REFLECTIONS ON THE 50TH ANNIVERSARY OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

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I. INTRODUCTION

Fifty years ago, on April 22, 1963, the United Nations General Assembly concluded its first ever conference on consular relations and opened the Vienna Convention on Consular Relations (VCCR) for signature.[1] The VCCR codified hundreds of years of consular practice that had evolved from the actions of foreign missions looking out for the interests of their citizens in another country.[2] Prior to the adoption of the VCCR, the rules governing consular relations derived largely from customary practices between states developed over time and through a series of bilateral consular conventions.[3] The VCCR served to clarify consular relations law and was expected to contribute to "friendly relations between States."[4] The 50th anniversary of the VCCR provides the consular community with an opportunity to reflect on the development of consular relations law since the adoption of the VCCR and to consider what the future may hold for further development of consular law.

In some ways, consular law has not changed very much since the negotiation and drafting of the VCCR. The basic consular functions continue to consist of protecting and facilitating the interests of a state and

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1. United Nations Conference on Consular Relations, Mar. 4-Apr. 22, 1963, *Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees*, U.N. Doc. A/CONF.25/16 (Apr. 22, 1963). The VCCR entered into force on March 19, 1967. *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 Oct. 19, 2013). U.S. President Kennedy signed the VCCR in 1963, but the United States did not complete ratification of the VCCR until November 24, 1969. *See id.*
2. United Nations Conference on Consular Relations, Mar. 4-Apr. 22, 1963, *Summary Records of First Plenary Meeting*, ¶ 57, U.N. Doc. A/CONF.25/16 (Mar. 4, 1963) (statement by President Stephen Verosta). For a description of the historical development of consular relations, see also Jaroslav Zourek, Special Rapporteur, *Consular Intercourse and Immunities, Report of the Special Rapporteur*, [1957] 2 Y.B. Int'l L. Comm'n 71, 72-77, U.N. Doc. A/CN.4/SER.A/1957/ADD.1.
3. *Summary Records of First Plenary Meeting*, *supra* note 2, ¶ 54 (statement by President Stephen Verosta).
4. Letter of Transmittal from Richard Nixon, President of the U.S., to the Senate of the U.S., 91st Cong., 1st Sess. (May 5, 1969) (on file with author).

its nationals in the territory of another state.[5] Article 5 of the VCCR lists the following consular functions: (1) promoting commercial, economic, cultural, and scientific relations between states, (2) issuing passports and other travel documents, (3) safeguarding the interests in the receiving State of the sending State's nationals, both individuals and corporate entities, (4) arranging appropriate representation of the sending State's nationals before the tribunals of the receiving State, (5) performing administrative functions such as acting as a public notary or serving judicial documents, and (6) exercising supervision and inspection of the sending State's national flag vessels and aircraft operating in the territory of the receiving State.[6]

Since the VCCR's entry into force, the two consular law issues that have been litigated most often in U.S. courts are: (1) the scope of consular immunity, and (2) the right of consular notification and access.[7] The remainder of this Article considers these two issues as they have developed over the past five decades and what the future may hold.

II. CONSULAR IMMUNITY

Like diplomats, consular officers are given a certain amount of immunity from prosecution in the host state so that they are free to perform their functions.[8] Section II of the VCCR sets forth the privileges and immunities of consular officers and other members of a consular post.[9] VCCR Article 40 begins that section by stating that: "The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity."[10] Consular officers may not be arrested or detained pending trial, "except in the case of a grave crime and pursuant to a decision by the competent judicial authority."[11] A grave crime has been interpreted by the U.S. State Department to mean a felony, and courts have followed that interpretation.[12]

Similarly, consular officers and consular employees are not subject to the jurisdiction of the judicial or administrative authorities of the receiving

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5. *See, e.g.*, *Summary Records of the 516th Meeting*, [1959] 1 Y.B. Int'l L. Comm'n 165-66, U.N. Doc. A/CN.4/SER.A/1959 (statements of Mr. Edmonds on draft articles 14 and 15).
6. Vienna Convention on Consular Relations art. 5, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].
7. 1 VED P. NANDA & DAVID K. PANSIUS, *The Vienna Consular Convention*, *in* LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 4:5 (1986).
8. *See* United States v. Cole, 717 F. Supp. 309, 322 (E.D. Pa. 1989).
9. VCCR, *supra* note 6, § 2.
10. *Id*. art. 40.
11. *Id*. art. 41.
12. *Cole*, 717 F. Supp. at 324 n.5 (citing S. EXEC. REP. NO. 91-9, at 14 (1969)).

State "in respect of acts performed in the exercise of consular functions."[13] Courts in the United States have developed a two-part test based on international practice to determine whether consular immunity applies to the subject conduct.[14] Acts performed in the exercise of a consular function are those that (1) have a logical connection between the act and the purposed function, and (2) are a reasonable means to fulfill that function.[15] Factors that have been taken into account include:

> (1) the subjective intent of the consular official, based on objective evidence, in performing a particular act; (2) whether the act furthered some function of the consulate; (3) whether the act is of a personal character; (4) the seriousness of the act; and (5) the absence or presence of a malicious motive in the performance of a particular act.[16]

U.S. courts have used this test to analyze the defense of consular immunity in a wide-ranging variety of cases, both criminal and civil, including cases involving allegations of money laundering,[17] heroin distribution,[18] torture and other human rights violations,[19] breach of contracts[20] and lease agreements,[21] conversion and trespass,[22] civil rights violations,[23] employment discrimination,[24] torts,[25] and motor vehicle

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13. VCCR, *supra* note 6, art. 43. Consular immunity is thus narrower than diplomatic immunity, which provides a general immunity from civil suit regardless of whether the diplomat was acting in the scope of his or her official functions. *See* Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. *See also* Logan v. Dupuis, 990 F. Supp. 26, 30 (D.D.C. 1997).
14. Berdakin v. Consulado de la Republica de el Salvador, 912 F. Supp. 458, 463-64 (C.D. Cal. 1995).
15. *Id.*; *see also Cole*, 717 F. Supp. at 323.
16. *Berdakin*, 912 F. Supp. at 464 (quoting Gerritsen v. Escobar Y Cordova, 721 F. Supp. 253, 259 (C.D. Cal. 1988)).
17. *Gerritsen*, 721 F. Supp. at 309.
18. United States v. Chindawongse, 771 F.2d 840, 848-49 (4th Cir. 1985) (consular officer not entitled to consular immunity for "grave crime" involving felony drug offense).
19. Samantar v. Yousuf, 560 U.S. 305, 308 (2010).
20. Heaney v. Government of Spain, 445 F.2d 501, 504 (2d Cir. 1971) (consular officials entitled to immunity with respect to encouraging political advocacy).
21. *Berdakin*, 912 F. Supp. at 465 (consul entitled to immunity for signing commercial lease on behalf of consulate).
22. Joseph v. Office of Consulate Gen. of Nigeria, 830 F.2d 1018, 1027 (9th Cir. 1987) (consular officer not immune from suit for removal of property and damage to leased house).
23. Gerritson v. de la Madrid Hurtado, 819 F.2d 1511, 1517 (9th Cir. 1987) (suppression of speech in United States not consular function entitled to immunity).
24. Ewald v. Royal Norwegian Embassy, 902 F. Supp. 2d 1208, 1219 (D. Minn. 2012) (actions of honorary consul in managing and supervising the employees of the Embassy are entitled to consular immunity). *See also* Ford v. Clement, 834 F. Supp. 72, 75 (S.D.N.Y. 1993) (actions of honorary consul in managing and supervising the employees of the Embassy are entitled to consular immunity). *But see* Park v. Shin, 313 F.3d 1138, 1145-46 (9th Cir. 2002) (consular officer not entitled to immunity from employment-related claims in hiring and supervising personal domestic servant).

accidents.[26] The courts tend to take a functional approach, according immunity when the consular officer is acting in his or her official capacity, such as signing a commercial lease on behalf of the consulate[27] or managing employees of the consulate,[28] while denying immunity in cases where the consular officer is acting in his or her personal capacity, such as signing a lease on a personal residence[29] or employing a domestic servant at home.[30] Although this functional approach may result in some uncertainty regarding the scope of consular immunity and requires a case-by-case analysis, it does seem to most appropriately recognize the underlying purpose in granting immunity at all, i.e., the need for the consul to perform his or her official functions without interference from the legal processes of the receiving State.

Consular immunity also extends to the premises of the consulate both pursuant to the VCCR[31] and the U.S. Foreign Sovereign Immunities Act (FSIA).[32] VCCR Article 31 is entitled "Inviolability of the consular premises" and provides that the authorities of the receiving State may not enter the portion of the consular premises used for the work of consulate without the consent of the head of the consular post.[33] It also provides that property of the consular post is immune from any form of requisition.[34] VCCR Article 32 provides that the consular premises are immune from taxation.[35] VCCR Article 33 protects "consular archives and documents" which are "inviolable at all times and wherever they may be."[36] In the United States, the protections under the VCCR are reinforced by the FSIA, pursuant to which the consulate is presumed immune from jurisdiction as part of a foreign state.[37]

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25. Risk v. K.I. Halvorsen, 936 F.2d 393, 398 (9th Cir. 1991) (Norwegian consular officials entitled to immunity in connection with actions taken to aid Norwegian citizen in removing children to Norway, even though removal was in violation of state court order).
26. Kashin v. Kent, 457 F.3d 1033, 1040 (9th Cir. 2006) (consular officer was acting within the scope of his employment when traffic accident occurred).
27. Berdakin v. Consulado de la Republica de el Salvador, 912 F. Supp. 458, 465 (C.D. Cal. 1995).
28. *See Ewald*, 902 F. Supp. 2d at 1212.
29. Joseph v. Office of Consulate Gen. of Nigeria, 830 F.2d 1018, 1027 (9th Cir. 1987).
30. Park v. Shin, 313 F.3d 1138, 1145-46 (9th Cir. 2002).
31. VCCR, *supra* note 6, arts. 31-32.
32. 28 U.S.C. § 1602 (2012).
33. VCCR, *supra* note 6, art. 31.
34. *Id*.
35. *Id*. art. 32.
36. *Id.* art. 33.
37. *Id.*; *see also* Berdakin v. Consulado de la Republica de el Salvador, 912 F. Supp. 458, 461 (C.D. Cal. 1995). Exceptions to immunity are listed in the FSIA and include, inter alia, when the action against the foreign state is related to real property, certain commercial activity, or terrorist activity. *See* 28 U.S.C. § 1605 (2012).

One of the most famous international cases involving an interpretation of the VCCR is the *Diplomatic and Consular Staff* case,[38] wherein Iranians who were unhappy with the United States' support for the former Shah of Iran carried out armed attacks on U.S. embassies and consulates in Iran, ultimately taking over several premises, taking a number of U.S. persons hostage, and ransacking the archives of the buildings.[39] The hostage situation continued for over a year. In an attempt to increase pressure on the government of Iran to resolve the situation, the United States brought suit against Iran at the International Court of Justice (ICJ) for Iran's violations of the VCCR, among other treaties.[40] Although the ICJ did not find the government of Iran responsible for the initial attacks, the court held that a receiving State such as Iran is under a duty "to take appropriate steps to ensure the protection of the . . . Consulates, their staffs, their archives, their means of communication and the freedom of movement of their staffs."[41] After the initial takeover, Iran's

> plain duty was at once to make every effort, and to take every appropriate step, to bring these flagrant infringements of the inviolability of the premises, archives and diplomatic and consular staff of the United States Embassy to a speedy end, to restore the Consulates at Tabriz and Shiraz to United States control, and in general to re-establish the status quo and to offer reparation for the damage.[42]

The facts of this case presented such a blatant violation of the principles of consular immunity that it was likely an easy decision by the ICJ in many respects.

Going forward, one major challenge will be to apply these centuries-old principles regarding consular immunity to modern technology. For example, how should the protections for the "consular archives and documents"[43] be applied in the digital age? Today, most communication occurs electronically, which increases ease and efficiency, among other benefits.[44] To facilitate the work of the consulate, the protection for consular "archives and documents" should be interpreted to include electronic records of every kind, including email communications, other

38. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).
39. *Id*. ¶¶ 17-24.
40. At the time, the United States and Iran were both parties to the VCCR and its Optional Protocol concerning the Compulsory Settlement of Disputes, which gives the ICJ jurisdiction to hear disputes between treaty parties arising out of the VCCR. *See id.* ¶ 45.
41. *Id*. ¶ 61.
42. *Id*. ¶ 69.
43. VCCR, *supra* note 6, art. 33.
44. *See* Won-Mog Choi, *Diplomatic and Consular Law in the Internet Age*, 10 SINGAPORE Y.B. INT'L L. 117 (2006).

electronic messaging, computer files, flash drives, and discs.[45] Keeping such electronic documents "inviolable" means that they are protected from viewing by the receiving State unless consent of the consul is obtained.

The principle of inviolability of consular records, including electronic records, is likely to present significant challenges in the United States in light of recent revelations that the U.S. National Security Agency (NSA) is routinely accessing the servers of firms such as Google, Apple, Facebook, and other Internet companies.[46] Given the wide and often indiscriminating sweep of the NSA surveillance program, it is unclear how it can or does distinguish between electronic records of consulates and the rest of the population. In fact, news reports indicate that the U.S. government has been breaching its obligations under international law by intercepting emails and other communications of foreign missions.[47] These are issues the international consular community will have to grapple with presently and going forward into the next fifty years.

III. CONSULAR NOTIFICATION AND ACCESS

Perhaps even more contentious than the scope of consular immunity is the issue of consular notification and access for foreign nationals who are arrested or detained while abroad, both historically and today. In 1963, as negotiations on the text of the VCCR were being concluded, a Yale Professor of Soviet Studies, Frederick Barghoorn, was arrested while visiting Russia and held incommunicado for over two weeks.[48] He was eventually released upon the intervention of U.S. President John F. Kennedy.[49] As a result of this incident and other similar incidents during the Cold War, the Kennedy Administration strongly supported the adoption of the VCCR with its consular notification requirements.[50] While the United States routinely notified other countries, including the Soviet Union, when it arrested one of their nationals, the same courtesies were not always

45. *Id.*

46. Glenn Greenwald & Ewen MacAskill, *NSA Prism Program Taps into User Data of Apple, Google and Others*, GUARDIAN (June 6, 2013), http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data; Charlie Savage et al., *US Confirms It Gathers Online Data Overseas*, N.Y. TIMES, June 6, 2013, http://www.nytimes.com/2013/06/07/us/nsa-verizon-calls.html?_r=0.

47. Ian Traynor et al., *Key US-EU Trade Pact Under Threat After More NSA Spying Allegations*, GUARDIAN (June 30, 2013), http://www.theguardian.com/world/2013/jun/30/nsa-spying-europe-claims-us-eu-trade.

48. Henry Tanner, *Yale Professor Seized in Soviet On Spy Charges*, N.Y. TIMES, Nov. 13, 1963, at 1. *See also* Cindy G. Buys, *JFK's Legacy Regarding Consular Relations Law*, *in* JOHN F. KENNEDY HISTORY, MEMORY, LEGACY: AN INTERDISCIPLINARY INQUIRY 151-66 (John Delane Williams et al. eds., 2010).

49. Henry Tanner, *Soviet, Heeding Kennedy, Releases Yale Professor But Insists He Was a Spy*, N.Y. TIMES, Nov. 17, 1963, at 1.

50. *Id.*

reciprocated.[51] President Kennedy believed the VCCR would provide a stronger legal basis to demand access to American citizens arrested and detained abroad.[52]

The Kennedy Administration's emphasis on the need for clearer legal protections for consular notification and access proved prescient. The issue of access to detained American citizens abroad remains extremely relevant today—witness the well-known cases of the three American hikers, Shourd, Bauer, and Fattal, arrested in 2009 on charges of spying by Iran,[53] or Amanda Knox, who was arrested and tried for murder in Italy, for example.[54] When U.S. citizens are arrested and tried abroad, U.S. consular officers, sometimes with the assistance of consular officers from neutral third countries, assist in facilitating communication with family members and legal defenses.[55] In the Iranian case for example, two of the male hikers were sentenced to eight years in prison for espionage and illegal entry into Iran, but diplomatic interventions resulted in their release after two years.[56] The potential need for consular assistance of this type is enormous. There are 4.5 million Americans living abroad and sixty million who travel abroad each year, many of whom will require the assistance of the U.S. consulate in a foreign country.[57] Similarly, more than one million foreigners become lawful permanent residents of the United States each year[58] in addition to approximately 160 million foreigners who visit the United States every year,[59] many of whom will avail themselves of consular services while in the United States.

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51. Max Frankel, *Washington Is "Gratified"; Asks Future Assurances*, N.Y. TIMES, Nov. 17, 1963, at 1.
52. *Id.*
53. J. David Goodman & Alan Cowell, *American Hikers Leave Iran After Prison Release*, N.Y. TIMES, Sept. 21, 2011, http://www.nytimes.com/2011/09/22/world/middleeast/iranian-lawyer-says-2-american-hikers-hopefully-are-about-to-be-freed.html?_r=0.
54. *Amanda Knox: "I'm Afraid to go Back" to Italy*, CNN (May 8, 2013), http://www.cnn.com/2013/05/06/justice/amanda-knox-interview. Amanda Knox was arrested in 2007 and convicted in 2009, but her conviction was overturned in 2011. *Id.*
55. Due to strained relations between the United States and Iran, the Swiss government represents U.S. interests in Iran. CNN Wire Staff, *U.S. Hikers in Iran get 8 Years in Prison, State Media Reports*, CNN (Aug. 21, 2011), http://www.cnn.com/2011/WORLD/meast/08/20/iran.us.hikers/index.html.
56. *See* Goodman & Cowell, *supra* note 53.
57. *Fulfilling Our Treaty Obligations and Protecting Americans Abroad: Statement Before the S. Comm. on the Judiciary* (2011), *available at* http://m.state.gov/md169182.htm (testimony of Patrick F. Kennedy, Under Secretary for Management, U.S. Department of State).
58. RANDALL MONGER & JAMES YANKAY, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: U.S. LEGAL PERMANENT RESIDENTS: 2012 (2013), *available at* http://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2012_2.pdf.
59. RANDALL MONGER, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: NONIMMIGRANT ADMISSIONS TO THE UNITED STATES: 2011 (2012), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ni_fr_2011.pdf. This figure does not include those who enter unlawfully.

Article 36 of the VCCR contains the relevant obligations regarding consular notification and access. It requires that a foreign national who is arrested or detained be given notice without delay of his or her right to have the appropriate consulate notified of the arrest or detention.[60] If the foreign national so requests, Article 36 also requires that law enforcement officials provide notice of the arrest or detention to the sending State without delay.[61]

Unfortunately, law enforcement authorities in the United States have not always provided consular notification and access as required, leading to much recent litigation. For example, there were hundreds of cases in federal courts involving claims under the VCCR over the last ten years.[62] This figure does not include all the litigation at the state level or cases involving the more than fifty bilateral consular conventions to which the United States is a party. Also, in addition to litigation in courts in the United States, three countries have sued the United States at the ICJ for violations of consular notification rights under Article 36 of the VCCR—Paraguay in *Breard*,[63] Germany in *LaGrand*,[64] and most recently Mexico in *Avena*.[65] The *Avena* case involved fifty-four Mexican nationals who were on death row in various states in the United States.[66] In defending the case at the ICJ, the United States admitted that law enforcement authorities had not provided timely consular notification,[67] but disputed the appropriate remedy,[68] a topic taken up in more detail below.

To address the problem of inadequate compliance, the U.S. State Department has attempted to increase compliance by offering extensive training materials and other training to local and state law enforcement officials.[69] However, compliance is still not as wide-spread as it should be, leading to continuing litigation.

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60. VCCR, *supra* note 6, art. 36(1)(b).
61. *Id.* Many bilateral consular treaties require notification of the foreign national's consulate. *See, e.g.*, Consular Convention and Protocol, U.S.-U.S.S.R., art. 12, June 1, 1964, T.I.A.S. No. 6503, 19 U.S.T. 5018.
62. Results of Westlaw search conducted on September 24, 2013 of "ALLFEDS" database for cases using phrase "Vienna Convention on Consular Relations."
63. Vienna Convention on Consular Relations (*Breard*) (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9).
64. LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466 (June 27).
65. *See* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31). Mexico originally brought its claim on behalf of fifty-four Mexican nationals, but subsequently amended the claim to include only fifty-two Mexican nationals. *See id.* ¶ 15.
66. One of those fifty-four defendants was José Ernesto Medellin, whose case was also heard by the U.S. Supreme Court. *See* Medellin v. Texas, 552 U.S. 491 (2008).
67. *Id.*
68. *Id.*
69. *See* U.S. Dep't of State, *Consular Notification and Access*, TRAVEL.STATE.GOV, http://travel.state.gov/law/consular/consular_753.html (last visited Oct. 18, 2013).

Persons who were denied consular notice and access have sought various remedies, including suppression of evidence,[70] dismissal of an indictment,[71] damages,[72] a re-hearing,[73] or re-sentencing.[74] This litigation has in turn led to a great deal of judicial opinions and scholarly commentary regarding what remedies may or may not be available to address the problem.[75] Unfortunately for these defendants, courts in the United States generally have not been receptive to providing remedies in connection with claims of lack of consular notification and access. The lack of a remedy provides little incentive for law enforcement officers to increase their compliance with the VCCR. But equally important, lack of compliance jeopardizes the ability of Americans to receive consular notice and access when they are arrested or detained abroad. Going forward, courts in the United States must recognize the importance of consular notification and order an appropriate remedy that increases compliance both at home and abroad.

As Professor John Quigley discusses elsewhere in this symposium issue,[76] consular notification and access is evolving to have the status of a human right that transcends the treaty-based obligations of the VCCR.[77] In addition to the VCCR, the right of consular notice and access is codified in several international human rights treaties, including, for example, the

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70. Sanchez-Llamas v. Oregon, 548 U.S. 331, 367 (2006) (suppression of evidence not an appropriate remedy).

71. United States v. De La Pava, 268 F.3d 157, 165-66 (2d Cir. 2001) (no dismissal of the indictment for failure to provide consular notification).

72. Both *Cornejo v. County of San Diego*, 504 F.3d 853, 860 (9th Cir. 2007) and *Bennett v. Gandara*, 528 F.3d 823, 829 (11th Cir. 2008) stand for the proposition that a violation of VCCR Article 36 does not give rise to a valid claim for damages under 42 U.S.C. § 1983, but the Seventh Circuit reached the opposite conclusion in *Jogi v. Voges*, 480 F.3d 822, 835-36 (7th Cir. 2007).

73. *See, e.g.*, Gutierrez v. State, No. 53506, 2012 WL 4355518 (Nev. Sept. 19, 2012) (Nevada Supreme Court granted a Mexican national defendant a rehearing to determine whether he had been prejudiced by a lack of consular notification).

74. In *Valdez v. State*, 46 P.3d 703 (Okla. Crim. App. 2002), for example, a court-appointed attorney for a Mexican national convicted of murder was found ineffective because he failed in his duty to inform the defendant of his right to communicate with the consulate. When the Mexican consulate was notified by a relative that Mr. Valdez had been sentenced to death, the Mexican consulate retained experts and experienced attorneys who investigated Mr. Valdez's background and learned that he suffered from organic brain damage, which greatly contributed to and altered his behavior. *Id.* at 706. The Oklahoma Court of Criminal Appeals held that the lack of consular notification resulted in a miscarriage of justice and granted Mr. Valdez's motion for re-sentencing. *Id.* at 710-11.

75. *See, e.g.*, David P. Stewart, *Weston Tribute: The Consular Notification Conundrum*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 685 (2013); Steve Charnovitz, *Correcting America's Continuing Failure to Comply with the Avena Judgment*, 106 AM. J. INT'L L. 572 (2012); Cindy Galway Buys, *The United States Supreme Court Misses the Mark: Towards Better Implementation of the United States' International Obligations*, 24 CONN. J. INT'L L. 39 (2008).

76. John Quigley, *Vienna Convention on Consular Relations: In Retrospect and into the Future*, 38 S. ILL. U. L.J. 1 (2013).

77. *See* Christina M. Cerna, *The Right to Consular Notification as a Human Right*, 31 SUFFOLK TRANSNAT'L L. REV. 419 (2008).

Convention Against Torture[78] and the Migrant Workers Convention.[79] Moreover, the Inter-American Court on Human Rights has issued an Advisory Opinion in which it states that the lack of consular notice and access in capital cases violates the right to life because it is so important to ensuring due process of law.[80] Consular assistance can also ensure respect for the right to a fair hearing by helping find a lawyer and a competent interpreter, working with the family of the defendant to facilitate communication and assistance, explaining the U.S. legal system, obtaining evidence from abroad, and other related assistance.[81]

Even when consular notification and access is provided, it is not always given in a timely manner, potentially rendering consular assistance less effective. In this regard, Article 36 of the VCCR requires that the notice be given "without delay." Currently, there is no accepted uniform time frame in which consular notice must be provided. Somewhat surprisingly given the inherent ambiguity of the phrase "without delay," not many courts have considered the meaning of those words in specific factual contexts. The ICJ held in *Avena* that notice by Texan officials to the Mexican consulate five days (three business days) after arresting a Mexican national, Mr. Hernández, was sufficient within the meaning of VCCR Article 36(1)(b).[82] However, the ICJ found that Texas breached its independent obligation to notify Mr. Hernández about his right to consular notification without delay in the first instance.[83]

In the United States, those few courts that have considered the issue on the merits have reached somewhat inconsistent results. For example, in *United States v. Miranda*,[84] a Minnesota court held that failure to notify the

78. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 6.3, 1465 U.N.T.S. 85 (Dec. 10, 1984) ("Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.").

79. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families art. 16.7, 2220 U.N.T.S. 3 (Dec. 18, 1990).

80. The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 137 (Oct. 1, 1999). Although the issue of consular notification is raised most often in capital cases, it has also been successfully used to secure a rehearing in noncapital cases. *See, e.g.*, Osageide v. United States, 543 F.3d 399 (7th Cir. 2008).

81. *See* The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, *supra* note 80, at ¶ 137; *see also* Cindy Galway Buys et al., *Do Unto Others: The Importance of Better Compliance with Consular Notification Rights*, 21 DUKE J. COMP. & INT'L L. 461, 467-75 (2011).

82. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, ¶ 97 (Mar. 31).

83. *See id.* ¶ 105(2).

84. 65 F. Supp. 2d 1002, 1005 (D. Minn. 1999) ("The Court finds that a period of two days constitutes a 'delay' within the meaning of the Convention when, as in this case, the record is devoid of evidence demonstrating that earlier notification would not have been reasonably possible.").

Mexican consulate for two days after the arrest of a Mexican national violated the VCCR under the circumstances. By contrast, in *Bell v. True*,[85] the Virginia Supreme Court held that a thirty-six hour delay prior to notification of the Jamaican consulate of Bell's arrest did not violate Article 36.[86] But, according to the Eighth Circuit Court of Appeals, a four-day delay was too long.[87]

In an instruction manual for law enforcement officers, the U.S. State Department currently takes the following position with respect to the timing of consular notification: "[T]here should be no deliberate delay, and that notification must occur as soon as reasonably possible under the circumstances . . . . Ordinarily, [the officer] must inform a foreign national of the possibility of consular notification by or at the time the foreign national is booked for detention."[88] In a later portion of the manual, the Department of State "recommends that notification [to the consular officer] be given within 24 to 72 hours of arrest or detention."[89] As a practical matter, a gap of seventy-two hours from arrest to first notification is a fairly significant time period in which many pertinent events may take place, including multiple interrogations of a suspect in a language that is likely not his or her native language, the presentation and signing of various documents, again in a non-native language, and, if the wrong person is arrested, the real perpetrator can use the delay and confusion to abscond or destroy evidence.[90] Accordingly, it is imperative that consular notification be provided as soon as possible so the case can proceed with proper communication and information.

In considering what constitutes timely notification, advances in telecommunications technology may further shorten the time frame in which it is reasonable to expect that consular notice be given. In this age of instant electronic communications, law enforcement officers have a variety of means at their disposal to contact consular officers, including the more traditional phone call or facsimile, but also email and text messages. The increasing speed of and options for electronic communication are likely to change the interpretation of the legal requirement to give notice "without delay."

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85. 413 F. Supp. 2d 657, 728 (W.D. Va. 2006).
86. A federal district court upheld this ruling in a related action for a writ of habeas corpus. *See id.*
87. United States v. Santos, 235 F.3d 1105 (8th Cir. 2000) (no dispute that four-day delay violated VCCR).
88. *See* U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS 21 (2010), http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf.
89. *Id.* at 25.
90. Although Article 36 of the VCCR requires that consular notification be given without delay, there is nothing in the treaty that requires the interrogation of a suspect be suspended until the consulate has been notified or has been in communication with the defendant.

Now that the states parties to the VCCR have several decades of experience with consular notification both under the VCCR and pursuant to various bilateral consular treaties, they may want to consider adopting an amendment or an additional protocol for the VCCR that provides more guidance as to the meaning of "without delay." Providing more specificity regarding expectations as to the timeliness of the notification may help to remedy the discrepancies in practice and case law that currently exist. It could also bring uniformity between a state's obligations under the VCCR and any bilateral consular conventions to which it belongs.[91]

Another fairly new legal issue that has implications for consular notification is a growing practice of states to invoke a national security exception to the requirement to provide defendants who are considered national security threats with prompt notification of their rights. For example, law enforcement authorities may claim that additional time is needed to question persons who are suspected of being terrorists to prevent them from causing further harm through other acts of terrorism, before providing the suspect with access to a lawyer or a consular officer. The recent case of the Boston bombers in April 2013 is a good example.[92] In that case, the U.S. government wanted to question the suspect, Dzhokhar Tsarnaev, before telling him of his right to remain silent or to an attorney.[93] Because Mr. Tsarnaev was born in Kyrgyzstan, there was also some early discussion in the media of which consulate should be notified and when that notification would occur.[94] However, it was ultimately determined that Dzhokhar Tsarnaev is a U.S. citizen and thus not entitled to consular assistance.[95] Another example comes from China, which reserves the right to postpone notification to Taiwanese authorities if it would "hinder ongoing investigation, prosecution or trial procedures" of the arrest or detention of a Taiwanese citizen arrested in China under a bilateral agreement between China and Taiwan.[96]

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91. With respect to the relationship between the VCCR and bilateral consular agreements, Article 73 of the VCCR provides: "1. The provisions of the present Convention shall not affect other international agreements in force as between the States parties to them. 2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof." VCCR, *supra* note 6, art. 73.

92. Allen G. Breed & Steve Peoples, *Dzhokhar Tsarnaev Interrogation: Bombing Suspect Won't Get Miranda Rights, Will Face Elite Investigators*, HUFFINGTON POST (Apr. 21, 2013), http://www.huffingtonpost.com/2013/04/21/dzhokhar-tsarnaev-interrogation_n_3126809.html. Tsamaev is a naturalized U.S. citizen, so he would not be entitled to consular notification. *Id.*

93. *Id.*

94. Michael Idov, *Are the Tsarnaev Brothers Russian?*, NEW YORKER (Apr. 19, 2013), http:// www.newyorker.com/online/blogs/newsdesk/2013/04/russia-reacts-to-boston.html.

95. *Id.*

96. Jerome A. Cohen, *For Taiwanese, the Mainland Remains a Dangerous Place*, SOUTH CHINA MORNING POST (Sept. 5, 2012), http://www.cfr.org/taiwan/taiwanese-mainland-remains-dangerous-place/p28926.

Currently, many courts take the view that the timeliness of consular notification is measured under the circumstances of the particular case.[97] Unlike Miranda warnings, there is nothing in the VCCR or related case law that requires consular notification be given before a foreign defendant is interrogated. Rather, the only standard is that notice be given "without delay." If the states parties to the VCCR were concerned that consular notification could interfere with a national security case, they could add an express national security exception to Article 36 that provides more flexibility as to how long states should wait before providing consular notification and access. However, such an exception to the usual notice requirements may lead to cases of abuse and should be approached cautiously.

Assuming there is no amendment to the VCCR that spells out more expressly what is meant by consular notification "without delay," another possibility to bring more clarity to this area of the law would be to address the issue at the domestic level. One option would be for the federal and state governments to adopt legislation that more fully implements the requirements of Article 36. In this regard, the Uniform Law Commission is currently studying the feasibility of a model or uniform law that states could adopt to implement consular access and notification.[98] Some states have already adopted legislation or administrative rules that spell out the state's obligations under the VCCR in more detail. For example, California has enacted a statute that provides that a foreign defendant must be given consular notification within two hours of arrest.[99] There is also a notice and comment procedure underway regarding proposed amendments to Rules 5 and 58 of the *Federal Rules of Criminal Procedure* to ensure better compliance with consular notification obligations.[100]

Official compliance with the requirements of Article 36 of the VCCR is likely to continue to lag, however, unless there are some consequences to a state's failure to comply. One way to increase enforcement and

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97. *See* United States v. Miranda, 65 F. Supp. 2d 1002, 1005 (D. Minn. 1999).

98. *ULC Drafting and Study Committee Projects* 9 (rev. Oct. 2013), *available at* http://www.uniformlaws.org/Shared/ProjectsList/ProjectsList.pdf.

99. CAL. PENAL CODE § 834c(a)(1) (West 2012) provides: "In accordance with federal law and the provisions of this section, every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national" of his or her consular notification rights. California law also provides that California law enforcement agencies shall ensure that policy or procedure and training manuals incorporate language based on the Vienna Convention. PENAL § 843c(c).

100. *See* Memorandum to the Hon. Jeffrey S. Sutton, Chair, Standing Comm. on Rules of Practice and Procedure, from Hon. Reena Raggi, Chair, Advisory Comm. on the Fed. Rules of Criminal Procedure, regarding Report of the Advisory Comm. on Criminal Rules (May 8, 2103), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CR05-2013.pdf (recommending transmittal to the Judicial Conference of proposed amendments to Rules 5 and 58 adding consular notification).

compliance would be to recognize an individual right to consular notification and access that is enforceable in U.S. courts. To date, the U.S. State Department has opposed the idea that the VCCR creates individually enforceable rights.[101] It may behoove the U.S. State Department to change its position and openly support the idea that the VCCR creates individuals rights that are enforceable in U.S. courts and encourage courts to provide a remedy for violations to resolve some of the foreign relations problems that have resulted from a lack of compliance.

Another option would be to amend the VCCR or to adopt an optional protocol to more specifically provide an obligation to award a remedy where a foreign national's right of consular notification and access has been violated. If this path were followed, the states parties could look to the ICJ's decision in *Avena* for guidance, where the ICJ stated that failure to provide consular notification and access gives rise to a duty to review and reconsider the case to determine whether the defendant was prejudiced by that failure.[102]

The issue of whether a foreign defendant should be required to demonstrate prejudice resulting from the failure of law enforcement to provide timely consular notification and access is a contentious one. In many cases where foreign nationals arrested or detained in the United States alleged that they did not receive notice of their right to communicate with their consulate, courts have held that the defendant must show that he or she was prejudiced by the lack of consular notification before obtaining any relief.[103] Some scholars have suggested that a showing of prejudice should not be required because it is not possible to know what a consul might have done and whether the involvement of counsel would have resulted in an acquittal.[104] Requiring a showing of prejudice does not necessitate such a high standard, however. Neither the courts nor the U.S. State Department has taken the position that "prejudice" means that the case would have ended in an acquittal instead of a conviction.

By way of analogy, in Sixth Amendment ineffective assistance of counsel claims, U.S. courts follow a prejudice standard set forth in *Strickland v. Washington*, whereby the U.S. Supreme Court held that a "defendant need not show that counsel's deficient conduct more likely than

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101. *See, e.g.*, Medellin v. Texas, 552 U.S 491 (2008). *See also* Brief for Respondent, Medellin v. Texas, 552 U.S. 491 (2008) (No. 06-984), 2007 WL 2428387, at *5-6.

102. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, ¶ 121 (Mar. 31).

103. *See, e.g.*, United States v. Rangel-Gonzales, 617 F.2d 529, 530 (9th Cir. 1980); United States v, Esparza-Ponce, 7 F. Supp. 2d 1084, 1096-97 (S.D. Cal. 1998); United States v. Briscoe, 69 F. Supp. 2d 738, 746-47 (D. V.I. 1999); Iowa v. Lopez, 633 N.W.2d 774, 783 (Iowa 2001); Colorado v. Preciado-Flores, 66 P.3d 155, 161 (Colo. App. 2002); Hernandez v. United States, 280 F. Supp. 2d 118, 124-25 (S.D.N.Y. 2003).

104. *See, e.g.*, Quigley, *supra* note 72, at 9-10.

not altered the outcome in the case."[105] Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[106] The Seventh Circuit Court of Appeals used the *Strickland* test to assess prejudice in the consular notification case of *Osageide*, setting a precedent for the borrowing of this standard.[107] Under the *Strickland* standard for prejudice, a foreign national who alleges lack of consular notification would have to show a reasonable probability that, had the foreign national known of such rights, he or she would have requested and received consular assistance of a specific type which, in turn, would have had a reasonable probability to make a difference in the outcome of the case. A foreign defendant need not demonstrate that but for the lack of consular assistance he or she would have been acquitted. Instead, a defendant might be able to show that with consular assistance additional evidence might have been uncovered that could have mitigated sentencing.[108] Requiring a showing of prejudice will likely reduce the number of frivolous claims on appeal and preserve the courts' review for those cases that have some merit.

Finally, the states parties to the VCCR could also consider the creation of an international body similar to the Human Rights Committee (HRC) with power to review and comment on states' compliance with the VCCR and to issue interpretive guidance regarding the meaning of the treaty.[109] As with the HRC, such a body could even be given power to adjudicate claims by other states parties or by individuals arising out of disputes under the VCCR. This idea is not the preferred option, however, because bodies like the HRC, although influential, lack any real enforcement power. Moreover, the ICJ has adequately dealt with dispute resolution pursuant to the powers given it under the existing Optional Protocol to the VCCR.

The United States is by no means alone in struggling with implementation of the consular notification requirements of the VCCR. Some foreign countries have adopted laws that implement the right of consular notice into their domestic legal systems. Foreign courts are increasingly ordering remedies for persons whose rights of consular notice and access were violated. For example, in the recent *Cassez* case from Mexico, the Mexican Supreme Court found that consular notice and access

105. 466 U.S. 668, 693 (1984).

106. *Id*. at 694.

107. Osagiede v. United States, 543 F.3d 399, 413-14 (7th Cir. 2008).

108. *See, e.g.*, Valdez v. State, 46 P.3d 703, 706 (Okla. Crim. App. 2002) (describing evidence unearthed by Mexican authorities that the defendant suffered from severe organic brain damage, which led the Oklahoma Court of Criminal Appeals to order that Valdez's capital sentence be reconsidered).

109. The Human Rights Committee is created by the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights pt. IV, Dec. 19, 1966, 999 U.N.T.S. 171.

is vital to an adequate defense because of the singular disadvantages that a foreign national faces.[110] These disadvantages often include unfamiliarity with the language and the legal system. Likewise, in 2006 the Federal Constitutional Court in Germany held that failure to provide consular notification under Article 36 of the VCCR violates the guarantee of a fair trial under the German Constitution.[111]

IV. CONCLUSION

The VCCR was an important advance in the international law of consular relations. Not only did it codify centuries of consular practice, it also broke new ground, especially through its recognition of a "right" of consular notification and access. However, law is not a static concept. The last fifty years have seen tremendous growth in the number of international human rights treaties, including treaties that further expand and entrench the right of consular notification and access. In addition, new technologies are challenging some of the traditional understandings of consular rights and duties and are opening new possibilities for methods of operation. It now may be time, with five decades of experience under the Vienna Convention, for the states parties to consider some modifications to the VCCR to clarify some of the issues left open in 1963, such as the meaning of "without delay." Most importantly, it is time for the states parties to find a mechanism to increase compliance with the VCCR's consular notification obligations. The most obvious way to do so is to provide for a remedy when those rights are violated.

110. Amparo Directo en Revision 517/2011. Quejosa: Florence Marie Louise Cassez Crepin, Acuerdo de la Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], correspondiente al día veintitrés de enero de dos mil trece (Mex.), http://www.scjn.gob.mx/Transparencia/Epocas/Primera%20sala/DecimaEpoca/ADR_517-2011_PS.pdf. *See also Mexico's Supreme Court Orders Florence Cassez Freed*, MEXICO GULF REP. (Jan. 23, 2013), http://www.mexicogulfreporter.com/2013/01/mexican-supreme-court-orders-florence.html.

111. Klaus Ferdinand Garditz, *International Decisions*: *Case Nos. 2 BvR 2115/01, 2 BvR 2132/01, & 2 BvR 348/03 [Vienna Consular Relations Case]*, 101 AM. J. INT'L L. 627, 629, 632 (2007).