Suppressing the Incriminating Statements of Foreigners

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INTRODUCTION

Foreign nationals arrested on a criminal charge enjoy a right, based on treaty, of access to their home-state consul, and additionally, a right to be informed by detaining authorities of that right. In the United States, the police who arrest foreign nationals frequently proceed to interrogate them without explaining the right of access to a consul. Non-compliance is frequent even when the charge is serious, as in capital murder. A number of foreign nationals have been condemned to death in the United States, following trials in which an incriminating statement figured prominently as evidence, but where the statement was made before authorities gave information about consular access.

Attorneys representing foreign nationals have objected to the admissibility of an incriminating statement made under such circumstances. These objections have generated appellate opinions in both the state and federal courts, though to date, not from the U.S. Supreme Court.

This Article assesses the manner in which the courts have handled such cases. After explaining consular access and its purposes, the Article asks whether consular access involves a judicially cognizable right, whether the information about consular access must be provided prior to interrogating, and whether principles of international law call for the suppression of a statement made by a foreign national who was not informed about consular access. Next, the Article examines the decisions of international courts on remedies where consular access obligations have been violated. Finally, it examines the views on remedies given to U.S. courts by the U.S. Department of State and, in particular, the Department’s analysis of decisions on this subject by the courts of other countries.
I. THE VIENNA CONVENTION ON CONSULAR RELATIONS AND SUPPRESSION

The Vienna Convention on Consular Relations ("VCCR") protects a foreign national arrested on a criminal charge. Article 36, paragraph 1, requires detaining authorities to inform a foreign national of her or his right to access a consul of her or his home state. If the foreign national opts for such access, the authorities must facilitate such access. The United States is among the 165 states that are parties to the VCCR.

Additionally, the VCCR requires states to provide a remedy if the obligation is violated. Article 36, paragraph 2, states:

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Not infrequently, police in the United States fail to inform a foreign national upon arrest of the right of consular access, but interrogate and elicit an incriminating statement. While no scientific studies have been conducted, it is thought that foreign nationals are particularly prone to succumbing to interrogation techniques aimed at encouraging them to confess. A Paraguayan national, operating on his understanding either of Roman Catholicism or of the Paraguayan legal system, apparently thought that if he confessed to the murder with which he was charged, mercy would be shown him. Instead he was convicted and executed. A Mexican national who confessed to murder later explained that his Mexican colleagues, who may have been the actual perpetrators, asked him to confess because he was younger than they were and had no family obligations, and because they told him

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3 See Vienna Convention on Consular Relations, supra note 1, at art. 36, para. 1.
4 Id.
5 Id.
7 Vienna Convention on Consular Relations, supra note 1, at para. 2.
9 Id.
that if he confessed he would be deported to Mexico rather than arrested.\textsuperscript{10} The colleagues fled to Mexico and the young man was convicted of the murder.\textsuperscript{11}

Foreign nationals may have particular difficulty understanding the right to remain silent when it is explained to them by a police officer. They may not understand that it applies at a police station, because police may immediately proceed to ask questions about the suspected offense. Whether or not foreign nationals in general, or a particular foreign national, are peculiarly likely to make incriminating statements, or are peculiarly likely to misunderstand the right to silence, the VCCR assumes that foreign nationals may benefit from consular assistance and requires the detaining authorities to facilitate this assistance.

The issue of whether suppression is appropriate depends on three subsidiary issues. First, it must appear that consular access is a right that adheres to the foreign national. Second, it must appear that information about consular access must be provided prior to interrogation. Third, it must appear that a judicial remedy is required.

II. CONSULAR ACCESS AS A RIGHT

The U.S. Department of State told the courts that the right of consular access relates to the two states involved — the receiving state and the sending state — but not to the detainee.\textsuperscript{12} "The right of an individual to communicate with his consular officials is derivative of the sending state’s right to extend consular protection to its nationals," it said, and therefore the VCCR does not establish "rights of individuals."\textsuperscript{13} The Department focused on language in the VCCR preamble that, it said, negated consular access as a right of the individual.\textsuperscript{14} The preamble phrase read, "[r]ealizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions by consular posts on behalf of their respective States."\textsuperscript{15}

Appearing before the Inter-American Court of Human Rights in 1998, the Department said, in a written submission, that "[t]he purpose of the VCCR is not to establish or protect individual human rights," and it cited the preamble language


\textsuperscript{12} Letter from David Andrews, Legal Adviser, Department of State, to James K. Robinson, Assistant Attorney General A–3 (Oct. 15, 1999) [hereinafter Andrews Letter] (including as Attachment A, Department of State Answers to the Questions Posed by the First Circuit in United States v. Nai Fook Li).

\textsuperscript{13} Id.

\textsuperscript{14} Id. at A–4.

\textsuperscript{15} Vienna Convention on Consular Relations, \textit{supra} note 1, at pmbl. (emphasis omitted).
The court rejected the argument, saying that the language referred to consular officers and was aimed at highlighting the functional character of the privileges accorded them.\textsuperscript{17}

The Solicitor-General of the United States, also citing the preamble language, told the U.S. Supreme Court that consular access is not a right that adheres to a detained foreign national.\textsuperscript{18} The interpretation of the preamble language by the Department and by the Solicitor-General is inconsistent with prior Executive Branch use of the same language. The bulk of the VCCR deals with the powers and immunities of consular officers. The immunities are aimed not at advantaging them as individuals, but at allowing the states they serve to perform consular functions.

This preamble phrase, moreover, was taken nearly verbatim from a sister treaty, the Vienna Convention on Diplomatic Relations, which had been drafted just two years earlier.\textsuperscript{19} Whereas the VCCR deals with consular officers, the Vienna Convention on Diplomatic Relations deals with diplomatic officers.\textsuperscript{20}

The phrase, as used in the two conventions, was boiler-plate language to explain immunities adhering to the representatives of a state. The U.S. delegation to the Vienna conference at which the VCCR was drafted, headed by a deputy legal advisor to the Secretary of State, recited this origin of the preamble language in explaining the VCCR.\textsuperscript{21} The delegation sent a detailed report that was transmitted by the Secretary of State to the United States Senate.\textsuperscript{22} In its account of the preamble, the U.S. delegation referred to it as applying to “officers, members of families, and employees.”\textsuperscript{23} Moreover, arguing the Tehran Hostages case, the Department of State wrote, “Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State

\textsuperscript{16} Written Observations of the United States of America, Request for Advisory Opinion OC–16 (June 1, 1998), at 26–27 (on file with Inter-American Court of Human Rights).
\textsuperscript{20} Id. (The preamble to the Vienna Convention on Diplomatic Relations reads: “Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.”).
\textsuperscript{22} Id. at 41.
\textsuperscript{23} Id. at 46.
who are assured access to consular officers and through them to others.” The Department based that suit against Iran on the proposition that by taking consuls hostage, Iran deprived U.S. nationals of access to the consuls. U.S. nationals had a right of access, and if the consuls were sequestered, that right was violated. For this reasoning to be valid, the preamble could not be read to negate rights to nationals in need of consular assistance.

Several U.S. courts have accepted interpretation of the preamble by the Department and the Solicitor-General to conclude that Article 36 gives no enforceable right to a detained foreign national. The weakness of that interpretation was understood by dissenting Judge Torruella in United States v. Li. Judge Torruella, viewing the matter as had the Inter-American Court of Human Rights, wrote:

It is clear that in the context in which [the preamble language] is framed (e.g., “such privileges and immunities”), it refers to the privileges and immunities of “diplomatic agents” qua diplomatic agents, and not with respect to the individual rights established in Article 36(1)(b) for the benefit of detained nationals.

III. THE MEANING OF “WITHOUT DELAY”

In a Virginia case, police attempted to comply with the Article 36 obligation thirty-six hours after arresting a foreign national. However, during that interval they elicited an incriminating statement. The defense attorney moved to suppress the statement, but the trial court refused. The Supreme Court of Virginia stated that “[t]he provisions of Article 36 do not mandate immediate notification, nor do

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25 Id.
26 Id.
27 See, e.g., United States v. De La Pava, 268 F.3d 157 (2d Cir. 2001) (stating that the preamble supports the view that the Convention created no judicially enforceable individual rights); State v. Martinez-Rodriguez, 33 P.3d 267, 273–74 (N.M. 2001) (relying in part on the proposition that the preamble states that a purpose of the treaty is “not to benefit individuals but to ensure the efficient performance of functions by consular posts” and citing the Department of State for the proposition that “[t]he [only] remedies for failures of consular notification . . . are diplomatic, political, or exists between states under international law”).
29 Id. at 72.
31 Id. at 705.
32 Id.
they necessarily require consular notification before an arrestee is advised of Miranda rights and agrees to waive those rights by answering questions.\textsuperscript{33}

Contrary to that of the Virginia Supreme Court is the view of the Department of Justice in \textit{Li}.\textsuperscript{34} In oral argument before the U.S. Court of Appeals, an assistant U.S. Attorney was asked, "Does [the Vienna Convention] require that the individual be notified immediately?"\textsuperscript{35} The attorney replied, "Well, yes it does."\textsuperscript{36}

Light is shed on the meaning of "without delay" by the manner in which the phrase was drafted. The International Law Commission, which produced the first draft of what became the VCCR, had written the words "without undue delay."\textsuperscript{37} The draft was revised, however, at the Vienna conference of states that finalized the text of the convention. The conference formed two committees, and divided between them the commission's draft articles. Article 36 went to the Second Committee. There the United Kingdom took issue with the word "undue."\textsuperscript{38} Concerned that the detaining authorities might contrive reasons to avoid consular access, it proposed deleting the term.\textsuperscript{39} The Second Committee did so and sent Article 36 to the plenary conference with the phrase reading "without delay."\textsuperscript{40}

At the plenary conference, the Soviet delegate bemoaned the deletion because, he said, it would give a right to consular access as soon as detention began:

[The deletion of "undue"] seemed to imply an obligation to supply the information immediately, but when a national of the sending State was committed to prison because he had committed an offence the authorities of the receiving State must have time to collect the necessary documents with a view to informing the consul.\textsuperscript{41}

The Soviet delegate's view that "without delay" meant "immediate" was not challenged by any other delegate. Those delegates favoring the deletion of "undue" might have tried to mollify the opposition by saying that the deletion did not mean

\begin{footnotes}
\item[33] \textit{Id.} at 706.
\item[34] \textit{See generally} \textit{Li,} 206 F.3d 56.
\item[35] \textit{Id.} at 69 (quoting Oral Argument of Apr. 6, 1999).
\item[36] \textit{Id.} (quoting Oral Argument of Apr. 6, 1999).
\item[39] \textit{See id.}
\item[40] \textit{See id.} at 131.
\end{footnotes}
that consular access would apply as soon as detention began. They did not. The evident view, among those states both opposing and favoring the deletion of "undue," was that the phrase "without delay" meant immediate consular access, with immediate notification to the detainee.

West Germany was one of the countries that, along with the U.S.S.R., thought that the detaining authorities should have a period of time into a detention before having to provide consular access. It took the approach of proposing a specific grace period. In the conference's committee, it offered an amendment to give the authorities thirty days before allowing consular access. By this amendment, the "without undue delay" language would have been retained, but qualified by the words "but at the latest within one month." When discussion in the committee made it clear that other states were not willing to allow so long a period, West Germany revised its own amendment to change "thirty days" to "48 hours." Thus, in the amendment's revised form, states would have had a forty-eight-hour grace period.

In this revised form, the Second Committee put the amendment to a vote and rejected it. The rejection of a forty-eight-hour grace period, taken together with the deletion of "undue," shows that the understanding of the states was that "without delay" meant no delay, and therefore that consular access applied as soon as detention commenced.

The Inter-American Court of Human Rights referred to the principle that treaty provisions be construed in keeping with their purpose and said that the phrase "without delay" must be read in accordance with the purpose of notification, namely, to ensure that the right to consular access is implemented. Therefore, it concluded:

[T]he expression 'without delay' in Article 36(1)(b) of the Vienna Convention on Consular Relations means that the State must comply with its duty to inform the detainee of the rights that article confers upon him, at the time of his arrest or at least before he makes his first statement before the authorities.

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43 Id.
44 Id.
45 Id.
47 Id.
48 See The Right to Information, supra note 17, at para. 103.
49 Id. at para. 141(3).
In *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*\(^{50}\) the International Court of Justice considered the meaning of "without delay" in light of the fact that the arresting authorities may not immediately know that a detainee is a foreign national. The court stated that in the drafting history of the phrase "without delay" there was no mention by delegates of a:

> connection with the issue of interrogation. The Court considers that the provision in Article 36, paragraph 1(b), that the receiving State authorities "shall inform the person concerned without delay of his rights" cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36.\(^{51}\)

That caveat was required by the court's concern that the authorities may not initially know that a detainee is a foreigner.

The court stated that information about consular access must be given "as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national."\(^{52}\) For that reason, the court noted that the duty to inform "is not to be understood as necessarily meaning 'immediately upon arrest.'"\(^{53}\) At the same time, the court wrote that the detaining authorities may not ignore the possibility that a detainee is a foreign national.\(^{54}\) They must make inquiry at the time of arrest.\(^{55}\)

The International Court of Justice stated that the drafting history showed no difference in the meaning of the phrase "without delay" in its several appearances in Article 36.\(^{56}\) The term is also used in Article 36 to refer to notification to a consul upon request by the detainee. Thus, in the court's reading of Article 36, both the provision of information to the detainee and, upon a detainee's request, the provision of information to a consul must occur "without delay."

\(^{51}\) Id. at para. 87.
\(^{52}\) Id. at para. 88.
\(^{53}\) Id.
\(^{54}\) See id. at para. 64.
\(^{55}\) Id.
\(^{56}\) Id. at para. 86.
IV. A JUDICIAL REMEDY

In United States v. Lombera-Camorlinga, the U.S. Court of Appeals wrote that "the Vienna Convention is silent — and therefore ambiguous, at best — on whether or not suppression is an appropriate remedy." U.S. courts have typically said that suppression is not required when a foreign national is interrogated without having been advised of the right of consular access.

The Department of State has taken the position that no judicial remedy, suppression or any other, is required when the authorities have failed to advise a foreign national about consular access. In 1998, Paraguay sued the United States in the International Court of Justice when Virginia was about to execute a Paraguayan national. The case involved no issue of an incriminating statement. The remedy sought by Paraguay was annulment of the conviction and sentence of death. The Department of State, representing the United States in the litigation, conceded that the United States had violated Article 36 by failing to inform the Paraguayan about consular access.

However, the Department told the court:

Paraguay's application maintains that the necessary legal consequence for any such breach is that the ensuing conviction and sentence must be put aside. There is absolutely no support for this claim in the language of the Convention. The Court should

57 206 F.3d 882 (9th Cir.), cert. denied, 531 U.S. 991 (2000).
58 Id. at 887.
59 See, e.g., United States v. Felix-Felix, 275 F.3d 627 (7th Cir. 2001) (stating that suppression of a statement is not a proper remedy for an Article 36 violation); United States v. Cowo, 22 Fed. Appx. 25 (1st Cir. 2001), cert. denied, 535 U.S. 966 (2002) (stating that neither suppression of an incriminating statement nor dismissal of an indictment is an appropriate remedy); United States v. Carrillo, 269 F.3d 761 (7th Cir. 2001), cert. denied, 535 U.S. 1004 (2002) (stating that suppression of a statement is not a proper remedy); United States v. Minjares-Alvarez, 264 F.3d 980, 986 (10th Cir. 2001) (stating, "suppression is not an appropriate remedy for a violation of Article 36 of the Vienna Convention," that nothing in VCCR's text requires suppression as a remedy); Lopez v. Georgia, 558 S.E.2d 698, 700 (Ga. 2002) (stating, "nothing in [VCCR's] text requires the suppression of evidence," that by its terms it does not require application of the exclusionary rule, and such a judicially-created remedy cannot be imposed absent a violation of a constitutional right; any rights created by the VCCR do not rise to the level of a constitutional right); State v. Issa, 752 N.E.2d 904 (Ohio 2001) (stating that a treaty-based right is on par with a statutory right, and that the exclusionary rule is only used for constitutional violations).

60 See infra text accompanying note 65.
62 Id.
63 Id. (application of Paraguay, Apr. 3, 1998).
64 Id. (hearing of Apr. 7, 1998).
not read into a clear and nearly universal multilateral instrument such a substantial and potentially disruptive additional obligation that has no support in the language agreed by the parties.\(^{65}\)

The second paragraph acknowledges that Article 36 issues will be handled in the context of procedures provided by domestic law.\(^{66}\) At the same time, the paragraph requires that those procedures be applied in such a way as to implement the Article 36 right.\(^{67}\)

The second paragraph of Article 36 is directed at courts, even though courts are not explicitly mentioned.\(^{68}\) The states signatory to the VCCR intended that courts should implement the right identified in the first paragraph. This provision is quite unusual in treaties. Very few, when they provide rights for individuals, additionally state that it is incumbent on domestic courts to implement those rights. The latter proposition, as in the Spain-U.S. treaty relating to Florida, is left unsaid, and even in that situation, courts of the United States have found it their obligation to provide implementation.\(^{69}\)

The interchange among the states that adopted the text of paragraph 2 shows that it requires a judicial remedy for a violation of paragraph 1. In the Second Committee, the U.K. proposed language to strengthen the requirement that the treaty prevail over domestic law.\(^{70}\) In place of International Law Commission draft language that domestic legislation would prevail unless it "nullified" consular access, the U.K. proposed the following language: "subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."\(^{71}\) The Second Committee adopted the U.K. amendment, and that language appears in the final text of paragraph 2.\(^{72}\)

Nonetheless, when the text as approved by the Second Committee went to the plenary session, the U.S.S.R. and other bloc states tried to reinstate the International Law Commission’s language. The Soviet delegate proposed that paragraph 2 read: "The rights referred to in paragraph 1 of this article shall be exercised in conformity

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\(^{65}\) \textit{Id.}  
\(^{66}\) Vienna Convention on Consular Relations, \textit{supra} note 1, at art. 36, para. 2.  
\(^{67}\) \textit{Id.}  
\(^{68}\) \textit{Id.}  
\(^{71}\) \textit{Id.}  
with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must not nullify these rights."

The objection of the bloc states was that the U.K.'s language too clearly required domestic courts to provide a remedy, altering, if necessary, domestic law to achieve that end.\(^7\) The Soviet delegate said, in reference to paragraph 2, "that the matters dealt with in article 36 were connected with the criminal law and procedure of the receiving State, which were outside the scope of the codification of consular law."\(^7\) The Belorussian delegate argued that "[t]he Conference was drafting a consular convention, not an international penal code, and it had no right to attempt to dictate the penal codes of sovereign States."\(^7\) The Romanian delegate said that Romania "could not agree to the inclusion in the convention of any provision that would affect criminal procedure."\(^7\)

The U.K. language to which the bloc states were objecting is, to repeat, the language that appears in paragraph 2 as finally adopted. The states that favored the U.K. version did not dispute the Soviet-bloc interpretation that paragraph 2 required courts of the receiving state to provide remedies, even if domestic law was overridden in the process. Had they been of the opinion that paragraph 2 did not require a judicial remedy, these states would likely have said so, as the Western states were keen to encourage the bloc states to support the VCCR.

The VCCR is unusual in providing for a remedy. Most treaties only provide obligations. U.S. courts provide remedies nonetheless. One example is United States v. Rauscher,\(^8\) a case involving a U.S.-U.K. treaty that provided for the extradition of persons sought on a charge of murder.\(^9\) At U.S. request, the U.K. extradited Rauscher to the United States to stand trial for murder.\(^10\) After Rauscher arrived, prosecutors filed an additional criminal charge against him.\(^11\) By a principle of extradition law, called the rule of specialty, the requesting state may try only for the offense on which extradition was sought.\(^12\) That principle was not mentioned in the U.S.-U.K. treaty.\(^13\) Nor did the treaty say anything about remedies


\(^{74}\) Id.
\(^{75}\) Id. (Mr. Avakov, Belorussia).
\(^{76}\) Id. at 84 (Mr. Cristescu, Romania).
\(^{77}\) 119 U.S. 407 (1886).
\(^{78}\) Id. at 410.
\(^{79}\) Id. at 409.
\(^{80}\) Id. at 419.
\(^{81}\) See id. at 420–21.
for violations. It did not refer to an individual subject to extradition as bearing rights of any kind. Nonetheless, Rauscher challenged the second charge, and the U.S. Supreme Court threw out the charge, thereby giving him a remedy for the treaty violation. 84

V. A STANDARD FOR A JUDICIAL REMEDY

The International Court of Justice, in an Article 36 case brought against the United States by Germany, stated:

[I]f the United States ... should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. 85

In that case, two German nationals had been convicted of murder in Arizona and sentenced to death. 86 The United States admitted its violation of the obligation to notify of the right of consular access but said that Arizona could lawfully proceed to execute the two men. 87 The United States asserted that it could remedy the violation of its obligations to Germany by apologizing to Germany. 88 The court rejected that position. 89 The court did not state whether the United States was in violation for not having overturned the conviction or sentence, but limited itself to stating that the United States was required to provide for “review and reconsideration” in a proceeding in which it would “take[e] account of the violation.” 90

86 Id. at 473.
87 Id.
88 Id.
89 Id. at 512.
90 Id. at 514.
In Avena, the court did address the issue of an incriminating statement. Mexico had asked for an approach comparable to the "exclusionary rule" of U.S. law, whereby a statement taken from a detainee who had not been informed of the right of consular access would be inadmissible as evidence. The court stated that it need not analyze the case in that way, but should confine itself to the VCCR's requirements and to the consequences under international law of a violation.

Referring back to LaGrand, the court reiterated that in the situation of an incriminating statement, "review and reconsideration" must be provided to "take[e] account of the violation." The court ruled:

The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.

The court did not further define "prejudice." It did not indicate that by "prejudice" it meant that the proceedings would have ended differently had consular access been available. The Department of State has made clear that such an approach would be unworkable and inconsistent with the VCCR. Arguing this issue in Paraguay's case against the United States, the Department asserted that it would be: "problematic to have a rule that a failure of consular notification required a return to the status quo ante only if notification would have led to a different outcome. It would be unworkable for a court to attempt to determine reliably what a consular officer would have done and whether it would have made a difference."
The International Court of Justice did not elaborate upon the many purposes that consular access may serve. That issue was addressed by the Inter-American Court of Human Rights when it concluded that "[n]on-observance or impairment of the detainee's right to information is prejudicial to the judicial guarantees." The court's view was that the opportunity for consular assistance may impact various aspects of criminal proceedings. When a detainee has not received consular assistance from not having been informed of the right, one can never know what a consul might have done that would have affected the proceedings in the foreign national's favor. Addressing the imposition of capital punishment on foreign nationals, which was the issue on which it was asked for an advisory opinion, the Inter-American Court stated that the imposition of a death sentence without compliance with the obligation to inform of the right of consular access constitutes an arbitrary deprivation of life.

The Inter-American Commission on Human Rights, which operates under the authority of the Inter-American Court of Human Rights, was presented with a case in which the issue was an incriminating statement. Shortly after arrest, an incriminating statement had been taken from a foreign national by authorities who had not informed the man about consular access. The commission noted the circumstances in which the incriminating statement had been taken. Police in El Paso, Texas, had arranged for the detainee's mother and step-father to be incarcerated in the town of Ciudad Juarez, Mexico, by local Mexican police, and had used the fact of their detention to coerce a confession. The commission noted that a Texas court had concluded that the El Paso officer who testified to not having coerced Fierro had perjured himself.

In indicating the consequences of the failure of consular notification, the commission focused on the confession and stated:

Mr. Fierro's confession was taken at a time when consular notification and assistance may have been highly significant in the circumstances. The consulate could, for example, have

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98 The Right to Information, supra note 17, at para. 129.
99 See id. at paras. 119–21.
100 Id. at para. 137.
102 Id. at para. 17.
103 Id.
104 Id. at para. 18. See also Ex parte Fierro, 934 S.W.2d 370, 371–72 (Tex. Crim. App. 1996) (holding that Fierro's due process rights were violated by the perjured testimony, but denying application for writ of habeas corpus because of harmless error), cert. denied, 521 U.S. 1122 (1997).
verified the status of Mr. Fierro's mother and step-father, who were being held in Mexico by the Mexican police, and thereby mitigated any detrimental impact that their detention may have had on Mr. Fierro's interrogation and the veracity of the resulting confession.105

Although the commission recited these facts to show a consequence of the failure to inform about consular access, it did not state that it need necessarily find that the failure to inform had led to a particular negative result for the foreign national. Unlike the Texas court, the commission held that to execute a foreign national following a failure to comply with the notification requirement of Article 36 constitutes an arbitrary deprivation of life.106 The Commission ruled that the United States was required to give the foreign national a new trial.107

The U.S. Supreme Court has not fully addressed the issue of the consequence of an Article 36 violation. In the only Article 36 case to reach the Court, the matter was only heard on a last-minute request for a stay of execution, without full briefing.108 Rejecting the request for a stay on grounds that the applicant had not raised the Article 36 issue in a timely manner, the Court nonetheless speculated on the impact of an Article 36 violation.109

By way of dictum, the Court wrote that prejudice would be relevant: "it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial."110 The Court did not specify that by "effect" it meant a decisive effect. A U.S. district court, purporting to follow this dictum, stated that the petitioner "must show a) that his Vienna Convention rights were violated; and b) that the violation had a material effect on the outcome of the trial or sentencing proceeding."111 This court found prejudice because of the absence of consular assistance at the mitigation phase of sentencing.112 "Particularly in this case, where trial counsel failed completely to undertake any investigation of the client's life, character, and background in preparation for the sentencing phase, the participation of the Consulate could possibly have made a difference."113

106 Id. at para. 41.
107 Id. at para. 72.
109 Id. at 376–77.
110 Id. at 377.
112 Id.
113 Id.
In an earlier case, the Ninth Circuit Court of Appeals took a different approach. The court stated that while it is incumbent on a foreign national to raise the issue, it is for the government to disprove that the failure of notification did not prejudice the foreign national. Applying the test to the case at bar, the Ninth Circuit held:

[T]he appellant in this case carried his initial burden of going forward with evidence that he did not know of his right to consult with consular officials, that he would have availed himself of that right had he known of it, and that there was a likelihood that the contact would have resulted in assistance to him in resisting deportation.

The court, moreover, did not require a decisive effect on the outcome of the proceedings. Rather, prejudice would be present if the foreign national’s contact with a consul, had it occurred, “would have resulted in assistance to him,” and if it appears that the foreign national was unaware of the right of consular access and would have requested it if informed about it. A number of U.S. courts have taken a similar approach to prejudice in the consular access context. These courts have stated that the evidentiary burden on the foreign national is one of production only.

This approach was taken in the Oklahoma Court of Criminal Appeals, as it considered the case of Osbaldo Torres, one of the Mexican nationals whose right to consular access had been found by the International Court of Justice in Avena to have been infringed. On the basis of the Avena decision, Torres, only days away

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114 United States v. Rangel-Gonzales, 617 F.2d 529 (9th Cir. 1980).
115 Id. at 532.
116 Id. at 533. In 2000, the issue of prejudice became irrelevant for the Ninth Circuit because of United States v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir.) (en banc) (holding that no remedy is required for a consular access violation), cert. denied, 531 U.S. 991 (2000).
117 Rangel-Gonzales, 617 F.2d at 533.
119 See Esparza-Ponce, 7 F. Supp. 2d at 1097 (citing United States v. Villa-Fabela, 882 F.2d 434, 440 (9th Cir. 1989) (“To establish prejudice, the defendant must produce evidence . . . .”)); see also State v. Cevallos Bermeo, 754 A.2d 1224, 1227–28 (N.J. Super. Ct. App.) (applying the same three-pronged test from Villa-Fabela, 882 F.2d at 440), cert. denied, 762 A.2d 221 (N.J. 2000).
from execution, moved the court for a stay.\textsuperscript{121} The Oklahoma Court of Criminal Appeals granted the stay and ordered a hearing of the kind called for in \textit{Avena}: to determine whether the Article 36 violation prejudiced Torres.\textsuperscript{122} One judge, specially concurring, recited specific ways in which the Article 36 violation may have affected the trial but included that the standard for prejudice was whether the defendant was unaware of the consular access right, whether the defendant would have availed himself of it, and whether the consulate likely would have assisted.\textsuperscript{123}

\textbf{VI. THE STATE DEPARTMENT'S ANALYSIS OF FOREIGN COURT PRACTICE}

The issue of whether to suppress a statement made by a foreign national who was not informed of the right of consular access received detailed analysis in a pair of 2000 U.S. Court of Appeals cases, one in the First Circuit and one in the Ninth Circuit.\textsuperscript{124} Each court denied suppression as a remedy.\textsuperscript{125} In both cases the foreign national sought suppression of a statement made shortly after arrest.\textsuperscript{126} Neither had been advised about consular access.\textsuperscript{127} The First Circuit asked the Department of State for its views and received a letter from David Andrews, Legal Adviser of the Department of State.\textsuperscript{128} Andrews wrote that a failure of consular notification “does not, as such, give rise to a right to an individual remedy requiring the reversal of all or part of a criminal proceeding.”\textsuperscript{129}

An accompanying document, prepared by the Department and forwarded to the court by Andrews, stated that the courts of states that are party to the VCCR do not suppress statements as a remedy.\textsuperscript{130}

Conversely, we are aware of two jurisdictions, Italy and Australia, in which courts have rejected requests by individuals for a remedy in the context of a criminal proceeding of a violation of Article 36 of the VCCR. These are the \textit{Yater} case, decided in Italy in 1973, and the \textit{Abbrederis} case, decided in

\textsuperscript{122} See id. at 1–2.
\textsuperscript{123} Id. at 1–12 (Chapel, J., specially concurring).
\textsuperscript{124} United States v. Li, 206 F.3d 56, 57 (1st Cir.) (en banc), \textit{cert. denied}, 531 U.S. 956 (2000); United States v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir.) (en banc), \textit{cert. denied}, 531 U.S. 991 (2000).
\textsuperscript{125} Li, 206 F.3d at 60; \textit{Lombera-Camorlinga}, 206 F.3d at 888.
\textsuperscript{126} Li, 206 F.3d at 59; \textit{Lombera-Camorlinga}, 206 F.3d at 884.
\textsuperscript{127} Li, 206 F.3d at 59; \textit{Lombera-Camorlinga}, 206 F.3d at 884.
\textsuperscript{128} Andrews Letter, \textit{supra} note 12.
\textsuperscript{129} Id. at 2.
\textsuperscript{130} Id. at A-9.
Australia in 1981. Copies of reports of both decisions have been provided to the Department of Justice.\textsuperscript{131}

As it concluded that no judicial remedy is required for an Article 36 violation, and specifically no suppression, the court cited the Department’s reference to the practice of foreign courts, though not specifically to the Italian or Australian cases.\textsuperscript{132} The court cited Supreme Court statements on the weight of Department views: “Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.”\textsuperscript{133} Further, “[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”\textsuperscript{134}

The U.S. Court of Appeals for the Ninth Circuit considered the same issue at the same time as the U.S. Court of Appeals for the First Circuit.\textsuperscript{135} In the Ninth Circuit case, a foreign national sought suppression of a pre-trial statement on the grounds that he had not been informed about consular access. After the district court denied suppression, a three-judge panel of the Ninth Circuit reversed and remanded, ruling that a post-arrest statement made by a foreign national who had not been informed about consular access should be suppressed, so long as the failure to inform caused prejudice.\textsuperscript{136} The court then agreed to hear the case en banc.\textsuperscript{137}

At that stage, U.S. Attorney David Kris filed Government’s Supplemental En Banc Brief, in which he recited that he was providing the court a copy of the Legal Adviser’s letter that had been submitted to the First Circuit in \textit{Li}.\textsuperscript{138} In the brief, Kris specifically referenced the State Department’s Answers and its treatment of the \textit{Yater} and \textit{Abbrederis} cases: “Courts in two countries, Italy and Australia, have specifically rejected claims for a remedy resulting from failures of consular notification in criminal cases. Letter A–8 (discussing \textit{Re Yater}, 77 I.L.R. 541 (Italy, Court of Cassation 1973), and \textit{R. v. Abbrederis}, 36 Australia Law Reports 109 (CCA NSW 1981).”\textsuperscript{139}

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Li}, 206 F.3d at 65–66.

\textsuperscript{133} \textit{Id.} at 63 (citing \textit{El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng}, 525 U.S. 155, 168 (1999)).

\textsuperscript{134} \textit{Id.} (citing \textit{Sumitomo Shoji Am., Inc. v. Avagliano}, 457 U.S. 176, 184–85 (1982)).

\textsuperscript{135} United States v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000).

\textsuperscript{136} United States v. Lombera-Camorlinga, 170 F.3d 1241, 12–44 (9th Cir. 1999).

\textsuperscript{137} United States v. Lombera-Camorlinga, 188 F.3d 1177 (9th Cir. 1999).

\textsuperscript{138} Government’s Supplemental En Banc Brief at 27, \textit{Lombera-Camorlinga}, 206 F.3d 882 (9th Cir. 2000) (Nos. 98–50347, 98–50305).

\textsuperscript{139} \textit{Id.} In Italy, the Court of Cassation is the country’s highest court. The Australian case, as the “CCA NSW” citation indicates, was decided by the Court of Criminal Appeal in the Australian state of New South Wales, the court of last resort in criminal matters in New South Wales.
In its en banc decision in *Lombera-Camorlinga*, the Ninth Circuit Court of Appeals reversed the panel decision.\(^{140}\) The en banc court placed great reliance on the Department of State's letter, which had not been available to the panel. "While the panel," the court stated, "was provided with 'scant authority' on this issue, the State Department has now spoken, and has expressed its opinion that suppression is an inappropriate remedy."\(^{141}\)

As a centerpiece in its analysis, the court related the State Department's account of foreign court decisions, as reflected in the Department's answer to the First Circuit:

The State Department also points out that no other signatories to the Vienna Convention have permitted suppression under similar circumstances, and that two (Italy and Australia) have specifically rejected it. In the Australian decision, R v. Abbrederis, (1981) 36 A.L.R. 109, the court concluded as we do today that the Vienna Convention's Article 36 protections neither target police interrogation nor seek to prevent self-incrimination or preserve the right to counsel. The opinion stated: "Even giving the fullest weight to the prescriptions in Art 36, I do not see how it can be contended that they in any way affect the carrying out of an investigation by interrogation." By refusing to adopt an exclusionary rule, we thus promote harmony in the interpretation of an international agreement.\(^{142}\)

Counsel for the foreign nationals in the two cases did not challenge the relevance of either the Australian or the Italian decision. The arrest and conviction of a foreign national was involved in both the Australian and the Italian case. However, in neither case did the court decline to suppress a post-arrest statement on the grounds that Article 36 does not call for a judicial remedy.

The quotation given by the U.S. Court of Appeals for the Ninth Circuit, from the Court of Criminal Appeal of New South Wales, gives the appearance that the Australian court denied suppression as a remedy for an incriminating statement made by a foreign national under interrogation, where the foreign national was not informed about consular access.\(^{143}\) That was not so, however. The colloquy in question took place at the Sydney International Airport.\(^{144}\) Australian customs

\(^{140}\) *Lombera-Camorlinga*, 206 F.3d 882.

\(^{141}\) *Id.* at 887 (citations omitted).

\(^{142}\) *Id.* at 888.

\(^{143}\) *Id.*

agents searched the luggage of an Austrian arriving on an international flight.\textsuperscript{145} After the agents found a substance appearing to be heroin, the Austrian made self-incriminating statements.\textsuperscript{146} Following conviction, the Austrian appealed, challenging the admission into evidence of his statements on the basis that the customs agent had not informed him of a right of access to an Austrian consul. The Court of Criminal Appeal rejected the challenge.\textsuperscript{147}

The court did not, however, state that it rejected a remedy for an Article 36 violation. The court was quoted incorrectly by the Ninth Circuit Court of Appeals.\textsuperscript{148} The latter court omitted a critical portion of the sentence as written by the Australian court. The full sentence, and the full paragraph, read:

\begin{quote}
The objection [by the defendant to the admission of his statement], in my view, has no merit. Even giving the fullest weight to the prescriptions in Art 36, I do not see how it can be contended that they in any way affect the carrying out of an investigation by interrogation of a foreign person coming to this country. The article is dealing with freedom of communication between consuls and their nationals. It says nothing touching upon the ordinary process of an investigation by way of interrogation. In my view this ground of appeal is not made good.\textsuperscript{149}
\end{quote}

The Ninth Circuit Court of Appeals omitted the final eight words of the sentence it quoted.\textsuperscript{150} Those eight words make clear that the rationale of the Court of Criminal Appeal was that Article 36 did not apply because of the type of questioning involved. In that court’s view, Article 36 does not come into play in customs questioning at a border. The issue of what type of custody gives rise to a right to be informed about consular access is not handled with precision in Article 36 of the VCCR. Whether or not the Australian court was correct in its view that the airport questioning did not qualify, its decision was based on that issue. The court expressed no opinion about whether an interrogation involved a right to be notified about consular access.

The \textit{Yater} case involved a British national convicted of criminal offenses in Italy, who challenged the conviction by invoking Article 36 of the VCCR, along with an article of an Italy-UK bilateral consular treaty.\textsuperscript{151} The case report does not

\textsuperscript{145} Id.
\textsuperscript{146} Id. at 111.
\textsuperscript{147} Id. at 123.
\textsuperscript{148} See infra note 150 and accompanying text.
\textsuperscript{149} 36 A.L.R. at 123.
\textsuperscript{150} Those eight words are “of a foreign person coming to this country.” Id.
indicate that the British national was interrogated or that he sought to suppress an inculpating statement. In its account of Article 36, the Court of Cassation made no mention of the fact that Article 36 requires the detaining authorities to inform a foreign national about consular access. Rather, the court asked whether there was a violation of either the bilateral treaty or of Article 36 because of the failure to notify a British consul.\textsuperscript{152} The court did not indicate whether the foreign national was informed about consular access.

The attorney representing Yater may have misunderstood consular access and argued that the failure was in not notifying a consul, whereas he perhaps should have argued that the failure was in not notifying Yater of his right to contact consul. In any event, the Court of Cassation seems to have thought that the obligation was to inform a consulate, rather than, as provided under Article 36, to inform the foreign national.\textsuperscript{153}

Moreover, the Court of Cassation focused on whether, as a result of non-notification of a British consul, Yater had been deprived of the right to legal representation, because a consul may assist in securing a lawyer. However, the court indicated that the accused has a right to secure counsel on his own, and if he does, he has no reason to complain that his consulate was not notified.\textsuperscript{154} In a final sentence omitted from the English translation used by the Department of State, the court stated, "in this case, Yater was assisted in the renvoi proceedings by the Attorney Manlio Cicatelli, chosen by [Yater] as defense counsel, who then was replaced by Attorney Candotti; therefore, defensive assistance was secured under the procedural norms in force."\textsuperscript{155}

If the Court of Cassation was implying that consular access is unnecessary when the foreign national is represented by counsel, it misunderstood Article 36. The fact that the foreign national has a lawyer, even a competent lawyer, does not allow the host state to avoid the obligations of Article 36.\textsuperscript{156}

The apparent confusion in the court's understanding of consular access and the lack of any mention of an interrogation deprive the decision of relevance to the issue before the American courts. The Court of Cassation rejected the Article 36 claim, but its decision gives little indication of the underlying facts. Most

\textsuperscript{541} (Italy, Court of Cassation 1973). The translation is the version cited by the State Department.

\textsuperscript{152} \textit{Id.}

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} \textit{Id.} at 466.

\textsuperscript{155} \textit{Id.} (translation by author).

\textsuperscript{156} Cf. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. Oral Pleadings, ¶ 4.5 (Nov. 17, 2000), \textit{available at} http://www.icj-cij.org/icjwww/idocket/us/usframe.htm. The United States argued that criminal prosecution need not "be reopened simply because a consular officer did not have a chance to arrange counsel for someone who in fact was represented by counsel." \textit{Id.}
importantly, the court, in discussing Article 36, never mentioned the obligation to inform the foreign national. Contrary to the representation in the Department of State’s Answers, the decision provides no support for the position that judicial remedies, and in particular suppression of a statement, are not required when Article 36 has been violated.157

In the United States Court of Appeals for the Ninth Circuit, three judges dissented, finding that suppression is an appropriate remedy.158 The dissenters felt it necessary to respond to the majority’s reliance on the Department of State’s reference to the Italian and Australian cases. Not realizing that the cases were inapposite, the dissenters were forced to dismiss them on statistical grounds: “That two of the more than 161 signatory countries have concluded that the Vienna Convention’s Article 36 protections ‘neither target police interrogation nor seek to prevent self-incrimination or preserve the right to counsel,’ hardly dictates how the treaty provisions should be enforced in the United States.”159

The dissenters, doubtless, are correct that even if the courts in two states party to the VCCR held as the State Department claimed, that fact would not be dispositive on how the Convention must be applied. Nonetheless, it is unfortunate that the dissenters were forced to explain away the Italian and Australian cases.

Two other circuits of the U.S. Court of Appeals have repeated the error of the First and Ninth Circuits by referring to the Department’s citation of the Australian and Italian cases.160 Rejecting an Article 36 claim in United States v. Page, the U.S. Court of Appeals for the Sixth Circuit quoted Lombera-Camorlinga: “Furthermore, ‘no other signatories to the Vienna Convention have permitted suppression under similar circumstances, and . . . two (Italy and Australia) have specifically rejected it.’”161 The U.S. Court of Appeals for the Eleventh Circuit, rejecting an Article 36 claim, stated that “no party to the Vienna Convention has dismissed a criminal charge based on a violation of Article 36.”162 Continuing, the court cited both Page and Lombera-Camorlinga to state, “[i]ndeed, two parties, Italy and Australia, have specifically rejected that possibility.”163

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158 Lombera-Camorlinga, 206 F.3d at 890 (Boochever, J., dissenting).
159 Id. at 888-89 (citations omitted).
160 See United States v. Page, 232 F.3d 536, 541 (6th Cir. 2000), cert. denied, 532 U.S. 1056 (2001) (quoting Li, 206 F.3d at 63, and Lombera-Camorlinga, 206 F.3d at 888, and concluding that the “remedies of suppression of evidence and dismissal of the indictment are not available under the Vienna Convention”); United States v. Duarte-Acero, 296 F.3d 1277, 1282 (11th Cir.), cert. denied, 537 U.S. 1038 (2002) (noting that both Italy and Australia have rejected dismissing a criminal charge because of an Article 36 violation).
161 Page, 232 F.3d at 541 (quoting Lombera-Camorlinga, 206 F.3d at 888).
162 Duarte-Acero, 296 F.3d at 1282.
163 Id. (citing Page, 232 F.3d at 541, and Lombera-Camorlinga, 206 F.3d at 888).
First Circuit Judge Torruella, who dissented in *Li*, noted that while courts give weight to State Department views, determining the meaning of treaties when relevant to litigation is the constitutionally mandated role of the courts. "We are no longer merely considering international agreements to be administered or enforced at the discretion of the State Department, in which its interpretation as to applicability is entitled to special expertise or deference," he wrote. The VCCR, after being ratified, he stated, "became the municipal law of the United States pursuant to the Supremacy Clause, and its provisions enforceable in the courts of the United States at the behest of affected individuals without the need for additional legislative action." Judge Torruella apparently did not realize that the views of the State Department were based on two mis-cited cases, but he appropriately discounted the State Department’s view.

Given the Department’s views on the VCCR, Judge Torruella’s reminder about the Supremacy Clause should be heeded by other courts. It is their role to read a treaty. The VCCR, fairly construed, provides rights invocable by foreign nationals. It requires a remedy in case of violation, and in particular, it does not allow the admission into evidence of an incriminating statement made before the foreign national was advised of the right of consular access.

The United States again used the *Abbrederis* and *Yater* cases, despite their irrelevance, in its Counter-Memorial against Mexico in the International Court of Justice. It cited them for the proposition that observance of Article 36 rights is not fundamental to due process and hence, no remedy is required.

**CONCLUSION**

The fact that the International Court of Justice has held that a VCCR violation must be judicially remedied adds a new element of obligation for the United States and for its courts. The U.S. District Court for the Northern District of Illinois stated that the ruling of the International Court of Justice in *LaGrand*, that procedural default rules may not be used to evade an Article 36 claim, "conclusively determines that Article 36 of the Vienna Convention creates individually enforceable rights, resolving the question most American courts . . . have left

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164 *Li*, 206 F.3d at 69–70 (Torruella, J., dissenting).
165 *Id.* at 69.
166 *Id.* at 69–70.
167 *Id.*
168 Vienna Convention on Consular Relations, *supra* note 1, at art. 36.
170 *Id.* at 135–36.
The concurring judge in the Oklahoma Court of Criminal Appeals wrote that his court was required to comply with the *Avena* ruling.\(^\text{173}\)

Under the UN Charter, a treaty ratified by the United States, a state that is a party to litigation in the International Court of Justice must comply with the court’s judgment.\(^\text{174}\) Recourse to the UN Security Council is available against a state that fails to comply.\(^\text{175}\) Thus, the U.S. obligation to provide a remedy for an Article 36 violation rests not only on the VCCR itself, but on the court’s interpretation of it.

The securing of an incriminating statement soon after arrest is one of the most flagrant consequences of an Article 36 violation. The rights of both the sending state and the individual detainee are implicated. The courts should be clear that a judicial remedy is required when Article 36 is violated, and that a statement taken in violation of Article 36 is presumptively inadmissible as evidence. In considering these cases, the courts should not automatically accept the views of the Department of State. In particular, they should scrutinize court decisions cited by the State Department.


\(^{174}\) U.N. CHARTER art. 94, para. 1.

\(^{175}\) *Id.* at art. 94, para. 2.