

RENDERED MEANINGLESS? SECURITY DETENTIONS AND THE EROSION OF CONSULAR ACCESS RIGHTS

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“Freedom of communication between consuls and their co-nationals may be regarded as so essential to the exercise of consular functions that its absence would render meaningless the establishment of consular relations.”¹

I. INTRODUCTION

Following the terrorist attacks of September 11, 2001, a worldwide pattern emerged of pervasive and prolonged detentions on broadly-defined national security grounds. Many provisions adopted to counter the increased threat of terrorism squarely conflict with human rights obligations, increasing the risk of torture, discriminatory treatment on the basis of national or ethnic origin, and the denial of fundamental due process.² The proliferation of new security measures has sanctioned the use of prolonged detention without charge and other profound restrictions on the rights of detainees, with an especially severe impact on foreign nationals suspected of terrorist activities. One troubling aspect of these draconian responses merits more attention than it has so far received: the widespread denial of timely consular access to foreigners held in restrictive detention, in plain violation of the Vienna Convention on Consular Relations (VCCR) and a host of other binding treaty obligations.

There is persuasive evidence that the universality of consular communication and access rights has eroded to a stunning degree over the past decade.³ Nations long in the forefront of demanding immediate consular contact with their own nationals abroad have relied on a loosely-defined “war on terror” to excuse the mass denial of consular visits to foreigners detained within their borders. Seizing on that dangerous

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1. LUKE T. LEE, *CONSULAR LAW AND PRACTICE* 436 (2d ed. 1991).
2. For a comprehensive overview of the human rights impact of anti-terrorism legislation and other recent restrictions, see Int’l Comm’n of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (2009), available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/Report-summary-of-the-eminent-jurists-panel-Report-of-the-Eminent-Jurists-Panel-2009.pdf>.
3. The recent proliferation of denials of timely consular communication and access on national security grounds is discussed in Parts III, V, VI, and VII of this Article.

precedent, other countries have ignored their consular notification obligations and innocent people have disappeared into the black hole of unlawful rendition. Just as disconcerting are the many recent cases in which access to security detainees has been grudgingly allowed, but only under conditions so oppressive that they eviscerate the crucial protective function of consular visits.⁴

However, there is also an emerging recognition of the need for mechanisms that balance legitimate security interests with safeguards for fundamental rights.⁵ Strengthening consular protection and responding effectively to denials of consular access are integral elements in that balancing process. Rebuilding this protective bulwark should thus be an issue of primary concern to governments, NGOs, and private citizens alike.

May a nation rely on national security concerns as an exception to its consular treaty obligations? Must consular access be allowed during a security detention, and under what conditions? These and other related questions cannot be answered without reference to the text and purpose of the VCCR: its lack of explicit language on some consular access concerns does not negate its value as a source of authority or as a point of analytical departure. Related fields of international law afford useful guidance and corroboration, such as the growing body of multilateral treaties addressing terrorism, human rights, and the treatment of prisoners. International court decisions provide yet another relevant source of law, as do the opinions of treaty monitoring bodies. The provisions of bilateral consular treaties offer an important but often overlooked source of authority on the contemporary understanding of consular notification and access obligations. Finally, examples of state practice provide real-world evidence of the right of consular access as it really is and not as it merely ought to be.

Restrictions on consular communication rights are not unique to any one country, nor are they an entirely recent development. The foreign services of many nations have encountered barriers to timely contact with their nationals in perilous custody abroad and have developed a variety of innovative responses, as have domestic commissions of inquiry and other

4. See, e.g., the illustrating cases discussed *infra* in Parts VI and VII.

5. One of the most recent acknowledgements of the need for new balancing mechanisms came in a speech given by President Obama at the National Defense University on May 23, 2013. Discussing the requirements for thwarting domestic terrorism plots, the President observed that “in the years to come, we will have to keep working hard to strike the appropriate balance between our need for security and preserving those freedoms that make us who we are. . . . And that means finally having a strong Privacy and Civil Liberties Board to review those issues where our counterterrorism efforts and our values may come into tension.” The White House Office of the Press Secretary, Remarks by the President at the National Defense University (May 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

expert bodies. This diversity of perspectives provides a rich source of ideas for adapting the venerable vehicle of consular protection to the rigors of a new and threatening global landscape.

II. THE RIGHT OF CONSULAR ACCESS

International law has long recognized the customary right of consulates to assist and protect nationals detained abroad.⁶ However, the ability of a consulate to provide effective aid is heavily dependent on prompt knowledge of the detention and timely access to the detainee. By the mid-twentieth century, bilateral consular treaties began to include detailed provisions on notification and access, such as a consul's right to "interview, communicate with, and advise any national" in the host country, to visit any national "who is imprisoned or detained," and to be "informed immediately by the appropriate authorities" when a national "is confined in prison awaiting trial or otherwise detained in custody within his consular district."⁷ Some treaties recognized a further sovereign right to "arrange for legal assistance" for detained nationals, as well as the detainee's right "at all times to communicate with the appropriate consular officer."⁸ As important as they were in shaping the modern contours of consular notification and access, these bilateral efforts were neither uniform in content nor universal in scope.

Adopted in 1963, the VCCR is widely recognized as the codification of customary international law on the establishment, functions, and rights of consulates.⁹ At present, 176 nations are parties to the VCCR,¹⁰ placing it among the most widely-ratified treaties in the world. The conclusion of the Convention in 1963 has been described as "undoubtedly the single most important event in the entire history of the consular institution," so that "there can be no settlement of consular disputes or regulation of consular relations, whether by treaties or national legislation, without reference or recourse to the Vienna Convention."¹¹ Its consular notification and access

6. For example, the U.S. Supreme Court recognized nearly two centuries ago that watching over "the rights and interests of heir subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which Consuls are deputed by their sovereigns . . ." *The Bello Corrunes*, 19 U.S. 152, 168 (1821).

7. Consular Convention, U.S.-Costa Rica, art. VII, Jan. 12, 1948, 1 U.S.T. 247.

8. Consular Convention, with Protocol of Signature, U.S.-U.K, art. 15, June 6, 1951, 3 U.S.T. 3426 [hereinafter Consular Convention, U.S.-U.K.].

9. For example, even before Canada ratified the VCCR in 1974, the then-Department of External Affairs stated that it regarded the Convention as "declaratory of international law." LEE, *supra* note 1, at 26.

10. *Vienna Convention on Consular Relations*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en (last visited Nov. 24, 2013).

11. LEE, *supra* note 1, at 27.

provisions are so essential to modern consular functions that the U.S. Department of State views the VCCR as “widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention.”¹²

Article 36 of the VCCR guarantees that, at the informed request of a detained foreign national, the consulate of the sending State will be notified of the detention “without delay.”¹³ The consulate is also accorded 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.”¹⁴ No time interval is indicated for granting consular access; but, like the other rights accorded, it “shall be exercised in conformity with the laws and regulations of the receiving State,” provided that these domestic rules “enable full effect to be given to the purposes for which the rights accorded under this article are intended.”¹⁵

Article 36 makes no distinction between different forms of detention: consular access is to be provided in all cases where a foreigner is “arrested or committed to prison or to custody pending trial or is detained in any other manner.”¹⁶ Applying the conventional rules of treaty interpretation to this phrasing indicates that the article means precisely what it says. In the absence of any qualifying language, the law of treaties requires that provisions “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms” used in the treaty, “in their context and in the light of its object and purpose.”¹⁷ Article 36 is intended to implement the core consular functions of “protecting in the receiving State the interests of the sending State and of its nationals . . . within the limits permitted by international law,” along with “helping and assisting” those nationals.¹⁸ The phrase “detained in any other manner” should therefore be read as requiring consular access to foreign nationals under *any*

12. Dep’t of State Telegram 40298 to the U.S. Embassy in Damascus (Feb. 21, 1975), *reprinted in* LEE, *supra* note 1, at 145.

13. Vienna Convention on Consular Relations art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

14. *Id.* art. 36(1)(c).

15. *Id.* art. 36(2).

16. *Id.* art. 36(1)(c). The consular right to visit and communicate with the detainee enshrined in Article 36(1)(c) is not conditional on the national’s decision to request consular notification under Article 36(1)(b). As the U.S. Department of State has instructed domestic law enforcement agencies, 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 or specifically tells you that he or she does not want to be visited or contacted by consular officers.” U.S. DEP’T OF STATE, CONSULAR NOTIFICATION AND ACCESS 33 (3d. ed. 2010), *available at* http://travel.state.gov/pdf/CNA_book.pdf.

17. Vienna Convention on the Law of Treaties art. 31(1), May 22, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

18. VCCR, *supra* note 13, art. 5(a), (e).

form of detention, regardless of the circumstances or charges. Furthermore, the consular right to arrange for the detainee's legal representation strongly indicates that consular access should be provided at a sufficiently early stage in the detention to enable full effect to be given to that right.

III. THE VCCR AND SECURITY DETENTIONS

In the weeks following the September 11 attacks, as many as 1,200 foreign nationals were taken into custody by authorities across the United States.¹⁹ Many were held without charge and in isolation from the outside world, and many were subjected to abusive treatment and harsh confinement conditions.²⁰ Although hundreds of the detainees were eventually deported for minor immigration violations, none were indicted on terrorism-related charges.²¹

At least seven countries "raised strong protests" over "the failure of the State Department to promptly notify countries whose citizens were being held," in apparent violation of the United States' VCCR obligations.²² "Nobody told us that they were being held," a Saudi embassy official declared.²³ "Until we heard from their lawyers or from their families, we had no idea."²⁴ At least one detainee died in custody, but his embassy was entirely unaware of his detention until contacted by journalists a week after his death.²⁵ Some U.S. authorities "continued to be very secretive about the people still being held," according to Yemen's ambassador.²⁶ "We feel there is legitimate concern from our side," he said.²⁷ "I'm sure Americans would be concerned if they were treated this way in another country, especially in countries that are with the US in the war on terrorism."²⁸ More than two months after the initial wave of detentions, diplomatic representatives of Lebanon and Egypt protested that they had still not been given the names of their nationals who remained in custody or told what charges they faced.²⁹ The U.S. Secretary of State responded by belatedly

19. See Human Rights Watch [HRW], *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, at 3 (Aug. 2002), available at <http://www.hrw.org/reports/2002/us911/USA0802.pdf>.

20. *Id.*

21. *Id.*

22. John Donnelly & Wayne Washington, *Diplomats Fault Lack of U.S. Notice on Many Detainees*, BOSTON GLOBE, Nov. 1, 2001, at A1.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. David E. Sanger, *President Defends Secret Tribunals in Terrorist Cases*, N.Y. TIMES, Nov. 30, 2001, <http://www.nytimes.com/2001/11/30/politics/30CIVI.html>.

assuring the Egyptian ambassador that those nationals “will be informed of their rights,” and that “Egyptian diplomats will be given access to the detainees.”³⁰

Half a world away, Kenyan authorities arrested some 150 individuals from at least eighteen countries in a border security operation in December of 2006.³¹ Suspected of links to terrorist groups, the detainees were held without charge for several weeks and denied consular contact.³² Approximately ninety suspects were then rendered to Somalia and on to Ethiopia, where they disappeared into secret custody.³³ A number of prisoners later reported that they were interrogated by U.S. intelligence officers during their ordeal.³⁴ One of the rendered detainees, a harmless Canadian businessman, was denied a consular visit for well over a year despite vigorous efforts by Canada.³⁵ He was later sentenced to life imprisonment, after a grossly unfair trial.³⁶

These and other mass security detentions raise crucially important questions under international law. Were the domestic authorities justified in denying consular notification and hindering consular access to the foreign detainees? Also, if the VCCR requires consular access to security detainees, when must it be granted?

There is every indication that the notification and access provisions of Article 36 are intended to be equally applicable to all forms of detention. While the article does not expressly state that its requirements override national security laws, a perceived ambiguity in a treaty’s text requires recourse to supplemental sources of interpretation such as its *travaux préparatoire*.³⁷ Any possible ambiguity vanishes when the drafting history is considered. During the International Law Commission (ILC) debate on the draft articles proposed by the Special Rapporteur on consular immunities (which contained no reference to consular notification), English jurist Sir Gerald Fitzmaurice proposed a new Article 30A that would enshrine the right to consular notification, communication, and visits

30. *Id.*

31. HRW, “*Why Am I Still Here?*” *The 2007 Horn of Africa Renditions and the Fate of Those Still Missing*, at 2 (Oct. 2008), available at <http://www.hrw.org/sites/default/files/reports/eafrica1008web.pdf>.

32. *Id.*

33. *Id.* at 3.

34. *Id.*

35. *Id.* at 18; see also Jim Bronskill, *Canadians Granted Access to Man Jailed in Ethiopia*, GLOBE AND MAIL (July 22, 2008), <http://www.theglobeandmail.com/news/national/canadians-granted-access-to-man-jailed-in-ethiopia/article1349229/>.

36. *Bashir Makhtal: Canadian Citizen Faces Life in Prison after Unfair Trial in Ethiopia*, AMNESTY INT’L (Nov. 8, 2012), <http://www.amnesty.ca/get-involved/take-action-now/bashir-makhtal-canadian-citizen-faces-life-in-prison-after-unfair-trial>.

37. See VCLT, *supra* note 17, art. 32.

“without delay” to nationals who were imprisoned, arrested, or detained in any other manner.³⁸ The sponsor asserted that “the proposed text was already included in a large number of existing consular conventions,” and that “the failure to observe those obligations was a prime cause of friction between countries and a source of frequent incidents and much controversy.”³⁹

Commenting on the proposed amendment, Yugoslav jurist Milan Bartos observed that “the practice in the majority of States was to inform the consul on the same day on which one of his nationals had been arrested.”⁴⁰ Other members of the ILC pointed out that a requirement of immediate notification and access “might conflict with the penal code of many countries,” which allowed for a period of incommunicado detention.⁴¹ Commissioner Edmonds of the United States replied: “The fact that, under the laws of some States, it was possible to isolate an accused person from his own lawyer was all the more a reason to safeguard the right of his consul to visit him.”⁴² After much discussion, the ILC decided to amend the proposed notification requirement to read “without undue delay,” in order to allow for “cases where it is necessary to hold a person incommunicado for a certain period for the purposes of the criminal investigation.”⁴³ Visitation rights were placed in a separate subparagraph, with no time limits attached to granting consular access.⁴⁴

Delegates raised objections during the VCCR drafting conference over the “undue delay” language, which was amended by deleting the word “undue,” precisely to avoid the implication “that some delay was permissible” in consular notification and in forwarding communications addressed to the consulate by the detainee.⁴⁵ In addition, the notification and visitation rights conferred under the article were initially made subject to the proviso that local laws and regulations “must not nullify these rights.”⁴⁶ An amendment successfully substituted the “full effect” language, over the vigorous objection of delegates who argued that the

38. *Summary Records of the 535th Meeting*, [1960] 1 Y.B. Int'l L. Comm'n 48, 48, U.N. Doc. A/CN.4/SER.A/1960 [hereinafter *535th Meeting*].

39. *Id.*

40. *Summary Records of the 534th Meeting*, [1960] 1 Y.B. Int'l L. Comm'n 42, 46, U.N. Doc. A/CN.4/SER.A/1960 [hereinafter *534th Meeting*].

41. *See, e.g., id.* at 42-44 (remarks of Commissioners Matarine-Daftary, Yokota, and Erim).

42. *Id.* at 47.

43. *Draft Articles on Consular Relations, with Commentaries*, [1961] 2 Y.B. Int'l L. Comm'n 92, 113, U.N. Doc. A/CN.4/SER.A/1961, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_2_1961.pdf.

44. *Id.* at 113.

45. *See* United Nations Conference on Consular Relations, Mar. 4-Apr. 22, 1963, *Official Records*, 85, U.N. Doc. A/CONF.25/C.2/L.107 (Vol. II) (Mar. 13, 1963) (United Kingdom: Amendments to Article 36).

46. U.N. Doc. A/CONF.25/L.34 (Apr. 16, 1963) (USSR: Amendment to article 36).

phrase would “modify the criminal law and regulations or the criminal procedure of the receiving state.”⁴⁷

Based on the ordinary meaning of the terms used in Article 36 and the drafting history of its provisions, its most plausible reading recognizes a right of consular contact with foreigners held in *any* form of detention. Moreover, no party to the VCCR has entered a reservation or understanding to the contrary.⁴⁸ The bedrock principle of treaty interpretation is that every treaty in force “is binding upon the parties to it and must be performed by them in good faith” and that a party “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁴⁹ Regardless of the presumed lawfulness of a preventive detention under the laws of the receiving State, consular officers thus possess a clear right under the VCCR to insist on rapid contact with detained nationals in any form of detention.

State practice subsequent to the adoption of the VCCR tends to support this interpretation. Denials of consular access were commonplace in Latin America during the 1970s and 1980s, for instance, where a number of countries had declared states of emergency that annulled civil liberties and authorized secret detentions.⁵⁰ In a 1976 protest over the incommunicado detention and alleged torture of U.S. citizens in Argentina, the United States directly linked the failure to give “full effect” to VCCR rights with the mistreatment of Americans in custody and emphasized that local laws cannot override these binding treaty requirements:

The United States government does not accept the view expressed in the Ministry’s note of Sept. 14 1976 . . . that article 36 (2) of the Vienna Convention recognizes the law of Argentina permitting incommunicado detention in the early stages of an investigation as a proper bar to consular

47. United Nations Conference on Consular Relations, Mar. 4-Apr. 22, 1963, *Official Records*, 38, ¶ 26, U.N. Doc. A/CONF.25/16 (Vol. I) (Apr. 17, 1963) (statement of Romania). *See also id.* at 38-39 (statement of Congo) (amendment “implied the revision of certain laws or regulations, which it would be difficult to carry out in practice”); *id.* at 40 (statement of U.S.S.R., rejecting the amendment because it would “force [signatories] to alter their criminal laws and regulations”).

48. *See Declarations and Reservations*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en (last visited Oct. 1, 2013).

49. VCLT, *supra* note 17, arts. 26-27.

50. For example, two American missionaries were detained by Salvadoran authorities in 1977 for taking a photograph of a police station, which was deemed to be a “national security installation” during a “state of siege.” The State Department lodged a protest note requesting the Salvadoran Minister of Foreign Relations to “elaborate expeditiously” as to “why the two United States citizens were not informed of their right to contact the Consulate . . . and why the Consulate was not officially informed of the detention of two United States citizens until approximately 28 hours afterward.” LUKE T. LEE & JOHN QUIGLEY, *CONSULAR LAW AND PRACTICE* 160 (3d ed. 2008) (quoting U.S. DEP’T OF STATE, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 290 (1977))

access. It is the view of the United States Government that under Article 36 (2) the Government of Argentina is obligated to enable full effect to be given to the purpose of protecting a national from improper treatment, since this is a primary purpose for according the right of access. Moreover, for the same reason, nothing in local law can override the requirement to advise the American citizen without delay of that citizen's right under article 36(1)(b) relating to access.⁵¹

Addressing concerns over the detention of U.S. citizens in Mexico, the State Department declared that "immediate consular access is the linchpin on which hangs in large measure the solution of many of our problems," because early access "can go a long way toward guaranteeing the prisoner against mistreatment and forced statements at the time of arrest, along with making available to him information about responsible legal counsel and judicial procedures."⁵²

Other countries also insist on prompt consular access to detainees notwithstanding domestic laws permitting incommunicado detentions. In 2000, two Canadian citizens were arrested by the Yugoslav army while returning to Kosovo from a holiday weekend on the Montenegrin coast.⁵³ Within three days of the detention, the Canadian Minister of Foreign Affairs called in the Yugoslav ambassador to reiterate Canadian demands for "immediate consular access to these individuals" and "stressed to the Yugoslav Foreign Ministry [that] their government is obliged, under the Vienna Convention, to grant Canadian officials immediate consular access to the detainees."⁵⁴ In a related incident, a British representative informed the U.N. Security Council that "the delay of 10 days between arrest and the permission of consular access was unacceptable" and repeated Britain's previous demand that the Yugoslav authorities "immediately release the men or bring charges."⁵⁵

The primary judicial authority for the interpretation and application of Article 36 is the International Court of Justice (ICJ), which has compulsory jurisdiction to resolve disputes between VCCR parties that are also

51. *Protest Over Treatment of U.S. Citizens in Argentina*, U.S. DEPARTMENT OF STATE (Oct. 21, 1976), <http://foia.state.gov/Search/results.aspx?searchText=%22Protest+Over+Treatment%22&beginDate=&endDate=&publishedBeginDate=&publishedEndDate=&caseNumber=>.

52. *U.S. Citizens Imprisoned in Mexico: Hearings before the Subcomm. on Int'l Political and Military Affairs of the H. Comm. on Int'l Relations*, 94th Cong. 6 (1975) (statement of Hon. Leonard F. Walentynowicz, Administrator, Bureau of Security and Consular Affairs, Department of State).

53. Can. Dep't of Foreign Affairs and Int'l Trade, *Axworthy Demands Immediate Consular Access to Detained Canadians in Yugoslavia* (Aug. 4, 2000), available at http://web.archive.org/web/20010415164645/http://198.103.104.118/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/103608.htm.

54. *Id.*

55. *Britain Slams Yugoslavia in Hostage Crisis*, HR-NET (Aug. 25, 2008), available at <http://www.hri.org/news/balkans/rferl/2000/00-08-25.rferl.html#19>.

signatories to the treaty's optional dispute settlement mechanism.⁵⁶ Although the ICJ has resolved important elements of Article 36 rights and the remedies that must be provided for their violation, it has not squarely addressed the question of consular contact with detainees under preventive or incommunicado detentions. The ICJ has, however, indicated that even the most irregular forms of detention (such as hostage-takings of diplomatic personnel done with the implicit approval of the receiving State) are nonetheless subject to Article 36 requirements, and that denials of consular contact "engage the responsibility" of the receiving State "under international law" so that it must "immediately take all steps to redress the situation."⁵⁷

The ICJ has also declared that the customary consular function of "protecting, assisting and safeguarding the interests of nationals" is enshrined in the VCCR, and that the purpose of those functions "is precisely to enable the sending State, through its consulates, to ensure that its nationals are accorded the treatment due to them under the general rules of international law as aliens within the territory of the foreign State."⁵⁸ While the ICJ has not defined the precise requirements for timely consular access, nothing in its Article 36 jurisprudence indicates that it would accept an exception to the "detained in any other manner" requirement, let alone countenance a denial of access in cases of internationally unlawful detention.

Other international courts have more directly addressed the relationship between access to consular assistance and arbitrary detentions. The Inter-American Court of Human Rights has observed that foreign detainees have the right of "effective access to communication with the consular official" and that prompt access "constitutes a mechanism to avoid illegal or arbitrary detentions from the very moment of imprisonment and, at the same time, ensures the individuals right to defense."⁵⁹ In another case, the Inter-American Court found that denial of the right to consular notification violated due process, since the consul may assist the detainee in

56. See Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes art. 1, Apr. 24, 1963, 596 U.N.T.S. 487 (declaring that disputes arising between the parties over the "interpretation or application" of the VCCR "shall lie within the compulsory jurisdiction of the International Court of Justice").

57. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶ 95(2), (3) (May 24). See also *id.* ¶ 67 (finding that the "inaction of the Iranian Government by itself constituted clear and serious violation of Iran's obligations to the United States" under, *inter alia*, Articles 5 and 36 of the VCCR).

58. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Order, 1979 I.C.J. 7, ¶ 19 (Dec. 15).

59. *Velez Loo v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 153 n.157 (Nov. 23, 2010).

different acts of defense, including “the observation of the defendant’s situation while he is imprisoned.”⁶⁰

Determining precisely when a delay in consular communications becomes so prolonged as to be unacceptable may well depend on the circumstances of an individual case, including the reasons for the delay, the form of detention involved, and the risk to the detainee’s well-being or legal rights. In all cases, the countdown to an unreasonable delay begins “from the moment he or she is deprived of liberty by a foreign governmental agency or authority and is not free to leave.”⁶¹ Any detention without consular access lasting more than a matter of days should always be treated as an impermissible breach of Article 36. As the ICJ noted in a related context, “the clarity of those provisions, viewed in their context, admits of no doubt.”⁶²

IV. PROMPT CONSULAR ACCESS: OTHER LEGAL SOURCES

Article 73 of the VCCR recognizes that “the provisions of the present Convention shall not affect other international agreements in force” and that nothing in the VCCR “shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.”⁶³ Bilateral consular conventions negotiated after the VCCR offer an important source of authority on the actual understanding and practice of States on issues such as consular contact with detainees during various forms of detention.

At least fifty post-VCCR bilateral consular treaties contain explicit notification or access timelines. The treaties were signed between 1964 and 2008 and involve thirty-nine parties, representing nations on every continent and employing a wide range of political and judicial systems.⁶⁴ No single formula for consular notification and access prevails within this diverse body of bilateral instruments, even among those that use the “without delay” language of the VCCR. The shortest maximum timeframe for consular *notification* is within forty-eight hours of the detention,⁶⁵ while the longest is within ten days.⁶⁶ The shortest maximum timeframe for

60. *Acosta Calderon v. Ecuador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 129, ¶ 3 (June 24, 2005).

61. 7 U.S. DEP’T OF STATE, *Educating*, in FOREIGN AFFAIRS MANUAL § 421.2-2 (2004).

62. *LaGrand Case* (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, ¶ 77 (June 27).

63. VCCR, *supra* note 13, art. 73.

64. The full tabulation of the notification and access requirements in the fifty treaties is available from the author, at mwarren@xplornet.com.

65. Consular Convention, Bulg.-Greece, art. 28, Apr. 24, 1973, 965 U.N.T.S. 245; Consular Convention with Protocols, U.S.-Rom., art. 22, July 5, 1972, 24 U.S.T. 1317 [hereinafter Consular Convention, U.S.-Rom.).

66. Consular Convention, Bulg.-Fr., art. 33, July 22, 1968, 747 U.N.T.S. 424.

consular *access* is within three days of a detention⁶⁷ and the longest is within fifteen days.⁶⁸ A clear majority of the fifty treaties require notification of the consulate within three days of a detention⁶⁹ and nearly 90% of the reviewed agreements require notification within no more than five days.⁷⁰ Similarly, a majority of the treaties require consular access within five days or less,⁷¹ while 82% of the treaties stipulate access within no more than one week of the detention.⁷²

None of the fifty treaties contain any language restricting the right of consular notification and access based on the form of detention under which the national is held. While there is no universal temporal interpretation of prompt consular access, the general requirement is that sending States will receive access to detainees shortly after notification takes place. There is also a consistent expectation in the reviewed agreements that notification and access shall take place expeditiously, with the treaty formula merely providing the permissible limits to immediacy.⁷³

More than a dozen multilateral treaties adopted after the VCCR also contain provisions facilitating consular assistance when foreigners are detained.⁷⁴ Particularly relevant are the series of treaties addressing terrorism-related offences, most of which state in mandatory terms that detainees shall be entitled to “communicate without delay” with their consular representatives, to be “visited by a representative of that State,” and that local laws and regulations “must enable full effect to be given to the purposes” for which these rights are accorded.⁷⁵ None of the anti-

67. See Convention on Consular Functions, Arg.-It., art. 14, Dec. 9, 1987, 1577 U.N.T.S. 219; Consular Convention, Greece-Pol., art. 41, Aug. 30, 1977, 1138 U.N.T.S. 406.

68. Consular Convention, Bulg.-Fr., *supra* note 66, art. 33.

69. Thirty out of fifty treaties, or 60%.

70. Forty-four out of fifty treaties, or 88%. The remaining treaties in the group either provide no timeframe for notification or specify maximum limits exceeding five calendar days.

71. Twenty eight out of fifty treaties, or 56%.

72. Forty-one out of fifty treaties, or 82%, require access within one week of the detention.

73. The treaties typically speak of notification immediately or without delay, but “within” or “not later than” a given number of days, and of access within a specified time interval after notification, indicating that the stated intervals are the maximum permissible delay. See, e.g., Consular Convention, U.S.-Rom., *supra* note 65, art. 22(1) (consular notification “without delay and, in any event, not later than after two days”); Consular Convention, U.S.-Hung., art. 41(3), July 7, 1972, 24 U.S.T. 1141 (consular access “at latest after the expiry of four days” from the detention).

74. See, e.g., Convention on the Safety of United Nations and Associated Personnel art. 17(2), Dec. 9, 1994, 2051 U.N.T.S. 363; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons art. 6(2), Dec. 14, 1973, 1035 U.N.T.S. 167; Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 7, Dec. 18, 1990, 220 U.N.T.S. 3.

75. Examples of U.N. instruments containing these requirements include: Convention for the Suppression of Terrorist Bombings art. 7, Dec. 15, 1997, 2149 U.N.T.S. 256; Convention for the Suppression of the Financing of Terrorism art. 9, Dec. 9, 1999, 2178 U.N.T.S. 197; Convention

terrorism treaties recognize or imply any exceptions to the rights of consular communication and visits on the basis of national security detentions or for any other reason. No nation has attached a limiting reservation to any of these provisions.⁷⁶ The most recently adopted anti-terrorism conventions repeat Article 36 of the VCCR virtually verbatim.⁷⁷ As the explanatory report for one such treaty notes, it “provides for a set of rights relating to the Vienna Convention on Consular Relations (see Article 36, paragraph 1) which are self-explanatory and shall be exercised in conformity with the laws of the Party unless they do not enable full effect to be given to the purposes for which the rights are intended”⁷⁸

A number of these treaties also make a direct connection between the right to prompt consular contact and the provision of other legal rights and safeguards to the detained foreigner. For example, the Convention on the Safety of United Nations and Associated Personnel expressly links an accused foreigner’s right to consular communication without delay with the right to “fair treatment, a fair trial and full protection of his or her rights at all stages of the investigations or proceedings.”⁷⁹ Similarly, the Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism provides four specific due process rights to those facing prosecution, in this order: the right of consular communication without delay; to be visited by a consular representative; to be represented by legal counsel of one’s own choosing; and the right to be informed of the preceding rights.⁸⁰

Reference by consular officers to the visitation provisions in anti-terrorism treaties may be useful in cases where the detaining state either has not ratified the VCCR or does not generally adhere to its requirements in security detention cases, but is a party to the anti-terrorism instrument. For example, 166 nations are parties to the International Convention for the Suppression of Terrorist Bombings, Article 7 of which restates the

for the Suppression of Acts of Nuclear Terrorism art. 10, Apr. 13, 2005, 2445 U.N.T.S. 142; and the Convention Against the Taking of Hostages art. 6, Dec. 17, 1979, 1316 U.N.T.S. 205. Regional instruments include: OAU Convention on the Prevention and Combating of Terrorism art. 7, July 14, 1999, 2219 U.N.T.S. 179; and the Council of Europe Convention on the Prevention of Terrorism art. 15, May 16, 2005, C.E.T.S. No. 196.

76. Based as these provisions are on Article 36 requirements, their multiplicity in other treaties and the absence of any objections indicates “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,” under Article 31(3)(b) of the Vienna Convention on the Law of Treaties. VCLT, *supra* note 17, art. 31(3)(b).

77. See Convention for the Suppression of Acts of Nuclear Terrorism, *supra* note 75, art. 10(3); Council of Europe Convention on the Prevention of Terrorism, *supra* note 75.

78. *Council of Europe Convention on the Prevention of Terrorism: Explanatory Report*, COUNCIL OF EUR., <http://conventions.coe.int/Treaty/EN/Reports/Html/196.htm> (last visited Oct. 2, 2013).

79. See Convention on the Safety of United Nations and Associated Personnel art. 17, Dec. 9, 1994, 2051 U.N.T.S. 363.

80. Convention on the Prevention and Combating of Terrorism (Protocol of Algiers) art. 7(3), July 14, 1999, 2219 U.N.T.S. 213.

notification and visitation rights under VCCR Article 36 (including the “full effect” requirement).⁸¹ Nations bound by this treaty include many where the denial of prompt or ongoing consular access has been a recurring problem, including Syria, Israel, and the Sudan.⁸²

There is a growing recognition in human rights treaty law that access to consular assistance is a crucially important safeguard to prevent torture, “disappearances,” and other grave violations when individuals are held in restricted detention. For instance, the International Convention for the Protection of All Persons from Enforced Disappearance⁸³ has been signed by ninety-three nations.⁸⁴ Article 17(1) of the Convention declares that “no one shall be held in secret detention” and outlines six essential safeguards that must be established by legislation to prevent secret custody.⁸⁵ The list includes a guarantee that “any person deprived of liberty shall be authorized . . . if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law.”⁸⁶

Human rights standards adopted by the U.N. General Assembly consistently recognize the right of all detainees to rapid consular notification and communication. The U.N. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment⁸⁷ provide the most detailed and contemporary guidance. Principle 16(2) states that foreign detainees shall be “promptly informed” of the right “to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national”⁸⁸ Under Principle 16(4), these notifications “shall be made or permitted to be made without delay,” although the competent authority may “delay a notification for a reasonable period where exceptional needs of the investigation so

81. Convention for the Suppression of Terrorist Bombings, *supra* note 75, art 7.

82. See, e.g., U.S. Dep’t of State, Bureau of Consular Affairs, *Learn About Your Destination*, U.S. PASSPORTS & INT’L TRAVEL, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1035.html (search each specific country) (last visited Jan. 13, 2013) (“Although Syria is a signatory to the Vienna Convention on Consular Relations, Syrian authorities generally do not notify the U.S. Embassy of the arrest of a U.S. citizen until weeks after the arrest, if at all.”); (in cases of U.S. citizens arrested in Israel for security offenses, the “U.S. Consulate General and the U.S. Embassy sometimes are only notified of such arrests after lengthy delays. Even after notification, consular access to the arrested individual may be delayed.”); (warning that “it is not unusual that the U.S. Embassy is not notified by the Government of Sudan of the arrest of a U.S. citizen. Even if notified, the U.S. Embassy is often not allowed access to arrested/detained U.S. citizens.”).

83. G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006).

84. *International Convention for the Protection of All Persons from Enforced Disappearance*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-16&chapter=4&lang=en (last visited Nov. 24, 2013).

85. G.A. Res. 61/177, art. 17(1), U.N. Doc. A/RES/61/177 (Dec. 20, 2006).

86. *Id.*

87. G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988).

88. *Id.* princ. 16(2).

require.”⁸⁹ Importantly, Principle 15 clarifies that, notwithstanding the delay provided for in exceptional circumstances, “communication of the detained or imprisoned person with the outside world . . . shall not be denied for more than a matter of days.”⁹⁰

It is beyond reasonable question that any protracted delay in, or outright denial of, consular access would be “in violation of the principles of international law and as such wrongful.”⁹¹ That understanding does not always translate into immediate access to a detainee, in the sense of no delay whatsoever. State practice varies widely, and some nations interpose a requirement that the consulate must first apply for a visit or may choose to notify consulates by letter.⁹² It may thus take several days for consular access to be provided, even in the absence of new security restrictions. Nonetheless, any delay in according consular access rights beyond a few days—including during a security detention—may properly form the subject of a consular protest or other remedial steps.

V. PROTESTING AND PREVENTING CONSULAR ACCESS VIOLATIONS

Protests over denials of consular access have long been standard elements of state practice; this process of protest and response indicates the development of a norm of customary international law.⁹³ The United States, for example, has instructed its consular posts around the world to file an immediate protest if another country fails to notify the consular post within seventy-two hours of the arrest of a U.S. citizen, because “[p]rompt notification is the necessary first step in obtaining early access to the arrestee.”⁹⁴ In countries where VCCR provisions are applicable, posts are instructed to “reference Article 36 of the VCCR in the protest.”⁹⁵

89. *Id.* princ. 16(4).

90. *Id.* princ. 15.

91. BISWANATH SEN, *A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE* 372 (3d rev. ed. 1988).

92. According to a State Department survey of actual state practice, “in a number of countries, U.S. consular officials must receive prior permission from a prosecutor, a judge, or even one or more ministries to speak with or visit a detainee during the investigative phase of the criminal case” and consulates in “countries that readily grant consular access may not receive consular notification . . . for several days,” where notification by letter is the norm. *Declaration of Ambassador Maura A. Harty Concerning State Practice in Implementing Article 36(1) of the Vienna Convention on Consular Relations* (Oct. 28, 2003), available at <http://www.cesarferro.info/Harty.PDF>.

93. LEE, *supra* note 1, at 136. See also Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L.J. 719 (1995) (discussing pre-VCCR protests as examples of state custom).

94. 7 U.S. DEP'T OF STATE, *Failure to Notify*, in *FOREIGN AFFAIRS MANUAL*, *supra* note 61, § 426.2-1; 7 U.S. DEP'T OF STATE, *Notification*, in *FOREIGN AFFAIRS MANUAL*, *supra* note 61, § 421.

95. 7 U.S. DEP'T OF STATE, *Notification*, *supra* note 94.

Security detentions are no exception to this long-standing norm.⁹⁶ When ten Pakistani students were arrested in the United Kingdom on suspicion of plotting terrorist attacks, Pakistan's High Commissioner in London "issued a formal complaint after British officials refused to reveal details of the suspects' identities or grant Pakistani diplomats consular access to the men."⁹⁷ An unnamed "Whitehall security source" reportedly said that counter-terrorism officers wished to complete preliminary interviews of the men before granting consular access to them.⁹⁸ Charges against the ten students were later dropped due to lack of evidence and they were transferred to the U.K. Border Agency for deportation on grounds of national security.⁹⁹ Consular access was finally granted more than a month after their detention. When three of the students complained during the consular visit that they were being held with hardened criminals in a high security prison while awaiting deportation, the High Commissioner prevailed upon British authorities to relocate the students to their previous detention facility.¹⁰⁰ Indian officials encountered a similar month-long delay when they requested consular access to a national held on suspicion of involvement in an attempt to bomb Glasgow Airport.¹⁰¹

This conflict with domestic authorities over prompt consular access is a telling example of the growing tension in many countries between national security legislation and treaty obligations. Under the provisions of the Police and Criminal Evidence Act (PACE), law enforcement authorities in the United Kingdom are required to advise detained or arrested foreigners "as soon as practicable" of their treaty-based right to consular communication and notification.¹⁰² A request for consular contact should also be "acted upon as soon as practicable."¹⁰³ Consular officers may, if the detainee agrees, "visit one of their nationals in police detention to talk to them" and "arrange for legal advice"; those visits "shall take place out of the hearing of a police officer."¹⁰⁴ Significantly, "the exercise of the rights

96. See LEE, *supra* note 1, at 148-49, 151-54 (citing examples).

97. Tim Shipman, *Pakistan Condemns Home Office Over Student Terror Arrests*, DAILY MAIL (Apr. 16, 2009), <http://www.dailymail.co.uk/news/worldnews/article-1170661/Pakistan-condemns-Home-Office-student-terror-arrests.html>.

98. *Id.*

99. *Three Pak Students Shifted to Manchester*, NATION (May 21, 2009), <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/Politics/21-May-2009/Three-Pak-students-shifted-to-Manchester>.

100. *Id.*

101. *India Secures Consular Access to Sabeel Ahmed*, TIMES INDIA, July 31, 2007, http://articles.timesofindia.indiatimes.com/2007-07-31/uk/27979658_1_consular-access-sabeel-ahmed-glasgow-airport.

102. Police and Criminal Evidence Act (PACE) 1984, 1991, c. 60, Code H, § 1.14 (U.K.).

103. *Id.* Code H, § 7.1.

104. *Id.* Code H, § 7.3.

in [PACE] may not be interfered with,” even if the foreign national has been detained under the highly restrictive provisions of the Terrorism Act of 2000.¹⁰⁵ These provisions are all very commendable, except for the absence of any specific timelines on when consular access must be granted. Moreover, the 2006 amendments to the Terrorism Act increased the permissible duration of detention without charge from fourteen to twenty-eight days, with the opportunity for additional extensions.¹⁰⁶ That change may well have dealt a body blow to the determination of when it might be “practicable” to act on a request for consular notification and visits. In any event, the language of the Terrorism Act does nothing to alleviate possible confusion or to prevent deliberate restrictions on consular visits, unlike the very explicit (albeit limited) notification and access guarantees in New Zealand’s Terrorism Suppression Act 2002.¹⁰⁷

British diplomats faced their own timely access challenge in 2011, after Eritrea detained four British nationals who were providing anti-piracy protection to merchant shipping in the Gulf of Aden and refused all requests for consular contact.¹⁰⁸ Five months into their detention, the Foreign and Commonwealth Office announced that high-level interventions to secure access had been rejected and that it had thus “been left with no alternative than to take a more direct approach” to resolving the problem.¹⁰⁹ Eritrean diplomats were forbidden to travel outside of the London area, and its embassy was instructed to suspend, “immediately and in full,” the collection of a tax on Eritrean nationals living in the United Kingdom.¹¹⁰ Eritrea responded with its own public statement, alleging that the four nationals were likely guilty of planning acts of terrorism, sabotage, and espionage.¹¹¹ Two days later, the Foreign Office announced that the detainees were “able to leave Eritrea and c[ould] be reunited with family and friends,” while expressing gratitude “to the Government of the State of

105. *Id.* Code H, n.7A.

106. Home Office, *The Terrorism Act 2006*, GOV.UK, § 23 (Apr. 26, 2011), <https://www.gov.uk/government/publications/the-terrorism-act-2006>.

107. Under section 66(2) of the Act, a person taken into custody expressly for prosecution or extradition under one of the international terrorism conventions will be promptly informed “that he or she is entitled, and must be permitted, (a) to communicate without delay with the nearest appropriate representative of the relevant State; and (b) to be visited by a representative of the relevant State.” *Terrorism Suppression Act 2002*, § 66(2) (N.Z.), <http://www.legislation.govt.nz/act/public/2002/0034/25.0/DLM153345.html>.

108. Foreign & Commonwealth Office, *Foreign Office Concern at Being Denied Consular Access to Detainees in Eritrea*, GOV.UK (May 26, 2011), <https://www.gov.uk/government/news/foreign-office-concern-at-being-denied-consular-access-to-detainees-in-eritrea>.

109. *Id.*

110. *Id.*

111. Zoe Flood, *Eritrea Accuses Four Detained Britons of ‘Espionage’ and ‘Terrorism,’* TELEGRAPH, June 10, 2011, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/eritrea/8568409/Eritrea-accuses-four-detained-Britons-of-espionage-and-terrorism.html>.

Qatar for helping facilitate their return.”¹¹² The statement added, “We remain concerned however that at no time did the Eritreans respond to our requests for consular access and will continue to raise this matter with them.”¹¹³

Iran took a similar position on immediate access after the U.S. military raid in January of 2007 on its asserted consulate in northern Iraq. Citing the VCCR, the Iranian Foreign Ministry declared that the United States had “violated Iran’s right with refusal to allow consular access to its nationals immediately, which is contradictory with regulations respected by civilized nations.”¹¹⁴ Iraq released the five detained Iranians two years later, immediately after their transfer from U.S. to Iraqi custody.¹¹⁵

After two weeks of intense diplomatic pressure by the Philippine Foreign Ministry, Malaysian authorities granted consular access to more than 100 detained Filipinos, including eight held on terrorism charges.¹¹⁶ “We want to give consular assistance to our people there. That’s why we have been insisting to Malaysia to give access to these Filipinos under the Vienna Convention on Consular Relations,” a spokesperson said, adding that the Foreign Ministry had sent at least four notes verbale to Malaysia regarding its request.¹¹⁷ “It is very important to have full access to the eight and the other Filipino detainees . . . to know their conditions and make sure that their rights are protected,” the spokesman stated.¹¹⁸

Addressing obstructions of consular communication in security detention cases has sometimes helped to dissolve deadlocks between the sending and receiving States on a wider range of issues. In 2012, Kim Young-hwan, a prominent South Korean campaigner for democracy in North Korea, was detained in China along with three colleagues and charged with “endangering national security.”¹¹⁹ South Korean officials denounced the charges as politically motivated and accused China of

112. Foreign & Commonwealth Office, *Foreign Office Welcomes Release of British Men from Eritrea*, GOV.UK (June 12, 2001), <https://www.gov.uk/government/news/foreign-office-welcomes-release-of-british-men-from-eritrea>.

113. *Id.*

114. *Embassy Condemns Detention of Iranian Diplomats by US*, PAYVAND IRAN NEWS (May 23, 2007), <http://www.payvand.com/news/07/may/1281.html>.

115. *Iranians Held in Iraq Since 2007 Released*, CNN (July 9, 2009) <http://www.cnn.com/2009/WORLD/meast/07/09/iraq.iranians.released/index.html>.

116. Angela Casauay, *Malaysia Grants PH Access to Detainees*, RAPPLER (Mar. 22, 2013), <http://www.rappler.com/nation/24391-malaysia-grants-consular-access-to-8-detained-pinoy>.

117. *Id.*

118. *Malaysia Grants Access to Detained Filipinos in Sabah*, SUN STAR, Mar. 22, 2013, <http://www.sunstar.com.ph/breaking-news/2013/03/22/malaysia-grants-access-detained-filipinos-sabah-274238>.

119. Choe Sang-Hun, *Relations Tested in Case of South Korean Activist Detained in China*, N.Y. TIMES, May 31, 2012, <http://www.nytimes.com/2012/06/01/world/asia/south-korean-democracy-campaigner-is-detained-in-china.html>.

violating the detainee's human and consular rights, while international rights activists and the European Parliament demanded Kim's release.¹²⁰ Kim and his colleagues were freed after four months of captivity and alleged that they had been tortured.¹²¹ South Korean authorities promptly announced that they planned to revive stalled discussions over a bilateral consular agreement that would enhance their consular access rights in China.¹²² The Foreign Ministry also declared that it was ordering consular interviews with all 625 Koreans incarcerated in China, to investigate whether they too had been abused.¹²³ A month after the announcement, renewed bilateral talks resulted in the establishment of a hotline on consular affairs between the two countries "to swiftly and smoothly cope with major consular issues," such as alleged abuses in custody or denials of prompt access to detainees.¹²⁴

Responding to concerns over enhanced security screening of foreign nationals disembarking at U.S. airports, a group of fourteen consulates persuaded U.S. immigration authorities at the Newark International Airport to install posters providing detainees with the telephone numbers for consular hot lines.¹²⁵ The intervention came after complaints that U.S. customs agents were exercising their enhanced post-9/11 screening authority by "acting on their suspicions without giving travelers the opportunity to get legal representation or counsel from their embassies."¹²⁶ Representatives of the consulates met twice with Customs and Border Protection officials "to discuss their concerns about the process used at the airports to screen visitors" and then "devised protocols to advise immigrants held at Newark International how to reach their consulate."¹²⁷ The hotline poster is prominently displayed in the interview rooms where detained travellers are questioned before they are granted or refused entry.¹²⁸ The area director for Customs and Border Protection was quoted as saying that she "would welcome other consulates to do the same" and

120. *Id.* See also European Parliament Resolution of 24 May 2012 on the Situation of North Korean Refugees, Eur. Parl. Doc. (2012/2655(RSP)), <http://www.europarl.europa.eu/document/activities/cont/201205/20120530ATT46037/20120530ATT46037EN.pdf> (calling, inter alia, on the Chinese authorities "to grant full consular access to the South Korean authorities").

121. Shin Hyon-hee, *Seoul to Push Consular Pact with China*, KOREAN HERALD, Aug. 8, 2012, <http://nwww.koreaherald.com/view.php?ud=20120802001071>.

122. *Id.*

123. *Id.*

124. *S. Korea, China to set up Hotline on Consular Affairs*, YONHAP NEWS AGENCY (Sept. 5, 2012), <http://english.yonhapnews.co.kr/national/2012/09/05/69/0301000000AEN20120905011300315F.HTML>.

125. Cindy Rodriguez, *Balancing National Security and the Rights of Visitors*, N.Y. TIMES, Sept. 15, 2008, <http://www.nytimes.com/2008/09/14/nyregion/nyregionspecial2/14detaininj.html>.

126. *Id.*

127. *Id.*

128. *Id.*

that “under the Vienna Convention on Consular Relations, federal authorities must allow foreign nationals to contact their consulates or embassies before deportation.”¹²⁹

This small sampling from the many available examples indicates that the effectiveness of consular protests depends in part on the persistence of the sending State, as well as its willingness to link the harmful effects of the consular breach to other important aspects of the bilateral relationship. In addition, joint outreach by the consulates of affected countries to local authorities may facilitate better consular notification and access for foreigners ensnared in the enhanced security measures now prevalent worldwide.

Nations may also enter into a formal memorandum of understanding that provides interim measures to address issues of consular concern. One such agreement was negotiated by the United States and Albania in 1991.¹³⁰ The agreement provides that the detaining authorities shall provide consular notification “within 72 hours” and “permit within 24 hours of such notification access by a representative of the sending country to the citizen who is under arrest or detained in custody.”¹³¹ In countries where denials of consular access for security detentions are a perennial concern, affected nations should consider inviting the receiving State to negotiate a special reciprocal agreement that will address the issue in a mutually-satisfactory manner.

VI. PRIVACY OF CONSULAR VISITS

After nearly a month of detention in China, South Korean democracy activist Kim Young-hwan was finally granted a short visit from a consular officer.¹³² They met in the presence of Chinese prison officials; when the consular officer asked Kim if he had been tortured or ill-treated, he replied, “How can I discuss such things here?”¹³³

Innocent of any wrongdoing, Canadian citizen Maher Arar was detained by U.S. authorities in 2002.¹³⁴ Despite his request for consular

129. *Id.*

130. Memorandum of Understanding Concerning the Re-Establishment of Diplomatic Relations, Alb.-U.S., Mar. 15, 1991, T.I.A.S. No. 12428.

131. *Id.* art. I(5).

132. Choe Sang-Hun, *Relations Tested in Case of South Korean Activist Detained in China*, N.Y. TIMES, May 31, 2012, <http://www.nytimes.com/2012/06/01/world/asia/south-korean-democracy-campaigner-is-detained-in-china.html>.

133. *Id.*

134. COMM’N OF INQUIRY INTO THE ACTIONS OF CAN. OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 9 (2006), http://www.pch.gc.ca/cs-kc/arar/Arar_e.pdf [hereinafter ARAR REPORT ANALYSIS AND RECOMMENDATIONS].

notification, he was denied timely Canadian consular access¹³⁵ and secretly transferred to Syria, where he was tortured repeatedly.¹³⁶ Some two weeks after Arar's rendition to Syria, the Canadian consul in Damascus was granted limited access to him and reported that Arar appeared to be in good health. But as the public inquiry into the case later found, the circumstances of the consular visit "should have alerted Canadian officials to the likelihood that Mr. Arar had been tortured when interrogated while held incommunicado" by the Syrian security agency.¹³⁷ The visit "was very controlled and Mr. Arar's demeanour was submissive."¹³⁸ In addition, "Syrian officials were present throughout and insisted that Mr. Arar speak in Arabic, with one of them serving as interpreter," while Arar "sent eye signals communicating that he could not speak freely."¹³⁹ Finally, he was made to utter statements that were "transparently artificial and contrived."¹⁴⁰

Regrettably, the VCCR does not expressly state that consular visits must be in private. While the insertion of a privacy requirement met with general approval during the ILC's discussions of the proposed text, it was not included in the draft submitted to the treaty conference. Still, as an authoritative text on consular law and practice notes, the view that Article 36 requires confidentiality of consular visits "is consistent with the purpose behind consular communication," since a detainee may be asked about mistreatment and may "make remarks that reflect negatively on the local authorities" that prompt reprisals, or may allege "political persecution or national origin discrimination."¹⁴¹ Discussing these crucially important matters during a consular visit "is meaningful only if confidentiality is maintained."¹⁴²

The primary basis for this interpretation is the purpose and plain language of Article 36. A consular officer cannot adequately exercise the rights of assisting and communicating with a national or arranging for appropriate legal representation without a private conversation with the detainee. Any local policy or regulation preventing reasonably private consular visits must therefore yield to the "full effect" requirement of

135. 1 COMM'N OF INQUIRY INTO THE ACTIONS OF CAN. OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: FACTUAL BACKGROUND 187-89 (2006), http://www.pch.gc.ca/cs-kc/arar/Arar_v.I_e.pdf.

136. 2 COMM'N OF INQUIRY INTO THE ACTIONS OF CAN. OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: FACTUAL BACKGROUND 805-10 (2006), http://www.pch.gc.ca/cs-kc/arar/Arar_v.II_e.pdf.

137. ARAR REPORT ANALYSIS AND RECOMMENDATIONS, *supra* note 134, at 33.

138. *Id.*

139. *Id.*

140. *Id.*

141. LEE & QUIGLEY, *supra* note 50, at 151.

142. *Id.*

Article 36(2).¹⁴³ Reasonable privacy would mean an interview consistent with basic security requirements: typically, the visit may be in sight of prison or police authorities, but not within their hearing and without monitoring of the conversation.

A significant number of bilateral consular conventions adopted over the past sixty years contain provisions ensuring some degree of privacy in consular visits, but the requirements are so varied in scope and language that it would be difficult to state any of them as an accepted international norm. Even so, the relative frequency of these provisions indicates that securing confidentiality for consular contact with detainees is a widely-recognized obligation. The privacy provisions in these treaties fall into two broad categories. In the first group are articles providing a clear right of consular officers to converse privately with detained nationals.¹⁴⁴ The second (and less prominent) group of agreements refers instead to the right to communicate with the detainee “in the language of the sending State,” which, while not guaranteeing privacy, may at least assure that the conversation will not require the presence of a translator.¹⁴⁵ The potential weakness of this last provision as a privacy safeguard is reflected in the recently-concluded consular treaty between Japan and China, which adds that if the conversation is “in a language other than the language of the receiving State,” consular officers “shall orally inform the competent authorities of the receiving State of the content of the conversation translated into the language of the receiving State upon request.”¹⁴⁶

Although a recognition of the right of consular communication and access is widespread in international instruments, neither human rights treaties nor standards on the treatment of prisoners expressly recognize a right to private consular visits.¹⁴⁷ The U.N. Committee Against Torture has

143. VCCR, *supra* note 13, art. 36(2).

144. *See, e.g.*, Consular Convention, U.S.-Costa Rica, *supra* note 7, art. VIII(3) (right to visit and “have private access to” detainee); Consular Convention, U.K.-U.S., *supra* note 8, art. 16(1) (right of consular officers “to converse privately” with detainees); Consular Convention, Hung.-Cuba, art. 26(1)(c), July 24, 1969, 892 U.N.T.S. 37 (right to “talk privately” with detainee); Consular Convention, Belg.-Turk., art. 35(5), Apr. 28, 1972, 1029 U.N.T.S. 208 (right to converse “even in private”).

145. Examples include: Consular Convention, U.K.-Mong., art. 42(5), Nov. 21, 1975, 1032 U.N.T.S. 62 and Consular Convention with Exchange of Notes, U.S.-China, art. 35(4), Sept. 17, 1980, 33 U.S.T. 2973, 1529 U.N.T.S. 199.

146. Agreement on Consular Relations Between Japan and the People’s Republic of China, art. 8(1)(c), Oct. 24, 2008, U.N. Reg. No. I-50746.

147. For instance, Article 38(1) of the 1955 U.N. Standard Minimum Rules for the Treatment of Prisoners states only that imprisoned foreign nationals “shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong,” with no indication of what a “reasonable facility” consists of. Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663C, Annex I, at 11, U.N. ESCOR, 24th Sess., Supp. No. 1, U.N. Doc. A/CONF/611 (July 31, 1957).

nonetheless recommended that Canada (and, by extension, any other country) should “insist on unrestricted consular access to its nationals who are in detention abroad, with facility for unmonitored meetings,” as an element of compliance with its obligations under the Convention against Torture.¹⁴⁸ In 2008, the Inter-American Commission on Human Rights issued its Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle V of which recognizes that, as an element of due process of law, foreign detainees “shall have the right to communicate with their diplomatic and consular authorities freely and in private.”¹⁴⁹ The recently-developed Ottawa Principles on Anti-terrorism and Human Rights likewise call on governments to ensure that “all communications between the consular authorities of the state of nationality and the person imprisoned, in custody or detained are confidential and conducted in private.”¹⁵⁰

On balance, though, the international legal situation today is not dramatically different from the guidance provided by the United States in 1973 to its consular posts:

The Department can locate no official precedent or binding rule of international law requiring that all such conversations be held in absolute privacy, free of all supervision or observation by receiving state authorities. However in the Department’s view a strong argument can be made that the right embodied in Article 36 paragraph 1(c) of the Vienna Convention on Consular Relations may only be enjoyed in a meaningful way if the consular officer is allowed the benefit of privacy with the national to whom he is extending consular protection In view of the variety of experiences which are possible in this regard, it would be extremely difficult to construe a definite rule applicable under any and all circumstances.¹⁵¹

Some countries have adopted a policy of requesting or encouraging private consular visits. Australia’s advice to its imprisoned citizens abroad states that they may “request that meetings with [their] consular officer are held in private, away from police or prison officials,” but that compliance “will be at the discretion of local authorities.”¹⁵² Canadian consulates are instructed to seek interviews with detainees “preferably in private,

148. U.N. Comm. Against Torture, *Conclusions and Recommendations of the Committee against Torture: Canada*, ¶ 5(d), U.N. Doc. CAT/C/CR/34CAN (May 20, 2005).

149. Approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008.

150. Univ. of Ottawa Faculty of Law, *Ottawa Principles on Anti-terrorism and Human Rights* 16, princ. 6.1.1(c) (2007), available at <http://www.unhcr.org/refworld/docid/470e0e642.html>.

151. LEE, *supra* note 1, at 150 n.100 (quoting Department of State File L/M/SCA).

152. Aust. Dep’t of Foreign Affairs and Trade, *Arrested or in Jail*, SMARTRAVELLER.GOV.AU, <http://www.smartraveller.gov.au/tips/gaolos.html> (last visited Oct. 3, 2013).

consistent with normal security precautions.”¹⁵³ The United States advises its consular posts abroad to seek a “reasonably private conversation” with the detainee and to protest any restrictions on privacy that would “intimidate” the national or “hinder [the post’s] performance of legitimate consular functions.”¹⁵⁴

Useful advice, undoubtedly, but it perhaps fails to recognize that even apparently private visits can be monitored by electronic means, and that the risk of hidden surveillance is greatest where the need for genuine privacy may be most acute. How then can a monitored consular visit determine the likelihood of ill-treatment? U.S. consular instructions provide one possible option: “Although not a requirement, the Department strongly recommends taking a few photos of the arrestee. This is assuming that the host country authorities permit and the arrestee consents.”¹⁵⁵ Digital photos can be useful in “validating and protesting any allegations of ill-treatment,” help in “identification and citizenship verification,” and provide “some reassurance to family members regarding the arrestee’s health and welfare.”¹⁵⁶

This suggestion suffers from some obvious limitations. As the State Department also notes, “many forms of physical abuse, including psychotropic drugs and systematic torture, are calculated to leave no physical evidence. Torture by electric shock and various forms of ‘water treatment’ are two of the more common methods that normally do not leave marks.”¹⁵⁷ Moreover, it is unlikely that the authorities would allow the photographing of a detainee showing clear signs of abuse. It is more conceivable that photographs of an apparently unharmed detainee would be allowed, particularly if the justification provided is solely to verify the national’s identity and citizenship and hence their entitlement to consular assistance. Even a seemingly innocuous passport-style photo may reveal signs apparent only to family members that their loved one’s appearance has degraded markedly in the short time since the arrest.

Although torture victims are typically compelled to tell consular officers that they are being treated well, there are a number of non-verbal cues that psychologists and criminologists use to determine if a suspect’s statements are untruthful or coerced. The professional literature on this

153. LEE & QUIGLEY, *supra* note 50, at 150 n.80 (citing CAN. DEP’T OF FOREIGN AFFAIRS AND INT’L TRADE, BUREAU OF CONSULAR AFFAIRS, MANUAL OF CONSULAR INSTRUCTIONS § 2.4.4(5) (2007)).

154. 7 U.S. DEP’T OF STATE, *Undue Interference With Communications Between Prisoner And Consular Officer*, in FOREIGN AFFAIRS MANUAL, *supra* note 61, § 426.2-4.

155. 7 U.S. DEP’T OF STATE, *Photographing the Prisoner*, in FOREIGN AFFAIRS MANUAL, *supra* note 61, § 423.10.

156. *Id.*

157. 7 U.S. DEP’T OF STATE, *Identifying Abuse*, in FOREIGN AFFAIRS MANUAL, *supra* note 61, § 425.1.

subject is exceptionally well-developed¹⁵⁸ and many of its conclusions have been incorporated into police training techniques. Those techniques are readily adaptable to situations where an initial consular or intelligence service interview in the presence of the captors may be the only opportunity to ascertain the likelihood of ill-treatment. This option would appear to meet in part a major recommendation of the Canadian public inquiry into the torture of Maher Arar in Syria; namely, that consular officials “posted to countries that have a reputation for abusing human rights should receive training on conducting interviews in prison settings in order to be able to make the best possible determination of whether torture or harsh treatment has occurred.”¹⁵⁹ The same recommendation noted that there is usually a protective advantage to demanding private consular visits even if they are likely to be denied, as they send a signal that the sending State “disapproves of any failure to fully respect detainees’ rights.”¹⁶⁰

Finally, it is an undeniable fact that detainees in some countries are routinely tortured as part of their initial interrogation and that abusive treatment exists in virtually every nation that allows for prolonged incommunicado detentions. Until there is compelling evidence to the contrary, all representatives of the sending State should assume that at-risk detainees have been tortured regardless of the individual’s own assertions of good treatment, based on authoritative reports regarding the receiving State’s human rights record and other reliable indicators of its typical practices.

VII. GUANTÁNAMO BAY AND OTHER AMBIGUITIES

Almost immediately after the first foreign detainees arrived at the Guantánamo Bay detention camp in 2002, foreign governments began demanding consular contact with their nationals.¹⁶¹ Those early efforts were firmly rebuffed; the U.S. Government apparently adopted the position early on that the detainees were unlawful enemy combatants, captured during the war on terror, and that the rules of consular law thus did not apply to them.¹⁶² Other countries were not necessarily persuaded by that

158. See, e.g., David E. ZULAWSKI & DOUGLAS E. WICKLANDER, PRACTICAL ASPECTS OF INTERVIEW AND INTERROGATION (2d ed. 2002); Robert S. Feldman, *Nonverbal Cues as Indicators of Verbal Dissembling*, 15 AM. EDUC. RES. J. 217 (1978); Gerald R. Miller et. al., *Self-Monitoring, Rehearsal, And Deceptive Communication*, 10 HUM. COMM. RES. 97 (1983).

159. ARAR REPORT ANALYSIS AND RECOMMENDATIONS, *supra* note 134, at 352.

160. *Id.* at 354.

161. Requests for consular access to Guantanamo detainees began as early as January of 2002. Petition for Writ of Habeas Corpus, *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), available at <http://news.findlaw.com/hdocs/docs/terrorism/rasulbush021902pet.pdf> (documenting some of the earlier requests).

162. I say “apparently” because there does not seem to be any formal statement by the United States to that effect. U.S. allies were evidently advised, however, that there could be “no consular access

argument, and the denial of VCCR rights was added to the long list of human rights concerns prompted by the detentions.¹⁶³ Determining the status of the Guantánamo detainees under the VCCR is admittedly a complex question,¹⁶⁴ but after thirteen years of detention without trials the policy of denying meaningful consular access is increasingly difficult to justify—most particularly for the many detainees who have been cleared of any wrongdoing and are simply awaiting repatriation.

In 2009, the U.S. government told members of Congress that “consular access has not been provided to detainees at Guantánamo Bay,” but that “foreign government officials have met with some of their citizens . . . following a determination by the U.S. Government that such access was appropriate and consistent with maintaining security.”¹⁶⁵ The real story is somewhat more complex, but no less troubling. As discussed below, some countries were granted what came to be known as welfare visits, in which consular officers interviewed detainees regarding their health and treatment in the midst of their ongoing interrogations, but were not allowed to provide

because these are unlawful combatants. They were not in the position of nationals who might find themselves in prison on ordinary criminal charges.” 651 Parl. Deb., H.L. (5th ser.) (2003) 31-32 (U.K.) (statement of Baroness Symons). In addition, the United States has declared that “the International Committee of the Red Cross (ICRC)” would have “access to every detainee at Guantanamo Bay, just as it would have to prisoners of war,” implying that international humanitarian law, rather than consular law, should apply. Judith A. Chammas, *The Truth About Guantanamo*, EMBASSY U.S. DHAKA BANG. (Feb. 12, 2006), http://dhaka.usembassy.gov/pre1feb12_06.html.

163. As one example, see Parliamentary Assembly of the Council of Europe, Rights of Persons Held in the Custody of the United States in Afghanistan or Guantánamo Bay, Res. 1340, ¶ 5 (2003) (U.K.) (stating that the United States had “failed to exercise its responsibility with regard to international law to inform those prisoners of their right to contact their own consular representatives”).
164. For example, Article 36 of the VCCR requires notification of the consulate only if a national is detained “within its consular district,” and Guantanamo Bay is a military base outside of any recognized consular district; consular law likewise does not apply to prisoners of war, or during a declared state of war between the sending and receiving States. On the other hand, there is authority to indicate that consular access is required in irregular detentions like those at Guantanamo, “even if a foreign national is held outside the territory of the State that effects the detention.” LEE & QUIGLEY, *supra* note 50, at 179-80.
165. Lynn Sweet, *Obama Purchase of Illinois Prison for Guantanamo Detainees: White House Memo to Illinois Delegation with FAQ's*, VOICES (Dec. 17, 2009, 7:10 AM), <http://voices.suntimes.com/early-and-often/sweet/obama-purchase-of-illinois-pri/>.

any protective or legal assistance.¹⁶⁶ Other countries are still waiting for any form of consular access to their nationals.¹⁶⁷

Consular services authorized to conduct welfare visits were hamstrung by the limitations imposed on them, sometimes by their own governments. Documents released in a British civil court case revealed that then-Prime Minister Tony Blair had made an exception for Guantánamo to Britain's long-standing policy of seeking full consular access to all of its nationals, over the objections of the Consular Division.¹⁶⁸ British and Australian consular officers would later report allegations of abusive treatment made during welfare visits; claims that they were powerless to investigate independently or address effectively.¹⁶⁹ After Australian detainee David Hicks complained to a consular officer about his ill-treatment, he was transferred into solitary confinement; months later, he refused to meet with the same official and instead provided a letter stating that "I am afraid to speak to you To speak with you and tell you the truth and reality of my situation once again would only risk further punishments."¹⁷⁰ That same day, the Australian Minister of Foreign Affairs assured the media that "18 consular visits to Guantánamo Bay by Australian officials from Washington had raised no concerns about Hicks' treatment."¹⁷¹

The case of Canadian national Omar Khadr illustrates yet another dimension of the corrosive effects of Guantánamo on consular protection. Canada unsuccessfully requested consular visits with Khadr both before and after his arrival, although Canadian foreign service personnel were

166. For example, by November of 2002, U.S. authorities had informed Canadian officials that consular visits to Guantanamo "were a non-starter"; however, visits by foreign ministry officials "were often indispensable to confirming the *identification* of the detainees" and a foreign ministry presence on visiting delegations was acceptable "as long as the core of the mission—to maximize cooperation on the intelligence and law enforcement front—was not affected." *Khadr v. Canada* (F.C.), [2006] 2 F.C.R. 505, ¶24 (Can). Canadian foreign ministry personnel subsequently visited Canadian detainee Omar Khadr.

167. Ben Fox, *US Won't Allow Russians to see Guantanamo Prisoner*, Yahoo! News (Apr. 3, 2013), <http://news.yahoo.com/us-wont-allow-russians-see-guantanamo-prisoner-222443909.html>; see also Huma Intiaz, *Gitmo Detainees: Consular Access Pending for Two Years*, EXPRESS TRIB., Mar. 3, 2012, <http://tribune.com.pk/story/344692/gitmo-detainees-consular-access-pending-for-two-years/>.

168. Duncan Gardham, *Memos Reveal Tony Blair Accepted Guantanamo Rendition*, TELEGRAPH, July 14, 2010, <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/7891197/Memos-reveal-Tony-Blair-accepted-Guantanamo-rendition.html>.

169. See, e.g., Vikram Dodd & Clare Dyer, *Guantánamo Torture and Humiliation Still Going on, Says Shackled Briton*, GUARDIAN (Dec. 11, 2004), <http://www.theguardian.com/world/2004/dec/11/politics.guantanamo> (reporting allegation that British detainee "was kept chained to the floor by his feet for an hour during a welfare visit from a British government official").

170. *Hicks Wants out of Guantanamo Bay*, EPOCH TIMES, Jan. 31, 2007, <http://www.theepochtimes.com/news/7-1-31/51146.html>.

171. *Hicks Just Not Handling it Well: Ruddock*, SYDNEY MORNING HERALD, Jan. 31, 2007, <http://www.smh.com.au/news/world/hicks-just-not-handling-it-well-ruddock/2007/01/31/1169919368869.html>.

freely granted access to him for interrogation purposes.¹⁷² The Canadian courts would later determine that, starting in February of 2003, Canadian Security and Intelligence Service (CSIS) agents and officers from the Canadian Department of Foreign Affairs and International Trade (DFAIT) visited Khadr at Guantánamo.¹⁷³ The purpose of their visits was intelligence-gathering, not consular support.¹⁷⁴ In March of 2004, a DFAIT official interviewed Khadr again, with the knowledge that he had been subjected by U.S. authorities to a sleep deprivation technique known as the “frequent flyer program” in an effort to make him less resistant to interrogation.¹⁷⁵ Not until 2005 would consular officers commence periodic visits to ensure Khadr’s welfare, and then only when a Canadian judge ordered that no other form of DFAIT access to him would be tolerated.¹⁷⁶ Canada responded to the judge’s order in a diplomatic note to the United States that requested “immediate welfare access to Mr. Khadr, consistent with Article 36 of the Vienna Convention on Consular Relations,”¹⁷⁷ and continued to provide what it characterized as “consular access” to Omar Khadr¹⁷⁸ until his transfer to a Canadian prison in 2012.¹⁷⁹

While any early access to a detainee at risk of ill-treatment may seem preferable to none at all, consular officers should never be compelled to serve two competing masters. Consular involvement in intelligence-gathering, however indirect, blunts the sharp distinction between the essentially inquisitorial role of intelligence officers and the essentially protective role of consular officers. Early access by intelligence officers or law enforcement agents has been proposed as a surrogate for consular visits, but those officials may not possess either the training to detect signs of torture or the inclination to assume that a detainee’s assertion of ill-treatment is truthful. Finally, there is a serious risk that merging the two functions could be perceived by the detaining authorities as indicating that the sending State’s primary concern is to extract security-related information from the detainee and that consular protection is at best a secondary consideration.

172. SEC. INTELLIGENCE REV. COMM., CSIS’S ROLE IN THE MATTER OF OMAR KHADR § 3 (2009), <http://www.sirc-csars.gc.ca/opbapb/2008-05/index-eng.html#section3>.

173. Canada (Prime Minister) v. Khadr (*Khadr II*), [2010] 1 S.C.R. 44, ¶¶ 5-6 (Can.).

174. Khadr v. Canada (F.C.), [2006] 2 F.C.R. 505, ¶ 23 (Can.).

175. Canada (Prime Minister) v. Khadr (*Khadr II*), [2010] 1 S.C.R. 44, ¶¶ 5-6 (Can.).

176. Khadr v. Canada (Prime Minister), [2010] 1 F.C.R. 73, ¶ 22 (Can.).

177. *Id.* ¶ 24.

178. *Ottawa Not Ready to Ask for Release of Khadr*, CBC NEWS (June 13, 2007), <http://www.cbc.ca/news/canada/ottawa-not-ready-to-ask-for-release-of-khadr-1.656037>.

179. *Omar Khadr Returns to Canada*, CBC NEWS (Sept. 29, 2012), <http://www.cbc.ca/news/canada/omar-khadr-returns-to-canada-1.937754> (reporting that Mr. Khadr received a consular welfare visit “in advance of his return”).

Despite the inherent risks, a greater degree of coordination between intelligence agencies and consulates could be beneficial when the stark choice is between security service access and no contact at all with the detainee. In 2007, DFAIT and CSIS entered into a memorandum of understanding regarding access to Canadians detained abroad as part of a national security or terrorism case.¹⁸⁰ Under its terms, CSIS will not meet with the detainee until after a consular officer has gained access, unless there are “urgent national security or terrorism-related considerations.”¹⁸¹ When CSIS becomes aware of such a detention it must promptly notify DFAIT, which will then take the lead in the coordinated approach that is “particularly important where there is a suspicion that the conditions of detention are inconsistent with international human rights instruments or customary international law.”¹⁸² In cases where consular access has not been granted, DFAIT may ask CSIS “to approach the authorities of the foreign state, with the aim of helping to facilitate access by a consular officer to the detained Canadian citizen.”¹⁸³

The official inquiry into the mishandling by Australian officials of the case of Guantánamo detainee Mamdouh Ahmed Habib also recommended better coordination between security and consular services, as well as comprehensive changes to the operating procedures of all government agencies with a role in overseas security detentions.¹⁸⁴ Initial and follow-up interviews with detained Australians should assess and report on factors such as “the ability the detainee has to independently communicate with Australian officials or a legal representative.”¹⁸⁵ Furthermore, “before sending questions or other information to another state, in support of a custodial interview overseas,” the intelligence agency must satisfy itself that “the interviewee is not being and is not likely to be subjected to torture” or other cruel treatment and record the factors it considered.¹⁸⁶

An internal review of Canadian intelligence-gathering practices made similar recommendations regarding the need to amend operational policy. CSIS has since “revised a number of its policies to include consideration of human rights issues in its dealings with foreign agencies, from entering into arrangements with foreign governments and institutions, to undertaking

180. *Agreement Allows CSIS 'Urgent' Access to Canadians Held Abroad*, CBC NEWS (July 17, 2008), <http://www.cbc.ca/news/canada/agreement-allows-csis-urgent-access-to-canadians-held-abroad-1.700988>.

181. *Id.*

182. *Id.*

183. *Id.*

184. *See* INSPECTOR-GEN. OF INTELLIGENCE AND SEC., INQUIRY INTO THE ACTIONS OF AUSTRALIAN GOVERNMENT AGENCIES IN RELATION TO THE ARREST AND DETENTION OVERSEAS OF MR MAMDOUH HABIB FROM 2001 TO 2005 (2011), *available at* <http://www.igis.gov.au/inquiries/docs/habib-inquiry.pdf>.

185. *Id.* at 10.

186. *Id.* at 112.

foreign travel and disclosing information.”¹⁸⁷ Reacting to concerns raised in a number of high-profile cases of Canadians tortured abroad, DFAIT announced in 2004 that it would develop a “clear protocol for managing difficult cases—those involving detention, reports of torture, and disregard for customary consular and diplomatic practices” while increasing awareness training for consular officers “to assist them in recognizing cases where torture or other abuse has occurred.”¹⁸⁸ Clearly, there is no shortage of remedial ideas or any professional unwillingness in Western nations to address the problems outlined in this Article; what may be lacking are the resources and the political will needed to implement meaningful solutions.

VIII. CONCLUSION

In a speech given at a human rights symposium in 2007, the Director of CSIS said that the international response to the threat of terrorism had stirred some “profound debates, many of them extending well beyond the particular question as to how to best respond to the threat of terrorism.”¹⁸⁹ One of those debates must surely revolve around the treatment of foreign detainees in security detentions. Whatever justifications are offered for its use, the fact remains that preventive detention denies the right of detainees to communicate with the outside world and to obtain effective oversight of the terms and conditions of their confinement. It is in these dark corners where torture, abuse, and injustice are most likely to flourish with impunity.

Already deeply embedded in international law, safeguarding and strengthening universal consular access can be among the most effective tools available to ensure that the basic rights of all detained foreigners are respected. We ignore denials of consular contact in security detention cases at our own peril, lest the legitimate task of collecting vital intelligence on terrorism overwhelms the human rights values that make democratic society worth defending in the first place.

187. SEC. INTELLIGENCE REV. COMM., *supra* note 172, § 5.

188. Craig Forcese, *The Obligation to Protect: The Legal Context for Diplomatic Protection of Canadians Abroad*, 57 U. N.B. L. J. 101, 109 n.28 (2007) (quoting from Treasury Bd. of Can. Secretariat, Report on Plans and Priorities, in Foreign Affairs Canada, No. BT31-2/2005-III-52 (2004)).

189. Jim Judd, Dir. of the Can. Sec. and Intelligence Serv., Talking Point for 2007 Raoul Wallenberg International Human Rights Symposium, How a Democracy Should Respond to Domestic Terrorism Threats (Jan. 19, 2007), *quoted in* SEC. INTELLIGENCE REV. COMM., *supra* note 172.