It is not difficult to imagine why such remedies do not exist. As noted, consular assistance, unlike legal assistance, is not regarded as a predicate to a criminal proceeding. Moreover, if a failure to advise a detainee of the right of consular notification *automatically* required undoing a criminal procedure, the result would be absurd. In particular, it would be inconsistent with the wide variation that exists in the level of consular services provided by different countries. But it would be equally problematic to have a rule that a failure of consular notification required a return to the *status quo ante* only if notification would have led to a different outcome. It would be unworkable for a court to attempt to determine reliably what a consular officer would have done and whether it would have made a difference. Doing so would require access to normally inviolable consular archives and testimony from consular officials notwithstanding their usual privileges and immunities. In this case, for example, one might wish to examine Paraguay's consular instructions and practices as of the time when Mr. Breard was arrested and inquire into the resources then available to Paraguay's consular officers. Surely governments did not intend that such questions become a matter of inquiry in the courts.

b. United States Court of Appeals, Ninth Circuit, *U.S. v. Calderon-Medina*, 591 F.2d 529 (1979)

Violation of a regulation renders a deportation unlawful only if the violation prejudiced interests of the alien which were protected by the regulation.¹

1 [Court's Footnote 6] The regulation admittedly violated here was evidently intended to ensure compliance with the Vienna Convention on Consular Relations, reprinted in 115 Cong. Rec. 30,945 (1969). Article 36 of the Convention provides that aliens shall have freedom to communicate with consular officers of their nationality and that "[any] communication addressed to the consular post by the person arrested, in prison, custody or detention shall . . . be forwarded . . . without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph" 115 Cong. Rec. 30,948 (1969). The convention was adopted by the United Nations Conference on Consular Relations in 1963. *Id.* at 30,952. The regulation was promulgated in 1967. *32 Fed. Reg. 5619 (1967)*. The government relies on an introductory clause of

...
The district courts in these cases made no finding of specific harm to these aliens resulting from lack of notice of their right to communicate with the Mexican Consul. Nor did appellees identify evidence of such harm in the record. Therefore, we reverse the orders dismissing the indictments.

On remand the aliens should be allowed the opportunity to demonstrate prejudice resulting from the INS regulation violations. The district courts will determine whether violation of 8 C.F.R. § 242.2(e) harmed the aliens' interests in such a way as to affect potentially the outcome of their deportation proceedings. Any such harm should be identified specifically. If either alien shows such prejudice, the indictment against him may be dismissed.

If Calderon-Medina fails to make such a showing, the government may proceed with its case against him. If Rangel-Gonzales fails to make such a showing with respect to § 242.2(e), the district court must determine whether 8 C.F.R. §§ 242.1 or 242.16 were violated in the deportation proceeding and, if so, whether his interests were prejudiced by such violations. Takasugi, District Judge, dissenting: . . . This nation must manifest integrity in our treaties with foreign countries. To honor the provisions of Article 36 of the Vienna Convention on Consular Relations, as noted in footnote 6 of the majority opinion, mandates a sense of justice and decency. To do anything less is a severe erosive compromise of our very essence equal to if not greater than a Constitutional violation.

For the foregoing reasons, I order an affirmance of the district court decision, or in the alternative, to remand the case to the district court imposing the burden on the government to establish the absence of prejudice.

c. United States Court of Appeals, Ninth Circuit, *U.S. v. Rangel-Gonzales*, 617 F.2d 529 (1980)

This is an appeal from a conviction of illegal entry after deportation. 8 U.S.C. §1326 (1976). We are called upon to apply the standards laid down in *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979), for collateral attacks on deportation based on violations of INS regulations.

This matter was first before this Court as a companion to *United States v. Calderon-Medina*. The trial court had dismissed the indictment on the ground that, in the underlying deportation, the INS had failed to advise the defendant of his right to consult with Mexican Consular authorities as required by INS regulations. 8 C.F.R. § 242.2(c)(1979). In the first appeal this Court remanded with instructions that the trial court consider whether the violation had prejudiced interests of the defendant protected by the regulation. On remand, after consideration of affidavits submitted on behalf of both the defendant and the government, the trial court found no prejudice. The matter is now before this Court in

the treaty declaring that the purpose of the privileges and immunities for which the treaty provides "is not to benefit individuals but to ensure the efficient performance of functions by consular posts" 115 Cong. Rec. 30,945 (1969). Nevertheless, protection of some interests of aliens as a class is a corollary to consular efficiency. This is evident because consular functions listed in article 5 of the Convention include "helping and assisting nationals . . . of the sending State" and "representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State . . . where such nationals are unable . . . to assume the defenses of their rights and interests." *Id.* at 30,945-46.

order to determine whether there was a sufficient showing of prejudice within the meaning of *Calderon-Medina*. We hold that there was a sufficient showing and reverse the trial court.

... [T]he Court in *Calderon-Medina* adopted a two step test to determine whether violation of a given regulation invalidated the deportation.

First, the Court held that the regulation itself must serve a purpose of benefit to the alien. The Court held that the particular regulation involved here, 8 C.F.R. § 242.2(e) (1979), serves such a purpose. It was intended to insure compliance with this country's treaty obligations to promote assistance from their country of origin for aliens facing deportation proceedings in the United States. 591 F.2d at 531 n.6 (regulation intended to ensure compliance with Vienna Convention on Consular Relations, reprinted in 115 Cong. Rec. 30,945 (1969)).

Second, the Court held that once it is determined that the violated regulation serves a purpose beneficial to the alien, the violation invalidates the deportation "only if the violation prejudiced interests of the alien which were protected by the regulation." 591 F.2d at 531.

The Court laid down the following procedure for determining this prejudice in this and the companion case:

On remand the aliens should be allowed the opportunity to demonstrate prejudice resulting from the INS regulation violations. The district courts will determine whether violation of 8 C.F.R. § 242.2(e) harmed the aliens' interests in such a way as to affect potentially the outcome of their deportation proceedings. Any such harm should be identified specifically.

591 F.2d at 532.

Thus, it is clear from *Calderon-Medina* that the initial burden of production of evidence showing prejudice is on the defendant. The prejudice must relate to the interests protected by the regulation. Since the interests of the alien protected by this regulation related to obtaining assistance in preparing a defense to the deportation, we must consider whether appellant demonstrated that such interests were materially affected.

With these principles in mind, we now turn to the evidence presented on prejudice in this case. None of the material presented to the trial court on remand constituted testimony from which the trial court draw inferences from demeanor relating to credibility.

The evidence presented by the defendant in support of his claim of prejudice took the form of several affidavits. Defendant's own affidavit stated that he did not know he had a right to consult with the Mexican Consulate, and that he believed that he would have contacted the Mexican Consulate had he known he could do so. The affidavit of the Mexican Consul General in Seattle stated that his office would visit an alien who called for help, would help him contact friends and an attorney, and might even send a Consular representative to the deportation hearing. The affidavit of an experienced immigration attorney stated that an individual in Rangel's position could, with appropriate assistance, have obtained voluntary departure rather than deportation. Affidavits from various family members and legal and social service groups stated that had they known of the appellant's difficulties they would have been of assistance to him.

We conclude that these affidavits made a prima facie showing of prejudice within the meaning of *Calderon-Medina*. The appellant showed he did not know of his right to contact the consular officials, that he would have done so had he known, and that such consultation may well have led not merely to appointment of counsel, but also to community assistance in creating a more favorable record to present to the immigration judge on the question of deportation. The appellant did show some likelihood that had the

regulation been followed his defense and the conduct of the hearing would have been materially affected.

The evidence adduced by the United States to rebut this showing consisted of two affidavits. One was an affidavit of the district director of the INS stating that an individual with Rangel's INS record would not have been considered eligible for voluntary departure. That affidavit could have taken into account only the record presented to the judge in the actual deportation proceeding and could not have taken into account any factors which might have been developed for the record as a result of consultation with consular officials.

The second affidavit was by an INS investigator. He stated that only six of approximately 400 individuals with whom he had dealt and who were advised of their right to call the Consulate actually did so. Nothing in the affidavit related specifically to this defendant, nor did the affidavit explain anything about the 400 aliens or the circumstances under which they were advised of their right to call the Consulate.

Based upon his review of the documentary evidence submitted, the trial court refused to dismiss the indictment. The relevant sections of the court's formal findings of fact stated that the INS did violate 8 C.F.R. § 242.2(e) (1979) by not notifying Rangel of his right to call the Consulate, but that Rangel had been notified of his right to call an attorney on prior occasions, and that in view of Rangel's previous experience with the INS he was adequately informed of his rights. The court's Finding No. 6 tracked the language in *Calderon*, saying that Rangel did not "specifically identify" the harm from the violation of the regulation, that his evidence was speculative and inconsistent with his prior acts, that Rangel's evidence did not support a conclusion that the outcome of the proceeding was "potentially affected," and finally that Rangel was not "prejudiced" by the violation. At the hearing the trial judge orally explained that he simply did not believe that Rangel would have called the Consulate, or that he would have obtained an attorney even if he had called the Consulate and had been told of his right to do so.²

There is no competent evidence in this record to show that the appellant would not have contacted the Consulate had he known that he was entitled to do so. Appellant's own affidavit states that he believed that he would have contacted the Consulate. The only evidence purporting to rebut that showing is the affidavit of the INS investigator which says merely that in his experience very few aliens who are told that they may contact the Consulate ever do so. This statement setting forth the conduct of others, in circumstances which are unexplained, would not appear to have any bearing on what this particular individual would have done in the particular circumstances facing him. We have been cited no cases, nor has our own research uncovered any, which suggest that it should. What others have done may be relevant to what a specific person should do, as in establishing the standard of care in negligence cases. Such use of others' conduct is very different from the use urged here. [Footnote omitted]

2 [Court's Footnote 2] On denying the appellant's motion to dismiss, the trial court observed: "We're dealing in absolute, pure, complete 100 percent solid speculation in this case from both sides. Hindsight. I really find it very difficult to believe and don't believe that even if he [the defendant] had been advised that he had a right to contact the Mexican Consulate that he would have. And even if he would have and the Mexican Consulate would have advised him that he was entitled to an attorney, he wouldn't have asked for an attorney. He'd been told that on at least five other occasions. So I find there's been no prejudice under the circumstances here involved."

We recognize that there may well be many aliens who, for one reason or another, may not wish to make their presence in this country known to their governments or who may not wish to take any step to protest or delay deportation. Persons in such a position are not prejudiced within the meaning of *Calderon-Medina* if they are not informed of their right to contact the Mexican Consulate. See *United States v. Vega-Mejia*, 611 F.2d 751, 752 (9th Cir. 1979). However, even assuming that most aliens are in such a position, it does not follow that all are or, more specifically, that this particular alien was. The right established by the regulation and in this case by treaty is a personal one. This Court recognized that fact in *Calderon-Medina* when it stressed inquiry into the particular circumstances of the underlying deportation. The effect of its violation on one individual cannot be measured by the effect of its violation on others. Personal rights cannot be abrogated simply because others do not exercise them. . . .

The district court further erroneously concluded that even if appellant had contacted the Consulate, nothing would have come of it because appellant already knew of his right to counsel. Even if we accept, arguendo, the assumption that the Mexican Consulate would have done nothing more than advise appellant of his right to counsel (an assumption contrary to the Consul General's own affidavit), it remains difficult from a practical standpoint to equate being advised by the INS in an adversary setting with being advised by the Mexican Consulate. Moreover the INS is required to advise of the right to counsel under regulations independent of the regulation violated here. E.g., 8 C.F.R. §§ 242.16(a), 23692(a) (1979). An interpretation equating the two requirements in effect renders 8 C.F.R. § 202.2(e) (1979) surplusage and should be avoided. . . . Such an interpretation also frustrates the purpose of the treaty which the regulation implements, namely to promote assistance to aliens from officials of their country of origin. See *United States v. Calderon-Medina*, 591 F.2d, 531 n.6 (9th Cir. 1979). [Footnote omitted]

In sum, the appellant in this case carried his initial burden of going forward with evidence that he did not know of his right to consult with consular officials, that he would have availed himself of that right had he known of it, and that there was a likelihood that the contact would have resulted in assistance to him in resisting deportation. There was no evidence to rebut that showing and the indictment should have been dismissed.

d. United States Court of Appeals, Ninth Circuit, *U.S. v. Vega-Mejia*, 611 F.2d 751 (1979)

Vega-Mejia was convicted of illegally reentering the United States after having been previously deported, a violation of 8 U.S.C. §1326, and was sentenced to two years in prison. He appeals both his conviction and his sentence. We reject each of his contentions and affirm.

Vega-Mejia moved to dismiss the indictment against him on the ground that the Immigration and Naturalization Service (INS) failed to advise him of his right to confer with Mexican consular officers before the deportation proceedings underlying this conviction, as required by 8 C.F.R. § 242.2(e) (1978). The district court found that Vega-Mejia was not prejudiced as a result of the INS's error and denied the motion.

Vega-Mejia challenges the denial and, consequently, his conviction on the ground that the underlying deportation proceedings were unlawful because the INS violated 8 C.F.R. § 242.2(e) and because this violation caused him not to seek voluntary departure. In prosecutions under section 1326, the lawfulness of the underlying deportation is a material element of the offense and thus may be attacked collaterally in the subsequent criminal proceeding. *United States v. Calderon-Medina*, 591 F.2d 529, 530 (9th Cir. 1979) . . .

Violation of a regulation does not invalidate a deportation proceeding unless the violation prejudiced interests of the alien that were protected by the regulation. 591 F.2d at 531.

...
The district court here applied *Calderon-Medina* and found that Vega-Mejia was not so prejudiced. The court noted that Vega-Mejia had been informed that he could apply for voluntary departure; that, if he did, the application process would take three months, during which he would be held in custody; and that if he acquiesced in deportation he would be sent back to Mexico on the same day. The district court here also noted that, even if he had been advised that he could talk to the Mexican consul, he would not have done so as it would have taken more time.

Throughout the record it is apparent that Vega-Mejia's main concern was to avoid detention and delay in his return to Mexico. Undoubtedly speaking with the consul and applying for voluntary departure would have resulted in some delay. On this record we cannot say that the district court's conclusion that Vega-Mejia was not prejudiced under *Calderon-Medina* is erroneous.

e. Oklahoma Court of Criminal Appeals, *Torres v. Oklahoma*, 120 P.3d 1184 (2005)

We remanded for an evidentiary hearing on . . . whether Torres was prejudiced by the State's violation of his Vienna Convention rights in failing to inform Torres, after he was detained, that he had the right to contact the Mexican consulate; . . . Briefly summarized, Judge Gray found that Torres was prejudiced by the violation of his Vienna Convention rights. . . . For the reasons discussed below, we agree with Judge Gray's findings but find no relief is required.

In finding that Torres was prejudiced by the violation of his Vienna Convention rights, the trial court used the following three-prong test: (1) whether the defendant did not know he had a right to contact his consulate for assistance; (2) whether he would have availed himself of the right had he known of it; and (3) whether it was likely that the consulate would have assisted the defendant. This test, which has been used by several jurisdictions, was suggested in the specially concurring opinion to this Court's Order remanding the case for an evidentiary hearing. [Footnote omitted] Under this test, prejudice is presumed if all three factors are present. This Court did not formally adopt this test when remanding the case. We adopt it now. In doing so, we describe the evidence required for proof under the third prong of the test. [Footnote omitted] The defendant must present evidence showing what efforts his consulate would have made to assist in his criminal case. The majority of jurisdictions considering the Vienna Convention question have adopted some version of this test. [Footnote omitted] The common thread in each is a threshold requirement that a defendant make some showing of how his consulate would have aided him. [Footnote omitted]

We reject any construction of the third prong of the test which would require a defendant to show that the consular assistance would, or could, have made a difference in the outcome of the criminal trial. Appellate review in the criminal justice system necessarily involves balancing uncertainties. In each criminal trial, a factfinder determines guilt or innocence beyond a reasonable doubt. In most trials there may be some doubt, and some questions may remain unanswered. Very rarely, a conviction may later be shown to be wrongful by subsequent evidence of actual innocence such as DNA testing or a confession by a third party. Also very rarely, an evidentiary or legal error may so obviously inflame a jury's passions as to render its sentencing determination unreliable as a matter of law. More usually, a defendant will present evidence of factual or legal errors which may or may not

have affected a jury's decision and which thus cannot be shown to have affected a verdict or sentence.

The essence of a Vienna Convention claim is that a foreign citizen, hauled before an unfamiliar jurisdiction and accused of a crime, is entitled to seek the assistance of his government. Even if that assistance cannot, ultimately, affect the outcome of the proceedings, it is a right and privilege of national citizenship and international law. The issue is not whether a government can actually affect the outcome of a citizen's case, but whether under the Convention a citizen has the opportunity to seek and receive his government's help. This protection extends to every signatory of the Convention, including American citizens. It is often impossible to say whether a particular action in a criminal trial could affect the outcome. However, it is possible to show what particular assistance, if any, a government would offer its citizen defending against a crime in a foreign country. That is the right and privilege safeguarded by the Convention. This Court is unwilling to raise the bar beyond that which the Convention guarantees. If a defendant shows that he did not know he could have contacted his consulate, would have done so, and the consulate would have taken specific actions to assist in his criminal case, he will have shown he was prejudiced by the violation of his Vienna Convention rights.

This test for prejudice from a violation of Vienna Convention rights is consistent with the direction of the International Court of Justice decision, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* [*Avena*].³ *Avena* noted that the remedy directed in that case, the judicial review we here undertake, should be done "with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice."⁴ The phrase "actual prejudice" can refer only to prejudice flowing from the violation of the purpose of the Convention provision. That purpose is to ensure that a foreign citizen has the opportunity for aid from his or her government in an unfamiliar criminal jurisdiction. Whether or not the aid results in a different case outcome, a citizen must be actually prejudiced when he is denied aid his government would have provided.

Reviewing the evidence presented in the evidentiary hearing, as well as the evidence submitted to this Court, we find that, under the unusual circumstances of this case, with regard to his convictions for first degree murder, Torres has not shown he was actually prejudiced by the State's failure to inform him of his rights under the Vienna Convention. Torres has provided ample evidence that the Mexican government takes its consular obligations to its citizens very seriously, particularly when those citizens are capital defendants in another country. The Mexican government has a tradition of active assistance extending back to the 1920s, and provided extensive assistance to capital defendants in 1993, the year of Torres's arrest. Had the consulate been contacted, it would have monitored Torres's case, consulted with and offered assistance to his attorney, and helped gather evidence, particularly in preparation for the second stage of trial. "The protection of Mexican nationals who face capital proceedings or capital trials is one of the highest priority of the Mexican Consular representatives. All their efforts are focused on trying to avoid the imposition of the death penalty."⁵ Among consular officials' most important duties are the gathering of mitigation evidence and locating mitigating witnesses in Mexico and

3 [Court's Footnote 9] 2004 I.C.J. 128 (Judgment of March 31, 2004).

4 [Court's Footnote 10] *Avena*, 2004 I.C.J. 128 at ¶121.

5 [Court's Footnote 11] Testimony of Victor Uribe, Director for Foreign Litigation as the Mexican Minister of Foreign Relations. Tr. 48.

the United States. After belatedly entering into Torres's case, Mexico hired two bilingual investigators, two gang experts, a mitigation expert and a neuropsychiatrist, to assist in developing mitigating evidence for the appellate process. All the evidence presented supports the conclusion that consular assistance, in Torres's particular circumstances, would have focused on obtaining a sentence of less than death. Evidence did not specifically show how consular assistance would have assisted in the guilt phase of the trial.

Torres clearly showed that the Mexican government would have expended considerable resources on the capital phase of his case. If Torres were still under a capital sentence, this would indeed amount to a showing of prejudice. However, the Governor's grant of clemency in Torres's case ensures that Torres is not subject to the death penalty. Any assistance Mexico could have given in this regard has become moot. Torres did not present evidence showing he was prejudiced in the guilt/innocence stage of trial by the Vienna Convention violation. Under these circumstances, Torres is not entitled to relief from his convictions, and has already received relief from his capital sentences. No further relief is required.

Lumpkin, V.P.J., concurring in part, dissenting in part:

... I disagree with this Court's assertion that the trial judge found Appellant was "prejudiced" as a result of the failure to adequately inform him of his rights under the Vienna Convention. What appears from a reading of the findings by the trial judge is the judge made a finding "as a matter of policy", not "actual fact" that Appellant was prejudiced. The trial judge stated:

This Court cannot say with certainty that Appellant suffered actual prejudice because he was not informed of his rights under the Vienna Convention. However, this Court does not support a result that could lead some in the international community to believe the United States does not take seriously its obligations under the Convention. See *U.S. v. Carrillo*, 70 F. Supp. 2d 854. Further, this Court believes that a ruling that Appellant was not prejudiced would allow officials of foreign signatories to ignore these same provisions when American citizens are detained abroad. Therefore, this Court finds that the Appellant was prejudiced because he was not adequately informed of his rights under the Vienna Convention. (Findings of Fact at Page 7)

This finding, on its face, acknowledges it is in direct contradiction to the facts of the case. Thus, it becomes not a legal finding based on the law and evidence, but a political or policy decision, which should not be made by courts. While I appreciate the challenges presented to the trial judge in this matter, I believe it reveals that even excellent, experienced jurists can be drawn down the wrong path by public policy arguments.

I also disagree with this Court creating a "presumption of prejudice" standard to apply in this case. That presumption is not supported by the law or evidence presented in this record either as to the notification of consular rights or the issue of effective assistance of counsel. What the Court disregards in applying its "presumption" is the fact that Appellant is a Mexican national in form, not substance, due to the fact he has lived in the United States since he was 4 or 5 years old. (Evidentiary Hearing Order, Pg. 6) His contacts with Mexico have been minimal. There was nothing the Mexican government could provide as to evidence regarding his time in Mexico due to the fact he resided there for such a short period during his infancy. However, they could and have provided him resources, which is commendable. The mere failure to give notice of consular rights under this fact situation cannot in any manner be deemed to have been prejudicial, much less presumed prejudice.

We should not attach some *carte blanche* presumption of prejudice due to mere failure to advise of consular rights. Those rights are important and should be given in each instance. But, if there is a failure to advise, that failure must be judged under the totality of the

circumstances and the actual impact it had upon a defendant to receive due process, effective assistance of counsel and resources needed for his/her defense. There is a valid reason for the requirement of advice of consular rights in the world today, but the failure to provide that notice must be evaluated in relation to the guarantees afforded to each person charged with a crime in this great country. Our constitution provides to the lowest of persons the guarantees not even possessed by the affluent in most countries. The methods of providing those constitutional benefits are evolving and improving on a continuing basis. The appellant in this case was never without the assistance of counsel, and there are some filings in this record that indicate his retained trial counsel actually had contact with Mexican officials prior to his trial. Regardless, Appellant's rights were protected and he was provided resources to mount his defense and seek his appeals at each stage of the proceedings. We should not deal in presumptions when we can adjudicate realities, and that should be our standard of review. If a defendant has been prejudiced he/she will be able to present evidence to support that allegation and this court can adjudicate the issue on the facts. I find the presumption of prejudice due to the failure to advise of consular rights totally unwarranted and in conflict with an understanding of our criminal justice system. In support of these conclusions, I reiterate portions of my previous writings in this case.

...

What has been exhibited and proven in this case is the United States of America continues to have the premier legal system in the world today. While many countries on this globe require the mandate of the notice of consular rights, and that is why we ascribe to and enforce them, to ensure the rights of persons charged with crimes are protected, those rights are automatically afforded to all persons pursuant to our constitution. Our concept of a "Nation of laws and not of men" works to secure and protect all who are charged with crimes without the need of an outside impetus. Granted, to ensure the proper example is presented to all who observe our system, we need to adhere to even the *pro forma* requirements of international agreements such as the Vienna Convention. However, we should never let form rule over substance as it is the assurance of due process, not the facade of it, that ensures the rights of the individual. In this case, substance prevailed over form and the Appellant received all the process that was due to him pursuant to the guarantees of the Constitutions of the United States of America and the State of Oklahoma. In addition to those guarantees, he was blessed with the additional mercy of the Governor of the State of Oklahoma.

f. Oklahoma Court of Criminal Appeals, *Duenas-Flores v. Oklahoma*, Case No. C-2005-1, Opinion Granting Certiorari, 28 June 2007

... Duenas-Flores was not advised without delay of his right to contact the Mexican consulate as required by Article 36 of the VCCR. Furthermore, the record shows that Duenas-Flores would have done so if he had been so advised. Additionally, through the statement and affidavit of Mexican consular official Fernando Gonzalez the record also shows that the Mexican government's Kansas City consulate likely would have assisted Duenas-Flores in obtaining the services of an expert witness had it been informed that Duenas-Flores had been detained and was facing homicide charges.

Under these circumstances, we find that Duenas-Flores has met his burden under *Torres*. He has thereby made a showing sufficient for us to conclude that had he been properly advised of his Article 36 rights under the VCCR, he would have opted to proceed to trial

rather than plead guilty. As a remedy for the State's failure to comply with Article 36 of the VCCR, therefore, we find that Duenas-Flores is entitled to withdraw his plea.

g. Supreme Court of Ohio, *State v. Issa*, 93 Ohio State 3d 49, 752 N.E.2d 904 (2001)

Lundberg-Stratton, J., dissenting:

I respectfully dissent from the majority's decision to affirm the defendant's convictions and sentence of death. The defendant was not properly advised of his consular rights under the Vienna Convention, Article 36, and, therefore, I would reverse the judgment of the trial court and remand for a new trial.

...

"Consular access serves two functions. It serves the needs of foreign nationals who benefit from prompt communication with consular officials, as well as their intervention during legal proceedings; at a minimum, it provides a cultural bridge for detained nationals who must otherwise navigate through an unfamiliar and often hostile legal system. It also enables governments to monitor the safety and fair treatment of their nationals abroad, to reassure relatives and friends at home, to promote respect for human rights, and to avoid disruptions in foreign relations that could result from the mistreatment of detained persons." Aceves, *International Decisions: Murphy v. Netherland* (1997), 116 F.3d 97 (1998), 92 Am.J.Internat.L. 87, 89-90.

In October 1973, the United States Department of State concluded, "In the Department's view, Article 36 of the Vienna Convention contains obligations of the highest order and should not be dealt with lightly." Quoted in Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies* (1998), 31 Vand.J.Transnatl L. 257, 270. Although the United States vigorously insists on consular notification for its own nationals, we often fail to comply with the treaty regarding foreign nationals in our country. Of the eighty-three foreign nationals currently on death row in the United States, the vast majority were not alerted to their right to consular notification under the Vienna Convention. Henry, *Overcoming Federalism in Internationalized Death Penalty Cases* (2000), 35 Tex.Internat.L.J. 459, 459-460, . . . Moreover, attempts to raise this issue have not been successful. At least two thirds of foreign nationals executed since reinstatement of the death penalty in 1976 unsuccessfully raised the treaty issue. *Id.* at 460.

Today, the majority follows the trend by failing to recognize the significance of defendant's rights under the Vienna Convention. The majority concludes that because defense counsel failed to raise defendant's Vienna Convention claim in the trial court, he has waived all but plain error, and the majority goes on to find no plain error on these facts.

In my view, however, the failure to inform the defendant of his rights under the Vienna Convention constitutes structural error, affecting "the entire conduct of the trial from beginning to end" as well as the "framework within which the trial proceeds." *State v. Esparza* (1996), 74 Ohio St. 3d 660, 661, 660 N.E.2d 1194, 1196, quoting *Arizona v. Fulminante* (1991), 499 U.S. 279, 309-310, 111 S.Ct. 1246, 1265, 113 L.Ed. 302, 331. I agree with the majority that suppression is not the remedy, however. Because the right to be advised of consulate access rights affects every aspect of a trial, I believe that the treaty's provisions can be enforced only by starting anew. Therefore, I believe that a new trial is the appropriate remedy.

On June 27, 2001, the International Court of Justice agreed. The court, which is the

principal judicial organ of the United Nations, delivered its judgment in the *LaGrand* case, holding that the United States, in arresting, detaining, trying, convicting, and sentencing Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, as provided by Articles 5 and 36 of the Vienna Convention . . .

The *LaGrand* decision makes clear that the United States must not take lightly the provisions of the Vienna Convention on Consular Relations. Today the majority does that which the International Court of Justice and even our Constitution warn against.

The Supremacy Clause, Section 2, Article VI of the United States Constitution provides: "This Constitution, and the Laws of the United States . . . and all Treaties made, or which shall be made, . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound ***." (Emphasis added.)

This very court has held in the past that the protections of treaties are on par with the Constitution. In *State v. Vanderpool* (1883), 39 Ohio St. 273, this court reviewed the provisions of the Ashburton Treaty, which provided for extradition, and held, "The provisions of this treaty are part of the law of the land, enforceable by the judicial tribunals of this state, in behalf of a person so detained and prosecuted." *Id.*, paragraph two of the syllabus. The court continued, "This treaty is therefore the law of the land, and the judges of every state are as much bound thereby as they are by the constitution and laws of the Federal or State governments. It is therefore the imperative duty of the judicial tribunals of Ohio to take cognizance of the rights of persons arising under a treaty to the same extent as if they arose under a statute of the state itself." *Id.* at 276-277.

Thus, in addition to the Supremacy Clause, this court in *Vanderpool* clearly held that treaties are on par with the Constitution, and we are bound by both. Therefore, I would find that the failure to advise the defendant of his rights under the Vienna Convention is akin to the failure to advise a defendant of his Sixth Amendment right to counsel. See *Gideon v. Wainwright* (1963), 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799.

The majority finds that, as in the case of a statutory violation, the exclusionary rule is not an appropriate sanction, absent an underlying constitutional violation, unless the treaty expressly provides for that remedy. I agree with the majority that exclusion is not the remedy, but I would distinguish *Kettering v. Hollen* (1980), 64 Ohio St.2d 232, 18 Ohio Op.3d 435, 416 N.E.2d 598, in that it deals with a statutory violation, not a treaty violation. As noted above, I would find that the failure to advise defendant of his rights under the Vienna Convention equates to the failure to advise him of his Sixth Amendment right to effective assistance of counsel. See *Vanderpool*. Therefore, as noted above, I would reverse and remand to the trial court for a new trial.

The Vienna Convention offers foreign nationals, who often have both cultural and language barriers, the opportunity to obtain information from their consul about the legal system in which they are detained and how it may differ from the legal system in the defendant's home country. Particularly with foreign nationals with language barriers, cultural differences, and scarce resources, the Vienna Convention can greatly enhance their ability to defend themselves; likewise, our nationals in foreign countries equally need such assistance.

Having grown up abroad and having lived in three different foreign countries, I have seen first-hand the vastly different foreign legal systems and how our nationals are often treated in a foreign land. Article 36 of the Vienna Convention may provide our nationals their only safeguard against a hostile legal system.

The Vienna Convention offers Americans abroad the comfort of reciprocity. Under starkly different legal systems, where rights we take for granted, such as the right to counsel,

a jury, discovery, cross-examination, and open trials, are routinely not afforded by other countries, how could our nationals possibly prove that they did not waive their consulate rights? With the closed trials and secrecy of many legal systems, how could our nationals overcome foreign legal barriers to prove that the failure to provide access to a consul resulted in an error at trial? Our best way to ensure that other nations honor the treaty by providing consular access to our nationals is to demand strict adherence to the right to consular access for foreigners in *our* country. In that way, our nationals will be provided an advocate to try to safeguard the minimal protections we take for granted in the United States.

When we excuse our failure to advise the defendant of his consulate rights on the ground that there was "no plain error," we provide the very words and tools to other countries to use to excuse their denial of rights to our nationals, and the protections of the treaty become meaningless. "If the right under the treaty . . . can only be enforced by the surrendering nation by protest or otherwise against the one making the demand, that is, if it is a question not cognizable in the courts, it is of little value under our system of Federal and state governments." *Vanderpool*, 39 Ohio St. at 377.

If the United States fails in its responsibilities under the convention, then other member countries may choose to do unto us as we have done unto them. Oliver Wendell Holmes said, "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." *The Western Maid* (1922), 257 U.S. 419, 433, 42 S.Ct. 159, 161, 66 L.Ed. 299, 303. If we are to expect that our nationals will be afforded the rights guaranteed them under the treaty, we must guard the rights of foreign nationals in our country as well. I respectfully dissent and would reverse the judgment of the trial court and remand the cause for a new trial.

h. Supreme Court of Illinois, *People v. Madej & Consul General of the Republic of Poland in Chicago*, 193 Ill. 2d 395; 739 N.E.2d 423 (2000)

Heiple, C.J., dissenting:

The State suggests that a letter of apology to the Polish government would rectify this oversight. Whether this apology would be sent before or after defendant's execution was not specified.

What is cavalierly dismissed here is that the consular notification requirement is meant to ensure that foreign nationals imprisoned abroad have adequate legal representation and that they should be tried in accordance with principles of justice generally recognized in the international community by allowing consular officials to consult with the defendant and with attorneys, court officials and prosecutors. It is important to note that this protection is designed for Americans abroad as well as for foreign nationals in the United States. In the instant case, however, the Polish Consul General was not even aware of defendant's situation until 1998, some 16 years after his conviction and sentence.

The question arises, how can we expect protection under this treaty for American citizens abroad if we do not extend equal protection to foreign nationals residing in the United States? The answer is, we cannot. The decision reached in this case thus has implications reaching far beyond the execution of this defendant.

For the breach of this international convention, defendant's convictions and sentence should be reversed and the cause remanded for a new trial in compliance with the solemn treaty obligations of the United States, which, under our constitution, are the supreme law of the land.

17 Suppression of evidence as a judicial remedy

17.1 Introduction

Not infrequently, police have interrogated a foreign national before advising about consular access. If the foreign national makes a statement with incriminating elements, and prosecuting authorities seek to use it at trial, the foreign national may object to its introduction. Similarly, if police detain and search before advising about consular access, and find items they seek to use as material evidence of guilt, the foreign national may object to their use.

One relevant issue in such situations is that of the time at which the VCCR Article 36 advice must be given to a foreign national, an issue examined in Chapter 5. The ICJ has not given a clear indication on the issue of suppression. It has said that the advice-giving need not necessarily precede interrogation (Document 2), but at the same time it has said that the advice must be given as soon as there is reason to believe that the individual is a foreign national (see Chapter 5).

Germany's constitutional court, citing this conclusion of the ICJ, took the fact that the advice was not required to be given upon the commencement of interrogation as an indication that the advice did not relate to interrogation (Document 3a). Germany's highest non-constitutional court ruled that this separation of the VCCR Article 36 advice from the time of interrogation means that there is a basis to exclude a statement where the advice has not previously been given (Document 3b).

In Australia, legislation does tie the giving of the VCCR Article 36 advice to the time of interrogation and requires postponement of interrogation if a foreign national indicates a desire to contact a consul (Document 4a). Two appellate courts in Australia have suppressed statements, and in one case material evidence, where the advice was not given prior to the giving of statements or the seizure of the evidence. In one of those cases, a foreign national being tried for smuggling heroin into Australia sought to exclude the introduction into evidence of statements he made in custody that contained incriminating elements. The court ruled that the statements must be excluded (Document 4b). In the other case, a foreign national also charged with smuggling drugs into Australia objected to the introduction into evidence of a statement and of a quantity of MDMA, commonly

known as "ecstasy," seized from a travel bag in his hotel room in Perth, Australia. In questioning the man there, and in seizing the MDMA, the investigating officers did not advise that statements could be used as evidence (Crime Act s 23F) or that he had a right to an attorney (Crime Act s 23G). Further, they did not arrange for an interpreter prior to questioning (Crime Act s 23N), did not advise about consular access (Crime Act s 23P), and did not properly record the statement (Crime Act s 23V). The court ruled that the statement and drugs could not be used as evidence (Document 4c).

In the United Kingdom, in two cases, drugs seized from foreign nationals were suppressed as evidence by the trial judge because advice about consular access had not been given prior to interrogation (Documents 5a, 5b). The UK had no legislation comparable to the Australian that would have explicitly tied the advice-giving requirement to interrogation. The two articles reproduced as Documents 5a and 5b were written by the barristers who represented the defendants. In neither case did the trial judge produce a written opinion.

In the United States, the U.S. Supreme Court has refused to exclude statements made without advice about consular access having been given, but on a basis different from the German courts. It said, as will be recalled, that the absence of an exclusion requirement in the text of the VCCR means that it was not the intent of the VCCR drafters to provide a judicial remedy of any kind (Chapter 14). It has said further, with specific reference to the suppression issue, that the advice-giving does not relate to interrogation (Document 6). A dissenting judge found suppression was required, at least in instances in which the foreign national lacked knowledge about a suspect's rights.

A Canadian trial court declined to suppress an incriminating statement made by a foreign national who had not been advised about consular access. In a pre-trial proceeding, the defense sought exclusion at the impending trial of statements Partak made to police without having been advised about consular access. The judge's rationale was that the foreign national appeared particularly anxious to confess, hence, participation by a consul would not have influenced his conduct (Document 7).

In a case before the Inter-American Commission on Human Rights, the foreign national was not advised about consular access and made an incriminating statement. The Commission explained how, had a consul been involved early on following arrest, the foreign national might not have made the statement (Document 8). In that case, police in Ciudad Juarez, Mexico, had arrested the foreign national's mother and step-father at about the same time as the foreign national was to be interrogated by police in El Paso, Texas, which is located across the US-Mexico border from Ciudad Juarez. There was no apparent valid suspicion of criminality on the part of the mother or step-father. The El Paso police allowed the foreign national to converse by telephone with Ciudad Juarez police to verify the fact of his mother's and step-father's incarceration. This scenario was apparently set up by the two police departments to lead the foreign national to believe that his family would be continued in custody unless he confessed to murder. A Texas court subsequently ruled the confession inadmissible. In the

excerpt included in this chapter, the Inter-American Commission on Human Rights explains that had a consul been involved, a consul could have inquired about the status of the foreign national's mother and step-father in Ciudad Juarez, such that the foreign national might not have made the confession.

The issue of suppression involves the law of state responsibility, which requires restoration of the *status quo ante* to remedy a violation of an internationally protected right (Chapter 14), and the issue of prejudice – whether a showing of prejudice should be required at all, and if so in what way (Chapter 16). Courts that have considered defense requests for suppression have, as reflected in this chapter, varied in the extent to which they view a violation as requiring a remedy, and as to whether they require a showing of prejudice, and if they do, how prejudice should be handled.

17.2 International Court of Justice

Avena and Other Mexican Nationals (Mexico v. USA), 2004 ICJ 12

87. The Court thus finds that “without delay” is not necessarily to be interpreted as “immediately” upon arrest. It further observes that during the Conference debates on this term, no delegate made any connection with the issue of interrogation. The Court considers that the provision in Article 36, paragraph I (b), that the receiving State authorities “shall inform the person concerned without delay of his rights” cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36.

17.3 Germany

a. Constitutional Court, *Case of F. & T.*, 2 BvR 2115/01, Judgment of 19 September 2006, paras. 71–72

[In distinguishing the obligation to advise about the right to counsel from the obligation to advise about the right of consular access, the Court refers to Criminal Procedure Code §136, paragraph 1, which requires that a suspect be advised about the right to counsel prior to the commencement of interrogation.]

71. aa) In this sense the Federal High Court can still utilize the case law it has developed regarding the consequences of violations of the obligation to inform. Therefore, not every impediment to bringing in evidence leads to a prohibition against its use. The decision for or against a prohibition to use evidence is rather to be judged on the basis of the general precepts and goals of the constitutional principle of the rule of law. Thus the case law of the Federal High Court in respect of a violation of the obligation to caution under § 136, paragraph 1, of the Criminal Procedure Code is not transferable to the present instance of a violation of VCCR Art. 36, especially because the obligation to caution – which was present here – concerns the right of assigning a defence counsel overlaps with the obligation to caution according to Art. 36, paragraph 1, of the VCCR, which involves a

consulate's help in engaging defence counsel for the accused. Unlike § 136, paragraph 1, of the Criminal Procedure Code, VCCR Art. 36, paragraph 1 does not link the obligation to caution to the beginning of interrogation but rather to the arrest. The ICJ so ruled in the *Avena* case, that the obligation to immediately inform [para. 72 begins here] the person can not be interpreted to mean that the provision of such information must necessarily precede an interrogation, so that the commencement of an interrogation giving the advice would be a violation of VCCR Art. 36 ("cannot be interpreted to mean that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36", ICJ, Judgments, p. 608, paragraph 87).

b. Federal High Court, Fifth Criminal Senate, *Case of S., E., Sa., D., & T.*, 5 StR 116/01, 5 StR 475/02, 25 September 2007, para. 23

23. Nevertheless the violation of the obligation to advise under VCCR Art. 36(1)(b)(3) does not lead to a prohibition against use of evidence, a prohibition that the accepted international law or constitutional law does not require. . . . To that extent the legal position is that there should be a balancing of the conflicting interests, namely through consideration of the type and gravity of the error and of its actual importance in the finding of the court decision in the criminal process . . . in comparison to the advice about the aforementioned right to silence or right to consult a lawyer. In those situations the actual rights of the suspect in regard to self-incrimination and effective defense are directly involved and in the interrogation situation are protected. The advice given to a suspect under VCCR Art. 36(1)(b)(3) is an advice obligation regarding those propositions and – which can be for acceptance of a prohibition on use – and regarding their significance for a possible outcome as to evidence, the burden on the accused is not sufficiently similar. Thus the obligation to advise under VCCR Art. 36(1)(b)(3) relates not to the beginning of the interrogation but to the moment of arrest. Moreover, the right to be informed under VCCR Art. 36(1)(b) is merely a supplementary protection for all detained suspects of foreign nationality, which in the arrest situation and out of special consideration of his nationality will allow for improvement in his chances of defense. Through this legal position, as has been explained, there is not something special as a possible foreigner-specific legal disability. It is not a question of some special valuation or further shaping of the right to take account of VCCR Art. 36(1)(b), rather through special regard for the protection of the right to keep silent and the right to consult an attorney, especially by the shaping of the aforementioned advice that is given under Criminal Procedure Code §136(1)(2) (cf. Federal High Court 42, 15). Foreign national suspects in question gain undiminished all the legal benefits in regard to the standards of defense. A violation of the subjective right under VCCR Art. 36(1)(b)(3) (cf. ICJ – “LaGrand” –, p. 494) is to be sure significant, however for the shaping of a defense it is not a central, special right. Unlike what is possible under Criminal Procedure Code §136(1)(2), there is no prohibition against use of evidence.

17.4 Australia

a. Crimes Act (1991), Section 23P: Right of foreign national to communicate with consular office

[Section 23L, referenced in Section 23P, permits non-compliance if the official

reasonably believes that compliance will result in the escape of an accomplice, the destruction of evidence, the intimidation of a witness, or harm to persons. "Commonwealth offence" means a crime under Australian law.]

- (1) Subject to section 23L, if a person, under arrest for a Commonwealth offence is not an Australian citizen, the investigating official holding the person under arrest must, before starting to question the person:
 - (a) inform the person that he or she may communicate with, or attempt to communicate with, the consular office of the country of which the person is a citizen; and
 - (b) defer the questioning for a reasonable time to allow the person to make, or attempt to make, the communication.
- (2) Subject to section 23L, if the person wishes to communicate with a consular office, the investigating official holding the person under arrest must, as soon as practicable, give the person reasonable facilities to do so.

b. Court of Criminal Appeal, Northern Territory, *Tan Seng Kiah v. The Queen*, [2001] NTCCA 1, 160 FLR 26

The applicant sought access to both a legal practitioner and a representative of the consular office of Singapore. Neither was provided.

The right to communicate with or to attempt to communicate with the consular office is contained in s 23P of the *Crimes Act*. There is an obligation imposed upon the investigating official to give the person arrested reasonable facilities to communicate with the consular office. In this case nothing was done.

Contacting the consular office by a detained foreign national provides an opportunity to report his or her circumstances, seek advice and assistance, provides a means of informing relatives and friends of his or her situation and all this in her or her native language. One need only contemplate the predicament of an Australian national held in custody in a foreign non-English-speaking country without access to an Australian consular office to appreciate the importance of the right contained in s 23P of the *Crimes Act*.

...
 There is no statutory sanction for a breach of ss 23c [requires release if a suspect is not brought before a magistrate within a specified time period, a requirement the court here found was violated], 23G [requires access to an attorney, a requirement the court here found was violated] or s 23P of the *Crimes Act*. The *Crimes Act* says nothing as to the impact upon the admissibility of evidence obtained in circumstances where those sections have been breached. However, it is clear that when a person is arrested and not dealt with in accordance with the law, the subsequent detention is unlawful and statements or admissions of the arrested person may be excluded in the exercise of a discretion: . . .

It is then necessary to consider the public policy discretion. The findings of the learned trial judge were to the effect that the police were not guilty of any deliberate delay or stalling. She specifically rejected a submission made that there were deliberate delaying tactics employed on the part of the police. Those findings are not challenged. Whilst, as her Honour held, there was no suggestion that the police deliberately applied any pressure to the applicant to enter into the interview and the process was not designed to subject him to improper pressure, the fact remains that he may not have agreed to be interviewed or the interview may have followed a different path had the applicant been dealt with in

compliance with the provisions of the *Crimes Act*. It seems the breaches occurred unintentionally and in some instances, inadvertently. However they demonstrated a less than diligent approach to the obligations imposed by the legislation.

The circumstances of the matter were such that the investigating authorities could easily have complied with the law. In relation to the contact with the consulate nothing was done. In relation to contact with a legal practitioner only desultory efforts were made. In relation to the expiry of the investigation period it would not have been a difficult matter to make an application for an extension of time. Even without an interpreter the applicant was able to communicate in English to some extent. Had the investigating authorities undertaken any one of those steps the applicant is likely to have obtained advice and it may well have been the case that the applicant would have declined to be interviewed or the interview and the resulting record would have assumed a different form.

The nature of the offence alleged against the applicant in this matter was clearly of a serious kind. The very serious nature of the matter is reflected in the maximum penalty of life imprisonment which applies. The applicant was sentenced to 16 years' imprisonment.

The evidence not excluded was relevant to the Crown case. It was the submission of the Crown that in the record of interview the applicant lied in a manner that demonstrated a consciousness of guilt. The Crown case was that those lies provided positive evidence of guilt. The evidence was presented to the jury on that basis. However the evidence was not of an admission to the crime charged. This was but one part of the Crown case against the applicant.

As was noted by Mullighan J in *Bondareff, Usachov and McCabe* (at 45) the clear intention of the legislation is to protect the rights of arrested persons and to ensure they are treated fairly. In this case, as in that case, the investigatory stage of the process was complete. Further "the keeping of an arrested person away from the judicial process must be regarded seriously even if due to a mistaken view of the law".

In the circumstances of this matter the investigating authorities breached three of the provisions of Pt 1C of the *Crimes Act*. Those provisions were ss 23C, 23G and 23P. They prescribe important protections for persons arrested and detained under the provisions of that Act. Because of the approach adopted by the learned trial judge consideration of the discretion to exclude proceeded on an erroneous basis and the applicant lost the opportunity of obtaining an exercise of the discretion in his favour.

It was therefore necessary for this Court to consider whether the proper exercise of the discretion would have led to the exclusion of the evidence. We have reviewed the relevant matters discussed above. Although the participation of the applicant in the interview was voluntary and the information obtained was reliable (in the relevant sense) there was unfairness to the applicant. That unfairness arose from the effective denial to him for a significant period of the rights created by the *Crimes Act* and, importantly, the advice that was available from the sources to which he sought access. He was detained for a lengthy period in breach of the requirements of the *Crimes Act* and without any effort being made to bring him before a magistrate. To use the statement obtained in those circumstances against him was unfair. The proper exercise of the discretion would lead to the exclusion of the evidence.

c. Supreme Court of Western Australia, *R v. Tan*, [2001] WASC no. 275

The alternative ground also covers relevant exchanges with Mr Tan prior to the start of the video at 8.25 pm. The obligations in ss 23F, 23G, 23N, 23P and 23V of the *Crimes Act* apply if a person is under arrest for a Commonwealth offence.

Section 23B(2) of the *Crimes Act* says a person who is arrested included a reference to a person who is in the company of an investigating official for the purpose of being questioned, if:

- (a) the official believes that there is sufficient evidence to establish that the person has committed a Commonwealth offence that is to be the subject of the questioning; or
- (b) the official would not allow the person to leave if the person wished to do so; or
- (c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

The Crown conceded that the suspects were arrested for the purposes of s 23B(2) of the *Crimes Act* from the time of entry into Room 311 and that the agents had not complied with the relevant provisions of the *Crimes Act*. After entry, agent McKenzie conducted a search of Mr Tan's person without referring to or relying on the search warrant. Agent Townsend and others questioned the applicant notwithstanding their perception (properly grounded) that the applicant had difficulties in understanding English and required an interpreter. The evidence establishes that the AFP conduct involved a deliberate disregard of the applicant's statutory rights. This involved relevant unfairness to the applicant. The following extract from *R v Su* [1997] 1 VR 1 (at 55) captures the applicant's situation:

"Stripped to its essentials, the case is one in which a foreign national, who, so far as the evidence went, had no familiarity at all with Australian police procedures, and whom the interviewing police officer believed had committed a very serious offence, was interviewed without being given a proper caution and without being informed of his rights. We consider that to tender that statement against him is unfair."

There was no evidence of any reasonable excuse for the deliberate disregard of the applicant's rights. There was no urgency or risk to the evidential material which dictated that the agents proceed without an interpreter with the consequences that followed. The Crown says there is no unfairness because the questions concerned the items found in Room 311 (as permitted by s203C(4) of the Customs Act) and the applicant understood the questions. This submission is without merit particularly in light of the Crown concessions: *R v Pinkstone*, unreported; SCt of WA; Library No 970188; 10 March 1997. Further, it overlooks the unfairness identified in *R v Su*. The conduct of the agents is such that in my assessment the discretionary balance is clearly in favour of the exclusion of the relevant evidence identified by the applicant's counsel by reference to exhibit 3.

17.5 United Kingdom

[PACE, referenced in the title of the two articles reproduced here as Documents 5a and 5b, is the Police and Criminal Evidence Act (United Kingdom) of 1984. Code of Practice C, which is referenced in the text of the two articles, includes rules on the arrest of foreign nationals. The reference to para. 7.4 as the provision breached by UK police is to that provision of the Code of Practice C as Code of Practice C read as of the date of these cases. Code of Practice C has since been amended, and the sub-paragraphs are differently numbered. At the time, Code of Practice C, para. 7.4, read: "Any other foreign national (meaning a foreign national who is not a citizen of a Commonwealth country) who is detained must be informed as soon as practicable of his right to communicate with his consul if he so wishes. He must also be informed that the police will notify his consul of his

arrest if he wishes." See Archbold, *Pleading, Evidence and Practice in Criminal Cases* 1253 (43rd ed. 1988).]

a. Gwilym Harbottle, barrister, London, Case Note: Interviews of foreign nationals under PACE: *R v Bassil and Mouffareg* (1990) 28 July, Acton Crown Court, HHJ Sich (*Legal Action*, December 1990, at 23-24)

FACTS

The defendants and others were charged with being knowingly concerned in importing £2.5m worth of cannabis resin from the Lebanon. The defendants were alleged to have played a substantial role in the UK end of the operation. Both were Lebanese nationals who had never spent long periods of time in England. They had a working, but limited, knowledge of English. Neither had any experience of the English police or of English criminal law. It was common ground that, in Lebanon, an arrested suspect is perceived to have no rights, or at least that it is dangerous to insist on any rights.

Both defendants were arrested in London on the same day. They were taken to different police stations where they were informed of their rights in the usual way. Each signed the custody record to indicate that they did not require a solicitor. They were then held incommunicado in accordance with Annex B of Code C. The police officers decided that the defendants' command of English was not sufficiently poor to warrant using an interpreter.

Both defendants were interviewed at length in the absence of a solicitor and made substantial admissions. During the interviews, both asked the interviewing officers about the function of a solicitor in an interview. The replies did not take the matter any further.

It was agreed that Code C paras 7.1-7.7 applied to both defendants as foreign nationals. The judge found that, at the date of arrest, no consular convention was in force between the UK and the Lebanon and that the defendants should, therefore, have been informed as soon as practicable of their right to communicate with the Lebanese consulate (para 7.4). The officers admitted that no such action had been taken.

DECISION

The evidence of the interviews should be excluded because Note for Guidance 7A, though not part of Code C, indicates that, even in the exceptional cases where Annex B applies, the right to consular access must not be withheld. In some cases, eg, where a foreign national had been settled in England for many years and was familiar with the language and the criminal justice system, a breach of paras 7.1-7.7 might well not justify the exclusion of an interview.

In this case, however, the paragraphs provided a protection of fundamental importance. These defendants were perhaps particularly vulnerable, since their working knowledge of English (of which they were proud) may well have given the police a misleading impression of their ability to understand the situation.

Apart from the breach of para 7.4, the police had followed the Act and the codes to the letter. However, there was a lingering doubt about whether the defendants had understood their rights, in particular the right of silence and the right to an independent solicitor. If para 7.4 had been complied with, a French- or Arabic-speaking official would have visited the defendants in the police station at short notice. Such a person would have helped them

to reach an informed decision about their position, and might well have advised them to obtain the services of a solicitor and an interpreter before being interviewed. It followed that the breach of para 7A was substantial and significant and so the evidence of the interview should be excluded.

b. Simon Farrell, barrister, London, Case Note: Interviews of foreign nationals under PACE: *R v Van Axel and Wezer* (1991) 31 May, Snaresbrook Crown Court, HHJ Sich (*Legal Action*, September 1991, at 12)

FACTS

The defendants and others were charged with being knowingly concerned in importing £750,000 worth of heroin and amphetamine sulphate from Holland. The two defendants were Dutch women aged 18 and 20. They both spoke English with some difficulty. Neither had any experience of the English police or English criminal law and both were of good character.

They were arrested at a hotel in London shortly after their arrival from Holland on 8 September 1990. They were not in possession of any drugs, but drugs were found in the possession of other people in the hotel. It was alleged that the defendants were couriers who had physically imported the drugs and handed them over just before the arrival of the police.

They were taken to Kentish Town police station where they were held incommunicado. They were not denied access to legal advice but neither had a solicitor. Their rights were given to them in English and in Dutch; those in Dutch pre-dated PACE and stated that an interpreter would be called and that it was possible to have a solicitor. The custody records stated "Code C para 7 applies". The Dutch embassy was not informed, partly because the officers looked for "Dutch" and "Holland", in the list of countries to which the consular convention applied, but not "Netherlands" under which it was listed.

Both admitted the offence and at trial the defence argued that the interviews should be excluded because the police had breached code C para 7 by failing to contact the embassy. The prosecution conceded that there had been a breach.

DECISION

In a *voir dire*, the judge ruled that para 7 was of "crucial importance" (a) because it was a lifeline for an arrested foreign national and (b) because of Note 7A which states: "The exercise of this right may not be interfered with . . .". He noted that, even if the offence were one to which the Prevention of Terrorism Act or the rules about being kept incommunicado applied, this right could not be withheld. For Dutch nationals, a consular convention was in force and the embassy should have been informed.

He said that the situation could vary enormously, from foreign nationals who had been resident in the UK for many years, to those who spoke no English and were here for the first time, but in all cases "compliance was extremely important". Here, he found that the defendants' English was reasonably good but that this might be deceptive, especially since they were young people who might wish to appear more sophisticated and worldly-wise than they really were.

However, he had some disquiet about whether they understood their rights, both because Ms Van Axel had asked what a solicitor was and because they had been given the

out-of-date rights in Dutch. He held that it was at least possible that, if contact with the embassy had been made, the defendants would have been advised to ask for a solicitor who spoke Dutch.

He, therefore, was not satisfied that breach of Code C had made no difference and he excluded the interviews.

17.6 United States

Supreme Court of the United States, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006)

[E]ven if Sanchez-Llamas is correct that Article 36 implicitly requires a judicial remedy, the Convention equally states that Article 36 rights “shall be exercised in conformity with the laws and regulations of the receiving State.” Art. 36(2), 21 U.S.T., at 101. Under our domestic law, the exclusionary rule is not a remedy we apply lightly. . .

The violation of the right to consular notification, in contrast, is at best remotely connected to the gathering of evidence. Article 36 has nothing whatsoever to do with searches or interrogations. Indeed, Article 36 does not guarantee defendants *any* assistance at all. The provision secures only a right of foreign nationals to have their consulate *informed* of their arrest or detention – not to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice or intervention. In most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police. . .

Leaving aside the suggestion that it is the role of police generally to advise defendants of their legal options, we think other constitutional and statutory requirements effectively protect the interests served, in Sanchez-Llamas’ view, by Article 36. A foreign national detained on suspicion of crime, like anyone else in our country, enjoys under our system the protections of the Due Process Clause. Among other things, he is entitled to an attorney, and is protected against compelled self-incrimination. . . . Article 36 adds little to these “legal options,” and we think it unnecessary to apply the exclusionary rule where other constitutional and statutory protections – many of them already enforced by the exclusionary rule – safeguard the same interests Sanchez-Llamas claims are advanced by Article 36.

Finally, suppression is not the only means of vindicating Vienna Convention rights. A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police. If he raises an Article 36 violation at trial, a court can make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance. Of course, diplomatic avenues – the primary means of enforcing the Convention – also remain open.

Breyer, J., dissenting:

[S]ometimes suppression could prove the only effective remedy. And, if that is so, then the Convention, which insists upon effective remedies, would require suppression in an appropriate case. Art. 36(2), 21 U.S.T., at 101.

Much depends upon the circumstances. It may be true that in “most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police.” [a reference to language in the majority opinion, preceding immediately]. . . . *Miranda* surely helps, for it guarantees that police will inform an arrested foreign national of his right to contact a lawyer. But one cannot guarantee in advance that *Miranda* will adequately cure *every* seriously prejudicial failure to inform an arrested person of his right to contact his consular post. One can imagine a case, for example, involving a

foreign national who speaks little English, who comes from a country where confessions made to the police cannot be used in court as evidence, who does not understand that a state-provided lawyer can provide him crucial assistance in an interrogation, and whose native community has great fear of police abuse.

17.7 Canada

Ontario Superior Court of Justice, *Regina v. Partak*, 160 CCC 3d 553 (2001)

... [B]oth the Crown and defence counsel proceeded from the following common ground. The authorities were obliged to fulfill the requirements contemplated by art. 36 of the Vienna Convention. Mr. Partak was a foreign national and was entitled to be advised of his rights to have the U.S. consulate notified. He was not so advised.

An issue was raised concerning when the obligation arose. Defence counsel submits that the obligation arose at the time of arrest. The Crown argues that there is nothing in the wording of art. 36 that imposes the obligation at any particular time other than the wording that the authorities shall inform the person concerned of their consular rights "without delay".

In my view, a foreign national's entitlement to be advised of his or her consular rights arises at the time that the authorities know or reasonably ought to be aware that the detainee is a foreign national.

I draw this conclusion for a number of reasons. First, the words "without delay" in art. 36 para. 1(b) have to be given some meaning. They suggest an immediacy that would be consistent with a finding that the notification obligation arises upon the authorities having reasonably available to them information that the detained person is a foreign national. In Mr. Partak's circumstances, this was at the time of his arrest. While Officers Pearson and Rytka did not know that Mr. Partak was a U.S. citizen, the Toronto police did know. The failure of the police to include this information on the mugshot form or to advise the officers of this fact before they went out on duty does not absolve the arresting officers of their obligations under art. 36 of the Vienna Convention. It is reasonable to require that the authorities exercise a certain degree of diligence which, in this case, would have amounted to nothing more than including a reference to Mr. Partak's citizenship on the mugshot form or to have advised the officers before they went out on duty that the person they were looking for was an American citizen.

Secondly, I find assistance in para. 2 of art. 36 that provides as follows: 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

To be in conformity with Canada's laws concerning advising the accused of his or her rights, the timing should be that of the time of arrest. Section 10 of the Charter requires that the right to be informed promptly of the reasons for arrest, the right to counsel and the right to have the validity of the detention determined, all arise upon arrest or detention. In *R. v. Manninen*, [1987] 1 S.C.R. 1233 at p. 1243, 34 C.C.C. (3d) 385, Lamer J. wrote, "[f]or the right to counsel to be effective, the detainee must have access to this advice before he is questioned or otherwise required to provide evidence". While the right in issue is not a Charter right, it is appropriate, having regard to the wording of para. 2 of art. 36, to interpret the timing of the right to be advised of consular rights in conformity with Charter

principles. Such an interpretation enables full effect to be given to the purposes for which the rights are intended.

...

I now turn to the defence application to have the disputed utterances excluded from the admissible evidence on the basis of the failure of the police to advise Mr. Partak of his right to have the consulate contacted. The defence advanced this part of its argument relying on the rights protected by and principles that emerge from s. 10(b) of the Charter.

Section 10(b) of the Charter provides: 10. Everyone has the right on arrest or detention . . . (b) to retain and instruct counsel without delay and to be informed of that right.

The duty of the police to inform individuals of the right to counsel does not arise until a person has been detained within the meaning of s. 10. Detention involves some form of coercion by the state that results in a deprivation of liberty. Section 10(b), among other things, is intended to protect the s. 7 liberty interests of those individuals detained by police.

In *R. v. Bartle* (1994), 92 C.C.C. (3d) 289, Chief Justice Lamer set out the duties on state authorities under s. 10(b) as follows at p. 301: This Court has said on numerous previous occasions that s. 10(b) of the Charter imposes the following duties on state authorities who arrest or detain a person: (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel; (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances), and; (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of emergency or danger).

Lamer C.J. stated at that same page that: [I]t is critical that the information component of the right to counsel be comprehensive in scope and that it be presented by police authorities in a "timely and comprehensible manner".

The defence submits that Canada's obligations under the Vienna Convention should inform the Charter. As such, the breach of Mr. Partak's consular rights is a breach akin to a s. 10(b) Charter violation. While s. 10(b) of the Charter does not make specific reference to consular rights, it should be interpreted as doing so in order that Canadian domestic law not be in conflict with its international obligations. The Crown argues the defence application does not engage the Charter at all. There are many instances where the Charter and international laws to which Canada is a signatory are in conflict and, in any event, it is simply wrong to equate a s. 10(b) right with an entitlement to be advised of consular rights.

There are many instances in Canadian jurisprudence where international instruments have been reviewed as an aid in construing Canadian law. Their influence is most pronounced in determining the content of human rights . . .

Notwithstanding the principles that emerge from these cases, I find that I disagree with the defence position that this is a Charter or quasi-Charter application. First, the Charter makes no express reference to Canada's international obligations. Secondly, while international treaties and conventions may help to define and interpret the Charter, that is not what the defence is suggesting here. The defence is suggesting that the right to be notified of consular rights, in effect, be added to the rights to counsel under s. 10(b) of the Charter. This is not a supportable position. A person's rights under s. 10(b) have nothing to do with a foreign national's right to be advised of his consular rights. The two rights have different sources and serve different purposes. While the law is clear that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in the international rights document that Canada has ratified, this does not mean there cannot be any inconsistency between the Charter and obligations created by international law.

The defence argues, in the alternative, that under Canadian law Mr. Partak enjoyed a separate right unrelated to anything that the Charter might afford him, and that is an independent right under the Act to be advised of his consular rights.

As indicated earlier in this ruling, I have proceeded on the basis that Mr. Partak had consular rights that, in the circumstances, were violated. The third question to be answered and area to be analyzed, therefore, involves the consequences of this violation.

3. *Consequences of the breach*

The court has a common law power to exclude evidence, including a confession, whose admission would adversely affect the fairness of an accused's trial. This common law principle has now been constitutionalized by the Charter's guarantee of a fair trial under s. 11(d) of the Charter and a right that would in any event be protected under s. 7 as an aspect of principles of fundamental justice. See: *R. v. Harrer* (1995), 101 C.C.C. (3d) 193 (S.C.C.) at 205, and *R. v. White* (1999), 135 C.C.C. (3d) 257 (S.C.C.) at 292.

In *Van Bergen*, the Alberta Court of Appeal held that the applicant, who in that case sought relief based on an alleged breach of the same rights to notification of consular rights, would have to prove "serious prejudice" to him in the process. The court found that such prejudice had not been established.

The same can be said about Mr. Partak's position in this application. The police misconduct that I have classified as an oversight has to be considered in light of its effect on Mr. Partak. In the circumstances, Mr. Partak has not demonstrated any negative effect. On the basis of the evidence before me, I find that Mr. Partak would not have acted any differently had the police fulfilled their obligation under art. 36 of the Vienna Convention. Mr. Partak effectively turned himself in to the police. Before the officers in the patrol car could say anything to him, he told them he was the one they were looking for. He cooperated fully with the investigation, making it clear that he wanted to answer the questions when he fully understood the jeopardy and the consequences of his statement. Significantly, he did not testify on the *voir dire*, nor did he tender any evidence showing that he would have asked that the consulate be contacted had he been informed of this right. Accordingly, I am of the view that Mr. Partak has completely failed to demonstrate any prejudice arising from the failure of the police to notify him of his consular rights. Accordingly, the police misconduct, such as I have described it, was immaterial and benign.

In the circumstances involving Mr. Partak's arrest and the statements he gave, I find that the defence has not persuaded me, on balance, that Mr. Partak's trial would be unfair if the four utterances that were in issue in this application were admissible. He has failed to adduce any evidence that would support a finding that the failure of the police to advise him of his rights to have a consulate notified prejudiced him in any way. The admission of the statements would not, in my view, adversely affect the fairness of Mr. Partak's trial.

17.8 Inter-American Commission on Human Rights

Fierro v. USA, Case No. 11.331, Report No. 99/03 (29 December 2003) (<https://www.cidh.oas.org/annualrep/2003eng/USA.11331.htm>)

67. . . . [T]he Commission considered the availability of information in Mexico to be pertinent in the circumstances of Mr. Fierro's case, where the consulate may have verified the status of Mr. Fierro's mother and step-father while they were in the custody of the

Mexican police and thereby mitigate any detrimental impact that their detention may have had on Mr. Fierro's interrogation and the veracity of his resulting confession. The State itself has recognized in its observations that it does not control what happens to individuals when they are outside the jurisdiction of the United States and in the custody of local authorities in their home country. Consular officials, on the other hand, may exercise authority in a defendant's home country and therefore be in a position to gather information located outside of the State's jurisdiction that is pertinent to the individual's defense.

18 Procedural default as barring a remedy

18.1 Introduction

A foreign national who was not informed about consular access and who seeks to challenge that violation in court may do so at an early stage of proceedings. On the other hand, the foreign national may, for various reasons, make such a challenge only after being convicted, or after a conviction has been affirmed on appeal. Often, the reason for a challenge only at a later stage is that the foreign national and defense counsel were unaware of the consular access issue. A foreign national who does not make the challenge at a sufficiently early stage may be denied the right to do so.

The ICJ has said that a receiving state's obligation is to provide a correction whenever it remains possible to do so, hence that a rule precluding challenge is impermissible (Document 2). The U.S. Supreme Court disputes that approach. It says that rules on procedural default that are used by U.S. courts may be used in regard to challenges over consular access violations (Document 3). Germany's Constitutional Court, which also considered the issue, decided in line with the ICJ. The German court ruled that domestic procedural rules on default cannot be used to avoid considering a consular access claim (Document 4).

The issue involves consideration of general international law as to a state's obligation to remedy an international-law violation, the rule being that violations must be remedied. It also involves a close reading of VCCR Article 36, paragraph 2, which says that consular access is to be implemented under the law of the receiving state – a proposition that might suggest that procedural default rules may validly be invoked to preclude a challenge – but which also says that the law of the receiving state must be applied in such a way as to give full effect to the purpose behind consular access rights – a proposition that might suggest that procedural default rules may not validly be invoked to preclude a challenge. In the U.S. Supreme Court, the majority stresses the first proposition while the dissent stresses the second (Document 3).

18.2 International Court of Justice

LaGrand Case (Germany v. USA), 2001 ICJ 466

90. Turning now to the “procedural default” rule, the application of which in the present case Germany alleges violated Article 36, paragraph 2, the Court emphasizes that a distinction must be drawn between that rule as such and its specific application in the present case. In itself, the rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information “without delay”, thus preventing the person from seeking and obtaining consular assistance from the sending State.

91. In this case, Germany had the right at the request of the LaGrands “to arrange for [their] legal representation” and was eventually able to provide some assistance to that effect. By that time, however, because of the failure of the American authorities to comply with their obligation under Article 36, paragraph 1(b), the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds. As a result, although United States court could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards, the procedural default rule prevented them from attaching any legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the Convention. Under these circumstances, the procedural default rule had the effect of preventing “full effect [from being] given go the purposes for which the rights accorded under this article are intended”, and thus violated paragraph 2 of Article 36.

18.3 United States

Supreme Court of the United States, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006)

The ICJ concluded that where a defendant was not notified of his rights under Article 36, application of the procedural default rule failed to give “full effect” to the purposes of Article 36 because it prevented courts from attaching “legal significance” to the Article 36 violation. *LaGrand*, 2001 I. C. J., at 497–498, pp 90–91. This reasoning overlooks the importance of procedural default rules in an adversary system, which relies chiefly on the parties to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication. . . . Procedural default rules are designed to encourage parties to raise their claims promptly and to vindicate “the law’s important interest in the finality of judgments.” . . . The consequence of failing to raise a claim for adjudication at the proper time is generally forfeiture of that claim. As a result, rules such as procedural default routinely deny “legal significance” – in the *Avena* and *LaGrand* sense – to otherwise viable legal claims.

Procedural default rules generally take on greater importance in an adversary system such as ours than in the sort of magistrate-directed, inquisitorial legal system characteristic of many of the other countries that are signatories to the Vienna Convention. “What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.” . . . In an inquisitorial system, the failure to raise a legal error can in part be attributed to the

magistrate, and thus to the state itself. In our system, however, the responsibility for failing to raise an issue generally rests with the parties themselves.

The ICJ's interpretation of Article 36 is inconsistent with the basic framework of an adversary system. Under the ICJ's reading of "full effect," Article 36 claims could trump not only procedural default rules, but any number of other rules requiring parties to present their legal claims at the appropriate time for adjudication. If the State's failure to inform the defendant of his Article 36 rights generally excuses the defendant's failure to comply with relevant procedural rules, then presumably rules such as statutes of limitations and prohibitions against filing successive habeas petitions must also yield in the face of Article 36 claims. This sweeps too broadly, for it reads the "full effect" proviso in a way that leaves little room for Article 36's clear instruction that Article 36 rights "shall be exercised in conformity with the laws and regulations of the receiving State." Art. 36(2). 21 U.S.T., at 101.

Breyer, J., dissenting:

Article 36 says that the rights it sets forth "shall be exercised in conformity with the laws and regulations of the receiving State," but it instantly adds, "subject to the proviso . . . that the said laws and regulations must enable *full effect* to be given to the purposes for which the [Article 36] rights are . . . intended." Art. 36(2), 21 U.S.T., at 101 (emphasis added). The proviso means that a State's ordinary procedural default rules apply *unless* (1) the defendant's failure to raise a Convention matter (e.g., that police failed to inform him of his Article 36 rights) can itself be traced to the failure of the police (or other governmental authorities) to inform the defendant of those Convention rights, *and* (2) state law does not provide any other effective way for the defendant to raise that issue (say, through a claim of ineffective assistance of counsel).

Several considerations lead to this conclusion. First, as I have just noted, Article 36 says both that its rights "shall be exercised in conformity with" the host country's "laws and regulations" and that those "laws and regulations must enable full effect to be given" to the purposes for which those rights "are intended." This interpretation makes *both* the "conformity" requirement and the "full effect" requirement meaningful.

Second, the Convention's drafting history supports this interpretation. The first draft of the Vienna Convention was written by the International Law Commission. Article 36(2) of that draft required only that domestic laws "not nullify" the rights afforded by the Convention. Draft Articles on Consular Relations Adopted by the International Law Commission at its Thirteenth Session, Art. 36(2), reprinted in L. Lee, *Vienna Convention on Consular Relations* 237 (1966). A later amendment substituted the "full effect" phrase over the strenuous objection of several negotiating countries whose delegates argued that the phrase would "modify the criminal law and regulations or the criminal procedure of the receiving state." 1 United Nations Conference on Consular Relations, Official Records, Summary records of plenary meetings and of the meetings of the First and Second Committees, U.N. Doc. A/CONF.25/16, P 26, p 38 (1963) (statement of Romania). See also *id.*, at P 30, p 38-39 (statement of Congo, Leopoldville) (amendment "implied the revision of certain laws or regulations, which it would be difficult to carry out in practice"); *id.*, 12th mtg., P 4, at 40 (statement of Union of Soviet Socialist Republics) (rejecting the amendment because it would "force [signatories] to alter their criminal laws and regulations"); *id.*, 20th mtg., P 81, at 84 (statement of Romania) (same); *id.*, P 95, at 86 (statement of Czechoslovakia) (same).

Based on this objection, the Soviet Union proposed reverting to the original language. The United Kingdom opposed that measure, explaining that it supported the "full effect" version because the initial ("not nullify") version "meant that the laws and regulations of the receiving State would govern the rights specified . . . provided that they did not render those rights completely inoperative – for 'to nullify' meant to 'render completely inoperative.' But rights could be seriously impaired without becoming completely inoperative . . . Consular officials should, of course, comply with the laws and regulations of the receiving State in such matters as the times for visiting prisoners, but it was most important that the substance of the rights and obligations specified . . . should be preserved." *Id.*, PP 6–7, at 40.

No one disagreed with the United Kingdom's understanding of the words "full effect." And with that understanding, the delegates voted down the Soviet Union's proposal to revert to the original language, and ultimately adopted the provision with the words "full effect." *Id.*, P 109, at 87. As so enacted, the provision reflects the "essential principle of international law . . . 'that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.'"

18.4 Germany

Constitutional Court, *Case of F. & T.*, 2 BvR 2115/01, Judgment of 19 September 2006, para. 68

There should not be any rule of national procedural law that would prevent the possibility of questioning an error in regard to the obligation to inform as found in the Vienna Consular Convention. The same is true for a general rule like the American procedural default rule that would be used to keep the right of the accused from being upheld (ICJ, *Arena*, paras. 131, 133ff).

19 Consular access violation as grounds for sentence reduction or clemency

19.1 Introduction

A consular access violation may be raised by the defense to seek remission of the sentence. It may be urged as a factor in favor of a grant of clemency. In the ICJ, the United States argued that clemency was a sufficient procedure for consideration of remedies for consular access violations, to the exclusion of courts. The ICJ did not accept that argument (Document 2). Nonetheless, consular access claims have been made to the authority responsible for clemency. For the receiving state, clemency remains a procedure for remedying a consular access violation, if the courts have failed to do so.

Foreign states may make representations to the clemency-granting agency, as exemplified by the Canadian government's representations (ultimately unsuccessful) to the Governor of Texas and to the Government of Vietnam for clemency for Canadian nationals sentenced to death (Document 3). The government of the receiving state may also support a plea for clemency, as exemplified by a request by the United States to the Governor of Oklahoma (ultimately successful) to consider a consular access violation as he was deciding whether to grant clemency to a foreign national sentenced to death (Document 4a).

In Germany, sentence reduction has been used by judges to deal with a violation of the obligation to advise about consular access. Germany's Federal High Court ordered a six-month reduction in the remaining prison terms of two foreign nationals whose consular access rights had been violated, citing the need to comply with the injunction of Germany's Constitutional Court and the wording of VCCR Article 36(2) as construed by the ICJ. The Federal High Court did this, as it explains, not by reducing the term explicitly, but rather by declaring that a part of the sentence had already been served, even though it had not (Document 5).

A court considering the effect of a consular access violation on a trial may find more reason to believe that the sentence may have been less severe had there been consular assistance, than that the decision about guilt (verdict) would have been different. In one case, a foreign national who was not advised about consular access was convicted of murder and sentenced to death. Little mitigating evidence was presented on his behalf by his attorneys during the phase of the trial in which

the sentence was determined. A U.S. district judge vacated the death sentence on grounds of inadequate performance by the lawyers for failing to present mitigating evidence. In response to the foreign national's claim that the failure to advise about consular access called into question both the conviction and the sentence, the judge said that it more likely had an effect on the sentence. Having already vacated the sentence, however, for poor performance by the attorneys, the judge found the issue of the consular access violation's impact on the sentence to be moot (Document 4b).

19.2 International Court of Justice

Avena and Other Mexican Nationals (Mexico v. USA), 2004 I.C.J. 12

141. The Court in the *LaGrand* case left to the United States the choice of means as to how review and reconsideration should be achieved, especially in the light of the procedural default rule. Nevertheless, the premise on which the Court proceeded in that case was that the process of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant concerned,

142. As regards the clemency procedure, the Court notes that this performs an important function in the administration of criminal justice in the United States and is "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted" (*Herrera v. Collins*, 506 US 390 (1993) at pp. 411–412). The Court accepts that executive clemency, while not judicial, is an integral part of the overall scheme for ensuring justice and fairness in the legal process within the United States criminal justice system. It must, however, point out that what is at issue in the present case is not whether executive clemency as an institution is or is not an integral part of the "existing laws and regulations of the United States", but whether the clemency process as practised within the criminal justice systems of different states in the United States can, in and of itself, qualify as an appropriate means for undertaking the effective "review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention", as the Court prescribed in the *LaGrand* Judgment (*I.C.J. Reports* 2001, p. 514, para. 125).

143. It may be true, as the United States argues, that in a number of cases "clemency in fact results in pardons of convictions as well as commutations of sentences". In that sense and to that extent, it might be argued that the facts demonstrated by the United States testify to a degree of effectiveness of the clemency procedures as a means of relieving defendants on death row from execution. The Court notes, however, that the clemency process, as currently practised within the United States criminal justice system, does not appear to meet the requirements described in paragraph 138 above and that it is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration" as envisaged by the Court in the *LaGrand* case. The Court considers nevertheless that appropriate clemency procedures can supplement judicial review and reconsideration, in particular where the judicial system has failed to take due account of the violation of the rights set forth in the Vienna Convention, as has occurred in the case of the three Mexican nationals referred to in paragraph 114 above.

19.3 Canada

Department of Foreign Affairs and International Trade, Consular Affairs Bureau, *The Death Penalty: Consular Policy, Procedures and Practices*, March 2005

1. . . . Consular officers have a responsibility to provide protective and humanitarian assistance to Canadians detained abroad, but they do not normally intervene in matters under domestic jurisdiction such as the sentences applied for various crimes. Death penalty cases are thus an anomaly in that the Canadian government may, in specific cases, decide to intervene on behalf of a Canadian whom a foreign State has sentenced to death. Canada has intervened in a number of cases where its nationals faced the death penalty abroad. Such intervention included helping to ensure that the detainee had access to appropriate legal representation, supporting requests for clemency or commutation of sentence or effecting diplomatic representations.

...

5.2 Leveraging Violations of Article 36 of the VCCR. The highlighting of an alleged violation of Article 36 rights, where the death penalty could be a factor, is a key element in dealing with such cases. The observance of these rights were central to the representations made in 1997 by the government of Canada in the case of Stanley Faulder.

In that case, the Minister of Foreign Affairs wrote to the American Secretary of State requesting that the Governor of Texas be informed of the serious breach of Article 36 rights. The Secretary of State subsequently sent detailed correspondence to the Governor of Texas and the Chairman of the Texas Board of Pardons and paroles, explaining the ramifications of Texas's failure to comply with the provisions of the *VCCR*. . . .

5.3 Supporting Appeals for Clemency or Commutation of Sentence. The Canadian government may support a detainee's appeal for commutation and/or clemency by writing letters to the appropriate authority or submitting *amicus curiae* briefs. These appeals are sometimes based on the grounds that law enforcement officers failed to notify the detainee of his or her right to consular assistance under Article 36 of the *VCCR*. The Canadian government submitted seven *amicus curiae* briefs in support of Mr. Faulder at various stages of his legal battles, two of which were submitted to the Supreme Court. The briefs argued that consular assistance, during the investigation, prosecution and trial of Mr. Faulder, could have improved the quality of the legal services available to him and the evidence available to the jury.

Requests for clemency or commutation of sentence may also be based on humanitarian considerations, which can include, but are not limited to, the ramifications of the subject's death on his or her family – particularly if he or she has children – as well as the subject's age and the appropriateness of the punishment relative to the crime. For example, the Canadian government sent letters to officials at various levels of the Vietnamese government in support of clemency for Mrs. Nguyen Hiep, a Canadian national whom that government had sentenced to death. In particular these letters pointed out the inappropriate severity of the death penalty relative to the drug trafficking offence for which Mrs. Hiep was convicted.

19.4 United States

a. Letter of William H. Taft IV, U.S. Department of State Legal Adviser, to Susan B. Loving, chairperson, Oklahoma Pardon and Parole Board (23 April 2004), as quoted in 98 AJIL 581 (2004)

The Department of State requests that in its review of the case the Pardon and Parole Board give careful consideration to the pending clemency request of Mr. Torres, including by considering the failure to provide Mr. Torres with consular information and notification pursuant to Article 36 of the VCCR and whether that failure should be regarded as having ultimately led to his conviction and sentence. We request that the Board give particular attention to the representations of the Government of Mexico on Mr. Torres' behalf.

b. United States District Court, Northern District of Illinois, Eastern Division, *Madej v. Schomig*, 223 F.Supp. 2d 968 (2002)

In the I.C.J. consideration of *LaGrand*, it was immaterial whether the LaGrands would have received assistance from Germany, see *LaGrand Case (Germany v. U.S.)*, 121 I.C.J. 104, at P74, but it is not immaterial for the case at issue here. The I.C.J. governs disputes between nations about the interpretation of the Vienna Convention. This is not a dispute between the Republic of Poland and the United States; this is a petition for a writ of habeas corpus from a state prisoner who is alleging that he is being held "in violation of the Constitution, Laws, or Treaties of the United States." While the I.C.J. interpretation of the interplay between the procedural default doctrine and the Vienna Convention is binding when considering an individual violation, the aspects of their holding that pertain more closely to the issue between nations do not control the dispute before this Court.

To gain relief on a Vienna Convention violation, then, a Petitioner must show a) that his Vienna Convention rights were violated; and b) that the violation had a material effect on the outcome of the trial or sentencing proceeding. In *Madej's* case, the violation of his rights under the Vienna Convention is clear; the effect of the violation, however, is somewhat muddy. If his rights had been respected, it is unlikely that the assistance of the Polish Consulate would have had a material effect on the outcome of the trial. The evidence of *Madej's* guilt was substantial. It is possible, though, that the Consulate's participation would have had an effect on the sentencing hearing. "Consular functions are particularly significant during penalty proceedings in which courts determine whether capital punishment will be applied." John Quigley, *LaGrand: A Challenge to the U.S. Judiciary*, 27 Yale J. Int'l L. 435, 435 (2002). Particularly in this case, where trial counsel failed completely to undertake any investigation of the client's life, character, and background in preparation for the sentencing phase, the participation of the Consulate could possibly have made a difference. As this Court has already granted Petitioner relief from his death sentence, this issue becomes moot.

19.5 Germany

Federal High Court, Fifth Criminal Senate, *Case of S., F., Sa., D., & T.*, 5 StR 116/01, 5 StR 475/02, 25 September 2007, paras. 24–27, 31

24. The Senate, however, considers it appropriate that the violation [of VCCR Article 36] be compensated.

25. Despite the rejection [by this court] of an exclusion of evidence [as a remedy for a failure to advise about consular access], the error, as it was determined to be, in regard to the internationally based obligation to advise under VCCR Art. 36(1)(b) should not remain without consequence. According to the construction given by the International Court of Justice to the second half of VCCR Art. 36(2) – which according to the Constitutional Court must be observed (Constitutional Court – Chamber – p. 501) – there must be an effective remedy (“full effect” – ICJ – LaGrand – p. 498). It follows that the appeals court, in a proceeding relating to the foreign defendants concerned, has found that a violation has been proved. Moreover, one can see that the defendants S. and D. will be violated in their personal and procedural rights and a simple statement – which is in any event unusual in German appellate practice – that there has been a violation is not sufficient. . . . In this way will it be guaranteed that the person whose rights were violated can, so far as is appropriate, gain a remedy in domestic procedure to account for the prejudice to his legal position under VCCR Art. 36.

26. Such a remedy is required if the defendant concerned experienced a substantial penalty and the violation . . . lasts for more than a short time. Both these conditions are at hand and are met in regard to the complainants directly concerned, S. and D.

27. f) The Senate does not effectuate this remedy . . . by reducing the penalty (sentence reduction), but rather by declaring that a certain numerical part of the custodial sentence has already been executed (enforcement reduction). In deciding in this way, it can be done without diverging from previous case law of the Federal High Court, even though it has not been decided yet how a violation of VCCR Art. 36(1)(b)(3) should be compensated. . . .

31. g) In light of the actual severity of the violation and its impact, and in light of the nature of the crimes involved, the Senate sets the length of the sentence considered to have been served in regard to the two complainants at six months.

20 Monetary damages for a foreign national

20.1 Introduction

Monetary damages are required under international law when rights of the individual are violated. Whenever the rights of a foreign national are violated by a state, whatever the right being violated, the national's home state may make a claim on the national's behalf. Further, for violation of internationally guaranteed human rights, monetary compensation is required when it is an appropriate remedy. An article from the American Convention on Human Rights is included in this chapter, in which this proposition is expressed (Document 2). The proposition is accepted generally in the international law relating to reparation for injuries, as reflected in the Draft Articles on the Responsibility of a State for Internationally Wrongful Acts (Document 3).

A national may try to sue after being released. The action would be for money damages for the time spent under incarceration, on the rationale that the failure to inform about consular access rendered the incarceration unlawful. Suits have been filed in the United States by foreign nationals seeking monetary compensation for consular access violations, in all instances foreign nationals not in custody. These suits have produced conflicting results. The U.S. Court of Appeals (Seventh Circuit) ruled that there is a sound legal basis for such an action (Document 4a). Two different judges of the U.S. District Court for the Southern District of New York came to contrary conclusions as to whether monetary damages can be claimed by a foreign national for a consular access violation (Documents 4b, 4c).

If money damages are not forthcoming within the legal system of the receiving state, the sending state may claim money damages, on behalf of the foreign national, from the receiving state. Guinea sued the Democratic Republic of Congo for money damages on behalf of a Guinean national, where Guinea claimed that the Democratic Republic of Congo had violated the Guinean's consular access rights (Document 5).

A different use of money damages has been suggested by Germany's Federal High Court, namely as a remedy to be applied to an incarcerated foreign national in lieu of a remedy that would affect the sentence in force. In a case in which, based on a failure to advise about consular access, it reduced a sentence being served, it suggested that in other cases, if the sentence were not severe, the

appropriate remedy might be monetary compensation. It said that money damages, to be paid by the state, might be ordered by a court hearing the criminal case (Document 6).

20.2 Organization of American States

American Convention on Human Rights, 22 November 1969, 1144 UNTS 123

Article 63(1). If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

20.3 United Nations

General Assembly, International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, UN Document A/56/10 (2001), as confirmed by UN General Assembly Resolution 56/83, 12 December 2001 [in which the General Assembly “commends” the documents “to the attention of Governments”]

Article 36. Compensation. (1) The state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

20.4 United States

a. United States Court of Appeals, Seventh Circuit, *Jogi v. Voges*, 480 F.3d 822 (2007)

Tejpal S. Jogi is an Indian citizen who was charged with aggravated battery with a firearm in Champaign County, Illinois. Jogi pleaded guilty to the crime and served six years of a twelve-year sentence; at that point, he was removed from the United States and returned to India. No state official ever advised him of his right under the Vienna Convention to contact the Indian consulate for assistance, nor did any Champaign County law enforcement official ever contact the Indian consulate on his or her own initiative on Jogi's behalf.

At some point after Jogi was in prison, he learned about the Vienna Convention. This prompted him to initiate several lawsuits, including the present case, in which he filed a *pro se* complaint seeking compensatory, nominal, and punitive damages to remedy this violation. He named as defendants various Champaign County law enforcement officials, including the two investigators who questioned him after his arrest.

...

[T]he first issue we reach is that of subject matter jurisdiction. In the end, very little needs to be said on that point. Jogi's complaint makes it clear that he is attempting to assert rights under Article 36 of the Vienna Convention. The general federal jurisdiction statute, 28 U.S.C. § 1331, confers jurisdiction over claims arising under the “Constitution, laws, or treaties of the United States.” As everyone, including the United States, acknowledges, the

assertion of a claim arising under any one of those sources of federal law is enough to support subject matter jurisdiction unless the claim is so plainly insubstantial that it does not engage the court's power. . . . There can be no doubt that Jogi's claim does not fall within that small subset of utterly frivolous actions that are insufficient to support the court's jurisdiction.

We thus save for another day the question whether the ATS might also support subject matter jurisdiction in a case like Jogi's. The ATS, as the Supreme Court held in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004), grants jurisdiction to the federal courts to hear suits brought by aliens for torts either in violation of the law of nations or in violation of a treaty of the United States. We expressly refrain from deciding whether the failure of the police officers here to inform Jogi of the right to consular notification provided by Article 36 of the Vienna Convention was the kind of "tort . . . in violation of a treaty" that § 1350 covers. It is enough, for present purposes, that jurisdiction under § 1331 is secure.

b. United States District Court, Southern District of New York, *Standt v. City of New York*, 153 F.Supp.2d 417 (2001)

Title 42, United States Code § 1983 "imposes liability on anyone who, under color of state law, deprives a person 'of any rights, privileges, or immunities secured by the Constitution and laws' " of the United States. . . . As set forth above, the VCCR gives individuals a right to consular notification in the event of arrest or detention.

. . . § 1983 provides a cause of action to redress the deprivation "of any rights . . . secured by the Constitution and laws" of the United States, not only fundamental or constitutional rights . . . It appears that only one other case has addressed the question whether the VCCR creates a cognizable §1983 action. In *Sorensen v. The City of New York*, 2000 U.S. Dist. LEXIS 15090, . . . (S.D.N.Y. Oct. 16, 2000), plaintiffs filed a § 1983 action asserting damages for violation of the VCCR after the plaintiff was arrested and imprisoned without the benefit of consular notification. The Honorable Harold Baer, Jr. analogized to the criminal suppression cases, and presumed, without directly addressing, that the defendant had standing to seek a remedy for violation of his VCCR rights. . . . [T]he *Sorensen* court held that the VCCR provides no private right of action for money damages under §1983 because "the Vienna Convention, by its terms, does not require that such violation be redressed by money damages." . . .

The remedy of civil damages for a plaintiff who alleges he was unlawfully detained without consular notification is much less "drastic" than suppressing incriminatory evidence or dismissing an indictment against a properly charged criminal defendant.

On the other hand, the Vienna Convention's lack of an enumerated remedy for civil damages – or any remedy at all – bears further discussion. The *Sorensen* court reasoned that the lack of specified remedy, coupled with other nations' failure to provide a civil damages remedy for Article 36 violations, led to the conclusion that civil damages are not available. . . . Yet the Vienna Convention does specify that the right of consular notification "shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." VCCR, art. 36(2). "As with federal statutes, it is not unusual for substantive rights [to] be defined by [treaty] but the remedies for their enforcement left undefined or relegated

wholly to the states.' " Vazquez, 92 Colum. L. Rev. at 1144 (quoting Hart & Wechsler, *The Federal Courts and the Federal System* 533 (1988)). That a cause of action for civil damages similar to 42 U.S.C. § 1983 is not available in other countries does not change the fact that such an action is a part of the "laws and regulations" of the United States.

Defendants contend that it is "well settled" that Standt must show prejudice in order to proceed with his §1983 claim, . . . Yet the prejudice requirement was developed in the criminal and immigration contexts, and is not applicable here for the same reasons already discussed. Instead, as in other §1983 contexts, a plaintiff bringing suit under the VCCR need only show that the violation injured him.

In criminal suppression and deportation contexts, the party seeking relief must demonstrate that the violation of his non-fundamental rights prejudiced him, or, in other words, that the outcome of the adversarial proceeding against him would have been different. . . .

In contrast, prejudice need not be shown in § 1983 actions, which seek monetary damages for unlawful acts committed under color of state law, rather than a remedy which will compromise the validity or possibility of a conviction. Such a requirement would be impossible to meet in the circumstances presented here, where the plaintiff in fact *prevailed* at an adversarial hearing. More importantly, it has been clearly established that a §1983 plaintiff must assert merely that he was "injured" in order to pursue a §1983 claim. 42 U.S.C. § 1983; . . . Pronouncements that "courts have unanimously held that in order for a foreign national to win relief for a Convention violation, he or she must show that the lack of consular notification prejudiced his or her case," *Rodriguez*, 68 F. Supp. 2d at 183, overlook the fact that every court to have addressed whether the VCCR includes a prejudice requirement has done so in the context of a criminal or immigration case, not a §1983 action. . . .

The complaint alleges that the defendants deprived Standt of his rights under the Vienna Convention by failing to allow him to communicate with a representative of the German Consulate, thereby causing him damages in violation of 42 U.S.C. § 1983. As the Vienna Convention confers a private right of action on persons in Standt's situation, which may be pursued in the United States through the vehicle of §1983 "in conformity with the laws" of the United States, VCCR, art. 36(2), defendants' motion for summary judgment on this claim is denied.

c. United States District Court, Southern District of New York, *Sorensen v. The City of New York*, 2000 U.S. District LEXIS 15090

There is no provision in the treaty providing for civil liability under Article 36. . . . I am not aware of any other nation that imposes civil liability upon its municipalities for violation of Article 36. In this case, I cannot impose such a remedy. While the City of New York is obliged to observe Article 36 of the Vienna Convention, the Convention's provisions clearly do not contemplate the imposition of civil liability upon a municipality for failure to adhere to the provisions of Article 36. Accordingly, the jury's award of \$6400 in compensatory damages for violation of plaintiff's right to consular notification must be set aside.

20.5 Guinea

Case Concerning Alimadio Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo), 2007 I.C.J. (24 May), Judgment on Preliminary Objections

[The ICJ here quotes from Guinea's written memorial in which Guinea states its claim against the Democratic Republic of Congo.]

11. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Guinea,

In the Memorial on the merits:

"The Republic of Guinea has the honour to request that it may please the International Court of Justice to adjudge and declare:

- (1) that, in arbitrarily arresting and expelling its national, Mr. Ahmadou Sadio Diallo; in not at that time respecting his right to the benefit of the provisions of the [1963] Vienna Convention on Consular Relations; . . . the Democratic Republic of the Congo has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea;
- (2) that the Democratic Republic of the Congo is accordingly bound to make full reparation on account of the injury suffered by the Republic of Guinea in the person of its national;
- (3) that such reparation shall take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the Democratic Republic of the Congo including loss of earnings, and shall also include interest."

20.6 Germany

Federal High Court, Fifth Criminal Senate, *Case of S., F., Sa., D., & T.*, 5 StR 116/01, 5 StR 475/02, 25 September 2007, para. 30

[The Law on Compensation for Penal Measures, to which reference is made, calls for compensation to a person wrongly convicted of crime. Criminal Procedure Law §465(2), to which reference is also made, allows for court costs that might otherwise be assessed against a criminal defendant to be waived under certain circumstances. By "less serious cases," the Senate meant cases in which the penalty was less severe than in the cases at hand, which involved convictions for murder and substantial prison terms.]

The Senate leaves open the possibility that, in less serious cases, remedies available under national law could be used by analogy, for example, by granting money damages under the Law on Compensation for Penal Measures, or by waiving court costs under §465(2) of the Criminal Procedure Law. In the case of minor penalties and when the procedural error was corrected quickly by providing the VCCR Article 36(1)(b)(3) advice . . . a remedy might be unnecessary altogether.

21 Intervention in court by a sending state

21.1 Introduction

One innovative element in international practice that has been spurred by VCCR Article 36 claims is the involvement of foreign states in litigation, as they seek redress for their nationals. Involvement of foreign states in national court litigation is not unprecedented, but consular access issues have brought a major increase in such involvement, in particular in courts of the United States.

This involvement has taken the form of written submissions. As reflected in documents excerpted in this chapter, this may be done by filing a brief as *amicus curiae* in criminal cases in which a foreign national seeks a remedy for a VCCR Article 36 violation. Such a brief may be filed by the sending state, or it may be filed by other states to express their broader interest in seeing the rights of foreign nationals respected. In a brief it filed in the U.S. Supreme Court on behalf of a Mexican national whose consular access rights had been violated, the European Union explained the interest that led it to file (Document 2a). The EU brief was joined by the Council of Europe, a 46-state organization, bringing the total number of states on the brief to forty-nine. Participation by large numbers of foreign states in domestic litigation is a recent development in international practice, generated by the consular access issue.

A sending state, instead of filing a brief as *amicus curiae*, may seek to intervene as a party. In a case excerpted in this chapter from the U.S. State of Illinois, a Polish national filed two actions, one a post-conviction action permissible under Sec. 2-1401 of the Illinois code, and another in *mandamus*, to challenge his conviction and death sentence on the basis of a VCCR Article 36 violation. The Consul General of Poland in Chicago, Illinois, sought to intervene, making itself a party in both actions. As indicated in the excerpt below, the judge hearing the two cases denied the motion to intervene in the post-conviction proceeding but granted it in the *mandamus* action (Document 3a).

Sending states have also on occasion filed a civil action seeking a remedy for their nationals. This development is examined in Chapter 25.

In some instances, consuls have given oral testimony in a receiving-state court, when a foreign national who was not advised about consular access has raised that failure in court, seeking some type of remedy. A consul has typically been called to

explain what the consulate might have done had it been informed of the arrest. In a case included in this chapter, Antonio Mata, a national of Mexico, was prosecuted for murder in Cook County, Illinois. His attorney filed a motion to dismiss the indictment for failure of the authorities to advise Mata about consular access. Salvador Cicero, Legal Officer of Mexico's consulate in Chicago, was called by Denise Nalley, defense attorney, to testify about services provided by that consular post to Mexican nationals under arrest in Cook County (Document 3b).

Testimony by consuls raises potential issues of consular immunity, since a consul cannot be compelled to testify in court about matters involving official functions. VCCR, Article 44(3) states: "Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto." A consul may, however, choose to testify. Canada, in its instructions to consuls, asks them to consult Ministry headquarters when they are asked to testify in a receiving-state court (see Chapter 2).

Some sending states assist local lawyers who represent their nationals. As indicated in Chapter 2, the UK organized a panel of UK lawyers to assist attorneys who represent UK nationals in receiving states. Mexico and El Salvador established attorney support programs for capital cases in the United States, where they have large populations of their nationals. Mexico set up a Capital Legal Assistance Program, directed by Attorney Sandra Babcock, to represent Mexico on *amicus curiae* briefs, and to help defense attorneys conduct fact investigations in Mexico, or locate experts. El Salvador set up a Capital Assistance Project, directed by Attorneys Nick Trenticosta and Susana Herrero, to provide litigation support to defense attorneys representing Salvadorans.

Beyond any impact in the particular case, this activity has broader implications. In a civil suit filed by a foreign national seeking monetary compensation for a VCCR Article 36 violation, the court cited *amicus curiae* briefs filed by foreign states in other cases, where the foreign states argued that VCCR Article 36 creates rights for foreign nationals (Document 5).

Additionally, the assertion by a state of a view as to what is required under VCCR Article 36 represents a commitment by that state in regard to how it itself will treat foreign nationals. Such assertions of position are relevant to the meaning of VCCR Article 36, because state practice in implementing a treaty is evidence of the meaning of a treaty provision. VCLT Article 31(3)(b) lists as one factor relevant to proper interpretation "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." A formal view expressed before a foreign court constitutes "practice" for this purpose. The widespread filing of *amicus curiae* briefs has served to flesh out the meaning of VCCR Article 36, as states have asserted positions on key issues.

21.2 European Union

European Union, *Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner*, filed in Supreme Court of the United States, *Medellin v. Dretke*, 544 U.S. 660 (2005)

Statement of Interest of Amici Curiae. The European Union (EU) considers the respect for treaty-based rights to be of vital importance both nationally and within the international community. This principle is common to its twenty-five Member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Like the United States, all EU Member States are party to the Vienna Convention on Consular Relations (VCCR). Article 36 of the VCCR (Article 36) confers both individual and State rights. As such, the EU has an interest in security compliance with rights guaranteed under Article 36.

21.3 United States: Illinois

a. Supreme Court of Illinois, *People v. Madej & Consul General of the Republic of Poland in Chicago*, 193 Ill. 2d 395; 739 N.E.2d 423 (2000)

In December, the Consul General sought leave to intervene in both actions. Judge Albert Green, who was presiding over the *mandamus* proceedings, granted the Consul General's petition. Thereafter, Judge Green transferred the *mandamus* proceedings to Judge Thomas Fitzgerald, who was presiding over the section 2-1401 proceedings. Thereafter Judge Fitzgerald denied the Consul General's motion to intervene in the section 2-1401 proceeding.

When Madej and the Consul General of Poland took this appeal to the Supreme Court of Illinois, Mexico filed an *amicus curiae* brief in that court even though no Mexican national was involved. After Madej's conviction was affirmed by the Supreme Court of Illinois, Mexico filed an *amicus curiae* brief in support of Madej and the Polish Consul General's petition to the U.S. Supreme Court, seeking the issuance of a writ of *certiorari*. In that brief, Mexico described its interest in the case as follows: [*Consul General for the Republic of Poland in Chicago and Gregory A. Madej v. Illinois*, U.S. Supreme Court, Case No. 00-1375 (2000)]

Amicus curiae the United Mexican States . . . is a party to the Vienna Convention on Consular relations. As a party, Mexico has an interest in securing compliance with rights guaranteed under Article 36 of the Convention by all states parties, both for its own nationals and for nationals of any other state party. As a member of the community of nations, Mexico has an interest in assuring compliance by all states with their obligations under treaties protecting individual rights. Under customary law and the International covenant on Civil and Political Rights, states (1) must extend the protection of their laws to foreign nationals in their territory, (2) must avoid acts contributing to discrimination based on race or national origin, (3) accord fair treatment to detained foreign nationals, in particular in capital cases.

b. Circuit Court of Cook County, Illinois, *Illinois v. Mata*, Case No. 97 CR3-1042, Proceedings on Motion to Quash and Dismiss, 8 February 1999. Direct examination by Ms. Nalley:

Q. Mr. Cicero, by whom are you employed?

A. I'm a foreign service officer. I work for the Ministry of Foreign Affairs of Mexico, and I am posted at the consulate general of Mexico in Chicago.

Q. And that consulate is located in downtown Chicago?

A. Yes, it's located at 300 North Michigan Avenue, second floor.

Q. And, Mr. Cicero, are you being compelled to testify here today?

A. No. Pursuant to Articles 43 and 44 of the Vienna Convention on Consular Relations, consular officers cannot be compelled and are not subject to the jurisdiction of the courts of the countries in which they are posted.

Q. So you are not under subpoena?

A. No, we voluntarily appear.

Q. And can you explain a little bit about your position at the consulate general?

A. . . . I am the chief of legal affairs for the consulate general. And what that implies, I work under the, what we call the protection department, otherwise known as the human rights and legal affairs department, and I am particularly charged with overseeing the protection and representation of our nationals in the courts in the United States and in this particular jurisdiction which covers Illinois, Wisconsin, Minnesota, Iowa and Indiana.

...

Q. . . . You stated that the consulate where you work at, you are in charge of the legal affairs for five separate states, is that correct?

A. That's correct.

Q. And during the time that you have been working in this capacity with the consulate, have you ever been contacted by the competent authorities of any of those five states regarding the detention of a Mexican national?

A. Yes, we were regularly contacted by the Minnesota federal authorities every time the DEA and the U.S. Marshals, and from the Des Moines Department of Police, they send us consular notifications all the time.

...

Q. . . . on those occasions when you were contacted, what, if anything, did you do as a result of being contacted?

A. . . . we took immediate measures to contact the person, to arrange for a consular access. To give you an idea, we have a system with the Iowa Police Department where they immediately upon arrest they send us a fax and they call us on the phone to tell us that - because we already have a liaison program with them which we have been developing. So they call us and they say, I'm sending you a fax, we go get the fax, we immediately call the person, and we try to do consular notification and advice over the phone. Because Iowa is so far. And so we try to arrange that. And they are fairly persistent if they don't get a hold of us, or for some reason we're not available, they contact us as soon as they can.

21.4 United States

United States District Court, Southern District of New York, *Standt v. City of New York*, 153 F Supp. 2d 417 (2001)

... [I]n *amicus* briefs filed in criminal actions in the United States, other countries have recognized that the VCCR creates a private right of notification for detained individuals. See, e.g. *Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996) (Paraguay and Argentina), *aff'd sub nom Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998), *cert. denied*, *Breard v. Greene*, 523 U.S. 371, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998); *Faulder v. Johnson*, 81 F.3d 515 (5th Cir. 1996) (Canada), *cert. denied*, 519 U.S. 995, 117 S. Ct. 487, 136 L. Ed. 2d 380 (1996); *Ohio v. Loza*, 71 Ohio St. 3d 61, 641 N.E.2d 1082 (Ohio 1994) (Mexico), *cert. denied*, 514 U.S. 1120, 115 S. Ct. 1983, 131 L. Ed. 2d 871 (1995); *Murphy v. Netherland*, 246 Va. 136, 431 S.E.2d 48 (Va. 1993) (Mexico), *cert. denied*, 510 U.S. 928, 114 S. Ct. 336, 126 L. Ed. 2d 281 (1993). Notably, Germany invoked the VCCR in a suit filed in Virginia to enjoin the imposition of the death penalty against a German citizen who was not notified of his VCCR right to consular notification. See *Federal Republic of Germany v. United States*, 526 U.S. 111, 119 S. Ct. 1016, 143 L. Ed. 2d 192 (1999).

22 Civil suit by a sending state

22.1 Introduction

On two occasions, both in the United States, sending states have filed suit against the receiving state and its officials in an effort to prevent the imminent execution of a sending-state national who had not been advised about consular access. Paraguay filed in 1998 against officials of the Commonwealth of Virginia when a Paraguayan national, Angel Breard, faced imminent execution in Virginia. Paraguay filed initially in a U.S. district court. It later filed a separate suit in the Supreme Court of the United States, basing that action on a clause in the United States Constitution that allows the Supreme Court to hear cases affecting ambassadors and consuls. Additionally, the Consul General of Paraguay filed in his own name (Document 2).

In 1999 Germany filed suit against officials of the State of Arizona and against the United States itself, when a German national faced imminent execution in Arizona. Germany based its suit, as Paraguay had unsuccessfully done, on the United States Constitution's provision giving the Supreme Court jurisdiction in cases affecting ambassadors and consuls (Document 3).

The Supreme Court rejected both suits. To date, no other states have filed such suits in the United States or elsewhere.

22.2 Paraguay-United States

Supreme Court of the United States, *Paraguay v. Gilmore, Governor of Virginia*, 523 U.S. 371 (1998)

In September 1996, the Republic of Paraguay, the Ambassador of Paraguay to the United States, and the Consul General of Paraguay to the United States (collectively Paraguay) brought suit in Federal District Court against certain Virginia officials, alleging that their separate rights under the Vienna Convention had been violated by the Commonwealth's failure to inform Breard of his rights under the treaty and to inform the Paraguayan consulate of Breard's arrest, conviction, and sentence. In addition, the Consul General asserted a parallel claim under 42 U.S.C. § 1983, alleging a denial of his rights under the Vienna Convention. The District Court concluded that it lacked subject-matter

jurisdiction over these suits because Paraguay was not alleging a “continuing violation of federal law” and therefore could not bring its claims within the exception to Eleventh Amendment immunity established in *Ex parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1272–1273 (ED Va. 1996). The Fourth Circuit affirmed on Eleventh Amendment grounds. *Republic of Paraguay v. Allen*, 134 F.3d 622 (1998). Paraguay has also petitioned this Court for a writ of *certiorari*.

On April 3, 1998, nearly five years after Breard’s conviction became final, the Republic of Paraguay instituted proceedings against the United States in the International Court of Justice (ICJ), alleging that the United States violated the Vienna Convention at the time of Breard’s arrest. On April 9, the ICJ noted jurisdiction and issued an order requesting that the United States “take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings. . . .” The ICJ set a briefing schedule for this matter, with oral argument likely to be held this November. Breard then filed a petition for an original writ of habeas corpus and a stay application in this Court in order to “enforce” the ICJ’s order. Paraguay filed a motion for leave to file a bill of complaint in this Court, citing this Court’s original jurisdiction over cases “affecting Ambassadors . . . and Consuls.” U.S. Const., Art. III, § 2.

...

As for Paraguay’s suits (both the original action and the case coming to us on petition for *certiorari*), neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States’ courts to set aside a criminal conviction and sentence for violation of consular notification provisions. The Eleventh Amendment provides a separate reason why Paraguay’s suit might not succeed. That Amendment’s “fundamental principle” that “the States, in the absence of consent, are immune from suits brought against them . . . by a foreign State” was enunciated in *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329–330, 78 L. Ed. 1282, 54 S. Ct. 745 (1934). Though Paraguay claims that its suit is within an exemption dealing with continuing consequences of past violations of federal rights, see *Milliken v. Bradley*, 433 U.S. 267, 53 L. Ed. 2d 745, 97 S. Ct. 2749 (1977), we do not agree. The failure to notify the Paraguayan Consul occurred long ago and has no continuing effect. The causal link present in *Milliken* is absent in this case.

Insofar as the Consul General seeks to base his claims on § 1983, his suit is not cognizable. Section 1983 provides a cause of action to any “person within the jurisdiction” of the United States for the deprivation “of any rights, privileges, or immunities secured by the Constitution and laws.” As an initial matter, it is clear that Paraguay is not authorized to bring suit under § 1983. Paraguay is not a “person” as that term is used in § 1983. See *Noor v. County of Alameda*, 411 U.S. 693, 699, 36 L. Ed. 2d 596, 93 S. Ct. 1785 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301, 323–324, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966); cf. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989). Nor is Paraguay “within the jurisdiction” of the United States. And since the Consul General is acting only in his official capacity, he has no greater ability to proceed under § 1983 than does the country he represents. Any rights that the Consul General might have by virtue of the Vienna Convention exist for the benefit of Paraguay, not for him as an individual.

22.3 Germany-United States

Supreme Court of the United States, *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999)

ON APPLICATION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION AND ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

Per Curiam.

The motion of the Federal Republic of Germany, et al (plaintiffs) for leave to file a bill of complaint and the motion for preliminary injunction against the United States of America and Jane Dee Hull, Governor of the State of Arizona, both raised under this Court's original jurisdiction, are denied. . . . Plaintiffs seek, among other relief, enforcement of an order issued this afternoon by the International Court of Justice, on its own motion and with no opportunity for the United States to respond, directing the United States to prevent Arizona's scheduled execution of Walter LaGrand. Plaintiffs assert that LaGrand holds German citizenship. With regard to the action against the United States, which relies on the *ex parte* order of the International Court of Justice, there are imposing threshold barriers. First, it appears that the United States has not waived its sovereign immunity. Second, it is doubtful that Art. III, § 2. cl. 2¹ provides an anchor for an action to prevent execution of a German citizen who is not an ambassador or consul. With respect to the action against the State of Arizona, as in *Breard v. Greene*, 523 U.S. 371, 118 S. Ct. 1352, 1356, 140 L. Ed. 2d 529 (1998), a foreign government's ability here to assert a claim against a State is without evident support in the Vienna Convention and in probable contravention of Eleventh Amendment² principles. This action was filed within only two hours of a scheduled execution that was ordered on January 15, 1999, based upon a sentence imposed by Arizona in 1984, about which the Federal Republic of Germany learned in 1992. Given the tardiness of the pleas and the jurisdictional barriers they implicate, we decline to exercise our original jurisdiction.

Breyer, J., with whom Stevens, J., joins, dissenting:

The Federal Republic of Germany has filed a motion for leave to file a complaint, seeking as relief an injunction prohibiting the execution of Walter LaGrand pending final resolution of Germany's case against the United States in the International Court of Justice (ICJ) – a case in which Germany claims that Arizona's execution of LaGrand violates the Vienna Convention. The Federal Republic also seeks a stay of that execution “pending the Court's disposition of the motion to file an original bill of complaint after a normal course of briefing and deliberation on that motion.” The International Court of Justice has issued an order “indicating” that the “United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these [ICJ] proceedings.”

The Solicitor General has filed a letter in which he opposes any stay. In his view, the “Vienna Convention does not furnish a basis for this Court to grant a stay of execution,” and “an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief.” The Solicitor General adds, however, that he has “not had time to read the materials thoroughly or to digest the contents.”

Germany's filings come at what is literally the eleventh hour. Nonetheless, Germany explains that it did not file its case in the International Court of Justice until it learned that the State of Arizona had admitted that it was aware, when LaGrand was arrested, that he was a German national. That admission came only eight days ago, and the ICJ issued its

1 Of the U.S.A. Constitution (cases affecting ambassadors and consuls).

2 To the U.S.A. Constitution.

preliminary ruling only today. Regardless, in light of the fact that both the International Court of Justice and a sovereign nation have asked that we stay this case, or "indicated" that we should do so, I would grant the preliminary stay that Germany requests. That stay would give us time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved, including further views of the Solicitor General, after time for study and appropriate consultation.

Part VI

Remedies at the international level

Violations of consular access obligations have had repercussions at the international level. Sending states whose nationals were not advised about consular access, or whose consuls and nationals were impeded in communicating with each other, have frequently raised the matter with the receiving state. This may be done through informal complaint to relevant officials of the receiving state or may be done more formally, through the route of diplomatic protest from one government to the other. On occasion, states may protest over consular access violations affecting persons not their own nationals (Chapter 23).

Beyond protest, a sending state may be in a position to sue a receiving state in the ICJ. The jurisdiction of the ICJ is quite limited, but avenues to jurisdiction may exist (Chapter 24). Finally, the human rights organs of the OAS may be in a position to address violations of consular access (Chapter 25).



23 Diplomatic protest by a sending state

23.1 Introduction

Diplomatic protest is the mechanism by which a state expresses its displeasure with the action of another. Violation of consular access obligations may lead a sending state to protest to the receiving state. A sending state that learns of an arrest otherwise than through VCCR Article 36 procedures may protest for the failure of receiving state authorities to advise the arrestee or to allow the arrestee to initiate communication. A sending state may protest over mistreatment of a national while in custody. It may also protest over the failure of the receiving state, in particular its judicial organs, to grant a remedy to a national whose consular access rights were violated and who is being prosecuted in the courts of the receiving state.

In international practice, protests are typically made to central authorities. In the United States, a number of sending states have protested also to the governor of a state in which their national has been convicted of crime. An example of such a communication is a letter from the Ambassador of the Dominican Republic to Gov. Ann W. Richards of Texas (Document 2). There is no established protocol for communication at this level of government. In the case referenced in the letter, the Dominican Republic ambassador followed up by going to the office of Gov. Richards, where he requested a meeting. Gov. Richards declined to receive the Ambassador. The Dominican national was executed, as scheduled, a few days later.

Protests over consular access violations are typically lodged by a sending state. In recent years, however, other states have protested. This developing practice reflects a view of a consular access violation as a due process violation, beyond a violation of the law relating to consular relations. In human rights law, a rights violation is regarded as being of concern to every state, even if its own nationals are not impacted. It is that concept, as well as the mutual interest of all states party to the VCCR to bring about compliance with its terms, that provides the theoretical underpinning for a protest of a consular access violation by a state that otherwise has nothing to do with the situation. The European Union has protested consular access violations affecting non-EU nationals (Document 3). Like the protest by the Dominican Republic, the EU protest was directed to

officials of a U.S. state, in that case Oklahoma. The EU letter was sent to a board with power to recommend clemency. The EU directed an identical letter to the Governor of Oklahoma, who exercises the clemency power. Clemency was subsequently granted in that case.

States may instruct their consuls how to protest over consular access violations (Document 4a). A U.S. instruction includes suggestions on how to react if a consul is confronted with the response that the United States as a receiving state does not always comply with its own consular access obligations (Document 4b).

A consul may be the official protesting on behalf of a national. Or a protest may be lodged by diplomatic representatives of the sending state. The matter may be handled by other officials as well, as reflected in a protest by Ukraine against Poland over the criminal prosecution of two Ukraine nationals. A Ukraine consul enlisted the assistance of the Commissioner for Human Rights of the Ukraine Parliament, who took the matter up with the Government of Poland (Document 5).

23.2 Dominican Republic

EMBAJADA DE LA REPUBLICA DOMINICANA
WASHINGTON DC

March 15, 1993

The Honorable Ann W. Richards
Governor
State of Texas
P.O. Box 12420, Capitol Station
Austin, TX 78711

Dear Governor Richards:

We have recently become aware of the impending execution of Carlos Santana, a national of the Dominican Republic. Through his attorney we have learned that a petition was filed on Mr. Santana's behalf with the Inter-American Commission on Human Rights in Washington.

According to his attorney, Texas authorities apparently did not inform Mr. Santana at the time of his arrest, as requires Article 36 of the Vienna Convention, of his right of consular access. The same assertion is made by Mr. Santana in his enclosed sworn affidavit. His defense lawyer indicates that no evidence on his behalf was presented at the sentencing hearing that led to the sentence of death.

We are communicating this information to the Department of State and at the same time urgently request from you on behalf of the people of the Dominican Republic and the National Government the stay of the execution of Mr. Santana to allow time for his attorney to handle this matter through appropriate channels.

With the greatest respect, we remain,

Yours most sincerely,

s/José del Carmen Ariza
Ambassador

JCA:ck

Enclosures:

- 1) Letter addressed to Secretary of State, Warren Christopher of March 15, 1993
- 2) Letter to Inter American Commission on Human Rights of March 15, 1993
- 3) Sworn affidavit of Carlos Santana of March 11, 1993

23.3 European Union

Letter dated 30 April 2004, from EU Presidency (Ireland) to Susan B. Loving, Chairwoman, Oklahoma Pardon and Parole Board, Oklahoma City, Oklahoma USA

The European Union has learned that Osvaldo Torres, a Mexican national, is to be executed in the State of Oklahoma on 18 May, 2004. On behalf of the European Union, Ireland, as current Presidency, together with the Netherlands, the subsequent Presidency, and the European Commission would like to make an urgent humanitarian appeal to spare the life of Mr. Torres.

The EU considers that the abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights. The European Union finds this form of punishment cruel and inhuman and the abolition of the death penalty is one of the key policy aims of the European Union in the field of human rights. The EU considers that in States, including federal States, where the death penalty is maintained, it should not be carried out in contravention to the State's international commitments.

A related matter of concern is the compliance with the Vienna Convention on Consular Relations of 1963. The right to consular notification and assistance according to article 36 of the convention is intended to redress the inherent disadvantages facing detained foreign nationals in any country. This provision gives US nationals abroad the right to contact an American Consulate, in the event of their arrest. The EU is convinced that the observance of the safeguards provided by this Convention is essential and may be decisive, not least in capital cases. The obligations of the United States under the Vienna convention were confirmed by the judgment of 27 June 2001 by the International Court of Justice (ICJ) in the LaGrand case.

It has come to the attention of the EU that the Oklahoma authorities failed to notify Mr Torres of his right to contact the Mexican Consulate for assistance. The authorities likewise never informed Mexican consular officials of his detention.

Furthermore, the ICJ recently issued a binding judgement in the case of *Arena and Other Mexican Nationals (Mex v US)*, which bears directly on the case of Mr Torres. The ICJ found that the United States had violated Mr Torres's right to consular notification and access, failed to notify Mexican consular authorities of his detention, and deprived Mexican consular officials of the opportunity to provide legal assistance prior to his capital murder trial. The ICJ judgement noted the commitment undertaken by the United States to ensure implementation of the specific measure adopted to ensure performance of its obligations under Article 36 of the Convention. The ICJ recommended that the convictions and sentences in this, and other cases under consideration, be reviewed and reconsidered in a manner which would take into account the violation of rights under the Vienna Convention. The European Union requests that, in accordance with the ICJ judgment, such a review and reconsideration of the conviction and sentence be undertaken. We are deeply concerned that the current date of execution would not permit

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sufficient time for such action to be taken. The EU could not remain silent in the event of an execution being carried out in contravention to the ICJ judgement.

We therefore respectfully urge you, Madame Chair, as we have also urged Governor Henry,¹ to take these factors into account and to exercise all the powers vested in your office to grant Mr Torres relief from the death penalty and to ensure that the required review and reconsideration of this case is undertaken.

We thank you in advance for your consideration

23.4 United States

a. Department of State, *Foreign Affairs Manual*, vol. 7, §426.2-1 Actions Meriting Protest: Failure to Notify

Whenever host government authorities fail to notify the post of the arrest of a U.S. citizen or national in a timely manner the post should advise the Department [of State] promptly, and protest immediately. Use the following guidelines in preparing the protest:

- a. Were arresting authorities aware that the arrestee was or claimed to be a U.S. citizen or national?
- b. If the host country is a party to the VCCR and there is no bilateral consular convention requiring notification,
 - (1) Protest if host government authorities failed to notify the post within 72 hours of the arrest
 - (2) Do not protest, however, if you know that the arrestee asked that U.S. consular authorities not be notified after being advised that he or she had a right to have them notified.

b. Department of State, *Foreign Affairs Manual*, vol. 7, §421.2-3 Responding to Complaints Regarding Reciprocal Notification (<http://www.state.gov/m/a/dir/regs/fam/c22164.htm>)

Occasionally, a host government official may counter with the claim that U.S. authorities do not always promptly notify that country's consular representatives of the arrest of one of their nationals. You can best deal with this by urging the host government to report such instances to the authorities who deal with consular notification and access at the Department (CA/P) if it has not done so already, and by pointing out:

- a. Even where this might be true, it does not exempt the host government from its treaty obligations. Two wrongs do not make a right. We should all work toward improved compliance with consular notification obligations.
- b. Given the multinational and multi-ethnic makeup of the U.S., it is difficult to identify a person as a foreign national unless he/she claims such nationality or has appropriate documentation.
- c. Unfortunately, the size and composition of U.S. law enforcement (local, county, State, Federal) make it difficult to ensure that every arresting official understands the obligation to notify foreign consuls.

1 The EU Presidency sent an identical letter, of the same date, to Oklahoma Governor Brad Henry.

- d. The Department of State (CA/P) conducts an ongoing concentrated educational program in an effort to remedy this situation, including:
- (1) Publishing a Handbook instructing Federal, state and local law enforcement officials in the U.S. on their responsibilities and procedures regarding consular notification and access. (On line at: Consular Notification and Access)
 - (2) Conducting seminars and appearing at various law enforcement meetings, conventions and similar gatherings in order to continue educating the U.S. law enforcement community of its obligations
 - (3) Providing posters with appropriate instructions for display in U.S. jails, police stations and similar detention facilities
 - (4) Providing specific guidance to individual questions posed by U.S. law enforcement officials
 - (5) Contacting responsible law enforcement officials when the governmental authorities of other countries allege that consular notification requirements were not observed in specific cases involving their nationals.

23.5 Ukraine

Parliament Commissioner for Human Rights, *Observance of the Rights of Ukrainian Citizens Deprived of Liberty Abroad*, 2003, reproduced by permission of Office of Ombudsman, Ukraine

... [I]n early 2002 the Consul-General of the Ukrainian Embassy in Poland, Anatoliy Hamaliy, addressed the [Parliament] Commissioner [for Human Rights] about the matter of Ukrainian citizens R. Filonenko and M. Liushch who were charged with assaulting a Polish woman. From the moment they were apprehended the accused insisted that they were not involved in the offense and the victim mistakenly identified them as the culprits. Serious violations of operative Polish laws of criminal procedure were detected in this case: the accused were not provided with an interpreter at the stage of apprehension; the identification by the victim was handled improperly; the counsel neglected his duty when defending R. Filonenko; and the pretrial investigation officers examined the documents submitted by the accused with prejudice, not taking into account the evidence of eyewitnesses and other facts confirming the alibi of the accused. After the intervention of consular officials the District Court of Radom acquitted M. Liushch on January 8, 2002. As to R. Filonenko, the court passed a guilty verdict and pronounced a five-year prison sentence. The verdict was appealed by the accused and the case referred to the Court of Appeals of Lublin, while he remained in the isolation ward of Radom. Upon the Request of the Ukrainian Parliament Commissioner for Human Rights the commissioner for Civil Rights Protection of the Republic of Poland scrutinized the case of R. Filonenko and informed that the Court of Appeals of Lublin, taking into consideration the procedural violations, reversed the District Court of Radom and referred the case for reconsideration.

24 Jurisdiction in the International Court of Justice

24.1 Introduction

Treaty obligations are more secure if a state whose rights are violated has recourse to some binding dispute settlement procedure. At the universal level, the only such court is the ICJ. The Court's jurisdiction is limited to situations in which the potential plaintiff state and the potential defendant state submit themselves in some fashion. This may be done after a dispute arises, but only if both states agree. In that situation the prospective defendant state may have little reason to agree.

The only certain route to jurisdiction lies with submissions made in advance of a dispute arising. Advance submission may be effected by a state by filing a general declaration with the Court indicating willingness to be sued by other states. Provision for such filings is made in the ICJ Statute, Article 36, paragraph 2. The *Diallo* case is an example of a state suing another state for a consular access violation, with jurisdiction based on such declarations (Document 2). Suit may be brought on this basis of jurisdiction only if both the potential plaintiff state and the potential defendant state have filed such declarations. In the *Diallo* case, as the ICJ indicates below, the Republic of Guinea and the Democratic Republic of Congo had each filed such a declaration. When the Republic of Guinea filed, the Democratic Republic of Congo did not contest jurisdiction, and the ICJ found that it had jurisdiction (Document 2).

Currently, only 66 states have declarations on file with the ICJ submitting themselves to the Court's compulsory jurisdiction. Since suit can be filed only if both prospective parties have submitted themselves, suits can only rarely be filed for a consular access violation based on such declarations.

The low number of submissions via declarations leaves only one other route to jurisdiction. Particular treaties may contain clauses that require any state party allegedly in breach to submit to jurisdiction if sued by another state party. This procedure is provided for in the ICJ Statute, Article 36, paragraph 1. Such clauses are commonly called submissions clauses. The VCCR itself contains no such clause. However, during the 1963 UN Conference in Vienna, a separate document was drafted, on a proposal by the United States, to have the same effect. This document was titled the Optional Protocol to the Vienna Convention

on Consular Relations Concerning the Compulsory Settlement of Disputes. It provides that one state party may sue another for breach of the VCCR, so long as each of the two states is party both to the VCCR and to the Optional Protocol (Document 3). On the basis of the Optional Protocol three cases have been filed in the ICJ over consular access violations. These cases are explained and analyzed in Chapter 26.

Of the 172 states that are party to the VCCR, only 48 are party to the Optional Protocol. Since both the plaintiff state and the defendant state must be parties for jurisdiction to obtain, the Optional Protocol procedure is not available for most potential disputes arising between states party to the VCCR.

The United States, which was the defendant state in the three ICJ cases under the Optional Protocol, filed a letter on 7 March 2005, with the Secretary-General of the United Nations, announcing that it was withdrawing from the Optional Protocol. The Secretary-General, who is responsible for receiving such documents (Optional Protocol, art. VI), notified the other states party to the Optional Protocol of this letter and recited its contents (Document 4). The Secretary-General publishes information about ratifications and withdrawals from treaties in *Multilateral Treaties Deposited with the Secretary-General*, available in print, and electronically at www.un.org.

No other state party to the Optional Protocol had ever filed a withdrawal document. In his notification to the other states party, the Secretary-General did not indicate a view as to the validity of the U.S. letter. Many treaties contain a provision allowing a state party to withdraw, but the Optional Protocol does not. There is only scant state practice on the question of the permissibility of withdrawal from a treaty lacking such a provision. (See Bibliography: John Quigley, *The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences*.) No state has attempted to sue the United States under the Optional Protocol since 7 March 2005. Were a state to do so, the ICJ would have to rule on the validity of the withdrawal letter.

24.2 Compulsory Jurisdiction of ICJ

Case Concerning Ahmadio Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo), 2007 I.C.J. (24 May), Judgment on Preliminary Objections

17. In respect of the specific circumstances of Mr. Diallo's arrest, detention and expulsion, Guinea maintains that Mr. Diallo was "secretly placed in detention, without any form of judicial process or even examination" on 5 November 1995. He allegedly remained imprisoned first for two months, before being released on 10 January 1996, "further to intervention by the [Zairean] President himself", only then to be "immediately rearrested and imprisoned for two [more] weeks" before being expelled. Mr. Diallo is thus said to have been detained for 75 days in all. Guinea adds that he was mistreated while in prison and was "deprived of the benefit of the 1963 Vienna Convention on Consular Relations".

...

32. To establish the jurisdiction of the Court, Guinea relies on the declarations made by

the Parties under Article 36, paragraph 2, of the Statute. The DRC acknowledges that the declarations are sufficient to found the jurisdiction of the Court in the present case.

24.3 Optional Protocol to VCCR

Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Vienna, 24 April 1963, 596 UNTS 487, 21 UST 325

The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as “the Convention”, adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963, Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period, Have agreed as follows:

Article I. Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Article II. The parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice but to an arbitral tribunal. After the expiry of the said period, either party may bring the dispute before the Court by an application.

Article III. Within the same period of two months, the parties may agree to adopt a conciliation procedure before resorting to the International Court of Justice.

The conciliation commission shall make its recommendations within five months after its appointment. If its recommendations are not accepted by the parties to the dispute within two months after they have been delivered, either party may bring the dispute before the Court by an application.

Article IV. States Parties to the Convention, to the Optional Protocol concerning Acquisition of Nationality, and to the present Protocol may at any time declare that they will extend the provisions of the present Protocol to disputes arising out of the interpretation or application of the Optional Protocol concerning Acquisition of Nationality. Such declarations shall be notified to the Secretary-General of the United Nations.

Article V. The present Protocol shall be open for signature by all States which may become Parties to the Convention as follows: until 31 October 1963 at the Federal Ministry for Foreign Affairs of the Republic of Austria and, subsequently, until 31 March 1964, at the United Nations Headquarters in New York.

Article VI. The present Protocol is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article VII. The present Protocol shall remain open for accession by all States which may become Parties to the Convention. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article VIII. The present Protocol shall enter into force on the same day as the Convention or on the thirtieth day following the date of deposit of the second instrument of ratification or accession to the Protocol with the Secretary-General of the United Nations, whichever date is the later.

For each State ratifying or acceding to the present Protocol after its entry into force in accordance with paragraph 1 of this Article, the Protocol shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article IX. The Secretary-General of the United Nations shall inform all States which may become Parties to the Convention:

- (a) of signatures to the present Protocol and of the deposit of instruments of ratification or accession, in accordance with Articles V, VI and VII;
- (b) of declarations made in accordance with Article IV of the present Protocol;
- (c) of the date on which the present Protocol will enter into force, in accordance with Article VIII.

Article X. The original of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States referred to in Article V. IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised thereto by their respective Governments, have signed the present Protocol. DONE at Vienna, this twenty-fourth day of April, one thousand nine hundred and sixty-three.

24.4 United States

United Nations, *Multilateral Treaties Deposited with the Secretary-General*, www.un.org

On 7 March 2005, the Secretary-General received from the Government of the United States of America a communication notifying its withdrawal from the Optional Protocol. The communication reads as follows:

“... the Government of the United States of America [refers] to the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, done at Vienna April 24, 1963.

This letter constitutes notification by the United States of America that it hereby withdraws from the aforesaid Protocol. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol.”

25 Jurisdiction in Inter-American human rights organs

Regional human rights systems function for the Western Hemisphere, for Africa, and for Europe. They entertain complaints of human rights violations under regional human rights instruments. For these regional agencies to hear a consular access case, the violation must be characterized as a violation of the relevant regional human rights instrument. These agencies do not have jurisdiction over violations of the VCCR. As indicated in Chapter 9, however, consular access rights have not infrequently been regarded as due process violations in treaties and by courts.

In each of the three regional human rights systems, one state may, in principle, sue another before the region's human rights court. To date, there have been no such suits over consular access violations. Importantly, individuals have access to the regional human rights systems. To date, of the three regional human rights systems, only the Western Hemisphere system has produced decisions on consular access.

The Western Hemisphere system operates under the Organization of American States. It has two agencies that may deal with consular access issues: the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights. The Commission has issued decisions on consular access in favor of two foreign nationals convicted of murder and sentenced to death in the United States, in both instances ruling that the United States must grant a new trial. In 1999, the Court issued an advisory opinion on consular access under power it has to issue such an opinion at the request of any member state of the Organization of American States. The decisions issued by the Inter-American Commission on Human Rights, and the advisory opinion issued by the Inter-American Court of Human Rights, are recounted in Chapter 27.

The basis for the Inter-American Court of Human Rights to issue such an advisory opinion is the right of any state member of the OAS to consult it on the interpretation of "treaties concerning the protection of human rights in the American states" (Document 2).

The Inter-American Commission on Human Rights may entertain a complaint against any OAS member state for violation of the American Convention on Human Rights, if the state is party thereto. That Convention contains a variety of guarantees relating to due process and fair trials.

If the state is an OAS member state but not party to the American Convention on Human Rights, the Commission may entertain a complaint under the American Declaration of the Rights and Duties of Man. The American Declaration is a resolution of the OAS, adopted by its General Assembly in 1948. The Commission has authority to investigate complaints about violations of the American Declaration by OAS member states. The Declaration guarantees due process and a fair trial – guarantees that the Commission has found to be implicated by a failure to advise a foreign national about consular access (Document 3a).

Under Commission procedures, any person may file to apprise the Commission of what, in the complainant's view, is a violation of applicable OAS human rights instruments (Document 3b). Complaints are filed at the Commission's headquarters in Washington, DC.

The Commission may, upon receipt of a complaint, issue precautionary measures to the state in question (Document 3b). In cases involving capital punishment, it may issue a request that an execution be postponed while the complaint is pending (Documents 3c, 5).

Courts in OAS member states have not had occasion to rule on the effect in domestic law of actions by the Commission relating to consular access violations. In a case involving other issues, a U.S. court found that a Commission decision is recommendatory only. Another U.S. court, in sentencing a man to death on the basis of a murder conviction, had taken into account additional murders he had allegedly committed in Mexico, for which he had not been prosecuted there. His case was taken to the Commission, which ruled that the use in evidence of the alleged murders in Mexico violated due process of law. He asked the court to stay his execution on the basis of the decision in his favor by the Commission. The stay was denied (Document 4).

If a state does not comply with a Commission decision, the Commission follows up by inquiring of the state whether it has complied. In that way it exerts a certain pressure on the state. A statement in a Canadian policy document suggests reasons why it might be considered useful to resort to the Commission's procedures (Document 5).

25.1 Inter-American Court of Human Rights

American Convention on Human Rights, 22 November 1969, 1144 UNTS 123

Article 64 (1) The member states of the Organization [of American States] may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.

25.2 Inter-American Commission on Human Rights

a. American Declaration of the Rights and Duties of Man, adopted by Ninth International Conference of American States, Bogota, Colombia, 2 May 1948,

OAS Document OEA/Ser.L/V/11.71 (<https://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>)

Article 18. Right to a fair trial. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Article 26. Right to due process of law. Every accused person is presumed to be innocent until proved guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

b. Rules of Procedure, adopted by the Inter-American Commission on Human Rights, 4–8 December 2000, as amended through 25 July 2008

Article 23. Presentation of Petitions. Any person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission, on their own behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights . . . The petitioner may designate an attorney or other person to represent him or her before the Commission, either in the petition itself or in another writing.

...

Article 25(1). Precautionary Measures. In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons.

c. *Fierro v. USA*, Case No. 11.331, Report No. 99/03 (29 December 2003), available at <https://www.cidh.oas.org/annualrep/2003eng/USA.11331.htm>

3. By note dated July 25, 1994, the Commission transmitted the pertinent parts of the Petitioners' petition to the State with a request for information within 90 days as provided for in Article 34(5) of the Commission's former Regulations. In the same communication, the Commission requested that the United States stay Mr. Fierro's execution, at that time scheduled to take place on August 10, 1994, in order that the Commission could examine the allegations in his complaint.

4. In a letter dated August 5, 1994, the Petitioners informed the Commission that the Texas Court of Criminal Appeals had granted Mr. Fierro an indefinite stay of execution pending an inquiry into the conduct of the El Paso and Mexican police in the circumstances of Mr. Fierro's arrest and interrogation. This information was also confirmed in a letter dated August 2, 1994 and received by the Commission from the Governor of Texas.

25.3 United States

United States Court of Appeals, Seventh Circuit, *Garza v. Lappin*, 253 F.3d 918 (2001)

Garza is not entitled to a stay of his execution unless he can establish that he has presented a substantial ground on which relief could be granted. It is here that Garza's petition falters. His claim depends on a showing that the Inter-American Commission's report created an enforceable obligation that the United States was bound by treaty to honor. However, as a general rule, international agreements, even those benefiting private parties, do not create private rights enforceable in domestic courts. There are, of course, exceptions to this rule, but an international agreement can be considered to create judicially enforceable private rights only where such rights are contemplated in the agreement itself. See *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985); Restatement (Third) of the Foreign Relations Law of the United States, § 703 cmt. c, § 907 cmt. a. Whether a particular international agreement provides for private enforcement is a matter for judicial interpretation of the agreement. See *Frolova*, 761 F.2d at 373; Restatement § 907 cmt. a. We can find no indication in the treaties Garza relies on that the parties to the treaties intended for the Inter-American Commission's reports to create privately enforceable rights, and ample evidence that they did not.

The only relevant treaty is the Charter of the Organization of American States, which the United States ratified in 1951, and ratified as amended in 1968. That treaty authorizes the creation of the Inter-American Commission on Human Rights and contains the following relevant provision: There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters. An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.

OAS Charter (Amended) Article 112, 21 U.S.T. 607. The American Declaration of the Rights and Duties of Man, on which the Commission relied in reaching its conclusions in Garza's case, is an aspirational document which, as Garza admitted in his petition in the district court, did not on its own create any enforceable obligations on the part of any of the OAS member nations. More recently, the OAS has developed an American Convention on Human Rights (American Convention), which creates an Inter-American Court of Human Rights. Under the American Convention, the Inter-American Court's decisions are potentially binding on member nations. The rub is this: although the United States has signed the American Convention, it has not ratified it, and so that document does not yet qualify as one of the "treaties" of the United States that creates binding obligations.

Recognizing the distinction between the obligations (or lack thereof) created under the OAS Charter and the American Declaration and those created by the American Convention, the Statute of the Inter-American Commission on Human Rights, which is the governing document for the Commission, sets out two sets of procedures: one for dealing with complaints against member nations that have ratified the American Convention, and another for dealing with complaints against member nations like the United States that have not yet ratified the American Convention. The Statute, which has been adopted by

the OAS General Assembly, gives the Commission the following relevant powers with respect to nations that have not ratified the American Convention:

To make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights in the framework of their legislation, constitutional provisions and international commitments, as well as appropriate measures to further observance of those rights; . . .

To pay particular attention to the observance of the human rights referred to in [certain provisions of] the American Declaration of the Rights of Man; . . .

To examine communications submitted to it, . . . and to make recommendations to [the government of any member state not a Party to the Convention], when it finds this appropriate, in order to bring about more effective observance of fundamental human rights. . . .

Statute of the Inter-American Commission on Human Rights, Arts. 18, 20.

No court of appeals has yet decided whether the Inter-American Commission's decisions create obligations binding on the United States, although the Fourth Circuit has expressed doubt that the Commission's decisions could have any effect on domestic judicial proceedings. *Roach v. Aiken*, 781 F.2d 379, 380–81 (4th Cir. 1986). We share the Fourth Circuit's doubt, based on the language of the OAS Charter and the Commission's Statute, both of which indicate that the United States has not obligated itself to be bound by the Commission's decisions – or more accurately not to the degree that would be required to create privately enforceable rights. Nothing in the OAS Charter suggests an intention that member states will be bound by the Commission's decisions before the American Convention goes into effect. To the contrary, the OAS Charter's reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members. The language of the Commission's statute similarly shows that the Commission does not have the power to bind member states. The Commission's power is only to make "recommendations," which, according to the plain language of the term, are not binding. Garza's likelihood of success on the merits can in no way be described as "substantial" under these circumstances; indeed, we think it quite unlikely that "recommendations to the government of any member state" could create judicially cognizable rights in individuals. By their very nature, non-binding recommendations to a government on how to conduct its affairs would appear to be addressed to the executive and legislative branches of the government, not to the courts.

For these reasons, Garza has not presented any substantial ground on which relief could be granted in his habeas corpus petition. We therefore Deny the petition for stay of execution.

25.4 Canada

Department of Foreign Affairs and International Trade, Consular Affairs Bureau, *The Death Penalty: Consular Policy, Procedures and Practices* (March 2005)

5.4 Bringing Cases to the Inter-American Commission on Human Rights. A decision by the Inter-American Commission on Human Rights can draw attention to an issue and influence domestic legal decisions. Mr. Faulder made a claim before the commission for precautionary measures to prevent his scheduled execution, claiming, *inter alia*, that the Texas officials

violated his Article 36 rights. Although the Commission issued precautionary measures, decisions of the commission are not binding on the United States or on the state of Texas. Canada subsequently made representations to the United States Department of State and to Texas, requesting that the precautionary measures be observed. However, Texas did not observe those measures and subsequently executed Faulder in 1999.

100

Part VII

An overview of consular access litigation

The right to consular access has been subject to proceedings in international tribunals as well as in national courts. These proceedings have helped to clarify the status of consular rights and the application of the Vienna Convention in domestic legal proceedings.

Determining the parameters of the law relating to consular access often requires analysis of judicial decisions issued by foreign courts or international courts. It can also require analysis of decisions of human rights agencies that function at the international level. Part VI has provided an explanation of the jurisdictional reach of the ICJ and the inter-American human rights institutions. Part VII provides an overview of litigation relating to consular access at the international level. One aim is to show how courts have dealt with consular access issues. Another is to convey an idea of how these courts approach a case involving these issues.

In order to be in a position to understand what one of these courts is saying, one must understand its frame of reference. For the ICJ, the limitations on its jurisdiction restrict the scope of issues it considers. In the consular access cases it has decided to date, its jurisdiction has been based on the VCCR Optional Protocol, which gives jurisdiction over the VCCR. Hence, the ICJ (Chapter 26) analyzes consular access through the lens of the VCCR. On the other hand, the Organization of American States commission and court (Chapter 27) are human rights institutions that have jurisdiction based on OAS human rights documents. Hence, they analyze consular access through the lens of OAS definitions of rights relating to arrest and fair trial.



26 Proceedings in the International Court of Justice

The International Court of Justice has addressed VCCR Article 36 in four cases: *Vienna Convention on Consular Relations (Paraguay v. United States)*; *LaGrand Case (Germany v. United States)*; *Avena and Other Mexican Nationals (Mexico v. United States)*; and *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.A.)*.¹ Each case related to convictions and death sentences in the United States. Paraguay, Germany, and Mexico were able to gain jurisdiction over the United States in these cases on the basis of the VCCR Optional Protocol (see Chapter 24).

Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)

In 1992, Angel Breard, a Paraguayan citizen, was arrested for attempted rape and murder in Virginia. He was subsequently convicted and sentenced to death. Throughout his detention, Breard was never notified of his right to communicate with Paraguayan consular officials; nor was Paraguay notified of Breard's detention. After exhausting his state appeals, Breard filed a petition for *habeas corpus* relief in a U.S. district court on 30 August 1996, alleging for the first time that Virginia officials had violated the VCCR by failing to inform him of his right to communicate with Paraguayan consular officials.

On 12 September 1996, the Republic of Paraguay, the Paraguayan Ambassador to the United States, and the Consul General of Paraguay filed a separate action against Virginia officials in the U.S. District Court for the Eastern District of Virginia. They argued that Virginia officials had failed to notify Breard of his right to consular access under the VCCR, and failed to notify consular officials of Breard's arrest as required by a U.S.-Paraguay Treaty of Friendship. The district court dismissed for lack of subject-matter jurisdiction. It noted that the Eleventh

¹ VCCR Article 36 was discussed, albeit briefly, in *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, 1980 ICJ 3. In *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, not yet decided on the merits, allegations are made of a violation of VCCR Article 36.

Amendment to the Constitution limits the jurisdiction of federal courts over actions against a state: "Although this Court is disenchanted by Virginia's failure to embrace and abide by the principles embodied in the Vienna Convention and Friendship Treaty, the Eleventh Amendment operates to bar retroactive relief."² In a separate ruling, the district court dismissed Breard's *habeas* petition on the grounds of procedural default, and because Breard could not demonstrate cause and prejudice for this default.³

On 22 January 1998, the U.S. Court of Appeals affirmed the dismissal of Breard's *habeas* petition.⁴ As to Paraguay's lawsuit, it reiterated the district court's "disenchantment" with Virginia's failure to comply with the VCCR but held that the Eleventh Amendment precluded relief.⁵ Virginia immediately scheduled Breard's execution for 14 April 1998. In response, both Paraguay and Breard filed separate petitions for *certiorari* with the U.S. Supreme Court and requested stays of execution.

Paraguay also instituted proceedings against the United States before the ICJ,⁶ basing jurisdiction on the VCCR Optional Protocol, which both states had accepted. In its application, Paraguay argued that the arrest and detention of Breard violated Paraguay's rights under the VCCR, and that Breard's pending execution represented a continuing violation of Paraguay's rights. Accordingly, Paraguay asked the Court to adjudge and declare:

- (1) that the United States, in arresting, detaining, trying, convicting, and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by Articles 5 and 36 of the Vienna Convention;
- (2) that Paraguay is therefore entitled to *restitutio in integrum*;
- (3) that the United States is under an international legal obligation not to apply the doctrine of "procedural default" or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and
- (4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

2 *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1273 (E.D. Va. 1996).

3 *Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996).

4 *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998).

5 *Republic of Paraguay v. Allen*, 134 F.3d 622, 629 (4th Cir. 1998).

6 *Vienna Convention on Consular Relations (Paraguay v. U.S.A.)*, Application Instituting Proceedings, 3 April 1998.

- (1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;
- (2) the United States should restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and
- (3) the United States should provide Paraguay with a guarantee of the non-repetition of the illegal acts.⁷

Because Breard was scheduled for execution, Paraguay also sought a provisional measures order. It requested that pending a final judgment in the case, the ICJ should indicate:

- (a) That the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case;
- (b) That the Government of the United States report to the Court the actions it has taken in pursuance of subparagraph (a) immediately above and the results of those actions; and
- (c) That the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision this Court may render on the merits of the case.⁸

Oral arguments were held on 7 April 1998, and on 9 April the ICJ issued its decision on the request for provisional measures. As a preliminary matter, the Court determined that, *prima facie*, it had jurisdiction under the Optional Protocol. It said that "an execution would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims."⁹ For this reason, the Court indicated the following provisional measures: "The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all measures which it has taken in implementation of this Order."¹⁰ The Court noted that its order did not prejudice findings the Court might make on the merits.¹¹ The Court set an expedited briefing schedule for the parties and indicated that any decision on the merits would be reached as quickly as possible.¹²

After this ICJ ruling, the United States pursued two courses of action. First, the

⁷ *Id.*, para. 25.

⁸ Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Republic of Paraguay, 3 April 1998, para. 8.

⁹ *Vienna Convention on Consular Relations (Para. v. U.S.A.)*, 1998 ICJ 248, at para. 37. Judges Schwebel, Oda and Koroma attached separate declarations.

¹⁰ *Id.*, para. 41.

¹¹ *Id.*, para. 38.

¹² *Id.*, para. 40.

U.S. Department of Justice urged the Supreme Court to deny the claims of both Paraguay and Breard. In a brief filed with the Court, the Solicitor General argued¹³ that neither the VCCR nor the Treaty of Friendship entitled Paraguay or its official representatives to a judicial remedy that would vacate a state criminal conviction:

It is most implausible that the contracting parties to the Convention intended such a remedy, and it is therefore not surprising that the decision below is not contrary to any decision of this Court, any federal court of appeals, any state supreme court, or (as far as we are aware) the court of any foreign nation.¹⁴

The Solicitor General argued that rules of procedural default barred Breard's claims, and that the ICJ Order indicating provisional measures should not be considered binding by the Supreme Court.

Second, the U.S. Secretary of State Madeleine Albright wrote to Governor James Gilmore of Virginia (see text of letter in Chapter 15), urging that he stay Breard's execution.

On 14 April 1998, the Supreme Court denied both to Paraguay and to Breard their petitions for *certiorari* and their applications for stays of execution.¹⁵ In a *per curiam* ruling, the Court said that Breard's VCCR claim was procedurally defaulted. It found that the treaty did not explicitly prohibit the use of such procedural rules: "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."¹⁶ It said that this rule was embodied in the VCCR, which provides that the rights expressed in the Convention must be exercised in conformity with the laws of the forum state: "By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia."¹⁷ Moreover, the Court determined that the Antiterrorism and Effective Death Penalty Act of 1996, which was enacted after the VCCR, precludes *habeas* relief if a petitioner has failed to develop the factual basis of his claim in state court. Applying the last-in-time doctrine, the Court found that Breard was now procedurally barred from raising the VCCR claim by the terms of the 1996 Act.

13 While the Solicitor General was the counsel of record, David Andrews, the Legal Adviser of the Department of State, cosigned the amicus brief on behalf of the United States. Mr. Andrews had appeared as the U.S. Agent before the ICJ barely a week earlier.

14 Brief for the United States at Amicus Curiae, *Paraguay v. Gilmore* (No. 97-1390), at 27-28. The brief was submitted after the Supreme Court invited the Solicitor General to express the views of the United States on the case.

15 *Breard v. Greene*, 523 U.S. 371 (1998). The Supreme Court also dismissed two other applications: a motion by Paraguay for leave to file a bill of complaint and a petition by Breard for an original writ of *habeas corpus*.

16 523 U.S. at 375.

17 *Id.* at 375-376.

With respect to Paraguay's claim, the Court ruled 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 to set aside a criminal conviction and sentence for violation of consular notification provisions."¹⁸ It also found that the Eleventh Amendment provided a separate basis for denying Paraguay's lawsuit because it precluded the filing of such an action against Virginia. Finally, the Court expressed regret that it had to consider these actions while proceedings were also pending before the International Court of Justice: "Nonetheless, this Court must decide questions presented to it on the basis of law . . . If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him."¹⁹

In a separate statement attached to the *per curiam* ruling, Justice Souter said that "the lack of any reasonably arguable causal connection between the alleged treaty violations and Breard's conviction and sentence disentitle him to relief on any theory offered."²⁰ He expressed doubt as to whether the Vienna Convention was enforceable in any of these proceedings.

In dissent, Justice Stevens expressed concern about Virginia's decision to schedule the execution at such an early date. Under the Court's rules, a petition for writ of *certiorari* seeking review of the Court of Appeals ruling could have been filed as late as 19 May 1998.²¹ By scheduling the execution for April 14, Virginia had significantly reduced the time for argument and consideration established by the Court's standard review procedures: "There is no compelling reason for refusing to follow the procedures that we have adopted for the orderly disposition of noncapital cases. Indeed, the international aspects of this case provide an additional reason for adhering to our established rules and procedures."²² Justice Breyer, also dissenting, argued that the question of procedural default and the relevance of the ICJ proceedings merited more careful deliberation.²³ Justice Ginsburg, dissenting as well, would have granted the stay of execution to consider Breard's petition in accordance with the Court's normal schedule.²⁴

Following the Supreme Court's ruling, the Governor of Virginia issued a statement indicating his refusal to grant Breard's request for clemency, or a reprieve pending an ICJ ruling (see text in Chapter 15). After the Court of Appeals denied several last-minute petitions,²⁵ Breard was executed by lethal injection at the state prison in Jarratt, Virginia.

18 *Id.* at 377.

19 *Id.* at 378.

20 *Id.* at 379.

21 U.S. Supreme Court Rule 13.1 provides that "a petition for a writ of *certiorari* to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment."

22 *Breard*, 523 U.S. at 381 (Stevens, J., dissenting).

23 *Breard*, 523 U.S. at 380-381 (Breyer, J., dissenting).

24 *Breard*, 523 U.S. at 381 (Ginsburg, J., dissenting).

25 Breard sought a writ of *mandamus* directing Attorney General Reno and Secretary of State

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On 9 October 1998, Paraguay submitted its written Memorial to the ICJ, asking it:

- (a) to adjudge and declare that the United States violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, under articles 5 and 36 of the Vienna Convention, by arresting, detaining, trying, convicting, sentencing, and executing Angel Francisco Breard without providing Paraguayan consular officials the opportunity to provide effective assistance;
- (b) to adjudge and declare that the United States violated its international legal obligation under Article 36(2) of the Vienna Convention by applying the municipal-law doctrine of procedural default to bar Angel Francisco Breard from raising his claim under the Vienna Convention and thereby failing to give full effect in United States municipal law to the provisions of Article 36;
- (c) to adjudge and declare that the United States violated its international legal obligation to comply with the Provisional Measures Order issued by this Court on 9 April 1998 by failing to take all measures at its disposal to ensure that Angel Francisco Breard was not executed; and
- (d) to adjudge and declare that the United States violated its international legal obligation not to undertake any action that might prejudice any eventual decision in the case or aggravate the dispute by failing to halt the execution of Angel Francisco Breard; and, in light of the foregoing violations;
- (e) to adjudge and declare that the United States is under an international legal obligation to provide Paraguay with a guarantee that the United States will not repeat its illegal acts, but will carry out in conformity with the foregoing international legal obligations, any future detention of or criminal proceedings against any Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial, or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;
- (f) to adjudge and declare that Paraguay was entitled to *restitutio in integrum* and would have been entitled to the restoration of the *status quo ante* had the United States not executed Mr. Breard;
- (g) to adjudge and declare that in light of the United States' actions rendering it impossible for the Court to provide the remedy of *restitutio in integrum*, Paraguay, in its own right and in the exercise of diplomatic protection of its national, is entitled to payment by the United States, in an amount to be determined by the Court in a subsequent proceeding, of (1) compensation, and (2) moral damages as satisfaction;
- (h) to adjudge and declare that, as a remedy for the United States' breach of the Provisional Measures Order and of its international legal obligation not to undertake any action that might prejudice any eventual decision in the case or aggravate the dispute, the Republic of Paraguay is entitled to payment by the United States, in an amount to

Albright to sue Virginia to seek a stay of execution pending an ICJ decision. *Breard v. Reno*, No. 3: 98-CV-226 (E.D. Va., filed 14 April 1998). Paraguay filed a complaint seeking to enforce the ICJ's ruling. *Paraguay v. Gilmore*, No. 3: 98-CV-227 (E.D. Va., 14 April 1998). Both petitions were denied by the district court and the U.S. Court of Appeals.

be determined by the Court in a subsequent proceeding, of (1) compensation, and (2) moral damages as satisfaction.²⁶

Despite this written submission, Paraguay asked the ICJ, on 2 November 1998, to discontinue its case against the United States. After the United States indicated to the ICJ that it did not oppose the discontinuance, the Court ordered the case removed from its list of active cases.²⁷

LaGrand Case (Germany v. United States of America)

In 1984, two German citizens, Karl and Walter LaGrand were convicted of murder and sentenced to death in Arizona. Throughout their state court proceedings, they were never informed of their right to communicate with German consular officials. In addition, German consular officials were not notified of the detention until 1992. Once the German government was informed of the detention and pending execution, the President and Chancellor as well as the Foreign Minister and Justice Minister made diplomatic interventions to the United States. The German Ambassador and Consul General both appeared before the Mercy Committee of the State of Arizona. Despite these requests, Karl LaGrand was executed on 24 February 1999. The execution of Walter LaGrand was then scheduled for 3 March 1999.

On the evening of 2 March 1999, Germany instituted ICJ proceedings against the United States.²⁸ As a basis for jurisdiction, Germany invoked the VCCR Optional Protocol, which both states had accepted. Germany alleged that the United States failed to notify the LaGrand brothers of their right to consular access as required by VCCR Article 36(1)(b), and had effectively prevented Germany from exercising its right to carry out consular functions. Germany requested reparation, in the form of compensation and satisfaction, for the execution of Karl LaGrand. In the case of Walter LaGrand, it requested the *status quo ante*, namely, that the United States restore the situation that existed before his conviction and sentence.

Given the impending execution of Walter LaGrand, Germany also requested provisional measures. It emphasized the irreparable harm that would occur to its case if Walter LaGrand were executed prior to a ruling on the merits:

Under the grave and exceptional circumstances of this case, and given the paramount interest of Germany in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Germany's national Walter LaGrand and the ability of this Court to order the relief to which Germany is entitled in the case of Walter LaGrand, namely restoration of the *status quo ante*. Without the provisional measures requested, the United States will execute Walter LaGrand – as it did execute his brother

26 Memorial of the Republic of Paraguay, 9 October 1998.

27 1998 ICJ 426 (Order of 10 November 1998).

28 *LaGrand (Germany v. U.S.A.)*, Application Instituting Proceedings, 2 March 1999.

Karl – before this Court can consider the merits of Germany’s claims and Germany will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour.²⁹

Given the immediacy of the situation and the inability to hold hearings on the provisional measures request due to the impending execution, Germany requested that the ICJ exercise its authority under Article 75(1) of the Rules of Court to issue provisional measures *proprio motu*.³⁰

The ICJ Vice-President sent a letter to the United States,³¹ reminding it “of the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects.”³² On the morning of 3 March 1999, the Court met with representatives of the United States and Germany to determine the course of proceedings. The German representative reiterated the urgency of the situation and asked the Court to indicate provisional measures without holding hearings. In contrast, the U.S. representative argued that the case had already been subject to lengthy proceedings in the United States, and that it would be inappropriate for the Court to make an order *proprio motu* because Germany’s request had been filed at such a late date.

On the evening of 3 March 1999, the ICJ announced its decision.³³ It found, *prima facie*, that a dispute existed with respect to the application of the VCCR, and therefore that it was authorized to act under the Optional Protocol. The ICJ then determined that it could proceed *proprio motu*. While it had never previously made use of this power, it noted that the power was available in cases of extreme urgency.³⁴ Finding the matter urgent, the ICJ indicated the following provisional measures:

- (a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;
- (b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.³⁵

29 Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Federal Republic of Germany, 2 March 1999, para. 7.

30 Under Article 75(1) of the Rules of Court, the ICJ “may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.”

31 Under Article 74(4) of the Rules of Court, “the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects.” Because the President of the Court was a U.S. national, Vice-President Weeramantry exercised the functions of the presidency.

32 ICJ, Press Communiqué 99/7 (2 March 1999).

33 *LaGrand (Germany v. U.S.A.)*, 1999 ICJ 9.

34 *Id.*, para. 21.

35 *Id.*, para. 29.

The ICJ indicated that the case did "not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes," and observed that "the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal."³⁶

Judges Oda and Schwebel attached separate declarations to the Order, though neither voted against it. Judge Schwebel, asserting that proceeding *proprio motu* is permissible only if there is no request for provisional measures, was troubled that the Court issued its ruling in this fashion: "But in this case, the Court has had such a request, and it is on the basis of the contents of Germany's accompanying Application that the Court has acted – all without affording the United States a hearing or the opportunity to present written observations."³⁷

Germany then petitioned the U.S. Supreme Court for leave to file a bill of complaint and a motion for preliminary injunction against the United States and the Governor of Arizona, pursuant to the Supreme Court's original jurisdiction. Germany argued that the Supreme Court should enforce the ICJ order and stay the execution.³⁸

In a brief *per curiam* ruling, the U.S. Supreme Court refused to exercise its original jurisdiction. With respect to the action against the United States, the Court found that the United States had not waived its sovereign immunity. In addition, the Court questioned whether Article III, Section 2 of the U.S. Constitution provides a basis for an action to prevent the execution of a German citizen who is not an ambassador or consul.³⁹ With respect to the action against Arizona, the Court found that "a foreign government's ability here to assert a claim against a State is without support in the Vienna Convention and in probable contravention of Eleventh Amendment principles."⁴⁰

In dissent, Justice Breyer, joined by Justice Stevens, suggested that the issues raised by the Court required further briefing, and particularly because "both the International Court of Justice and a sovereign nation have asked that we stay this case."⁴¹

Walter LaGrand was executed later that evening in Arizona's gas chamber.⁴²

36 *Id.*, para. 25.

37 Separate Opinion of President Schwebel, 3 March 1999.

38 In a letter submitted to the Supreme Court, the Solicitor General opposed the action. In his view, the "Vienna Convention does not furnish a basis for this Court to grant a stay of execution," and "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief."

39 Article III, Section 2 of the Constitution provides that "in all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction."

40 *Federal Republic of Germany v. United States*, 526 U.S. 111, 112 (1999).

41 *Id.*

42 In a separate action, the Supreme Court lifted a stay of execution issued by the U.S. Court of Appeals prohibiting Walter LaGrand's execution by lethal gas. *Steinart v. LaGrand*, 526 U.S. 115 (1999).

Two days later, on 5 March 1999, the ICJ fixed time limits for filing memorials in *LaGrand*. Germany submitted its memorial on 16 September 1999, and the United States its counter-memorial on 27 March 2000. Public hearings were held 13 to 17 November 2000.⁴³ At the conclusion of the oral proceedings, Germany made four submissions to the Court:

- (1) that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, subparagraph 1(b), of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36, paragraph 1, of the said Convention;
- (2) that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its international legal obligation to Germany under Article 36, paragraph 2, of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended;
- (3) that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligations to comply with the Order on Provisional Measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject-matter of a dispute while judicial proceedings are pending; and, pursuant to the foregoing international legal obligations,
- (4) that the United States shall provide Germany an assurance that it will not repeat its unlawful acts and that, in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations. In particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36.⁴⁴

These four submissions formed the basis of the Court's subsequent analysis of the case. On 27 June 2001, the Court issued its decision on the merits.⁴⁵ First it rejected challenges to its jurisdiction, affirming the application of the Optional Protocol. It also rejected several challenges to the admissibility of Germany's four submissions.

43 At the request of the State Department, both the Justice Department and the Arizona Attorney General participated in the oral proceedings. In addition, several international law scholars – including Michael Matheson, Theodor Meron, Shabtai Rosenne, and Stefan Trechsel – represented the United States.

44 *LaGrand*, Verbatim Record, ICJ Doc. CR 2000/30, sec. VIII (Nov. 16, 2000). Under Article 60(2) of the Rules of Court, a party must read its final submissions at the conclusion of its last statement made at the hearing.

45 *LaGrand (Germany v. U.S.A.)*, 2001 ICJ 466.

In analyzing Germany's first submission, the Court considered whether the United States had violated VCCR Article 36(1). It noted that Article 36(1) "establishes an interrelated regime designed to facilitate the implementation of the system of consular protection."⁴⁶ If a sending state is unaware that its nationals are detained, it will be unable to exercise its rights under Article 36(1)(a) and (c). It also observed that the United States did not deny that it violated VCCR Article 36(1)(b). The Court found that the Article 36(1)(b) violation had prevented Germany from exercising its rights under Article 36(1)(a) and (c) and that the United States had therefore violated those provisions as well:⁴⁷

It is immaterial . . . whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen.⁴⁸

The Court considered whether a breach of Article 36(1) might constitute a violation of the individual rights of the LaGrand brothers. Reviewing the language of Article 36(1)(b) and (c), the Court found that "the clarity of these provisions, viewed in their context, admits of no doubt," and that "the Court must apply these as they stand."⁴⁹ Based on these provisions, the Court determined that Article 36(1) creates individual rights that the United States had violated. The Court declined to rule, however, on whether the individual right to be informed under Article 36(1) had assumed the character of a human right: "Having found that the United States violated the rights accorded by Article 36, paragraph 1, to the LaGrand brothers, it does not appear necessary . . . to consider the additional argument developed by Germany in this regard."⁵⁰

With respect to Germany's second submission, the ICJ considered whether the United States had violated Article 36(2) through the application of the procedural default rule (on which see Chapter 18). The Court distinguished between the rule and its specific application in the *LaGrand* case: "In itself, the rule does not violate Article 36 of the [Consular Relations] Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence. . . ."⁵¹ In the present case, the procedural default rule prevented the LaGrand brothers from challenging their convictions and sentences on the basis of the VCCR violation. "As a result, although United

46 *Id.*, para. 74.

47 "Although the violation of paragraph 1(b) of Article 36 will not necessarily always result in the breach of the other provisions of this Article, the Court finds that the circumstances of this case compel the opposite conclusion. . . ." *Id.*, para. 73.

48 *Id.*, para. 74.

49 *Id.*, para. 77.

50 *Id.*, para. 78.

51 *Id.*, para. 90.

States courts could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards, the procedural default rule prevented them from attaching any legal significance” to the consequences of the VCCR violation.⁵² By the express terms of VCCR Article 36(2), the application of the procedural default rule prevented “full effect to be given to the purposes for which the rights accorded under this article are intended.”

In its analysis of Germany’s third submission, the ICJ considered both the nature of provisional measures orders as set forth in Article 41 of the ICJ Statute and the implications of the Court’s provisional measures order of 3 March 1999. The Court acknowledged that neither it nor its predecessor, the Permanent Court of International Justice, had determined the legal effect of provisional measures orders issued under Article 41 – the interpretation of which had generated extensive controversy in the legal literature. The Court noted a discrepancy between the French and English texts of Article 41. While the French text suggested that provisional measures were mandatory, the English text implied that they were not.⁵³ To reconcile the texts, the Court “considered the object and purpose of the [ICJ] Statute together with the context of Article 41.”⁵⁴ The Statute was designed to allow the Court to fulfill its function of judicial settlement of international disputes through the adoption of binding decisions. In turn, Article 41 allows the Court to exercise its function of judicial settlement by allowing it to preserve the rights of the parties during the pendency of the litigation:

It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court.⁵⁵

The Court found that its conclusion was supported by the long-recognized

⁵² *Id.*, para. 91.

⁵³ The English text of Article 41 provides:

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

The French text of Article 41 provides:

1. *La Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.*
2. *En attendant l'arrêt définitif, l'indication de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.*

⁵⁴ *LaGrand*, para. 101. Under VCLT Article 33(4), “when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”

⁵⁵ *LaGrand*, para. 102.

principle that parties before the Court must abstain from any measure that would aggravate a dispute or prejudice the execution of a decision.⁵⁶ The Court also found that the preparatory work of Article 41 supported its conclusion, although it indicated such review was unnecessary in light of the analysis it had presented.

The Court then examined its provisional measures order of 3 March 1999. Inasmuch as the order was adopted pursuant to Article 41, it "was consequently binding in character and created a legal obligation for the United States."⁵⁷ The Court noted that the order indicated two provisional measures. First, it required the United States to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision in the proceedings. Second, it required the United States to transmit the order to the governor of Arizona. In reviewing U.S. compliance with the order, the Court found that the United States limited its actions to transmitting the order to the governor. While this action met the requirements of the second requested measure, it fell short of complying with the first such measure. The Court recognized that the first measure did not create an obligation to achieve a result and that there was little time for the United States to act in response:

The Court observes, nevertheless, that the mere transmission of its Order to the Governor of Arizona without any comment, particularly without even so much as a plea for a temporary stay and an explanation that there is no general agreement on the position of the United States that orders of the International Court of Justice on provisional measures are non-binding, was certainly less than could have been done even in the short time available.⁵⁸

The ICJ found it significant that the Solicitor General had informed the U.S. Supreme Court that provisional measures are not binding, and had maintained that such measures provide no basis for judicial relief in the United States.⁵⁹ The Court also found it noteworthy that the U.S. Supreme Court had rejected Germany's application despite the urgings of several justices to grant a stay. Even the Governor of Arizona refused to give effect to the order despite the recommendation by the Arizona Clemency Board for a stay of execution: "The review of the above steps taken by the authorities of the United States with regard to the Order . . . indicates that the various competent United States authorities failed to take all the steps they could have taken to give effect to the Court's Order."⁶⁰

With respect to Germany's fourth submission, the Court considered Germany's request for it to adjudge and declare that the United States provide assurances – particularly in death penalty cases – that it will not repeat its unlawful acts and

56 *Id.*, para. 103 (quoting *Electricity Co. of Sofia and Bulgaria*, Order, 1939 PCIJ (Ser. A/B) No. 79, at 199).

57 *Id.*, para. 110.

58 *Id.*, para. 112.

59 The Court noted that the advice of the Solicitor General in *Breard v. Greene*, 523 U.S. 371 (1998), was more nuanced on this issue and had indicated, in fact, that the matter was unresolved. *See Agona: Breard*, 92 AJIL 666 (1998).

60 *LaGrand*, para. 115.

that it will ensure the effective exercise of the rights set forth in the VCCR. Although the United States had acknowledged its breach of the VCCR and apologized to Germany, the Court determined that the apology was insufficient and would not be sufficient in other cases where foreign nationals were not advised of their rights under the VCCR and were then subjected to prolonged detention or sentenced to severe penalties. The Court did consider, however, "that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1(b), must be regarded as meeting Germany's request for a general assurance of non-repetition."⁶¹ In this respect, the Court acknowledged the evidence presented by the United States that it was carrying out a comprehensive program to inform state and federal agencies of their obligations under VCCR Article 36. "If a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regards."⁶² Although the United States could not guarantee that there would be no future violations of the VCCR, the Court recognized that no country could give such a guarantee and that Germany had not requested such a guarantee.

If, however, the United States failed to provide advice about consular access to German nationals who were then subjected to prolonged detention or were convicted and sentenced to severe penalties, "It would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention."⁶³ Because this obligation could be fulfilled in various ways, the choice of means was left to the United States.

Avena and Other Mexican Nationals (Mexico v. U.S.A.)

For decades, Mexico has provided consular assistance to its nationals traveling or living in the United States. As it explained to the ICJ in 2003, Mexico and the United States in 1942 entered into a bilateral consular agreement "because of their geographic proximity and the frequent interstate travel of their respective citizens."⁶⁴ Similar agreements were entered with other states. In 1965, Mexico

61 *Id.*, para. 124.

62 *Id.*

63 *Id.*, para. 125. While the Court did not address the position of nationals of other countries or that of individuals sentenced to penalties that are not of a severe nature, President Guillaume indicated in a separate declaration that "there can be no question of applying an *a contrario* interpretation to this paragraph." *Id.*, Declaration of Guillaume, J. Judge Koroma echoed these concerns, indicating that "everyone, irrespective of nationality, is entitled to the benefit of fundamental judicial guarantees." *Id.*, Sep. Op. Koroma, J., para. 8.

64 *Avena and Other Mexican Nationals (Mexico v. U.S.A.)*, Application Instituting Proceedings, 9 January 2003, para. 20.

ratified the VCCR to supplement its bilateral consular agreements and to provide additional protection to Mexican nationals traveling abroad. In 1986, Mexico developed the Program of Legal Consultation and Defense for Mexicans Abroad to improve the work of its consular officials in representing the interests of Mexican nationals, particularly in legal proceedings.⁶⁵ In 2000, Mexico established the Mexican Capital Legal Assistance Program in the United States, which at the time was "the sole capital [crimes] legal assistance programme established by a foreign Government in the United States."⁶⁶ The program works with consular officials and defense counsel in the United States to promote awareness and compliance with international norms, including the VCCR. Through the program, Mexico had intervened to protect the rights of Mexican nationals in approximately 110 capital cases.⁶⁷ In some of these cases, Mexican representatives assisted defense counsel in obtaining evidence or presenting arguments to the courts. In others, Mexico submitted diplomatic protests or requests for clemency to state and federal officials. Mexico said that its efforts to assist nationals were often ineffective, because U.S. authorities "have neglected to inform Mexican nationals of their consular rights."⁶⁸

On 9 January 2003, Mexico instituted proceedings against the United States in the ICJ. Its application based jurisdiction on the Optional Protocol, which both countries had accepted.⁶⁹

Mexico alleged that fifty-four Mexican nationals had been "arrested, detained, tried, convicted, and sentenced to death" in proceedings in which the competent authorities failed to comply with VCCR obligations.⁷⁰ These violations "prevented Mexico from exercising its rights and performing its consular functions pursuant to Articles 5 and 36 . . . of the Vienna Convention."⁷¹ As a result, Mexico "had suffered injuries in its own right and in the form of injuries to its nationals."⁷²

Accordingly, Mexico asked the Court to adjudge and declare, *inter alia*, that the United States violated its international legal obligations to Mexico under the VCCR. It requested the following remedies:

- (1) the United States must restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States international legal obligations;

65 *Id.*, para. 22.

66 *Id.*, para. 25.

67 *Id.*, para. 26.

68 *Id.*, para. 27.

69 Mexico acceded to the Optional Protocol on 5 March 2002.

70 *Arena*, Application, para. 1.

71 *Id.*, para. 2. (VCCR Article 5 lists "consular functions." VCCR Article 36 addresses the sending state's entitlements regarding communication and contact with its nationals.)

72 *Id.*, para. 2.

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- (2) the United States must take the steps necessary and sufficient to ensure that the provisions of its municipal law enable full effect to be given to the purposes for which the rights afforded by Article 36 are intended;
- (3) the United States must take the steps necessary and sufficient to establish a meaningful remedy at law for violations of the rights afforded to Mexico and its nationals by Article 36 of the Vienna Convention, including by barring the imposition, as a matter of municipal law, of any procedural penalty for the failure timely to raise a claim or defence based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention; and
- (4) the United States, in light of the pattern and practice of violations set forth in this Application, must provide Mexico a full guarantee of the non-repetition of the illegal acts.⁷³

In a separate request for provisional measures, Mexico emphasized that three of its nationals – Cesar Roberto Fierro Reyna, Roberto Moreno Ramos, and Osvaldo Torres Aguilera – faced possible execution in the ensuing six months, and that others could face early execution. Thus, Mexico sought to ensure that no Mexican national would be executed before the Court ruled on its claims:

Unless the Court indicates provisional measures directing the United States to halt any executions of Mexican nationals until this Court's decision on the merits of Mexico's claims, the executive officials of constituent states of the United States will execute Messrs. Fierro, Moreno Ramos, Torres, or other Mexican nationals on death row before the Court has had the opportunity to consider those claims.⁷⁴

At public hearings held on 21 January 2003, Mexico argued that the *LaGrand* judgment had not increased the likelihood that its nationals would receive stays of execution based on VCCR violations.⁷⁵ In response, the United States argued that none of the individuals named by Mexico were scheduled for execution. Moreover, it said that the clemency power provided a sufficient mechanism for review and reconsideration of any VCCR violation, thereby complying with the Court's ruling in *LaGrand*.⁷⁶ It argued that approval of Mexico's request "would

⁷³ *Id.*, para. 281.

⁷⁴ Request for the Indication of Provisional Measures of Protection Submitted by the Government of the United Mexican States, 5 February 2003. On 20 January 2003, Mexico had withdrawn its request for provisional measures in regard to three of the 54 Mexican nationals because their death sentences had been commuted.

⁷⁵ *Arena*, Verbatim Record, ICJ Doc. CR 2003/1, paras. 51–83, 21 January 2003 (statement of Sandra Babcock). At the public hearings, Mexico was represented by Juan Manuel Gomez Robledo, Santiago Onate, Alberto Szekely, Sandra Babcock, and Donald Donovan. The United States was represented by William H. Taft IV, Stephen Mathias, Catherine Brown, James Thessin, Elihu Lauterpacht, and Daniel Collins.

⁷⁶ *Arena*, Verbatim Record, ICJ Doc. CR 2003/2, para. 3.10, 21 January 2003 (statement of Catherine Brown).

constitute a wholly unprecedented and unwarranted interference with the sovereign rights of the United States."⁷⁷

On 5 February 2003, the Court ruled on Mexico's request for provisional measures. It first found that, since both Mexico and the United States were parties to the VCCR and the Optional Protocol, it had, at least *prima facie*, "jurisdiction under Article I of the aforesaid Optional Protocol."⁷⁸

The Court then considered whether a dispute existed between Mexico and the United States concerning the VCCR, thereby implicating the Optional Protocol. At the public hearings, the United States acknowledged that Mexican nationals were prosecuted and sentenced without being informed of their VCCR rights. The United States argued, however, that the *LaGrand* decisions allowed such violations to be reviewed and reconsidered through executive clemency. In contrast, Mexico argued that executive clemency was insufficient and did not comply with the obligations set forth in *LaGrand*. Based on these differences, the Court determined that there was, in fact, "a dispute between the Parties concerning the rights of Mexico and of its nationals regarding the remedies that must be provided in the event of a failure by the United States to comply with its obligations under Article 36, paragraph 1, of the Vienna Convention."⁷⁹ The Court added, however, that the dispute could not be settled at this preliminary stage of the proceedings and must await the proceedings on the merits.

On the need for provisional measures in the case, the Court reiterated its earlier jurisprudence from *Breard* and *LaGrand*, which provided that the Court may grant provisional measures in order to preserve "the rights which may subsequently be adjudged by the Court."⁸⁰ Such measures are justified only "if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given."⁸¹

While Mexico sought an order that would ensure that *no* Mexican national was executed and that no execution date was set, the Court declined to accept such a broad request. The Court noted that its jurisdiction was limited to an actual dispute between Mexico and the United States concerning the interpretation and application of the VCCR with regard to the fifty-four individuals named in the application. Accordingly, the Court could not rule on the rights of other Mexican nationals who were not alleged to have been victims of a violation. In contrast, the Court found it could proceed to consider provisional measures with respect to the fifty-four named individuals. It did so even though no execution dates had been set in any of their cases. The Court found that the absence of execution dates should not preclude it from considering whether to indicate provisional measures

77 *Id.*, para. 2.9 (statement of Stephen Mathias).

78 *Arena and Other Mexican Nationals (Mexico v. U.S.A.)*, 2003 ICJ 77, para. 42. Judge Oda filed a separate declaration. While he voted in favor of the Order, he expressed his doubts that there was a dispute arising out of the interpretation or application of the VCCR.

79 *Id.*, para. 46.

80 *Id.*, para. 48.

81 *Id.*, para. 50.

in light of the “rules and time-limits governing the granting of clemency and the fixing of execution dates” in the United States.⁸²

Of the Mexican nationals identified in the request for provisional measures, the Court found that three faced the risk of execution in the coming weeks or months. Such executions, it said, “would cause irreparable prejudice to any rights that may subsequently be adjudged by the Court to belong to Mexico.”⁸³ Accordingly, the Court indicated provisional measures with respect to those three individuals:

- (a) The United States of America shall take all measures necessary to ensure that Mr. Cesar Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;
- (b) The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.⁸⁴

As to the other fifty-one named individuals, who did not face the same risk of imminent execution, the Court declined to indicate provisional measures, but reserved the right to do so if it became necessary. The Court set a time frame for filing memorials and scheduled public hearings for December 2003. At these hearings, Mexico submitted:

- (1) That the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row described in Mexico’s Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) (b) of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals’ right to receive such protection as Mexico would provide under Article 36 (1) (a) and (c) of the Convention;
- (2) 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 take any action potentially detrimental to the foreign national’s rights;
- (3) That the United States of America violated its obligations under Article 36 (2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36 (1); by substituting for such review and reconsideration clemency proceedings; and by applying the “procedural default” doctrine and other municipal law doctrines that fail to attach legal significance to an Article 36 (1) violation on its own terms;
- (4) That pursuant to the injuries suffered by Mexico in its own right and in the exercise of diplomatic protection of its nationals, Mexico is entitled to full reparation for those injuries in the form of *restitutio in integrum*;

⁸² *Id.*, para. 54.

⁸³ *Id.*, para. 55.

⁸⁴ *Id.*, para. 59. The Court added that it would seek to reach a final judgment “with all possible expedition.” *Id.*, para. 57.

- (5) That this restitution consists of the obligation to restore the *status quo ante* by annulling or otherwise depriving of full force or effect the convictions and sentences of all 52 Mexican nationals;
- (6) That this restitution also includes the obligation to take all measures necessary to ensure that a prior violation of Article 36 shall not affect the subsequent proceedings;
- (7) That to the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the 52 nationals, and that this obligation cannot be satisfied by means of clemency proceedings or if any municipal law rule or doctrine inconsistent with paragraph (3) above is applied; and
- (8) That the United States of America shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals and shall provide appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36 (1) and to ensure compliance with Article 36 (2).

In response, the United States submitted:

On the basis of the facts and arguments made by the United States in its Counter-Memorial and in these proceedings, the Government of the United States of America requests that the Court, taking into account that the United States has conformed its conduct to this Court's Judgment in the *LaGrand Case (Germany v. United States of America)*, not only with respect to German nationals but, consistent with the Declaration of the President of the Court in that case, to all detained foreign nationals, adjudge and declare that the claims of the United Mexican States are dismissed.

On 31 March 2004, the Court issued its judgment on the merits. It first dismissed the jurisdictional and admissibility challenges raised by the United States. It found that exhaustion of local remedies within the United States was not necessary because Mexico was requesting the Court to rule on the violation of rights that it claimed to have suffered both directly and through the violation of individual rights conferred on Mexican nationals. In addition, the Court held that Mexico had not waived its right to bring the case before the ICJ, even if it had delayed in doing so: "[O]nly a much more prolonged and consistent inaction on the part of Mexico . . . might be interpreted as implying such a waiver."⁸⁵ The Court rejected the U.S. claim that Mexico's own alleged failure to comply with the VCCR precluded its suit, saying that the VCCR was designed to facilitate consular practice and promote friendly relations among member states: "Even if it were shown, therefore, that Mexico's practice as regards the application of Article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico's claim."⁸⁶

Having resolved the jurisdictional and admissibility challenges, the Court then considered the merits of Mexico's claim. VCCR Article 36(1)(b) requires a state to act "without delay" in notifying foreign nationals of their rights under the VCCR.

⁸⁵ *Avena and Other Mexican Nationals (Mexico v. U.S.A.)*, 2004 ICJ 12, para. 44.

⁸⁶ *Id.*, para. 47.

It also requires consular communications to be forwarded to foreign nationals without delay. However, the term "without delay" is not defined in the treaty. Accordingly, the Court indicated that it must be interpreted according to the customary rules of treaty interpretation as reflected in the VCLT.⁸⁷ After considering the object and purpose of the VCCR and its *travaux préparatoires*, the Court concluded that "without delay" does not necessarily mean "immediately upon arrest." Rather, it means "as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national."⁸⁸ The Court also suggested that notification could be provided concurrently with notification of other rights:

The provision of such information could parallel the reading of those rights of which any person taken into custody in connection with a criminal offence must be informed prior to interrogation by virtue of what in the United States is known as the "Miranda rule"; these rights include, *inter alia*, the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed at government expense if the person cannot afford one. The Court notes that, according to the United States, such a practice in respect of the Vienna Convention rights is already being followed in some local jurisdictions.⁸⁹

For these reasons, the Court held that the United States breached its obligations by failing to inform, without delay, 51 Mexican nationals of their rights under VCCR Article 36(1)(b).⁹⁰ It also found the United States breached its obligations by failing to notify, without delay, the appropriate Mexican consular post of the detention of 49 Mexican nationals, thereby depriving Mexico of the right to render them assistance.⁹¹

The Court said that VCCR Article 36(1)(c) requires a receiving state to allow sending-state consular officials to have access to their nationals and to visit them in detention in a timely fashion. This obligation extends to providing consular officials with the right to render assistance in a timely fashion, including allowing them to arrange for legal representation:

Mexico has laid much emphasis in this litigation upon the importance of consular officers being able to arrange for such representation before and during trial, and especially at sentencing, in cases in which a severe penalty may be imposed. Mexico has further indicated the importance of any financial or other assistance that consular officers may provide

87 *Id.*, para. 83.

88 *Id.*, para. 88.

89 *Id.*, para. 64.

90 *Id.*, para. 106(1). Mexico originally identified 54 Mexican nationals but withdrew its claim for relief for two, after it was determined that one held dual Mexican-U.S. nationality and another had been informed about consular access. *Id.*, para. 7. Subsequently, it was determined that an additional Mexican national listed in Mexico's Application was also a U.S. citizen. *Id.*, para. 66.

91 *Id.*, para. 106(2). The Court found that the United States complied with the Article 36(1)(b) obligation in two out of the 51 cases.

to defence counsel, *inter alia* for investigation of the defendant's family background and mental condition, when such information is relevant to the case. The Court observes that the exercise of the rights of the sending State under Article 36, paragraph 1 (c), depends upon notification by the authorities of the receiving State. It may be, however, that information drawn to the attention of the sending State by other means may still enable its consular officers to assist in arranging legal representation for its national.⁹²

On this issue, the Court held that the United States breached its obligations under VCCR Article 36(1)(a) and (c) by depriving Mexico of the right to communicate with, and have access to, 49 Mexican nationals in a timely fashion.⁹³ It also held that the United States breached its obligations under VCCR Article 36(1)(c) by depriving Mexico of the right to arrange for legal representation of 34 Mexican nationals in a timely fashion.⁹⁴

The Court addressed Mexico's argument that procedural default was used in the United States to foreclose remedies for VCCR violations.⁹⁵ VCCR Article 36(2) provides that the laws and regulations of the receiving state must allow full effect to be given to the rights set forth in VCCR Article 36(1). Echoing its analysis in *LaGrand*, the Court indicated that the procedural default rule often prevents courts from attaching legal significance to violations of VCCR Article 36: "In such cases, application of the procedural default rule would have the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violate paragraph 2 of Article 36."⁹⁶ On this issue, therefore, the Court held that the United States breached its obligations under VCCR Article 36(2) by not permitting review and reconsideration, in light of the rights set forth in the VCCR, of the convictions and sentences of the three Mexican nationals then awaiting execution.⁹⁷

Thus, the Court found that the United States had breached its obligations under the VCCR in the following manner:

- (1) by failing to inform, without delay, 51 Mexican nationals of their rights under the Vienna Convention;
- (2) by failing to notify, without delay, the appropriate Mexican consular post of the detention of 49 Mexican nationals, thereby depriving Mexico of the right to render assistance to its nationals;
- (3) by depriving Mexico of the right to communicate with, and have access to, 49 Mexican nationals in a timely fashion;

92 *Id.*, para. 104.

93 *Id.*, para. 106(3).

94 *Id.*, para. 106(4).

95 *Id.*, para. 111.

96 *Id.*, para. 113.

97 In most of the cases brought by Mexico, there remained the possibility of judicial review. Thus, the Court considered it premature to conclude that the United States had violated VCCR Article 36(2) in these cases. In contrast, there were three cases where the conviction and sentence of the Mexican national had become final and where judicial review was no longer available. Thus, the Court found the United States in violation of VCCR Article 36(2) in these three cases.

- (4) by depriving Mexico of the right to arrange for legal representation of 34 Mexican nationals in a timely fashion; and
- (5) by not permitting the review and reconsideration, in light of the rights set forth in the Vienna Convention, of the convictions and sentences of three Mexican nationals currently awaiting execution.

To remedy these violations, the Court said that the United States must provide “by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals.”⁹⁸ In order to satisfy the Court’s judgment, such review and reconsideration must take into account the rights set forth in Article 36 as well as the relevant portions of the Court’s opinion on this issue. The Court indicated that review and reconsideration must be effective and must provide “a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.”⁹⁹ Thus, the procedural default rule cannot be used to preclude a defendant from raising a VCCR violation. In addition, the Court stated that review and reconsideration must occur “with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.”¹⁰⁰ Thus, the Court declined Mexico’s request to find that a VCCR violation must automatically result in the partial or total annulment of conviction or sentence.

The Court also averred that it was not determining the correctness of any conviction or sentence issued by a U.S. court:

The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.¹⁰¹

Finally, the Court indicated that such review and reconsideration must apply to both the conviction and sentence. It must also take place within the judicial process and not through the clemency process: “[T]he clemency process as currently practiced within the United States criminal justice system . . . is not sufficient in itself to serve as an appropriate means of ‘review and reconsideration.’”¹⁰²

⁹⁸ *Id.*, para. 153(9).

⁹⁹ *Id.*, para. 139.

¹⁰⁰ *Id.*, para. 121.

¹⁰¹ *Id.*, para. 122.

¹⁰² *Id.*, para. 143.

The Court also focused on prospective relief. First, the Court acknowledged the considerable efforts of the United States to ensure, in good faith, that law enforcement authorities complied with the VCCR. These efforts included extensive outreach efforts by the U.S. State Department to inform state and local law enforcement officials about the VCCR and its attendant obligations. Thus, the Court found that the U.S. commitment to ensure implementation of specific measures in performance of its obligations under Article 36 constituted a sufficient guarantee and assurance of non-repetition. Second, the Court held that any failure of the United States to inform Mexican nationals of their right to contact their consulate in future cases where Mexican nationals are sentenced to severe penalties would raise a new set of obligations. In these cases, the United States "shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention. . . ." ¹⁰³ Finally, the Court indicated that its analysis of the VCCR should not be limited to Mexican nationals: "[T]he fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States." ¹⁰⁴

One member of the Court, Judge Parra-Aranguren, disagreed with the Court's assessment in regard to U.S. violations. In a separate opinion, ¹⁰⁵ he said that Mexico had failed to establish the Mexican nationality of the individuals listed in its Application:

[U]nless I were to rely on extralegal considerations, as the Judgment itself does, I had no alternative but to conclude that the claims presented by Mexico against the United States cannot be upheld since the Mexican nationality of the 52 persons concerned was not demonstrated and this is, in the present case, a necessary condition for the application of Article 36 of the Vienna Convention and for Mexico's exercise of its right to diplomatic protection of its nationals. ¹⁰⁶

Judge Parra-Aranguren also considered that the exhaustion of local remedies requirement applied. Thus, the Court should have examined each case to determine whether local remedies had been exhausted: "If that was not [the] case, the claims presented by Mexico in the exercise of diplomatic protection of its nationals were to be dismissed, unless covered by any of the customarily accepted exceptions to the local remedies rule. . . ." ¹⁰⁷

103 *Id.*, para. 153(11).

104 *Id.*, para. 151.

105 Separate opinions were also filed by Judges Tomka and Vereshchetin as well as Judge ad hoc Sepúlveda. Declarations were filed by Judges Shi and Ranjeva.

106 *Arena and Other Mexican Nationals (Mexico v. U.S.A.)*, Separate Opinion of Parra-Aranguren, J., para. 11.

107 *Id.*, para. 28.

Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.A.) (Mexico v. U.S.A.)

On 4 June 2008, Mexico instituted new proceedings against the United States in the ICJ, seeking an interpretation of the *Avena* judgment.¹⁰⁸ Under Article 60 of the ICJ Statute, the ICJ may interpret a judgment if the parties disagree about its meaning. Mexico asserted that the review and reconsideration obligation mandated by the *Avena* judgment had been repeatedly denied by the United States. It cited the U.S. Supreme Court decision of *Medellin v. Texas* as proof, where the Supreme Court held that the U.S. federal government could not compel the State of Texas to comply with the *Avena* judgment. As a result, Medellin, and four other Mexican nationals on death row in Texas, would be scheduled for execution without having received the review and reconsideration mandated by *Avena*.

In its application, Mexico argued that the *Avena* judgment imposed an “obligation of result,” namely, that the United States was obligated to bring about the “result” of a “review and reconsideration” before Medellin could be executed:

Mexico understands the operative language of paragraph 153(9) of the *Avena* Judgment to establish an obligation of result incumbent upon the United States. While the United States may use “means of its own choosing,” the obligation to provide review and reconsideration is not contingent on the success of any one means. Mexico understands that in the absence of full compliance with the obligation to provide review and reconsideration, the United States must be considered to be in breach. By its actions thus far, by contrast, it is clear that the United States understands the Judgment to constitute merely an obligation of means. Further, Texas, a constituent state of the United States, does not recognize that the obligation to comply subjects its own law to that of binding international law.¹⁰⁹

Accordingly, Mexico requested a ruling from the ICJ regarding the interpretation of the *Avena* judgment:

The Government of Mexico asks the Court to adjudge and declare that the obligation incumbent upon the United States under paragraph 153(9) of the *Avena* Judgment constitutes an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide “review and reconsideration of the convictions and sentences” but leaving it the “means of its own choosing;” and that, pursuant to the foregoing obligation of result,

- (1) the United States must take any and all steps necessary to provide the reparation of review and reconsideration mandated by the *Avena* Judgment; and
- (2) the United States must take any and all steps necessary to ensure that no Mexican national entitled to review and reconsideration under the *Avena* Judgment is executed

¹⁰⁸ *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.A.)*, Application of 5 June 2008.

¹⁰⁹ *Id.*, para. 5.

unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation.¹¹⁰

Mexico also asked the ICJ to issue a provisional measures order against the execution of Medellín pending the resolution of its request for interpretation. Mexico asserted that provisional measures “are clearly justified in order both to protect Mexico’s paramount interest in the life of its nationals and to ensure the Court’s ability to order the relief Mexico seeks.”¹¹¹ Accordingly, Mexico requested the following measures:

- a. That the Government of the United States take all measures necessary to ensure that José Ernesto Medellín, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending the conclusion of the proceedings instituted this day;
- b. That the Government of the United States inform the Court of all measures taken in implementation of subparagraph (a); and
- c. That the Government of the United States ensure that no action is taken that might prejudice the rights of Mexico or its nationals with respect to any interpretation this Court may render with respect to paragraph 153(9) of its *Avena* judgment.¹¹²

In light of the immediacy of the threat faced by Mexican nationals on death row in Texas, Mexico requested the Court to schedule a hearing on the provisional measures request as soon as possible. The hearings took place at The Hague on June 19–20, 2008.

On 16 July 2008, the ICJ issued a provisional measures order, stating that the United States must take all measures necessary to ensure that five Mexican nationals on death row in the United States, including José Medellín, not be executed while Mexico’s request for interpretation was pending before the Court.¹¹³ The Court noted that the execution of a national whose rights are in question would render it impossible for the Court to order the requested relief:

Whereas it is apparent from the information before the Court in this case that Mr. José Ernesto Medellín Rojas, a Mexican national, will face execution on 5 August 2008 and other Mexican nationals, Messrs. César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos, are at risk of execution in the coming months; whereas their execution would cause irreparable prejudice to any rights, the interpretation of the meaning and scope of which is in question; and whereas it could be that the said Mexican nationals will be executed before this Court has delivered its judgment on the Request for interpretation and therefore there undoubtedly is urgency;¹¹⁴

110 *Id.*, para. 59.

111 *Id.*, para. 13.

112 *Id.*, para. 15.

113 *Request for Interpretation*, Order of 18 July 2008. Judges Buergenthal, Owada, Tomka, Keith, and Skotnikov filed dissenting opinions.

114 *Id.*, para. 73.

In this situation, therefore, a provisional measures order was necessary to preserve Mexico's rights:

The United States of America shall take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending judgment on the Request for interpretation submitted by the United Mexican States, unless and until these five Mexican nationals receive review and reconsideration consistent with paragraphs 138 to 141 of the Court's Judgment delivered on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*.¹¹⁵

Following the ICJ's issuance of its provisional measures order, legislators in both the U.S. Congress and the State of Texas indicated they would press for legislation calling for implementation of the *Avena* judgment. These efforts were unsuccessful. Medellín sought a stay of execution in the U.S. Supreme Court on the day of his scheduled execution. He argued that the legislation might be adopted, thereby preventing his execution. After ordering Texas to await its ruling, the U.S. Supreme Court heard oral argument. By a vote of 5 to 4, the Court rejected Medellín's request for a stay.¹¹⁶ Medellín was executed immediately following the Court's decision.

Written submissions were presented to the ICJ by Mexico and the United States. The U.S. submission challenged the Court's jurisdiction on the grounds that there was no dispute over the *Avena* judgment:

Nevertheless, should the Court decide to engage the dispute on the merits, the United States requests that the Court interpret the Judgment as Mexico has requested – that is, as follows:

[T]he obligation incumbent upon the United States under paragraph 153(9) of the *Avena* Judgment constitutes an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide "review and reconsideration of the convictions and sentences" but leaving it the "means of its own choosing." [Citation omitted.]

Consistent with this interpretation, it is the United States' understanding that the *Avena* Judgment requires it to take measures to provide the review and reconsideration mandated by the Judgment, and to ensure that, with respect to any individual included in the Judgment, no sentence is carried out unless and until that individual has received such review and reconsideration.¹¹⁷

In its written observations, Mexico asserted a new claim based on the failure of

¹¹⁵ *Id.*, para. 80(a).

¹¹⁶ *Medellín v. Texas*, 129 S. Ct. 360 (2008).

¹¹⁷ *Request for Interpretation*, Written Observations of the United States of America on the Application for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and other Mexican Nationals*, 29 August 2008, para. 62.

the United States to comply with the ICJ's provisional measures in the case of Jose Medellin. Accordingly, Mexico requested the following relief:

- (a) That the correct interpretation of the obligation incumbent upon the United States under paragraph 153(9) of the *Avena* Judgment is that it is an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide "review and reconsideration of the convictions and sentences;" and that, pursuant to the interpretation of the foregoing obligation of result,
 - (1) the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, must take all measures necessary to provide the reparation of review and reconsideration mandated by the *Avena* Judgment in paragraph 153(9); and
 - (2) the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, must take all measures necessary to ensure that no Mexican national entitled to review and reconsideration under the *Avena* Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation;
- (b) That the United States breached the Court's Order of 16 July 2008 and the *Avena* Judgment by executing José Ernesto Medellín Rojas without having provided him review and reconsideration consistent with the terms of the *Avena* Judgment; and
- (c) That the United States is required to guarantee that no other Mexican national entitled to review and reconsideration under the *Avena* Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation.¹¹⁸

The United States submitted further written observations, reasserting that there was no dispute between the United States and Mexico regarding the *Avena* judgment:

Mexico claims there is such a dispute, but in its written observations, it does not cite a *single* instance in which the United States has contested Mexico's interpretation of *Avena*. Nor could it: it has been the consistent position of the U.S. government – stated in this Court and elsewhere – that *Avena* obligates the United States to provide review and reconsideration of the convictions and sentences of the individuals included in *Avena*.¹¹⁹

On 19 January 2009, the ICJ issued its decision on the merits of the case.¹²⁰ As a

¹¹⁸ *Request for Interpretation*, Submission of Mexico in Response to the Written Observations of the United States of America, 17 September 2008, para. 86.

¹¹⁹ *Request for Interpretation*, Further Written Observations of the United States of America on the Application for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena* and other Mexican Nationals, 6 October 2008, para. 1.

¹²⁰ *Request for Interpretation*, Judgment of 19 January 2009. Judges Koroma and Abraham filed declarations. Judge Sepúlveda-Amor filed a dissent.

preliminary matter, the Court ruled that the United States had breached its obligations under the July 18, 2008 provisional measures order with respect to Jose Medellin because Medellin was not afforded the review and reconsideration provided for by the *Avena* judgment:

Mr. Medellin was executed in the State of Texas on 5 August 2008 after having unsuccessfully filed an application for a writ of *habeas corpus* and applications for stay of execution and after having been refused a stay of execution through the clemency process. Mr. Medellin was executed without being afforded the review and reconsideration provided for by paragraphs 138 to 141 of the *Avena* Judgment, contrary to what was directed by the Court in its Order indicating provisional measures of 16 July 2008.¹²¹

The Court reiterated its position, as stated in the *LaGrand* case, that its provisional measures orders are binding. Moreover, the Court reaffirmed “the continuing binding character of the obligations of the United States of America under paragraph 153(9) of the *Avena* judgment and *takes note* of the undertakings given by the United States of America in these proceedings; . . .”¹²²

Despite these findings, the ICJ declined to interpret *Avena*. The *Avena* judgment, it said, did not specify how compliance was to be achieved within the legal system of the United States. Without directly saying whether there was a dispute between the United States and Mexico, the ICJ indicated that the United States might have used a variety of routes to comply with paragraph 153(9) of the *Avena* judgment:

The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153 (9). The obligation laid down in that paragraph is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law. Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law. In short, the question is not decided in the Court’s original Judgment and thus cannot be submitted to it for interpretation under Article 60 of the Statute . . .¹²³

Finally, the ICJ declined to order the United States to provide guarantees of non-repetition. It found it sufficient, however, “to reiterate that its *Avena* Judgment remains binding and that the United States continues to be under an obligation fully to implement it.”¹²⁴

121 *Id.*, para. 52.

122 *Id.*, para. 61(3).

123 *Id.*, para. 44.

124 *Id.*, para. 60.

27 Proceedings in the Inter-American human rights system

Both the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court of Human Rights (Inter-American Court) have addressed consular notification and access. These two bodies are organs of the Organization of American States, the inter-state organization of the Western Hemisphere. The Inter-American Court, based in San Jose, Costa Rica, hears cases filed by one OAS state against another. It has the power as well to issue advisory opinions at the request of an OAS member state. The Inter-American Commission, based in Washington DC, U.S.A., receives and decides upon complaints of rights violations filed against OAS member states on behalf of individuals. These two organs stand in no hierarchical relationship to the ICJ, or to any other organ of the United Nations. The OAS and UN are independent of each other.

Inter-American Court of Human Rights

On 9 December 1997, Mexico submitted a request for an advisory opinion to the Inter-American Court of Human Rights. Article 64(1) of the American Convention on Human Rights (American Convention) authorizes OAS member states to consult the Inter-American Court regarding the interpretation of the American Convention "or of other treaties concerning the protection of human rights in the American states."¹ Mexico asked whether human rights are violated if a foreign national who was not informed about consular access is sentenced to death. In this regard, it requested interpretation of the VCCR, the International Covenant on Civil and Political Rights, the OAS Charter, the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights.

Pursuant to its rules, the Inter-American Court transmitted Mexico's request to all OAS members, as well as to the Inter-American Commission on Human Rights (Inter-American Commission).² On 30 April 1998, the Inter-American Commission submitted written observations. The Commission said that the

1 American Convention on Human Rights, 22 November 1969, 1144 UNTS 123.

2 Rules of Procedure of the Inter-American Court of Human Rights, 1 January 1997, art. 62(1).

VCCR is a human rights treaty for purposes of American Convention Article 64(1). VCCR Article 36, it said, protects the individual rights of foreign nationals by ensuring equality of treatment during criminal proceedings. In death penalty cases, the Commission said that states must rigorously apply the due process rights established in Article XXVI of the American Declaration of the Rights and Duties of Man (American Declaration), Article 8 of the American Convention, and Article 14 of the International Covenant on Civil and Political Rights (ICCPR), and that failure to comply with the VCCR may have a negative impact on the implementation of these rights. Therefore, a state that fails to apply these international norms incurs international responsibility and must provide an appropriate remedy. The Commission said that a comparative study of national legislation revealed that judicial proceedings can be annulled if a VCCR violation prejudices a foreign national.

The governments that submitted written observations to the Inter-American Court included Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Paraguay, and the United States. Non-governmental organizations that submitted *amicus* briefs included Amnesty International, Human Rights Watch, the International Human Rights Law Institute, and the Minnesota Advocates for Human Rights.

In its written observations, the United States asked the Inter-American Court to decline to issue an advisory opinion.³ First, the United States asserted that the VCCR is not a human rights treaty as required by American Convention Article 64(1): "Even if the [Vienna Convention] establishes a potentially important protection for certain individuals in detention (foreign nationals whose States of nationality have consular relations with the host State), it does not follow that it concerns or deals with human rights so as to confer jurisdiction upon this Court."⁴ Second, said the United States, the VCCR is not an inter-American agreement. The possibility of inconsistent interpretations of states' obligations on a regional basis should preclude review by the Inter-American Court. Third, considerations of comity should preclude examination of the VCCR by the Inter-American Court, because at the time the ICJ had Paraguay's case against the United States before it. Finally, the United States argued that Mexico's petition was directed specifically at it and therefore represented "a contentious case in the guise of a request for an advisory opinion."⁵

With respect to the substance of Mexico's request, the United States argued that the VCCR does not create a right to consular assistance: "Rather, it provides that a receiving State must inform a detainee that, if he requests, sending State consular authorities may be *notified* of his detention (hence, the term 'consular notification')."⁶ The obligation of the receiving state to notify a foreign national of

3 Written Observations of the United States of America, 10 June 1998, at 2.

4 *Id.*, at 3-4.

5 *Id.*, at 5.

6 *Id.*, at 7.

the right to seek consular assistance does not give rise to an obligation for the sending state's consular authorities to provide consular assistance: "If the detainee requests consular notification, whether, and to what extent, consular assistance is ultimately provided to the detainee is in the discretion of sending State's consular authorities."⁷ In addition, the United States argued that compliance with the VCCR is not a prerequisite for the observance of human rights in criminal cases: "The international human rights instruments invoked by Mexico, and presumably the relevant municipal laws of all OAS member states, provide foreign detainees with specific fair trial rights and procedural protections."⁸ These rights must be recognized and applied in all cases, the United States said, regardless of the nationality of the foreign national and regardless of whether consular relations exist between a host country and the foreign national's home country. Although special measures may be appropriate in some cases to ensure the adequate and effective enjoyment of human rights, assessing the need for such measures is highly contextual and fact specific.

Oral proceedings were held on 12 and 13 June 1998, and final written observations were submitted thereafter by the Inter-American Commission, Mexico, the United States, and several non-governmental organizations.

On 1 October 1999, the Inter-American Court issued its Advisory Opinion.⁹ As a preliminary matter, the Court affirmed its competence to render an advisory opinion concerning the interpretation of the American Convention and other international agreements affecting human rights. The Court said that the interpretation of the American Convention and any other treaty concerning human rights in the Americas would provide guidance on legal issues to all OAS member states, and to the organs of the inter-American system.¹⁰

The Court dismissed several challenges to its authority to issue an advisory opinion. It held that the potential existence of a contentious issue involving consular notification rights did not preclude its examination of the underlying legal issues. Proceedings raising similar issues before the Inter-American Commission and the ICJ did not bar the Court from considering the legal issues in an advisory opinion.¹¹ The Court unanimously held that it was competent to issue an advisory opinion.

In considering the merits of the request, the Inter-American Court addressed

7 *Id.*, at 8.

8 *Id.*

9 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Inter-American Court of Human Rights, Advisory Opinion No. OC-16/99, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999).

10 *Id.*, para. 65.

11 *Id.*, paras. 52, 61. The Court found that the case before the Inter-American Commission involved entirely different proceedings. See Individual Complaint to the Inter-American Commission on Human Rights Against the United States of America on Behalf of Carlos Santana, Case 11.130, Inter-Am. C.H.R., OEA/ser.L/V/II.85 (1993). The Court made a similar finding with respect to the proceedings before the ICJ. The Inter-American Court emphasized that it and the ICJ are autonomous judicial institutions.

eight questions. First, it examined whether VCCR Article 36 confers rights upon individuals and, if so, whether such rights carry with them correlative obligations for the receiving state. The Court noted that VCCR Article 36 serves a dual purpose: “that of recognizing a State’s right to assist its nationals through the consular officer’s actions and, correspondingly, that of recognizing the correlative right of the national of the sending State to contact the consular officer to obtain that assistance.”¹² Based on the VCCR text and its *travaux préparatoires*, the Court concluded that Article 36 “endows a detained foreign national with individual rights that are the counterpart to the host State’s correlative duties.”¹³

Second, the Court inquired whether VCCR Article 36 concerns the protection of human rights. The Court identified several ways in which consular officials can assist a detained national – securing a lawyer, obtaining evidence in the country of origin, verifying the conditions under which legal assistance is provided, and observing the conditions under which the foreign national is incarcerated or otherwise detained. For these reasons, the Court found that the right to seek consular assistance as set forth in VCCR Article 36 concerns the protection of human rights and is part of the body of international human rights law.

Third, the Court examined the meaning of the phrase “without delay” as set forth in VCCR Article 36(1)(b). It noted that its interpretation of the phrase “without delay” would not be limited to death penalty cases but would apply to all cases in which a foreign national is deprived of liberty. According to the VCCR *travaux préparatoires*, the phrase “without delay” was added to Article 36 in order to ensure that a foreign national was aware of his right to consular access, thus facilitating such assistance. The Court reasoned that its interpretation of the phrase “without delay” should therefore serve this *effet utile*.¹⁴ To ensure that consular assistance is effective, a foreign national must be informed of his rights at a time that will allow him to prepare an effective defense. “Accordingly, notification must be prompt; in other words, its timing in the process must be appropriate to achieving that end.”¹⁵ For these reasons, the Court interpreted the phrase “without delay” to mean that foreign nationals should be notified of their right of consular access at the moment they are deprived of liberty and, in any case, before they make their first statement to the authorities.

Fourth, the Court considered whether the rights and obligations set forth in VCCR Article 36 require a protest on the part of the sending state. According to the text of Article 36, the right to consular notification is conditioned only upon the will of the detained foreign national. Similarly, the *travaux préparatoires* do not indicate any conditions that the sending state must fulfill in order for the detained foreign national to receive consular assistance. Thus, it is unnecessary for the sending state to issue a prior protest. Indeed, “it would be illogical to make

12 *Id.*, para. 80.

13 *Id.*, para. 84.

14 *Id.*, para. 104.

15 *Id.*, para. 106.

exercise of these rights or fulfillment of these obligations subject to protests from a State that is unaware of its national's predicament."¹⁶

Fifth, the Court addressed whether the ICCPR contains provisions regarding the protection of human rights in the American states for purposes of American Convention Article 64(1). It noted that nearly all OAS member states were also parties to the ICCPR. After reviewing Articles 2, 6, 14, and 50 of the ICCPR, the Court determined that they concerned the protection of human rights in the American states.

Sixth, the Court examined the relationship between ICCPR Article 14, which establishes minimum due process guarantees, and VCCR Article 36. To answer this question, the Court indicated it was necessary to take into account the broader developments of international human rights law:

The *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law.¹⁷

Applying this methodology, the Court noted that due process of law, as set forth in the ICCPR, derives from the inherent dignity of the human person. To ensure due process of law, a defendant must be able to assert his rights and defend his interests in the same manner as any other individual. Thus, legal proceedings must recognize and resolve all elements of inequality that may arise in criminal proceedings. Indeed, "the presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests."¹⁸ ICCPR Article 14 establishes minimum due process guarantees to those subject to criminal proceedings that can be amplified in light of other international agreements. With respect to detained foreign nationals, the right to communicate with consular officials will significantly contribute to a defense and help to ensure that any proceedings will be accomplished with greater adherence to the law and respect for personal dignity. For these reasons, the Court held that the individual's right to information established in VCCR Article 36(1)(b) facilitates effective implementation of the right to due process of law as set forth in ICCPR Article 14.

Seventh, the Court addressed the consequences of failing to notify a foreign national of the right to seek consular assistance. The Court recalled its earlier advisory opinion concerning the death penalty, in which it noted that the application of capital punishment is limited in absolute terms by the principle that "no

¹⁶ *Id.*, para. 92.

¹⁷ *Id.*, para. 115.

¹⁸ *Id.*, para. 119.

one shall be arbitrarily deprived of their life."¹⁹ Both the ICCPR and the American Convention require strict observance of due process, and they limit application of the death penalty to the most serious crimes. In these agreements, there exists a clear tendency to restrict the application of the death penalty and to move, ultimately, towards its final abolition. "This tendency, evident in other inter-American and universal instruments, translates into the internationally recognized principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases."²⁰ For these reasons, the Court concluded that the failure to inform a foreign national of the right to seek consular assistance affects due process guarantees. In death penalty cases, this failure also constitutes a violation of the right to be free from arbitrary deprivation of life, as set forth in various agreements. Such violations give rise to international responsibility and the obligation to provide reparations.

Finally, the Inter-American Court considered whether the provisions of human rights agreements, including VCCR Article 36(1)(b), must be applied by all parties, regardless of their federal or unitary structure. The VCCR contains no provision concerning the obligation of federal states to promote compliance in the entirety of their territory. The Inter-American Court had already established, however, that a state cannot use its federal structure to avoid its international obligations.²¹ This interpretation was supported by reference to VCLT Article 29, under which a treaty is binding upon a party throughout its territory. Accordingly, the Court determined that international obligations concerning the protection of human rights, including VCCR Article 36, must be respected by states of the Americas, regardless of whether their structure is federal or unitary.

In a concurring opinion, Judge Cançado Trindade emphasized the importance of incorporating recent developments in legal thought and human development when interpreting human rights agreements.²² Consular assistance should now be associated with the basic guarantees of due process of law. Judge Cançado Trindade criticized the United States for taking a position before the Inter-American Court at odds with what it argued to the ICJ in *United States Diplomatic and Consular Staff in Tehran*.²³ In that case, he noted, the United States argued that VCCR Article 36 guarantees rights to individuals in need of consular assistance.²⁴ Finally, Judge Cançado Trindade noted that international human rights law had developed, in part, to protect the weaker and more vulnerable segments of society. Such protection assumes growing importance in a world torn by distinctions

19 *Restrictions on the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion No. OC-3/83, Inter-Am. Ct. H.R. (ser. A), No. 3, paras. 52, 55 (1983).

20 *The Right to Information*, para. 135.

21 *Id.*, para. 139; see *Garrido and Baigorria Case*, 26 Inter-Am. Ct. H.R. (ser. C), No. 39, para. 46 (1996).

22 *The Right to Information*, Cançado Trindade, J., concurring.

23 *United States Diplomatic and Consular Staff in Tehran (U.S.A. v. Iran)*, 1980 ICJ 3.

24 *The Right to Information*, Cançado Trindade, J., concurring, para. 19.

between nationals and foreigners (including *de jure* discrimination, notably vis-à-vis migrants), and in a "globalized" world in which frontiers open themselves to capital, investment, and services, but not necessarily to human beings.²⁵ Consular assistance seeks to remedy the vulnerability of detained foreign nationals, and the Advisory Opinion plays an important role in the protection of human rights and in the "humanization of international law."²⁶

In another concurring opinion, Judge Garcia-Ramirez emphasized that it is insufficient for the law to provide foreign nationals with the same rights accorded to nationals of the arresting state. The law must also guarantee those rights that enable foreign nationals to overcome any limitations to an effective defense, including social, legal, and language differences. In the absence of measures that recognize and remove these limitations, existing rights become merely nominal rights. Accordingly, the right to seek consular assistance forms part of the group of rights and guarantees that constitute due process. A violation of this right must therefore be remedied in the same manner as other responses to due process violations – through nullity and responsibility. When VCCR Article 36 is recognized as providing specific individual rights to a detained foreign national, the progressive and expansive character of human rights is acknowledged: "A democratic concept of criminal justice keeps due process in a state of constant evolution." Thus, recognition of these rights will ensure that criminal procedure will become "a civilized means to restore order and justice."²⁷

Judge Oliver Jackman dissented in part. Although he concurred with the Advisory Opinion in most respects, Judge Jackman did not agree that failure to provide consular notification in any death penalty case, followed by a conviction, should automatically be considered arbitrary: "The approach taken by the Court in this Advisory Opinion appears to be based on what might be called an immaculate conception of due process, a conception which is not justified by the history of the precept in either municipal or international law." According to Judge Jackman, "the concepts of relevance, proportionality, adequacy, and, above all, necessity are indispensable tools in assessing the role which a given right plays in the totality of the structure of due process."²⁸

Inter-American Commission on Human Rights

Like the Inter-American Court, the Inter-American Commission on Human Rights has regarded the right to consular access as being a protected right under the American Declaration of the Rights and Duties of Man. Whereas the Inter-American Court, asked to issue an advisory opinion, had no actual cases to resolve, the Inter-American Commission has received complaints of consular

25 *Id.*, para. 23.

26 *Id.*, para. 35, emphasis in original.

27 *Id.*, Garcia-Ramirez, J., concurring.

28 *Id.*, Jackman, J., partially dissenting, para. 9.

access violations in regard to specific individuals. It has made decisions in three such cases, all involving Mexican nationals convicted of crime in the United States.

In *Ramon Martinez Villareal v. United States*, a Mexican national convicted of murder in the State of Arizona and sentenced to death had not been informed of his right to communicate with Mexican consular officials. In 1997, a petition was filed on his behalf against the United States in the Inter-American Commission. The Commission ruled on the case in 2002.²⁹

As a preliminary matter, the Commission said that it would apply a heightened standard of scrutiny because the case involved capital punishment: "This approach requires in particular strict adherence to the rules and principles of due process and fair trials in the context of capital cases."³⁰ The Commission said that developments in international human rights law, including the right to consular access, were relevant when interpreting and applying the American Declaration. The Commission's decision on these points is excerpted in Chapter 9.

In support, the Commission cited the Advisory Opinion of the Inter-American Court and the ICJ *LaGrand* opinion. It also noted the significance given to the VCCR by the UN Commission on Human Rights and the OAS General Assembly, a reference to UN Commission and OAS documents excerpted in Chapter 9 in which consular access is viewed as having due process implications.

The Commission determined that the United States failed to comply with the VCCR and that this failure could have affected the fairness of the criminal proceedings against Martinez Villareal. In paragraphs of its decision provided in Chapter 16, it called for a retrial as the appropriate remedy. If Martinez Villareal were executed, it said, the United States would be violating Martinez Villareal's right to life under Article I of the American Declaration.

In addition, the Commission recommended that the United States develop procedures to ensure compliance with its consular access obligations generally. In this respect, the United States should:

Review its laws, procedures and practices to ensure that foreign nationals who are arrested or committed to prison or to custody pending trial or are detained in any other manner in the United States are informed without delay of their right to consular assistance and that, with his or her concurrence, the appropriate consulate is informed without delay of the foreign national's circumstances, in accordance with the due process and fair trial protections enshrined in Articles XVIII and XXVI of the American Declaration.³¹

In 2002, Martinez Villareal's death sentence was vacated on the basis of a ruling by the U.S. Supreme Court prohibiting the execution of individuals with mental retardation.³²

29 *Ramon Martinez Villareal v. United States*, Case No. 11.753, Report No. 52/02, 10 October 2002.

30 *Id.*, para. 52.

31 *Id.*, para. 101(2).

32 *Atkins v. Virginia*, 536 U.S. 304 (2002).

Another Inter-American Commission case, *Cesar Roberto Fierro v. United States*, involved a Mexican national convicted in 1980 of capital murder in Texas and sentenced to death.³³ Fierro's conviction was based largely on a confession made to an El Paso, Texas, police interrogator. As recounted in the Introduction to Chapter 17, that confession was made under circumstances reflecting coercion. The Texas Court of Criminal Appeals held in 1996 that the confession should not have been used against Fierro for that reason, although it upheld his conviction on the basis of other evidence.³⁴

In 1994, a petition had been filed in the Inter-American Commission on Fierro's behalf. The petition alleged violations of the American Declaration for the failure of the United States to inform Fierro of his right of consular access. The Commission ruled on the Fierro complaint only in 2003, since his case was in litigation in the United States for several years and therefore was not ripe for decision.³⁵ The Commission based its analysis on its ruling the previous year in *Martinez Villareal*. In a paragraph of its decision provided in Chapter 17, the Commission said that had Fierro been afforded consular access, he might not have made the confession that led to his being tried. In paragraphs of its decision provided in Chapter 16, the Commission found that the U.S. failure to comply with its consular assistance obligations had a potentially serious impact on the fairness of Fierro's trial. It said that Fierro should be re-tried, and if that were not possible, then released. Were the United States to execute Fierro, it would violate his right to life.

The Inter-American Commission's third consular access case was *Medellin, Ramirez Cardenas and Leal Garcia v. United States*. Petitions were brought before the Inter-American Commission in 2006 on behalf of three Mexican nationals incarcerated on death row in the United States.³⁶ The petitions asserted that the United States had violated the American Declaration of the Rights and Duties of Man by its failure to provide consular notification to these three Mexican nationals. In each case, the Mexican national had not been provided consular notification and had subsequently been convicted and sentenced to death.

In particular, the Petitioner alleges that, at the time of their arrest, they were not informed of their right to consular notification and access, in violation of Article 36 of the Vienna Convention on Consular Relations . . . ; that they were not afforded competent legal representation by the State; that the mode of execution as currently practiced in Texas creates an unacceptable risk of excruciating pain; that they have been denied a meaningful opportunity to present their cases to a clemency authority prior to execution; and that the conditions in Texas' death row violate the right to humane treatment.³⁷

Precautionary measures were also requested, which would prevent the United

33 *Fierro v. Texas*, 706 S.W.2d 310 (1986).

34 *Ex parte Fierro*, 934 S.W.2d 370 (1996).

35 *Cesar Fierro v. United States*, Case No. 11.331, Report No. 99/03, 29 December 2003.

36 *Medellin, Ramirez Cardenas and Leal Garcia v. United States*, Case No. 12.644, Report No. 45/08, 24 July 2008.

37 *Id.* at 1.

States from executing these Mexican nationals while their claims were pending before the Commission. On 30 January 2007, the Commission granted these precautionary measures.

On 24 July 2008, the Commission released its decision on the merits. As a preliminary matter, the Commission determined that the case was admissible. The Commission found that there was no prospect for judicial review of the VCCR claims in the United States. Thus, it was unnecessary to exhaust domestic remedies, which would otherwise be required. In addition, the Commission indicated there was no duplication between the Commission proceedings and the ICJ proceedings. The ICJ proceedings had been brought by Mexico and concerned the VCCR. In contrast, the Commission proceedings concerned consular information and notification in connection with individual rights under the American Declaration. Accordingly, the Commission found the petitions admissible.

The Commission acknowledged the implications of the death penalty on its analysis:

Before addressing the merits of the present case, the Commission wishes to reaffirm and reiterate its well-established doctrine that it will apply a heightened level of scrutiny in deciding capital punishment cases. The right to life is widely recognized as the supreme right of the human being, and the *condition sine qua non* to the enjoyment of other rights. The Commission therefore considers that it has an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration. This "heightened scrutiny test" is consistent with the restrictive approach taken by other international human rights authorities to the imposition of the death penalty, and has been articulated and applied by the Commission in previous capital cases before it.³⁸

The Commission then considered the role of the VCCR in its analysis of the American Declaration. It said that VCCR Article 36 should be considered "when interpreting and applying the provisions of the American Declaration to a foreign national who has been arrested, committed to trial or to custody pending trial, or is detained in any other manner by that state."³⁹

The Commission found that consular notification had not been provided to Medellín, Ramirez Cardenas, or Leal Garcia. It noted the significance of consular notification to the due process rights of foreign nationals, particularly in death penalty cases.⁴⁰ The Commission cited its 2008 report *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, as well as the American Bar Association's 2003 report *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* to highlight the significance of consular notification to the due process rights of foreign nationals:

38 *Id.* at 23 (citations omitted).

39 *Id.* at 24.

40 *Id.* at 25.

Based upon the foregoing, the Commission concludes that the State's obligation under Article 36.1 of the Vienna Convention on Consular Relations to inform Messrs Medellin, Ramirez Cardenas and Leal Garcia of their right to consular notification and assistance constituted a fundamental component of the due process standards to which they were entitled under Articles XVIII and XXVI of the American Declaration, and that the State's failure to respect and ensure this obligation deprived them of a criminal process that satisfied the minimum standards of due process and a fair trial required under Articles XVIII and XXVI of the Declaration.⁴¹

The Commission found additional due process and fair trial violations in the case that were contrary to the requirements of the American Declaration. These included limitations in sentencing and clemency proceedings.

For these reasons the Commission recommended that the United States take the following action:

- (1) Vacate the death sentences imposed and provide the victims with an effective remedy, which includes a new trial in accordance with the equality, due process and fair trial protections prescribed under Articles I, XVIII and XXVI of the American Declaration, including the right to competent legal representation.
- (2) Review its laws, procedures and practices to ensure that foreign nationals who are arrested or committed to prison or to custody pending trial or are detained in any other manner in the United States are informed without delay of their right to consular assistance and that, with his or her concurrence, the appropriate consulate is informed without delay of the foreign national's circumstances, in accordance with the due process and fair trial protections enshrined in Articles XVIII and XXVI of the American Declaration.
- (3) Review its laws, procedures and practices to ensure that persons who are accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, XVIII and XXVI of the Declaration, and in particular by prohibiting the introduction of evidence of unadjudicated crimes during the sentencing phase of capital trials.
- (4) Review its laws, procedures and practices to ensure that persons who are accused of capital crimes can apply for amnesty, pardon or commutation of sentence with minimal fairness guarantees, including the right to an impartial hearing.⁴²

The Commission transmitted its report to the United States along with a request that it comply with the recommendations within two months. Despite the Commission's decision, Medellin was executed less than one month later, on 5 August 2008.

⁴¹ *Id.* at 26.

⁴² *Id.* at 32.

Appendix: Vienna Convention on Consular Relations

The States Parties to the present Convention,

Recalling that consular relations have been established between peoples since ancient times,

Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

Article 1

DEFINITIONS

1. For the purposes of the present Convention, the following expressions shall have the meanings hereunder assigned to them:
 - (a) "consular post" means any consulate-general, consulate, vice-consulate or consular agency;
 - (b) "consular district" means the area assigned to a consular post for the exercise of consular functions;
 - (c) "head of consular post" means the person charged with the duty of acting in that capacity;

- (d) "consular officer" means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions;
 - (e) "consular employee" means any person employed in the administrative or technical service of a consular post;
 - (f) "member of the service staff" means any person employed in the domestic service of a consular post;
 - (g) "members of the consular post" means consular officers, consular employees and members of the service staff;
 - (h) "members of the consular staff" means consular officers, other than the head of a consular post, consular employees and members of the service staff;
 - (i) "member of the private staff" means a person who is employed exclusively in the private service of a member of the consular post;
 - (j) "consular premises" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post;
 - (k) "consular archives" includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping.
2. Consular officers are of two categories, namely career consular officers and honorary consular officers. The provisions of Chapter II of the present Convention apply to consular posts headed by career consular officers; the provisions of Chapter III govern consular posts headed by honorary consular officers.
 3. The particular status of members of the consular posts who are nationals or permanent residents of the receiving State is governed by Article 71 of the present Convention.

CHAPTER I: CONSULAR RELATIONS IN GENERAL

Section I: Establishment and conduct of consular relations

Article 2

ESTABLISHMENT OF CONSULAR RELATIONS

1. The establishment of consular relations between States takes place by mutual consent.
2. The consent given to the establishment of diplomatic relations between two States implies, unless otherwise stated, consent to the establishment of consular relations.

3. The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations.

Article 3

EXERCISE OF CONSULAR FUNCTIONS

Consular functions are exercised by consular posts. They are also exercised by diplomatic missions in accordance with the provisions of the present Convention.

Article 4

ESTABLISHMENT OF A CONSULAR POST

1. A consular post may be established in the territory of the receiving State only with that State's consent.
2. The seat of the consular post, its classification and the consular district shall be established by the sending State and shall be subject to the approval of the receiving State.
3. Subsequent changes in the seat of the consular post, its classification or the consular district may be made by the sending State only with the consent of the receiving State.
4. The consent of the receiving State shall also be required if a consulate-general or a consulate desires to open a vice-consulate or a consular agency in a locality other than that in which it is itself established.
5. The prior express consent of the receiving State shall also be required for the opening of an office forming part of an existing consular post elsewhere than at the seat thereof.

Article 5

CONSULAR FUNCTIONS

Consular functions consist in:

- (a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
- (b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;
- (c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting

- thereon to the Government of the sending State and giving information to persons interested;
- (d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;
 - (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;
 - (f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;
 - (g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;
 - (h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;
 - (i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;
 - (j) transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;
 - (k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;
 - (l) extending assistance to vessels and aircraft mentioned in sub-paragraph (k) of this Article and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending State;
 - (m) performing any other functions entrusted to a consular post by the sending

State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

Article 6

EXERCISE OF CONSULAR FUNCTIONS OUTSIDE THE CONSULAR DISTRICT

A consular officer may, in special circumstances, with the consent of the receiving State, exercise his functions outside his consular district.

Article 7

EXERCISE OF CONSULAR FUNCTIONS IN A THIRD STATE

The sending State may, after notifying the States concerned, entrust a consular post established in a particular State with the exercise of consular functions in another State, unless there is express objection by one of the States concerned.

Article 8

EXERCISE OF CONSULAR FUNCTIONS ON BEHALF OF A THIRD STATE

Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State.

Article 9

CLASSES OF HEADS OF CONSULAR POSTS

1. Heads of consular posts are divided into four classes, namely:
 - (a) consuls-general;
 - (b) consuls;
 - (c) vice-consuls;
 - (d) consular agents.
2. Paragraph 1 of this Article in no way restricts the right of any of the Contracting Parties to fix the designation of consular officers other than the heads of consular posts.

Article 10

APPOINTMENT AND ADMISSION OF HEADS OF CONSULAR POSTS

1. Heads of consular posts are appointed by the sending State and are admitted to the exercise of their functions by the receiving State.
2. Subject to the provisions of the present Convention, the formalities for the appointment and for the admission of the head of a consular post are determined by the laws, regulations and usages of the sending State and of the receiving State respectively.

Article 11

THE CONSULAR COMMISSION OR NOTIFICATION OF APPOINTMENT

1. The head of a consular post shall be provided by the sending State with a document, in the form of a commission or similar instrument, made out for each appointment, certifying his capacity and showing, as a general rule, his full name, his category and class, the consular district and the seat of the consular post.
2. The sending State shall transmit the commission or similar instrument through the diplomatic or other appropriate channel to the Government of the State in whose territory the head of a consular post is to exercise his functions.
3. If the receiving State agrees, the sending State may, instead of a commission or similar instrument, send to the receiving State a notification containing the particulars required by paragraph 1 of this Article.

Article 12

THE EXEQUATUR

1. The head of a consular post is admitted to the exercise of his functions by an authorization from the receiving State termed an exequatur, whatever the form of this authorization.
2. A State which refuses to grant an exequatur is not obliged to give to the sending State reasons for such refusal.
3. Subject to the provisions of Articles 13 and 15, the head of a consular post shall not enter upon his duties until he has received an exequatur.

Article 13

PROVISIONAL ADMISSION OF HEADS OF CONSULAR POSTS

Pending delivery of the exequatur, the head of a consular post may be admitted on a provisional basis to the exercise of his functions. In that case, the provisions of the present Convention shall apply.

Article 14

NOTIFICATION TO THE AUTHORITIES OF THE CONSULAR DISTRICT

As soon as the head of a consular post is admitted even provisionally to the exercise of his functions, the receiving State shall immediately notify the competent authorities of the consular district. It shall also ensure that the necessary measures are taken to enable the head of a consular post to carry out the duties of his office and to have the benefit of the provisions of the present Convention.

Article 15

TEMPORARY EXERCISE OF THE FUNCTIONS OF THE HEAD OF A CONSULAR POST

1. If the head of a consular post is unable to carry out his functions or the position of head of consular post is vacant, an acting head of post may act provisionally as head of the consular post.
2. The full name of the acting head of post shall be notified either by the diplomatic mission of the sending State or, if that State has no such mission in the receiving State, by the head of the consular post, or, if he is unable to do so, by any competent authority of the sending State, to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry. As a general rule, this notification shall be given in advance. The receiving State may make the admission as acting head of post of a person who is neither a diplomatic agent nor a consular officer of the sending State in the receiving State conditional on its consent.
3. The competent authorities of the receiving State shall afford assistance and protection to the acting head of post. While he is in charge of the post, the provisions of the present Convention shall apply to him on the same basis as to the head of the consular post concerned. The receiving State shall not, however, be obliged to grant to an acting head of post any facility, privilege or immunity which the head of the consular post enjoys only subject to conditions not fulfilled by the acting head of post.
4. When, in the circumstances referred to in paragraph 1 of this Article, a member of the diplomatic staff of the diplomatic mission of the sending State in the receiving State is designated by the sending State as an acting head of post, he shall, if the receiving State does not object thereto, continue to enjoy diplomatic privileges and immunities.

Article 16

PRECEDENCE AS BETWEEN HEADS OF CONSULAR POSTS

1. Heads of consular posts shall rank in each class according to the date of the grant of the exequatur.

2. If, however, the head of a consular post before obtaining the exequatur is admitted to the exercise of his functions provisionally, his precedence shall be determined according to the date of the provisional admission; this precedence shall be maintained after the granting of the exequatur.
3. The order of precedence as between two or more heads of consular posts who obtained the exequatur or provisional admission on the same date shall be determined according to the dates on which their commissions or similar instruments or the notifications referred to in paragraph 3 of Article 11 were presented to the receiving State.
4. Acting heads of posts shall rank after all heads of consular posts and, as between themselves, they shall rank according to the dates on which they assumed their functions as acting heads of posts as indicated in the notifications given under paragraph 2 of Article 15.
5. Honorary consular officers who are heads of consular posts shall rank in each class after career heads of consular posts, in the order and according to the rules laid down in the foregoing paragraphs.
6. Heads of consular posts shall have precedence over consular officers not having that status.

Article 17

PERFORMANCE OF DIPLOMATIC ACTS BY CONSULAR OFFICERS

1. In a State where the sending State has no diplomatic mission and is not represented by a diplomatic mission of a third State, a consular officer may, with the consent of the receiving State, and without affecting his consular status, be authorized to perform diplomatic acts. The performance of such acts by a consular officer shall not confer upon him any right to claim diplomatic privileges and immunities.
2. A consular officer may, after notification addressed to the receiving State, act as representative of the sending State to any inter-governmental organization. When so acting, he shall be entitled to enjoy any privileges and immunities accorded to such a representative by customary international law or by international agreements; however, in respect of the performance by him of any consular function, he shall not be entitled to any greater immunity from jurisdiction than that to which a consular officer is entitled under the present Convention.

Article 18

APPOINTMENT OF THE SAME PERSON BY TWO OR MORE STATES AS A CONSULAR OFFICER

Two or more States may, with the consent of the receiving State, appoint the same person as a consular officer in that State.

Article 19

APPOINTMENT OF MEMBERS OF CONSULAR STAFF

1. Subject to the provisions of Articles 20, 22 and 23, the sending State may freely appoint the members of the consular staff.
2. The full name, category and class of all consular officers, other than the head of a consular post, shall be notified by the sending State to the receiving State in sufficient time for the receiving State, if it so wishes, to exercise its rights under paragraph 3 of Article 23.
3. The sending State may, if required by its laws and regulations, request the receiving State to grant an exequatur to a consular officer other than the head of a consular post.
4. The receiving State may, if required by its laws and regulations, grant an exequatur to a consular officer other than the head of a consular post.

Article 20

SIZE OF THE CONSULAR STAFF

In the absence of an express agreement as to the size of the consular staff, the receiving State may require that the size of the staff be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the consular district and to the needs of the particular post.

Article 21

PRECEDENCE AS BETWEEN CONSULAR OFFICERS OF A CONSULAR POST

The order of precedence as between the consular officers of a consular post and any change thereof shall be notified by the diplomatic mission of the sending State or, if that State has no such mission in the receiving State, by the head of the consular post, to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry.

Article 22

NATIONALITY OF CONSULAR OFFICERS

1. Consular officers should, in principle, have the nationality of the sending State.
2. Consular officers may not be appointed from among persons having the nationality of the receiving State except with the express consent of that State which may be withdrawn at any time.
3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.

Article 23

PERSONS DECLARED "NON GRATA"

1. The receiving State may at any time notify the sending State that a consular officer is *persona non grata* or that any other member of the consular staff is not acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his functions with the consular post.
2. If the sending State refuses or fails within a reasonable time to carry out its obligations under paragraph 1 of this Article, the receiving State may, as the case may be, either withdraw the exequatur from the person concerned or cease to consider him as a member of the consular staff.
3. A person appointed as a member of a consular post may be declared unacceptable before arriving in the territory of the receiving State or, if already in the receiving State, before entering on his duties with the consular post. In any such case, the sending State shall withdraw his appointment.
4. In the cases mentioned in paragraphs 1 and 3 of this Article, the receiving State is not obliged to give to the sending State reasons for its decision.

Article 24

NOTIFICATION TO THE RECEIVING STATE OF APPOINTMENTS, ARRIVALS
AND DEPARTURES

1. The Ministry for Foreign Affairs of the receiving State or the authority designated by that Ministry shall be notified of:
 - (a) the appointment of members of a consular post, their arrival after appointment to the consular post, their final departure or the termination of their functions and any other changes affecting their status that may occur in the course of their service with the consular post;
 - (b) the arrival and final departure of a person belonging to the family of a member of a consular post forming part of his household and, where appropriate, the fact that a person becomes or ceases to be such a member of the family;
 - (c) the arrival and final departure of members of the private staff and, where appropriate, the termination of their service as such;
 - (d) the engagement and discharge of persons resident in the receiving State as members of a consular post or as members of the private staff entitled to privileges and immunities.
2. When possible, prior notification of arrival and final departure shall also be given.

Section II: End of consular functions

Article 25

TERMINATION OF THE FUNCTIONS OF A MEMBER OF A CONSULAR POST

The functions of a member of a consular post shall come to an end *inter alia*:

- (a) on notification by the sending State to the receiving State that his functions have come to an end;
- (b) on withdrawal of the exequatur;
- (c) on notification by the receiving State to the sending State that the receiving State has ceased to consider him as a member of the consular staff.

Article 26

DEPARTURE FROM THE TERRITORY OF THE RECEIVING STATE

The receiving State shall, even in case of armed conflict, grant to members of the consular post and members of the private staff, other than nationals of the receiving State, and to members of their families forming part of their households irrespective of nationality, the necessary time and facilities to enable them to prepare their departure and to leave at the earliest possible moment after the termination of the functions of the members concerned. In particular, it shall, in case of need, place at their disposal the necessary means of transport for themselves and their property other than property acquired in the receiving State, the export of which is prohibited at the time of departure.

Article 27

PROTECTION OF CONSULAR PREMISES AND ARCHIVES AND OF THE INTERESTS OF THE SENDING STATE IN EXCEPTIONAL CIRCUMSTANCES

1. In the event of the severance of consular relations between two States:
 - (a) the receiving State shall, even in case of armed conflict, respect and protect the consular premises, together with the property of the consular post and the consular archives;
 - (b) the sending State may entrust the custody of the consular premises, together with the property contained therein and the consular archives, to a third State acceptable to the receiving State;
 - (c) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.
2. In the event of the temporary or permanent closure of a consular post, the provisions of sub-paragraph (a) of paragraph 1 of this Article shall apply. In addition,

- (a) if the sending State, although not represented in the receiving State by a diplomatic mission, has another consular post in the territory of that State, that consular post may be entrusted with the custody of the premises of the consular post which has been closed, together with the property contained therein and the consular archives, and, with the consent of the receiving State, with the exercise of consular functions in the district of that consular post; or
- (b) if the sending State has no diplomatic mission and no other consular post in the receiving State, the provisions of sub-paragraphs (b); and
- (c) of paragraph 1 of this Article shall apply.

CHAPTER II: FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO CONSULAR POSTS, CAREER CONSULAR OFFICERS AND OTHER MEMBERS OF A CONSULAR POST

Section I: Facilities, privileges and immunities relating to a consular post

Article 28

FACILITIES FOR THE WORK OF THE CONSULAR POST

The receiving State shall accord full facilities for the performance of the functions of the consular post.

Article 29

USE OF NATIONAL FLAG AND COAT-OF-ARMS

1. The sending State shall have the right to the use of its national flag and coat-of-arms in the receiving State in accordance with the provisions of this Article.
2. The national flag of the sending State may be flown and its coat-of-arms displayed on the building occupied by the consular post and at the entrance door thereof, on the residence of the head of the consular post and on his means of transport when used on official business.
3. In the exercise of the right accorded by this Article regard shall be had to the laws, regulations and usages of the receiving State.

Article 30

ACCOMMODATION

1. The receiving State shall either facilitate the acquisition on its territory: in accordance with its laws and regulations, by the sending State of premises

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- necessary for its consular post or assist the latter in obtaining accommodation in some other way.
2. It shall also, where necessary, assist the consular post in obtaining suitable accommodation for its members.

Article 31

INVIOIABILITY OF THE CONSULAR PREMISES

1. Consular premises shall be inviolable to the extent provided in this Article.
2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.
3. Subject to the provisions of paragraph 2 of this Article, the receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.
4. The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State.

Article 32

EXEMPTION FROM TAXATION OF CONSULAR PREMISES

1. Consular premises and the residence of the career head of consular post of which the sending State or any person acting on its behalf is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in paragraph 1 of this Article shall not apply to such dues and taxes if, under the law of the receiving State, they are payable by the person who contracted with the sending State or with the person acting on its behalf.

Article 33

INVIOABILITY OF THE CONSULAR ARCHIVES AND DOCUMENTS

The consular archives and documents shall be inviolable at all times and wherever they may be.

Article 34

FREEDOM OF MOVEMENT

Subject to its laws and regulations concerning zones, entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure freedom of movement and travel in its territory to all members of the consular post.

Article 35

FREEDOM OF COMMUNICATION

1. The receiving State shall permit and protect freedom of communication on the part of the consular post for all official purposes. In communicating with the Government, the diplomatic missions and other consular posts, wherever situated, of the sending State, the consular post may employ all appropriate means, including diplomatic or consular couriers, diplomatic or consular bags and messages in code or cipher. However, the consular post may install and use a wireless transmitter only with the consent of the receiving State.
2. The official correspondence of the consular post shall be inviolable. Official correspondence means all correspondence relating to the consular post and its functions.
3. The consular bag shall be neither opened nor detained. Nevertheless, if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this Article, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.
4. The packages constituting the consular bag shall bear visible external marks of their character and may contain only official correspondence and documents or articles intended exclusively for official use.
5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. Except with the consent of the receiving State he shall be neither a national of the receiving State, nor, unless he is a national of the sending State, a permanent resident of the receiving State. In the performance of his functions he shall

be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State, its diplomatic missions and its consular posts may designate consular couriers ad hoc. In such cases the provisions of paragraph 5 of this Article shall also apply except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.
7. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

Article 36

COMMUNICATION AND CONTACT WITH NATIONALS OF THE SENDING STATE

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

proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Article 37

INFORMATION IN CASES OF DEATHS, GUARDIANSHIP OR TRUSTEESHIP, WRECKS
AND AIR ACCIDENTS

If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:

- (a) in the case of the death of a national of the sending State, to inform without delay the consular post in whose district the death occurred;
- (b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments;
- (c) if a vessel, having the nationality of the sending State, is wrecked or runs aground in the territorial sea or internal waters of the receiving State, or if an aircraft registered in the sending State suffers an accident on the territory of the receiving State, to inform without delay the consular post nearest to the scene of the occurrence.

Article 38

COMMUNICATION WITH THE AUTHORITIES OF THE RECEIVING STATE

In the exercise of their functions, consular officers may address:

- (a) the competent local authorities of their consular district;
- (b) the competent central authorities of the receiving State if and to the extent that this is allowed by the laws, regulations and usages of the receiving State or by the relevant international agreements.

Article 39

CONSULAR FEES AND CHARGES

1. The consular post may levy in the territory of the receiving State the fees and charges provided by the laws and regulations of the sending State for consular acts.
2. The sums collected in the form of the fees and charges referred to in

paragraph 1 of this Article, and the receipts for such fees and charges, shall be exempt from all dues and taxes in the receiving State.

Section II: Facilities, privileges and immunities relating to career consular officers and other members of a consular post

Article 40

PROTECTION OF CONSULAR OFFICERS

The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.

Article 41

PERSONAL INVIOABILITY OF CONSULAR OFFICERS

1. Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.
2. Except in the case specified in paragraph 1 of this Article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.
3. If criminal proceedings are instituted against a consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case specified in paragraph 1 of this Article, in a manner which will hamper the exercise of consular functions as little as possible. When, in the circumstances mentioned in paragraph 1 of this Article, it has become necessary to detain a consular officer, the proceedings against him shall be instituted with the minimum of delay.

Article 42

NOTIFICATION OF ARREST, DETENTION OR PROSECUTION

In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving State shall promptly notify the head of the consular post. Should the latter be himself the object of any such measure, the receiving State shall notify the sending State through the diplomatic channel.

Article 43

IMMUNITY FROM JURISDICTION

1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.
2. The provisions of paragraph 1 of this Article shall not, however, apply in respect of a civil action either:
 - (a) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State; or
 - (b) by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft.

Article 44

LIABILITY TO GIVE EVIDENCE

1. Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings. A consular employee or a member of the service staff shall not, except in the cases mentioned in paragraph 3 of this Article, decline to give evidence. If a consular officer should decline to do so, no coercive measure or penalty may be applied to him.
2. The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. It may, when possible, take such evidence at his residence or at the consular post or accept a statement from him in writing.
3. Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending State.

Article 45

WAIVER OF PRIVILEGES AND IMMUNITIES

1. The sending State may waive, with regard to a member of the consular post, any of the privileges and immunities provided for in Articles 41, 43 and 44.
2. The waiver shall in all cases be express, except as provided in paragraph 3 of this Article, and shall be communicated to the receiving State in writing.
3. The initiation of proceedings by a consular officer or a consular employee in a matter where he might enjoy immunity from jurisdiction under Article 43

shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary.

Article 46

EXEMPTION FROM REGISTRATION OF ALIENS AND RESIDENCE PERMITS

1. Consular officers and consular employees and members of their families forming part of their households shall be exempt from all obligations under the laws and regulations of the receiving State in regard to the registration of aliens and residence permits.
2. The provisions of paragraph 1 of this Article shall not, however, apply to any consular employee who is not a permanent employee of the sending State or who carries on any private gainful occupation in the receiving State or to any member of the family of any such employee.

Article 47

EXEMPTION FROM WORK PERMITS

1. Members of the consular post shall, with respect to services rendered for the sending State, be exempt from any obligations in regard to work permits imposed by the laws and regulations of the receiving State concerning the employment of foreign labour.
2. Members of the private staff of consular officers and of consular employees shall, if they do not carry on any other gainful occupation in the receiving State, be exempt from the obligations referred to in paragraph 1 of this Article.

Article 48

SOCIAL SECURITY EXEMPTION

1. Subject to the provisions of paragraph 3 of this Article, members of the consular post with respect to services rendered by them for the sending State, and members of their families forming part of their households, shall be exempt from social security provisions which may be in force in the receiving State.
2. The exemption provided for in paragraph 1 of this Article shall apply also to members of the private staff who are in the sole employ of members of the consular post, on condition:

- (a) that they are not nationals of or permanently resident in the receiving State; and
 - (b) that they are covered by the social security provisions which are in force in the sending State or a third State.
3. Members of the consular post who employ persons to whom the exemption provided for in paragraph 2 of this Article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.
 4. The exemption provided for in paragraphs 1 and 2 of this Article shall not preclude voluntary participation in the social security system of the receiving State, provided that such participation is permitted by that State.

Article 49

EXEMPTION FROM TAXATION

1. Consular officers and consular employees and members of their families forming part of their households shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:
 - (a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
 - (b) dues or taxes on private immovable property situated in the territory of the receiving State, subject to the provisions of Article 32;
 - (c) estate, succession or inheritance duties, and duties on transfers, levied by the receiving State, subject to the provisions of paragraph (b) of Article 51;
 - (d) dues and taxes on private income, including capital gains, having its source in the receiving State and capital taxes relating to investments made in commercial or financial undertakings in the receiving State;
 - (e) charges levied for specific services rendered;
 - (f) registration, court or record fees, mortgage dues and stamp duties, subject to the provisions of Article 32.
2. Members of the service staff shall be exempt from dues and taxes on the wages which they receive for their services.
3. Members of the consular post who employ persons whose wages or salaries are not exempt from income tax in the receiving State shall observe the obligations which the laws and regulations of that State impose upon employers concerning the levying of income tax.

Article 50

EXEMPTION FROM CUSTOMS DUTIES AND INSPECTION

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:
 - (a) articles for the official use of the consular post;
 - (b) articles for the personal use of a consular officer or members of his family forming part of his household, including articles intended for his establishment. The articles intended for consumption shall not exceed the quantities necessary for direct utilization by the persons concerned.
2. Consular employees shall enjoy the privileges and exemptions specified in paragraph 1 of this Article in respect of articles imported at the time of first installation.
3. Personal baggage accompanying consular officers and members of their families forming part of their households shall be exempt from inspection. It may be inspected only if there is serious reason to believe that it contains articles other than those referred to in sub-paragraph (b) of paragraph 1 of this Article, or articles the import or export of which is prohibited by the laws and regulations of the receiving State or which are subject to its quarantine laws and regulations. Such inspection shall be carried out in the presence of the consular officer or member of his family concerned.

Article 51

ESTATE OF A MEMBER OF THE CONSULAR POST OR OF A MEMBER OF HIS FAMILY

In the event of the death of a member of the consular post or of a member of his family forming part of his household, the receiving State:

- (a) shall permit the export of the movable property of the deceased, with the exception of any such property acquired in the receiving State the export of which was prohibited at the time of his death;
- (b) shall not levy national, regional or municipal estate, succession or inheritance duties, and duties on transfers, on movable property the presence of which in the receiving State was due solely to the presence in that State of the deceased as a member of the consular post or as a member of the family of a member of the consular post.

Article 52

EXEMPTION FROM PERSONAL SERVICES AND CONTRIBUTIONS

The receiving State shall exempt members of the consular post and members of their families forming part of their households from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 53

BEGINNING AND END OF CONSULAR PRIVILEGES AND IMMUNITIES

1. Every member of the consular post shall enjoy the privileges and immunities provided in the present Convention from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties with the consular post.
2. Members of the family of a member of the consular post forming part of his household and members of his private staff shall receive the privileges and immunities provided in the present Convention from the date from which he enjoys privileges and immunities in accordance with paragraph 1 of this Article or from the date of their entry into the territory of the receiving State or from the date of their becoming a member of such family or private staff, whichever is the latest.
3. When the functions of a member of the consular post have come to an end, his privileges and immunities and those of a member of his family forming part of his household or a member of his private staff shall normally cease at the moment when the person concerned leaves the receiving State or on the expiry of a reasonable period in which to do so, whichever is the sooner, but shall subsist until that time, even in case of armed conflict. In the case of the persons referred to in paragraph 2 of this Article, their privileges and immunities shall come to an end when they cease to belong to the household or to be in the service of a member of the consular post provided, however, that if such persons intend leaving the receiving State within a reasonable period thereafter, their privileges and immunities shall subsist until the time of their departure.
4. However, with respect to acts performed by a consular officer or a consular employee in the exercise of his functions, immunity from jurisdiction shall continue to subsist without limitation of time.
5. In the event of the death of a member of the consular post, the members of his family forming part of his household shall continue to enjoy the privileges and immunities accorded to them until they leave the receiving State or until the expiry of a reasonable period enabling them to do so, whichever is the sooner.

Article 54

OBLIGATIONS OF THIRD STATES

1. If a consular officer passes through or is in the territory of a third State, which has granted him a visa if a visa was necessary, while proceeding to take up or return to his post or when returning to the sending State, the third State shall accord to him all immunities provided for by the other Articles of the present Convention as may be required to ensure his transit or return. The same shall apply in the case of any member of his family forming part of his household enjoying such privileges and immunities who are accompanying the consular officer or traveling separately to join him or to return to the sending State.
2. In circumstances similar to those specified in paragraph 1 of this Article, third States shall not hinder the transit through their territory of other members of the consular post or of members of their families forming part of their households.
3. Third States shall accord to official correspondence and to other official communications in transit, including messages in code or cipher, the same freedom and protection as the receiving State is bound to accord under the present Convention. They shall accord to consular couriers who have been granted a visa, if a visa was necessary, and to consular bags in transit, the same inviolability and protection as the receiving State is bound to accord under the present Convention.
4. The obligations of third States under paragraphs 1, 2 and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and to consular bags, whose presence in the territory of the third State is due to *force majeure*.

Article 55

RESPECT FOR THE LAWS AND REGULATIONS OF THE RECEIVING STATE

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.
2. The consular premises shall not be used in any manner incompatible with the exercise of consular functions.
3. The provisions of paragraph 2 of this Article shall not exclude the possibility of offices of other institutions or agencies being installed in part of the building in which the consular premises are situated, provided that the premises assigned to them are separate from those used by the consular post. In that event, the said offices shall not, for the purposes of the present Convention, be considered to form part of the consular premises.

Article 56

INSURANCE AGAINST THIRD PARTY RISKS

Members of the consular post shall comply with any requirement imposed by the laws and regulations of the receiving State in respect of insurance against third party risks arising from the use of any vehicle, vessel or aircraft.

Article 57

SPECIAL PROVISIONS CONCERNING PRIVATE GAINFUL OCCUPATION

1. Career consular officers shall not carry on for personal profit any professional or commercial activity in the receiving State.
2. Privileges and immunities provided in this Chapter shall not be accorded:
 - (a) to consular employees or to members of the service staff who carry on any private gainful occupation in the receiving State;
 - (b) to members of the family of a person referred to in sub-paragraph (a) of this paragraph or to members of his private staff;
 - (c) to members of the family of a member of a consular post who themselves carry on any private gainful occupation in the receiving State.

**CHAPTER III: REGIME RELATING TO HONORARY
CONSULAR OFFICERS AND CONSULAR POSTS HEADED
BY SUCH OFFICERS**

Article 58

GENERAL PROVISIONS RELATING TO FACILITIES, PRIVILEGES AND IMMUNITIES

1. Articles 28, 29, 30, 34, 35, 36, 37, 38 and 39, paragraph 3 of Article 54 and paragraphs 2 and 3 of Article 55 shall apply to consular posts headed by an honorary consular officer. In addition, the facilities, privileges and immunities of such consular posts shall be governed by Articles 59, 60, 61 and 62.
2. Articles 42 and 43, paragraph 3 of Article 44, Articles 45 and 53 and paragraph 1 of Article 55 shall apply to honorary consular officers. In addition, the facilities, privileges and immunities of such consular officers shall be governed by Articles 63, 64, 65, 66 and 67.
3. Privileges and immunities provided in the present Convention shall not be accorded to members of the family of an honorary consular officer or of a consular employee employed at a consular post headed by an honorary consular officer.
4. The exchange of consular bags between two consular posts headed by honorary consular officers in different States shall not be allowed without the consent of the two receiving States concerned.

Article 59

PROTECTION OF THE CONSULAR PREMISES

The receiving State shall take such steps as may be necessary to protect the consular premises of a consular post headed by an honorary consular officer against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

Article 60

EXEMPTION FROM TAXATION OF CONSULAR PREMISES

1. Consular premises of a consular post headed by an honorary consular officer of which the sending State is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in paragraph 1 of this Article shall not apply to such dues and taxes if, under the laws and regulations of the receiving State, they are payable by the person who contracted with the sending State.

Article 61

INVIOABILITY OF CONSULAR ARCHIVES AND DOCUMENTS

The consular archives and documents of a consular post headed by an honorary consular officer shall be inviolable at all times and wherever they may be, provided that they are kept separate from other papers and documents and, in particular, from the private correspondence of the head of a consular post and of any person working with him, and from the materials, books or documents relating to their profession or trade.

Article 62

EXEMPTION FROM CUSTOMS DUTIES

The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of, and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services on the following articles, provided that they are for the official use of a consular post headed by an honorary consular officer: coats-of-arms, flags, signboards, seals and stamps, books, official printed matter, office furniture, office equipment and similar articles supplied by or at the instance of the sending State to the consular post.

Article 63

CRIMINAL PROCEEDINGS

If criminal proceedings are instituted against an honorary consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except when he is under arrest or detention, in a manner which will hamper the exercise of consular functions as little as possible. When it has become necessary to detain an honorary consular officer, the proceedings against him shall be instituted with the minimum of delay.

Article 64

PROTECTION OF HONORARY CONSULAR OFFICERS

The receiving State is under a duty to accord to an honorary consular officer such protection as may be required by reason of his official position.

Article 65

EXEMPTION FROM REGISTRATION OF ALIENS AND RESIDENCE PERMITS

Honorary consular officers, with the exception of those who carry on for personal profit any professional or commercial activity in the receiving State, shall be exempt from all obligations under the laws and regulations of the receiving State in regard to the registration of aliens and residence permits.

Article 66

EXEMPTION FROM TAXATION

An honorary consular officer shall be exempt from all dues and taxes on the remuneration and emoluments which he receives from the sending State in respect of the exercise of consular functions.

Article 67

EXEMPTION FROM PERSONAL SERVICES AND CONTRIBUTIONS

The receiving State shall exempt honorary consular officers from all personal services and from all public services of any kind whatsoever and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 68

OPTIONAL CHARACTER OF THE INSTITUTION OF HONORARY CONSULAR OFFICERS

Each State is free to decide whether it will appoint or receive honorary consular officers.

CHAPTER IV: GENERAL PROVISIONS

Article 69

CONSULAR AGENTS WHO ARE NOT HEADS OF CONSULAR POSTS

1. Each State is free to decide whether it will establish or admit consular agencies conducted by consular agents not designated as heads of consular post by the sending State.
2. The conditions under which the consular agencies referred to in paragraph 1 of this Article may carry on their activities and the privileges and immunities which may be enjoyed by the consular agents in charge of them shall be determined by agreement between the sending State and the receiving State.

Article 70

EXERCISE OF CONSULAR FUNCTIONS BY DIPLOMATIC MISSIONS

1. The provisions of the present Convention apply also, so far as the context permits, to the exercise of consular functions by a diplomatic mission.
2. The names of members of a diplomatic mission assigned to the consular section or otherwise charged with the exercise of the consular functions of the mission shall be notified to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry.
3. In the exercise of consular functions a diplomatic mission may address:
 - (a) the local authorities of the consular district;
 - (b) the central authorities of the receiving State if this is allowed by the laws, regulations and usages of the receiving State or by relevant international agreements.
4. The privileges and immunities of the members of a diplomatic mission referred to in paragraph 2 of this Article shall continue to be governed by the rules of international law concerning diplomatic relations.

Article 71

NATIONALS OR PERMANENT RESIDENTS OF THE RECEIVING STATE

1. Except in so far as additional facilities, privileges and immunities may be granted by the receiving State, consular officers who are nationals of or permanently resident in the receiving State shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions, and the privilege provided in paragraph 3 of Article 44. So far as these consular officers are concerned, the receiving State shall likewise be bound by the obligation laid down in Article 42. If criminal proceedings are instituted against such a consular officer, the proceedings shall, except when he is under arrest or detention, be conducted in a manner which will hamper the exercise of consular functions as little as possible.
2. Other members of the consular post who are nationals of or permanently resident in the receiving State and members of their families, as well as members of the families of consular officers referred to in paragraph 1 of this Article, shall enjoy facilities, privileges and immunities only in so far as these are granted to them by the receiving State. Those members of the families of members of the consular post and those members of the private staff who are themselves nationals of or permanently resident in the receiving State shall likewise enjoy facilities, privileges and immunities only in so far as these are granted to them by the receiving State. The receiving State shall, however, exercise its jurisdiction over those persons in such a way as not to hinder unduly the performance of the functions of the consular post.

Article 72

NON-DISCRIMINATION

1. In the application of the provisions of the present Convention the receiving State shall not discriminate as between States.
2. However, discrimination shall not be regarded as taking place:
 - (a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its consular posts in the sending State;
 - (b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

Article 73

RELATIONSHIP BETWEEN THE PRESENT CONVENTION AND OTHER
INTERNATIONAL AGREEMENTS

1. The provisions of the present Convention shall not affect other international agreements in force as between States parties to them.
2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.

CHAPTER V: FINAL PROVISIONS

Article 74

SIGNATURE

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention, as follows until 31 October 1963 at the Federal Ministry for Foreign Affairs of the Republic of Austria and subsequently, until 31 March 1964, at the United Nations Headquarters in New York.

Article 75

RATIFICATION

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 76

ACCESSION

The present Convention shall remain open for accession by any State belonging to any of the four categories mentioned in Article 74. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 77

ENTRY INTO FORCE

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.
2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 78

NOTIFICATIONS BY THE SECRETARY-GENERAL

The Secretary-General of the United Nations shall inform all States belonging to any of the four categories mentioned in Article 74:

- (a) of signatures to the present Convention and of the deposit of instruments of ratification or accession, in accordance with Articles 74, 75 and 76;
- (b) of the date on which the present Convention will enter into force, in accordance with Article 77.

Article 79

AUTHENTIC TEXTS

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States belonging to any of the four categories mentioned in Article 74.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna, this twenty-fourth day of April, one thousand nine hundred and sixty-three.

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