

AMERICAN BAR ASSOCIATION
SECTION OF LITIGATION
SECTION OF CRIMINAL JUSTICE
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SECTION OF INTERNATIONAL LAW
DEATH PENALTY REPRESENTATION PROJECT
COMMISSION ON IMMIGRATION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges the United States and upon state and
2 territorial governments to work to ensure that the fundamental protections of Article 36 to the
3 Vienna Convention on Consular Relations (“Article 36”) are extended fully and without obstacle
4 to foreign nationals within United States borders; and

5 FURTHER RESOLVED, That the American Bar Association urges the United States to work to
6 ensure that the fundamental protections of Article 36 are extended fully and without obstacle to
7 United States citizens in foreign countries; and

8 FURTHER RESOLVED That the American Bar Association urges the President and Congress to
9 renew the United States’ commitment to the implementation of the Vienna Convention and to the
10 enforcement of its obligations under the United Nations Charter and the Optional Protocol to the
11 Vienna Convention by:

12 (1) Seeking means to fully implement the decision of the International Court of Justice in
13 *Avena and Other Mexican Nationals* through legislation and other means, where possible;

14 (2) Recognizing that disputes arising out of the interpretation of the Vienna Convention
15 and related questions of international law should be decided by the International Court of Justice;
16 and

17 (3) According the decisions of the International Court of Justice with regard to those
18 disputes binding force within the United States, including honoring and enforcing any
19 International Court of Justice judgments to which the United States is a party; and

20 FURTHER RESOLVED That the American Bar Association urges the President and Congress,
21 as well as state and territorial executives, officials, and legislatures, to advance the
22 implementation of and compliance with Article 36 of the Vienna Convention in the United States
23 through the following measures:

24 (1) Drafting and adopting appropriate legislation that would codify the protections of
25 Article 36 of the Vienna Convention into United States and state law, including but not limited to
26 the following:

27 (a) Enacting legislation requiring that a person who is arrested or detained shall be
28 advised without delay that if the arrestee or detainee is a foreign national, the foreign national
29 has a right to communicate with an official from the consulate of the foreign national’s country,
30 and that if the arrestee or detainee chooses to exercise this right the advising officer notify the
31 pertinent official in the officer’s agency or department of that fact; and

32 (b) Enacting legislation that renders procedural default rules inapplicable to an
33 assertion in criminal cases that the defendant’s right under Article 36 has been violated; and

34 (2) Developing federal, state and territorial policies and procedures that enhance United
35 States compliance with Article 36 of the Vienna Convention, such as the following measures:

36 (a) Advising an arrestee or detainee as part of the booking process that foreign
37 nationals have an Article 36 right to communicate with an official from the consulate of the
38 foreign national’s consulate;

39 (b) Adopting, as appropriate, policies and procedures that reflect and abide by the
40 principles set forth in model guidelines or standards such as those promulgated by the United
41 States Department of State or by Commission on Accreditation of Law Enforcement Agencies,
42 regarding compliance with the Vienna Convention consular notification requirements;

43 (c) Taking steps to ensure that knowledge of these polices and procedures and of
44 the right to consular notification is disseminated to federal, state, and local law enforcement
45 personnel;

46 (d) Taking steps to ensure that a magistrate or judge informs a defendant at the
47 first appearance that foreign nationals have an Article 36 right to communicate with an official
48 from the consulate of the foreign national’s consulate;

49 (e) Providing training for prosecutors, defense counsel, judges, and law
50 enforcement personnel as to the United States’ obligations under Article 36;

51 (f) Taking steps to ensure that for countries on the mandatory notification list, that
52 mandatory notification does occur in all cases; and

53 FURTHER RESOLVED, That the American Bar Association urges prosecutors and criminal
54 defense attorneys to become knowledgeable about the Vienna Convention’s consular notification
55 requirements and work to ensure effective exercise of those rights by foreign national
56 defendants, including through the following measures:

57 (1) For prosecutors, assuming a responsibility to verify that a foreign national criminal
58 defendant has been informed of the right to consular notification, and verifying that any request
59 has been honored or that mandatory notification requirements have been met;

60 (2) For criminal defense attorneys in all cases, complying fully with ABA Guideline 10.6
61 "Additional Obligations of Counsel Representing a Foreign National" contained in the ABA
62 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases
63 (rev. 2003); and

64 FURTHER RESOLVED, That the American Bar Association urges state and territorial
65 bar associations, in matters involving foreign national defendants, to establish local links with
66 consulates in the United States to assist the consulates in finding counsel for foreign national
67 defendants, to provide other appropriate assistance to the consulates, to seek periodic
68 assessments from consulates as to compliance with Article 36 by the United States and state and
69 local governments, and to work with the consulates to propose and implement any necessary
70 reforms and improvement.

REPORT

1. Background on the VCCR and Its Optional Protocol

The Vienna Convention on Consular Relations (VCCR) is a binding multilateral treaty that codifies many of the rights, privileges, immunities and functions of consulates worldwide.¹ Currently ratified by 172 nations, its provisions are so essential to modern consular functions that the U.S. Department of State views the VCCR as “widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention.”²

The VCCR addresses a range of matters related to consular function. The Convention establishes a set of protocols for the establishment and conduct of consular relations, while also prescribing specific privileges and immunities that should attach to consular officials.³ Such provisions are intended to “ensure the efficient performance of functions by consular posts on behalf of their respective States.”⁴ The Convention itself details some of the various consular functions it aims to further. These functions include, most importantly for present purposes, the protection, in the receiving nation, of the interests of the sending nation and its nationals.⁵

Article 36 of the Convention operates within the scope of this protective function, specifically addressing the consular notification rights of arrested foreign nationals. Consular officers have long possessed the right under international law to assist their co-nationals.⁶ Article 36(1)(b) of the VCCR regulates the provision of timely consular information, notification and assistance in the cases of nationals detained in a foreign country. Under its terms the detaining authorities must advise the foreign national “without delay” of his rights to consular communication and notification; at the informed request of the detainee, the authorities must then notify the consulate “without delay” that “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 foreign detainee must likewise be “forwarded by the said authorities without delay.” Article 36(1)(c) grants consular officers 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.” Finally, Article 36(2) provides that local laws and regulations “must enable full effect to be given to the purposes for which the rights accorded under this article are intended.”

The assistance that consulates provide to their arrested nationals is not confined to arranging for an attorney. As the State Department has instructed U.S. law enforcement, a consular officer may also “monitor the progress of the case, and seek to ensure that the foreign

¹ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

² Dep’t of State Telegram 40298 to the U.S. Embassy in Damascus (February 21, 1975), *reprinted in* LUKE T. LEE, *CONSULAR LAW AND PRACTICE* 145, Oxford: Clarendon Press (2d ed. 1991).

³ Vienna Convention on Consular Relations, *supra* n. 1, at ch. I, II.

⁴ *Id.* at preamble, cl. 5.

⁵ *See id.* at art. V.

⁶ *See Wildenhuis’s Case*, 120 U.S. 1, 4 (1887) (quoting Article 10, *Reglements Consulaires*, Bruxelles, 1857).

national receives a fair trial (e.g., by working with the detainee’s lawyer, communicating with prosecutors, or observing the trial).⁷ Access to timely consular assistance is particularly significant in cases that may result in the death penalty or other severe punishments.⁸ Prompt consular involvement serves to ensure that foreign defendants properly understand and exercise their legal rights,⁹ bridges cultural barriers to augment the plea agreement process,¹⁰ and results in the development of crucial mitigating evidence available only in the defendant’s homeland.¹¹ In addition, a consulate “can provide critical resources for legal representation and case investigation” or may “file amicus briefs and even intervene directly in a proceeding if it deems that necessary.”¹² Thus, prompt consular notification and access to foreigners arrested in the United States “may very well make a difference to a foreign national, in a way that trial counsel is unable to provide.”¹³

The United States played a significant role in the development of the language of Article 36. In its draft form the article made notification of the consulate mandatory, with no reference to individual rights beyond a general entitlement to “communicate with and to have access to the competent consulate.”¹⁴ The U.S. delegation to the drafting conference objected to this formulation, observing that “[i]n its present form the draft...did not recognize the freedom of action of the detained persons.”¹⁵ The United States instead strongly supported the amendments

⁷ U.S. Dept. of State, CONSULAR NOTIFICATION AND ACCESS 22 (Jan. 2003), *available at* <http://travel.state.gov/pdf/CNA_book.pdf> (last accessed May 25, 2009). This Report and Recommendation, as well as the referenced Consular Notification and Access documents referred to herein, can be found at <http://www.abanet.org/litigation/nosearch/report2010.html>

⁸ *See* Torres v. State, 120 P.3d 1184, 1188 (Okla. Crim. App. 2005) (describing the protection of Mexican nationals facing capital proceedings as a top priority for Mexican consular officials).

⁹ *See* State v. Ramirez, 732 N.E.2d 1065, 1070-71 (Ohio App. 3d. 1999) (compliance with Article 36 obligations would have avoided *Miranda* violation by helping foreign national appellant understand nuances of American legal system).

¹⁰ *See* Ledezma v. State, 626 NW.2d 134, 152 (Iowa 2001) (consular officer would be able to address “general obstacles presented by cultural barriers” and help foreign national “obtain a greater understanding” of the charges and maximum sentence that would help him when considering plea offers and the presentation of his defense.”).

¹¹ *See* Valdez v. State, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (reversing death sentence for trial counsel’s failure to seek consular assistance and observing that the court “cannot ignore the significance and importance of the factual evidence discovered with the assistance of the Mexican Consulate”).

¹² Osagiede v. United States, 543 F.3d 399, 403 (7th Cir. 2008) (citing LEE, CONSULAR LAW AND PRACTICE, *supra* n. 2, at 125-88).

¹³ Ledezma v. State, 626 NW.2d 134, 152 (Iowa 2001).

¹⁴ Yearbook of the International Law Commission 1961, vol. II, p. 112.

¹⁵ United Nations Conference on Consular Relations, Official Records, vol. I, UN Doc. A/Conf.25/16, p. 38 (para. 21).

requiring consular information followed by notification, in order “to protect the rights of the national concerned.”¹⁶

At the instigation of the United States, the drafting conference also adopted a binding international dispute settlement mechanism for the VCCR, in the form of its Optional Protocol concerning the Compulsory Settlement of Disputes.¹⁷ Article 1 of the Optional Protocol provides that disputes “arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice.” Under its Statute, the decisions of the International Court of Justice (ICJ) in cases brought under the VCCR Optional Protocol have “binding force...between the parties” and are “final and without appeal.”¹⁸ The UN Charter further requires that each Member of the United Nations “undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.”¹⁹

The U.S. signed the Vienna Convention on April 24, 1963, but ratification did not occur for several years. Instead of submitting the treaty to the Senate, the Executive Branch initially chose to rely on bilateral agreements rather than the multilateral Convention.²⁰ By the late-1960s, however, the Nixon Administration had prioritized ratification, describing the Convention as “an important contribution to the development and codification of international law” that “should contribute to the orderly and effective conduct of consular relations between States.”²¹

President Nixon sent the VCCR and the Optional Protocol to the Senate for its advice and consent on May 8, 1969. The Executive’s report to the Senate noted that the Article 36 procedure “has the virtue of setting out a requirement that is not beyond the means of practical implementation in the United States, and, at the same time, is useful to the consular service of the United States in the protection of our citizens abroad.”²² The Senate was also made aware of the United States’ support for a binding dispute settlement mechanism and that the U.S. delegation

¹⁶ *Id.* p. 337 (para. 39) (quoting U.S. delegate, speaking in support of a proposed amendment that notification of the consulate would occur only at the request of the detainee).

¹⁷ Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

¹⁸ Statute of the International Court of Justice, June 26, 1945, arts. 59, 60, 1 U.N.T.S. 16.

¹⁹ Charter of the United Nations, June 26, 1945 art. 94(1), 1 U.N.T.S. 16. The Statute of the International Court of Justice is an annex to the United Nations Charter and forms an “integral part thereof.” U.N. Charter, art. 92. The Charter and the Statute have both been ratified by the United States. 59 Stat. 1031, 1055, T.S. No. 993.

²⁰ William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT’L L. 257, 267-68 (citing 115 Cong. Rec. 30, 953 (1969)).

²¹ *Id.* (quoting Ex. E, 91st Cong., 1st Sess., at VII (Statement of Secretary of State William Rogers) (1969)).

²² Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963, reprinted in S. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at 60.

had voted against a proposal that would have significantly weakened the “compulsory jurisdiction” clause in the VCCR Optional Protocol.²³

In hearings before the Senate Foreign Relations Committee, the State Department took the position that the VCCR is “entirely self-executive and does not require any implementing or complementing legislation”²⁴ so that “[t]o the extent that there are conflicts in Federal legislation or State laws, the Vienna Convention, after ratification, would govern” as the supreme law of the land.²⁵ The VCCR thus falls within the group of U.S. treaties that achieve full domestic legal effect immediately upon ratification and the terms of which are directly enforceable in the United States courts.²⁶ The Senate subsequently approved the VCCR and the Optional Protocol on October 22, 1969, unanimously and without reservations.²⁷ Both agreements entered into force for the United States on December 24, 1969.²⁸ On March 7, 2005, the U.S. sent the U.N. Secretary General a communication with notice of its withdrawal from the Optional Protocol.

2. History of U.S. Compliance with Article 36 Requirements

In the 40 years since its ratification, the United States has consistently relied on the VCCR and its binding enforcement mechanism to safeguard the consular rights of its citizens in other countries. So important is compliance with Article 36 obligations to the functioning of U.S. consulates abroad that “protesting unreasonable delays in consular notification is not discretionary but has long been an integral element of U.S. policy to provide protective consular services to detained Americans overseas.”²⁹ The State Department has informed Congress that “immediate consular access” to Americans detained abroad “is the linchpin. . . . guaranteeing the

²³ *See id.* at 73 (describing American rejection of a proposed Yugoslav amendment).

²⁴ Hearing Before the Senate Comm. on Foreign Rel., S. EXEC. REP. NO. 91-9, 91st Cong. at 5 (1st Sess. 1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State).

²⁵ *Id.* at 24. *See also* *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941) (under the Supremacy Clause, “no state can add to or take from the force and effect” of a ratified U.S. treaty establishing the rights of aliens); *Charlton v. Kelly*, 229 U.S. 447, 468 (1913) (the “construction of a treaty by the political department of the government, while not conclusive upon a court...is nevertheless of much weight.”).

²⁶ *See Foster v. Neilson*, 27 U.S. 253, 314 (1829); *Head Money Cases*, 112 U.S. 580, 598-99 (1884) (explaining that a self-executing treaty “is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.”).

²⁷ 115 CONG. REC. 30,997 (Oct. 22, 1969).

²⁸ Proclamation of Ratification, 21 U.S.T. 77, 185.

²⁹ U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, January 1, 2001, *available at* <http://www.state.gov/s/l/16139.htm> (last accessed May 25, 2009).

prisoner against mistreatment and forced statements at the time of arrest, along with making available to him information about responsible legal counsel and judicial procedures.”³⁰

The United States was also the first nation to invoke the VCCR Optional Protocol, following the seizure of the U.S. Embassy in Tehran in 1979.³¹ In its submissions to the International Court of Justice, the United States emphasized that 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.”³² The ICJ entered a final judgment in favor of the United States on May 24, 1980. The State Department responded by insisting that Iran must comply with the Court’s binding judgment.³³

At home, however, the record of U.S. compliance with Article 36 obligations has been inconsistent, and at times deficient—even in cases that resulted in death sentences. For example, German nationals Karl and Walter LaGrand were arrested in Arizona in 1982, but the German consulate was only notified of their cases ten years later “by the LaGrands themselves, who had learnt of their [Article 36] rights from other sources, and not from the Arizona authorities.”³⁴

The State Department has endeavored to facilitate domestic compliance with the VCCR, and compliance has improved over time. The State Department’s efforts began in 1970 with a letter to all U.S. governors advising them that “the initial responsibility for giving effect to the United States Government’s rights and obligations under the Vienna Convention will often rest” with state and local officials.³⁵ While drawing particular attention to Article 36 and other VCCR provisions “regarding consular notification and access,” the letter added that the State Department “do[es] not believe that the Vienna Convention will require significant departures from existing practice within the several states of the United States.”³⁶ By 1986 the Department was sending periodic notices on Article 36 obligations to major law enforcement agencies nationwide, advising them that the “arresting official should in all cases immediately inform the foreign national of his right to have his government notified concerning the arrest/detention” and that if “the foreign national asks that such notification be made, you should do so without delay by informing the nearest consulate or embassy.”³⁷ In 1998 the State Department began circulating a comprehensive manual on consular notification and access requirements to domestic law enforcement agencies. The manual advised these agencies to notify detained

³⁰ U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International, Political and Military Affairs, Part II, 94th Cong. 6 (1975) (Statement of Leonard F. Walentynowicz).

³¹ See *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (May 24), reprinted in 19 I.L.M. 553 (1980).

³² Memorial of the United States, *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Pleadings 1980, p. 174.

³³ See *U.S. Urges the Iranians to Obey Court Decision*, N.Y. TIMES, May 25, 1980, pg. 9.

³⁴ *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 104 (Judgment of Jun. 27), para. 22.

³⁵ Letter of April 13, 1970, from John R. Stevenson, State Department Legal Adviser, to The Hon. Keith H. Miller, Governor of Alaska, page 1.

³⁶ *Id.* page 2.

³⁷ U.S. Dept. of State, *If You Have Detained a Foreign National, Read This Notice* (October 1986), page 1. Essentially identical notices were issued on September 1, 1991 and April 20, 1993

foreign nationals of their consular notification right.³⁸ Furthermore, it described Article 36 obligations as “binding on states and local governments as well as the federal government, primarily by virtue of the Supremacy Clause.”³⁹

More recently, the State Department has been engaged in an outreach and training effort directed at federal, state, and local law enforcement officials, counsel, and judges. The Department recently completed a new and significantly expanded edition of the Consular Notification and Access manual which includes guidance on many additional consular notification and access scenarios, draft guidelines and standard operating procedures. The manual will be published early next year. In addition, the State Department has been working with the Department of Justice on a proposal to amend the Federal Rules of Criminal Procedure to make it a requirement that a foreign national defendant be given consular information at first appearance before a magistrate. The Departments of State and Justice hope that states will adopt similar rules, using the revised federal rule as a template.

Even before formal ratification of the VCCR, federal regulations were amended to “establish a uniform procedure for consular notification where nationals of foreign countries are arrested by officers of this Department [of Justice] on charges of criminal violations.”⁴⁰ Regulations governing immigration detentions were amended in 1967 to require that “[e]very detained alien” receive notification of his or her right to consular notification.⁴¹ The instructions for a federal agency that most closely conform to Article 36 requirements are found in the Internal Revenue Service manual, which obliges its special agents to “promptly inform” foreign detainees of their right to inform their government and gain consular access and to ensure that “notification is immediately given” to the nearest consulate upon the detainee’s request.⁴²

Three U.S. states have enacted laws addressing consular notification requirements. The California statute is the most explicit: it requires that “every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country” and that “the peace officer shall notify the pertinent official in his or her agency or department of the arrest or detention and that the foreign national wants his or her consulate notified.”⁴³ In Oregon, police officers who detain a foreigner on grounds of mental illness are required to “inform the person of the person’s right to communicate with an

³⁸ U.S. Dept. of State, CONSULAR NOTIFICATION AND ACCESS 2 (Jan. 2003), *Summary of Requirements Pertaining to Foreign Nationals*.

³⁹ *Id.* at 44, *Basis for Implementation*.

⁴⁰ Notification of Consular Officers upon the arrest of foreign nationals. 28 C.F.R. 50.5(a) (2008) (32 Fed. Reg. 1040 (1967)).

⁴¹ Apprehension, custody, and detention. 8 C.F.R. § 236.1(e) (2009) (originally enacted as 8 C.F.R. § 242.2(e) (1967) (32 Fed. Reg. 5619 (1967))). See also *United States v. Rangel-Gonzales*, 617 F.2d 529, 532 (9th Cir. 1980) (finding that “[t]he right established by the regulation and in this case by treaty is a personal one.”).

⁴² U.S. Internal Revenue Service, Internal Revenue Manual §9.4.12.9 (07-30-2004), *Arrest or Detention of Foreign Nationals*, paras. 4-5.

⁴³ CAL. PENAL CODE section 834(c)(a)(1) (enacted 1999).

official from the consulate of the person's country."⁴⁴ No similar provision exists for criminal arrests, except for a general duty of police officers to "[u]nderstand the requirements of the Vienna Convention on Consular Relations and identify situations in which the officers are required to inform a person of the person's rights under the convention."⁴⁵ A Florida statute enacted in 1965 required that "the official who makes the arrest or detention shall immediately notify the nearest consul or other officer of the nation concerned,"⁴⁶ but this language was amended in 2001 to state only that failure to provide consular notification "shall not be a defense in any criminal proceeding against any foreign national and shall not be cause for the foreign national's discharge from custody."⁴⁷

Somewhat better developed is the growing body of state policy guidelines, court directives and police patrol manuals establishing procedures to inform foreign defendants of their consular rights. For example, the Wisconsin Department of Justice has issued an instruction that "law enforcement is obligated by the VCCR to follow consular notification procedures" of information and notification without delay if "the arrested subject is a foreign national" and requests notification or is from a mandatory notification country.⁴⁸ The Texas Attorney General's Office has circulated a magistrate's guide to consular notification, advising that when "foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified" and advising that courts of record offer at arraignment "without delay, to notify the foreign national's consular officials of the arrest/detention."⁴⁹ A memorandum from the Michigan Supreme Court has advised state "judicial officials who preside over arraignments or other initial appearances of aliens in court to inquire at that time whether the alien has been provided with consular notification as required by the VCCR...."⁵⁰ Some state and local police forces have already incorporated Article 36 requirements into their standard operating procedures.⁵¹ Meanwhile, the recent decision by the Commission on Accreditation for Law Enforcement Agencies (CALEA) mandating a written procedure "assuring compliance with all consular notification and access requirements"⁵² is likely to expand the number of police departments that meet their Article 36 obligations.

⁴⁴ OR. REV. STAT. ch. 426.228 (9)(a) (2007).

⁴⁵ OR. REV. STAT. ch. 181.642 (2) (2007).

⁴⁶ FLA. STAT. ch. 901.26 (3) (1965), Recognition of International Treaties Act.

⁴⁷ FLA. STAT. ch. 901.26 (2008), Arrest and detention of foreign nationals.

⁴⁸ Wisconsin Dept. of Justice, Guide for Law Enforcement Contacts with Foreign Nationals (Jan. 2008), at 4. *See also* State of Alaska Department of Corrections, Policies and Procedures, Index 811.15 (effective December 1, 1990), at 2 (when a foreign national is "remanded or committed to an institution" the prisoner "must be informed of the right to have his or her government informed of the arrest or detention.")

⁴⁹ Office of the Attorney General of Texas, Magistrate's Guide to Consular Notification Under the Vienna Convention (2000), pp. 7-9.

⁵⁰ Michigan Supreme Court, SCAO Administrative Memorandum 2002-09 (July 26, 2002), at 2.

⁵¹ See, e.g., Georgia Department of Community Affairs Planning and Management Division, *A Model Law Enforcement Operations Manual* (6th ed. Feb. 1996), S.O.P. 8.1, Arrests of Foreign Nationals; NYPD Patrol Manual, Procedure No. 208-56 (02-28-01), *both available at* <<http://users.xplornet.com/~mwarren/compliance.htm>> (last accessed May 25, 2009).

⁵² CALEA, Standards for Law Enforcement Agencies (5th ed. 2006), Standard 1.1.4.

While there are indications that domestic compliance with Article 36 obligations may be improving, still largely unresolved is the scope of the legal remedies necessary for past and future Article 36 violations. A large body of American legal literature has emerged in the past 15 years that examines this complex issue. Most of the articles fall into one of four broad categories: 1) the importance of accessing consular assistance in serious criminal cases;⁵³ 2) raising Article 36 claims in litigation;⁵⁴ 3) the relationship between international and domestic law,⁵⁵ and 4) specific recommendations for remedial action, such as the development of Article 36 advisements akin to *Miranda* warnings and the legislative implementation of U.S. obligations arising under the VCCR Optional Protocol.⁵⁶ There is virtual unanimity among legal commentators that the ongoing failure of the United States to provide consistent compliance with Article 36 and meaningful remedies for its violation has profoundly negative consequences, both at home and abroad.⁵⁷

3. Domestic and International Litigation of Article 36 Claims

Despite their consistent recognition of the individual and reciprocal rights conferred under the VCCR, federal authorities have long resisted the creation of judicial remedies for the violations of those rights. In response to other governments' concerns in the early 1990s regarding foreign nationals on death row who had not received consular notification, the Department declared that it "does not believe that the VCCR...require[s] that violations of consular notification obligations be remedied through the criminal justice process."⁵⁸ In recent

⁵³ See, e.g., S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to Consul*, 26 ST. MARY'S L.J. 719 (1995).

⁵⁴ See, e.g., Logene Foster & Stephen Dogett, *Vienna Convention: New Tool for Representing Foreign Nationals in the Criminal Justice System*, THE CHAMPION, Mar. 1997.

⁵⁵ See, e.g., Hernan de J. Ruiz-Bravo, *Suspicious Capital Punishment: International Human Rights and the Death Penalty*, 3 SAN DIEGO JUSTICE J. 379, 386 (1995).

⁵⁶ See, e.g., Gregory Dean Gisvold, Note, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 MINN. L. REV. 771 (1994) (recommending a uniform Article 36 advisement procedure akin to *Miranda* warnings); Joshua A. Brook, Note, *Federalism and Foreign Affairs: How to Remedy Violations of the Vienna Convention and Obey the U.S. Constitution, Too*, 37 U. MICH. J. L. REF. 573 (2004) (suggesting judicial, executive, and legislative remedies); John Quigley, *The Law of State Responsibility and the Right to Consular Access*, 11 WILLAMETTE J. INT'L L. & DISP. RESOL. 39 (2004) (advocating executive enforcement of state violations through lawsuits brought by the Justice Department); Linda E. Carter, *Lessons from Avena: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations*, 15 DUKE J. COMP. & INT'L L. 259 (2005) (suggesting compliance with the ICJ decision in *Avena* through legislative implementation).

⁵⁷ See, e.g., *Medellín v. Texas: A Symposium*, 31 SUFFOLK TRANSNAT'L L. REV. 209 (2008); *Symposium: Treaties and Domestic Law After Medellín v. Texas*, 13 LEWIS & CLARK L. REV. 1 (2009).

⁵⁸ U.S. Dept. of State, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2000, 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, Attachment A, page A-1.

domestic litigation, the United States has continued to take the position that Article 36 “does not provide foreign nationals with a judicially enforceable right that can be asserted to challenge a domestic criminal judgment.”⁵⁹

Along with the threshold question of judicially enforceable rights, two other issues have dominated domestic and international litigation of Article 36 claims: the application of procedural default rules to deny review on the merits, and the scope of the remedies available for meritorious claims. The first such case to reach the U.S. Supreme Court was that of Paraguayan national Angel Breard, who was sentenced to death in Virginia without any advisement of his consular rights and without the benefit of consular assistance. After the U.S. Fourth Circuit Court of Appeals determined that his Article 36 claim was procedurally defaulted and an execution date was set, Paraguay filed a claim against the United States before the International Court of Justice. The ICJ promptly noted jurisdiction under the VCCR Optional Protocol and issued a provisional measures order requiring that the United States “take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings....”⁶⁰

It was in this procedural context that the Supreme Court issued its response to Breard’s petition for a writ of certiorari. The Court rejected the argument that Article 36 requirements trump federal rules of procedural default, observing that “while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.”⁶¹ While Article 36 “arguably confers on an individual the right to consular assistance following arrest,” the stringent procedural default standard of the recently-amended federal habeas statute made the Article 36 claim “subject to this subsequently enacted rule” and “prevents Breard from establishing that the violation of his Vienna Convention rights prejudiced him.”⁶² Even if the Article 36 claim had been “properly raised and proved, 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.”⁶³ The Court’s 5-4 per curiam denial of certiorari in *Breard* set the stage for the international litigation of Article 36 claims that followed.

The ICJ’s Avena Judgment

⁵⁹ Brief for the United States as Amicus Curiae at 17, *Ex parte Medellín*, 223 S.W.3d 315 (Tex. Crim. App. 2006) (No. AP-75,207).

⁶⁰ *Breard v. Greene*, 523 U.S. 371, 373 (1998) (per curiam).

⁶¹ *Breard*, 523 U.S. at 375. This determination is in conflict with the conventional international legal rule of *pacta sunt servanda*: that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith” and the corollary rule that a party “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Vienna Convention on the Law of Treaties, arts. 26, 27, 1155 U.N.T.S. 331, *entered into force* January 27, 1980.

⁶² *Breard*, at 376.

⁶³ *Id.* at 377.

On January 9, 2003, Mexico filed suit in the International Court of Justice (ICJ) on behalf of over 50 Mexican nationals on death row in the United States.⁶⁴ In each case, Mexico argued, its nationals had been deprived of their rights to seek consular assistance under Article 36 of the VCCR. Among other issues, the Government of Mexico asked the Court to adjudge and declare that the United States had violated its international legal obligations by failing to comply with Article 36 of the VCCR, and that the convictions and sentences of its nationals should be vacated.

The ICJ issued its final judgment in the *Avena* case on March 31, 2004. By a vote of 14 to one, the Court found that, for 51 Mexican nationals, the United States had failed to inform the detainees of their right to consular notification without delay, in violation of Article 36 (1) (b) of the VCCR. In 49 cases, the Court also found that the United States had violated its corresponding obligation to notify the Mexican consulate of the detention without delay, as well as Mexico's right to communicate and have access to its nationals. In 34 of the cases, the United States was also found to have deprived Mexico of its right to arrange for legal representation of those nationals in a timely manner, in breach of Article 36, paragraph 1 (c). The ICJ also reaffirmed its previous jurisprudence finding that Article 36 of the Vienna Convention gives rise to individual rights.⁶⁵

The *Avena* Court found that, in all 51 cases, the United States was obligated to provide judicial review and reconsideration of the convictions and sentences in light of the violations of Article 36. The Court held that review must be effective, and must give "full weight" to the violation of the rights set forth in Article 36, "whatever may be the actual outcome of such review and reconsideration."⁶⁶ The ICJ also unanimously held that the same remedy must be applied to all future cases in which Mexican nationals in the United States are sentenced to "severe penalties" without their Article 36 rights having been respected.⁶⁷ Furthermore, the remedy of "review and reconsideration" applies in all of the named or future cases regardless of domestic rules of procedural default.⁶⁸ The Court declined to adopt Mexico's position that the convictions and sentences of all 51 nationals must automatically be vacated, while indicating that such remedies could result where the treaty violation was found by the United States courts to be prejudicial.

Responding in dicta to the U.S. argument that it can be extremely difficult to identify foreign nationals, the Court observed that "were each individual to be told upon arrest that, should he be a foreign national, he is entitled to ask for his consular post to be contacted," Article 36 compliance "would be greatly enhanced," adding that this advisement "could parallel the reading of those rights of which any person taken into custody in connection with a criminal offence must be informed"⁶⁹ under *Miranda*.

⁶⁴ See Application Instituting Proceedings (Mex. v. U.S.), No. 128 (*Avena* and Other Mexican Nationals) (I.C.J. Jan. 9, 2003), available at <<http://www.icj-cij.org/docket/files/139/14582.pdf>>.

⁶⁵ See *LaGrand Case* (F.R.G. v. U.S.) 2001 ICJ 104.

⁶⁶ *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), ¶ 139.

⁶⁷ *Avena*, ¶ 153(11).

⁶⁸ *Id.* ¶ 141.

⁶⁹ *Id.* ¶ 64.

U.S. Supreme Court's Responses to Avena

In *Sanchez-Llamas v. Oregon*, the Supreme Court granted review in two consolidated cases involving violations of the VCCR. The two foreign national petitioners had unsuccessfully raised Article 36 claims in state court proceedings but were not part of the *Avena* litigation. The Court granted certiorari to resolve the following 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?”⁷⁰

A bare majority of the Court bypassed the first and 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.⁷¹ Addressing the second question, 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*. Responding to the third question (which had been briefed largely on the basis of *Avena*), the Court held that “a State may apply its regular procedural default rules to Convention claims”⁷² despite the ICJ's decision in *Avena*. The Court held that while the judgments of the International Court of Justice (ICJ) are entitled to “respectful consideration,” “nothing in the ICJ's structure or purpose suggests that its interpretations were intended to be binding on U. S. courts.”⁷³

However, the majority noted that an Article 36 violation *can* be relevant to determining the admissibility of a defendant's statements, and implied that courts were free to craft additional pre-trial remedies for VCCR violations:

[S]uppression 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.⁷⁴

While *Sanchez-Llamas* resolved some important questions regarding the interpretation of Article 36, it left unanswered the enforceability of the *Avena* Judgment in those cases to which the ICJ decision expressly applies. In one of those cases, *Medellín v. Dretke*, the Supreme Court granted certiorari to resolve the following questions: (1) whether a federal court is legally bound to apply the *Avena* Judgment notwithstanding procedural default doctrines that would otherwise bar relief; and (2) whether a federal court should give effect to the *Avena* Judgment as a matter of judicial comity and in the interest of uniform treaty interpretation.

⁷⁰ *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S.Ct. 2669, 2674 (2006).

⁷¹ *Sanchez-Llamas*, 548 U.S. at 342-343. The four dissenting justices held that Article 36 does confer individual rights, but divided 3-1 on the availability of the requested remedies.

⁷² *Id.* at 354.

⁷³ *Id.*

⁷⁴ *Id.* at 350.

On February 28, 2005, in response to the petitioner's filings in the *Medellín* case, President Bush issued a memorandum to the Attorney General declaring that:

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.

Shortly before the Supreme Court was scheduled to hear oral arguments in the case, Mr. Medellín and other Mexican nationals on Texas's death row filed successive habeas petitions in the Texas courts. The petitions relied on the *Avena* Judgment and the Presidential determination in seeking review of the consular rights violations found by the ICJ. In a *per curiam* opinion issued on May 23, 2005, the Supreme Court dismissed the writ of certiorari as improvidently granted "[i]n 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."⁷⁵ The Texas Court of Criminal Appeals (CCA) later dismissed Medellín's subsequent habeas application, finding that it was procedurally barred under the Texas statute governing successive petitions.

The Supreme Court granted certiorari and issued its decision on March 25, 2008. The majority found it undisputed that *Avena* "constitutes an *international* law obligation on the part of the United States,"⁷⁶ but held that none of the treaties addressing the enforcement of ICJ decisions are "self-executing," meaning that their requirements cannot be directly enforced by the U.S. courts. Consequently, the Court concluded that "neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that preempts state limitations on the filing of successive habeas petitions," and thus neither *Avena* nor the Presidential memorandum required state courts to provide review and reconsideration of the claims of the 51 Mexican nationals named in the ICJ decision.⁷⁷ The Court also held that President Bush lacked the constitutional authority to order the state courts to provide "review and reconsideration" of the Vienna Convention violations in the affected cases.

Three aspects of the *Medellín* decision bear emphasis. First, every member of the Court recognized that the United States has an international legal obligation to comply with *Avena*. Second, every justice acknowledged that the national interest in securing full domestic compliance with *Avena* is "plainly compelling," since that would result in "ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law."⁷⁸ Third, the Court determined

⁷⁵ *Medellín v. Dretke*, 544 U.S. 660, 666 (2005) (*per curiam*).

⁷⁶ *Medellín v. Texas*, 128 Sup. Ct. 1346, 1356 (2008).

⁷⁷ *Medellín*, 128 S. Ct. at 1353.

⁷⁸ *Id.* at 1367.

that the responsibility for vindicating these plainly compelling national interests rests not with the courts but with the U.S. Congress.⁷⁹

4. Prior action on this issue by the ABA and peer organizations

For more than a decade, divisions of the ABA have been in the forefront of efforts to enhance the fairness of criminal justice proceedings by securing full compliance with the United States' Article 36 obligations. At its 1998 annual meeting, the Law Student Division adopted a resolution calling on the ABA to urge "federal, state, territorial and local law enforcement authorities to adopt a warning of rights similar to the "Miranda" standard, advising foreign nationals of their right to consular assistance" and that "this warning be given at the moment of detention and identification of the foreign national by law enforcement authorities". The resolution further called on law enforcement agencies to "adopt the procedures and statements proposed by the Department of State in its handbook titled *Consular Notification and Access*" and that the ABA should encourage "the Attorney General of the United States, as well as the public defenders and attorneys general of all the States and territories, to work together to disseminate the knowledge and the enforcement of these rights."⁸⁰ The resolution was adopted by the ABA House of Delegates in August of 1998.⁸¹

The ABA House of Delegates also reaffirmed its support for resolving international disputes in the International Court of Justice when it adopted a policy in 1994 recommending that the United States Government present a declaration recognizing that the International Court of Justice has "compulsory" jurisdiction in all legal disputes concerning "the interpretation of a treaty," "any question of international law," or "the nature or extent of the reparation to be made for the breach of an international obligation."⁸²

Recognizing the crucial significance of consular assistance to the effective representation of capital defendants, the 2003 *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* added a new standard to address the issue. Guideline 10.6 requires that 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." Unless predecessor counsel has already done so, counsel representing a foreign national should "immediately advise the client of his or her right to communicate with the relevant consular office" and 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." The Commentary to the Guideline notes that enlisting the consulate's support should be viewed by counsel "as an important element in defending a foreign

⁷⁹ See, e.g., *id.* at 1368 ("[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress"); *id.* at 1391 (Breyer, J., dissenting) (majority's holdings "encumber Congress with a task (postratification legislation)").

⁸⁰ The full text is available at <www.abanet.org/intlaw/policy/misc/consularassistance.pdf> (last accessed May 26, 2009).

⁸¹ "Urge U.S. law enforcement authorities to comply with the Vienna Convention by advising foreign nationals of Right to Consular Assistance." (98A125) 8/98. Listed on the ABA Section of International Law website at <<http://www.abanet.org/intlaw/leadership/policy/misc.html>>.

⁸² See Brief of the American Bar Association as Amicus Curiae in Support of Petitioner at 2, *Medellín v. Dretke*, 544 U.S. 660 (2005) (Jan. 24, 2005), 2005 WL 176451.

national at any stage of a death penalty case” 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.”⁸³

The ABA has raised concerns over Article 36 violations in individual cases of foreign nationals facing execution. In December of 1998, the ABA President sent a letter to then-Governor George W. Bush of Texas, urging him to grant a reprieve in the case of a Canadian national facing imminent execution despite an undisputed and unremedied violation of his Article 36 rights. The letter emphasized that the ABA’s interest in seeking a stay of execution to permit a more thorough clemency review stemmed from “its long-standing support for adherence to the requirements of Article 36(1) (b) of the Vienna Convention on Consular Relations.”⁸⁴

The ABA has also been a staunch advocate of individual rights under Article 36 and judicial remedies for its violation. It has submitted a series of *amicus curiae* briefs to the U.S. Supreme Court, arguing among other issues that state rules of procedural default should yield to Article 36 obligations,⁸⁵ that the United States is bound under the VCCR Optional Protocol to comply with the ICJ decisions on consular rights and remedies,⁸⁶ and that the *Avena* Judgment should be given effect by the domestic courts.⁸⁷

Other domestic legal associations have played prominent roles as supporting *amici* before the Supreme Court on these issues, including the National Association of Criminal Defense Lawyers, the Hispanic National Bar Association, the Mexican American Bar Association, the Mexican American Legal Defense and Educational Fund, and the Constitution Project. International bar associations have also advocated before the Supreme Court for Article 36 rights and remedies, including the Bar Human Rights Committee of England and Wales and the Australian Law Council.⁸⁸

The Union Internationale des Avocats (International Association of Lawyers) has a particularly long history of activity on this issue, beginning with its 1997 *amicus curiae* brief in *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998), arguing that failure of the federal courts to remedy Article 36 violations would impair worldwide efforts to secure basic human rights and implement the rule of law. Prior to the execution of Jose Medellín, the UIA sent a letter to the Governor of Texas urging him to take immediate steps to commute the death

⁸³ ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (February 2003), Guideline 10.6, Additional Obligations of Counsel Representing a Foreign National, pp. 73-75.

⁸⁴ Letter from Philip S. Anderson President, American Bar Association to The Hon. George W. Bush, Governor of Texas, Dec. 9, 1998, at 1.

⁸⁵ Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) (Dec. 22, 2005), 2005 WL 3597819.

⁸⁶ Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, Medellín v. Dretke, 544 U.S. 660 (2005) (Jan. 24, 2005), 2005 WL 176451.

⁸⁷ Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, Medellin v. Texas, 128 S.Ct. 1346 (U.S. 2008) (Jun. 28, 2007), 2007 WL 1886208.

⁸⁸ A full collection of the Supreme Court amicus briefs filed by these and other organizations in support of Article 36 rights and remedies is posted on the website of Debevoise and Plimpton LLP, at <<http://www.debevoise.com/vccr/>> (last accessed May 26, 2009).

sentence.⁸⁹ Following the execution, the UIA issued a press release in which it “underscore[s] the fact that José Medellín has been executed in violation of international law. It invites the US authorities – both federal as well as Texan – to take the necessary legislative measures to respond appropriately to decisions taken by the ICJ.”⁹⁰

Finally, some 60 nations that are parties to the VCCR have stated as *amici* before the U.S. Supreme Court that Article 36 confers legally-enforceable rights and that judicial review is required whenever those rights are violated. In addition, federal laws in countries as diverse as Australia, the UK, Poland, Ecuador, Indonesia and Lithuania “require advising foreign detainees of their consular rights simultaneously with other legal rights.”⁹¹

5. Reasons for Recommendation

Ensuring that foreigners arrested in the United States are promptly notified of their right to consular notification does far more than protect the reciprocal rights of Americans abroad. As a senior federal judge has pointed out, by providing foreign defendants with the means necessary to mount a full defense against serious charges, timely consular assistance enhances the truth-seeking function that lies at the heart of American justice:

[C]onsular notification and access are absolutely essential to the fair administration of our criminal justice system. Just as a lawyer guides a criminal defendant through the unknown territory of the justice system, diplomatic officials are often the only familiar face for detained nationals, and the best stewards to help them through the ordeal of criminal prosecution. . . . Without these aids, I think that we presume too much to think that an alien can present his defense with even a minimum of effectiveness. The result is injury not only to the individual alien, but also to the equity and efficacy of our criminal justice system.⁹²

Despite these compelling reasons for ensuring domestic compliance with Article 36 obligations, recent actions have weakened American commitment to the VCCR. The Supreme Court, in *Medellín*, effectively rendered ICJ decisions relating to the VCCR powerless in the absence of implementing congressional legislation. The Bush administration, meanwhile, through a post-*Avena* 2005 letter from Secretary of State Condoleezza Rice to UN Secretary-General Kofi Annan, withdrew from the Optional Protocol, no longer consenting to compulsory ICJ jurisdiction for matters related to the Vienna Convention. Domestic compliance, meanwhile, despite the best efforts of the State Department and numerous other federal, state, and local

⁸⁹ Letter from UIA President Hector Diaz-Bastien to the Hon. Rick Perry (June 3, 2008). Available at <http://dlh.uiagnet.org/uploads/tx_hhuiadlh/UIA_Letter_-Medellin_080603.pdf> (last accessed May 26, 2009).

⁹⁰ UIA, Execution of Jose Medellin in Texas (Aug. 28, 2008), available at <http://dlh.uiagnet.org/uploads/tx_hhuiadlh/UIA_CP_Medellin_080827_GB_01.pdf> (last accessed May 26, 2009).

⁹¹ See Human Rights Research, *Individual Consular Rights: Foreign Law and Practice*, available at <<http://users.xplornet.com/~mwarren/foreignlaw.html>> (last accessed May 26, 2009).

⁹² U.S. v. Li, 206 F.3d 56, 78 (1st Cir. 2000) (Torruella, C.J., concurring in part and dissenting in part).

agencies, remains spotty and inconsistent. As Justice Breyer pointed out in his *Medellín* dissent, such non-compliance increases the risk of “worsening relations” with other nations, especially neighbors like Mexico; furthermore, it could have the effect of “of precipitating actions by other nations putting at risk American citizens who have the misfortune to be arrested while traveling abroad, or of diminishing our Nation's reputation abroad as a result of our failure to follow the ‘rule of law’ principles that we preach.”⁹³

In light of these recent developments, it is essential that the ABA unequivocally affirm its longstanding commitments to the international rule of law and to Article 36 compliance. To that effect, the recommendation encourages United States authorities to uphold Vienna Convention principles domestically through legal and political action and guidelines designed to facilitate and improve compliance.

Lorna G. Schofield
Chair, ABA Section of Litigation
February 2010

⁹³ *Medellín*, 128 S.Ct. at 1391 (Breyer, J., dissenting).

GENERAL INFORMATION FORM

Submitting Entity: Section of Litigation

Submitted by: Lorna G. Schofield, Chair

1. Summary of Recommendation.

The Vienna Convention on Consular Relations (VCCR) is a binding multilateral treaty that codifies the rights, privileges, immunities, and functions of consulates worldwide. Article 36 of the VCCR regulates the provision of timely consular information, notification, and assistance to detained foreign nationals. Since ratifying both the Convention and the Optional Protocol in 1969, the United States has relied on the VCCR and its binding enforcement mechanisms to safeguard the consular rights of its citizens in other countries. Despite efforts by the State Department and Justice Department to promote compliance, many states continue to fall short of Vienna Convention standards, and only three states have enacted legislation addressing consular notification requirements. The Recommendation affirms the ABA's commitment to the international rule of law and encourages federal, state and territorial authorities to uphold Vienna Convention principles domestically through political action and improved domestic compliance.

2. Approval by Submitting Entity.

On October 2, 2009, the Section of Litigation Council approved the Recommendation during a regularly-scheduled meeting, for which the time and agenda had been previously distributed.

3. Has this or a similar recommendation been submitted to the House or Board previously?

In 1994, the House of Delegates adopted a policy recommending that the United States Government present a declaration recognizing that the International Court of Justice has compulsory jurisdiction in all legal disputes concerning a treaty or a question of international law. In 1998, the House of Delegates adopted a resolution advising a set of measures designed to further domestic compliance with Article 36 obligations. Both of these resolutions are more than ten years old; the current proposed Recommendation is consistent with these prior resolutions, and also it builds on them to address more recent events in this area, including recent Supreme Court and Executive Branch actions.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

None.

5. What urgency exists which requires action at this meeting of the House?

As noted in the Report and Recommendation, recent Supreme Court and Executive Branch actions have weakened American commitment to VCCR obligations. In addition, only three states have enacted legislation addressing VCCR consular notification requirements. In light of

104

recent developments, it is important that the ABA unequivocally affirm its longstanding commitment to the international rule of law and Article 36 compliance.

6. Status of Legislation. (If applicable).

N/A

7. Cost to the Association. (Both direct and indirect costs.)

Adoption of the recommendation will not result in expenditures.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

This Recommendation is being co-sponsored by the following Association entities and Affiliated Organizations:

Section of Criminal Justice
Section of Individual Rights & Responsibilities
Section of International Law
Death Penalty Representation Project
Standing Committee on Legal Aid and Indigent Defendants
Young Lawyers Division
Section of State and Local Government Law
Government and Public Sector Lawyers Division

10. Contact Person. (Prior to the meeting.)

JoAnne A. Epps
Dean of Temple University Beasley School of Law
1719 N. Broad Street
Philadelphia, PA 19122-6094
Phone: (215) 204-8993
Email: joanne.epps@temple.edu

Robert Rothman
Arnall Golden Gregory LLP
171 17th Street, NW Suite 2100
Atlanta, GA. 30363-1031
Tel: (404) 873-8668
Email: robert.rothman@agg.com

Alison J. Markovitz
Tel: (415) 939-3049
Email: alisonmarkovitz@gmail.com

Genevieve A. Cox
Munger Tolles & Olson LLP
560 Mission, 27th Floor
San Francisco, CA 94105
Phone: (415) 512-4065
Email: genevieve.cox@mto.com

11. Contact Person. (Who will present the report to the House.)

JoAnne A. Epps
Dean of Temple University Beasley School of Law
1719 N. Broad Street
Philadelphia, PA 19122-6094
Phone: (215) 204-8993
Cell Phone: (609) 304-2881
Email: joanne.epps@temple.edu

EXECUTIVE SUMMARY

1) Summary of the Issue Which the Recommendation Addresses

The Vienna Convention on Consular Relations (VCCR) is a binding multilateral treaty that codifies the rights, privileges, immunities, and functions of consulates worldwide. Article 36(1)(b) of the VCCR regulates the provision of timely consular information, notification, and assistance to detained foreign nationals. When international delegates met to draft the Convention in the 1960s, the United States successfully lobbied for the inclusion of an Optional Protocol, a binding enforcement mechanism that would grant the International Court of Justice (ICJ) with jurisdiction over claims arising from the VCCR.

Since ratifying both the Convention and the Optional Protocol in 1969, the United States has consistently relied on the VCCR and its binding enforcement mechanisms to safeguard the consular rights of its citizens in other countries. At home, however, the record of U.S. compliance with Article 36 obligations has been inconsistent, and at times deficient—even in cases that resulted in death sentences. Despite efforts by the State Department and Justice Department to promote compliance, many states continue to fall short of Vienna Convention standards, and only three states have enacted legislation addressing consular notification requirements. The inconsistent enforcement of the VCCR threatens the individual rights not only of foreign nationals arrested in the United States but also of American citizens detained abroad who rely on reciprocal compliance.

For more than a decade, the ABA has stood at the forefront of efforts to enhance the fairness of criminal justice proceedings by securing full compliance with the United States' Article 36 obligations. In 1998, the House of Delegates adopted a resolution calling for domestic law enforcement officials to provide foreign nationals with timely notice of their right to consular assistance and advocating the more widespread dissemination of information relating to that right. Four years earlier, the House of Delegates reaffirmed the ABA's commitment to the rule of international law when it recommended that the United States recognize the jurisdiction of the International Court of Justice in any legal dispute concerning a treaty or a question of international law. The ABA has also been, through a series of amicus curiae briefs to the Supreme Court, a staunch advocate of individual rights under Article 36 and judicial remedies for their violation.

Despite these efforts by the ABA, recent actions have weakened American commitment to VCCR obligations. The U.S. Supreme Court, in *Sanchez-Llamas v. Oregon* (2006), contradicted the ICJ in concluding that Vienna Convention claims are subject to the application of state procedural default rules. Subsequently, in *Medellin v. Texas* (2008), the Court held that the nation's treaty obligations under the VCCR, the Optional Protocol, and the U.N. Charter, without implementing congressional legislation, do not make ICJ decisions enforceable in domestic courts. In addition, the Bush Administration recently withdrew from the Optional Protocol.

2) How the Proposed Policy Position Will Address The Issue

In light of these recent developments, it is essential that the ABA unequivocally affirm its longstanding commitments to the international rule of law and to Article 36 compliance. To that effect, the recommendation encourages United States authorities to uphold Vienna Convention principles domestically through political action and improved domestic compliance. The complexity of these issues and the wide array of actors involved demands that we address this crucial concern in a variety of ways, including recommending implementing legislation at the national and state levels, advocating improved compliance procedures for law enforcement agencies, and facilitating the provision of competent and well-informed counsel to arrested foreign nationals.

3) Summary of the Recommendation

The recommendation calls for legislative and executive bodies to take steps to ensure enforceable Article 36 rights in the United States. We urge federal and state legislative bodies to adopt laws implementing Article 36 requirements domestically and preventing procedural default rules from overriding VCCR rights. We further urge the Obama Administration to renew the nation's commitment to the Optional Protocol, thereby making clear the United States' faith in the ICJ to sustain the international rule of law.

The recommendation also builds off the ABA's 1998 recommendations, advising a set of measures designed to further domestic compliance with Article 36 obligations. We urge law enforcement authorities to implement Miranda-like warnings advising foreign nationals of their Article 36 rights as soon as they are detained and identified, and to adopt the State Department's recommended compliance procedures. We urge counsel for accused foreign nationals, in all criminal defense proceedings, to comply with ABA consular notification procedures previously limited to death penalty cases. We urge federal and state public defenders and Criminal Justice Act panels to disseminate knowledge of VCCR rights and appropriate procedures for exercising them to counsel who may represent foreign nationals. And we recommend that the ABA itself provide educational materials and resources to U.S.-based consular officials who may otherwise have difficulty identifying competent local counsel in response to VCCR requests.

4) Summary of Minority Views or Opposition

No opposition or minority views have been expressed.