Bridging the Gap: Effective Representation of Foreign Nationals in U.S. Criminal Cases

An Introductory Guide for Attorneys

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INTRODUCTION

It is the nightmare scenario of almost all people who travel or live abroad: to be arrested on a criminal charge in a foreign country, far from home and friends, facing prosecution under an unfamiliar legal system. Confronting the legal process of another country is a bewildering experience; for indigent foreign defendants, it is a truly frightening ordeal. Barriers of language, culture and perception often result in injurious waivers of legal rights, discriminatory treatment or inadequate legal representation. As a consequence, foreigners facing serious charges may be particularly vulnerable to unfair trials, wrongful conviction and excessive punishment.

This introductory guide is the third in a series of publications by the International Justice Project (IJP) addressing the rights of foreign nationals in custody. The previous publications, intended primarily for consular officers, outlined the importance of consular assistance in U.S. death penalty cases (*Equal Protection*) and explained the diverse role of consulates in protecting their nationals in custody worldwide (*A Universal Safeguard*). Both titles are available on the website of the IJP, which is listed below.

In contrast, this guide is designed for use by attorneys representing foreign nationals facing the death penalty or other extremely serious charges in the United States. Providing effective representation for a foreigner facing a potential capital charge poses unique challenges—and opportunities—for defense teams. Foreign nationality can impede legal assistance at fundamental levels, such as communicating with and obtaining instructions from the client or gathering evidence. Particularly in life-or-death situations, we believe that counsel representing foreign clients should explore and make use of all available avenues for assistance to overcome these obstacles. The guide attempts to identify many of the problems which commonly arise when representing foreigners. It also proposes remedies intended to bridge the gap between a foreign national and the fair administration of justice to which all accused persons are entitled.

In particular, the guide emphasizes the significance of enlisting consular assistance as a central element in the defense strategy. Consular support can be crucial in securing the resources to adequately defend a foreign citizen. Experience at home and abroad has shown that consular officers and defense attorneys should work together closely in criminal cases, especially where consular treaty provisions have been breached or whenever the death penalty is involved. We sincerely hope this guide will help to foster that vitally important relationship.

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This guide and related publications can also be downloaded at:
http://www.internationaljusticeproject.org/nationalsResources.cfm

BASIC DEFINITIONS OF TERMS USED IN THIS GUIDE

"consulate"

An office established by a national government to represent its interests and those of its citizens within another country. Unlike an embassy (which represents the diplomatic and political interests of a foreign government), a nation may have more than one consulate within a foreign country.

"consular officer"

An official appointed by the sending nation to carry out specified functions within its consulates abroad. Consular officers are accredited by the government of the receiving nation, which typically provides them with identification to assist them in carrying out their tasks.

"consul"

A senior consular officer in a given consulate.

"consular assistance"

Any form of assistance or support that a consulate is authorized to provide to its citizens within a given consular jurisdiction.

"foreign national"

Any person who does not possess citizenship of the country in which they are present.

"Vienna Convention on Consular Relations" or *"VCCR"*

The international treaty governing the rights, duties and privileges of consulates worldwide. The VCCR is the cornerstone of consular relations under international law, supplemented by bilateral consular agreements ratified by individual nations.

"Article 36"

The section of the VCCR that outlines the rights of both consular officers and individual foreign nationals whenever foreign citizens are detained, arrested or imprisoned. The article also stipulates procedures that must be followed by the arresting authorities to advise foreign detainees of their consular rights and to provide consular communication and access.

"consular advisement"

The procedure by which the local authorities inform foreign nationals in custody of their right to consular notification, communication and access.

"consular notification"

The procedure by which the detaining authorities notify a consulate that one of its citizens is in their custody. Notification can be made by various means (such as phone or fax), provided that the consulate is notified without delay.

WORKING WITH A FOREIGN CLIENT

Foreign Nationals in the USA: An Overview

A foreign national in the United States is any individual who does not possess U.S. citizenship. Foreign nationals would thus include tourists and visitors, migrant workers with temporary permits, resident aliens, undocumented aliens, asylum-seekers and persons in transit. Foreign citizens comprise a significant portion of the population: more than 20 million foreigners visit the USA annually and approximately 12 million U.S. residents are non-citizens.[1]

By far the largest groups of foreigners in the United States are from Mexico and Central America, followed by Asia, the Caribbean and Eastern Europe. Large concentrations of foreign nationals are found in states such as California, Florida, Texas, Arizona, Illinois and New York. Significantly, these large populations of foreigners also tend to correspond with jurisdictions that impose the death penalty.

At present, there are no comprehensive statistics on the total number of foreign citizens incarcerated in the USA. According to data compiled by Human Rights Research, 118 foreign nationals representing thirty-one nationalities were known to be under sentence of death across the United States as of July, 2005.[2] Foreigners thus comprise approximately three per cent of the total death row population; the Bureau of Justice Statistics estimates that approximately 4% of the inmate population in state institutions are non-citizens.[3] Assuming the same ratio in the federal prison system, some 52,000 foreign nationals are imprisoned in the USA.

In virtually every reported death penalty case, local authorities failed to inform foreign detainees of their guaranteed right to consular notification, communication and access, as required under Article 36 of the *Vienna Convention on Consular Relations* (VCCR) (See Section 2(a)). This functional denial of consular assistance at the most crucial stage of the proceedings unquestionably contributed to the eventual death sentence in many cases. In all likelihood, similar circumstances and consequences arose in the as yet unknown number of cases in which foreign nationals have been sentenced to life imprisonment without parole.

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[1] For general data on foreign nationals in the USA, see Campbell J. Gibson and Emily Lennon, *Historical Census Statistics on the Foreign-born Population of the United States: 1850-1990*, U.S. Bureau of the Census Population Division, available at:
http://www.census.gov/population/www/documentation/twps0029/twps0029.html.

[2] For the most current data, see:
http://www.deathpenaltyinfo.org/article.php?did=198&scid=31.

[3] Bureau of Justice Statistics, U.S. Department of Justice, *Criminal Offenders Statistics*, *available at:*
http://www.ojp.usdoj.gov/bjs/crimoff.htm.

Timely consular assistance is vitally important whenever a foreigner faces arrest and prosecution on serious charges. The widespread failure of U.S. police departments to comply with their binding treaty obligations is thus a significant obstacle confronting arrested foreign nationals, one which should be identified and addressed by counsel at the earliest possible stage of any serious case. Just as importantly, enlisting the consulate as an ally can be indispensable in overcoming the many barriers that may arise when defending a foreign client. Much of this guide is devoted to identifying, researching and litigating violations of consular rights.

Barriers Facing Arrested Foreigners: Strangers in a Strange Land

To a degree rarely encountered in the cases of domestic citizens, arrested foreign nationals face a multitude of linguistic, cultural and conceptual barriers that frequently hinder their ability to fully understand and act on their legal rights. Some of these obstacles are obvious, while others operate in more subtle but equally important ways; even relatively sophisticated or affluent foreign defendants may be seriously disadvantaged from the moment of their detention. As a general rule, counsel representing a foreign client facing a criminal charge should treat foreign nationality as a highly significant factor that may permeate both the relationship with the client and the factual circumstances of the case.

a) Barriers of Language

As every defense attorney knows, it is often challenging to convert the arcane vocabulary of the legal process into terms which the client will fully comprehend and act on accordingly. When the client has a limited or non-existent command of English, this challenge is immediately compounded. Attorneys generally sensitive to the problem of achieving effective client communication can nonetheless face a number of additional hurdles when representing a foreign national.

In many cases, counsel will need to rely on an interpreter (or their own command of a foreign language) to communicate with and obtain instructions from a foreign client. However, most languages consist of a host of regional or national dialects, where commonly-used words are subject to different pronunciations or meanings depending on the geographic origin or socioeconomic status of the speaker. As an example, an interpreter of Spanish familiar with the language as it is spoken in Cuba may be inadequate when confronting the Spanish of a Mexican national, whose pronunciation and vocabulary will be significantly different.[4] Moreover, it is not sufficient to merely translate U.S. legal terminology into another language. An interpreter fluent in your client's language and idiom may have only a limited grasp of legal concepts, and thus be unable to adequately convey important information in terms that a foreign national will truly comprehend.

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[4] For instance, the Spanish word "drogas" literally translates as "drugs" and is so used in many Spanish dialects; in Mexico, however, the same word is colloquially used to mean "debts". Mexican Spanish is widely known as a distinct regional variety of the language, one which incorporates many indigenous words and unique colloquial phrases.

Nor should a foreign national's ability to carry on an ordinary conversation in English be taken as proof of proficiency. Few foreigners' fluency will be sufficient to understand and assign appropriate importance to such legalisms as "arraignment" or "waiver of rights", including foreign clients with previous exposure to the U.S. criminal justice system. The ability of any listener to internally translate and process verbal information given in a foreign language is heavily dependent on the speed of the conversation, the complexity of the vocabulary used and the accent of the speaker. English can be a particularly difficult language to fully master, given its extensive vocabulary and inconsistent rules of grammar and pronunciation. Where any doubt exists concerning the language ability of a foreign client, it is invariably best to obtain the assistance of a qualified interpreter at the outset. You should also be mindful of the need to explain even basic legal terminology so that its meaning and significance can be properly conveyed by the interpreter.

b) Barriers of Culture

Differences in cultural background are frequently overlooked but can be major impediments to effective communication with a client. Much of the information that people convey to each other is unspoken (such as body language and gestures) or derives from a shared set of social assumptions and behavior. This unconscious dialogue is primarily cultural in nature, often resulting in misunderstandings between attorneys and their foreign clients that are just as significant as language barriers.

In many cultures outside of North America, for example, it is impolite to make direct eye contact with a person of higher social status; what may appear to an American to be evasive or untrustworthy behavior may simply be a sign of respect. Similarly, it may be considered extremely rude to contradict any authority figure: a foreign national may thus attempt to agree with an interrogating police officer (or their own attorney), by answering questions in ways that are not consistent with the actual facts. A question as basic as "do you understand what I am telling you?" may result in an affirmative response out of respect for the authority asking the question or to signal a willingness to continue listening, rather than as an indication of actual comprehension.

Cultural differences may be further complicated by issues of gender and socioeconomics. The masculine self-image prevalent in many cultures may prompt some male foreign clients to pretend to greater facility in English than they actually possess, while women from some cultures may be inarticulate or ill at ease when conversing with a male authority figure. Many foreign nationals have come from the lower economic strata of their own societies, with limited educations and an ingrained deference to, or distrust of, authority. Both in their home cultures and since their arrival in the United States, the acquired coping mechanism for most disadvantaged foreigners is to be as compliant and deferential as possible. Attorneys asking for instructions may be told to do whatever they believe is best, even though these clients may have strong preferences that they feel unable to express.

Definitions of criminal behavior are themselves sometimes cultural in nature. What constitutes a criminal act in the USA may be seen as normal or even desirable behavior in other cultures. For example, notions of family honor may prompt an unassimilated foreigner to retaliate violently

against a perceived slight or to impose harsh discipline on a spouse or child, without any 'criminal' intent. Non-citizens may fail to comprehend that what they view as appropriate or even necessary behavior may be perceived in this country as a criminal act warranting imprisonment. While culturally-motivated behavior does not exonerate your client, it may form the basis for a so-called "cultural defense" and is clearly relevant to your understanding of the case circumstances.

Cultural codes of honor can make it exceptionally difficult for some accused foreigners to provide counsel with personal information deemed to be shameful, such as a history of mental illness or mental retardation. A strong sense of family loyalty or other cultural considerations may inhibit the sharing of crucially important information, including the identity of the actual perpetrator in cases of wrongful arrest. Within some cultures, important decisions affecting family cohesion are made collectively; accordingly, a foreign national may feel a strong need to discuss their legal options with senior family members or, in their absence, with leaders of their ethnic community. Counsel should thus be prepared for a greater degree of interaction with the defendant's family and their community advisers than might otherwise usually occur.

At the other end of the spectrum, it is also possible to stereotype foreign defendants by ascribing to them rigid cultural values that are either inaccurate or inapplicable to the specific individual.[5] While few other societies are as open and diverse as that of the United States, no culture is entirely monolithic. Sensitivity to cultural issues should also include an awareness of cultural diversity: the same range of individualized life factors that contributed to the unique identity of each of your domestic clients will also have shaped the persona and values of a foreign defendant.

c) Conceptual Barriers

Legal concepts that domestic citizens innately understand and take for granted may seem dubious or utterly incomprehensible to a foreigner. Very few countries outside of the USA use the adversarial system of justice, which is based on English common law. Many other countries (and their nationals) rely on an inquisitorial system, in which the rights of the accused during the pre-trial stage are protected not by an attorney, but rather by an investigating magistrate. While most judicial systems recognize the defendant's right to an attorney, the crucial need to retain legal representation from the outset of a criminal case in the United States may not be immediately apparent to a foreign defendant.

Furthermore, the appointment of counsel for indigent defendants is not an entrenched right in many societies; the widespread corruption that taints some judicial systems can further distort a foreign national's perception of an appointed lawyer. It can be difficult for indigent foreign defendants to understand why they need your services at all; some may doubt that you are working exclusively in their interests, since you were appointed by the same authorities seeking

[5] As a timely illustration, almost all Middle Eastern societies contain significant numbers of non-Muslim citizens whose cultural matrix differs sharply from that of the majority. Islamic culture itself encompasses a wide spectrum of value systems, ranging from highly secularized to rigidly fundamentalist adherents.

to convict them. Other foreign nationals and their families may believe that money changes everything: from their perspective, an appointed attorney cannot possibly be as influential or effective as retained counsel.[6]

Even foreign nationals who have resided for the majority of their lives in the United States may not have absorbed the concepts of the right to counsel and attorney-client privilege, owing to the tendency of immigrants in the lower economic strata to achieve limited assimilation into American culture. A blend of cultural deference and innate distrust of judicial procedures may also prompt some foreign clients to tell you only what they think you want to hear, inadvertently hindering your ability to provide effective representation.

A classic example of these conceptual barriers is the practice of plea bargaining, which is rarely used outside of the USA. Throughout much of Central and South America, for example, plea bargaining is either unheard of or is explicitly illegal. Some foreign clients will react with hostility and suspicion to a plea offer, out of the mistaken belief that you have abandoned them and are now conspiring against them with the prosecution. Explaining that plea bargaining is the standard method by which most criminal cases are resolved in the United States (and elaborating on the benefits of the offer) may well require a degree of preparation and creativity that is simply not at issue with most other defendants.

More generally, every aspect of the U.S. legal process can produce confusion and misunderstanding in the minds of foreign defendants, sometimes with disastrous consequences.[7] As one essential element in providing effective representation, a knowledgeable person who is trusted by the defendant should be available wherever possible to patiently explain the process in terms that will be fully understood. Above all, counsel should firmly keep in mind that a foreign client facing criminal prosecution will frequently be subject to intense feelings of anxiety and confusion, coloring their initial responses and requiring increased attentiveness in order to establish the necessary relationship of trust.

In many cases, the best avenue for a reliable "cultural bridge" to the defendant will be through a consular officer from your client's country of origin. From the time of your first meeting with a foreign defendant, you should be exploring the possibility of contacting consular representatives and seeking their involvement in the case. (See Section 2; *Working with the Consulate*).

See Section 3: Legal Issues Affecting Foreign Nationals for information on involuntary waivers of Miranda rights and other legal consequences in the cases of foreign nationals.

[6] Occasionally, the families of foreign nationals facing capital charges in the United States have dismissed experienced appointed counsel and retained private attorneys for rock-bottom fees, in the mistaken belief that a retained lawyer is invariably more committed and competent to represent their loved one. The results in those cases have been tragically predictable.

[7] As an example of fatal confusion, Paraguayan national Angel Francisco Breard was arrested and charged with capital murder in Virginia. Against the advice of his attorneys, he insisted on taking the stand during his trial and confessed in open court, mistakenly believing that the court would then be required to show leniency (as it would in Paraguay). Breard was promptly sentenced to death and subsequently executed.

Recommendations for More Effective Communication with Foreign Clients

1. When meeting with your client, try and include a competent interpreter in the interview unless you are completely proficient in the foreign national's language and dialect.

2. When relying on an interpreter, watch for warning signs of communication problems such as confusion on the part of the client, questions from the client that aren't translated, or long responses by the client that produce short translations.

3. Be prepared to explain the basic role of legal representation and the concept of attorney-client privilege, using simple language and non-technical terms. Take your time, and speak at a measured pace.

4. Be ready and willing to take part in discussions about the case with the client's family. If there are significant barriers to client communication, consider enlisting the family member who is most proficient in English as another channel to your client.

5. Be prepared to retain additional experts to assist you, such as cross-cultural specialists and bi-cultural psychologists required for mental health assessments and mitigation investigations. Familiarize yourself with your client's culture through research and by consultation with local experts such as academics and leaders of the national's ethnic community. Your state bar association or public defender agency may maintain a list of qualified bilingual experts in fields such as psychology, cross-cultural issues, immigration and mitigation investigations.

6. Be patient when explaining legal procedures and remain alert to your client's responses. Periodically ask the client to repeat back their understanding of what you have just said, to ensure their full comprehension. Correct any misunderstandings as soon as they arise.

7. In all cases where a foreign defendant is facing very serious charges, give particular consideration to the benefits of prompt consular involvement, both as a cultural bridge to your client and as a potential source of assistance to the defense.

Additional Resources

- For a detailed discussion of the linguistic and cultural barriers confronting foreign-born defendants in the USA, see *Immigrants in Courts*, Joanne Moore, ed. (1999).

- Assistance for detained foreign nationals may also be available from other organizations, including cultural, religious and special interest groups. For a list of these groups in the United States by nationality, see Lara A. Ballard*, The Vienna Convention, Consular Access and Other Assistance Available to Foreign Nationals: A Guide for Criminal and Immigration Lawyers*, Columbia Human Rights Law Review (1998). Also available on-line as a compressed file at:

http://www.gacdl.org/download/viennaco.zip

- For a general introduction to factors in mitigation investigations (including cultural issues), see Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, The Champion, January/February 1999. Also available at:

  http://www.nacdl.org/public.nsf/941a6d5b3ad55cd485256b05008143fd/bee3ff4450880bb485256704006793eb?OpenDocument

- The challenges and benefits of mental health investigations are summarized in: Russell Stetler, *Mental Disabilities and Mitigation*, The Champion, April 1999. Also posted at:

  http://www.nacdl.org/public.nsf/941a6d5b3ad55cd485256b05008143fd/1f190a60788274dd8525674b00597b54?OpenDocument

- The Cultural Orientation Project has produced a series of Culture Profiles, providing short introductions to the cultural background of refugee populations, at:
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  www.culturalorientation.net/fact.html

- The Center for International Rehabilitation Research Information and Exchange (CIRRIE) has developed an eleven-volume monograph series, *The Rehabilitation Provider's Guide to Cultures of the Foreign-Born*, which provides specific information on cultural perspectives of foreign-born persons in the U.S., especially recent immigrants:
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  http://cirrie.buffalo.edu/mseries.html

- The Mexican Capital Legal Assistance Program (MCLAP) has produced a detailed manual and litigation guide entitled *Representing Mexican Nationals Facing the Death Penalty: Core Resources for Defense Teams*. Although specific to Mexican nationals, the chapters on cultural and linguistic issues contain valuable advice applicable to representing all foreign-born capital defendants. For ordering information, contact Andrea Richardson, Mexican Capital Legal Assistance Program, 2201 East 34th Street, Minneapolis, MN 55407, tel: 612-729-7378, email: africhardson@gmail.com

WORKING WITH THE CONSULATE

The Role of the Consul in Criminal Cases: An Informal Summary

Assisting its nationals in distress is one of the defining aspects of the consular service of every nation. Few nationals require that assistance more urgently than those who are arrested and face prosecution in a foreign country. Approaching a foreign client's consulate and enlisting its support should be seen as an essential element in effective legal representation. Consular officers can provide a wide range of services for their nationals facing the death penalty or other severe sentences, often augmenting the resources available to the defense and sometimes providing assistance that would not otherwise be available.

Establishing a good working relationship between defense attorneys and consular officers requires some understanding from both parties about respective capacities and expectations. In a death penalty case, attorneys must meet strict deadlines at each stage of the legal process and are responsible to their clients in a life-or-death situation. That creates an understandable sense of urgency in their requests for consular assistance and high expectations of the consulate's capacity to respond. It can also create tensions with lawyers not used to the more measured pace of diplomacy. For their part, consular officers have a responsibility to safeguard the interests of their national in custody; the consulate relies on defense counsel to keep it apprised of significant legal developments at each stage of the judicial process.

For guidance on developing a good working relationship with the consulate, see *Contacting the Consulate*, subsection (e) of this chapter.

Consulates are responsible for a host of duties other than representing their arrested nationals. A partial listing of consular functions would include: issuing identity documents and visas, emergency assistance to nationals during natural disasters, returning remains for burial, notary functions, and promoting trade or cultural links with the home country. Since consular services are so diverse, the degree of support that any given consulate can provide in a criminal case may be limited by staffing or resource constraints. Nonetheless, counsel should always strive to develop a relationship with the client's consulate whenever a foreign national faces criminal prosecution and a severe sentence.[8]

Consular intervention can be crucial in providing the additional resources to adequately defend a foreign citizen facing an extremely serious charge, by providing access to mitigating evidence, witnesses, cultural expertise, diplomatic influence and many other forms of assistance. Consular

[8] Circumstances may arise under which a relatively minor charge can result in serious harm to the national's well-being, such as a summary deportation from the USA upon completion of the sentence despite long residency and strong family ties in this country. While consular assistance is generally most extensive in capital cases, humanitarian considerations may also prompt extensive assistance for a national facing less severe charges. For assistance when communicating with consular officers or embassy staff in Washington DC, please contact the IJP at the email address listed in the Introduction.

actions can also be beneficial to your client in unexpected ways. The active involvement of the consulate has dissuaded some prosecutors from seeking the death penalty in the first place; in other cases, consular support has persuaded condemned prisoners to resume their appeals.

The concept that all states are entitled to protect the interests of their nationals abroad is a basic principle of international consular law and diplomatic practice. International law recognizes the unique vulnerability of foreign nationals facing prosecution and imprisonment; consular officers have long had the right to visit, communicate with and assist their nationals who are jailed or imprisoned abroad. As the U.S. Supreme Court recognized nearly two centuries ago in *The Bello Corrunes*, 19 U.S. 152, 168 (1821):

> To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which Consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in Courts only, it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the Courts of the United States, has sanctioned the exercise of this right, and it is impossible that any evil or inconvenience can flow from it.

a) The Vienna Convention on Consular Relations (VCCR)

The 1963 *Vienna Convention on Consular Relations* (VCCR) (21 U.S.T. 77, T.I.A.S. 6820) is a multilateral treaty created by the United Nations to regulate the rights, privileges, immunities and duties of consular posts and consular staff worldwide. Without question, the VCCR is the cornerstone of international consular relations. The USA and more than 160 other countries are parties to this treaty; its provisions express the binding minimum norms of consular practices under international law.

Article 36 of the VCCR enshrines the time-honored right of consular officers to communicate with and assist their detained nationals. The article also confers specific rights on detained or imprisoned foreign nationals. As the U.S. Government noted before the International Court of Justice, Article 36 "establishes rights not only for the consular officer, but perhaps more importantly for the nationals of the sending State who are assured access to consular officers and through them to others".[9] These obligations also apply to those nations that have not yet ratified the VCCR, under customary international law.[10]

Requirements under Article 36:

- The local authorities must inform detained foreigners without delay of their right to have

[9] *United States Diplomatic and Consular Staff in Tehran* (U.S.A. v. Iran), I.C.J. Pleadings, at 174.

[10] "Customary international law" refers to the body of international law based on the established customs and practices that nations comply with from a sense of legal obligation. Its provisions are binding on all nations even in the absence of a ratified treaty.

their consular post notified of their detention and of their right to communicate with their consular representatives.

- At the request of the detainee, the authorities must then notify the consular post of the arrest without delay and permit consular access to the detained national.
- Consular officers have the right to be promptly informed of the detention at the national's request, to communicate, correspond, and visit with their detained nationals, to arrange for their nationals' legal representation, and to provide other appropriate assistance with the detainee's consent.

These rights of information, notification, access, and assistance apply at all stages of the legal process, commencing as soon as the local authorities realize that the detainee is a foreign national or once there are grounds to think that the person is probably a foreign national. Local laws and regulations must give "full effect" to Article 36 provisions and the rights that it accords.[11] The terms of Article 36 are reciprocal: they apply with equal force to foreign nationals in custody within the USA and to the thousands of U.S. citizens detained, arrested or imprisoned abroad.

The USA unconditionally ratified the VCCR in 1969, without attaching any limiting reservations or understandings that would prevent the invocation of its terms in domestic litigation. The United States also recognizes the VCCR as a self-executing treaty: no implementing legislation is required to give the treaty full force under domestic law. Thus, any rights conferred on individuals by the provisions of Article 36 are justiciable and may be addressed directly by the domestic courts.

While consular assistance for detained nationals can take many forms, each intervention serves three basic purposes. The first is ***humanitarian***: consular officers provide detainees with access to the outside world (e.g., by communicating with family and friends) and ensure that they have the basic necessities of life (in some countries, for example, prisons do not provide adequate food or medicine).
The second purpose is ***protective***: consular visits help to ensure that detained foreign nationals are not discriminated against or mistreated. In many countries, timely consular assistance is all that stands between foreign prisoners and ill-treatment, torture, or even death in custody.

The final purpose is ***legal assistance***: consular officers immediately acquaint their nationals with their legal rights and the basic procedures under the local legal system, provide them with lists of local lawyers to defend them and take other appropriate steps to ensure that their nationals receive fair and equal treatment under the laws of the arresting state.

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[11] The full text of Article 36 and other relevant provisions of the VCCR is enclosed as Appendix I.

b) Common Misconceptions about Consular Assistance

- Consular assistance is **not** intended to immunize foreign nationals from local laws. With the exception of individuals possessing diplomatic or consular immunity, a foreigner arrested abroad is fully subject to the laws and legal procedures of the receiving country, including all legal punishments that may be imposed for breaches of domestic law. However, consular officers are entitled to intercede with the local authorities on behalf of their nationals to avoid excessively harsh or unjust punishments.

- Consular representatives do **not** act as surrogate attorneys for their nationals, nor may they serve as a detainee's legal representative. While the consular function is often complementary to that of defense counsel, it does not replace (or conflict with) the indispensable role of the detainee's legal representative.

- Under the provisions of Article 36, consular officers may **not** provide any form of assistance that is expressly opposed by the detained person. Foreign nationals in custody always retain the right to accept or decline any form of consular assistance, except in those instances where they are not competent to make an informed decision due to mental or physical incapacity.

- Article 36 does **not** require that the consulate be notified automatically, unless the detainee first requests consular notification. Police should not contact the consulate without authorization from the national, except when the USA and the national's country of citizenship are also parties to a separate bilateral agreement requiring mandatory notification of the consulate for all detentions.

- Under the provisions of many of the **bilateral consular agreements** in force between the United States and some 50 other nations, notification of the consulate is mandatory irrespective of the wishes of the detainee. Nonetheless, the arresting police are still required to advise these detainees of their right under Article 36 to communicate with their consulate. Detainees from mandatory notification countries also retain the right to accept or refuse any offered consular assistance.[12]

- **Mandatory notification** of the consulate is required under Article 37 of the VCCR in all cases involving the death of a foreign national, or where "the appointment of a guardian or trustee appears to be in the interests of a minor or other persons lacking full capacity."[13]

- Contact between the police and law enforcement agencies in the defendant's home country (such as requesting criminal records from the home jurisdiction) does **not** meet

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[12] A current list of these bilateral consular agreements (along with links to their texts) is posted by the State Department at: http://travel.state.gov/law/legal/treaty/treaty_784.html.

[13] Information on bilateral agreements and mandatory notification provisions is posted by the IJP at: http://internationaljusticeproject.org/nationals_bil.cfm.

the notification requirements of Article 36, in circumstances where the consulate has not been notified of the detention.

- Consular rights apply **regardless** of immigration status or the length of time that a foreign national has resided in the arresting State.

c) Consular Functions in Serious Criminal Cases

In any serious case, basic consular assistance could include:

- explaining legal rights and procedures to the detainee;
- visiting, communicating with and monitoring the treatment of the detainee in custody;
- contacting friends and family in the home country;
- attending significant court hearings;
- working to resolve any problems that arise between the defense team and the national;
- acting as a "cultural bridge" between the national and the defense team or the local authorities;

Depending on the case circumstances, consular assistance may also include:

- arranging for family visits;
- interceding with prosecutors to seek a lesser sentence;
- assisting with mitigation investigations in the home country;
- locating, authenticating and conveying documents from the home country (e.g., educational, medical, military records);
- when Article 36 violations are raised, testifying at evidentiary hearings or submitting consular affidavits;
- submitting amicus briefs or motions based on any violations of international law;
- any other assistance necessary to ensure that the national receives fair, equal and humane treatment, throughout the detention, trial and imprisonment.

The consulates of most nations strive to provide at least basic consular protections to their nationals detained abroad. However, the scope of assistance that you and your client will receive may vary, depending on the severity of the offense, the resources available to the local consular

post, the priority placed by the home government on this form of consular services and even the degree of interest of the local consul. Nonetheless, in all reported capital cases to date, contacted consulates have provided meaningful assistance of varying kinds to U.S. defense counsel.[14]

While the resources and capacities of individual consular posts may vary considerably, all consulates should be able to provide defense counsel with these basic forms of assistance:

- communicate with the detainee, defense counsel and the local authorities on an ongoing basis;
- provide an affidavit describing the consular services extended to detainees;
- maintain a case file for each of their nationals in custody and provide pertinent information to the defense attorney;
- provide diplomatic assistance where necessary, such as by submitting a diplomatic note through the embassy to the Department of State to express concern over an alleged violation of the VCCR and to request an investigation of the circumstances.

d) Discussing Consular Assistance with Your Client

Under the provisions of Article 36, the decision to initiate consular contact normally rests with the detainee. Many foreign nationals will have a limited or erroneous understanding of consular assistance, while others may have legitimate reasons for not wanting their home government to know about their whereabouts (political refugees, for example). Providing your client with a basic explanation of the purpose and potential benefits of consular involvement could be the initial step in developing a productive relationship with the consulate.

If your client is a citizen of a country that has negotiated a bilateral agreement with the USA requiring mandatory notification of the consulate, you should also explain why the consulate must be notified regardless of the client's wishes. Despite this mandatory obligation, your client still retains the right to accept or refuse any offered consular assistance. In some instances, the terms of a bilateral consular agreement may also confer supplementary rights on a detainee beyond those contained in Article 36. As an initial step in preparing to represent a foreign national, counsel should become familiar both with the provisions of Article 36 and with the terms of any bilateral consular agreement pertinent to the case.

It is important to recognize that your client may initially decline consular contact or assistance and then later decide to accept it. This may be especially relevant in the earliest stages of a case, when distress over their situation may cloud the judgment of people in custody. A common example would be a routine offer by the consular officer to contact the detainee's family, where

[14] This assistance is not limited to those nations that have abolished the death penalty. The consular services of a number of retentionist nations have intervened vigorously when one of their nationals was facing the death penalty in the USA but was not apprised of consular rights upon detention.

embarrassment or confusion may initially prompt the national to refuse the offer. It is frequently necessary to provide an explanation of the benefits of any offered consular assistance as a prelude to obtaining your client's consent.

e) Contacting the Consulate

Once you have obtained consent, contact the nearest consulate of your client's nationality. If there is no consulate nearby, contact the home government's embassy in Washington instead, directing your enquiry to the Consul General.[15]

Even if your research indicates that your client was promptly advised of their consular rights upon detention, you should still make contact with the consulate to discuss possible assistance.

If at all possible, you should arrange to meet personally with a consular officer to discuss the case and the forms of consular assistance that would be beneficial. When a meeting is not possible, send an introductory letter summarizing your client's background and case history, stressing the grave predicament of the defendant and any breaches of consular rights that your initial case investigation has uncovered.

At this point, your purpose should be to acquaint the consulate with the legal situation as you see it and to establish a dialogue on how you might work together on your client's behalf. The section at the end of this chapter (see *Additional Resources*) should provide you with some ideas on potential resources to discuss, but you should also be creative in shaping your thinking to the circumstances of the specific case. Not all consulates will be familiar with U.S. criminal case procedures, or with the potential scope and benefit of consular assistance in these cases. A companion document on effective consular assistance is also available from the IJP. Intended primarily for consular officers in the United States, *Equal Protection* includes examples of effective consular interventions, an overview of the U.S. death penalty process and advice for consular officers working with defense teams. The publication is available for downloading at the web-address provided in the Introduction.

There are two requests for assistance you may make initially that most consulates will feel duty-bound to comply with. First, a consular representative should immediately arrange to visit or speak with your client. Secondly, request that a consular representative be present at all significant court hearings. Both are general consular functions under the VCCR; this visible support from the home government can boost your client's morale, alleviating their anxiety and improving your rapport. Evidence of consular participation will also add credibility to any legal claim you raise arguing that the consulate would have rendered valuable assistance to the defendant immediately following arrest. Finally, a consular presence in the courtroom will

[15] The State Department Internet site provides a full list of foreign embassies and consulates in the USA, at: http://travel.state.gov/law/consular/consular_745.html .

impress upon the judge (and the prosecutor) that the home government is resolved to ensure that its citizen is afforded scrupulous due process. At all stages of the proceedings, the consulate should regularly visit or communicate with the national and should lodge formal complaints with the authorities over any irregularity in the prisoner's treatment.

As previously noted, more than 50 nations are also parties to bilateral consular agreements with the USA. Breaches of these mandatory notification obligations can provide additional incentive for consular involvement in a serious case or may open other potential avenues for litigation. Counsel should raise this concern whenever there is a bilateral consular convention in force, and also determine through the consulate if there is any other treaty that might bear on the rights of the client.[16]

After developing a good working relationship with the consulate, other forms of assistance can be requested. If it is apparent that the consulate is deeply committed to assisting its national, your conversations with them may well assist consular authorities in making informed choices. Depending on the case circumstances, any form of consular assistance listed in this guide may be sought. The consular services of some countries (such as Mexico) can provide substantial expertise and resources. Other consulates may require careful explanation of the legal process on your part, before agreeing to intensify their support.

Limitations on consular resources should not be seen as an impediment to effective consular involvement in a potential capital case. The prestige of representing a foreign government often prompts law firms to provide *pro bono* assistance when asked to do so by a consulate. That free assistance can mean either direct representation of the consular interest in the case or additional legal resources for defense counsel. In a very serious case, counsel should advise a consulate with limited resources that *pro bono* assistance would be most welcome and is frequently available.[17]

If your first contact or subsequent relations with the consulate are unsatisfactory, do not give up. Send a copy of your introductory letter to the Consul General at the home government's embassy, or to the Foreign Affairs Minister.[18] Do not criticize the consulate in your correspondence with the home government; should the higher authorities decide to intervene in the case, you will still need to work with the local consular officers. When all else fails, you may wish to consider publicity or lobbying in your client's country of citizenship to persuade a reluctant government to take action. However, this step should only be taken in extremely

[16] One example would be a prisoner transfer agreement with the USA whereby the national might be eligible for repatriation in order to serve out their sentence in the home jurisdiction; another example is a mutual legal assistance treaty (MLAT) specifying the nature and extent of cooperation between criminal justice authorities in the USA and the other signing nation.

[17] In the Aldape Guerra case, for example, a Mexican consular request persuaded a major Houston law firm to provide *pro bono* assistance to habeas counsel. The firm spent two million dollars in billable hours before Aldape's conviction was reversed and he was released from death row in Texas.

[18] The names and addresses of foreign government officials are available via the Internet, through sites such as the worldwide listing of governmental agencies provided at: http://www.gksoft.com/govt/en/.

serious cases, after consultation with well-informed and reliable people on the ground in the home country.[19]

f) Consular Communications with Your Client

Some defense attorneys have expressed concerns about consular contact with their clients, fearing that these visits could result in conflicts of interest or otherwise impair the attorney-client relationship. These concerns are usually misplaced, for a variety of reasons. First, the role of the consulate is to provide support, information and assistance to the detainee, not to offer advice on legal options and strategies or to otherwise act as a surrogate attorney. In all cases, counsel should encourage consular officers to advise their detained nationals that they should discuss the case with their attorney and with no one else, unless explicitly instructed to do so by their own attorney.

Under the VCCR, consular communications with a national are exempt from disclosure and any consular documents or correspondence are inviolable (Articles 33 and 35). Consular immunity ensures that a consular officer may not be compelled to divulge any information about a case, for example, even when testifying at an evidentiary hearing (Article 44). Furthermore, experienced consular officers are well aware that detainees may complain about their legal representation and that those complaints are often unfounded. Because foreign nationals frequently have little or no familiarity with U.S. criminal justice procedures, they may readily misunderstand aspects of the proceedings (such as plea bargaining) and mistakenly conclude that their attorney is not representing their best interests. Consular officers are often trained to recognize any such misunderstandings and to work closely with defense counsel to resolve them.

You may wish to establish some working guidelines for consular communications with your client, such as ensuring that privileged information will not be imparted (and possibly overheard by jail authorities).

In the aftermath of September 11th, you should advise the consulate of the risk that prison authorities may be monitoring conversations between consular officers and detained foreigners, particularly if your client is Muslim or from the Middle East. To be certain, consular officers should not discuss case specifics or other sensitive information with your client.

A final word of advice: most diplomats are accustomed to moving slowly and deliberately. It may be frustrating, but the yield will be greater if you employ gentle but persistent pressure by making incremental requests rather than sudden demands. Be aware of the political realities between the USA and the home government: some consulates may prefer to keep their

[19] Amnesty International maintains national Sections in some 55 countries worldwide. Many AI Sections have press officers and campaign coordinators who can advise you on the local opportunities for media outreach, government lobbying, approaches to domestic bar associations, etc. For information on Amnesty International contacts in the home country, consult with the Death Penalty Program Director at the Amnesty International office in Washington, DC.

interventions low-key and will strive to avoid publicity, while others may use your client's case to further their own nation's agenda. In either situation, let the consulate retain a sense of control over their participation in the case. Always keep them fully informed of any relevant legal developments, and always show your appreciation for any assistance that they decide to provide.

g) Representing Dual Nationals

A dual national is any person who retains citizenship in two or more countries. In essence, there are two broad categories of dual nationals:

a) those with citizenship in two or more foreign countries (e.g., France and Morocco)

b) those who are simultaneously citizens of the USA and of one or more other nations.

Dual nationals in the first category are clearly entitled to consular advisement and notification under Article 36, even though the text of the treaty does not refer specifically to dual citizenship. As a practical matter, one of the respective consulates will usually take the lead in providing assistance to a detained dual national, frequently based on the detainee's country of principal residence or due to a more generous consular policy regarding dual citizenship. When representing a dual national in this category, counsel should consult with the client to determine which consulate should be approached first to request assistance.

Many countries extend the full range of consular assistance to their dual nationals, including those with U.S. citizenship arrested within the United States. However, this second category of dual citizens is problematic from the perspective of advisement of consular rights upon arrest or detention within the USA. The State Department has taken the position that a U.S. citizen with foreign nationality is not entitled to advisement of their consular rights if arrested in this country.

That interpretation of the treaty obligation may be open to question. Regardless, the fact remains that a consulate always retains the right to visit, correspond with and assist its nationals in confinement. That right would also apply to dual nationals arrested in their other country of citizenship, if their consulate chooses to extend that assistance. Where jail or prison authorities refuse consular access to a dual national in this category (or to any foreign national), counsel should encourage the consulate to lodge a protest with the State Department's Bureau of Consular Affairs. The Bureau will usually undertake to remedy consular access problems, at the request of the affected consular post. [20]

Some countries may also extend nationality on the basis of ancestry; the child of a foreign parent, for example, may be in a position to apply for citizenship and then be entitled to consular assistance. While this mechanism is not retroactive, counsel representing any client who may have a viable claim to foreign citizenship should explore the possibility of obtaining consular

[20] To register a complaint regarding consular notification or access, the consulate should contact the Office of Public Affairs and Policy Coordination for Consular Affairs, 202-647-4415. Because the U.S. Government has taken an adversarial position on the question of judicial remedies for consular rights violations, consulates should not discuss the circumstances of the case with the Bureau.

assistance. In all cases involving any form of dual nationality, varying degrees of consular support may be available and should be requested by counsel on behalf of the client.

Additional Resources

Two introductory guides on consular assistance have been prepared by the International Justice Project and Human Rights Research:

- *A Universal Safeguard: Providing Consular Assistance to Nationals in Custody*. This guide is universal in scope and applicable to consular assistance procedures in any country. It is intended to serve as a source for ideas and advice, both for training consular personnel and in the development of consular policies and procedures:

- *Equal Protection: Consular Assistance & Criminal Justice Procedures in the USA*. The purpose of this manual is to better acquaint consular officers with the U.S. criminal justice process and the importance of consular notification and assistance for foreign nationals detained in the United States. It also recommends procedures to be followed by consulates when communicating with detained nationals, defense attorneys and law enforcement agencies. The original edition of Equal Protection is also available in Spanish.

  All resources can be found at:
  http://www.internationaljusticeproject.org/nationalsResources.cfm

- For extensive information on consular rights under international law and further advice on working with consulates, visit "Foreign Nationals, Consular Rights and the Death Penalty" at:

  http://www3.sympatico.ca/aiwarren

LEGAL ISSUES AFFECTING FOREIGN NATIONALS

Barriers to Effective Trial Preparation

The same cultural, linguistic and conceptual barriers that can hinder effective communications with a foreign client frequently color the legal posture and factual circumstances of the case. Procedures as basic to a fair trial as the gathering of background information or mitigating evidence can be seriously impaired when the necessary information is found only in another country. Domestic courts are often unwilling to provide the additional funding for travel, investigators and experts required to adequately represent a foreign defendant. Furthermore, your client or other affected people such as family members may fail to understand the necessity of developing all aspects of the case, initially refusing to cooperate with defense investigators.

Mental health aspects that commonly arise in criminal cases illustrate the many types of challenges that can surface during preparation for trial. Counsel representing a foreign defendant may assume that the client's unusual behavior or responses are cultural in nature, thus entirely failing to recognize symptoms of mental illness or retardation. In addition, mental health issues are even more stigmatizing in many cultures than within the USA. Foreign defendants may thus be highly resistant to competency evaluations or other mental health assessments, viewing such testing as insulting and intrusive. Careful explanation of the purpose for such testing may be required; the need for mental evaluations should be discussed only after developing a relationship of trust with the client and should always be raised in a respectful manner. While some domestic defendants may see a competency evaluation as a potential avenue of exoneration or mitigation, a foreign defendant may respond more positively if the proposed testing is portrayed as a means of ruling out mental defects.

Many standard psychological testing instruments are written in English and are designed from an American cultural perspective: tests of personality (such as the MMPI), intelligence (WAIS, WISC) and other routine procedures may yield grossly inaccurate results when administered to a foreigner.[21] Linguistic and cultural barriers can also prevent the development of the necessary rapport between the tester and subject, further undermining the reliability of test results. In general, mental health assessments that fail to take into account cultural attitudes and values can produce highly distorted findings.[22] This well-documented phenomenon should always be considered when retaining experts for evaluations or whenever challenging the findings of testing conducted by the state. Counsel may also experience difficulty in finding and assessing documentation related to mental health issues in the home jurisdiction of a foreign client, due to varying standards for the monitoring, classification and treatment of mental health concerns. Consular assistance is often indispensable in both obtaining and interpreting these records.

[21] This problem is not alleviated through translation or by using tests purportedly designed for a non-English linguistic group. For example, EIWA (a Spanish-language IQ test) results may not be valid for Mexican nationals. Similarly, the MMPI should not be administered at all to foreign nationals who have less than a seventh grade education.

[22] For additional information, see Antonio Puente, "Psychological Assessment of Minority Groups", *Handbook of Psychological Assessment* (2nd Ed. 1990, Gerald Goldstein and Michael Heisen, editors).

Foreign nationals commonly develop a trusting relationship with consular officers, who speak their language, share a cultural idiom and provide the solidarity of a fellow-citizen. Consular visits and communications with the national may provide important information which would assist the defense. In a number of cases, for example, consular officers visiting their nationals in custody have detected symptoms of mental illness or brain impairments that had gone unnoticed by the defense team. More generally, an ongoing consular involvement in the case may be indispensable in ensuring that the national is able to participate fully in the efforts to mount an effective defense. Even where the consulate is unable to provide extensive material assistance, the benefits of regular consular contact to your client's state of mind and willingness to cooperate with you can be enormous.

Foreign Nationals and Miranda Claims

A variety of legal issues and claims stem from the barriers confronting arrested foreigners. One common example of these inherent deficits is the inability of many foreign detainees to properly comprehend and invoke their legal rights when provided with *Miranda* warnings. As you know, while a waiver of legal rights must be knowing, intelligent and voluntary, there is no obligation on the police to explain the underlying significance of these rights or the full consequences of waiving them. Far too often, the warnings are given in a perfunctory or misleading way; foreign suspects are frequently manipulated into waiving their basic legal rights, with disastrous results.

Non-citizens often have no real grasp of their *Miranda* rights, simply because the underlying concepts are so unfamiliar to them. A statement as basic as "you have the right to an attorney" is meaningless to many foreign detainees: why should they need an attorney, before the trial begins? Similarly, "you have the right to remain silent" is bizarre to someone who knows that, back home, remaining silent under questioning will be used against them in court—or may even result in their torture or death. A cultural deference to authority may easily prompt a foreign detainee to "cooperate" by providing a statement, without realizing that virtually any statement, however truthful and apparently exonerating, can and will be used against them. For the same reasons, foreign suspects may be particularly susceptible to false confessions and waivers of rights that are not truly knowing, intelligent and voluntary.

Another undermining factor may be the suspect's failure to grasp that legal rights applying in the home jurisdiction are not available in the USA, such as the requirement under Mexican law that no custodial statement may be used in court unless it was given in the presence of defense counsel. It is not uncommon for a foreign suspect to respond to questioning in a manner shaped by their understanding of criminal law procedures that prevail within their own legal system, thus requiring some understanding of comparative law on the part of defense counsel when reviewing these custodial statements. Courts nationwide have held that linguistic, conceptual and cultural barriers are significant elements that must be considered when assessing the voluntariness of *Miranda* waivers.[23] Many courts have also recognized that other attributes of

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[23] *See, e.g., United States v. Garibay*, 143 F.3d 534 (9th Cir. 1998) (involuntariness factors to assess in the totality of the circumstances for a foreign national include: any language difficulties encountered by the defendant during custodial interrogation; his mental capacity; whether he signed a written waiver; whether the advice of rights was in his native language; whether he appeared to understand those rights; whether he had the assistance of a translator;

foreign nationality (such as an unfamiliarity with the U.S. legal process) are highly relevant to this analysis.[24]

Linguistic barriers compound the likelihood that a foreign suspect will waive their legal rights. The language of advisements is confusing enough when given in English to U.S. citizens; when those same rights are translated by the police or by incompetent interpreters, the warning often becomes totally incomprehensible.[25] Where a *Miranda* warning and custodial statement given in another language was transcribed or recorded, counsel should always retain independent linguistic experts to translate and assess the statement; the prosecution's translation of these statements should never be taken at face value.

Consular Rights and Miranda Claims

As the State Department's 1984 training manual for U.S. consular officers abroad points out, consular assistance is intended to act as a "cultural bridge" between the detained national, their attorney and the local authorities.[26] An early consular intervention can ensure that the national makes knowing and voluntary decisions regarding their legal options and fully understands the consequences of those choices. In cases where Article 36 has been breached, the absence of timely access to consular assistance provides an important additional consideration in determining that *Miranda* waivers were knowing, intelligent and voluntary, in the totality of the circumstances. Every aspect of a custodial interrogation should be examined for prejudice arising from the failure to provide a timely advisement of consular rights.[27]

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whether his rights were explained painstakingly; and whether he had experience with the American criminal justice system).

[24] *See, e.g.*, *United States v. Short*, 720 F.2d 464,469 (6th Cir. 1986) (noting that German defendant, whose English was limited, "apparently had no knowledge of the American criminal justice system" and had not knowingly and intelligently waived her legal rights at the time of interrogation); *United States v. Yunis*, 681 F. Supp. 909, 964-66 (D.C. Cir. 1988) ("([a]n individual's foreign background seems especially pertinent to the knowing quality of a waiver."); *United Status v. Nakhoul*, 596 F. Supp. 1398, 1402 (D. Mass. 1984) (given changed circumstances of the second interrogation, the defendant, whose "understanding of American law, customs, and constitutional rights may be limited, did not understand that the same [Miranda] rights could be asserted during questioning by any law officer.").

[25] Here is a literal translation of the *Miranda* advisement provided to a Mexican defendant in Spanish by a police interpreter: "Ah, you have the right that something that you can use against yourself in a court of law. You have absolutely on the right hand side to stay in silence, if you prefer. You have the right hand side to [non-word] to an attorney before and also you have the right hand side for the presence of an attorney here with you during the questions and also if you can't pay for an attorney, it is possible for having an attorney…without paying before the questions, O.K.? ". *State v. Ramirez*, 732 N.E.2d 1065, 1068 (1999 Ohio App.). Understandably, the Court was not impressed with this "translation" and suppressed the defendant's subsequent statement.

[26] *See* U.S. Dep't of State, 7 Foreign Affairs Manual (1984), section 400: *Arrest of US Citizens Abroad*.

[27] S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 St. Mary's Law J. 719, 720-21 (1995) ("A foreigner may also be particularly vulnerable to deception used by police detectives as a standard interrogation technique…If properly implemented, the right of consular access can significantly compensate for the difficulties confronting an accused foreigner").

Even in those comparatively rare cases where police in the United States promptly advise foreign nationals of their consular rights, it is highly unlikely that any subsequent interrogation was suspended pending consular contact—nor does the treaty language or its authoritative interpretations require that an interrogation cease pending consular notification and response. However, the advisement of consular rights must be provided to the detainee as soon as the police know or reasonably suspect foreign nationality. The main objective should therefore be to establish that properly advising the detainee of the right to consular notification would of itself have prompted an invocation of Fifth Amendment rights pending consular notification and advice, irrespective of the assistance that the consulate would have provided.[28] Factors such as the suspect's hesitation, confusion, or requests for contact with family members or community leaders may all support an argument that an Article 36 advisement would have triggered a decision to await the advice of the consulate before answering any other questions.

In some cases, an additional argument could be raised that the consulate would have responded promptly enough to advise and assist its national at the time of the interrogation, and that the consulate's involvement would have affected the suspect's decision to waive *Miranda* rights. This reasoning applies to circumstances where the police were aware of the detainee's nationality from the outset and the ensuing detention for questioning was lengthy enough to have triggered the notification obligation had the detainee so requested, thus allowing the consulate to provide advice prior to the incriminating statement. Where a delayed interrogation is coupled with a failure to provide mandatory notification of the consulate under the terms of a bilateral treaty, that treaty violation could also be introduced as a factor relevant to the voluntariness of the waiver.[29] Police are normally expected to provide notification of the consulate within 24 to 72 hours after determining foreign nationality, whenever notification is mandatory or is required at the request of the detainee.

See *Applying Sanchez-Llamas to Pre-trial Claims*, and *Preparing a VCCR Claim*, *infra*, for further discussion of the factors to consider when crafting a suppression claim incorporating a consular treaty violation.

Depending on the case circumstances, the formidable cultural and linguistic barriers confronting many foreign defendants may thus be presented as classic *Miranda* claims or as part of a more comprehensive claim also citing a violation of Article 36. Writing *in dicta*, an Ohio appellate court conveyed how an inadequate *Miranda* warning combined with non-advisement of consular rights triggered a chain of events that undermined a Mexican defendant's right to a fair trial:

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[28] See *U.S. v. Chaparro-Alcantara*, 37 F.Supp.2d 1122, 1126 (C.D.Ill. 1999) (Nothing in the Vienna Convention or the case law requires law enforcement officials to cease all interrogation until they speak to their consular official; appellants "failed to show that they would not have waived their Fifth Amendment rights before speaking with the Consulate" or "failed to establish that they would have stopped talking to the I.N.S. immediately after being advised that they had a right to speak to the Mexican Consulate.").

[29] *See United States v. Amano*, 229 F.3d 801 (9th Cir. 2000) (incorporating the lack of consular notification under a bilateral treaty into the totality of the circumstances analysis when assessing voluntariness in a foreign national's case).

> We note that if the Vienna Convention had been complied with in this case, the errors detailed in appellant's first assignment of error [a Miranda violation] would have been avoided. First, a competent translator would have been present to ensure that appellant's rights were not violated. Second, the American 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.[30]

These barriers to effective comprehension of legal rights will naturally be compounded if your foreign client is a juvenile or suffers from any form of mental impairment. Where these or other additional limiting factors are present, counsel should stress the enhanced significance that those circumstances give to any denial of consular rights. For instance, counsel representing an unaccompanied foreign juvenile who provided a custodial statement might productively research cases construing a provision of the Juvenile Delinquency Act (18 U.S.C. sec. 5033) which requires notification of the juvenile's legal rights to a parent or guardian.[31]

Foreign Nationals and Involuntary Statements

A court's inquiry into involuntariness does not end with a determination that the waiver of *Miranda* rights was knowing, intelligent and voluntary; a properly-obtained waiver does not authorize coercive interrogations or condone the use at trial of improperly-obtained custodial statements. Due process requires a separate inquiry into the voluntariness of a defendant's statements, apart from the validity of the *Miranda* waiver.[32] Many of the same factors that contribute to legally inadequate waivers of *Miranda* rights by foreign nationals are equally relevant to the second prong of the involuntariness inquiry. For example, references by the police to a suspect's immigration status may prompt a coerced statement by an undocumented

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[30] *State of Ohio v. Ramirez*, 732 N.E.2d 1065, 1070 (1999).

[31] The Ninth Circuit has held that "[f]or those juveniles whose parents live outside the United States, if it is not feasible to notify a parent or guardian, the government could alternatively notify a foreign consulate in the United States." *United States v. Doe*, 701 F.2d 819, 822 (9th Cir. 1983). Furthermore, "[i]f the statutory violations did not rise to the level of constitutional violations but nonetheless prejudiced[the juvenile defendant], we have discretion to reverse or to order more limited remedies so as to ensure that [the defendant's] rights are safeguarded and the will of Congress is not thwarted." *Doe II*, 862 F.2d at 780-81. Suppression of the statements may be appropriate if the violation was not harmless to the juvenile beyond a reasonable doubt. *Doe IV*, 170 F.3d at 1168. Applying these principles, the Court suppressed a foreign juvenile's confession for the arresting officer's failure to contact the consulate "as soon as reasonably possible." *United States v. Juvenile (RRA-A)*, 229 F.3d 737 (9th Cir. 2000).

[32] *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 396-402 (1978); *People v. Raffaelli,* 647 P.2d 230, 235 (Colo. 1982) ("[t]he fact that *Miranda* warnings precede a challenged confession does not insulate that confession from an inquiry into whether it was voluntarily given.")

alien who fears deportation if he fails to cooperate with his interrogators.[33] Any evidence that the statement was obtained by relying on the vulnerability and isolation of a foreign defendant should be incorporated into the involuntariness challenge, as should personal attributes of detainees that may have exacerbated the coercive circumstances (such as a previous traumatic interrogation by police in their home country).[34] As with *Miranda* claims, the susceptibility of detained foreign nationals to coercive interrogation has been widely recognized by the courts.[35] Here, too, a failure by the authorities to provide timely notification of the consulate may well be relevant in cases of prolonged interrogation.

Involuntary Waivers of Other Rights

Aspects of foreign nationality are also pertinent to other possibly involuntary waivers of rights, such as consenting to a search, declining the assistance of counsel at trial or relinquishing the right to a trial. The U.S. Supreme Court has held, for instance, that the arraigning judge must make a "thorough inquiry" before accepting that a foreign defendant's waiver of counsel and guilty plea is "understandingly and wisely made."[36] Appellate courts have likewise granted relief where foreign nationals inadvertently waived their right to a jury trial, entered unadvised guilty pleas or did not voluntarily consent to a search.[37] Once again, the denial of access to timely consular advice and assistance could be a highly relevant consideration in some circumstances, as in cases where a foreigner accepts an ill-advised plea bargain that results in a felony conviction mandating their deportation from the United States.

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[33] *See United States v. Beraun-Panez*, 812 F.2d 578, 580-81 (9th Cir. 1987) (during an interrogation, police officers took advantage of the defendant's insecurities about his alien status by mentioning the possibility that he would be deported and separated from his family).

[34] *See State v. Xiong*, 504 N.W.2d 428 (Wis. Ct. App. 1993) (police coercion and a defendant's personal characteristics are interdependent concepts: the more vulnerable a person is because of his or her unique characteristics, the more easily he or she may be coerced by subtle means).

[35] *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 457 (1966) (potentiality for compulsion is "forcefully apparent" in a case where the defendant was an "indigent Mexican defendant"); *Martinez v. State*, 545 So.2d 466, 467 (Fla. 4th DCA 1989) (facts supporting finding that the confession was the product of coercion and intimidation included defendant's status as an illegal alien who had an extremely limited education).

[36] *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948).

[37] *See, e.g.*, *United States v. Mendez*, 102 F.3d 126 (5th Cir. 1997) (defendant did not impliedly waive his right to a jury trial by his silence, where he was unable to speak or understand English, had only been the United States a few days, did not understand the purpose of a jury; and was not afforded an opportunity to voice his objection to the dismissal of a venire); *Diaz v. State*, 905 S.W.2d 302 , 308 (Tex. Ct. App. 1995) (Mexican native who had a sixth grade education and who could not read, write or understand the English language, did not knowingly, intelligently and voluntarily make his guilty plea when his rights were read to him in Spanish by an interpreter without the presence of counsel, and counsel did not explain rights to defendant); *U.S. v. Gallego-Zapata*, 630 F. Supp. 665 (D. Mass. 1986) (Colombian defendant's consent to search of his jacket during an illegal detention was not voluntary; the defendant's response to the agents' request (the nonverbal shrugging of his shoulders and the nodding of his head) were gestures of resignation and not indicative of voluntary consent to search); *U.S. v. Benitez-Arreguin*, 973 F.2d 823 (10th Cir. 1992) (search of Mexican defendant's bag containing controlled substance was not consensual when based on police officer's pantomime gestures to the defendant, who did not speak English).

Exploring Discrimination Claims

No criminal justice system anywhere is entirely free of the taint of racism, ethnic bias or xenophobia. It should come as no surprise to defense counsel that indigent foreigners arrested in the United States are frequently subjected to discriminatory treatment by police, prosecutors, local media and juries. Almost any aspect of a foreign national's case may be affected by bias, either deliberate or unconscious.

These inequities frequently surface in cases involving co-defendants, where one is a citizen and the other is not. Even when the domestic co-defendant is clearly more culpable, the foreigner will often face the more severe charge. This unequal treatment may be due to the foreigner's failure to "know the ropes" by not promptly negotiating cooperation in exchange for leniency, or simply because the foreign national was perceived by the prosecution as easier to convict.

Prosecutors may also attempt to use a defendant's nationality, ethnicity or immigration status to inflame the jury. Argentine national Victor Saldaño, for example, was sentenced to death in Texas after a prosecution psychologist testified at the penalty phase that Hispanics were more likely to commit future acts of violence. During closing arguments, the prosecutor referred to Saldaño's nationality, asserting that he had "invaded our country." In other cases, prosecutors have argued that foreign defendants should be more severely punished because they had entered the USA without proper documentation.[38] While such discriminatory tactics are highly improper, a failure to raise a timely objection at trial may hamper or even foreclose appellate review.

It is not uncommon for the media or even officers of the court to use the derogatory term "illegal alien" when describing a foreign defendant, or to otherwise inflame public opinion against a foreign suspect through references to alienage. Trial counsel should be prepared to vigorously challenge any hint of discrimination, for example, when arguing against the denial of bail or through change of venue motions. Appellate or habeas counsel should review the record thoroughly for potential equal protection or due process claims based on discriminatory treatment, including any failure by the trial court to appoint a competent interpreter.

Litigating VCCR Claims: Precedent Cases

[38] Mexican national Ricardo Aldape Guerra was wrongly convicted of capital murder and spent 15 years on death row in Texas before he was exonerated. The prosecution urged the jury to find future dangerousness because of his immigration status; meanwhile, the Ku Klux Klan demonstrated outside the courtroom, carrying signs reading "Houston will not tolerate illegal alien crimes".

The provisions of the VCCR are binding on all federal, state and local authorities in the USA.[39] Despite recent efforts by the State Department and foreign consular services to improve compliance, violations of this binding treaty obligation remain commonplace nationwide. These breaches of a fully-ratified treaty designed to protect the legal and human rights of foreign detainees may provide a variety of potential grounds for pre-trial and appellate motions. They also serve as compelling justification for attorneys to contact the consular representatives of a foreign client and to seek material and legal assistance from the home government.

Although the plain text of Article 36 confers distinct rights on individuals, most U.S. courts have so far declined to fashion meaningful remedies for its violation. However, the issue of individual consular rights and remedies is far from settled and there have been some encouraging developments recently which establish the value of pursuing and preserving these claims.

A violation of the VCCR is thus not a magic bullet to avoid a death sentence or other severe punishment. While stand-alone claims citing Article 36 violations have not fared well in most jurisdictions, the treaty issue may also be used to augment more traditional claims (like the *Miranda* issues discussed above). The novelty of the claim may persuade some judges to pay closer attention to other issues in your brief, or to grant an evidentiary hearing. The intervention of a foreign government or the complexity of litigating international law claims may also encourage some prosecutors to find an easier (and cheaper) target for a death penalty trial.

In light of the elevated status of the VCCR under U.S. law and the obvious relevance of its provisions to the arrest and prosecution of foreigners, it is hardly surprising that Article 36 violations have been litigated in a wide variety of proceedings. Under Article 6 of the U.S. Constitution, treaties are part of the supreme law of the land and are binding on all courts.[40] The Supreme Court has long recognized that treaties generally take precedence over inconsistent state laws or practices and must be enforced by the courts.[41] The VCCR is acknowledged by the United States to be a self-executing treaty, both in the sense that it required no separate implementing legislation to gain full legal force upon ratification, and that the interpretation and enforcement of its provisions rests with the domestic courts.

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[39] Although no implementing legislation is required to give full force under domestic law to a self-executing treaty such as the VCCR, federal regulations on arrest procedures have been amended to comply with Article 36 obligations. *See* 8 C.F.R. 236.1(e) (DHS guidelines); 28 C.F.R. 50.5(a) (FBI arrest procedures); AR 27-52 (1968) (Consular Protection of Foreign Nationals Subject to the Uniform Code of Military Justice). *See also* California Penal Code 834c (1999) (requiring advisement of consular rights for any detention of more than two hours' duration).

[40] "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." U.S. Const. art. VI, clause 2. *See also Ware v. Hylton*, 3 U.S. 199, 237 (1796) ("Federal Judges are bound by duty and oath to the same conduct").

[41] It is well-settled that "when the national government by treaty has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty is the supreme law of the land. No state can add to or take from the force and effect of such treaty...". *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941). *See also The Amiable Isabella*, 19 U.S. 1, 72 (1821); *Missouri v. Holland*, 252 U.S. 416 (1920); *Antoine v. Washington*, 420 U.S. 194, 201 (1975).

Where a self-executing treaty confers a legal right on an individual, it is the role of the U.S. judiciary to construe that right and to fashion remedies for its violation.[42] The plain language of Article 36 confers rights on individual detainees, while imposing clear and mandatory obligations on the arresting authorities. Accordingly, any violation of its requirements may give rise to judicial review and potential remedies at the behest of the affected individual.[43]

Article 36 litigation first arose in the context of immigration proceedings. In 1980, the Ninth Circuit dismissed the indictment of a Mexican national for illegal re-entry after deportation, on the grounds that the INS had failed to advise the detainee of his right to consular notification. Observing that the right "established by the regulation and in this case by treaty is a personal one"[44] the court found that the defendant "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."[45] In 1993, the Second Circuit construed the same INS regulation as requiring an individual advisement of consular rights and a demonstration of prejudice for its violation, while expressing its skepticism over the legal significance of the right. "Although compliance with our treaty obligations clearly is required, we decline to equate such a provision with fundamental rights, such as the right to counsel, which traces its origins to concepts of due process," the court wrote.[46] Both of these decisions would significantly influence later rulings on Article 36 breaches in criminal cases.

Major litigation in criminal cases began when death-sentenced foreign nationals started raising the claim in post-conviction habeas corpus proceedings.[47] These early efforts were uniformly

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[42] *See Jones v. Meahan*, 175 U.S. 1, 32 (1899) (construction of treaties "is the peculiar province of the judiciary"); *Holmes v. Laird* , 459 F. 2d 1211, 1215, 1222 (D.C. Cir. 1972) ("[i]n the domestic realm courts are not only equipped to enforce self-executing treaties affecting individual rights, but by virtue of the Supremacy Clause are required to do so.").

[43] *See Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348-49 (1809) (Marshall, CJ.) (Federal courts were given Article III jurisdiction over treaty claims so that "all persons who have real claims under a treaty should have their causes decided by the national tribunals….Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected.").

[44] *United States v. Rangel-Gonzalez*, 617 F.2d 529, 532 (9th Cir. 1980).

[45] *Id*. at 533. This three-part prejudice test was subsequently adopted by other courts when assessing Article 36 violations in both immigration and criminal cases. *See, e.g.*, *U.S. v. Esparza-Ponce*, 7 F.Supp.2d 1084, 1097 (S.D. Cal. 1998); *U.S. v. Tapia-Mendoza*, 41 F. Supp. 2d 1250, 1254 (D. Utah 1999); U.S. v. Briscoe, 69 F.Supp.2d 738, 747 (D. Virgin Islands 1999); *People v. Preciado-Flores*, 66 P.3d 155, 161 (Colo. App. 2002); *Zavala v. State*, 739 N.E.2d 135, 142 (Ind. App. 2000); *Torres v. State*, 120 P.3d 1184, 1187 (Okla. Crim. App.2005) (finding prejudice at penalty phase of Mexican national's capital trial).

[46] *Waldron v. INS*, 17 F.3d 511, 518 (2nd Cir. 1993).

[47] For a thorough summary and analysis of the early cases, see William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs and Remedies*, 31 Vand. J. Transnat'l L. 257 (1998). See also Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 612 (1997).

rejected, either on the grounds that the Article 36 violation constituted harmless error,[48] or because the treaty conferred no judicially-enforceable individual rights[49] or, most typically, because the claim was procedurally defaulted by the failure to raise it at an earlier stage in the appellate proceedings.[50]

After it became apparent that the domestic courts were resistant to affording remedies even in capital cases, several nations turned instead to the international courts for remedies on behalf of their condemned nationals. When the United States ratified the VCCR it also adopted the treaty's optional enforcement mechanism, under which disputes over 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".[51] Acting on that basis, several nations sought and obtained either preliminary rulings or binding final judgments from the International Court of Justice (ICJ) against the United States and attempted to enforce those decisions in the domestic courts, with widely varying results.[52] However, this international litigation resulted in landmark decisions in which the ICJ confirmed that Article 36 confers legal rights on individual detainees,[53] that applying procedural default to deny judicial consideration of Article 36 violations breached the treaty's "full effect" requirements[54] and that the necessary remedy in cases where severe sentences were imposed was for the domestic courts to provide effective "review and reconsideration" to determine if the violation resulted in prejudice to the defendant.[55] Subsequent decisions by the domestic courts have focused largely on the scope and enforceability of these ICJ rulings. Because this international litigation is closely intertwined with the still-evolving holdings of the domestic courts, we have devoted a separate section of this chapter to a detailed analysis of the relevant ICJ decisions. As that section demonstrates, whether those ICJ decisions are directly enforceable or not, they have exerted a strong influence both on domestic court decisions and on a major legal determination of Article 36 remedies from the Executive Branch. *See International Court Rulings, infra.*

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[48] *Faulder v. Johnson*, 81 F.3d 515 (5th Cir.1996).

[49] *Kasi v. Virginia*, 508 S.E.2d 57 (Va. 1998)

[50] *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997).

[51] Vienna Convention on Consular Relations Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1963, art.1, 21 U.S.T. 325, 596 U.N.T.S. 487.

[52] *See, e.g.*, *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) (refusing to grant temporary injunction staying execution of German national, despite provisional ICJ order) ; *Valdez v. State*, 46 P.3d 703, 710(Okla. Crim. App. 2000) (declining to enforce an ICJ decision but remanding for resentencing, on the grounds that trial counsel's failure to seek assistance from the Mexican Consulate constituted deficient and prejudicial performance); *Torres v. State*, 120 P.3d 1184, 1187 (Okla. Crim. App.2005) (applying an ICJ-mandated remedy and finding prejudice arising from the Article 36 violation).

[53] LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 104, ¶ 77.

[54] *Id*. ¶ 91.

[55] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128, ¶¶ 138, 140.

As knowledge of Article 36 obligations became more widespread, many defendants raised timely challenges to its violation and sought remedies such as suppression of custodial statements or dismissals of indictments. Those claims were usually denied,[56] although courts recognizing an individual right were sometimes receptive to remedies such as civil suits for damages or suppression where actual prejudice could be demonstrated.[57] One common thread connecting nearly all Article 36 decisions that contemplate judicial remedies is the necessity of demonstrating specific and individualized prejudice arising from the treaty violation.[58] However, the fundamental issues of individual rights under the treaty and the availability of judicial remedies remained an unsettled legal question over which the lower courts remained deeply divided.

At the time of printing, there have been two substantive Supreme Court decision on Article 36 issues. The first is *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam), a denial of certiorari in the case of a Paraguayan national. Noting that the Court should give "respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such," the majority declined to stay the execution despite a preliminary order from the International Court of Justice.[59] The Supreme Court held that the right to consular notification did not rise to a constitutional right and that the VCCR stood on par with an act of federal legislation. Appeals based on Article 36 could thus be limited by subsequent legislation (e.g. the time limits imposed on habeas appeals by the Anti-Terrorism and Effective Death Penalty Act) or foreclosed by domestic legal rules such as procedural default. Significantly, *Breard* does not preclude consideration of individual habeas claims on the basis of the treaty violation, assuming that they are timely filed and can demonstrate actual prejudice. The Court also acknowledged that Article 36 "arguably confers on an individual the right to consular assistance following arrest". As an initial matter, it is important to distinguish the factual and legal circumstances of your case from the posture of *Breard*. More importantly still, the Court's since-confirmed

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[56] *See e.g., United States v. Jimenez-Nava*, 243 F.3d 192, 199 (5th Cir. 2001), *cert. denied*, 533 U.S. 962, 150 L. Ed. 2d 773, 121 S. Ct. 2620 (2001) (absent an express provision in a treaty, exclusion of evidence is not an appropriate remedy); *United States v. Ademaj,* 170 F.3d 58, 67 (1st Cir.1999) (noting that the Convention establishes no judicial remedy for its violation, and holding that violation did not warrant vacatur of conviction on appeal); *United States v. Page*, 232 F.3d 536, 540 (6th Cir. 2000) ("[a]lthough some judicial remedies may exist, there is no right in a criminal prosecution to have evidence excluded or an indictment dismissed due to a violation of Article 36.").

[57] *Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001) (VCCR confers a private right of action enforceable by individuals; defendants may pursue an affirmative claim for violations of their Article 36 rights pursuant to 42 U.S.C. §1983); *Jogi v. Voges*, 425 F.3d 367, 385 (7th Cir. 2005) (authorizing suit under the Alien Tort Statute, 28 U.S.C. § 1350, because "there is an implied private right of action to enforce the individual's Article 36 rights."); *State v. Miranda*, 622 N.W.2d 353 (Minn. App. 2001) (suppression is an available remedy for an Article 36 violation where the defendant can show that the violation resulted in actual prejudice).

[58] *See, e.g., Breard v. Greene*, 523 U.S. 371, 377 (1998) (per curiam) (noting in dicta that "it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial"); *U.S. v. Briscoe*, 69 F.Supp.2d 738, 747 (D. Virgin Islands 1999) (defendant "has not explained how the help the consul might have given him would have added to or varied from the assistance that an attorney would have provided, which assistance he knowingly waived").

[59] *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam).

holding on procedural default (discussed below) makes it essential to preserve any VCCR claim for further review, at the earliest possible stage in the proceedings.

Understanding the Sanchez-Llamas Decision

The most recent substantive decision by the U.S. Supreme Court on Article 36 claims has great significance for the future litigation of the issue, both in trial proceedings and on appeal. In *Sanchez Llamas v. Oregon*, the Court combined the cases of two foreign nationals who had unsuccessfully raised Article 36 claims in state court proceedings[60] and granted review to address three unanswered questions:

> "*First,* does Article 36 create rights that defendants may invoke against the detaining authorities in a criminal trial or in a postconviction proceeding? *Second,* does a violation of Article 36 require suppression of a defendant's statements to police? *Third,* may a State, in a postconviction proceeding, treat a defendant's Article 36 claim as defaulted because he failed to raise the claim at trial?"[61]

A bare majority of the Court bypassed the first and arguably most basic issue, assuming without deciding that Article 36 does confer individually-enforceable rights, but finding it "unnecessary to resolve the question" because the petitioners were not entitled to the requested relief.[62] Since "neither the Vienna Convention itself nor our precedents applying the exclusionary rule support suppression" on these grounds, the exclusion of evidence is never an available remedy for an Article 36 violation *per se*. Although the Court should give "respectful consideration" to the post-*Breard* holdings of the International Court of Justice on procedural default and Article 36 claims, "nothing in the ICJ's structure or purpose suggests that its interpretations were intended to be binding on U. S. courts" and the ICJ interpretation "sweeps too broadly, for it reads the 'full effect' proviso in a way that leaves little room for the clear instruction in Article 36(2) that

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[60] Mexican national Moises Sanchez-Llamas was convicted of the attempted murder of a police officer, following a drunken altercation with police in Oregon. He unsuccessfully raised the treaty violation in a pre-trial motion to suppress; after an 11-hour interrogation, he gave a confession that included factual inaccuracies regarding the use of a second weapon. The transcript of his interrogation also established that he understood his Miranda rights as meaning that "it would be better if I told the truth and everything." The Oregon courts denied relief on the grounds that the treaty does not create individual legal rights and suppression was thus not an available remedy. Honduran national Mario Bustillo did not object to the treaty violation at trial or on direct appeal, first raising the claim in his state habeas corpus petition challenging the validity of his conviction; the Virginia courts found that his treaty claim was procedurally defaulted. His submission to the Supreme Court included evidence that another person subsequently confessed to the murder for which Bustillo was convicted, after the Honduran Consulate assisted habeas counsel in locating that individual in Honduras. Bustillo had raised a defense of mistaken identity at trial, but trial counsel was unable to locate the other suspect. In both cases, police were aware of the nationality of the defendants but failed to advise them of their consular rights.

[61] *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2674 (2006).

[62] *Sanchez-Llamas*, 126 S.Ct. 2669, at 2677. The four dissenting justices held that Article 36 does confer individual rights, but divided 3-1 on the availability of the requested remedies.

Article 36 rights 'be exercised in conformity with the laws . . . of the receiving State.'" Accordingly, "a State may apply its regular procedural default rules to Convention claims."[63]

However, the majority noted that an Article 36 violation can be relevant to determining the admissibility of a defendant's statements, and that other more limited pre-trial remedies could be available for the violation standing alone:

> 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.[64]

Brief though it is, this description of potential remedies has potentially far-ranging implications. First, any violation of Article 36 obligations should now be included in the totality of the circumstances when assessing the involuntariness of custodial statements and in determining whether a *Miranda* waiver leading to those statements was knowing, intelligent and voluntary. Second, in some circumstances, the treaty obligation to advise the detainee "without delay" must attach prior to or during interrogation; if the consular rights advisement could always be delayed until after a statement was obtained, there would never be a viable "Article 36 claim" to introduce "as part of a broader challenge to the voluntariness" of those statements.

Furthermore, the Court has conceded that the defendant has independent standing to raise the claim for the purpose of securing benefits, strongly suggesting the existence of an individual right and calling into question precedent cases to the contrary.[65] Where a trial court arbitrarily refuses to grant a reasonable accommodation or trial counsel fails to raise a known violation, those issues could likely now be considered as grounds for an appeal. Nor does *Sanchez-Llamas* absolutely preclude state court habeas relief for already-defaulted Article 36 claims; although a state court "may apply" its procedural default rules, nothing in the decision requires it to do so. Many state courts of final appeal possess the discretionary authority to set aside procedural barriers where the interests of fundamental justice so require, and might be persuaded to do so if presented with particularly egregious consequences arising from a denial of consular rights.[66] Finally, the holding on procedural default and the reference to "appropriate accommodations" that trial courts may provide places the onus squarely on trial counsel to investigate, develop and preserve Article 36 violations.

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[63] *Id*. at 2685-86.

[64] *Id*. at 2682.

[65] A number of courts had previously held that defendants lacked standing to raise an Article 36 violation because the VCCR creates no individual rights. *See, e.g., U.S. v. Emuegbunam*, 268 F.3d 377 (6th Cir. 2001); *Maharaj v. State*, 778 So. 2d 944 (Fla. 2000); *State v. Martinez-Rodriguez*, P.3d 267 (N.M. 2001); *Kasi v. Virginia*, 508 S.E.2d 57, 63-64 (Va. 1998); State v. Navarro, 659 N.W.2d 487 (Wisc. App. 2003).

[66] *See, e.g.*, *Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (court exercised "its power to grant relief when an error complained of has resulted in a miscarriage of justice", for a procedurally-defaulted claim of ineffective assistance stemming from trial counsel's prejudicial failure to seek consular assistance).

Perhaps most importantly, the *Sanchez-Llamas* Court left for another day a decision on whether individual rights are conferred under Article 36, along with all the legal consequences implicit in any such determination.[67] Until such time as the Supreme Court rules definitely on the scope of individual rights conferred under the treaty and the full range of remedies available for its violation, important aspects of this issue must be treated as unresolved legal questions. And, although there is language in *Sanchez-Llamas* indicating that the relevant ICJ decisions are not directly binding on the domestic courts,[68] the weight to be attached to Article 36 interpretations by the ICJ that (unlike procedural default) do not conflict with domestic law remains an unsettled question. The "respectful consideration" to be accorded to the ICJ indicates that its interpretations of other still-unresolved aspects of Article 36 claims should always be presented as persuasive authority. To summarize, the pressing legal questions still to be answered include the following:

- Does Article 36 confer privately-enforceable rights on individual foreigners and, if so, do remedies such as civil suits flow from a timely claim?
- What is the precise meaning of consular advisement and notification "without delay" under Article 36?
- To what extent is an Article 36 violation relevant to other appellate issues, such as related claims of ineffective assistance of counsel?
- To what degree should the other determinations of the ICJ be treated as persuasive authority when construing the meaning of Article 36, either on grounds of comity or "respectful consideration"?

Applying Sanchez-Llamas to Pre-trial Claims

a. **Suppression Motions**

Two factors should be kept in mind when developing suppression claims that incorporate Article 36 violations. First, after *Sanchez-Llamas*, suppression of statements will not be granted for an Article 36 violation standing alone. It is essential to develop other grounds for suppression to which the treaty breach can then be colorably connected. Second, international and domestic authority holds that the police are not required to suspend an interrogation pending notification of the consulate, nor need they contact the consulate immediately after the detainee requests notification.[69] However, advisement of the right must take place as soon as the police know or

[67] It is a basic axiom of U.S. law that where there is a legal right, there must be a legal remedy for its violation. *See generally Marbury v. Madison*, 5 U.S. 137 (1803).

[68] *Sanchez-Llamas*, 126 S.Ct. 2669, at 2685 (noting in dicta the subsequent U.S. withdrawal from the VCCR Optional Protocol and observing that "it is doubtful that our courts should give decisive weight to the interpretation of a tribunal whose jurisdiction in this area is no longer recognized by the United States.")

[69] *See Sanchez-Llamas* at 2688-89 (Ginsburg, J., concurring in the judgment) (citing the ICJ decision in *Avena* and State Department documents to support the observation that "Article 36 of the Vienna Convention does not require

suspect foreign nationality, which will often be prior to interrogation or during its earliest stages.[70] The central element in this component of the suppression motion must therefore be a demonstration that simply advising the suspect of his consular rights at the required time would have prompted him to request consular notification and to invoke his Fifth Amendment rights while awaiting the consulate's assistance and advice.

In cases where the detention prior to the incriminating statement was clearly long enough to have triggered the obligation to notify the consulate, you might also seek to establish that consular notification was readily achievable, resulting in a prompt response that would also have addressed the identified involuntariness factors (such as the coercive effects of multiple interrogations over several days).

An Article 36 claim should be relevant to the involuntariness analysis whenever:

1. the foreign national was in some form of detention at the time that the incriminating statement was made;
2. there are cogent grounds for suppression apart from the Article 36 violation;
3. the interrogating police knew or had reason to suspect that the detainee was a foreign national prior to obtaining the incriminating statement;
4. the detainee was not advised of the right to consular notification and would have exercised that right;
5. the detainee would have refused to answer any further questions upon invoking the right to consular notification.

In cases of prolonged detention prior to securing the statement, additional factors may support involuntariness:

6. the interrogation prior to the statement was of sufficient duration to have allowed the consulate to respond and communicate with its national;
7. the consulate would have responded promptly, advising the detainee to remain silent and/or arranging for the immediate presence of an attorney;
8. the violation was prejudicial, in the sense that the absence of consular notification can be plausibly linked to the suspect's statement and that the statement itself was a major element in the subsequent conviction or sentence.

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the arresting authority to contact the consular post instantly….[n]or does that Article demand that questioning await notice to, and a response from, consular officials."). The State Department "would normally expect notification to consular officials to have been made within 24 hours, and certainly within 72 hours." Consular Notification and Access (Part 3: FAQs).

[70] Consular advisement "without delay" gives rise to an obligation to advise a detained foreign national of his Article 36 rights "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." *Avena and Other Mexican Nationals*, 2004 I.C.J. 128, at ¶ 88; *United States v. Miranda*, 65 F. Supp. 2d 1002, 1005 (D. Minn. 1999) (a period of two days constitutes a "delay" within the meaning of the Convention where there is no evidence that earlier advisement would not have been reasonably possible).

b. **Securing the "benefits of consular assistance**"

It is not uncommon for awareness of the treaty violation and its implications to surface at a later stage in the trial proceedings. Assessing the potentially harmful effects of the absence of consular assistance should thus span the entire time interval between the first knowledge by the arresting authorities of probable foreign nationality and the consulate's eventual awareness of the detention. Depending on the stage of the proceedings and the supporting facts, counsel should thus file or supplement motions addressing a range of issues related to the delay in consular notification. Those motions include:

- requesting a continuance at any stage in the proceedings, to permit defense consultation with the consulate and the opportunity to obtain case-specific assistance;

- seeking a rehearing of previously denied claims, such as motions to suppress or competency determinations, where consular assistance would have provided additional support for the claim;

- mental retardation or juvenile offender claims in capital cases, based on newly-available medical, educational, or birth records obtained by the consulate;

- addressing involuntary waivers of other rights where, in the absence of consular assistance, the defendant either refused a favorable plea or accepted a harsh sentence without a trial;

- motions to defer sentencing, based on consular assistance that would have mitigated a death sentence or justified a downward departure.

As with all Article 36 claims, it is important to demonstrate prejudice by arguing that the denial of the motion would be harmful to the defendant's right to a fair trial. Counsel should formally object if the motion is denied, to preserve the issue on the record for potential appellate review.

Seeking a continuance or rehearing is not the only way to interpret the "appropriate accommodations" language of *Sanchez-Llamas*. For example, even where suppression is ultimately denied, the defense could request a jury instruction incorporating the Article 36 violation (and the potential benefits of timely consular assistance) into the jury's determination of involuntariness. Regardless of the case circumstances, however, counsel should in all cases acquaint the trial court with the Article 36 violations and preserve the claim by requesting the court to apply the general remedy recognized by *Sanchez-Llamas.*

Preparing a VCCR Claim

In all circumstances, the first step is to familiarize yourself with the provisions of Article 36 and consider its potential ramifications in your client's case. Review the case file (particularly arrest reports, interrogations and prior offense printouts) to ascertain that the arresting authorities were aware that the suspect was likely to be a foreigner and that they failed

to notify your client without delay of the right to communicate with the consulate. Although some foreign nationals may present false identification to conceal their immigration status and thus delay the timing of a consular rights advisement, the great majority will be properly identified as non-citizens either before their arrest or after a routine background check. Jail records indicating a visit to the detainee by the BICE are another sure indication that the authorities were aware of your client's nationality. It is essential to confirm why and when the police had reason to believe that your client was a non-citizen but failed to provide a timely and suitable advisement of consular rights. Where no other documentation exists, a detainee's inability to understand basic English or to present valid identification to the police should be argued as sufficient to have alerted the authorities to the likelihood of foreign nationality.

Claims citing a violation of consular rights should be filed at the earliest possible stage of the proceedings (including pre-trial motions), if only to preserve the issue for further review. Raising a violation of consular rights prior to trial may also offer significant support for motions to suppress or exclude, or form the basis for an evidentiary hearing involving consular officers. Introducing the issue as part of the trial proceedings may also provide an opportunity to seek a jury instruction on the significance of the treaty violation.[71]

On direct appeal where the claim was not introduced in trial proceedings, appellate counsel should carefully search the record for any references to the defendant's nationality. Where those references are sufficiently numerous or significant, they can be cited as part of a record-based claim of ineffective assistance of counsel (e.g., for failing to seek consular assistance) or as evidence that a custodial statement was involuntary (e.g., because the police were aware of the defendant's nationality but failed to provide the necessary advisement of consular rights).

Claims first raised in post-conviction habeas appeals should strive to establish that the prejudice sustained by the defendant was not harmless error and should also address any procedural default issues (for example, by identifying cause for the default and the prejudice arising). There is a growing body of sample motions, briefs and pleadings that defense counsel can draw on; many of the sources for that material are listed under *Additional Resources*, at the end of this chapter.

Particularly in post-conviction VCCR claims, counsel should point to the tangible benefits of the consular assistance subsequently provided to the defendant, in order to establish that the prejudice claim is not speculative. While specificity is always important when raising a claim of prejudice, its particular significance in this context was underscored by the U.S. Supreme Court, which noted that "it is extremely doubtful that the violation [of Article 36]

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[71] In response to a defense motion in the case of a Mexican national facing the death penalty in Georgia, the trial judge incorporated the following instruction to the jury (the defendant subsequently received a life sentence):

> Reference has been made in this case to the Vienna Convention treaty. This is an international treaty to which many countries, including the United States and Mexico, are parties. The Vienna Convention provides in part that a foreign national, upon request, has a right to have his country's consulate notified that he is arrested or detained in any other manner. The authorities should inform the person concerned without delay of his rights under this treaty. Defendant in this case contends that the police failed to inform him of his rights under the Vienna Convention. . .You may or may not, in your discretion, consider this evidence along with all the other evidence in determining the voluntariness of Defendant's statements.

should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." *Breard*, 523 U.S. 371 at 376.

One useful source when researching VCCR claims is *Consular Notification and Access*, the State Department's instruction manual for U.S. law enforcement regarding their obligations under Article 36. The manual includes common questions and answers, the legal framework for the obligations, notification forms and recommended procedures. It outlines in considerable detail the procedures that domestic police forces are expected to follow, thus providing excellent language to cite when seeking to establish police misconduct in your case.[72]

Police departments in all major U.S. cities have received copies of the State Department manual, as well as wallet-sized cards providing recommended advisements of consular rights to detainees. A number of police departments (such as the NYPD and LAPD) have also incorporated consular notification procedures into their operational manuals. The State Department has undertaken a nationwide program of outreach and training for law enforcement and prosecutors concerning Article 36 obligations. Not surprisingly, those efforts have not eliminated non-compliance; so long as there are no enforceable remedies for breaches of the treaty, police can—and often do—violate Article 36 provisions with impunity.

The U.S. government has taken the position in both domestic and international litigation that Article 36 confers no judicially enforceable rights on individuals and that no judicial remedies are available for its breach. Given that the interpretation of a treaty by the Executive is normally entitled to substantial deference by the courts,[73] counsel may wish to consult a detailed outline of the government's position on Article 36, submitted in response to questions posed by the First Circuit in *United States v. Li*. The response is available on the State Department web site.[74]

Other excellent sources for building a claim are the dissenting or concurring opinions in some circuit court cases denying relief for violations of the petitioner's consular rights. Several

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[72] For example, the manual provides recommended statements for police to use when advising foreign detainees of their consular rights, in a variety of languages. Notably, the translations appear to uniformly advise detainees that they have a *personal right* to consular notification, contrary to the State Department's often-repeated position that Article 36 confers no individual rights. The full text of the State Department manual is available at: http://travel.state.gov/consul_notify.html.

[73] *See, e.g.*, *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 119 S. Ct. 662, 671 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."). However, while the executive's interpretation of a treaty is accorded "much weight," it is "not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights." *Charlton v. Kelly*, 229 U.S. 447, 468 (1913). As Justice O'Connor and her colleagues noted in their dissenting opinion in *Medellín v. Dretke*, *supra*, examples abound in which the Supreme Court has rejected the executive interpretation of a treaty, to the benefit of individual litigants.

[74] *See* Letter from Legal Adviser David R. Andrews to Assistant Attorney General James K. Robinson of the Criminal Division, Department of Justice, with attachments, filed with the First Circuit Court of Appeals in *United States v. Nai Fook Li*, October 15, 1999, *available at* <http://www.state.gov/s/l/6151.htm>. For rebuttal arguments to points raised in the letter, contact Mark Warren at Human Rights Research, as listed in *Additional Resources*.

decisions in particular contain lengthy and well-reasoned opinions on the significance of Article 36 and the legal arguments for enforcing its provisions through the courts.[75] A short list of cases in which U.S. courts have granted relief or recognized its availability for Article 36 violations can be found later in this section, under *Useful Precedent Cases.*

Establishing Prejudice

Under the current state of domestic law, motions or appeals citing an Article 36 violation in the United States would be most likely to prevail where it can be demonstrated that the violation materially harmed the plaintiff's ability to mount an adequate defense or otherwise affected the outcome of the trial. Of particular importance is the crafting of a strong argument that judicial remedies are both available and appropriate for the violation of an individual's treaty-based rights, if only to deter widespread, serious and ongoing governmental misconduct.

In all cases where a VCCR violation has not been raised previously, obtain an affidavit from your client to establish that they were not informed of their consular rights and would have exercised them. After obtaining your client's consent, immediately contact the consulate and apprise them of the situation. Given the significance of the VCCR, most consular officers will respond positively, particularly in cases where timely consular assistance could plausibly mean the difference between life and death. Ask the consulate to provide you with an affidavit outlining the assistance that they would have provided to your client, with particular emphasis on those aspects of the case where the denial of that assistance was demonstrably prejudicial.

For additional information and sample materials on establishing prejudice through consular affidavits, see Appendix Two.

Claims under Bilateral Consular Agreements

The terms of bilateral consular treaties vary considerably but most require mandatory notification of the consulate by the detaining authorities within a given time period, such as 72 hours following the detention. In general, these treaties reiterate the rights of consular officers to visit and assist their detained nationals, while also requiring that the detainee be informed of the right to communicate with the consulate. The detainee's right of information under a bilateral treaty is usually similar to that afforded under the VCCR, but may use language that is arguably more definitive. For illustration, article 35(3) of the *Consular Convention between the United States and the People's Republic of China* provides that the arresting authorities must *immediately* inform the detainee of the right to communicate with a consular officer. The comparable

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[75] *See United States v. Li*, 206 F.3d 56 (1st Cir. 2000) (Torruella C.J., dissenting); *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000) (Thomas J., Boochever J. dissenting); *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998) (Butzner J., concurring); *Rocha v. State*, 16 S.W.3d 1 (Tex. Crim. App. 2000) (Holland, J., concurring); *State v. Issa* (2001), 93 Ohio St.3d 49 (Lundberg Stratton, J., dissenting).

provision of the VCCR requires that this advisement take place “without delay”, language that has been subjected to varying interpretations.[76]

The existence of a bilateral consular agreement does not negate the obligation on the part of the detaining authorities to inform all foreign nationals of their rights under the VCCR (i.e., the right to consular communication and the right to accept or decline consular assistance). The only Article 36 right of the individual which is superseded by a bilateral consular treaty provision is the right to choose whether or not to have the consulate notified of the arrest. All other rights of detainees under Article 36 must be observed without delay in all such cases.

To avoid any confusion between “mandatory notification” obligations and requirements under Article 36, the following federal regulation was adopted for Justice Department agents to follow:

> 28 C.F.R.§ 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 the 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.

Since the focus of these bilateral agreements is more on the rights of the consulate than on the corresponding rights of the detainee, most litigation in criminal cases has focused on breaches of corresponding rights under the VCCR. In those cases where a violation of a bilateral consular agreement conferring individual rights has been raised in tandem with a VCCR claim, the courts have tended to look first to the language of Article 36 and have usually treated the bilateral treaty’s provisions as supplemental to those requirements. At a minimum, however, a breach of a mandatory notification obligation could be cited in parallel with any claim based on Article 36, as further evidence of the failure by the local authorities to conform the arrest to binding treaty

[76] The State Department interprets “without delay” to mean without undue delay, typically by the time of booking or upon arraignment of the national. For comparison, see *United States v. Miranda*, 65 F.Supp.2d 1002, 1005 (D. Minn. 1999) (a period of two days’ confinement before advisement of consular rights constitutes a ‘delay’ within the meaning of Article 36, absent a showing that earlier notification was not reasonably possible).

obligations. The consulate should also be encouraged in a serious case to treat any violation of its sovereign rights under a bilateral treaty as grounds for diplomatic protests and for its own potential litigation of the issue.[77]

Consular Rights Claims in Death Penalty Cases

The evidence gathered in scores of U.S. cases demonstrates that timely consular assistance can literally mean the difference between life and death, or even the difference between execution and acquittal. In all capital cases, even one where a foreign national is entirely familiar with U.S. criminal justice procedures, the consulate can provide an indispensable function. For example, crucial mitigating evidence may exist only in the home country but may lie beyond the reach of defense counsel. In jurisdictions where the consideration of mitigation evidence is part of prosecutorial discretion in death-possible cases, early consular assistance can help develop a case record sufficient to avoid a death penalty trial altogether.

The protective and supportive function of the consulate does not end with the arrest and interrogation of their national: it continues with unabated significance throughout the trial, sentencing and appellate review. Cases resulting in death sentences may well require the active participation of the consular post throughout the appellate process and in any final clemency proceedings.

Where necessary, additional consular assistance may be provided:

- interceding with prosecutors to avoid death penalty trials;
- funding expert witnesses and investigators, where the courts deny adequate defense resources;
- bringing mitigation witnesses to testify or otherwise assisting defense investigations;
- retaining an attorney to represent the consular interest;
- participating directly or indirectly in appellate review;
- bringing cases before international bodies and tribunals;

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[77] Numerous domestic courts have recognized the standing of consulates to seek vindication of consular treaty violations, either in their own right or on behalf of their affected nationals. Examples include *Santovincenzo v. Egan*, 284 U.S. 30 (1931) and *Kolovrat v. Oregon*, 366 U.S. 187 (1961) (both successfully challenging state laws denying inheritance rights to foreigners); *Wildenhus's Case*, 120 U.S. 1 (1886) (consular standing to seek jurisdiction over a detained national through the writ of habeas corpus); *Consulate Gen. of Mexico v. Phillips,* 17 F. Supp. 2d 1318, 1322-23 (S.D. Fla. 1998) (Mexican Consulate had a right to be notified and to be of assistance to detained national and standing to assert that right). At the request of intervening consular representatives, the Supreme Court has also enforced treaty obligations owed to sovereigns where local officials had failed to perform those obligations. *See Tucker v. Alexandroff,* 183 U.S. 424 (1902); *Dallemagne v. Moisan*, 197 U.S. 169 (1905).

- petitioning for clemency;
- any other assistance necessary to ensure that the national receives the enhanced due process required throughout a capital case.

A violation of consular rights will thus often have far-reaching consequences, especially in a death penalty case. Your re-examination of the case record from this perspective may reveal other fruitful ways to augment existing claims with the treaty violation. For example, the failure of trial counsel to introduce the issue (or to seek consular assistance) may strengthen an IAC claim in post-conviction habeas proceedings.[78] A failure by the state to provide consular notification when specifically asked to do so may similarly bolster claims of prosecutorial or judicial misconduct.

Once again, limitations on consular resources should not be seen as an impediment to effective consular involvement, especially in a capital case. In any case that could result in the death penalty, counsel should always advise a consulate with limited resources that *pro bono* assistance may be readily available upon their request of and would be highly beneficial to their national's defense. [79]

Consular Involvement in Litigation

A consular representative would normally attend every significant court hearing in a serious case, as well as the trial itself. This consular presence in the courtroom serves to reassure the national that their interests are being protected, while impressing on the local authorities that the home government is genuinely concerned that its citizens receive fair and even-handed treatment. Monitoring the proceedings may also alert the consular officer to discriminatory treatment based on national origin, to inadequate translation services or to communications problems between the national and the defense team.

Consular officers are also authorized under the VCCR and many bilateral treaties to make direct representations on behalf of their nationals to the authorities of the arresting nation. In the cases of foreign nationals, it is appropriate—and increasingly common—for consulates to express their concerns over the possible application of the death penalty. Consular approaches to prosecutors may be made by means of a formal letter, followed by a personal meeting. If only as a courtesy to the consulate, most prosecutors will agree to consider these interventions. Naturally, a

[78] *See, e.g.*, *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1996), noting that "reasonably diligent counsel" would have investigated and introduced potential treaty issues when representing a foreign national facing capital charges; *Deitz v. Money*, 391 F.3d 804 (6th Cir. 2004) (remanding non-capital case to determine, inter alia, if trial attorney's failure to "notify Deitz of his right to contact the Mexican consulate…deprived him of the effective assistance of counsel.").

[79] In the Aldape Guerra case, for example, a Mexican consular request persuaded a major Houston law firm to provide *pro bono* assistance to counsel. The firm spent two million dollars in billable hours before Aldape's conviction was reversed and he was released from death row in Texas.

consular intercession of this kind requires careful planning and consultation with the defense team.

Where the legal arguments in a case include the impact of any denial of consular notification or access, a consular representative may be requested to provide a statement or to give testimony. Direct involvement in the proceedings would ordinarily take place following discussions with both defense counsel and the home government's Foreign Ministry. In many such cases, it will suffice for the consular post to submit an affidavit describing the general forms of assistance routinely provided to its nationals facing criminal prosecution.[80] When the testimony of a consular officer is required for an evidentiary hearing, it may be necessary first to obtain a limited waiver of consular immunity.[81]

Consular officers or their legal representatives may have standing to address the sentencing authority directly, either by writing to the presiding judge or by making a declaration in court. This option could be exercised in circumstances of particular concern to the home government, such as cases that could result in sentences of death or confinement for life. The right of consular officers to represent the interests of the national before the authorities of the receiving State is a flexible one, which should be interpreted to encompass any form of intervention that is both necessary and permissible under the individual circumstances.

Ethical Obligations of Counsel in Death Penalty Cases

Many attorneys representing foreign nationals facing death sentences or execution have felt duty-bound to approach the consulate and to work diligently to obtain consular assistance. This ethical obligation is now enshrined by the American Bar Association in its 2003 *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. Guideline 10.6 addresses the additional obligations in death penalty cases involving foreign nationals. Under its provisions, defense counsel at any stage of a death penalty case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals. Counsel should also ensure that foreign clients have been advised of their consular rights and then make contact with the consulate, with the nationals' consent.

See Appendix Three for the full ABA Guideline regarding counsel representing foreign nationals in death penalty cases.

[80] A sample affidavit is provided in Appendix Two, as a basis for the development of case-specific material by defense counsel and the consulate.

[81] Under VCCR article 44(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." Any waiver provided to permit consular testimony should be expressly limited in nature, so as to forestall prosecutorial questions regarding privileged conversations with the detainee or other sensitive case-specific information.

Bringing Claims before the Inter-American Commission

Where all normally available avenues of appeal have been exhausted, you may wish to explore the benefits of bringing a petition before the Inter-American Commission on Human Rights (the Commission). Established by the Organization of American States (OAS), the Commission is a body of experts based in Washington, D.C. which monitors and enforces compliance with human rights provisions created under the Inter-American treaty system. As a charter member of the OAS and a party to the *American Declaration of the Rights and Duties of Man*, the USA recognizes the authority of the Commission to consider petitions brought on behalf of individuals within the United States who allege that their fundamental human rights have been violated.

The Commission's application mechanism and rules of procedure are remarkably straightforward, in order to facilitate the submission of petitions by people not represented by counsel. It is even possible to submit an application directly to the Commission via its Internet site, which also contains full instructions on submitting petitions, a searchable data base of prior decisions and other reference documents.[82]

Typically, a petition must be filed within six months of exhausting domestic legal remedies for the claims raised. In a U.S. capital case, exhaustion of domestic remedies would occur following the denial of habeas relief by a circuit court, or possibly following the denial of a certificate of appealability by a district court. Counsel should not wait until applying for certiorari review by the U.S. Supreme Court: as a discretionary mechanism that is rarely granted, an application for Supreme Court review does not constitute a normally available domestic remedy.

It should be noted that the scope of the Commission's authority to review petitions arising in the USA is by no means limited to foreign nationals or even to death penalty cases. Virtually any criminal case raising significant and unresolved fair trial concerns could be construed as violating human rights norms. However, the Commission gives enhanced attention and expedited review to death penalty cases, since the timely consideration of those petitions impacts on the most fundamental of all human rights: the right to life itself. Some examples of the diverse issues addressed in the Commission's final decisions in U.S. death penalty petitions include the cases of Ramon Martinez Villareal (requiring a new trial for a VCCR violation), William Andrews (racial discrimination), Michael Domingues (prohibition on juvenile executions), and Juan Raoul Garza (introduction of unadjudicated offenses).

When a petitioner faces irreparable harm such as imminent execution, the Commission is empowered to grant "precautionary measures", a kind of temporary injunction requiring the nation accused of the violation to preserve the life and rights of the petitioner pending full review of the claim. Regrettably, the USA does not view the measures and final decisions of the Inter-American Commission as legally binding.[83] A number of foreign nationals have been executed

[82] The on-line form and instructions are posted at <http://www.cidh.oas.org/denuncia.eng.htm>. The full Rules of Procedure and other basic documents of the Commission are posted at: http://www.cidh.oas.org/basic.eng.htm.

[83] *See, e.g.*, *Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001), holding that the orders and decisions of the Inter-American Commission are not binding on US courts.

in the United States despite the issuance of precautionary measures. Obtaining a protective order or final decision from an international human rights body can nonetheless be highly beneficial to your client. The publicity surrounding the Commission's intervention could provide grounds for requesting an executive reprieve, for instance, or may persuade bodies such as the European Union to intervene in support of clemency.[84] In addition, the Inter-American Commission has recently held that its precautionary measures requests must be viewed as binding in death penalty cases, which may reopen the prospect of domestic litigation.[85]

Useful Precedent Cases

Courts in the United States have now considered several hundred VCCR claims, in a wide variety of postures and proceedings. The following list includes some of the lesser-known or more helpful of those decisions.

Pre-trial remedies

Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 2682 (2006) ("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.").

Immigration law

United States v. Rangel-Gonzalez, 617 F.2d 529 (9th Cir. 1980) (dismissing indictment for illegal re-entry, where INS failed to comply with consular advisement requirements and defendant demonstrated prejudice: he did not know of his consular rights, would have exercised them and consular contact would likely have assisted his defense).

Ineffective assistance claims

Valdez v. State, 46 P.3d 703, 710(Okla. Crim. App. 2000) (in capital case, finding Article 36 claim procedurally defaulted but remanding for resentencing *sua sponte*, on the grounds that trial counsel's failure to seek assistance from the Mexican Consulate constituted deficient and prejudicial performance).

Torres v. State, 120 P.3d 1184, 1187 (Okla. Crim. App.2005) (in capital case, applying the ICJ-mandated remedy of "review and reconsideration" and the *Rangel-Gonzalez* prejudice test to find prejudice at penalty phase arising from the Article 36 violation).

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[84] Contact the International Justice Project if you wish to approach the European Union or any member nation when petitioning for clemency in a case involving a foreign national.

[85] *See Javier Suarez Medina v. United States*, Report No. 91/05, Case 12.421 (October 24, 2005), paras. 88-92, available at http://www.cidh.oas.org/annualrep/2005eng/USA.12421eng.htm.

Deitz v. Money, 391 F.3d 804 (6th Cir. 2004) (remanding non-capital case to determine, *inter alia*, if trial attorney's failure to "notify Deitz of his right to contact the Mexican consulate…deprived him of the effective assistance of counsel.").

Suppression

State v. Miranda, 622 N.W.2d 353 (Minn. App. 2001) (in criminal cases, suppression is an available remedy for an Article 36 violation where the defendant can show that the violation resulted in actual prejudice).

State of Ohio v. Ramirez, 732 N.E.2d 1065, 1070-71 (Ohio App. 3d. 1999) (in criminal case, noting in dicta that if Article 36 had been complied with the inadequate Miranda translation requiring reversal "would have been avoided").

U.S. v. Miranda, 65 F.Supp.2d 1002 (D.Minn.1999) (in immigration case, a two-day delay in advisement of consular rights constituted an Article 36 violation, but defendant failed to demonstrate how consular contact might have prevented him from making statements to police).

Civil remedies

Jogi v. Voges, 425 F.3d 367, 385 (7th Cir. 2005) (following completion of sentence, authorizing suit under the Alien Tort Statute, 28 U.S.C. § 1350, because "there is an implied private right of action to enforce the individual's Article 36 rights.")

Standt v. City of New York, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001) (in wrongful arrest suit, VCCR confers a private right of action enforceable by individuals; defendants may pursue an affirmative claim for violations of their Article 36 rights pursuant to 42 U.S.C. §1983).

Instructive language

United States ex rel. Madej v. Schomig, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002) (in capital case, noting that the ICJ finding "conclusively determines that Article 36 of the Vienna Convention creates individually enforceable rights, resolving the question that most American courts. . .have left open"; finding the treaty claim defaulted, but granting generous penalty phase relief on other grounds).

Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir. 1997) (in capital case, treaties such as the VCCR "are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national.").

Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner J., concurring) ("The provisions of the Vienna Convention should be implemented before trial when they can be appropriately addressed. Collateral review is too limited to afford an adequate remedy").

Other noteworthy cases

Consulate Gen. Of Mexico v. Phillips, 17 F. Supp. 2d 1318, 1322-23 (S.D. Fla. 1998) (Mexican Consulate had a right to be notified and to be of assistance to detained national and standing to assert that right).

Arteaga v. Texas Department of Protective and Regulatory Services, 924 S. W. 2d 756 (Tex. App.-Austin 1996) (construing the mandatory notification provisions of Article 37 (legal guardianship of foreign juveniles) and restating the axiom that the state must comply with the provisions of the VCCR).

Additional Resources

a) *Miranda* Claims

Researchers at the *International Criminal Justice Law Clinic* (Gonzaga University) have assembled and posted a comprehensive survey of reported cases in which the courts have addressed *Miranda* claims in the context of language difficulties. This valuable reference source is available as an Adobe Acrobat file upon request from Human Rights Research or the International Justice Project (see cover page).

This is a Colorado trial court decision suppressing a foreign national's statement on culturally-related grounds, ordering police to inform foreign detainees of their consular rights and recognizing that non-notification of consular rights may be grounds for suppression under *Miranda* in the totality of the circumstances.

The briefs and decision in People v. Mata-Medina are also available. Contact Mark Warren at Human Rights Research for copies of the defense briefs and the court order.

b) General Assistance

Human Rights Research acts as a clearinghouse of information and contacts on Article 36 issues. Among other services, it offers a free electronic newsletter on recent developments, access to an extensive electronic library, a brief bank, litigation guides and bibliographies, consulting services and contacts with other experts in this field. Contact Mark Warren at (613) 278-2280, by email at aiwarren@sympatico.ca or visit the website collection at:

http://www3.sympatico.ca/aiwarren

The *Mexican Capital Legal Assistance Program* is an initiative funded by the Mexican Foreign Ministry to provide various forms of support to attorneys representing Mexican nationals facing the death penalty in the United States. Its services include a team of attorneys experienced in raising VCCR and other international law claims, model briefs and motions, amicus briefs and

assistance in working with local Mexican consular officers. For more information, contact the Program at 520-792-8033.

The Government of El Salvador has recently established the *El Salvador Capital Assistance Project.* The Project assists nationals of El Salvador who are facing the death penalty at trial and in post conviction by providing litigation support and amicus briefs to attorneys handling these cases.

If you are aware of an El Salvador national who is or may be facing the death penalty, please contact:

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c) Books and Law Review Articles on VCCR claims

For a comprehensive overview of consular functions and the significance of the VCCR, see Luke T. Lee , *Consular Law and Practice*, Oxford: Clarendon Press, 1991 (2nd ed.).

The history of the VCCR, its applicability in individual cases and the scope of potential judicial remedies is ably outlined in William C. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs and Remedies*, 31 V and. Journal of Transnational Law, 257 (1998). An excellent overview of the VCCR under both domestic and international law, with an emphasis on the justiciability of treaty-based rights through the U.S. courts.

See also John Sims and Linda Carter, *Representing Foreign Nationals: Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool*, The Champion, September/October 1998. Outlines the litigation history of Article 36 in the USA and proposes a number of strategies for raising the claim at various stages of litigation. Detailed footnotes included.

An early analysis of Article 36 violations and U.S. law is found in Gregory Dean Gisvold, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, Minnesota Law Review, Vol. 78 No.3, February 1994. The footnotes contain a wealth of useful detail and additional sources; the article proposes a standardized notification procedure akin to *Miranda v. Arizona*.

Consular assistance in criminal cases is also reviewed in Victor Uribe, *Consuls at Work: Universal Protections of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 Houston Journal of International Law, 375 (1996).

Consular notification rights should apply from the earliest possible moment of detention to prevent prejudicial treatment; the drafters of Article 36 expressly intended to confer a legal right on individual nationals, according to Mark J. Kadish , *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 Michigan Journal of International Law, 565 (1997).

A domestic court should order restitution as the usual remedy when a party with a real stake in the matter has established that a violation of international law has occurred. Frederic L. Kirgis, *Restitution as a Remedy in U.S. Courts for Violations of International Law* , 95 A.J.I.L. 341 (2001).

Executive action or enforcement through a lawsuit brought by the Justice Department is possible to compel a state to comply with the treaty in a criminal case. John Quigley, *The Law of State Responsibility and the Right to Consular Access*, 11 Willamette J. Int'l L. & Disp. Resol. 39 (2004). *See also* Howard S. Schiffman, *Breard and Beyond: The Status of Consular Notification and Access Under the Vienna Convention*, 8 Cardozo J. Int'l & Comp. L. 27 (2000); Ronald L. Hanna, *Consular Access to Detained Foreign Nationals: An Overview of the Current Application of the Vienna Convention in Criminal Practice*, 25 S. Ill. U.L.J. 163, 164 (2000).

d) Reports on VCCR violations

Amnesty International has issued a series of reports on consular rights violations in the context of the death penalty. All are available at: http://web.amnesty.org/library/engindex

Worlds Apart: Violations of the Rights of Foreign Nationals on Death Row - Cases of Europeans AI Index: AMR 51/101/2000. Outlines the issues of concerns and some of the efforts by European governments and institutions to assist their death-sentenced nationals.

A Time for Action-- Protecting the consular rights of foreign nationals facing the death penalty AI Index: AMR 51/106/2001. Provides a review of the *LaGrand* ruling by the International Court of Justice, outlines the responses of foreign governments in recent capital cases and proposes 12 recommended steps for compliance by state and federal authorities.

Osvaldo Torres, Mexican national denied consular rights, scheduled to die, AI Index: AMR 51/057/2004. Detailed description of the Torres case and an initial analysis of the significance of the *Avena* Judgment.

e) On-line Material on VCCR Litigation

VCCR Litigation Strategies, by Sandra L. Babcock. Written by an experienced death penalty

litigator who specializes in raising consular and other international law claims, this is a first-rate overview of the challenges, issues, and opportunities presented by consular rights claims in death penalty cases.

http://capdefnet.org/fdprc/contents/litigation_guides/foreign/101001-01.htm

The *International Justice Project* website provides an ever-expanding menu of legal materials and other resources on VCCR claims, including amicus briefs and sample motions:

http://www.internationaljusticeproject.org/nationals.cfm

Extensive data on death-sentenced foreign nationals in the USA and other background material is posted on the website of the *Death Penalty Information Center* at:

http://www.deathpenaltyinfo.org/article.php?did=198&scid=31

The *U.S. Department of State* manual for law enforcement on Article 36 obligations provides useful insights into the procedure police are expected to follow when detaining a foreign national. Available at:

http://travel.state.gov/law/consular/consular_636.html

All material from the *International Court of Justice* on the *LaGrand* case is available at:

http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm

The ICJ pleadings and submissions in *Avena and Other Mexican Nationals* are posted at:

http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm

For a capsule summary of *Avena's* main holdings (in question and answer format), visit:

http://www3.sympatico.ca/aiwarren/ICJ.html

The law firm of Debevoise & Plimpton has posted a comprehensive collection of legal briefs in recent Vienna Convention cases at:

http://www.debevoise.com/vccr

The briefs, motions and opinions in the domestic litigation of the case of Paraguayan national *Angel Breard* can be downloaded from:

http://www.mcguirewoods.com/breard/breardbriefs.htm

Several recent decisions of the *Inter-American Commission on Human Rights* have held that individuals deprived of their consular rights and sentenced to death are entitled to remedies such as new trials:

Martinez Villareal v. United States

http://www1.umn.edu/humanrts/cases/52-02.html

Cesar Fierro v. United States

http://www1.umn.edu/humanrts/cases/99-03.html

RELEVANT DECISIONS BY INTERNATIONAL COURTS

The Continuing Significance of International Court Rulings

Because the VCCR is a multilateral treaty that is binding under both international and domestic law, the interpretation of its provisions by international courts may be crucially relevant to its proper construction by the domestic courts. Counsel preparing to raise a violation of the VCCR either in litigation or in discussions with the client's consulate should have a working knowledge of the following international court rulings.

International courts that have addressed this issue have reached dramatically different conclusions than the U.S. Supreme Court. Following the 1997 execution of two Mexican nationals in the USA, the Mexican government obtained an advisory opinion from the Inter-American Court of Human Rights (the judicial arm of the Organization of American States). The Court held that the treaty confers due process rights on individual nationals which apply from the moment of detention, that the denial of those rights would render a subsequent execution illegal under international law and that no prejudice need be demonstrated to mandate a suitable remedy.[86]

Although the United States does not recognize the jurisprudence of the Inter-American Court as binding, the Court's advisory opinion may nonetheless be presented in domestic litigation as supporting authority for the correct interpretation of a U.S. obligation under international law. The Court's common-sense approach to construing the term "without delay" as used in Article 36 may be especially helpful in cases raising *Miranda* issues:

> 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 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.[87]

Two recent judgments from the International Court of Justice (ICJ) stands on a demonstrably higher footing. As previously noted, when the United States ratified the VCCR in 1969, it also unconditionally ratified the treaty's international enforcement mechanism. Under the provisions of the VCCR *Optional Protocol Concerning the Compulsory Settlement of Disputes*, any dispute

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[86] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, October 1, 1999, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999). Posted at: http://www1.umn.edu/humanrts/iachr/A/OC-16ingles-sinfirmas.html.

[87] *Id*. para. 106.

over the interpretation or application of the VCCR falls under the compulsory jurisdiction of the ICJ, which is empowered to issue legally binding decisions in disputes between parties to the Optional Protocol.

There is a sound argument to be made that the United States thus ceded ultimate jurisdiction over the interpretation and enforcement of this treaty to the ICJ and that the domestic courts must attempt to conform their rulings to the relevant judgments of the ICJ, at least so far as they do not conflict with domestic procedural rules. In response to the imminent execution in Arizona of German national Walter LaGrand in 1999, Germany brought an action against the United States at the ICJ under the Optional Protocol. After the federal and Arizona authorities ignored the ICJ's provisional order requiring a stay of execution, Germany proceeded to obtain a binding judgment from the ICJ, which was issued on 27 June 2001.

In the *LaGrand Case*, the ICJ determined that the United States had violated every major provision of Article 36, thus incurring obligations both to Germany and to its detained nationals. The key elements of the ruling squarely contradict the legal position adopted by U.S. authorities in the domestic courts, as well as the *per curiam* decision of the Supreme Court in *Breard v. Greene*. For instance, the ICJ held that Article 36 confers specific rights on individuals, that procedural default may not be applied to bar domestic judicial consideration of the treaty violation, and that the USA must provide "review and reconsideration" of the treaty violation in all cases of prolonged detention or severe sentences.[88]

Since the VCCR Optional Protocol was then part of a ratified U.S. treaty (and ceded ultimate judicial authority to the ICJ), the *LaGrand* decision was arguably binding on the domestic courts. Ruling in the case of a death-sentenced Polish national, an Illinois district court judge noted that *LaGrand* "conclusively determines that Article 36 of the Vienna Convention creates individually enforceable rights, resolving the question most American courts. . . have left open." The court stated that the ICJ's decision suggests that "courts cannot rely upon procedural default rules to circumvent a review of Vienna Convention claims on the merits." Although the prosecution asked the court to reconsider its decision, the court declined, noting in response that consular assistance could have played a significant role in the capital sentencing hearing.[89]

In the first domestic death penalty case to take cognizance of *LaGrand*, the Oklahoma Court of Criminal Appeals (CCA) granted an indefinite stay of execution to Mexican national Gerardo Valdez, finding that Valdez's successor habeas petition based on *LaGrand* raised "a unique and serious matter involving novel legal issues and international law". While the Oklahoma CCA eventually determined that the treaty claim was procedurally defaulted, Valdez's death sentence was nonetheless set aside—based on a procedurally defaulted 'ineffective assistance of counsel' claim that neither party had raised. Given that the Court's finding of ineffectiveness was based on the failure of trial counsel to seek assistance from the consulate (and the demonstrable

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[88] LaGrand Case (Germany v. United States), 2001 ICJ 104 (Judgment). The full text of this historic ruling and all of the related documents are available at:
http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm

[89] *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 978-79 (N.D. Ill. 2002). Madej's death sentence was reversed, but on Sixth Amendment grounds.

prejudice that ensued), it is obvious that the treaty claim was the underlying basis for the remedy.[90] The Valdez case demonstrates that a VCCR claim can result in a favorable decision even when the claim is deemed to be defaulted.

a) Understanding *Avena and Other Mexican Nationals*

While *LaGrand* addressed consular rights violations in the cases of two German nationals who were executed before the ICJ could fully consider Germany's claim, a more recent ICJ Judgment carries broader implications for all foreign nationals facing the death penalty in the USA whose Article 36 rights were not respected. Because a thorough understanding of this decision may well be of significance to all capital defense counsel confronting Article 36 violations, it is discussed here in detail.

In January of 2003, Mexico brought a claim against the United States before the ICJ alleging violations of Article 36 rights in the cases of more than 50 death-sentenced Mexican nationals. Unlike the two individuals in the *LaGrand Case*, all of the nationals that Mexico brought to the attention of the ICJ were still alive and were thus capable of receiving meaningful remedies from the Court's final decision. Among other issues, Mexico asserted that the appropriate remedy for the VCCR violations would be new trials or, at a minimum, meaningful judicial review and reconsideration by U.S. courts of the Article 36 violation in each case. The United States disputed Mexico's claims, arguing that no legal rights were conferred on individuals under the VCCR and that the appropriate remedy in each case would be clemency review.

After both parties submitted extensive written materials and participated in four days of oral arguments, the ICJ issued its binding Judgment in what is now known as *Avena and Other Mexican Nationals* (Mexico v. USA) (or simply *Avena*). In a lengthy and complex decision issued on 31 March 2004, the ICJ found that the United States had breached its obligations under various provisions of the VCCR in 51 of the 52 individual cases submitted for its review. Clarifying and expanding on its previous ruling in *LaGrand*, the Court's decision included these key points:

- Article 36 confers specific rights on foreign nationals, rights "which are to be asserted. . . within the domestic legal system of the United States."

- Advisement of a detainee's consular rights "without delay" means "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. Precisely when this will occur will vary with the circumstances."

- Because the VCCR does not contemplate that a consular officer acts as the detainee's legal representative, the term "without delay" is not to be understood as necessarily meaning "immediately upon arrest and before interrogation."

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[90] *See Valdez v. State*, 46 P. 3d 703 (Okla. Crim. App. 2002)

- In all cases resulting in prolonged detention or severe sentences, U.S. courts are required to take full account of the Article 36 violation by a process that provides effective "review and reconsideration" of both the conviction and sentence.

- Domestic rules of legal procedure (such as procedural default) may not be invoked by the United States to prevent review and reconsideration of the Article 36 violations from taking place in those cases where the defendant failed to raise a timely objection.

- The judicial process of review and reconsideration must be sufficient to "guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account."

- It is not enough that the U.S. courts sometimes consider consular rights violations indirectly, as part of other legal claims raising due process concerns. Article 36 violations must be reviewed independently and on their own terms, as violations of a treaty right.

- Clemency review is not sufficient in itself to provide meaningful review and reconsideration, although it can supplement judicial proceedings where the judicial system has failed to take due account of the violation of the rights set forth in the Vienna Convention.

- Should other Mexican nationals nonetheless be sentenced to severe penalties without their Article 36 rights being respected, the United States must also provide them with the same review and reconsideration of the conviction and sentence.

But what about the cases of other foreign nationals whose consular rights were violated? Under the ICJ Statute, the *Avena* Judgment is final and without appeal, but is legally binding only on the parties to the dispute (i.e., Mexico and the United States). However, where the ICJ is interpreting the terms of a multilateral treaty ratified by over 165 nations, its definitions of phrases such as "without delay" are clearly intended to apply to all parties to the treaty.

Furthermore, the Court took the unusual step of clarifying that the remedy it has imposed applies to *all* foreign nationals convicted under similar circumstances in the United States:

> To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present Judgment. In other words, the 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.[91]

[91] In addition, failing to apply the *Avena* Judgment to other essentially identical cases of foreign nationals not named in that proceeding would arguably violate constitutional rights to equal protection and due process.

Perhaps the most important point to understand is that the remedy required under *Avena* is one of judicial process, not specific outcomes. The ICJ rejected Mexico's request for the annulment of convictions and sentences or the automatic exclusion of evidence, holding instead that:

> 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.

Where the domestic courts find that the consular rights violations had a harmful effect on the trial or sentencing of a foreign national, the ICJ clearly expects that those courts would then provide suitable remedies. Although the outcome of each review would depend on the circumstances of the individual case, the review itself must always be thorough and effective. The ICJ also emphasized that this new review must take place even when the domestic courts have previously considered the Article 36 violation in the context of appeals raising due process concerns:

> 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.

Nor is the Court's requirement confined solely to death penalty cases; the references in the *Avena* Judgment to review and reconsideration for individuals "being subjected to prolonged detention or convicted and sentenced to severe penalties" establish that the ICJ intended its remedy to apply in a wider set of circumstances. At the very least, "severe penalties" should be interpreted as including not only death sentences but also life imprisonment, either with or without the possibility of parole. Similarly, the ICJ did not specifically define what it meant by "prejudice" as a requirement for a domestic court to provide a remedy following review. A reasonable definition of "prejudice" would be the presentation of credible evidence that:

- the detainee was unaware of his consular rights;
- he would have exercised those rights if the authorities had complied with Article 36;
- it is likely that the consulate would have assisted the defendant.[92]

[92] Numerous courts nationwide have determined that the appropriate standard of prejudice to apply in cases raising Article 36 violations is that: (1) the defendant did not know he had a right to contact his consulate for assistance, (2) he would have availed himself of that right had he known of it; and (3) it is likely the consulate would have assisted the defendant. *See, e.g.*, *United States v. Rangel-Gonzales*, 617 F. 2d. 529, 532 (9th Cir. 1980) (dismissing indictment for illegal entry for failure to inform defendant of his consular rights); *United States v. Briscoe*, 69 F. Supp. 2d 738 (D. VI. 1999); *People v. Preciado-Flores*, 66 P.3d 155, 161 (Colo. App. 2002); *Zavala v. State*, 739 N.E. 2d. 135, 142 (Ind. App. 2000); *Torres v. State*, 120 P.3d 1184, 1186-87 (Okla. Crim. App. 2005) (adopting the

Thus, in every case in which foreign nationals have been convicted and received a severe sentence without strict compliance with Article 36 obligations, defense counsel should cite the ICJ Judgments in *LaGrand* and Avena. Regardless of the eventual status of *Avena* under domestic law, the ICJ Judgment should always be presented by defense attorneys as an authoritative determination of the rights and remedies conferred on individual foreign nationals under Article 36.

b) Initial Responses to the *Avena* Judgment

The first case to test the binding force of the ICJ decision was that of Mexican national Osbaldo Torres in Oklahoma. Specifically named by the ICJ as one of the cases in which the U.S. courts must provide "review and reconsideration" and facing imminent execution, Torres filed a successive habeas petition with the Oklahoma courts based on *Avena*. The Oklahoma Court of Criminal Appeals then issued an order indefinitely staying his execution and requiring the trial court to hold a special hearing to determine primarily "whether Torres was prejudiced by the State's violation of his Vienna Convention rights." Although the court gave no reasons for its dramatic decision, a separate opinion filed by one of the participating judges recognized the binding force of the *Avena* Judgment:

> At its simplest, this is a matter of contract. A treaty is a contract between sovereigns. The notion that contracts must be enforceable against those who enter into them is fundamental to the Rule of Law. This case is resolved by this very basic idea. The United States voluntarily and legally entered into a treaty, a contract with over 100 other countries. The United States is bound by the terms of the treaty and the State of Oklahoma is obligated by virtue of the Supremacy Clause to give effect to that treaty.
>
> As this Court is bound by the treaty itself, we are bound to give full faith and credit to the Avena decision. I am not suggesting that the International Court of Justice has jurisdiction over this Court – far from it. However, in these unusual circumstances the issue of whether this Court must abide by that court's opinion in Torres's case is not ours to determine. The United States Senate and the President have made that decision for us.[93]

Just hours later, Governor Brad Henry commuted Mr. Torres's death sentence to life imprisonment. Noting the court order, the Governor said, "Despite that stay, I felt it was important to announce the decision that I had made upon a careful and thorough review of the entire case." The Governor's statement also pointed out that "Under agreements entered into by the United States, the ruling of the ICJ is binding on U.S. courts." Following the court order, an Oklahoma judge held a special hearing and determined that Mr. Torres was prejudiced by the

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test as consistent with *Avena*); *see also State v. Reyes*, 740 A.2d 7 (Del. 1999) (suppressing defendant's statement for violation of Article 36).

[93] *Torres v. State*, No. PCD-04-442, slip op. at 5 (Okla. Crim. App. May 13, 2004) (Chapel, J. concurring) (citations omitted).

violation of his consular rights. The Oklahoma Court of Criminal Appeals subsequently endorsed that conclusion.[94]

On 10 December 2004, the U.S. Supreme Court agreed to review the case of José Medellín, a death-sentenced Mexican national in Texas and another of the individuals named in the *Avena* decision. Mr. Medellín asked the Supreme Court to decide whether the *Avena* Judgment was directly binding on the U.S. courts, or should be followed by the domestic courts out of judicial comity. Mr. Medellín's appeal was supported by a wide range of amicus briefs from concerned nations, non-governmental organizations and former U.S. diplomats.[95]

Shortly before the Supreme Court was scheduled to hear oral arguments on these important questions, President George W. Bush issued a legal memorandum announcing that the United States intended to comply with *Avena* by requiring state courts to provide "review and reconsideration" in all 51 cases:

> I have determined, pursuant to the authority vested in me as President by the Constitution and 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 I.C.J. 128 (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.[96]

In an amicus brief submitted to the U.S. Supreme Court, the United States clarified that, under the presidential directive, a state court "is required to review and reconsider the conviction and sentence of the affected individual to determine whether the violations identified by the ICJ caused actual prejudice to the defense at trial or at sentencing." Where prejudice is found, "a new trial or a new sentencing would be ordered. A state court may not, however, interpose procedural default to prevent review and reconsideration." The President's determination establishes a "binding federal rule" and hence constitutes the supreme law of the land.[97] While the scope of the President's legal determination is confined to the cases named in *Avena*, the

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[94] On September 6, 2005, the Court concluded that the Article 36 violation was prejudicial only at the sentencing phase; because the death sentence had already been commuted, no further remedy was required. In adopting the 3-part prejudice test described above in footnote 41, the Court noted: "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 "is consistent with the direction of the International Court of Justice decision. . . .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." *Torres v. State*, 120 P.3d 1184, 1187 (Okla. Crim. App. 2005).

[95] All of the briefs filed with the Supreme Court are posted on the Debevoise and Plimpton website at: http://www.debevoise.com/vccr

[96] George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005), App. 2 to Brief for United States as *Amicus Curiae*, *Medellín v. Dretke* (No. 04-5928).

[97] Brief of the United States as *Amicus Curiae*, *Medellín v. Dretke,* at 41-42, available from Westlaw as 2005 WL 504490.

government's brief also recognizes that it is "without prejudice to the courts' power to consider afresh in other cases the underlying treaty-interpretation and application issues subsumed in the ICJ's rulings".[98]

In reaction to the President's memorandum, Mr. Medellín filed a new habeas petition with the Texas courts asserting that he was now entitled to "review and reconsideration" under *Avena* and by the terms of the presidential directive. Texas authorities responded to the President's decision by questioning his constitutional authority to order state court reviews of the cases.

On May 23, 2005, the Supreme Court ruled 5-4 that Mr. Medellín's petition should be dismissed as improvidently granted. The Court recognized that review and potential remedy by the state courts was the correct next step, followed by its further consideration of the case, if necessary:

> In light of the possibility that the Texas courts will provide Medellín with the review he seeks pursuant to the *Avena* judgment and the President's memorandum, and the potential for review in this Court once the Texas courts have heard and decided Medellín's pending action, we think it would be unwise to reach and resolve the multiple hindrances to dispositive answers to the questions here presented.[99]

Four of the Justices initially preferred that the case be stayed until the Texas courts could address the successive habeas petition filed by Mr. Medellín. Significantly, all of the opinions filed acknowledge the possibility that the petitioner might well obtain compliance with the *Avena* Judgment through the Texas courts. The per curiam opinion noted that the "state-court proceeding may provide Medellín with the very reconsideration of his Vienna Convention claim that he now seeks in the present proceeding," with the concurring and dissenting opinions all expressing similar views.[100] The principal dissent by Justice O'Connor provides a useful analysis of why Article 36 could well be construed as conferring justiciable rights on individuals.

The Texas Court of Criminal Appeals decided on 15 November, 2006 that President Bush has exceeded his constitutional authority by ordering state court review of Medellin's case. The ruling raises constitutional questions that will be appealed to the Supreme Court, but the case was unresolved at the time of writing. Counsel are advised to monitor ongoing litigation of this highly publicized issue through coverage in the U.S. media.

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[98] *Id*. at 58.

[99] *Medellín v. Dretke*, 125 S.Ct. 2088, 2092 (May 23, 2005) (per curiam). The majority identified five "threshold issues that could independently preclude federal habeas relief for Medellín," *id*. at 2090. These hurdles included the determination of the availability of federal habeas relief for the violation of a federal statutory right, the question of whether the state court adjudication on the merits was contrary to established Supreme Court precedent, and the requirement that a habeas corpus petitioner generally cannot enforce a "new rule" of law, under *Teague v. Lane,* 489 U.S. 288, 109 (1989).

[100] 125 S.Ct. 2088 at 2090 ; *see also id*. at 2095 (Ginsburg, J., concurring) (same); *id*. at 2105 (O'Connor, J., dissenting) (noting possibility that "the Texas court will grant him relief"); *id*. at 2108 (Breyer, J., dissenting, joined by Stevens, J.) (noting "very real possibility of [Medellín's] victory in state court").

On 7 March 2005, the U.S. Government advised the United Nations of its withdrawal from the Optional Protocol. It should be clearly understood that this decision has no effect on the force of the prior ICJ Judgments in *LaGrand* and *Avena*, which continue to be legally binding on the USA. As the State Department later announced, **"The United States has not withdrawn from the Vienna Consular Convention and remains committed to its principles and provisions. . . The U.S. is fully committed to compliance with our international legal obligations under the VCCR, and actively works to improve compliance nationally."**[101]

The U.S. withdrawal means that other parties to the Optional Protocol may no longer bring VCCR claims against the United States for compulsory resolution by the ICJ. However, the ICJ does not sit as court of appeal and has already fully addressed the requirements of Article 36 for all nationalities, suggesting that any future claims brought against the USA raising identical issues would not have been productive. The most significant effect of this unfortunate decision may well be to deprive the United States of the right to defend its own consular rights and interests by bringing VCCR claims before the International Court.

c) Citing *Avena* in Article 36 claims

Until such time as the U.S. Supreme Court definitively resolves the domestic legal status of *Avena*, counsel may continue to cite the ICJ decision as persuasive authority on Article 36 rights and remedies.

Regardless of the procedural status of their cases, all prisoners and their counsel planning on a motion or appeal relying on the authority of *Avena* must also develop persuasive evidence of actual harm caused by the treaty violation, by showing prejudice that demonstrably affected the fairness of the proceedings. In order to be persuasive, the showing of prejudice must be real, not speculative: it is not enough to argue that the consulate could or might have assisted in a particular way—it must be shown that the consulate would have intervened in the manner described, and that the effect of that intervention would have been significant. In other words, unless a prisoner can demonstrate a genuine causal link between the treaty violation and the trial outcome, obtaining relief on this claim would be very doubtful regardless of the legal status of *Avena*.

Defendants who are awaiting or are in the midst of trial must raise a timely objection based on the VCCR violation. Under no circumstances should trial counsel fail to file motions addressing Article 36 violations, once they are aware of the issue and have properly developed the claim. Failing to raise a known VCCR claim at trial may well raise major obstacles to addressing the issue on appeal, especially in those jurisdictions that rigorously apply a "contemporaneous objection" rule.

In many instances, prisoners would be raising the consular rights violation for the first time on direct appeal or as a state habeas claim—and there are strict rules in most jurisdictions requiring

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[101] U.S. Department of State, *Announcement: All Consular Notification Requirements Remain in Effect*, available at: http://travel.state.gov/news/news_2155.html.

the assertion of all known issues within the allowable time limits. Failing to file a timely claim in the hopes that some other court will later create a more favorable precedent might well be perceived by the reviewing court as "sandbagging", a practice strongly condemned by the Supreme Court.[102] The delay would be caused deliberately by the petitioner, and it is very likely that a state appellate court would rely on *Sanchez-Llamas* to find the claim procedurally defaulted.

It should always be remembered that no one is entitled to automatic relief under the ICJ decision. The remedy required by the ICJ is entirely one of process, not of outcome; only if actual prejudice can be demonstrated at an *Avena* hearing would someone then obtain a new trial or sentencing hearing.

[102] *See, e.g.*, *Murray v. Carrier*, 477 U.S. 478, 492 (1986); *Miller-El v. Dretke*, 545 U. S. __ (2005) slip op. at 7 (Thomas, J., dissenting) ("AEDPA does not permit habeas petitioners to engage in this sort of sandbagging of state courts").

APPENDIX ONE: EXCERPTS FROM THE VIENNA CONVENTION ON CONSULAR RELATIONS

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;

(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 extra-judicial 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;

[…]

(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 inter-national agreements in force between the sending State and the receiving State.

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.

APPENDIX TWO: ESTABLISHING PREJUDICE THROUGH CONSULAR AFFIDAVITS

When reviewing claims seeking remedies for non-notification of consular rights, many U.S. courts have applied a prejudice standard to determine if the treaty violation affected the outcome of the proceedings. One commonly-applied test for prejudice was originally developed by the Ninth Circuit to assess VCCR violations in INS proceedings. *See United States v. Calderon-Medina*, 521 F.2d 529 (9th Cir. 1979).

Under this analysis, the defendant has the burden of establishing prejudice by producing evidence that "1) he did not know of his right; 2) he would have availed himself of the right had he known of it; and 3) there was a likelihood that the contact [with the consul] would have resulted in assistance to him." *United States v. Villa-Fabela*, 882 F.2d 434, 440 (9th Cir. 1989).

Defense counsel would thus need to obtain two affidavits in order to support the claim: one from the national (to meet the first two prongs of the prejudice test) and one from the consulate (to meet the third).

You should also be aware that several courts have held that, even if the defendant could meet the described test, suppression or exclusion would not be an appropriate remedy for a treaty violation where the treaty does not specifically call for such a remedy. *See, e.g.*, *United States v. Li*, 206 F.3d 56 (1st Cir. 2000). Other courts, however, have been more inclined to assume that a well-developed prejudice claim might justify a remedy such as exclusion. *See, e.g.*, *United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084 (S.D. Cal. 1998), n. 10 (in an appropriate case, a violation of the Convention may warrant suppressing a defendant's statements or granting other appropriate relief); *State v. Miranda*, 622 N.W.2d 353, 356 (Minn. App. 2001) (suppression based on an Article 36 violation requires a showing that the defendant was prejudiced thereby).

Individual Affidavits

Due to the still widespread non-compliance with consular notification obligations by U.S. law enforcement, a suitable affidavit from the affected national should carry considerable weight in court and would be difficult to refute. Initial investigation of the claim by counsel might include a review of arrest reports, jail logs or booking forms, to determine if the arresting authorities were aware of the suspect's nationality. Discussions with the client and with the consulate should also provide a good starting point for determining the plausibility of the claim.

However, it is important to recall that any assertion of prejudice can prevail only if it is not speculative in nature. When preparing motions, briefs and affidavits regarding violations of consular rights, counsel would be well advised to always keep in mind the dictum of the Supreme Court on this issue. Even if a claimed consular rights violation is properly raised and proven, "it is extremely doubtful that the violation should result in the overturning of a final

judgment of conviction without some showing that the violation had an effect on the trial." *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam). [103]

The first generic affidavit is a sample of what should be obtained from the individual foreign national, suitably adapted to the factual circumstances of the case. For instance, the affidavit should indicate (if possible) that the authorities knew or ought to have known that the detainee was a foreign citizen. Three commonly offered proofs of that knowledge by the authorities are included in the sample affidavit (points 3-5).

Generic Affidavit of Foreign National on non-notification of consular rights

1. My name is XX. I am over twenty-one years of age and am fully competent to make this affidavit.

2. I have personal knowledge of all the facts set forth in this affidavit, and all such facts are true and correct.

3. On [DATE], the day of my arrest, I carried my wallet with me. In my wallet were photos and my INS "green card." The green card stated that I was from Generica. The police took my wallet and its contents when they arrested me.

4. I truthfully informed the booking police officer that I was born in Generica.

5. On the day after my arrest, I was visited and interviewed by an agent of the Immigration and Naturalization Service, who asked me questions about my citizenship and place of birth. I truthfully informed him that I am a citizen of Generica.

6. I was never advised by the police of my rights under the Vienna Convention on Consular Relations, either at the time of my arrest or at any time since my arrest.

7. I was not aware that I had the right to consult with and seek the assistance of the Generic Consulate upon my arrest.

8. If I had been informed of my right to consular notification, I would have requested that the Generic Consulate be contacted.

9. If I had been informed of my right to consular communication and assistance, I would have spoken to and met with Generic consular representatives and would have accepted any and all assistance that they would have offered to me to aid in my defense.

FURTHER AFFIANT SAYETH NOT.

Consular Affidavits

Because the scope and availability of consular assistance varies widely, it would be difficult to produce a generic affidavit suitable for all circumstances. However, some basic elements should always be present in a consular affidavit:

- any treaties on consular notification to which the consulate's home government is a party;
- the high importance the consulate attaches to consular notification and assistance;
- the basic assistance that the consulate provides to its detained nationals;
- a statement that especially serious cases produce an enhanced response;
- a declaration that the consulate was not notified of the detention;
- specific examples of the timely assistance that the consulate would have provided, had notification occurred;
- in cases involving *Miranda* claims, an emphasis on the immediacy of the consular response (i.e. consular advice would be provided to the national prior to any interrogation taking place). [104]

Some consular services have previous experience providing these affidavits and have a well-developed consular assistance program in the United States (e.g., Mexico, Canada, Germany, and Colombia). It is likely that these consulates will require relatively little prompting or assistance to provide a suitable affidavit in a capital case. Other consulates may be less experienced or could be reluctant to intervene in ongoing legal proceedings; providing a generic affidavit as an example may assist counsel in obtaining satisfactory results. Still other consulates may require considerable persuasion, or may not be in a position to attest to a standard notification procedure. There may thus be situations in which the resulting affidavit would not significantly advance a claim of actual prejudice. In those circumstances, other legal strategies may be called for when fashioning the claim.[105]

One common application of consular affidavits is in motions to suppress statements, either as a stand-alone claim citing consular treaties or (more commonly) as complimentary to a Miranda claim. The sample affidavit provided below is based on the assumption that the consulate in question has limited resources and capacities, but does have standardized and effective

[104] It is essential to establish a plausible chain of events providing a causal link between the consular rights violation and the custodial statement. Precisely when notification of consular rights must be provided to a detainee is a matter of disputed interpretation. Similarly, courts in the United States have not accepted the premise that interrogation must cease until consular contact has been established—hence the need for immediacy in the consular response.

[105] Regardless of the circumstances, the claim should always be preserved for review. Until such time as the Supreme Court rules definitively on the issue, the possibility exists that a future decision might develop a broadly helpful standard for consular rights violations in capital cases.

procedures for responding promptly to reported arrests. The chosen scenario is the case of a juvenile detainee who gives a statement to the authorities without advisement of consular rights and is now facing prosecution on a capital charge; the home government of the national is a 'mandatory notification' country, but was not informed of the arrest.[106]

The sample affidavit would be modified in consultation with the consulate, to suit the factual circumstances, the available consular resources and the procedural posture of any given case.

Generic Affidavit of a Consular Official on Consular Notification and Assistance

I swear under the penalty of perjury that the following is true and correct:

1. My name is XX. I am the Consul General of Generica, based at the Embassy of Generica in Washington, D.C. My duties include the direction of consular assistance to nationals of Generica detained, arrested or incarcerated in the United States.

2. I have personal knowledge of all the facts set forth in this affidavit, and all such facts are true and correct.

3. Generica is a party to the Vienna Convention on Consular Relations (VCCR), having ratified the treaty without reservations on [DATE].

4. Under the provisions of Articles 5 and 36 of the VCCR, the consular officers of Generica have the right to represent the interests of their nationals detained within the United States, as well as the right to visit, communicate with and offer assistance to those nationals.

5. Generica is also a party to the Bilateral Consular Convention between the United States and Generica, ratified on [DATE].

6. Under the terms of Article 00 of the Bilateral Convention, the arresting authorities in the United States must inform the Consulate of Generica immediately of the arrest or detention of any citizen of Generica within the United States.

7. The Consulate of Generica places a high emphasis on the importance of prompt notification by the authorities of any arrest of a citizen of Generica.

8. It is the policy and standard practice of the Consulate of Generica to respond without delay to such notifications of arrests by offering immediate assistance to its nationals in custody.

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[106] More than 50 countries are parties to bilateral consular treaties with the USA. Unlike article 36 of the VCCR (which requires that the national be informed of the option of consular notification), most of these bilateral agreements require mandatory notification of the consulate, irrespective of the detainee's wishes. For a listing of and full text of those agreements, visit: http://travel.state.gov/law/legal/treaty/treaty_784.html on the State Department website.

9. The Consulate of Generica responds to such notifications by seeking immediate communication with its detained nationals, either by telephone or in person. Although the resources available for consular visits are limited, it is the standard practice of the Consulate to arrange for a personal visit with every detainee facing a serious charge within a 100-mile radius of the Consulate.

10. In all cases, the Consulate first informs its nationals by telephone of their legal rights under U.S. law and the importance of invoking those rights, in terms that the national will properly understand.

11. The Consulate also offers to make contact with the family of the accused and provides a list of local attorneys competent to represent them.

12. In cases involving the arrest of a juvenile national on a serious charge, the Consulate insists on speaking with the national immediately upon receiving notification of the arrest. The duty officer at the Consulate of Generica is under standing instructions to notify me immediately of any such arrest report received after normal consular business hours.

13. Cases involving the potential application of the death penalty or other severe punishments receive particular attention and enhanced consular assistance, to the extent necessary to ensure that the national receives fair, equal and humane treatment by the local authorities.

14. No personnel at the Consulate of Generica have any recollection of being notified that Mr. XX was arrested on [DATE], nor is there any consular record of such a notification being provided, either orally or in writing.

15. Had the Consulate of Generica received notification of the arrest of Mr. XX, it would have contacted him immediately. Given the circumstances of this case, a consular representative would have advised Mr. XX to make no statements to the authorities without the advice of his attorney and to sign no waivers or other documents until advised by counsel.

16. The Consulate of Generica did not learn of the arrest and subsequent prosecution of Mr. XX until [DATE], when the Consulate was contacted by defense counsel. To date, the competent authorities have not provided formal notification of the arrest of Mr. XX.

17. Upon learning of the arrest of Mr. XX, a consular representative immediately arranged to visit him in custody and offered consular assistance. Mr. XX immediately accepted the offer.

18. It is my experience that timely consular assistance in such cases is of crucial importance in ensuring that a detained national fully understands and acts on their available legal rights. Ongoing consular assistance from the moment of detention also ensures that our nationals have the means at their disposal to offer an adequate defense against the charges that they face.

FURTHER AFFIANT SAYETH NOT

APPENDIX THREE: FOREIGN NATIONALS AND THE ABA GUIDELINES ON THE APPOINTMENT OF COUNSEL IN DEATH PENALTY CASES

GUIDELINE 10.6 – ADDITIONAL OBLIGATIONS OF COUNSEL REPRESENTING A FOREIGN NATIONAL

A. Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.

B. Unless predecessor counsel has already done so, counsel representing a foreign national should:

> **1. immediately advise the client of his or her right to communicate with the relevant consular office; and**
>
> **2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest.**
>
> **a. Counsel who is unable to obtain consent should exercise his or her best professional judgment under the circumstances.**

History of Guideline

This Guideline is new and reflects developments in law and practice since the original edition.

Related Standards

Vienna Convention on Consular Relations and Optional Protocol on Disputes, April 24, 1963, art. 36, 21 U.S.T. 77, T.I.A.S. 6820.

Commentary

The right to consular assistance is contained in Article 36 of the Vienna Convention on Consular Relations, a multilateral treaty ratified unconditionally by the United States in 1969. Under its provisions, an obligation rests on local authorities to promptly inform detained or arrested foreign nationals of their right to communicate with their consulate. At the request of the foreign

national, local authorities must contact the consulate and permit consular communication and access.

There is considerable evidence that American local authorities routinely fail to comply with their obligations under the Vienna Convention.[107]

Any such failure is likely to have both practical and legal implications. As a practical matter, consuls are empowered to arrange for their nationals' legal representation and to provide a wide range of other services. These include, to name a few, enlisting the diplomatic assistance of their country to communicate with the State Department and international and domestic tribunals *(e.g.*, through *amicus* briefs), assisting in investigations abroad, providing culturally appropriate resources to explain the American legal system, arranging for contact with families and other supportive individuals. As a legal matter, a breach of the obligations of the Vienna Convention or a bilateral consular convention may well give rise to a claim on behalf of the client.

Enlisting the consulate's support after obtaining the client's consent to do so should therefore be viewed by counsel as an important element in defending a foreign national at any stage of a death penalty case,[108] and counsel should also give careful consideration to the assertion of any legal rights that the client may have as a result of any failure of the government to meet its treaty obligations.

Subsection B(2)(a) recognizes, however, that cases do vary. A range of considerations may make clients reluctant to have their consular office informed of their detentions. In many circumstances, such as those in which clients simply fear embarrassment if word of their plight reaches home, the attorney should counsel the client to overcome the reluctance. But if the client

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[107] *See* Breard v. Greene, 523 U.S. 371, 380 (1998) (Breyer, J., dissenting) (finding Paraguayan national's argument for stay of execution not wholly without merit where the United States government had submitted an *amicus* brief acknowledging that the Vienna Convention had been violated); Sandra Babcock, *The Role of International Law in United States Death Penalty Case*s, 15 LEIDEN J. INT. L. 367, 368 (2002) (describing violations as "widespread and uncontested"). Furthermore, counsel should be alert to the fact that the United States has bilateral consular treaties with over 50 countries which may impose obligations additional to those under the Vienna Convention, *see* www.travel.state.gov/notification5.html#provisions (listing treaties). One example is Article 16 of the Consular Convention Between the United States and the United Kingdom, 3 U.S.T. 3426 (1952), which currently covers 32 independent countries around the world that were formerly entities within the British Empire.

[108] *See* Valdez v. State, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (granting post-conviction relief because it was ineffective assistance for trial counsel not to "inform Petitioner he could have obtained financial, legal and investigative assistance from his consulate"); *see also* Breard v. Greene, 523 U.S. 371, 380 (1998); Anne-Marie Slaughter, *Editorial: On a Foreign Death Ro*w, WASH. POST, Apr. 14, 1998, at A15 (noting that under the Vienna Convention on Consular Relations, "[a] citizen is entitled to the protection and advice of his or her government when caught in a foreign legal system and a foreign language," granting that citizen access to "a translator, local counsel and diplomatic pressure if needed"). Foreign governments often have formal assistance programs in place for nationals facing the death penalty in the US. *See, e.g.,* Ana Mendieta, *Mexico Will Aid Nationals in US; Fund Will Help 45 Death Row Inmate*s, CHICAGO SUN-TIMES, Oct. 6, 2000, at 18 (describing creation of legal assistance program to defend the rights of Mexican nationals sentenced to death in the United States and bolster recognition of rights under the Vienna Convention); *Court Blocks Execution of Canadian in Texa*s, WASH. POST, Dec. 10, 1998, at A47 ("Canada . . . regularly seeks clemency for Canadians sentenced to death abroad").

is a political dissident and the likely effect of informing the consulate would be to cause adverse consequences to his relatives without obtaining any assistance with the case, the attorney might reasonably abide by the client's direction to withhold notification. The matter should, however, be kept under continuing review, since conditions may well change over time.

Subsection A is included in the Guideline to emphasize that the determination of nationality may require some effort by counsel. A foreign government might recognize an American citizen as one of its nationals on the basis of an affiliation (e.g. one grandparent of that nationality) that would not be apparent at first glance.