Providing Consular Rights Warnings to Foreign Nationals

By M. WESLEY CLARK, J.D., LL.M.

For 35 years, federal, state, and local law enforcement officials have been giving *Miranda* rights warnings to suspects in custody.[1] To ensure that the suspect is correctly informed of these rights, (i.e., that the verbiage actually given during the heat of the moment will pass constitutional muster) law enforcement agencies typically provide their operational personnel with pocket- or wallet-sized cards that contain the *Miranda* warnings verbatim. The Drug Enforcement Administration (DEA) card, for example, has the rights printed in both English and Spanish on a durable piece of 4¼-inch by 2½-inch yellow plastic.

In contrast, how many law enforcement personnel at the federal, state, and local level read arrested or detained foreign nationals the rights warnings contained on the U.S. Department of State's *Consular Notification and Access Reference Card*?[2] How many have ever seen the card, let alone have one? How many know what consular rights warnings are? How many prosecutors are familiar with them? How many know that failure to provide these rights warnings to detained foreign nationals is in contravention of the law?

Law enforcement officials must provide consular rights warnings to arrested or detained foreign nationals. And, under appropriate circumstances, they must notify the foreign nationals' consular officials who are posted in the United States.

TREATY LAW, GUIDANCE, AND REGULATION AND POLICY

Treaty Law

Most countries of the world, including the United States, are parties to or otherwise obligated by the *Vienna Convention on Consular Relations and Optional Protocol on Disputes* (VCCR).[3] Consistent with the Constitution, this multilateral treaty is the "supreme law of the land" within the United States.[4] Article 36(1)(b) of the VCCR, which applies equally to all federal, state, and local law enforcement officials, states—

> [I]f he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner.... The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

In other words, an arresting or detaining official must notify the foreign national of the right to have the individual's *nearest* consular officials notified of the arrest or detention so that the appropriate foreign official may visit and assist. Article 36(1)(c) of the VCCR provides that "consular officers shall have the right to visit a national of the sending state who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation."[5] With the exception of the mandatory circumstances discussed below, officers must *not* notify the foreign national's consulate unless the individual requests them to do so. Foreign nationals may not want their country of nationality to know of their arrest or detention either because they may fare badly if they ever voluntarily or involuntarily return home or because any family members remaining in the country of nationality may be subjected to harsh treatment (especially if the arrested/detained nationals desire refugee or asylum status in the United States).

Mandatory Versus Voluntary Notification

The U.S. Department of State (State) suggests the following notice be read (this should be documented)[6] to those detained or arrested foreign nationals who have the right to decide (i.e., those who are not from a "mandatory notification country") whether or not they want consular officials to be notified:

> As a non-U.S. citizen who is being arrested or detained, you are entitled to have us notify your country's consular representatives here in the United States. A consular official from your country may be able to help you obtain legal counsel, and may contact your family and visit you in detention, among other things. If you want us to notify your country's consular officials, you can request this notification now, or at any time in the future. After your consular officials are notified, they may call or visit you. Do you want us to notify your country's consular officials?[7]

In addition to the VCCR, the United States has entered into bilateral agreements with 56 countries that *require* consular notification

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Mr. Clark is a senior attorney in the International Law Section, Office of Chief Counsel, DEA.

despite even the individual's most emphatic desire to the contrary. These nations generally are referred to as "mandatory notification countries" and are listed in State's *Consular Notification and Access Reference Card*[8] and in State's *Consular Notification and Access* booklet.[9] The list and the explanatory notes (contained in the latter two references) should be studied carefully because some countries that one might not expect to be on the list, such as the United Kingdom (U.K.),[10] are and some nations that could be anticipated to be listed, such as Mexico, are not. Further, some of the listed countries no longer exist (the U.S.S.R.), but mandatory notification is nevertheless still necessary for some of the U.S.S.R. successor states (which are named) and for some areas (which also are named) formerly part of the U.S.S.R. Additionally, the explanatory notes contain other important details relating to China, Taiwan, and Hong Kong, and the notes in the booklet also list those U.K. dependencies requiring mandatory notification.[11] State recommends that the following rights warning be provided in mandatory notification circumstances:

> Because of your nationality, we are required to notify your country's consular representatives here in the United States that you have been arrested or detained. After your consular officials are notified, they may call or visit you. You are not required to accept their assistance, but they may be able to help you obtain legal counsel and may contact your family and visit you in detention, among other things. We will be notifying your country's consular officials as soon as possible.[12]

Definitions

For the purposes of consular rights notification, some definitions may be different from traditional understandings under domestic U.S. law. A "foreign national," including a lawful permanent resident alien, is anyone who is not a U.S. citizen.[13] Under some circumstances, determining nationality might be a challenge. Ask for the person's country of citizenship; if the detainees state they are U.S. citizens, law enforcement officials can rely upon that assertion unless the claim does not ring true giving officials reason to probe further. Proof of foreign nationality would include a passport or an alien registration document.[14]

> ***"A 'foreign national,' including a lawful permanent resident alien, is anyone who is not a U.S. citizen."***

"Without delay" refers both to how quickly foreign nationals are to be advised of their rights and how quickly the consular officials are to be notified. State emphatically recites that foreign nationals are to be provided consular rights warnings without "...deliberate delay and notification [to the individuals] should occur as soon as reasonably possible under the circumstances."[15] Notification to consular officials should follow thereafter and "...there should be no deliberate delay and...[it] should occur as soon as reasonably possible under the circumstances. State normally would expect notification to consular officials to have been made within 24 hours, and certainly within 72 hours."[16] Law enforcement officials may telephone the consular official or choose to use State's suggested fax sheet.[17] Notifying the consular official does not necessarily mean or include providing an explanation of the reason for the arrest or detention. The VCCR does not require that these details be given; additionally, foreign nationals may not want their country to know why they are being detained. "Thus we suggest that [the reasons for the detention] not be provided unless requested specifically by the consular officer, or if the detainee authorizes the disclosure.... If a consular official insists that he/she is entitled to information about an alien that the alien does not want disclosed, the Department of State can provide guidance."[18] The "suggested fax sheet," for example, does not list or contain any information category relating to reasons, such as charges or crimes, for the arrest or detention. The fax sheet is helpful if consular notification of necessity will occur after normal business hours or if it is presently improvident for the law enforcement officer to speak personally with a consular officer.

Notification must be made to a consular official and not to a foreign law enforcement counterpart

or to any other foreign government official. A "consular officer"—

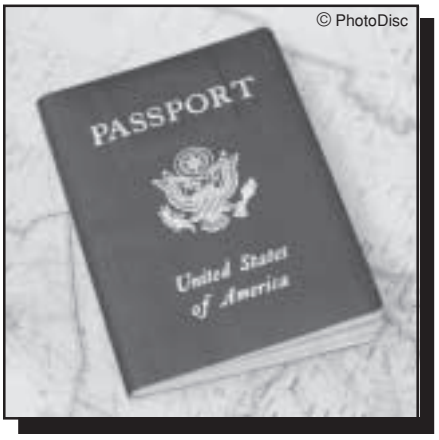
> is a citizen of a...country employed by a...government and authorized to provide assistance on behalf of that government to that government's citizens in a foreign country. Consular officials are generally assigned to the consular section of a foreign government's embassy in [the nation's capital] or to consular offices maintained by the...government in locations [outside the capital].[19]

The VCCR does not explain what "detention" means. State has adopted a "reasonable person" standard.

> ...State does not consider it necessary to follow consular notification procedures when an alien is detained only momentarily, *e.g.,* during a traffic stop. On the other hand, requiring a foreign national to accompany a law enforcement officer to a place of detention may trigger the consular notification requirements, particularly if the detention lasts for a number of hours or overnight. The longer a detention continues, the more likely it is that a reasonable person would conclude that the Article 36 obligation [of the VCCR] is triggered.[20]

Regulation and Policy

State asserts that the obligation to inform the foreign national's consular officials rests with the law enforcement "officers" (not a judge and not a prosecutor) who made the arrest or are responsible for the alien's detention.[21] The U.S Department of Justice (DOJ), however, indicates that the U.S. attorney is to inform the foreign consular official in both a mandatory notification circumstance and in the case where notification is not mandatory, but the foreign national requests it.[22] Inasmuch as the law enforcement officer is in the best and most timely



command of the facts and given the VCCR's command that a foreign country consular official be notified "without delay," State's guidance appears to be more practical, although notification also provided by the U.S. attorney would not be objectionable. If officers forget to provide consular rights warnings to the foreign national, unless the individual's consular officer already knows of the arrest or detention and is providing assistance, State urges that "[c]onsular notification is 'better late than never.' "[23]

Common sense, circumspect (but courteous) restrictions can be placed upon the time and manner when a consular officer visits the detainee. "Law enforcement authorities may make reasonable regulations about the time, place, and manner of consular visits to detained foreign nationals. Those regulations cannot, however, be so restrictive that the purpose of the consular assistance is defeated."[24]

THE IMPACT OF A FAILURE TO WARN

Suppression of Evidence, Dismissal of Indictment

Compliance with the VCCR's consular rights notification requirement within the United States has been spotty at the federal, state, and local levels. One commentator noted that "[a]s of June 2000, eighty-seven foreign nationals from twenty-eight different countries were on death row.... While not all of these foreign nationals allege that they were deprived of their rights under the Vienna Convention, there is overwhelming evidence that the failure on the part of the United States to notify them of their rights is the rule rather than the exception."[25] State courts appear to be quite satisfied following the lead of their federal brethren in not adopting an exclusionary rule.[26] "[T]he overwhelming majority of American federal and state courts have held that a violation of Article 36 of the Vienna Convention does not get remedied by adopting an exclusionary rule requiring suppression of the evidence."[27] According to the Queens County, New York City Criminal Court, inasmuch as no other country that is a party to the VCCR has adopted such a remedy,[28] it would be "unilaterally self-limiting" for any jurisdiction in the United States to do so.

The consequences associated with law enforcement failure to provide consular notification rights warnings is best illustrated by a Ninth Circuit three-judge panel opinion rendered in *United States v. Lombera-Camorlinga*.[29] Mexican national José Lombera-Camorlinga was arrested at the Calexico, California, port of entry on November 17, 1997, when U.S. Customs inspectors discovered approximately 39 kilograms of marijuana hidden in his vehicle. Lombera-Camorlinga made incriminating remarks after being advised of his *Miranda* rights, but the Customs officials never advised him of his Article 36 VCCR rights nor were Mexican consular officials notified. Based upon this treaty violation, he moved the district court to withhold his statement from evidence. Although the district court denied the motion, that decision was reversed by a Ninth Circuit three-judge panel, which held that a violation of the VCCR could be raised by the defendant and the statement successfully suppressed. (In part, the government had argued that, assuming there had been a violation of the VCCR, it was a matter that could only be surfaced by and between governments, not individuals.) Crucially, the panel also said:

> Upon a showing that the Vienna Convention was violated by a failure to inform the alien of his right to contact his consulate, the defendant in a criminal proceeding has the initial burden of producing evidence showing prejudice from the violation of the Convention. If the defendant meets that burden, it is up to the government to rebut the showing of prejudice.[30]

A full panel of the Ninth Circuit later heard the case and disagreed with the three-judge panel. The full court upheld the district court.

> ***"State normally would expect notification to consular officials to have been made within 24 hours, and certainly within 72 hours."***

> We voted to accept en banc review of the case to consider whether the suppression of evidence is an appropriate remedy for violation of the Vienna Convention. We now hold that it is not, for there is nothing in the language or operation of the treaty provision to suggest Article 36 was intended to create an exclusionary rule with protections similar to those announced by the United States three years later in *Miranda v. Arizona* [citations omitted].... We do not decide whether the treaty creates individual rights that are judicially enforceable in other ways.[31]

In the course of its opinion, the Ninth Circuit noted that State believed suppression was an "inappropriate remedy" and that State also had advised the court that "no other signatories to the Vienna Convention have permitted suppression under similar circumstances, and that two (Italy and Australia) have specifically rejected it."[32] Other courts in the United States that have considered the issue also concluded that failure to provide consular rights warnings does not warrant suppression of any incriminating remarks made. Some courts have additionally ruled that dismissal is not an appropriate remedy.[33] Also, unlike the situation presented in the *Miranda* context, questioning does not have to cease once the suspect has received an Article 36 rights warning.[34] "There is no exclusionary rule generally applicable to international law violations."[35] Assuming that the defendant would be entitled to some form of relief in the face of an Article 36 violation, the majority of criminal courts that have spoken on the topic appear to require the demonstration of at least some prejudice.[36]

Civil Liability

As noted earlier, some courts, such as the Ninth Circuit, have suggested that persons victimized by the lack of an adequate consular rights notification may not be entitled to the suppression of incriminating statements or the dismissal of an indictment, but that other unspecified relief might be available. This possibility of civil remedies should be troubling for both law enforcement agencies and for individual officers. The Ninth Circuit left the door open in *Lombera-Camorlinga*: "We do not decide whether a violation of Article 36

may be redressable by more common judicial remedies such as damages or equitable relief."[37]

The unsettled state of the law in this area is further evidenced by recent district court decisions in the Second Circuit that have split on whether an "aggrieved" criminal defendant-turned-plaintiff is entitled to any remedy. In *Sorensen v. City of New York*,[38] a jury awarded one Danish plaintiff $66,400 (which included $60,000 in *punitive* damages) in a suit grounded upon 42 U.S. Code Section 1983.[39] The complainant alleged that following her arrest, New York City police officers failed to provide her Article 36 VCCR rights advice. The city did not dispute the facts, but, instead, argued that the plaintiff lacked "standing" to sue, that the VCCR provided rights and remedies to countries and not to individuals. Even if she had standing, the city further contended, she had not been prejudiced by the lack of such a rights warning. After remarking that "...several Circuit Courts of Appeal...have uniformly held that the suppression of a criminal defendant's post-arrest statements is not an appropriate remedy for violation of Article 36 [,]"[40] the district judge proceeded to grant New York's motion for judgment as a matter of law because the VCCR makes no provision for money damages.

In a case decided subsequently within the same New York federal judicial district, the plaintiff (a German national) brought a 42 U.S. Code Section 1983 action against both the city of New York and *individual* police officers complaining that he had not been advised of his Article 36 VCCR rights. The matter was heard before a different U.S. district judge in *Standt v. City of New York*[41] who specifically rejected the reasoning in *Sorensen*, finding that a plaintiff could establish standing. The court added:

> The VCCR, as a ratified treaty, "is of course 'the supreme law of the land.' " [citations omitted].... Title 42, U.S. Code Section 1983 "imposes liability on anyone who, under color of state law, deprives a person 'of *any rights*, privileges, or immunities secured by the Constitution and laws' " of the United States. [Emphasis supplied; citations omitted.][42]

The court went on to note that "...the Vienna Convention confers a private right of action on persons in Standt's situation, which may be pursued in the United States through the vehicle of Section 1983 'in conformity with the laws' of the United States, VCCR, art. 36(2)...."[43] The court consequently denied defendants' motion for summary judgment. Put differently, the *Standt* court determined that officers failing to give VCCR rights conceivably may be subject to civil liability pursuant to Section 1983.

INTERNATIONAL CASE LAW

In two cases decided in the United Kingdom, sanctions were imposed for violations of legislation that closely tracks the VCCR right to consular notification and access.[44] In contrast, a relatively recent Canadian decision upheld the justice minister's determination to extradite a person to the United States despite an objection based upon Article 36 of the VCCR. Following his arrest in America, U.S. authorities failed to provide a consular rights notification. The Alberta court opined that, "The Vienna Convention creates an obligation between states and is not one owed to the national."[45] In any event, the court observed that the appellant failed to prove "serious" prejudice, let alone any prejudice, resulting from the violation.[46]

Bad facts make "bad" law; the United States recently received an adverse judgment from the International Court of Justice (ICJ). Despite German protests, after a state trial, local U.S. authorities executed brothers Karl and Walter LaGrand for their involvement in connection with a murder committed during an attempted Marana, Arizona, bank robbery in early 1982. The LaGrand brothers were not provided with an appropriate Article 36(1)(b) VCCR rights warning. Germany brought its action before the ICJ on March 2, 1999, and requested that the court, *inter alia,* "adjudge and declare"—

> [t]hat the United States, by not informing Karl and Walter LaGrand without delay[47] following their arrest of their rights under Article 36, subparagraph 1(b), of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36, paragraph 1, of the said Convention....[48]

In its response, the United States admitted that Arizona's Article 36(1)(b) VCCR failure "....was in breach of the United States legal obligations to Germany."[49] The United States did call to the court's attention the fact that it already had "...apologized to Germany for this breach, and is taking extensive measures seeking to avoid any recurrence."[50]

Not surprisingly, the ICJ concluded that the United States violated Article 36(1)(b) of the VCCR, thereby breaching its legal obligation not only to Germany but also—and contrary to the American assertion—to the LaGrand brothers *as individuals*.

> The United States contends... that rights of consular notification and access under the Vienna Convention are rights of States, and not of individuals, even though these rights may benefit individuals... [and consequently they do] not constitute a fundamental right or a human right.[51]

By a vote of 14-1, the court had absolutely no difficulty disposing of the U.S. contention. The treaty language in Article 36 itself could not be more clear, concluded the judges: "The clarity of these provisions, viewed in their context, admits of no doubt" and makes apparent the creation of "individual rights."[52]

> ***"Notifying the consular official does not necessarily mean or include providing an explanation of the reason for the arrest or detention."***

In the course of its opinion, however, the court did remark upon State's ongoing attempts, including distribution of State's publications,[53] to educate the U.S. law enforcement, prosecuting, and judicial communities regarding Article 36. Germany was less than impressed with these U.S. endeavors, harshly remarking that "[v]iolations of Article 36 followed by death sentences and executions cannot be remedied by apologies or the distribution of leaflets."[54]

The ICJ rejoined that no country could provide a promise of absolute certainty to comply with Article 36 and unanimously—

> [*took*] *note* of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1(b) of the convention; and [*found*] that this commitment must be regarded as meeting the Federal Republic of Germany's request for a general assurance of non-repetition....[55]

One commentator noted that international reaction to the execution of the LaGrands and other foreign nationals at the hand of the United States in violation of their Article 36 rights "...was so great that, in 1999, for the first time in history, [America] was placed on Amnesty International's list of human rights violators."[56]

The *LaGrand Case* was not the first time the United States had been called before the ICJ to face a claim of failure to comply with Article 36, VCCR. Paraguay instituted proceedings on April 3, 1998, correctly asserting, and without contradiction from the United States, that Virginia had never provided Angel Breard with a consular rights warning, *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)*.[57] Breard had been convicted upon "overwhelming evidence of guilt,"[58] including an in-court confession, and sentenced to death by lethal injection for the 1992 attempted rape and effected murder of the victim. A unanimous ICJ had "indicated" provisional measures 5 days before Breard's

sentence was carried out to include a call that the United States—

> [t]ake all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order....[59]

Neither the ICJ's provisional order nor a letter from the secretary of state requesting a stay caused the governor of Virginia to delay or halt the execution. At Paraguay's November 2, 1998, request, the case before the ICJ was discontinued without explanation but with prejudice 8 days later.[60]

In another venue and at Mexico's request, the Inter-American Court of Human Rights, Organization of American States (OAS), issued an advisory opinion in 1999[61] in which it unanimously concluded that the state that detains or arrests a foreign national "must comply with its duty to inform the person detained on the rights that said precept [Article 36, VCCR] recognises [*sic*] on her or his behalf, the moment it brings her or him under custody or, in any event, before she or he makes the first statement before the authorities...."[62] Furthermore, these Article 36 rights belong to the individual and consequently their observance "is not contingent on protests by the sending State."[63] Indeed, the court went so far as to stress, by a vote of 6-1, that imposition of the death penalty in the face of an Article 36 violation "constitutes a violation of the right not to be deprived of life 'arbitrarily,' in terms of the relevant provisions of human rights agreements (i.e., the American Convention on Human Rights, Article 4; the International Covenant on Civil and Political Rights, Article 6)...."[64]

NONJUDICIAL INTERNATIONAL MEASURES

The OAS General Assembly adopted resolutions at plenary sessions in both 1999 and 2000. These contained almost identical language "emphatically" reaffirming and reiterating—

> [t]he duty of states to ensure full respect and observance of the 1963 Vienna Convention on Consular Relations, particularly with regard to the right of foreign nationals, regardless of their immigration status, to communicate with a consular official of their own state in case of detention and the obligations of the state in whose territory the detention occurs to inform the foreign national of that right.[65]

CONCLUSION

Apart from keeping an investigation and prospective prosecution clear of possible motions to suppress and dismiss, civil lawsuits, attendant press scrutiny, and political pressure, the consistent provision of consular rights warnings to aliens by federal, state, and local law enforcement personnel provides the United States with "clean hands" when the tables are reversed and Americans find themselves detained by foreign officials overseas. "It is critical...to recognize VCCR rights of foreign nationals detained in the United States for the United States to continue its success in invoking the Vienna Convention on behalf of U.S. citizens detained abroad."[66] VCCR compliance also avoids international diplomatic unpleasantries.[67]

Summarizing, even though the great weight of case law within the United States indicates that failure to provide Article 36 VCCR rights warnings to arrested or detained foreign nationals when required will not result in either suppression of the subjects' statements nor the dismissal of prosecutions brought against them, law enforcement officials at all levels of American government should nevertheless comply with the treaty's notification provisions (and document that compliance) for a number of significant reasons. These include:

> 1) first and foremost, the Vienna Convention is the law of the land;
>
> 2) the state of the law regarding whether a violation can give rise to monetary damages

or other relief remains unsettled;

3) the United States already has been soundly pilloried at the ICJ and elsewhere within the international legal community for past failures to comply;

4) alert defense counsels will continue to surface motions for failure to comply with Article 36 of the VCCR, which will

a) drain prosecutorial reources best expended elsewhere and

b) induce some prosecutors to decline prosecution, thus nullifying what otherwise may have been a satisfactory, legally sufficient investigation and causing the suspect to go "free";

5) helping ensure reciprocity of treatment, that U.S. citizens arrested or detained overseas are accorded their consular notification rights; and, finally,

6) "Always do right. This will gratify some people and, astonish the rest."[68] ✦

Endnotes

[1] "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). A full discussion of *Miranda* is beyond the scope of this article.

[2] *Consular Notification and Access Reference Card: Instructions for Arrests and Detentions of Foreign Nationals* (February 1998).

[3] April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261. Parties and countries otherwise obligated by the convention and listed in *U.S. Department of State*, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force* on January 1, 2000, 354-55, *http://www.state.gov/www/global/legal_affairs/tifindex.html.*

[4] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Pursuant to this clause, not only state and local, but also "...federal agencies are obliged to observe Article 36 of the Vienna Convention." *United States v. Hongla-Yamche*, 55 F. Supp. 2d 74, 77 (D. Mass. 1999).

> ***...officers failing to give VCCR rights conceivably may be subject to civil liability....***

[5] *Supra* note 3, at 21 U.S.T. 77, 101. The most helpful reference concerning consular rights warnings is a State Department 72-page booklet, *U.S. Department of State, Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them* (1998) (hereafter *Consular Notification and Access*), *http://www.state.gov/www/global/legal_affairs/ca_notification/ca_prelim.html.* Hardcopies of the booklet and the consular rights warning card (referred to in note 2, *supra*) can be obtained by contacting the Office of the Assistant Legal Adviser for Consular Affairs (L/CA), Room 5527A, U.S. Department of State, Washington, D.C. 20520, 202-647-4415, FAX 202-736-7559, after hours, 202-647-1512.

[6] State says that the foreign national may be given consular rights warnings "orally or in writing" and "strongly recommends that a written record of the fact of notification be maintained." *Consular Notification and Access, supra* note 5, at 20.

[7] This rights warning is contained in State's *Consular Notification and Access Reference Card*, *supra* note 2, and in State's *Consular Notification and Access* booklet, *supra* note 5, at 7 and 25. Additionally, the booklet version of the rights warning contains space for the foreign nationals to circle either "yes" or "no", and the rights warning has been translated into 13 different languages, *id.* at 27-39, that can be shown to them.

[8] *Supra* note 2.

[9] *Supra* note 5, at 5.

[10] The nondiscretionary wording contained in the relevant U.S.-U.K. agreement provides, "A consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district." *Consular Convention and Protocol,* June 6, 1951, art. 16(1), 3 U.S.T. 3426, T.I.A.S. No. 2494, 165 U.N.T.S. 121.

[11] "[O]ne of the mandatory notification agreements now applies to two countries, another applies to 32 countries, and a third applies to 12 countries." *Consular Notification and Access* booklet *supra* note 5, at 43.

[12] *Supra* note 2, at Statement 2 and *Consular Notification and Access* booklet, *supra* note 5, at 25.

[13] *Consular Notification and Access* booklet *supra* note 5, at 18.

[14] *Id.* Someone who is a citizen of both the U.S. and another country and who can be referred to as a "dual national" is considered a U.S. citizen (and not a foreign national) for Article 36 VCCR purposes and, therefore, does not have to be provided consular notification rights warnings.

[15] *Id* at 20.

[16] *Id.* State advises that if U.S. consular officers abroad are not notified within 72 hours of the arrest of a U.S. citizen, a protest should be filed with the foreign government. 7 *Foreign Affairs Manual* (FAM) 415.4-1. The FAM and State's *Foreign Affairs Handbook* (FAH) are available on the Internet at *http://foia.state.gov/fam/.*

[17] *Consular Notification and Access* booklet *supra* note 5, at 9.

[18] *Id.* at 21. The appropriate phone number to call at State is L/CA's, *see supra* note 5.

[19] *Id.* at 17. *Compare* State's definition at 7 FAM 113e which is, from the perspective of the United States, "...any consular or other officer of the United States who is designated, by the regulations prescribed under the authority of U.S. law, to provide protective, citizenship, passport, notarial, judicial, Federal benefit, and other consular services to U.S. citizens abroad."

[20] *Consular Notification and Access* booklet, *supra* note 5, at 19. The requirements of the VCCR are reciprocal and apply equally to foreign governments when they arrest or detain a U.S. citizen. State's guidance to U.S. consular officers in these circumstances is at 7 FAM 400. The FAM defines detention to mean "hold[ing] a person in custody or confinement before or without charging the person with a violation or crime." 7 FAM 403e.

[21] *Consular Notification and Access* booklet, *supra* note 5, at 14, 18-19. However, during an arraignment or initial appearance, the court may ask the government whether consular rights warnings have been provided. State's legal adviser wrote an April 10, 2000, letter to 1,400 U.S. district court judges and magistrate judges urging that they inquire about government compliance with the VCCR. Additionally, at least one district court responded by writing a letter to all federal law enforcement agencies within the district (S.D. Tx.). Chief U.S. District Judge George Kazen's June 5, 2000 letter, *Subject: Consular notification of persons under arrest or detention*, said in part that "...the State Department traditionally looks to the arresting or detaining officers as the persons primarily responsible for notifying the foreign Consul. For that reason, I now request that your agency strive to make your personnel aware of this matter and sensitive to their obligations under the treaty."

State and local law enforcement officials are also responsible for notifications. "State and local governments must comply with the consular notification and access obligations because these obligations are embodied in treaties that are the law of the land under the Supremacy Clause of the United States Constitution. The federal government, however, would be responsible for a dispute with a foreign government concerning obligations under the relevant treaties." *Consular Notification and Access* booklet, *supra* note 5, at 19.

[22] 28 C.F.R. § 50.5(a)(1) and (a)(3). In most contexts, 28 C.F.R. § 50.5 discusses consular rights notification only where there has been an arrest; it often fails to mention that the notifications to the foreign national and, as appropriate, to the consular officer also are required if the foreign national is being detained. Additionally, whenever a foreign national is arrested (or, presumably, detained), the U.S. attorney is to be notified. 28 C.F.R. § 50.5(a)(2). This 28 C.F.R. § 50.5 guidance is echoed in the *United States Attorneys' Manual* (USAM), 9-2.173 *Arrest of Foreign Nationals.* Similar DOJ instructions on consular rights warnings are in the January 2000 *OIA Bulletin*, Office of International Affairs, Criminal Division, at 6-8. In contrast to the C.F.R. and *USAM* provisions, the *OIA Bulletin* mentions detentions. As of this writing (October 2001), DOJ actively is seeking to revise 28 C.F.R. § 50.5.

[23] *Consular Notification and Access* booklet, *supra* note 5, at 21-22.

[24] *Id.* at 23.

[25] Brook M. Bailey, *People v. Madej: Illinois' Violation of the Vienna Convention on Consular Relations*, 32 Loy. U. Chi. L. J. 471, 472 (2001).

[26] For example, *Rocha v. Texas*, 16 S.W.3d 1 (Tex. Crim. App. 2000).

[27] *People v. Litarov*, 727 N.Y.S.2d 293, 295 (N.Y. Crim. Ct. 2001).

[28] *Id.* at 296 [citing *United States v. Rodrigues*, 68 F. Supp. 2d 178, 186 (E.D.N.Y. 1999)]. In point of fact, however, contrary authority arguably exists. Attention is called to a pair of decisions in the United Kingdom where contravention of U.K. provisions strikingly similar to Article 36 VCCR requirements resulted in suppressed statements, *see* Rebecca E. Woodman, *International Miranda? Article 36 of the Vienna Convention on Consular Relations*, 70 Jul J. Kan. B.A. 41, 47 (2001)(hereinafter Woodman, *International Miranda?*), referring to *R. v. Bassil and Mouffareg* (1990) 28 July, Acton Crown Court, HHJ Sich, *reported in* Legal Action 23, Dec. 1990, and *R. v. Van Axel and Wezer* (1991) 31 May, Snaresbrook Crown Court, HHJ Sich, *reported in* Legal Action 12, Sep. 1991. Because there was no explicit mention of the VCCR in the two Legal Action reports, it concededly cannot be concluded that the decisions to suppress were based upon Article 36 violations. The damaging statements were deemed inadmissible because they had been obtained in violation of the U.K.'s Police and Criminal Evidence Act 1984 (PACE), Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers.

It seems abundantly evident, and even inadvertently consistent with the majority of American rulings relying upon VCCR Article 36, that both Crown Courts would have ruled differently if the detained suspects had not suffered apparent prejudice from the lack of consular notification. In the words of the *Van Axel and Wezer* reporter, the Snaresbrook Crown Court "was not satisfied that breach of Code C had made no difference."

[29] 170 F.3d 1241 (9th Cir.), *withdrawn* 188 F. 3d 1177 (9th Cir. 1999), *Dist. Ct. aff'd en banc* 206 F. 3d 882 (9th Cir.), *cert. denied*, __ U.S. __, 121 S. Ct. 481 (2000).

[30] *Id.* 170 F.3d at 1244 (9th Cir. 1999). *See also* the Ninth Circuit panel decision *United States v. Oropeza-Flores*, 173 F.3d 862 (9th Cir. 1999)(*unpublished*), *remanded*, 242 F.3d 385 (9th Cir. 2000)(*en banc, unpublished*), 230 F.3d 1368 (9th Cir. 2000)(*unpublished*), *cert. denied sub nom*, *Oropeza-Flores v. United States*, __ U.S. __, 121 S. Ct. 836 (2001). In light of the Ninth Circuit's *en banc* decision in *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000), the panel ruling in *Opropeza-Flores* also was overturned, and it was ultimately held that failure to provide VCCR Article 36 warnings does not warrant suppression. One can only speculate what "prejudice" could be suffered in the United States if there were a failure to provide consular rights warnings followed by the lack of consular officer contact. Presumably, one of the most important pieces of advice that the consular officer would provide is that the foreign person arrested or detained seek legal counsel, an advisement that most probably already would have been communicated to the individual during a *Miranda* warning.

[31] *Lombera-Camorlinga*, *supra* note 30, 206 F.3d 882 at 883-84. "[T]his and other circuits have held in recent years that an exclusionary rule is typically available only for constitutional violations, not for statutory or treaty violations." *Id.* at 886.

[32] *Id.* at 887-88 *citing R v. Abbrederis* (1981) 36 A.L.R. 109. The defendant in *Abbrederis* argued on appeal that, *inter alia*, "...the trial judge erred in admitting into evidence the conversations which took place between appellant and the customs officers [because] appellant was an Austrian citizen and that it was accordingly incumbent upon the investigating officers to afford him access to his consular representative before questioning him." Even though the Australian *1972-1973 Consular Privileges and Immunities Act* "...prescribes that certain of the articles and paragraphs in the [VCCR]...are to have the force of law in Australia[,]...[t]he objection, in [the court's view] has no merit. Even giving the fullest weight to the prescriptions in Art 36, [the court does] 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 [the court's] view this ground of appeal is not made good." (A.L.R. pagination not provided in LEXIS printout.)

Note also that § 23P, Australian *Crimes Act 1914*, as amended, provides—

> 1) Subject to section 23L, if a person under arrest for a Commonwealth offense is not an Australian citizen, the investigating official holding the person under arrest must, before starting to question the person:
>
> a) inform the person that he or she may communicate with, or attempt to communicate with, the consular office of the country of which the person is a citizen; and
>
> b) defer the questioning for a reasonable time to allow the person to make, or attempt to make, the communication.
>
> 2) Subject to section 23L, if the person wishes to communicate with a consular office, the investigating official holding the person under arrest must, as soon as practicable, give the person reasonable facilities to do so.

Australian *Crimes Act 1914, as amended*, *http://scaleplus.law.gov.au/html/pasteact/0/28/0/PA002450.htm*. State's conclusion, quoted in the main text, that "no other signatories to the Vienna Convention have permitted suppression" may be incorrect in light of the U.K. decisions discussed at note 28, *supra.*

[33] *See, e.g., United States v. Li*, 206 F.3d 56 (1st Cir.), *cert. denied, Li v. United States*, 531 U.S. 956 (2000); *United States v. De La Pava*, No. 00-1116, 2001 WL 1223178, (2d Cir. Oct. 15, 2001); *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir.), *cert. denied*, No. 00-10298, 2001 WL 606881 (U.S. June 29, 2001); *United States v. Page*, 232 F. 3d 536 (6th Cir. 2000), *cert. denied sub nom., Linton v. United States*, __ U.S. __, 121 S. Ct. 1389 (2001); *United States v. Emuegbunam*, No. 00-1399, 2001 WL 1176577 (6th Cir. Oct. 5, 2001); *United States v. Lawal*, 231 F.3d 1045 (7th Cir. 2000), *cert. denied sub nom.*, *Lawal v. United States*, __ U.S. __, 121 S. Ct. 1165 (2001); *United States v. Cordoba-Mosquera*, 212 F.3d 1194 (11th Cir. 2000). *Cf. Breard v. Greene*, 523 U.S. 371, 376 (1998): "The Vienna Convention...arguably confers on an individual the *right* to consular assistance following arrest...." (Emphasis added.)

[34] *Lombera-Camorlinga*, *supra* note 30, 206 F.3d at 886.

[35] *United States v. Chaparro-Alcantara*, 226 F.3d 616, 621 (7th Cir.), *cert. denied*, __U.S.__, 121 S. Ct. 599 (2000).

[36] *Cordoba-Mosquera, supra* note 33, at 1196. "Even were [defendant's] Vienna Convention claim properly raised and proven, 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." *Breard, supra* note 33, at 377 (citation omitted).

[37] *Lombera-Camorlinga*, *supra* note 30, 206 F.3d at 888.

[38] Nos. 98 Civ. 3356(HB), 98 Civ. 6725(HB), 2000 WL 1528282 (S.D.N.Y. Oct. 16, 2000).

[39] The statute provides in significant part that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable...."

[40] *Supra* note 38, at *5 (citations omitted).

[41] 153 F. Supp. 2d 417 (S.D.N.Y. 2001).

[42] *Standt, supra* note 41, at 428.

[43] *Id.* at 431.

[44] Woodman, *International Miranda? supra* note 28, at 47. To the extent the writer of *International Miranda?* bases her conclusion that PACE codifies Article 36 VCCR upon these two cases *as reported* in the Legal Action accounts described in note 28, *supra*, this author takes exception. Neither of two Legal Action case summaries, prepared by barristers, mentions the VCCR let alone any legal foundations underlying PACE, Code C, para. 7.

[45] *R. v. Van Bergen*, No. 99-18145, 2000 W.C.B.J. LEXIS 10995, at *8, (Alberta Ct. App. July 19, 2000).

[46] *Id.* at *9.

[47] The LaGrands were ultimately in contact with German consular officials. It was, however, untimely, and as even the United States concluded, "Clearly this notice came too late to constitute compliance with Article 36 in this case[.]" Counter-Memorial of the United States, note 23 at p. 45, *LaGrand Case (Germany v. U.S.)*(ICJ Mar. 27, 2000), *http://www.icj-cij.org/icjwww/idocket/igus_ipleading_CounterMemorial_US_20000327.htm.*

[48] Summary of the Judgment of 27 June 2001, p. 1, *LaGrand Case (Germany v. U.S.)*(ICJ June 27, 2001), *http://www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001-bis_20010627.htm*. Article 5, VCCR, is a listing of consular functions contemplated by the convention to include "protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law[.]" Article 5(a), VCCR.

[49] Counter-Memorial, *LaGrand Case, supra* note 47, p. 4, *http://www.icj-cij.org/icjwww/idocket/igus_ipleading_CounterMemorial_US_20000327.htm.*

[50] *Id.* at p. 15. In point of fact, the LaGrands were visited a number of time by German consular officials beginning in December 1992. Indeed, Walter even refused to entertain at least two consular visits. *Id.* at p. 20.

[51] Final Judgment, *LaGrand Case, supra* note 47, p. 24, *http://www.icj-cij.org/icjwww/idocket/igus_ijudgment_20010625.htm.*

[52] *Id.*

[53] *See supra* notes 2 and 5.

[54]. Final Judgment, *LaGrand Case, supra* note 47, p. 38, *http://www.icj-cij.org/icjwww/idocket/igus_ijudgment_20010625.htm.*

[55] Emphases in the original; *id.* at 42.

[56] *Citation omitted,* Woodman, *International Miranda? supra* note 28, at 48.

[57] *Application of Paraguay (Paraguay v. United States)* (ICJ Apr. 3, 1998), *http://www.icj-cij.org/icjwww/idocket/ipaus/ipausorder/ipaus_iapplication_980403.html*. Paraguay's memorial was submitted October 9, 1998, *http://www.icj-cij.org/icjwww/idocket/ipaus/ipa.../ipaus_memorial_ paraguay_19981009.htm.*

[58] *Breard, supra* note 33, at 372.

[59] *Provisional Order (Paraguay v. United States)*(ICJ Apr. 9, 1998), at 9, *http://www.icj-cij.org/icjwww/idocket/ipaus/ipausorder/ipaus_iorder_090498.htm.*

[60] *Order (Paraguay v. United States)*, 1998 I.C.J. 426, 1998 WL 1180014 (Nov. 10, 1998).

[61] *Advisory Opinion OC-16/99* (Oct. 1, 1999), *http://wwwl.umn.edu/humanrts/iachr/b_11_4p.html*. Mexico's request "...came about as a result of the bilateral representations that [it] had made on behalf of some of its nationals, whom the host State had allegedly not informed of their right to communicate with Mexican consular authorities and who had been sentenced to death in ten states in the United States." *Id.* at 2.

[62] *Press Release OC-16/19* (Oct. 1, 1999), at 3-4, *http://wwwl.umn.edu/humanrts/iachr/pr24-99.html.*

[63] *Id.* at 4. When the opinion was rendered, the Court was comprised of seven judges none of whom were from the United States and one of whom was from Mexico. The Court is "an autonomous legal institution of the Organization of American States established in 1979 [and] is comprised of legal experts of the highest moral authority and recognised [*sic*] competence in the field of human rights."

[64] *Id.*

[65] AG/Res. 1611 (XXIX-0/99) O.A.S., 1st plen. sess. (June 7, 1999), at 2, *http://www.oas.org/juridico/english/ga-res99/eres1611.htm*. and AG/Res. 1717 (XXX-0/00) O.A.S., 1st plen. sess. (June 5, 2000), at 2, *http://www.oas.org/juridico/english/agres_1717_ xxxo00.htm*.

[66] *Standt, supra* note 41, at 427. State promulgated an April 20, 1993, precursor to the 1998 *Consular Notification and Access* booklet, *supra* note 5, entitled *Notice for Law Enforcement Officials on Detention of Foreign Nationals* in which it was remarked on the first page, "Compliance with the notification requirement is essential to ensure that similar notice is given to U.S. diplomatic and consular officers when U.S. citizens are arrested or detained abroad."

[67] Remarks in a June 18, 2001, letter from the German Consul to DEA's New York Special Agent-in-Charge (SAC):

> It is the Consular General's duty to bring to the knowledge of the Drug Enforcement Agency [*sic*] that the authorities of the United States who arrested and detained Mr. Rossner unfortunately did not comply with Article 36 of the Vienna Convention on Consular Relations.... The DEA officers did not inform him that he had the right to contact the Consulate General of the Federal Republic of Germany.
>
> The German Consulate General would appreciate if the competent US authorities having acted in this matter could be informed accordingly. This Consulate General would furthermore appreciate if it could be informed about the outcome of this meeting.

[68] Samuel Langhorne Clemens (Mark Twain), *To the Young Peoples Society, Greenpoint Presbyterian Church, Brooklyn (Feb. 16, 1901),* collected in *Bartlett's Familiar Quotations* at 626 (1980).

Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.