

Equal Protection:
Consular Assistance and
Criminal Justice Procedures
in the USA

An Introductory Guide for Consulates
Third Edition

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Overview

The purpose of this introductory guide is to better acquaint consular officers with the criminal justice process in the United States of America and the importance of prompt consular notification and assistance for foreign nationals detained in the USA. The guide outlines the rights of consulates and foreign detainees under international and domestic law, as well as the application of those rights to cases in the United States. It also recommends procedures to be followed by consulates when communicating with detained nationals, defense attorneys and law enforcement agencies. Finally, the guide lists some of the additional resources available to assist consulates in this indispensable work.

The contents of this guide are based largely on first-hand experience working with consulates and attorneys in the United States, primarily on the cases of foreign nationals facing the death penalty. This experience indicates that the resources available to consulates for assisting their detained nationals vary greatly, as does the familiarity of individual consular officers with U.S. legal procedures. Despite the often-significant constraints on consular resources, the authors submit that all consulates have the potential capacity – and responsibility – to provide a basic level of assistance to their detained nationals facing the most serious criminal charges. Since not all consular officers have received legal training, this guide explains U.S. legal procedures and suggests consular responses in practical, clear, and non-technical terms.

Awareness of consular rights within the U.S. legal community, the media and the general public has grown significantly, following the highly publicized cases of foreign nationals who were executed in the United States without access to timely consular assistance. Consequently, requests for consular assistance in the United States will undoubtedly continue to increase. These growing demands suggest that all consulates would do well to review their assistance programs in order to ensure the most efficient and effective use of limited resources.

Consular assistance is not restricted to death penalty cases, nor are such cases the only ones generating controversy over the frequent non-compliance of U.S. authorities with their consular treaty obligations. For example, one of the enduring consequences of the tragic events of September 11th is the increased detention of foreign nationals on grounds of national security or for breaches of immigration laws. When the detaining authorities fail to facilitate prompt consular notification, consular officers are prevented from assisting their fellow citizens in circumstances where that support is most urgently required. More than ever, it is crucially important that consulates in the United States understand the domestic legal process and vigorously assert their sovereign rights whenever consular treaty violations occur. We are hopeful that this guide will encourage and support those essential efforts.

Obtaining the Expanded Supplement to This Manual

The subjects that this introductory guide addresses are both complex and far-reaching. For the benefit of consulates wishing additional information or seeking to enhance their own consular training and assistance programs, an Expanded Supplement to this manual is available upon request. The full guide is offered in the form of a CD containing detailed material and sample documents illustrating the major topics in this introductory manual.

To obtain a copy of the Expanded Supplement, please contact:

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The contents of the Expanded Supplement include the following:

- Articulating the foreign national’s right to consular access under international law (the VCCR, and relevant other treaties and instruments).
- International rulings on the right to consular access.
- The United States and the right to consular access (reports by the Congressional Research Service).
- Reported violations of the right to consular access in the United States.
- Litigating the right to consular access in the United States I: significant recent cases.
- The United States’ opinion on domestic remedies for violation of the right to consular access.
- Sample regulations on consular notification in the United States: federal, state, and local.
- Litigating the right to consular access in the United States II: typical application of the right within the trial process.
- Working with consulates (sample materials)
- Briefs by amici curiae.
- Clemency.
- Media campaigns (sample materials).
- The United States’ consular agreements, country-by-country (US Dept. of State material).
- Bibliography and further resources.”

ALL TOPICS ADDRESSED IN MORE DETAIL IN THE EXPANDED SUPPLEMENT ARE INDICATED BELOW WITH AN ASTERISK [*].

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1. CONSULAR RIGHTS UNDER INTERNATIONAL LAW

Consulates have the right to visit, communicate with and assist their nationals who are detained, arrested or imprisoned abroad. Detained nationals have the right to communicate with and seek assistance from their consulate. The overall purpose of consular intervention is to provide any necessary humanitarian, protective, or legal assistance to nationals in custody. Timely consular assistance ensures that foreigners facing prosecution and imprisonment receive fair and equal treatment by the courts and penal authorities.

Article 36 of the Vienna Convention on Consular Relations (VCCR) confers specific rights on all foreign detainees and prisoners:

- To be **informed without delay** by the arresting authority of the right to consular communication and notification.
- To **choose** whether or not to have the consulate notified of the detention.
- To have the consulate **notified without delay** by the arresting authority.
- To **communicate freely** with the consulate.
- To **accept or decline** any offered consular assistance.

Article 36 confers rights on consulates:

- To **communicate with** and have **access** to detained nationals.
- To be **notified without delay** of the detention, at the request of the national.
- To **visit and correspond** with the detainee at all stages of the case.
- To **arrange** for the detainee's **legal representation**.
- To provide other forms of **humanitarian, protective, or legal assistance** with the permission of the detainee.

Limitations on Consular Assistance

- The VCCR **does not prevent** foreign nationals from receiving a death sentence or any other lawful punishment. A foreigner is subject to the same laws and penalties as any other person in the United States.
- Consular assistance is **not a substitute** for legal representation; consular officers may not act as attorneys for their detained nationals in the USA.

***ALL TOPICS ADDRESSED IN MORE DETAIL IN THE EXPANDED SUPPLEMENT ARE INDICATED BELOW WITH AN ASTERISK [*].**

CONSULAR RIGHTS UNDER INTERNATIONAL LAW

1.1. *Rights of Consular Notification, Access and Assistance Under International Law*

“The channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations.”¹

A primary function of the consulates of all nations is to render assistance to any of their nationals who are in distress within their consular jurisdiction. Consular access and assistance become particularly indispensable when foreign nationals face prosecution, sentencing, and incarceration under the local legal system. Few nationals require consular assistance more urgently than those who are arrested and face prosecution in a foreign country. Arrested foreigners are truly “strangers in a strange land”, confronted by an unfamiliar legal system, far from home, and frequently at the mercy of the local authorities.

International law has long recognized that consular officers have the right to visit, communicate with, and assist their nationals who are detained, arrested or imprisoned abroad. Indeed, the concept that all States are entitled to protect the interests of their nationals abroad is a basic principle of international consular law and practice. The right to consular notification, access, and assistance has an impressive pedigree under international law, including treaty provisions, United Nations human rights instruments, regional declarations, and international court rulings.*

Under international law, the violation of any sovereign treaty right produces an obligation on the offending State to remedy the breach. Several nations (including the USA) have exercised their sovereign right to seek remedies for consular rights violations through international courts and tribunals, when diplomatic or domestic remedies have proven ineffectual.* The affirmation of these essential rights by the international courts supports vigorous consular interventions on behalf of all nationals facing serious criminal charges in the United States.

1.2. *The Vienna Convention on Consular Relations (VCCR)*

The Vienna Convention on Consular Relations (VCCR)* is a multilateral treaty that regulates the rights, privileges, immunities and duties of consulates and consular staff worldwide. Ratified by some 171 countries (including the United States), the VCCR is the cornerstone of international consular relations.

Article 36 of the VCCR recognizes and enshrines the time-honored right of consulates to communicate with and assist their detained nationals. The article also confers specific rights on

¹ Memorial of the United States to the International Court of Justice, in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, filed in response to the 1979 seizure of the American Embassy in Iran.

detained or imprisoned foreign nationals. These provisions are regarded as the universal norm for consular relations. The same rights also apply to those nations that have not yet ratified the VCCR, as part of customary international law.* As the United States has itself 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.”²

Article 36 of the VCCR requires the following:

- The local authorities must inform detained foreigners “without delay” of their right to communicate with their consulate and to have the consulate notified of their detention.
- At the request of the detainee, the authorities must then notify the consulate of the arrest without delay and permit consular access to the detained national. Any communication addressed to the consulate by the detainee must also be forwarded without delay.
- Consulates have the right to be notified of the detention without delay, to communicate, correspond, and visit with their detained nationals, to arrange for their legal representation and to provide other appropriate assistance with the detainee’s consent.
- While these rights are to be exercised in conformity with the laws of the detaining State, its laws and regulations must allow “full effect” to be given to the rights conferred under Article 36.

These rights of notification, access, and assistance apply at all stages of the legal procedure, 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.³

Article 36 is the legally binding expression of an international consensus; foreign citizens face unique disadvantages when confronted with prosecution and imprisonment under the legal system of another nation. Its provisions ensure that all arrested foreigners have access to the means necessary to prepare an adequate defense and to receive the same treatment before the law as domestic citizens. Consular communication and visits also ensure that imprisoned foreigners are not subject to discriminatory or abusive treatment while in custody.

The right to consular information, notification and access thus serves to protect the fundamental human rights of detained foreign nationals, including the right to equal treatment before the law, the right to a fair trial, and the right not to be subjected to cruel, inhuman, or degrading treatment or punishment.

1.3. The Purpose and Scope of Consular Assistance

While consular assistance for detained nationals can take many forms, each intervention serves

² *United States Diplomatic and Consular Staff in Tehran* (U.S.A. v. Iran), I.C.J. Pleadings, at 174.

³ The full text of Article 36 and other relevant provisions of the VCCR is enclosed as Appendix I.

three basic functions. The first is *humanitarian*: consulates provide detainees with access to the outside world (e.g., by facilitating communication with the detainee's family and friends) and ensure that they are provided with basic necessities while incarcerated. A consular presence also alleviates the distress of detainees by assuring that an authority representing their country of citizenship will safeguard their interests.

The second function is *protective*: consular visits help to ensure that foreign nationals are not mistreated in custody. Regular consular visits may in themselves deter misconduct by prison officials. Consular representatives may also intercede directly with the authorities when it is alleged that the detainee is suffering ill treatment, such as at the hands of guards or fellow-prisoners.

The final function is *legal assistance*: consular officers acquaint their nationals with the basic safeguards, procedures and penalties applicable under the local legal system, provide them with lists of local lawyers to defend them, arrange for their legal representation, make legal interventions on their behalf, or take any other appropriate steps to ensure that their nationals receive fair and equal treatment under the laws of the arresting State.

1.4. Limitations on Consular Assistance

It should be noted, however, that 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 judicial procedures of the receiving country, including all legal punishments that may be imposed for breaches of domestic law.

Consular representatives also do *not* act as substitutes for attorneys; while the consular function is often complementary to that of defense counsel, it does not replace the indispensable role of the detainee's legal representative.

Under the provisions of Article 36, consulates 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.

2. CONSULAR RIGHTS IN THE USA

The provisions of the VCCR are binding on all local, state and federal authorities in the USA. They apply with equal force to foreigners of any nationality, even if their country of citizenship has not ratified the treaty. However, police often fail to inform foreign detainees of their consular rights.

The Status of Consular Rights in the USA

- The VCCR has been the law of the land in the United States since 1969. Its provisions are legally binding nationwide, without any need for local or state regulations to implement its requirements.
- Consulates have legal standing in the U.S. courts to seek remedies for any violation of consular treaty rights.
- Violations of VCCR Article 36 by the arresting authorities are still widespread and commonplace across the United States.
- With some important exceptions, courts in the United States have been reluctant to fashion remedies for violations of detainees' rights under Article 36. The US Supreme Court's recent decision in *Medellín* has confirmed the conservative judicial approach.
- The U.S. Department of State recognizes that Article 36 confers specific rights and domestic obligations, which are explained in *Consular Notification and Access*, its manual for law enforcement.
- **Mandatory notification** of the consulate is required in all cases involving the death of a foreign national, or where the appointment of a guardian or trustee may be required.
- Mandatory notification of the consulate may also be required under the terms of **bilateral consular agreements** between the USA and certain other countries.
- The VCCR **confers specific rights** on foreign nationals who are detained, arrested, or imprisoned. However, the US Supreme Court presently only affords these rights limited domestic recognition.
- Cases involving **dual nationals** may require special consular procedures. The State Department's interpretation of consular rights and dual nationality may not be consistent with that of other countries.
- At a minimum, consulates should insist on the right **to visit and assist their dual nationals** in custody, to the extent considered appropriate under their own national laws and regulations on citizenship and consular assistance.

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CONSULAR RIGHTS IN THE USA

2.1. Consular Rights Under United States Law

The USA unconditionally ratified the VCCR in 1969, at the same time ratifying an optional protocol on dispute settlements that places breaches of the treaty under the compulsory jurisdiction of the International Court of Justice.*

As a ratified treaty, the VCCR is part of the “supreme law of the land” under the United States Constitution; all of its provisions are binding on all federal, state and local authorities. The VCCR is considered to be a “self-executing treaty” under United States law, meaning that no enabling legislation is required to give its provisions full legal force nationwide and that the domestic courts are empowered to enforce its terms. Because the United States ratified the VCCR without attaching any limiting reservations, the requirements of Article 36 (and all other articles of the treaty) must be fully observed, under both domestic and international law.

Despite this binding obligation, there is overwhelming evidence that many state and local police departments remain ignorant or heedless of their duties under Article 36. Thousands of foreign nationals who have been arrested and prosecuted in the United States may never have learned of their right to seek consular assistance because the arresting authorities failed to inform them, without delay, of these basic rights. In spite of recent efforts by the U.S. Department of State to improve local compliance with Article 36,* cases continue to be reported in which foreign nationals were not advised of their consular rights when that knowledge was of crucial significance: from the earliest stages of the case, prior to their trial and conviction.*

For example, more than 160 foreign nationals representing 35 nationalities have been sentenced to death in the United States over the past 25 years. As of May 2008, approximately 122 foreign nationals have death sentences. In many cases, these foreign citizens were arrested, prosecuted, and condemned to death without learning of their right to seek the crucial assistance of their consulate.* Evidence from many of the cases on record suggests that timely consular intervention could literally have meant the difference between life imprisonment and a death sentence, or could even have resulted in an acquittal.*

The violation of defendants’ consular rights has been the subject of extensive litigation through the U.S. courts in recent years.* With a few important exceptions, the domestic courts have generally failed to provide meaningful remedies in these cases, even when the treaty breach demonstrably contributed to an inadequate defense and an unfair trial outcome.*

Until recently, the U.S. Government had long taken the legal position that the VCCR confers no judicially enforceable rights on individual nationals and that no judicial remedies were available for its violation. The only remedy proposed by the United States was diplomatic: an apology to the affected government and a promise of better compliance in the future.* However, the International Court of Justice (ICJ) ruled in 2001 in the *LaGrand Case* (Germany v. USA) that apologies for Article 36 violations are not an adequate response under international law and that the United States must instead provide the remedy of “review and reconsideration” – a ruling

that ultimately led to important domestic developments.* For example, in response to the subsequent ICJ Judgment in *Avena and Other Mexican Nationals*, President George W. Bush determined in 2005 that state courts must provide judicial review and reconsideration of the treaty violations in the cases of 51 Mexican nationals who were denied their Article 36 rights and sentenced to death. Nonetheless, the US Supreme Court declined to recognize Article 36 rights as individually enforceable under US law in the recent *Medellín* case. Accordingly, the US position remains confused, with a discernible gap between the approaches espoused by the executive and judicial branches. A legislative solution may be desirable. * **See Sections 6.7 and 6.8 for additional information.**

2.2. Legal Rights of Consulates

The general reluctance of courts in the United States to fashion judicial remedies for violations of detainees' consular rights does not mean that domestic courts lack the authority to uphold and enforce consular treaty rights. On the contrary: the U.S. judiciary has a long tradition of enforcing consular treaty obligations.

The legal standing of consulates and consuls is enshrined directly in the United States Constitution. Under the provisions of Article III, the judicial power extends to all cases arising "under Treaties" or those "affecting Ambassadors, other Public Ministers and Consuls", over which cases the U.S. Supreme Court has "original jurisdiction".

Some examples of judicial action in this sphere include: upholding the right of consulates to exemption from local property taxes, the right of consuls to represent the interests of their nationals, the right to be notified of a detention and the right to seek enforcement of treaty obligations through the courts.*

Consulates are thus fully entitled to seek the enforcement of treaty-based rights through access to the U.S. courts. That entitlement extends to seeking remedies for any violation of rights conferred under Article 36 of the VCCR.*

In its comprehensive instruction manual to U.S. law enforcement agencies entitled *Consular Notification and Access*, the State Department recognizes that Article 36 confers specific rights and obligations within the USA:

Detained foreign nationals are entitled to communicate with their consular officers. Any communication by a foreign national to his/her consular representative must be forwarded by the appropriate local officials to the consular post without delay.

Foreign consular officers must be given access to their nationals and permitted to communicate with them. Such officers have the right to visit their nationals, to converse and correspond with them, and to arrange for their legal representation. They must refrain from acting on behalf of a foreign national, however, if the national opposes their involvement. In addition, consular officers may not act as attorneys for their nationals.

The rights of consular access and communication generally must be exercised subject to

local laws and regulations. For example, consular officers may be required to visit during established visiting hours. Federal, state, and local rules of this nature may not, however, be so restrictive as to defeat the purpose of consular access and communication. Such rules “must enable full effect to be given to the purposes” for which the right of consular assistance has been established.

The above requirements are set out in Article 36 of the VCCR. Additional requirements may apply to particular countries because of bilateral agreements.⁴

To obtain a copy of the State Department manual for law enforcement on consular notification and access, see Section 7.2, *Other Available Resources*.

All consulates and consular officers with responsibility for providing assistance to detained or imprisoned nationals should review and retain a reference copy of the State Department instruction manual for law enforcement. The manual includes: suggested procedures for notifying detainees of their consular rights; instructions on contacting consulates; questions and answers regarding consular rights and privileges; legal materials on the VCCR and customary international law; and contact information for all consular missions in the USA.

The State Department’s interpretation of consular rights and obligations may not always be consistent with the views of other nations, nor should the manual be treated as an authoritative statement of international consular law. Nonetheless, the manual does provide insights into the procedures expected of domestic police departments. It is therefore a valuable resource for all consulates operating within the United States.

In some instances, notification of the consulate is mandatory, regardless of the wishes of the detainee. For example, under VCCR article 37*, the consulate must be notified of the death of a foreign national, whenever an unaccompanied juvenile national is detained or arrested, or in any other situation in which the detainee is not competent to exercise judgment. Many of the bilateral consular agreements in force between the United States and some fifty individual nations* also require mandatory notification of the consulate, typically within 72 hours of any detention.

Regardless of the provisions of any bilateral treaty, the terms of VCCR Article 36 remain as the basic and universal requirement for all cases involving the detention of a foreign national. Even where notification of a consulate is mandatory under a bilateral consular agreement, the detaining police must nonetheless inform the national of the Article 36 right to consular communication without delay. While a bilateral treaty may confer additional rights on consulates or impose special obligations on the local authorities, it should never be interpreted as restricting the rights of individual detainees guaranteed under Article 36.

⁴ U.S. Department of State, January 1998, *Consular Notification and Access: Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them*.

2.3. Dual Nationals

The cases of arrested foreign nationals retaining citizenship in more than one country may require special consideration on the part of consulates. Where a detainee holds citizenship in two or more foreign countries (but is not also a U.S. citizen), the State Department expects the local authorities to promptly inform the foreigner of Article 36 rights and to contact the consulate(s) at the request of the detainee. In cases of multiple nationality, it may be necessary for the respective consulates to determine which will take the lead in providing consular assistance. A degree of cooperation and flexibility may be called for when establishing consular assistance procedures in such cases. For instance, one of the dual national's countries of citizenship may be entitled to mandatory notification of the arrest under a bilateral consular agreement but is not necessarily in the best position to assist the detainee. In most instances, the consulate of the nation with which the detainee has the closest ties (indicated by factors such as permanent residence) would take the lead role in providing assistance, subject to the consent of the detainee.

The State Department has taken the position that individuals who retain U.S. citizenship along with another nationality are not entitled to advisement of consular rights if arrested in the United States and that the consulate of other citizenship is not entitled to notification of the arrest. However, the Department also recognizes that consulates retain the right to assist, communicate with and visit their detained nationals who are also U.S. citizens, if the consulate so chooses. Where the consular policy is to provide services to this category of dual nationals, consulates should always insist on the right to offer that assistance and should protest any denial of access by local authorities. This practice would be consistent with the State Department's own policy regarding consular access to dual U.S. citizens detained abroad in their other country of citizenship.

3. CONSULAR ASSISTANCE UPON DETENTION OR ARREST

Despite extensive legal safeguards protecting the rights of the accused in the USA, timely consular involvement is crucially important. Prompt consular assistance upon detention or arrest ensures that foreign detainees fully understand and properly exercise their available legal rights.

Basic consular assistance upon detention or arrest:

- Promptly speaking with the national by telephone, if a visit is not feasible;
- Determining the detainee's identity, the general nature of the charge and where the person is detained;
- Determining the individual's situation and offering humanitarian assistance (e.g., by contacting family or friends);
- Ensuring that detainees comprehend their basic legal rights, by explaining them in language and terms that they will understand;
- Providing the detainees with information on local lawyers who could represent them;
- Agreeing to accept calls from the national if their situation requires further intervention;
- Maintaining ongoing contact with the detainee, if only by means of periodic letters.

Consular Information on Basic Legal Rights in the United States

- The assistance of an attorney is essential from the earliest stages of any criminal case.
- Every person detained on a criminal charge has the right to an attorney, even if they cannot afford one.
- The attorney represents only the interests of the defendant; information that the detainee provides to the attorney is confidential and cannot be given to or used by the prosecution.
- Every detained person has a genuine right to remain silent under questioning and has nothing to fear from exercising that right. The right is available at anytime.
- Every detained person has the right to speak with an attorney before answering any questions, and to have them present during questioning. Once an attorney has been clearly requested, the police must cease any questioning until the attorney arrives.
- The right to consult with an attorney also applies before signing any statements or forms or before making any other arrangements with the authorities regarding the case.

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CONSULAR ASSISTANCE UPON DETENTION OR ARREST

3.1. The Significance of Timely Consular Information and Assistance

While the U.S. criminal justice system provides many safeguards to protect the legal rights of people facing criminal charges, timely consular assistance at this initial stage is just as important here as in other countries. Foreign nationals may be entirely unfamiliar with the workings of the U.S. system of law, failing to understand their basic legal rights or to act accordingly. Fundamental concepts of United States law may seem dubious or incomprehensible to a national who comes from one of the many countries that rely on vastly different judicial and legal systems. Simply translating these unfamiliar concepts into the native language of the detainee provides no guarantee that these essential rights will be fully understood, or even believed. Few local lawyers, however perceptive, are likely to fully comprehend the conceptual, linguistic, and cultural barriers confronting foreigners who face prosecution under an unfamiliar legal system.

The function of the consulate is to seek fair and equal treatment, by working with the detainee, the defense attorney, and local authorities. Prompt consular involvement ensures that a foreign national in custody fully understands the nature of the charge against them, as well as their legal rights and options. The consulate is the “cultural bridge” between the defendant and the criminal justice system, providing basic information to the detainee and facilitating their participation in the legal process. Although consular officers do not act as a detainee’s lawyer and thus cannot offer specific legal advice, consulates can and should provide detained nationals with sufficient information about their legal rights to ensure that they exercise those rights appropriately.

To ensure that “full effect” is given to Article 36 rights, a consulate should communicate with a detainee immediately following notification to verify that the national was advised of and understands the basic legal rights discussed in this chapter. As the Foreign Affairs Manual instructs U.S. consuls abroad, consulates “must make every effort to gain prompt personal access” to an arrested national in order to have “the opportunity to explain the legal and judicial procedures of the host government and the detainee’s rights under that government at a time when such information is most useful.” If a prompt consular visit is not possible, “you should contact the detainee by telephone” and ask the authorities “to permit a private conversation.”

A submission by the Government of Canada to the U.S. Supreme Court emphasized the vital importance of a rapid consular explanation of rights:

[The typical detained foreign national,] who is not relatively sophisticated, or who lacks strong connections in the arresting community, is especially vulnerable to making dangerously uninformed choices in exercising even the rights of which the arresting authorities do inform him. He is therefore almost certain to be unable to avail himself of rights of which the arresting authorities fail to inform him. Finally, with no one to explain his predicament in the context of the more familiar system of his home country, a detained foreign national is at a considerable disadvantage in establishing a defense.

The legal rights of accused persons are not identical in each country. Very few nations outside of

the USA, the UK, and the Commonwealth use the adversarial system of justice, which is based on English common law. Most countries— and their nationals— rely on an inquisitorial system of justice, in which the rights of the accused during the pre-trial stage are protected not by an attorney but rather by an investigating magistrate. Even in those countries that share a common legal heritage with the USA, the scope and operation of the rights of the accused may be significantly different than in the United States.

Even in those cases where a foreign national may be familiar with U.S. criminal justice procedures, the consulate still provides an indispensable function. For example, previous arrest in the United States is of itself no guarantee that foreign suspects fully understand their legal rights, nor does it diminish the importance of rapid consular intervention. Crucial favorable evidence that could influence a prosecutor’s initial decision on whether to seek the death penalty may exist only in the defendant’s home country but may lie beyond the reach of defense counsel. The prompt gathering of important documents can require the consulate to correspond with other branches of the home government, or may rely on the notarizing function of the consulate for their legal verification.

3.2. Miranda Warnings and Consular Assistance

Police in the United States are required to inform all detained persons of their legal rights before interrogating them. This advisement is often referred to as a *Miranda* warning, based on the instructions developed by the U.S. Supreme Court in the case of *Miranda v. Arizona*. They include an advisement of the right to remain silent under questioning and the right to an attorney. The individual must be told of these rights and consent to interrogation before questioning can continue. Suspects may choose to have an attorney present during questioning and may decide to exercise their *Miranda* rights at any time during interrogation. The suspect’s decision must be “knowing, intelligent and voluntary”, requiring that the detainee has been fully informed of these rights, understands their basic meaning and has not been coerced into relinquishing them.

These essential rights of people facing arrest are based on the U.S. Supreme Court’s interpretation of three provisions of the United States Constitution:

- The Fifth Amendment states that: “No person. . .shall be compelled in any criminal case to be a witness against himself”;
- Under the Sixth Amendment, “In all criminal prosecutions, the accused shall. . .have the assistance of counsel for his defense”;
- The Fourteenth Amendment requires “due process of law” in all cases and provides that no person shall be denied “the equal protection of the laws.”

Police must notify a person in custody of their *Miranda* rights before any interrogation begins, regardless of whether the person has already been arrested or is simply detained for questioning as a suspect. Detention refers to any situation in which an individual is being held by the authorities and is not free to leave.

While there is no standardized statement of *Miranda* rights, a full notification would include:

WARNING OF RIGHTS

1. You have the right to remain silent and refuse to answer questions. Do you understand?
2. Anything you do say may be used against you in a court of law. Do you understand?
3. You have the right to consult an attorney before speaking to the police and to have an attorney present during questioning now or in the future. Do you understand?
4. If you cannot afford an attorney, one will be appointed for you before any questioning if you wish. Do you understand?
5. If you decide to answer questions now without an attorney present you will still have the right to stop answering at any time until you talk to an attorney. Do you understand?
6. Knowing and understanding your rights as I have explained them to you, are you willing to answer my questions without an attorney present?

In reality, these *Miranda* rights often do not operate in the way one might anticipate. For example, courts in the United States have authorized interrogating police to use deception to elicit information from suspects. Police in the United States are not required to explain to suspects the full consequences of relinquishing their legal rights. Unsuspecting foreigners (including those innocent of any crime) may thus waive their *Miranda* rights and make a statement to the authorities without the benefit of a lawyer, in the mistaken belief that they are acting in their own best interest. In fact, *any* statement made by suspects may be used against them or against others, even when detainees are attempting to exonerate themselves. Unqualified police officers will often act as interpreters for the questioning of a foreign national unable to communicate in English, further limiting the detainee's comprehension of her basic legal rights.

For these reasons, people under police interrogation in the United States must be extraordinarily careful when making statements to the authorities. However benign its contents may appear, no detained individual should ever sign a formal statement or a waiver of rights form without consulting an attorney. Foreign detainees may be especially vulnerable to demonstrating their willingness to cooperate, without realizing that their cooperation may have erroneous or even lethal consequences. Despite the important protections afforded by the *Miranda* advisement, false confessions are still frequent and have resulted in wrongful convictions or death sentences.

While every person facing criminal prosecution in the United States has the right to an attorney, that right may not attach immediately if the person cannot afford a lawyer or does not know how to retain one. Since there is no nationwide legal aid system, the appointment of attorneys for impoverished defendants varies widely. There can be lengthy delays in honoring an indigent suspect's request for an attorney. In many jurisdictions, an appointed lawyer would not ordinarily be available until the defendant appears in court, which may be several days (or longer) after the initial questioning and arrest. Even in states that strive to provide lawyers at the outset of a case, resources are limited and an attorney may not be immediately available. Furthermore, the quality of appointed attorneys varies widely; regrettably, incompetent or

overworked lawyers are a recurring problem in many of the cases of foreign nationals who are sentenced to death.

All consulates should develop a list of qualified local lawyers who practice criminal law and should provide that information to detained or arrested nationals. See Section 4.2.

3.3. Initial Contact with Detainees

The U.S. Department of State has issued comprehensive instructions to all major law enforcement agencies on the consular notification procedures to be followed whenever a foreign national is formally detained or arrested.* The arresting authorities are required to promptly contact the consulate by telephone or fax, providing basic information on the identity and nationality of the detainee, the place of detention, the case number, and the official to contact in order to arrange a consular visit. According to the State Department, **the consulate should be notified as soon as reasonably possible under the circumstances, typically within 24 hours after the detainee has made the request.**

Some jurisdictions in the United States have adopted laws or regulations requiring the police to inform foreign nationals of their consular rights within a few hours of the detention, and some police departments have adopted the helpful policy of providing an Article 36 advisement simultaneously with the *Miranda* warning.* In reality, neither the State Department guidelines nor local regulations assure that a consulate will receive formal notification in a prompt or consistent manner. A consulate's first information about a detention may thus come from a variety of sources, including the arresting police, detainees or their family members, defense attorneys, or the media.

Not all consulates are in a position to offer immediate services in-person for detained nationals, but all should be prepared to provide minimum consular assistance to their nationals facing serious criminal charges.

That basic consular assistance would consist of:

- Promptly speaking with the national by telephone, if a visit is not feasible;
- Determining the detainee's identity, the general nature of the charge and where the person is detained;
- Determining the detainee's situation and offering humanitarian assistance (e.g. by contacting family or friends);
- Ensuring that detainees comprehend their basic legal rights and options, by explaining those rights in language and terms that they will understand (see Section 4.4 below);
- Provide the detained person with information on local lawyers who could represent them;
- Agreeing to accept calls from the national if their situation requires further intervention;
- Maintaining ongoing contact with the detainee, if only by means of periodic letters.

Consular officers should at all times refrain from discussing the specifics of a case with a detained national, even though detainees may frequently wish to explain their actions or to talk about the circumstances of the alleged crime. The role of the consulate is to provide support, information and assistance to the detainee, not to offer advice to the detainee on legal options or strategies. Detainees should be encouraged to discuss their case with their attorney and not with anyone else. Neither should consular representatives make any promises to detainees concerning the disposition of their case or guarantee to undertake any service which they may be unable to fulfill. At this early stage, it is essential both to alleviate the anxiety of the detainee and to build a relationship of trust. However well-intentioned the offer, a failure to fulfill promised assistance will only damage the credibility and trustworthiness of the consulate.

In the aftermath of September 11th, consulates should be aware of the risk that prison authorities may monitor conversations or correspondence between consular officers and detained foreigners. As a general rule, consular officers should refrain from discussing case specifics or other sensitive information with detainees or prisoners.

3.4. Basic Consular Information for Arrested Foreign Nationals

Providing appropriate consular information at the detention and arrest stage of a case does not require a vast knowledge of U.S. law. It would be sufficient to explain the following, using terms that a fellow-national would understand:

- The assistance of an attorney is essential from the earliest stages of any criminal case in the United States.
- Every person detained on a criminal charge in the United States has the right to an attorney, even if they cannot afford one.
- The attorney represents only the interests of the defendant; information that the attorney obtains from a client is confidential and cannot be shared with or used by the prosecution.
- Every detained person has a genuine right to remain silent under questioning and has nothing to fear from exercising that right.
- Every detained person has the right to speak with an attorney before answering any questions, and to have them present during questioning. Once an attorney has been clearly requested, the police must cease any questioning until the attorney arrives.
- The rights to remain silent and/or to request an attorney may be exercised at any time during questioning. Once the right has been clearly invoked, the police must cease any questioning until the attorney has arrived.
- The right to consult with an attorney also applies before signing any statements or forms, or before making any other arrangements with the authorities regarding the case.
- The attorney should advise and guide you the detained person before you make any arrangements with the police or prosecutors regarding the case are made.

- It is a crime to give a false statement to the police.

For additional sources of information on the basic legal rights of foreign nationals in the United States, see Section 7.2.

4. CONSULAR CONTACT WITH LOCAL AUTHORITIES AND DEFENSE ATTORNEYS

Consular assistance includes establishing and maintaining a good relationship with the detaining authorities and with defense attorneys. Consulates should be prepared to resolve problems concerning consular access or the national's legal representation.

The consular case officer should ask the detaining authority to:

- Include full contact information for the consulate in the national's case file;
- Provide the national with the consulate's contact information;
- Inform the consulate of any changes to the prisoner's status or circumstances.
- The consulate should be prepared to bring any concerns over breaches of consular communications or access to the attention of the local authority and, if necessary, to the U.S. Department of State.

Consulates should monitor the legal representation provided to their nationals and be willing to assist in resolving any problems or special needs that may arise. They should:

- Provide an appropriate list of local attorneys who could represent the detainee.
- Be mindful of the difficulties that may arise between the attorney and a foreign national and work to resolve them.
- Provide the attorney, if requested, with a clear understanding of what the consulate is prepared to do immediately and over the duration of the case.

All consulates should be prepared to offer basic legal support to the attorney by:

- Communicating in some form with the detainee, the attorney and the local authorities;
- Providing an affidavit to the attorney describing the consular services available to detainees;
- Maintaining a case file for each of their nationals in custody and providing pertinent information to the defense attorney;
- Providing diplomatic assistance where necessary, such as by submitting a diplomatic note through the embassy to the State Department in cases involving a VCCR violation.

ALL TOPICS ADDRESSED IN MORE DETAIL IN THE EXPANDED SUPPLEMENT ARE INDICATED BELOW WITH AN ASTERISK []

CONSULAR CONTACT WITH LOCAL AUTHORITIES AND DEFENSE ATTORNEYS

4.1. Contact with Local Authorities

Once the consulate has been informed of the detention, arrest or imprisonment and has communicated with its national, the consular case officer should establish and maintain contact with the detaining authorities. As an initial step, the case officer should ask the authority to:

- Include full contact information for the consulate in the national's case file;
- Provide the national with the contact information;
- Inform the consulate of any changes to the prisoner's status or circumstances, such as transfer to another facility, medical or personal emergencies, court hearings, release, or deportation.

Consular officers and detained nationals have the right to private communication and correspondence with each other. The consulate should be prepared to bring the following concerns to the attention of the local authority and, if necessary, to the U.S. Department of State:

- Any failure by the authorities to comply with the consular information or notification provisions of the VCCR or bilateral treaties;
- Attempts by police or custodial staff to overhear or monitor conversations between consular representatives or detainees;
- Any interference with correspondence between consular representatives and their nationals under any form of detention;
- Any outright denial of consular access to a detained national by police, jail or prison officials;
- Any violation of consular privileges, such as disrespectful treatment or unnecessarily intrusive searches of a consular representative.

These following excerpts from the State Department manual on consular notification and assistance provide additional guidance on issues of consular privilege related to visits with detainees.

Do I have to permit a consular officer to have access to a detainee?

Yes. Consular officers are entitled to visit and to communicate with their detained nationals. This is true even if the foreign national has not requested a visit. The consular

officer must refrain from taking action on behalf of the foreign national if so requested by the national, however.

Are consular officers entitled to visit whenever they want to?

No. Law enforcement authorities may make reasonable regulations about the time, place, and manner of consular visits to detained foreign nationals. Those regulations cannot, however, be so restrictive that the purpose of consular assistance is defeated. These matters are addressed in Article 36 of the VCCR. The Department urges law enforcement authorities to grant foreign consular officials liberal access to detained persons, granting the consular officer every courtesy and facility consistent with local laws and regulations. Liberal visiting privileges are particularly important when consular officers have to travel long distances to visit their nationals.

Do consular officers have to comply with prison security regulations?

Yes. If the consular officer questions having to follow a particular security rule, the consular officer should be advised to address the question to the Department of State. Such questions may arise occasionally because, while not exempt from security regulations, under rules relating to the privileges and immunities of diplomatic and consular officers, consular officers conducting prison visits are entitled to be treated with respect.

Can a consular officer be subject to search prior to visiting a prisoner?

Yes. Even though a consular officer has certain privileges and immunities, the officer must comply with applicable prison security rules. On the other hand, because a consular officer is entitled to be treated with respect, any search of a consular officer should not be unnecessarily intrusive.

Where local authorities are unable or unwilling to resolve issues regarding consular access or communications, the consulate should contact the State Department's Bureau of Consular Affairs for assistance. See Section 7.2 for contact information.

Consular officers should also be prepared to correct some common misconceptions by police departments and prison officials about Article 36 obligations:

- 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, unless required to do so by a bilateral consular agreement.
- Consular rights apply regardless of the immigration status or the length of time that a foreign national has resided in the arresting state.

- Contact between the local police and law enforcement agencies in the national's home country does *not* constitute compliance with Article 36 if the consulate has not also been notified of the detention.

Because violations of Article 36 obligations are still frequent in the United States, consulates can play an important role in securing better compliance by law enforcement agencies. Where it is apparent that police departments are routinely failing to advise foreign detainees of their consular rights or to provide consular notification “without delay”, consulates should approach the competent authorities and work with them to improve Article 36 procedures. That support can include consular participation in police training sessions, providing contact information for timely notifications, and ensuring that the State Department's multi-lingual instructions on consular rights are prominently displayed in local jails and police stations.

4.2. Working with Defense Attorneys

Consulates are authorized to arrange for the legal representation of their nationals in custody and to provide any other assistance necessary to ensure that the detainee's legal rights and interests are protected. At the outset of a case in the United States, this assistance could include providing the detainee with a list of local attorneys who may be able to represent them. It may be of particular importance to provide information on attorneys who are bilingual (if the national has a limited understanding of English) or from a cultural background similar to that of the national, or simply a list of attorneys experienced in defending clients on the same type of charges as those facing the national.

Maintaining a comprehensive list of qualified attorneys can be a challenging task, particularly if the consular jurisdiction covers many U.S. states and communities. However, an initial step could be to develop a list that includes all communities where there are large concentrations of nationals who may require legal assistance. National, state, and local associations of criminal defense attorneys often provide lists of members by community, or a referral service for individuals seeking qualified legal counsel. Other consulates may also be able to recommend defense attorneys based on past cases.

Whether they are retained by the national or appointed by the court, attorneys may have little or no familiarity with the cultural background and perceptions of a foreign client. They may need to rely on an interpreter, for example, to communicate with their client. They may not be attuned to important aspects of the national's background, upbringing or mental state. Attorneys may fail to explain the proceedings and the legal issues under review in terms that a foreign client will fully understand. Quite frequently, misunderstandings of various kinds may arise between the defendant and the attorney.

Consulates should monitor the legal representation provided to their nationals and be willing to assist in resolving any problems or special needs that may arise.

Here again, consular involvement may serve as the “cultural bridge” between the defendant and

their attorney, whether retained or appointed. Consular visits and communications with the national may provide important information that would assist in their defense. In a number of cases, for example, consular officers visiting 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.

While not all cases will involve or require an ongoing relationship with the defense attorney, consulates should be prepared to develop a rapport where the case circumstances clearly require further consular assistance. This would be especially true where the prosecution and conviction of the detainee might result in a death sentence, life imprisonment, or other serious penalties impairing the physical or mental integrity of the defendant. In all such cases, the consulate should be prepared to meet with the national's attorney and discuss its ongoing involvement.

We have learned that consulates and defense attorneys can and should work closely together, particularly on cases where Article 36 provisions have been breached or where severe sentences may be imposed. Experience has shown that these cooperative efforts are often beneficial, sometimes in unexpected ways. Consulates rely on defense attorneys for timely case updates, as well as to defend and vindicate the rights of their nationals. Attorneys require consular support in order to provide effective representation to their client, or to establish that the denial of access to timely consular assistance prejudiced the fairness of the proceedings against the defendant.

Establishing a good working relationship with defense attorneys requires some understanding from both parties about respective capacities and expectations. In a death penalty case, for example, 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 when lawyers are unused to the more measured pace of diplomacy.

It is important that the consulate provide the lawyer with a clear understanding of what forms of assistance it is prepared to offer on short notice and to discuss other consular involvement over the longer term. It may be beneficial to re-evaluate current policies for consular assistance and *prepare a legal contingency plan* for intervening in a case where Article 36 has been violated or where a national faces a very serious criminal charge.

Although its available resources may be limited, every consulate should be in a position to:

- Promptly communicate with the detainee, the attorney and the local authorities;
- Provide an affidavit to the attorney describing the consular services provided 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 State Department, expressing concern over an alleged violation of the VCCR and requesting an investigation of the circumstances.

These four basic functions will provide the defense with the basis for a variety of legal strategies. If other assistance is requested, the lawyer needs to know what is readily available and the consulate's policy on enhanced forms of assistance should be clarified (e.g., additional requests may require approval from your Foreign Ministry).

A consular officer should be designated to communicate with the attorney on a regular basis. The case officer needs to be kept informed of the legal status of the case, just as the attorney requires regular updates on consular efforts. A review of this manual and the available Expanded Supplement should provide additional insights into the expectations of attorneys when they call seeking assistance, as well as more information on some of the requests that may be made of the consulate.*

A creative and flexible approach to cooperation with the lawyer is often called for. As a basis for discussion, the case officer and the attorney might choose, for instance, to review the general outline of consular functions provided in Article 5 of the VCCR (see Appendix 1) and the consulate's general policy on assisting its detained nationals facing serious charges.

Diplomatic notes protesting Article 36 breaches are appropriate and particularly useful interventions at any stage of a capital case and can be especially helpful in the pre-trial phase. Many embassies have seen fit to formally raise this concern with the State Department, which then contacts the local authorities and requests both an investigation and an explanation of the reasons for the treaty violation.* Although the State Department has no supervisory authority over local prosecutors, these interventions can serve several valuable purposes. First, this formal response by the sending State underscores the high value that it attaches to Article 36 compliance and its willingness to defend the rights of its nationals by all appropriate means. Coupled with the fact that the United States Government has raised concerns over a breach of its international commitments, the note may thus help persuade a prosecutor to swiftly resolve the case through plea negotiations. In addition, a diplomatic note adds credibility to claims by the defense that the consulate would have assisted its national promptly and effectively if it had been notified of the arrest in a timely manner.

5. FROM ARREST TO FINAL APPEALS: THE U.S. CRIMINAL JUSTICE PROCESS

The Basic Stages of a Typical Death Penalty Case

STAGE	KEY OUTCOME
Detention and Arrest	--
Booking and Arraignment	<i>Possible release on bail</i>
Indictment	--
Pre-trial Hearings	--
Trial	--
Conviction or Acquittal	<i>Release if Acquitted</i>
Sentencing Hearing	<i>Death or Life Sentence</i>
Direct Appeals Through State Courts	<i>Possible Reversal of Conviction or Sentence</i>
Automatic Review by U.S. Supreme Court	<i>Possible Reversal of Conviction or Sentence, or Return to Lower Court</i>
Habeas Corpus Appeals Through State Courts	<i>Possible Reversal of Conviction or Sentence, or Return to Lower Court</i>
Habeas Corpus Appeals Through Federal Courts	<i>Possible Reversal of Conviction or Sentence, or Return to Lower Court</i>
Clemency Review	<i>Possible Reprieve, Commutation or Pardon</i>

ALL TOPICS ADDRESSED IN MORE DETAIL IN THE EXPANDED SUPPLEMENT ARE INDICATED BELOW WITH AN ASTERISK []

FROM ARREST TO FINAL APPEALS: THE U.S. CRIMINAL JUSTICE PROCESS

5.1. *Understanding the U.S. Legal Process*

The protective and supportive function of the consulate does not end with the interrogation and arrest of its national: it often continues with unabated significance throughout the national's trial, sentencing, and imprisonment. To fully grasp the significance of prompt and effective consular intervention, it is necessary first to understand the nature of the U.S. criminal justice system.

The United States relies on an *adversarial process* of law to fairly determine guilt or innocence and to impose the appropriate sentence in each individual case. This process pits two opposing forces: the power of the state to investigate and prosecute offenders against the resources provided to defendants to challenge that prosecution in open court. However, a fair outcome is only possible if those two forces are equal in strength; the truth will not always prevail if either side has more resources at its disposal than the other, or if the defendant cannot meaningfully participate in the process due to ignorance or incapacity.

The procedures in a typical U.S. death penalty case provide important insights on when and how consulates can best provide assistance in any serious case.

While the focus of this section and the following one is on capital cases (i.e., those that could result in a death sentence upon conviction), most of this information is also relevant to any case in which a foreign citizen faces prosecution or has already been convicted on a serious non-capital charge. Since U.S. law enforcement agencies so frequently ignore Article 36 obligations, the consulate may first become aware of a case at any stage in the proceedings, from pre-trial to final appeals. Furthermore, the potentially grave consequences of a capital case may call for the highest possible level of consular assistance over an extended period of time, thus requiring an understanding of the various stages in the legal process.

The death penalty is not a mandatory punishment for any crime in the United States. Its use is restricted to a fairly narrow category of crimes: cases that fall within the definition of capital offences in state or federal statutes (most frequently, premeditated murder). Even in those cases where a death sentence may be an available option, it is rarely sought or applied. For instance, more than 16,000 homicides occurred in the United States in 2004, yet only 125 death sentences were imposed: less than 1 per cent of the total number of lethal crimes.

Each U.S. state has its own constitution and criminal code, resulting in wide variations in judicial procedures and punishments. The death penalty is still retained as an available punishment in 36 states, as well as under Federal and military law.⁵ As of May, 2008, there are 40 jurisdictions with allow for capital punishment, 37 U.S states and the U.S Government and US Military. The state of New York rendered the death penalty unworkable in 2004, although they have not

⁵ Somewhat different procedures apply to the Federal and military death penalty; however, the great majority of capital prosecutions in the USA take place under state laws.

officially abolished it. Therefore, within International Justice Project statistics, New York still officially has the death penalty. Moreover, thirteen jurisdictions have no capital punishment: Alaska, District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin.

Most recently in *Baze v. Rees*, the US Supreme Court ended a *de facto* ‘quasi-moratorium’ which developed nationally in late 2007/early 2008 pending a legal challenge to a commonly used method for administering the lethal injection. The issue has now been settled, with little change to prevailing policies.

Every state is allowed to establish its own judicial procedures, but each of these systems must comply with the minimum requirements of the U.S. Constitution. As a consequence, death sentences are first reviewed on mandatory appeal by state courts and then receive an automatic review by the U.S. Supreme Court. Additional appeals may also be filed in the state courts and reviewed by the federal judiciary. It is this dual system of judicial review that results in the lengthy and complex process of appeals prior to an actual execution.

Since the death penalty is never mandatory, the actual decision on whether or not to seek and impose a death sentence is itself a complex procedure. It begins with the provisions of the applicable state laws, which divide murder cases into two broad categories: capital cases (for which the death penalty may apply) and non-capital (for which a range of prison sentences are the only available punishments). Within the category of capital (or death-eligible) cases, the decision on whether to seek a death sentence ordinarily rests with the local prosecutor or with the District Attorney, who is usually an elected public official. In cases brought under federal law, the ultimate decision on whether or not to seek the death penalty rests with the U.S. Attorney General.

Prosecutors in the United States have broad discretionary powers: they may decide not to seek the death penalty in a capital case or may negotiate with the defense for a lesser punishment, in exchange for the defendant’s cooperation in a related case or in order to obtain a guilty plea (and thus avoid a trial). Many potential capital cases are resolved by imposing a lesser sentence through this exercise of *prosecutorial discretion*. Prosecutors may elect not to seek the death penalty for any reason they consider to be sufficient, including interventions by concerned consular authorities. Timely consular involvement can also be instrumental in explaining the benefits of an offered plea agreement to the defendant. **For more information, see Section 6.1.**

5.2. The Stages of a Typical Case

The investigation of a murder, and the arrest, of a suspect is usually made by the police in the jurisdiction where the crime occurred. The police are required to inform a suspect in custody of the following legal rights (“Miranda rights”), prior to *any interrogation*: the right to remain silent, to have legal counsel present during questioning, to have the court appoint legal counsel if he cannot afford to retain an attorney, and that anything he says may be used against him in a court of law. **See Section 3.2 for more details on the rights of the accused.**

If the suspect is arrested, the police will fill out an *arrest report* or *booking form*, which includes basic information such as the individual's full name, address, birthplace, physical features, and the nature of the charge.

Following an arrest on a serious charge, the *arraignment hearing* is the first appearance of the prisoner before a judge (usually within 72 hours of arrest), at which time the formal charges are read and the defense enters a plea of guilty or not guilty. The judge considers any initial legal motions brought before her, including a request for *bail*: the temporary release of the defendant from custody on payment of a bond guaranteeing that the person will appear at court hearings and at the trial.

Frequently, cases involving serious crimes proceed to trial through a process called *indictment*. An indictment is a formal charge issued by a grand jury. The grand jury is composed of a number of citizens who hear evidence from the prosecution regarding the suspect's alleged criminal behavior. The defense has no right to present arguments before the grand jury and, in most cases, the defendant does not testify. The grand jury determines from the information presented to them whether or not there is probable cause to believe the accused committed the crime submitted by the prosecution. Aside from protecting against false prosecution, the purpose of the indictment is to notify the accused of the charges against him and the elements of the state's case, so that he and his attorney may then prepare their defense.

Before a death penalty trial commences, the defense attorney may submit a number of *motions* to the court concerning the fairness of the proceedings. Among other matters, these may include motions to exclude evidence or confessions that were illegally obtained, a mental competency review, or requests for a change of venue due to prejudicial pre-trial publicity.

If there has been a violation of the Vienna Convention on Consular Relations, the defense must raise the violation at the earliest possible stage in the proceedings and argue that appropriate sanctions should be imposed as a remedy for the violation.

Prior to the commencement of a death penalty trial, the prosecution formally indicates that the death penalty will be sought. The defendant may elect to be tried only before a judge, although jury trials are by far the more common choice. Death penalty trials differ from all other murder trials in their structure and procedure. For example, *jurors* in a death penalty trial are questioned to establish their willingness to impose a death sentence; those jurors who would never vote for a death sentence or those who would always impose it are to be excused from jury duty. Both the defense and the prosecution are permitted to question and exclude potential jurors in a process known as *voir dire*.

The trial itself is divided into two separate parts. In the first stage, the trying authority (either the judge or the jury, depending on the defendant's choice) determines the *guilt or innocence* of the defendant. It is extremely important that the defense raise *objections* to any aspect of the proceedings that are improper or unfair: these objections, the motions filed, and the judge's rulings on them form the basis for many of the possible issues that may later be raised on appeal.

Following a determination of guilt, a separate hearing is held to decide on the *penalty*, which will be either a death sentence or the alternative sentence of life imprisonment (with or without the possibility of parole, depending on state law). In order to determine the appropriate sentence, the jury is required to consider aggravating and mitigating factors.

The prosecution presents *aggravating factors* to justify a death sentence. These factors might include the brutality of the crime itself, the defendant's reputation for violence or a previous criminal record (where that record is admissible evidence), or any of a number of case circumstances that local law stipulates as grounds for a death sentence (e.g., premeditated murder for monetary gain, or the murder of a police officer).

Mitigating factors are presented by the defense and include any relevant information that might persuade the jury to impose a sentence less than death. These mitigating circumstances might include testimony about the defendant's background, upbringing, good character, or impaired state of mind at the time of the offence. In most jurisdictions, a death sentence may not be imposed unless the jury's choice of that punishment is unanimous. Jurors are instructed by the trial judge on how to assess the evidence presented to them; for example, if the mitigating factors are found to outweigh the aggravating circumstances, jurors may be required by state law to vote against a death sentence.

After the conviction and sentencing, each death sentence is subject to a mandatory process of judicial review, known as the *direct appeal*. The state appellate court reviews the transcript of the proceedings to determine that the trial outcome is justified by the evidence presented and that all procedural rules were observed. The defense may raise a number of arguments on direct appeal in an attempt to gain the reversal of the conviction or the sentence. For example, the defense might challenge the trial court's finding that the defendant was mentally competent to stand trial. In the case of a foreign national where an Article 36 violation was raised at trial, the defense might assert that violation of the Vienna Convention as grounds for a new trial or sentencing hearing. The decision of the state courts is subject to automatic review by the U.S. Supreme Court, although it is rare for the Court to accept a case for consideration at this stage of the proceedings.

At the conclusion of this mandatory review, prisoners may choose to pursue further appeals by seeking a writ of *habeas corpus*. In general terms, this is the legal safeguard that entitles all prisoners to challenge the legality of their confinement before a judge. In U.S. death penalty cases, the term applies most frequently to appeals challenging the constitutionality of either the conviction itself or the death sentence.⁶ *Habeas corpus* proceedings (also known as "post-conviction" proceedings) offer an opportunity to present additional evidence and arguments to the courts in support of a new trial or re-sentencing.* A typical habeas issue is *ineffective assistance of counsel*, asserting that the trial lawyer failed to discover and present important mitigating evidence to the sentencing jury. Habeas appeals are filed initially in the state courts. After a decision on the appeal by the highest state court, the federal courts of appeal may then further review those rulings. Finally, the U.S. Supreme Court may agree to review the case if it

⁶ Individuals in the USA are entitled to certain basic legal rights, which are outlined in the first 14 amendments to the U.S. Constitution (known generally as the Bill of Rights).* The constitutions of the individual U.S. states also contain similar guarantees.

raises important and unresolved questions of law.

Strict *rules of procedure* govern each stage of the appellate process, including time limits on the filing of appeals and barriers that limit the introduction of new issues in the latter stages of review. Except in rare circumstances, prisoners are now permitted only one round of habeas appeals through the U.S. court system. A failure to raise a timely objection at trial or to introduce a legal issue in the earliest stages of appeal may prevent the higher courts from considering an issue at all, however compelling the argument. Recent legal reforms have also greatly reduced the independent authority of the federal appeals courts to reverse state death penalty decisions.

If all appeals are unsuccessful, prisoners may also seek the commutation of their death sentences by petitioning for *executive clemency*.^{*} State governors or their appointed representatives are empowered to grant mercy, following a final, non-judicial review of the case. Clemency procedures (and their effectiveness at preventing fatal error) vary widely.^{*}

On first impression, it might seem as though this extensive framework of review would guarantee that only the worst offenders condemned for the most serious crimes are actually executed, and that direct consular intervention is therefore unnecessary. In reality, the determination of who lives and who dies is influenced by a host of subjective factors, such as the jurisdiction in which the case is prosecuted, the quality of legal defense provided and the effects of racial or ethnic bias. Despite the elaborate mechanisms intended to ensure that death sentences are imposed reasonably and fairly, the actual process remains deeply flawed.

For instance, over 120 prisoners have been released from death row in the United States since 1973 on grounds of actual or presumed innocence; in most cases, their exoneration came only because of extraordinary efforts by appellate attorneys to overcome procedural barriers intended to preserve the finality of all death sentences. Other prisoners have gone to their execution with troubling questions about the fairness of their trial or the reliability of its outcome left unresolved by the courts.

Assessing the efforts to administer the death penalty fairly and rationally during his two decades on the U.S. Supreme Court, Justice Harry Blackmun wrote in the 1994 case of *Callins v. Collins*:

Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. . . . From this day forward, I no longer shall tinker with the machinery of death.

As we outline in the next chapter, each stage in this lengthy and unpredictable process affords opportunities for effective consular involvement. Regardless of the sending State's views on the death penalty or its understandable reluctance to intervene in the judicial procedures of another nation, all consulates should be aware that appellate mechanisms operating alone cannot be relied on to correct lethal error in the United States. When a foreign national faces a death sentence or execution in the USA, vigorous consular interventions are not only appropriate but

essential.

Between 1988 and 2006, at least 22 foreigners were executed in the United States. Citizens of 14 nations were put to death, from countries as diverse as Germany, South Africa, Viet Nam, Canada and Honduras. During that same time period, the executions of 22 death-sentenced foreign nationals were prevented either through legal appeals or executive clemency. With few exceptions, these two categories of cases are indistinguishable based on the severity of the offence or the conduct of the offender. In many instances in which the death sentence was ultimately set aside, consular involvement was indispensable in securing a fair and just outcome.

6. CONSULAR ASSISTANCE IN CAPITAL CASES

Consulates may provide any form of assistance necessary to ensure that a national facing harsh punishment in the United States receives fair, equal and humane treatment, throughout the legal proceedings.

In a U.S. capital case, consular assistance can include:

- Visiting and corresponding with the detainee on an ongoing basis;
- Monitoring the treatment of the detainee in custody and protesting ill-treatment or lack of consular access;
- Contacting friends and family in the home country;
- Monitoring the performance of court-appointed defense attorneys;
- Ensuring that the attorney is in regular contact with the defendant;
- Resolving problems that may arise between the lawyer and the national;
- Interceding with prosecutors to avoid excessive punishment;
- Attending court hearings and trials;
- Facilitating the hiring of interpreters, expert witnesses and investigators, where the courts deny adequate defense funding;
- Notarizing and conveying documents from the home country for use by the defense (e.g., medical, educational or military records);
- Assisting mitigation investigations in the home country;
- Arranging for the appearance of mitigation witnesses from the home country;
- Providing an affidavit to the defense attorney regarding consular protection services provided by the consulate to its detained nationals;
- If necessary, arranging for the hiring of competent counsel for the accused;
- Retaining an attorney to represent the consular interest;
- Submitting *amicus curiae* briefs or motions based on any violations of international law;
- Participating directly or indirectly in appellate review;
- Bringing claims before international courts and tribunals;
- Petitioning for clemency;
- Hosting press conferences or assisting in publicity.

ALL TOPICS ADDRESSED IN MORE DETAIL IN THE EXPANDED SUPPLEMENT ARE INDICATED BELOW WITH AN ASTERISK []

CONSULAR ASSISTANCE IN CAPITAL CASES

6.1. Pre-trial Interventions

Foreign nationals may be particularly vulnerable to prosecution and sentencing on capital charges: as of May, 2008, approximately 122 foreign nationals from more than thirty foreign countries were under sentence of death in the United States. By its very nature, a death penalty case calls for the highest possible level of consular assistance. Consular interventions in capital cases may be both extensive and sustained, sometimes requiring the diverting of other consular resources or additional expenditures that would not be considered in a lesser case.

Interventions by consulates on behalf of their nationals facing the death penalty or other severe punishments should occur at the earliest possible stage, if only to ensure that the accused receives a fair trial and adequate appellate review.

Prosecutors in the United States have broad discretionary authority in deciding which charges to bring against the accused and which punishment they will seek. This prosecutorial discretion is particularly significant in capital cases, since the death penalty is not mandatory for any crime and is only rarely sought. It is common for prosecutors to offer a lesser sentence in exchange for a guilty plea, in order to avoid the time and expense of a capital trial. Many capital cases in the United States are resolved by means of plea bargaining, which often provides the best prospect for avoiding a death sentence that could be imposed if the case went to trial. Prosecutors may also choose to consult with any parties who have a legitimate interest in a case before deciding whether or not to seek the death penalty. 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.

Under the U.S. legal system, it is entirely appropriate for consular officers to meet with prosecutors before a capital trial, to raise concerns about the possible punishment or to ensure the fairness of the proceedings.

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. A consular intervention at this stage requires careful planning and consultation. For example, the defense attorney should be consulted for an opinion on whether or not such an intervention would be beneficial. The attorney should also be able to provide information on the best timing for the intervention, as well as details on the proper official to contact and the most effective arguments to raise.

District Attorneys (i.e., the senior local official in charge of prosecutions) are typically elected politicians, who may have run for office based on their aggressive use of harsh punishments to protect “law and order.” Prosecutors may be sympathetic to the consulate’s concerns but at the same time feel that they must not be seen by the public as subject to foreign influence. Consular interventions thus require sensitivity to local political circumstances and should always be done

discreetly. If the government of the sending State has no previous policy on consular interventions of this kind, a decision to intervene may also require consultation with superiors.

Consular participation at this early stage of the proceedings is essential. The active presence of the consulate in the case may influence a prosecutor not to seek a death sentence, or to reduce a first-degree murder charge to second-degree murder (which in most jurisdictions would result in a sentence with the possibility of eventual parole). In a number of recent capital cases, for example, consuls of Mexico and other nations have met with local prosecutors and persuaded them to offer a lesser sentence in exchange for a guilty plea.*

Just as significantly, consular involvement can be instrumental in explaining the purpose and benefits of a plea agreement to a defendant who might otherwise refuse the prosecutor's offer. Since plea bargaining is either rare or non-existent in most jurisdictions outside of the United States, foreign defendants asked to accept a negotiated plea frequently respond with suspicion or confusion. Consulting closely with the defense attorney, a consular representative can help ensure that the defendant understands why accepting the offer is likely to be in their best interests.

Consular attendance at all court hearings in a capital case may influence a trial judge to give more diligent consideration to defense motions based on Article 36 violations or related concerns. Particularly in rural or impoverished jurisdictions, a consular presence in the courtroom and the prospect of its support for the defense throughout an expensive capital trial may also provide a strong incentive for prosecutors to offer a plea agreement.

At a minimum, a consular representative should strive to attend all significant pre-trial hearings in a potential death penalty case.

As knowledge of Article 36 obligations spreads throughout the legal community, we see a growing number of cases in which violations of a defendant's consular rights are raised before the trial begins. These claims are not legal technicalities: they are based on the very real harm that may befall a detained person who fails to fully understand and act on their legal rights from the moment of their detention and questioning.

Even though a consulate may eventually learn that one of its citizens has been detained and begin to provide belated assistance, the damage has already been done in many cases. To try and correct that harm, the attorney may file a number of motions with the court before the trial commences. One example would be a *motion to suppress* arguing that the defendant's statements to the arresting authorities may not be used against them because of factors such as a failure to provide a *Miranda* warning or the inability of the detainee to understand the warning properly. The failure of the police to provide a timely advisement of Article 36 rights can then be introduced as part of a broader challenge to the admissibility of the defendant's incriminating statements.* The defense might also request a *continuance*, delaying further legal proceedings to permit it to consult fully with the consulate and enlist its assistance in the case.

It is also important to recognize that proving the violation of Article 36 obligations will likely not

be sufficient of itself to guarantee a judicial remedy. Most trial judges will also require evidence of *prejudice*: that the treaty violation undermined the defendant's right to due process and a fair trial, or otherwise tainted the proceedings.

To establish prejudice arising from a consular rights violation, the defense attorney may need to know what services the consulate routinely provides when one of its nationals is detained or arrested. Of course, the level of consular assistance does vary widely depending on factors such as the severity of the charge, the available consular resources and the consulate's proximity to the detained person.

If a consulate offers even basic services to detainees, the attorney may request an *affidavit* outlining the forms of assistance that would have been provided or to verify that the consulate was not notified of the arrest.* An affidavit is a sworn statement in the form of a written document that has been witnessed by a notary. In most circumstances, a consular affidavit will be sufficient to establish these facts. However, a consular officer might also be asked by the attorney to *testify* at a hearing before the trial judge. Under VCCR Article 44(3), consular officers "are under no obligation to give evidence concerning matters connected with the exercise of their functions." Thus, in order for a consular officer to testify at a hearing into an Article 36 violation, the sending State must provide an express and written *waiver of immunity*, as indicated in VCCR Article 45(2). An individual consular officer is not authorized to waive immunity from giving testimony and can do so only with the written consent of the appointing State.

Where consular testimony is desirable, a *limited waiver of immunity* should be provided which specifies that the consular testimony will be confined to general information such as the assistance the consulate provides in this type of case or confirmation that the consulate was not notified of the arrest. Since all communications between a consulate and a detainee are confidential, as are all consular files and correspondence, a consular officer must always decline to answer any questions seeking privileged information such as the contents of consular interviews with the defendant. Providing a limited waiver of immunity clarifying the limits of consular testimony establishes in advance to the prosecution and the trial judge that questions breaching consular privilege should not be asked and cannot be answered.

In one Colorado case, the trial judge was so concerned by the evidence presented at a pre-trial *Miranda* hearing that he ordered the suppression of the Mexican defendant's statement to the police. Consular testimony assisted the trial court in understanding that the suspect's request during interrogation "to speak with a judge" was actually an attempt to invoke his *Miranda* right to an attorney, as understood by a Mexican national familiar only with his rights under the inquisitorial system of justice. The judge also instructed local authorities to immediately comply with Article 36 requirements whenever they arrest a foreign citizen. In a capital murder case in Oregon, the judge ordered a pre-trial hearing into the alleged violation of Article 36. After the court heard testimony from consular officers and legal experts, the prosecutor agreed to negotiate a plea arrangement: the capital charge was dropped and the defendant pleaded guilty in exchange for a prison term.

6.2. *Trial Stage Interventions*

A death sentence is never a foregone conclusion in any capital case. Prosecutors may decide not to seek the death penalty for a variety of reasons, or may withdraw the request at any time until the start of the trial's penalty phase. Juries may find the defendant guilty, but still decide not to impose a death sentence. A consular presence in the courtroom throughout the trial may serve to ensure the fairness of the proceedings, for example, by deterring discriminatory treatment based on the defendant's nationality or ethnicity.

A consular representative should attend any trial in which a national is facing capital charges.

The presence and participation of consular representatives can be beneficial in many ways

- Defense attorneys may seek consular assistance in gathering crucial mitigating or exonerating evidence that is only available in the defendant's home country.
- Defense witnesses from the defendant's country of origin may require assistance with travel expenses or in obtaining visas, in order to testify at the trial.
- Since the quality of trial counsel varies widely, the consulate should monitor the trial proceedings to ensure that the national is receiving competent legal representation.

One common form of consular assistance in capital cases is facilitating the rapid production of official records crucial to the defense that are available only in the defendant's country of origin. For example, verifying a defendant's foreign nationality is a prerequisite of establishing a violation of Article 36 obligations. Producing a youthful defendant's birth certificate can be essential, since the death penalty may not be imposed on any person who was under the age of 18 at the time of the offense. Similarly, medical or educational records can support a claim of mental retardation that would likewise preclude a death sentence.

The importance of mitigating evidence in a death penalty case cannot be overstated. Even where the crime itself was truly shocking, jurors may be persuaded to impose a lesser punishment than death. In many jurisdictions, the jury must vote unanimously for a death sentence; if a single juror is persuaded to spare the defendant's life, the death penalty may not be imposed.

In order to "humanize" the defendant, the defense will present any mitigating information regarding upbringing, background, mental or physical health, or any other personal factor that may tend to persuade the prosecuting or sentencing authority to favor a lesser sentence. Compiling that material may require access to documents in the home country, such as medical, military, and educational records. Obtaining these documents promptly and verifying their authenticity often requires consular involvement. Effective representation of a foreign defendant facing the death penalty generally requires the sending of a mitigation investigator to visit the defendant's country of origin in order to interview potential witnesses and to conduct

background investigations. Consular assistance in arranging for these investigations can be indispensable. This may be particularly true in jurisdictions where the courts refuse to grant adequate funding to the defense for mitigation work. Prompt consular involvement in securing documentary support for the defense may also persuade a prosecutor not to seek a death sentence.

As an example, the intervention by Mexico's consulate in Miami was critical in saving Sergio Soto from the death penalty, according to his lawyer. The prosecution had a strong case against Mr. Soto on charges of kidnapping, robbery and murder, his lawyer told the New York Times, and the case was tried in Palm Beach, Florida, "a very conservative jurisdiction where feelings against foreigners are high in such cases." The Mexican government paid for medical experts who discovered that Mr. Soto suffered from brain damage, and for investigators to go to Mexico, where they located witnesses who testified about Mr. Soto's upbringing. This evidence was crucial in persuading the jury to sentence Mr. Soto to life imprisonment, instead of imposing a death sentence.

Timely consular involvement can also be highly beneficial in establishing the innocence of the accused. Honduran national Mario Bustillo was arrested for first-degree murder in Virginia and was never advised of his Article 36 rights. The defense alleged at trial that another person had committed the crime and then fled to Honduras, but was unable to verify its claim and did not seek consular involvement. After consular authorities belatedly learned of the conviction, they assisted habeas counsel in locating the suspect in Honduras, whereupon he admitted committing the murder and exonerated Mr. Bustillo. Because the Article 36 claim was not raised at trial, the U.S. Supreme Court later determined that state rules of procedure barred any legal remedy for the consequences of the treaty violation. However, if the consulate had not been deprived of its right to assist the defense prior to trial, it is probable that Mr. Bustillo would have been acquitted.

Consular interventions at this stage are not limited to assisting the defense in developing evidence. Following a direct intervention by the Ecuadorian Consulate at the trial stage of a New Jersey death penalty case, local prosecutors agreed to amend their procedures to ensure that all foreign defendants are informed of their consular rights by the time of their first appearance before a judge. While not a perfect solution, this policy is a step in the right direction that would not have come about without the active intervention of consular officers.* In this case, the Ecuadorian national was sentenced to life imprisonment.

In some cases, consulates have determined that the preparation for trial by defense counsel was falling below an acceptable professional standard. Warning signs may include attorneys who appear to be distracted or disinterested during court hearings, who fail to visit and consult with their client, file no pre-trial motions or briefs, are evasive or misleading when discussing their case strategy, and are difficult to reach at all times. Consulates have sometimes seen fit to request that counsel withdraw from a case and have either requested that the courts appoint a new attorney or have retained competent counsel to represent their national.

6.3. Direct Appeal

Despite widespread efforts to promote and publicize the importance of Article 36 compliance, it

is still entirely possible that a foreign defendant may be tried and sentenced to death without consular knowledge or involvement. Consular intervention in the case during the early stages of appeal can still be of great value.

After a Mexican citizen was sentenced to death in Idaho, his appellate attorney contacted the Mexican consulate. The defendant's mental health and competency to stand trial had not been properly investigated before trial. With the support and assistance of the consulate, the attorney was able to establish that his client had a long history of mental disorders and was clearly mentally ill prior to the crime. Faced with proof that the prisoner had not been competent to stand trial in the first place, the prosecutor agreed to accept a term of imprisonment and forgo the death sentence.

Another issue that may arise in these early appeals is the capacity of defendants to comprehend the trial proceedings and to participate in their own defense, due to cultural differences or language barriers. In a recent case in California in which the defendant's understanding of the legal process was a pivotal issue, the consular representative of Taiwan submitted an affidavit stating that he would have provided the national with a list of Chinese-speaking attorneys and would have monitored the court proceedings. The appeal including this information resulted in a reversal of the conviction. Without the support of the consulate it would have been impossible for the defense to establish the merit of this significant issue.

The experience of receiving a sentence and being confined on death row or to life imprisonment has a devastating psychological impact on many prisoners. The knowledge that their consular representative is taking an interest in their welfare has tremendous value in maintaining morale.

In a Pennsylvania case, a young man from Moldova had decided to abandon his appeals and submit to execution, even though many avenues of appeal still remained in his case. Following the intervention of the Moldovan consular authorities, with support from Amnesty International and local religious groups, the prisoner agreed to resume his appeals just days before his scheduled execution. Ironically, extensive investigation later revealed that the prisoner was, in fact, a naturalized U.S. citizen and was thus not entitled to consular assistance. Still, the message is clear: any intervention by the consulate, even simply visiting or corresponding with the imprisoned or condemned national, can produce substantial and sometimes unexpected benefits.

6.4. Habeas Corpus Appeals

In 1976, the U.S. Supreme Court approved new legal safeguards intended to ensure that death sentences would be imposed fairly and rationally. One of these safeguards is a requirement that all death sentences must receive a mandatory review on appeal. Defendants are entitled to legal representation for that mandatory appeal.

However, individuals who wish to appeal their sentences further are not constitutionally entitled to an attorney, and not all U.S. states provide legal aid beyond the mandatory appeal stage. Many prisoners could raise substantial constitutional issues through state and federal habeas corpus proceedings, but have little or no legal representation to assist them. The funding available for

post-conviction attorneys is minimal.

A first consular intervention at this stage of the process may thus require additional resources. While a consulate may still be asked to submit an affidavit, it is also possible that it may need to recruit an attorney for the national or provide other forms of direct support. The prestige of representing the interests of a foreign consulate can be instrumental in persuading a law firm to take up the case *pro bono* (for the public good, without cost).

In 1992, the case of a Mexican national in Texas was entering federal habeas review. The attorneys representing him believed that there was substantial merit in his claim of innocence, but felt that they lacked the resources to adequately investigate and argue the case. The Mexican Consul General contacted a prominent law firm and urged it to take up the case. The firm agreed, and placed substantial resources at the disposal of a team of their best attorneys. Due to those efforts, the defendant was eventually released from prison after 15 years on death row. The courts concluded that his prosecution was based on tainted and coerced evidence. Without consular intervention, the outcome could well have been fatal.*

At any stage during the legal proceedings, the consulate may also be asked by the defense attorneys to submit an *amicus curiae*, or ‘friend of the court’ brief.* These briefs are provided to the court to aid its deliberations on issues of law. They are submitted by those who have expertise on the matter under review but who are not themselves parties to the legal dispute.

Many nations have submitted amicus briefs on behalf of their nationals, stressing the significance of consular assistance and the importance of compliance with the Vienna Convention, among other issues.* The preparation and filing of the brief will require legal counsel to represent the consulate. However, a lack of resources should not prevent meeting this request from the defense team. They may be able to recommend qualified attorneys to represent the consular interest at little or no cost. In addition, organizations such as the International Justice Project and Human Rights Research may be able to assist the consulate in obtaining *pro bono* counsel to prepare and file the brief.

An extensive library of briefs that can be readily adapted by amicus counsel for submission to the courts is contained in the full version of this guide. See *Overview*.

Another option may be to seek supporting amicus briefs from other governments or organizations. For example, in the famous case of Paraguayan national Ángel Breard, four nations submitted a joint amicus brief to the U.S. Supreme Court, reiterating the need for a domestic judicial remedy for violations of Article 36 in capital cases.* Other briefs were submitted in the Breard case by the International Union of Advocates, the American Branch of the International Law Association and a group of U.S. law professors specializing in treaty law. Five years later, when the case of Mexican national José Medellín was brought before the U.S. Supreme Court to seek enforcement of decisions by the International Court of Justice on Article 36 rights, more than 50 concerned nations participated as signatories to amicus briefs.*

The active participation of the consulate at this stage of the proceedings may well persuade other

organizations to intervene. More importantly still, it provides the courts with a clear indication that the consulate would indeed have intervened vigorously to assist its national, had it been promptly notified of their arrest. Every consulate also has a legitimate interest in protecting the rights of its nationals to receive due process of law and humane treatment. Consular amicus briefs may thus address other issues of concern under international law such as violations of extradition treaties, inadequate funding of the defense, discriminatory prosecution or inhumane forms of execution.

Among the organizations that may offer assistance if contacted by the consulate are state and national bar associations. A number of these organizations have programs to provide assistance for indigent prisoners.* They may also choose to intervene as a body because of the legal significance of consular notification in protecting the legal rights of foreign nationals facing prosecution. In the Medellín case, for example, supporting amicus briefs were filed by the American Bar Association and by a coalition of international lawyers' organizations.

Some nations have felt it necessary to make direct legal interventions during appellate proceedings, in order to uphold their sovereign rights under consular treaties. For example, the Polish consulate filed motions in the case of one of its nationals under sentence of death in Illinois. Poland maintained that it had legal standing in the case to uphold its sovereign rights under the Vienna Convention and the bilateral consular agreement with the United States.* Both Germany and Mexico filed amicus briefs supporting Poland's arguments. The death sentence was later set aside by a federal court, which found that the defendant's appointed trial lawyer had failed to provide adequate legal representation. In response to Poland's intervention, authorities in Cook County have since amended their procedures for processing all arrested foreigners, to ensure that each will be informed of their right to consular assistance no later than their first appearance before a judge. This reform came only as a result of one country's vigorous defense of consular rights.

6.5. Clemency

Every U.S. jurisdiction that retains the death penalty has also instituted some form of clemency procedure. Clemency is an executive review that takes place outside of the judicial process, usually after all normal avenues of appeal have been exhausted. Its purpose is to provide a non-judicial review of a death sentence, to ensure that the punishment is appropriate and valid in light of all of the circumstances of the case. Clemency review is the final opportunity to obtain a reduction of a death sentence and normally takes place shortly before the scheduled execution. Unlike the legal appeals, a petition for clemency may contain any information that might persuade the clemency authority to show mercy by commuting the death sentence. That relevant information could include: humanitarian concerns raised by a foreign national's consulate; a home government's principled opposition to the death penalty in general; or concerns over a violation of consular rights.

While executive clemency is comparatively rare, it is certainly not a wasted effort to pursue the commutation of a death sentence. Between 1977 and the close of 2007, U.S. jurisdictions carried out 1099 executions and 241 death sentences were commuted through executive clemency, a

ratio of approximately one commutation for every five executions. The review mechanisms vary widely from state to state, but each clemency process does offer some opportunity for consular intervention.* Perhaps the most notable example of the potential for executive commutation was the decision in 2003 by Governor George Ryan of Illinois to commute all 167 death sentences in that state because of systemic flaws in the capital justice system. In announcing his courageous decision, Governor Ryan noted:

Another issue that came up in my individual, case-by-case review was the issue of international law. The Vienna Convention protects U.S. citizens abroad and foreign nationals in the United States. It provides that if you are arrested, you should be afforded the opportunity to contact your consulate. There are five men on death row who were denied that internationally recognized human right. Mexico's President Vicente Fox contacted me to express his deep concern for the Vienna Convention violations. If we do not uphold international law here, we cannot expect our citizens to be protected outside the United States.

The consulate may also request a clemency intervention from the State Department, based on a violation of the VCCR and its harmful consequences. The State Department policy is to review these requests on a case-by-case basis and to intervene by requesting that clemency authorities give full consideration to the importance of Article 36 obligations. When Mexican national Osbaldo Torres was facing execution in Oklahoma, one aspect of Mexico's extensive clemency efforts was to request an intervention by the State Department. Announcing his decision to commute the death sentence, Governor Brad Henry noted that Mr. Torres had not been informed of his right to contact the Mexican Consulate. "I took into account the fact that the U.S. signed the 1963 Vienna Convention and is part of that treaty," the Governor said. "In addition, the U.S. State Department contacted my office and urged us to give 'careful consideration' to that fact."

Establishing an early diplomatic dialogue with State Department officials should be a priority whenever you learn of an Article 36 violation in a capital case, if only to establish the basis for a clemency appeal.

The drama of an imminent execution may also be used to generate publicity about the case or about the failure of local authorities to meet their consular obligations. Most clemency decisions are made by elected officials or their appointees, so a well-developed media campaign could be a useful strategy.* For example, the consulate could publicize an offer to incarcerate the national in his home country in exchange for clemency. Your press officer or the media services of your Foreign Ministry can be helpful in generating greater awareness of the grounds for mercy in the case, both within the USA and abroad. Clemency campaigns may also offer productive opportunities for the consulate to work with non-governmental organizations opposed to the death penalty, or with other foreign governments in joint initiatives.* The Presidency of the European Union has been particularly active in calling for clemency on behalf of foreign nationals facing execution in the United States who were denied their consular rights.⁷

⁷ Examples of European Union initiatives on the death penalty in the United States are available at: <http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#ActiononUSDeathRowCases>

6.6. Effective Consular Assistance: The Valdez Case

A consulate is uniquely placed to raise grounds for commutation based on the consequences of a Vienna Convention violation. Mexican national Gerardo Valdez Maltos was sentenced to death in Oklahoma in 1990 on a single count of first-degree murder. The Mexican Consulate did not learn of the case until April of 2001, just two months before his scheduled execution. Confronted with his imminent execution, the Mexican government immediately retained a team of lawyers and investigators to assist in preparing a clemency petition.

On 6 June 2001, the Oklahoma Pardon and Parole Board voted 3 to 1 in favor of recommending the commutation of Mr. Valdez's death sentence to life imprisonment without parole. The decision marked only the second such recommendation by the Board in the past 35 years. The Board heard newly discovered facts concerning Gerardo Valdez's background and medical history discovered due to Mexico's intervention, including evidence that he sustained brain damage from a life-threatening head injury as a teenager in Mexico as well as other head injuries as a child.

At the request of the Mexican government, the U.S. Department of State also sent a letter to the Board, asking it to give careful consideration during its clemency deliberations to Mexico's concerns. Other diplomatic initiatives by Mexico resulted in formal appeals for clemency from the European Union and a number of individual nations. Senior Mexican officials and defense attorneys then met with Governor Frank Keating of Oklahoma following the clemency recommendation, urging him to commute the sentence. Governor Keating issued a 30-day stay of execution three days before the scheduled execution, immediately after President Vicente Fox of Mexico made a personal plea for commutation of the death sentence.

Governor Keating later announced that he had rejected the parole board's recommendation for clemency. However, Mexican authorities continued to press the Governor to reconsider his decision. On 17 August, citing the "complicated questions of international law which have been presented by this case," the governor granted a second 30-day reprieve to permit "the Government of Mexico and attorneys for Valdez to conduct a thorough review of potential legal avenues available to them."

Armed with the compelling new evidence provided only through Mexico's intervention, defense attorneys employed the additional time obtained through the two reprieves to prepare and file a comprehensive new appeal in the Oklahoma courts. As a consequence, the Oklahoma Court of Criminal Appeals granted an indefinite stay of execution to Gerardo Valdez.

On 2 May 2002, the Oklahoma Court of Criminal Appeals ordered the setting aside of Mr. Valdez's death sentence and the convening of a new sentencing hearing. The Court based its decision on the failure of the appointed trial attorney to seek consular assistance and the potential impact of that assistance at the time of the trial. Had Mexico not intervened to support his clemency petition, there is no question that Gerardo Valdez would have been quietly executed on schedule. Prosecutors later agreed to forego seeking the death penalty and Mr. Valdez was re-sentenced to life imprisonment.

In a U.S. capital case, consular assistance can include:

- Visiting and corresponding with the detainee on an ongoing basis;
- Monitoring the treatment of the detainee in custody and protesting ill-treatment or lack of consular access;
- Contacting friends and family in the home country;
- Monitoring the performance of court-appointed attorneys;
- Ensuring that the detainee and the defense attorney are in regular contact;
- Resolving problems that may arise between the lawyer and the national;
- Interceding with prosecutors to avoid excessive punishment;
- Attending court hearings;
- If necessary, arranging for the hiring of competent counsel for the accused;
- Funding expert witnesses and investigators, where the courts deny adequate defense funding;
- Notarizing and conveying documents from the home country (e.g. medical, educational, military records);
- Assisting mitigation investigations in the home country;
- Bringing defense witnesses from the home country to testify;
- Providing an affidavit to the defense attorney regarding consular protection services provided by the consulate to its detained nationals;
- Testifying at court hearings into the treaty violation;
- Retaining an attorney to represent the consular interest;
- Submitting amicus briefs or motions based on any violations of international law;
- Participating directly or indirectly in appellate review;
- Petitioning for clemency;
- Hosting press conferences or assisting in publicity;
- Bringing claims before international courts and tribunals;
- Any other assistance necessary to ensure that the national receives fair, equal and humane treatment, throughout the legal proceedings.

6.7. Decisions of International Courts and Tribunals

Following the exhaustion of domestic legal remedies, several nations have sought to vindicate consular rights by bringing or supporting claims before international tribunals such as the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights.* The rulings of these bodies may provide an additional incentive for clemency or may be cited in legal appeals based on violations of Article 36.

After the execution in the United States of several Mexican nationals whose consular rights were

violated, Mexico sought and obtained an advisory opinion from the Inter-American Court of Human Rights, a judicial mechanism established by the Organization of American States (OAS). Supported by other Latin American nations, Mexico asserted that the rights to consular advisement, notification and access were indispensable to ensuring that arrested foreign nationals receive due process of law. The Court agreed, ruling in *Advisory Opinion OC-16** that compliance with Article 36 is essential to protect the fair trial rights of foreign nationals and that any execution of a foreigner who had been deprived of consular rights would be unlawful. The decision of the Court has since been endorsed by resolutions of the OAS General Assembly and the UN General Assembly.

Established by the OAS to monitor compliance by member States, the Inter-American Commission on Human Rights has the authority to consider and rule on petitions from individuals in the Americas alleging violations of their basic human rights. Following the Inter-American Court's decision, the Commission has ruled in several cases that death-sentenced foreign nationals in the United States whose consular rights were violated are entitled to new trials.*

In response to the imminent executions of their nationals in the USA, Paraguay, Germany and Mexico have each exercised their rights under the VCCR Optional Protocol to seek a binding judgment from the International Court of Justice (ICJ).* In *LaGrand* (Germany v. U.S.), the ICJ ruled that Article 36 confers individual rights on foreign detainees and that the United States may not deprive foreign nationals of the opportunity to challenge their convictions and sentences based on violations of their consular rights.* All consulates should be aware of this binding decision and seek to obtain a meaningful clemency hearing for any condemned foreign national on this basis, in cases where Article 36 rights were violated and the domestic courts have failed to provide meaningful remedies.

Avena and Other Mexican Nationals: A Landmark Ruling on Consular Rights

While the *LaGrand* decision 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 clarified other requirements under Article 36 and required a specific judicial remedy in a case brought by Mexico.

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 *LaGrand*, 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. Both Mexico and the United States were parties to the VCCR Optional Protocol Concerning the Compulsory Settlement of Disputes, which gives the ICJ binding authority to settle disagreements over the interpretation or application of the VCCR. Among other issues, Mexico asserted that the appropriate remedy 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 Article 36 and that the appropriate remedy in each case of a proven violation 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 *Avena and Other Mexican Nationals*.^{*} In a lengthy and complex decision issued on 31 March 2004, the ICJ found that the USA had breached various Article 36 obligations in 51 of the 52 individual cases submitted for its review. Clarifying and expanding on its previous ruling in *LaGrand*, the Court's final decision included these key points:

- In all 51 cases, U.S. courts are required to provide effective “review and reconsideration” of both the conviction and sentence, fully taking into account the Article 36 violation and its possible harmful effects on the outcome.
- Domestic rules limiting the introduction of claims not raised at trial or on initial appeal (“procedural default”) may not be invoked by the United States to prevent review and reconsideration of the Article 36 violations from taking place.
- Clemency review is not sufficient 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.”
- 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.”

But what about the cases of citizens of other nations whose consular rights were violated? Under the ICJ Statute, the *Avena* Judgment is final and without appeal, yet is legally binding only on the parties to the dispute (i.e., Mexico and the USA). Nonetheless, where the ICJ is interpreting the terms of a multilateral treaty ratified by over 170 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 required should apply to all foreign nationals 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. . . . 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.

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.

Thus, in every case in which foreign nationals have been convicted and received a severe sentence without strict compliance with Article 36 obligations and the domestic courts have failed to address the issue, their consulates should bring the *Avena* Judgment to the attention of the local authorities. Although the binding status of *Avena* under domestic law remains unresolved, the ICJ Judgment should always be presented as persuasive authority on the rights and potential remedies conferred on individual foreign nationals under Article 36.

Additional information on the *Avena* Judgment is available in the Expanded Supplement to this manual and from Internet sources. See Section 7.2, *On-line Material*.

6.8. 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 an emergency appeal 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 and endorsed a reasonable test to determine prejudice in the Torres case.*

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 violation of his consular rights. The Oklahoma Court of Criminal Appeals subsequently endorsed that conclusion, determining that Mr. Torres was prejudiced by the violation of his consular rights and would have been entitled to a new sentencing hearing had the Governor not already commuted his death sentence.

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 respect for the authority of the ICJ.* Mr. Medellín's appeal was supported by a wide range of amicus briefs from concerned nations, non-governmental organizations and former U.S. diplomats.*

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.* 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."

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", meaning that new legal developments since the Court decided to hear the case had now made it inappropriate to decide the merits of the questions he had presented. 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.

The Texas Court of Criminal Appeals was thus required to rule on the availability of the remedy that Mr. Medellín sought. The Texas court decided on 15 November 2006 that the President had exceeded his constitutional authority by ordering state court review of Mr. Medellín's case and that the *Avena* Judgment is not binding federal law. The ruling raises constitutional questions that have been appealed to the Supreme Court, but the case remained unresolved at the time this guide was printed. Consulates are advised to monitor the ongoing litigation of this highly publicized issue through coverage in the U.S. media.

The Presidential memorandum requiring state court compliance with *Avena* was issued on 28 February, 2005, the same day as the final briefs were to be filed with the Supreme Court in the Medellín case. The strategy behind this timing became visible almost immediately, when on 7 March 2005 the U.S. Government advised the United Nations of its withdrawal from the VCCR Optional Protocol Concerning the Compulsory Settlement of Disputes.

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.”⁸

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.

A further decision by the U.S. Supreme Court on Article 36 claims which has great significance for the future litigation of the issue, both in trial proceedings and on appeal, is *Sanchez-Llamas v. Oregon*. In that case, the Court combined the cases of two foreign nationals who had unsuccessfully raised Article 36 claims in state court proceedings (but who were not part of the *Avena* litigation). The Court 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?

By a 5 to 4 decision, the majority of the Court bypassed the first question, 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. Since “neither the Vienna Convention itself nor our precedents applying the exclusionary rule support suppression” on these grounds, the automatic exclusion of evidence is never an available remedy for an Article 36 violation. Although the Court should give “respectful consideration” to the findings 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 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.” In dissent, four of the Justices expressly found that Article 36 does confer individual rights, as the ICJ determined, and recognized that judicial remedies would be available for its violation.

The majority itself conceded that an Article 36 violation can be relevant to determining the admissibility of a defendant’s statements, and that other 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

⁸ U.S. Department of State, *Announcement: All Consular Notification Requirements Remain in Effect*, available at: http://travel.state.gov/news/news_2155.html

appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance.

Some courts have already begun to consider Article 36 violations in the context of motions to suppress a defendant's statement on other grounds, such as a breach of *Miranda* requirements. Defense attorneys will also undoubtedly raise the claim to seek "appropriate accommodations" from a trial court, such as motions to reconsider preliminary issues that were decided against the defendant without the benefit of consular involvement. Perhaps most importantly, the *Sanchez-Llamas* decision leaves for a future Court to decide whether Article 36 confers legal rights on individuals and the scope of any judicial remedies that may exist for its violation. Meanwhile, the "respectful consideration" to be accorded to the ICJ indicates that its interpretations of other aspects of Article 36 claims should always be presented as persuasive authority, particularly where those interpretations do not conflict with domestic law.

Because the Supreme Court's decision is limited in scope, defense attorneys will continue to seek additional remedies through the courts. That could include obtaining *habeas corpus* relief for Article 36 claims that were properly raised at trial, or lawsuits seeking damages for the failure of authorities to meet their treaty obligations.* Consular assistance and involvement both prior to trial and following a conviction will continue to be an essential component in those efforts to obtain just remedies for harmful violations of Article 36 rights.

Most recently, the US Supreme Court had occasion to hear a further appeal in the *Medellín* case. In a decision on March 25, 2008, the Justices ruled 6-3 that the President of the United States does not have the authority to order US states to relax their criminal procedures to obey a ruling of the ICJ. This decision has posed significant problems to the executive branch of the US government, and despite the US government's *amicus* brief supporting the petitioner, the Court held that the VCCR Optional Protocol (conferring compulsory jurisdiction on the ICJ), the ICJ Statute (declaring its compulsory judgments to be binding on the parties to the dispute, final and without appeal), or the UN Charter (declaring that UN member States undertake to comply with compulsory ICJ judgments) are not self-executing treaties.

In summary, according to the US Supreme Court, the ICJ decision in *Avena* cannot be enforced in the domestic courts because the treaties conferring jurisdiction on the ICJ to issue that decision are not self-executing. The Court recognized that the *Avena* Judgment is binding on the United States under international law, but neither the executive nor the judiciary has the constitutional power to implement non-self-executing treaties. Only Congress has the authority to implement the ICJ decision, by passing enabling legislation.

The consequences of this decision remain, as yet, uncertain. Nonetheless, it re-emphasizes the importance of a pro-active approach by consular officials in providing assistance to their nationals, within the framework of their national policy. Legal opportunities to correct the absence of such assistance are, at least in the short-term, likely to be limited.

On June 5, 2008, Mexico filed a Request for Interpretation of the Judgment delivered by the International Court of Justice (ICJ) in the case concerning *Avena and Other Mexican Nationals* (Mexico v. United States of America). Mexico invokes Article 60 of the Statute of the Court,

which provides that: “In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.” A request for interpretation opens a new case.

7. STRENGTHENING CONSULAR ASSISTANCE PROGRAMS

All consulates in the USA should undertake periodic reviews of their assistance programs. Following a basic checklist of questions can indicate what changes may be required. Other resources are readily available which can provide additional information, training and assistance.

- Use the enclosed 12-point checklist to review and assess your own consular assistance program.
- The American Civil Liberties Union has produced a multi-lingual pamphlet on the basic legal rights of foreign nationals in the United States.
- The U.S. Department of State provides a variety of resources that may be helpful to consular assistance programs.
- Material and practical assistance for consulates is available from Human Rights Research.
- Assistance for detained foreign nationals may also be available from other organizations, including cultural, religious and special interest groups.
- The Internet provides an increasingly important source of additional information and assistance.

***ALL TOPICS ADDRESSED IN MORE DETAIL IN THE EXPANDED SUPPLEMENT ARE INDICATED BELOW WITH AN ASTERISK [*]**

STRENGTHENING CONSULAR ASSISTANCE PROGRAMS

7.1. Reviewing Your Consular Assistance Program

Throughout this guide, we have provided numerous examples of the importance of timely consular assistance and the effectiveness of consular interventions as a safeguard of the legal and human rights of foreign nationals confronted by criminal prosecution. The following excerpt from the State Department manual on consular notification and access provides a good summary of the expectations that detainees, prisoners, attorneys and law enforcement officials may have when consulates are contacted regarding a serious case.

What can we expect a consular officer to do once notified?

A consular officer may do a variety of things to assist a foreign national. The consular officer may speak with the detained foreign national over the phone and/or arrange one or more consular visits to meet with the detainee about his/her situation and needs. A consular officer may assist in arranging legal representation, monitor the progress of the case, and seek to ensure that the foreign national receives a fair trial (e.g., by working with the detainee's lawyer, communicating with prosecutors, or observing the trial). The consular officer may speak with prison authorities about the detainee's conditions of confinement, and may bring the detainee reading material, food, medicine, or other necessities, if permitted by prison regulations. A consular officer frequently will be in touch with the detainee's family, particularly if they are in the country of origin, to advise them of the detainee's situation, morale, and other relevant information.

As the State Department also notes, the range and forms of assistance which consulates actually provide may vary:

The actual services provided by a consular officer will vary in light of numerous factors, including the foreign country's level of representation in the United States and available resources. For example, some countries have only an Embassy in Washington, DC, and will rarely be able to visit their nationals imprisoned in locations remote from there. Other countries have consulates located in many major U.S. cities and may regularly perform prison visits throughout the United States. Each country has discretion in deciding what level of consular services it will actually provide.

While we agree that consulates are not all equally endowed to provide consular assistance, we believe that each consular service in the USA has the potential to provide the most essential forms of assistance by ensuring that their available resources are properly directed. We encourage all consulates to undertake an assessment and evaluation of their current assistance programs. Consulates might begin a review of their consular policies and procedures by starting with the contents of this guide and then answering a series of relevant questions.

12 Point Checklist

1. What basic advice does the consulate provide to detained nationals, either by phone or in person? Does it open a file on every case of arrest or imprisonment reported to the consulate, including data on the time and nature of all communications concerning the case?
2. Are other mission staff aware of the standard advice consular case officers provide and the information they request when notified of a detention?
3. Is that advice available in written form and in the national's native language?
4. What procedures are in place to respond to after-hours requests or when the duty officer is unavailable?
5. If the consulate or embassy has an Internet site, does it include basic information about the rights of detainees and provide consular contact information?
6. Does the consulate have a reference copy of the U.S. Department of State manual for law enforcement on consular notification and access, along with any relevant state or local laws and regulations on consular rights?
7. Are consular officers familiar with the varying procedures for the appointment of defense attorneys (such as legal aid services) in each state within the consular district?
8. Are consular officers confident that local law enforcement agencies are aware of their consular obligations and know how to reach them? Has the consulate developed an ongoing relationship with local police departments, prosecutors, and lawyers' associations?
9. Does the consular mission maintain a dialogue with other consulates on consular assistance issues and share ideas or concerns with them?
10. How would the consulate respond to a request for assistance from a defense attorney? For example, could it provide a standard affidavit indicating the forms of assistance that you routinely provide to detained nationals, for use in court? Has the consulate developed a legal contingency plan for responding to a capital case?
11. Are there legal issues relating to consular assistance on which consular officers are unclear and for which they should seek legal advice? For instance, if two or more defendants in a case are co-nationals, how would the consulate render assistance to their respective (but competing) attorneys? If a detained national divulges information about the crime circumstances, what is the consulate's policy on disclosing that information to the defense attorney? Are all consular personnel aware of their duty not to disclose privileged information about a defendant to the police or prosecuting authorities?

12. Lastly, are consular personnel confident that the consulate's limited resources are directed to providing the most comprehensive possible assistance, relative to the circumstances of each case?

7.2. *Other Available Resources*

- ❖ A free publication from the American Civil Liberties Union provides clear and accurate information on many of the legal rights of foreign nationals when confronted by various U.S. law enforcement agencies. Following the recent mass detentions of foreign nationals in the United States on grounds of national security concerns, the ACLU issued a pamphlet entitled *Know Your Rights: What to Do If You're Stopped by the Police, the FBI, the DHS or the Customs Service*.

Readers will find answers to the questions: "What Constitutional Rights Do I Have?" "What If the Police or FBI Contact Me?" "What If I Am Not a Citizen and the DHS Contacts Me"? and "What Are My Rights At Airports?"

The free pamphlets may be downloaded in eight languages (in Adobe Acrobat format) from the ACLU website at:

<http://www.aclu.org/safefree/general/17444res20040528.html>

- ❖ *Human Rights Research* acts as a clearinghouse of information and contacts on consular rights issues in U.S. criminal cases. It offers a free electronic newsletter on recent developments, access to an extensive electronic library, contacts with attorneys, law professors, and NGOs with experience in this field. The organization also provides consulting services to consulates and defense attorneys on consular rights and other international law issues in death penalty cases. Its website includes a number of reference documents, including: international standards on consular rights; federal, state and local consular regulations within the USA; and resource guides for attorneys and consular officials. For more information, visit: <http://www3.sympatico.ca/aiwarren> or contact Mark Warren: telephone (613) 278-2280 e-mail: aiwarren@sympatico.ca
- ❖ Assistance for detained foreign nationals may also be available from other organizations, including cultural, religious, and special interest groups. For a detailed list of these groups in the USA by nationality, see: *The Vienna Convention, Consular Access and Other Assistance Available to Foreign Nationals: A Guide for Criminal and Immigration Lawyers*, by Lara A. Ballard, Columbia Human Rights Law Review (1998). Also available on-line at: <http://www.gacdl.org/download/viennaco.zip> .
- ❖ In some cases, jail or prison authorities have refused to allow consular access to prisoners or communications between the consulate and the detainee. The State Department's *Bureau of Consular Affairs* will undertake to remedy consular access problems, at the request of the affected diplomatic post. To register a complaint regarding consular notification or access, the consulate should contact the Office of Public Affairs and

Policy Coordination for Consular Affairs, CA/P, Room 6831, U.S. Department of State, Washington, DC 20520; telephone number 202-647-4415; facsimile number 202-736-7559.

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 factual circumstances or the legal posture of a case with State Department officials.

On-line Material

- U.S. Department of State manual for law enforcement on Article 36, covering common questions and answers, legal framework, notification forms and procedures:
http://travel.state.gov/law/consular/consular_636.html
- Data on death-sentenced foreign nationals in the USA and other background material:
<http://www.deathpenaltyinfo.org/article.php?did=198&scid=31>
- Material from the International Court of Justice on the *LaGrand Case*:
<http://www.icj-ij.org/docket/index.php?p1=3&p2=3&code=gus&case=104&k=04>
- Material from the International Court of Justice on the *Avena Case*:
<http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>
- Excerpts from the *Avena Judgment*, in question and answer format:
<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=mus&case=128&k=18>
<http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>
- Links to *Advisory Opinion OC-16* (Inter-American Court):
<http://www.corteidh.or.cr/opiniones.cfm> (Spanish language website)
<http://www1.umn.edu/humanrts/iachr/A/OC-16ingles-sinfirmas.html>
- Inter-American Commission rulings on consular rights:
<http://www1.umn.edu/humanrts/cases/99-03.html>
<http://www1.umn.edu/humanrts/cases/52-02.html>
- Human Rights Research data on consular rights, foreign nationals and the death penalty:
<http://www3.sympatico.ca/aiwarren>

APPENDIX: EXCERPTS FROM THE VIENNA CONVENTION ON CONSULAR RELATIONS

Ratified without reservations by the United States on November 24, 1969.

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 defense 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.