

Chapter 13

JFK's Legacy Regarding Consular Relations Law

Cindy G. Buys

I. The Barghoorn Affair

In the fall of 1963, Professor Frederick Barghoorn of Yale University traveled to the Soviet Union on a tourist visa.¹ The 52-year-old Barghoorn was chair of Yale's Department of Soviet Studies and had visited the Soviet Union quite frequently.² On the evening of October 31, Professor Barghoorn visited the Moscow home of Walter Stoessel, Minister-Counselor and second-ranking official at the U.S. embassy.³ Professor Barghoorn told Stoessel that he planned to leave the Soviet Union by plane the following morning.⁴ Barghoorn left Stoessel's home shortly after 7 p.m. and an embassy car drove him to the Metropole Hotel in Central Moscow, where he was staying.⁵ Barghoorn was not heard from again until two weeks later, when TASS, the Soviet press agency, reported that he had been arrested on charges of spying for the United States.⁶ The U.S. Ambassador to Moscow, Foy Kohler, denied the charges against Professor Barghoorn, calling them "completely unwarranted," and demanded Barghoorn's immediate release.⁷ The U.S. Ambassador also demanded an immediate opportunity to see the prisoner, charging the Soviet authorities with waiting "an unjustifiably long period before informing the embassy of the arrest."⁸ Those demands went unheeded.

On Friday, November 15, 1963, U.S. President John F. Kennedy became personally involved. He held a news conference at which he stated that: "Professor Barghoorn was not on an intelligence mission of any kind."⁹ He further stated that the arrest could have "a most serious effect" on U.S.-Russian cultural relations and demanded Barghoorn's prompt release.¹⁰ President Kennedy decided to postpone meetings on a U.S.-U.S.S.R. cultural exchange program and hinted that the Barghoorn affair might interfere with a pending bilateral agreement on wheat.¹¹ U.S. Ambassador

¹ Henry Tanner, *Yale Professor Seized in Soviet On Spy Charges*, N.Y. TIMES, Nov. 13, 1963, at 1.

² *Id.*

³ Henry Tanner, *U.S. Bids Soviet Free Prisoner*, N.Y. TIMES, Nov. 14, 1963 at 1.

⁴ *Id.*

⁵ *Id.*

⁶ Henry Tanner, *Yale Professor Seized in Soviet On Spy Charges*, N.Y. TIMES, Nov. 13, 1963, at 1; Max Frankel, *Positions Harden Over Professor*, N.Y. TIMES, Nov. 16, 1963, at 1.

⁷ Henry Tanner, *U.S. Bids Soviet Free Prisoner*, N.Y. TIMES, Nov. 14, 1963 at 1.

⁸ *Id.*

⁹ *Russia's Switch*, N.Y. TIMES, Nov. 17, 1963 at E1.

¹⁰ *See id.* *See also News Summary and Index*, N.Y. TIMES, Nov. 15, 1963, at 35.

¹¹ *News Summary and Index*, N.Y. TIMES, Nov. 15, 1963, at 35; William Blair, *Wheat Sale to Soviet Bogs Again on Rates*, N.Y. TIMES, Nov. 16, 1963, at 1.

Kohler continued to make repeated requests for immediate permission to see Barghoorn.¹²

Professor Barghoorn was released on November 17, 1963, after being held incommunicado for 16 days, and was immediately expelled from the Soviet Union.¹³ The Soviets continued to assert that Barghoorn had been involved in espionage activities, but cited the personal concern expressed by President Kennedy as the reason Barghoorn was released.¹⁴

Incidents such as the Barghoorn affair were not uncommon during the Cold War time period. In 1960, the Soviets shot down an American CIA U-2 plane piloted by Francis Gary Powers over Soviet territory. The Soviets then interrogated Powers for several months before trying him for espionage. Powers was sentenced to 10 years imprisonment, but was freed after two years in exchange for a Soviet spy imprisoned by the Americans.¹⁵ In 1961, the Soviets put another American on trial for espionage in Moscow, along with two Dutchmen and four West Germans.¹⁶ That American was a student studying in West Germany named Marvin MacKinnon. He went to the Ukraine on a tourist visa and was arrested while there for photographing items the Soviets deemed to be of military significance.¹⁷ U.S. authorities were often frustrated by their inability to visit or communicate with American nationals arrested or detained in the U.S.S.R.

These incidents pointed to the need for better agreements on consular access to detained foreign nationals. The willingness of the U.S. and U.S.S.R. to negotiate such agreements was made possible in part by the slight softening in Cold War tensions during the 1960s following the Cuban Missile Crisis. That crisis brought home the imminent threat of nuclear war and the need for better relations between the U.S. and U.S.S.R. It led directly to the signing of the Nuclear Test Ban Treaty in August 1963.¹⁸ It also contributed indirectly to a decision by the U.S., the U.S.S.R., and the rest of the international community to conclude the first truly multinational treaty for the purpose of improving consular relations.

While the Kennedy Administration is probably better known for its work on the Nuclear Test Ban Treaty, it was also instrumental in codifying the international law of

¹² Henry Tanner, *Steinbeck and Albee Speak Out in Soviet for U.S. Professor*, N.Y. TIMES, Nov. 15, 1963, at 1.

¹³ Max Frankel, *Washington Is "Gratified"; Asks Future Assurances*, N.Y. TIMES, Nov. 17, 1963, at 1; *see also* Henry Tanner, *Soviet, Heeding Kennedy, Releases Yale Professor But Insists He Was a Spy*, N.Y. TIMES, Nov. 17, 1963, at 1.

¹⁴ Henry Tanner, *Soviet, Heeding Kennedy, Releases Yale Professor But Insists He Was a Spy*, N.Y. TIMES, Nov. 17, 1963, at 1.

¹⁵ *Russia Says Mr. Wynne Pleaded Guilty to Espionage*, TIMES (London), Nov. 28, 1962, at 10d.

¹⁶ *Id.*

¹⁷ Seymour Topping, *Soviet Jails U.S. Tourist as Spy; To Try Him as Western Agent*, N.Y. TIMES, Sept. 5, 1961, at 1 ("Under Soviet law, a tourist can be arrested for photographing a railway station, a factory, public works or other objects considered innocuous in the West.").

¹⁸ *See, e.g.,* Max Frankel, *Positions Harden Over Professor*, N.Y. TIMES, Nov. 16, 1963, at 1.

consular relations. Both the multilateral Vienna Convention on Consular Relations¹⁹ and the bilateral U.S.-U.S.S.R. Consular Convention²⁰ were negotiated during President John F. Kennedy's time in office.

Ironically, the bilateral U.S.-U.S.S.R. Consular Convention was under negotiation at the time of the Barghoorn incident. The Barghoorn case brought into focus two key issues involved in those negotiations: (1) the right of consular officers to visit their nationals who have been arrested in a foreign country; and (2) the obligation of a host government to inform the foreign consulate promptly when one of its nationals is arrested. The United States had routinely granted these courtesies to the Soviet Union when a Soviet citizen was arrested in the United States, but Moscow had rarely extended reciprocal courtesies.²¹ The Kennedy Administration was eager to secure greater protections for Americans arrested in the U.S.S.R. through the negotiation of international agreements.

The Vienna Convention on Consular Relations was concluded and signed by the Kennedy Administration in 1963, but did not come into force until several years later.²² The bilateral U.S.-U.S.S.R. Consular Convention was concluded approximately six months after President Kennedy's death.²³

The Vienna Convention on Consular Relations continues to be one of the most important and widely adopted treaties in the modern era.²⁴ Issues relating to its application and interpretation regularly arise both in the diplomatic context and in litigation, particularly with respect to the right of consular notification and access to persons who are arrested or detained. In fact, a recent search of an electronic database of federal court cases revealed almost 400 cases involving claims under the VCCR in the 10-year period from 1998 to 2008.²⁵

This article provides background on the drafting of the VCCR and highlights some of the issues that presented the most difficulties during the negotiations. It also provides some comparisons between the VCCR and the bilateral U.S.-U.S.S.R. Consular Convention. It then discusses the continuing importance of consular treaties today, with a particular focus on the issue of consular notification. Finally, the article highlights areas of legal uncertainty with respect to consular notification that are currently being litigated in U.S. courts or which are likely to be resolved through litigation in the future.

¹⁹ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention or VCCR].

²⁰ Consular Convention and Protocol (U.S.-U.S.S.R.), June 1, 1964, T.I.A.S. No. 6503, 19 U.S.T. 5018.

²¹ Max Frankel, *Washington Is "Gratified"; Asks Future Assurances*, N.Y. TIMES, Nov. 17, 1963, at 1.

²² The VCCR entered into force on March 18, 1967. The United States completed ratification of the VCCR on November 21, 1969. See

<http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=219&chapter=3&lang=en>.

²³ Consular Convention and Protocol (U.S.-U.S.S.R.), *supra* note 21.

²⁴ *Id.*

²⁵ There are currently 172 parties to the VCCR. See

<http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=219&chapter=3&lang=en>.

²⁵ Results of Westlaw search conducted on March 1, 2009 of "ALLFEDS" database for cases using phrase "Vienna Convention on Consular Relations" on file with author.

II. Background on 1963 Vienna Convention on Consular Relations

Broadly speaking, consular functions consist of protecting and facilitating the interests of a state and its nationals in the territory of another state.²⁶ In particular, consular functions include: (1) promoting commercial, economic, cultural and scientific relations between states, (2) issuing passports and other travel documents, (3) safeguarding the interests in the receiving state of the sending state's nationals, both individuals and corporate entities, (4) arranging appropriate representation of the sending state's nationals before the tribunals of the receiving state, (5) performing administrative functions such as acting as a public notary or serving judicial documents, and (6) exercising supervision and inspection of the sending state's national flag vessels and aircraft operating in the territory of the receiving state.²⁷

Consular relations between states have existed for centuries.²⁸ Prior to the adoption of the Vienna Convention on Consular Relations, the rules governing consular relations derived largely from customary practices between states developed over time and through a series of bilateral consular conventions.²⁹ There were some prior attempts at developing a multilateral set of rules, but none were successful until the VCCR in 1963.³⁰

The International Law Commission (ILC), a group of experts on international law convened by the United Nations (U.N.), was responsible for preparing a draft of the new multilateral convention on consular relations.³¹ In 1949, the ILC conducted a review of international law at its first session based on a survey that had been prepared by the U.N. Secretariat.³² As a result of that review, the ILC decided to add "consular intercourse and immunities" to its list of topics for codification. The U.N. General Assembly approved the inclusion of that topic on the ILC's agenda at the General Assembly's fourth session in 1949.³³ However, it was not until 1955 that the ILC actually began work to codify the

²⁶ See, e.g., *Summary Records of the 516th Meeting*, [1959] 1 Y.B. Int'l L. Comm'n 165-66, U.N. Doc. A/CN.4/SER.A/1959 (Statements of Mr. Edmonds on draft articles 14 and 15).

²⁷ VCCR, *supra* note 20, art. 5.

²⁸ United Nations Conference on Consular Relations, Mar. 4-Apr. 22, 1963, *Summary records of first plenary meeting*, ¶ 57, U.N. Doc. A/CONF.25/16 (Mar. 4, 1963) (Statement by President Stephen Verosta). For a description of the historical development of consular relations, see also, Jaroslav Zourek, Special Rapporteur, *Consular Intercourse and Immunities, Report of the Special Rapporteur*, [1957] 2 Y.B. Int'l L. Comm'n 71, 72-77, U.N. Doc. A/CN.4/SER.A/1957/ADD.1.

²⁹ U.N. Conference on Consular Relations, *Summary records of first plenary meeting*, *supra* note 29, ¶ 54 (Statement by President Stephen Verosta).

³⁰ Zourek, *Consular Intercourse and Immunities, Report of the Special Rapporteur*, *supra* note 29, at 78.

³¹ The ILC is a group of experts on international law from different countries who are charged with carrying out the mandate of Article 13 of the U.N. Charter to facilitate the progressive development and codification of international law. U.N. CHARTER art. 13. Members of the ILC sit in their individual capacities and not as representatives of their government. For more information on ILC membership, see <http://www.un.org/law/ilc/>. During the relevant time period, there were 21 members of the ILC including was one American, Douglas L. Edmonds, a California Supreme Court Judge. *Summary Records of the Ninth Session*, [1957] 1 Y.B. Int'l L. Comm'n viii, U.N. Doc. A/CN.4/SER.A/1957.

³² Zourek, *Consular Intercourse and Immunities, Report of the Special Rapporteur*, *supra* note 29, at 82.

³³ G.A. Res. 373 (IV), at 66, U.N. Doc. A/1251 (Dec. 28, 1949).

existing rules and practices regarding consular relations.³⁴ Over the next six years, the ILC prepared a series of draft articles on consular relations, which were provisionally adopted, submitted to governments for comment, and revised in light of the comments received.³⁵

The first draft of the articles was prepared by the special rapporteur, Jaroslav Zourek of Czechoslovakia, who submitted a report to the ILC in 1957 on Consular Intercourse and Immunities.³⁶ This report formed the basis for the ILC's further work on these issues. In his report, Mr. Zourek stated that he had reviewed the many bilateral agreements on consular relations that already existed and tried to identify rules that were common to those agreements and therefore likely to be acceptable to a majority of States.³⁷ Where there were gaps in the rules or clarification was required, he took into account the practices of States and their municipal laws, thereby adding to the codification of customary international law.³⁸

The ILC did not spend much time as a group on consular issues in 1957, however, because it spent most of that year dealing with a separate treaty relating to diplomatic intercourse and immunities. The ILC's substantial work on consular issues really began in 1959.³⁹ From 1959 to 1961, the ILC had numerous meetings where they debated the nature and scope of consular obligations.⁴⁰ The final result of the ILC's work was a document containing 71 draft articles on consular relations.⁴¹ In 1961, the U.N. General Assembly decided by way of Resolution 1685 to convene a conference on consular relations to consider the ILC's draft articles.⁴²

In the words of the Acting President of the conference, the purpose of the conference was to codify the law dealing with an important part of international relations:

At a time when international relations has taken on an ever-increasing significance for the lives of all mankind, it had become increasingly desirable to place them on a secure basis of clear, generally recognizable and generally observed rules of law. . . The general development of foreign travel, international trade and shipping had increased the volume of consular activities all over the world . . . Clarification of consular law

³⁴U.N. Conference on Consular Relations, *Summary records of the plenary meetings and of the meetings of the First and Second Committees*, *supra* note 29, at ¶ 7 (Statement of Stephen Verosta).

³⁵ *Id.*

³⁶ Zourek, *Consular Intercourse and Immunities, Report of the Special Rapporteur*, *supra* note at 71.

³⁷ *Id.* at 80.

³⁸ *See id.*

³⁹ *Summary records of the 496th meeting*, [1959] 1 Y.B. Int'l L. Comm'n 75, U.N. Doc. A/CN.4/SER.A/1959.

⁴⁰ *See, e.g., See Summary Records of the 528th Meeting*, [1960] 1 Y.B. Int'l L. Comm'n 3, U.N. Doc. A/CN.4/SER.A/1960; *Summary Records of the 587th Meeting*, [1961] 1 Y.B. Int'l L. Comm'n 33, U.N. Doc. A/CN.4/SER.A/1961.

⁴¹ *Report of the International Law Commission to the General Assembly*, 16 U.N. GAOR Supp. (No. 9) at 5-40, U.N. Doc. A/4843 (1961), reprinted in [1961] 2 Y.B. Int'l L. Comm'n 92, U.N. Doc. A/CN.4/SER.A/1961/Add.1.

⁴² G.A. Res. 1685 (XVI) at 61, U.N. Doc. A/5013 (Dec. 18, 1961).

would thus contribute to the promotion of friendly relations between States.⁴³

The conference began on March 4, 1963 and concluded on April 22 of that year.⁴⁴ Thus, it took the 92 states' delegations seven weeks of negotiating and compromise to reach agreement on the final text of the VCCR. The 78-article convention⁴⁵ was signed by representatives from 92 countries on April 24, 1963, including the United States (but not the U.S.S.R.).⁴⁶

The VCCR did not solve all consular issues between the U.S. and the U.S.S.R. however. The U.S. State Department continued work during 1963 on the bilateral convention with the U.S.S.R. to better regularize consular relations between the two nations. The U.S. and U.S.S.R. concluded that bilateral consular convention in Moscow on June 1, 1964.⁴⁷ Because it took several years for a sufficient number of parties to ratify the VCCR to allow it to enter into force, the bilateral convention between the U.S. and the U.S.S.R. became the only treaty governing consular relations between the two nations for several years. The bilateral convention also elaborated on some of the details of their respective rights and duties.

III. Some Difficult Issues Involved in the Negotiations of the VCCR

One of the most important issues to the United States in the 1960s, as highlighted by the Barghoorn incident, was the issue of guaranteed and immediate consular access to nationals who are arrested or detained in a foreign country. This issue continues to be one of the most litigated issues in consular relations today.

The Vienna Convention provides for: "Communication and contact with nationals of the sending State" in Article 36.⁴⁸ This article sets forth the general rule that "consular officers shall be free to communicate with nationals of the sending State and to have access to them" and, correspondingly, "[n]ationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State."⁴⁹ More specifically, subparagraph (1)(b) of Article 36 provides that, if requested by a foreign national, "the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if . . . a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other

⁴³ U.N. Conference on Consular Relations, *Summary records of plenary meetings and of the meetings of the First and Second Committees*, ¶ 5 (Opening Remarks of Acting President Stavropoulos).

⁴⁴ *See id.*

⁴⁵ The final version of the VCCR contained eight more articles than the ILC draft. Most of the additional articles had to do with the procedural formalities relating to signature and ratification and entry into force of the convention.

⁴⁶ *See* <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=219&chapter=3&lang=en>.

⁴⁷ Consular Convention and Protocol, (U.S.-U.S.S.R.), *supra* note 21. The bilateral convention clarifies or expands on certain aspects of consular relations, including, *inter alia*, the duty of each state to assist the other in acquiring property for the consular premises, assistance that is particularly important in a country like the U.S.S.R. where most of the property is owned by the government. *See id.* at art. 4.

⁴⁸ VCCR, *supra* note 20, art. 36.

⁴⁹ *Id.* at art. 36(1)(a).

manner.”⁵⁰ The article further states that “said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.”⁵¹

Interestingly, the original draft of articles prepared by the ILC’s Special Rapporteur did not contain any specific language relating to consular notification when a national of the sending State is arrested or detained by the receiving State.⁵² A general listing of consular functions was included in the Special Rapporteur’s draft Article 13, which the ILC’s Secretary, Mr. Liang, accurately predicted “was likely to raise more difficulties than any other, in the Commission, at any conference on the subject and in the General Assembly.”⁵³

Mr. Bartos of Yugoslavia was the first to raise the specific issue of consular notification with the ILC, stating that:

His country had been very much concerned about the difficulty of arranging for the defence [sic] of nationals arrested on foreign soil. To deny consuls access to arrested persons was a flagrant violation of international law; the consular function of protecting nationals of the appointing State was fundamental, and hence should be mentioned first in the enumeration [of consular functions].⁵⁴

Sir Gerald Fitzmaurice from the United Kingdom of Great Britain and Northern Ireland followed these remarks by proposing a new draft article on consular notification (provisionally numbered Article 30A) in May 1960.⁵⁵ Subparagraph (a) of Sir Fitzmaurice’s proposed article established that “a consul shall have complete freedom of communication with and access to [its] nationals;” subparagraph (b) provided for visits by the consul to nationals being detained pending trial; and subparagraph (c) provided for visits by consuls to nationals in prison after sentencing.⁵⁶

⁵⁰ *Id.* at art. 36(1)(b).

⁵¹ *Id.* The United States also is a party to more than 50 bilateral agreements which contain even more extensive consular notification obligations. See BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, CONSULAR NOTIFICATION AND ACCESS 47 (2003), available at http://travel.state.gov/law/consular/consular_636.html. Of particular interest here, the U.S.-Russia Consular Convention modifies the VCCR’s consular notification obligations in two important respects. First, Article 12 requires that consular notification occur “immediately” and, second, it further defines that obligation in the Protocol to require that notification of the consulate and access to any detained national occur within one to four days of the arrest or detention. Consular Convention and Protocol, (U.S.-U.S.S.R.), *supra* note 21, at art. 12 and Protocol.

⁵² Zourek, *Consular Intercourse and Immunities, Report of the Special Rapporteur, supra* note 29, at 83-103.

⁵³ *Summary Records of the 513th Meeting*, [1959] 1 Y.B. Int’l L. Comm’n 156, U.N. Doc. A/CN.4/SER.A/1959 (Statement by Mr. Liang).

⁵⁴ *Summary Records of the 514th Meeting*, [1959] 1 Y.B. Int’l L. Comm’n 160, U.N. Doc. A/CN.4/SER.A/1959 (Statement by Mr. Bartos).

⁵⁵ *Summary Records of the 534th Meeting*, [1960] 1 Y.B. Int’l L. Comm’n 42, U.N. Doc. A/CN.4/SER.A/1960.

⁵⁶ *Id.*

Agreement on the final language of the consular notification article came “[o]nly after much debate.”⁵⁷ Some of the issues that caused the most difficulties involved:

- (1) Whether notification of the consulate should be mandatory in every case where a national of that consulate’s State is arrested or detained, or only if the foreign national so requests;
- (2) How quickly after arrest or detention notice of consular rights to the individual and notice to the consulate must occur;
- (3) To what extent, if any, local rules of criminal procedure should be allowed to delay or interfere with consular access to a foreign national who has been detained or arrested; and
- (4) To what extent consular officers should be allowed access to foreign nationals who are serving prison sentences.⁵⁸

Ultimately, it was agreed with respect to the first issue that the duty to notify the appropriate consulate would only arise if the foreign national so requests.⁵⁹ Early on, the ILC delegates agreed that consular notification would occur automatically in every case.⁶⁰ As Mr. Dadzie from Ghana pointed out, a foreign national who is arrested or imprisoned might not know that his consulate should be notified and, therefore, might not request notification.⁶¹ However, the United States delegation strongly advocated for limiting the requirement to only those cases when the foreign national so requests for two primary reasons: (1) mandatory notification in every case might become an unreasonable administrative burden and thus result in less compliance; and (2) mandatory notification might call for unwarranted intrusions upon the privacy of individuals.⁶² Despite successfully opposing mandatory notification in the VCCR, the United States has entered into more than 50 bilateral consular conventions, including the bilateral U.S.-U.S.S.R. Consular Convention, which require the United States to notify the appropriate foreign consulate when a national of those states is arrested or detained, regardless of the foreign national’s wishes.⁶³

⁵⁷ Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963, S. Exec. Doc. E., 91st Cong., at 59 (1969) [hereinafter Report of the United States Delegation].

⁵⁸ *Summary Records of the 534th-537th Meetings*, [1960] 1 Y.B. Int’l L. Comm’n 42-43, 47, 57, 61, U.N. Doc. A/CN.4/SER.A/1960.

⁵⁹ VCCR, *supra* note 20, at art. 36(1)(b).

⁶⁰ *See Summary Records of the 536th Meeting*, [1960] 1 Y.B. Int’l L. Comm’n 58, U.N. Doc. A/CN.4/SER.A/1960.

⁶¹ *See* U.N. Conference on Consular Relations, *Eleventh plenary meeting*, *supra* note 29, at 36 (statement of Mr. Dadzie). This view was echoed by delegates from the U.S.S.R. Tunisia, and the Congo, among others. *See id.* at 37-38.

⁶² *See* Report of the United States Delegation, *supra* note 58, at 59. Other delegates also expressed concern about their States’ ability to comply in every case and about intrusions on individuals’ freedom of choice. *See* U.N. Conference on Consular Relations, *Eleventh plenary meeting*, *supra* note 29, at 36-38 (Statements by delegates from New Zealand, United Arab Republic, the Federation of Malaya, Venezuela, Vietnam and France).

⁶³ For examples of the mandatory notification provisions of bilateral conventions, *see, e.g.*, Consular Convention, U.S.-P.R.C., art. 35, Sept. 17, 1980, modified Jan. 17, 1981, 33 U.S.T. 2973, Consular Convention, U.S.-Pol., art. 29, May 31, 1972, 24 U.S.T. 1231; Consular Convention, U.S.-U.K., art. 16, June 6, 1951, 3 U.S.T. 3426; Consular Convention and Protocol, U.S.-U.S.S.R., *supra* note 21, art.12 (“The

The second issue regarding the timeliness of notification also presented much difficulty. Sir Fitzmaurice's original draft article stated that "the local authorities shall inform the consul of the sending State without delay" and that "communications from [a foreign] national shall immediately be forwarded by the local authorities."⁶⁴ Several delegates supported this proposal.⁶⁵ However, Mr. Matine-Daftary of Iran objected on the grounds that it was not always possible to discover the identity or nationality of a person who had been detained, and it would therefore be wrong to impose upon the local authorities an obligation to inform consuls immediately and automatically.⁶⁶ Mr. Yokota of Japan agreed, and suggested that there might be conflicts with the penal codes of many countries.⁶⁷ He suggested the insertion of the word "undue" before "delay," a suggestion the ILC subsequently adopted in a later draft.⁶⁸ The United States and the United Kingdom expressed concern that the word "undue" was "susceptible to considerable abuse" and proposed its deletion.⁶⁹ Mr. Erim of Turkey suggested that notification occur "within a reasonable time."⁷⁰ There also was some discussion of whether a time frame should be included, e.g., notice must be given within a certain number of hours or days of arrest.⁷¹ States appeared concerned about committing to a specific timeframe in all circumstances. In light of these objections, it was ultimately agreed to revert back to the "without delay" language with no specific time frame in which notification must occur.⁷²

With respect to the third issue regarding potential conflicts with local laws, one of the issues here was whether the consular officer must be permitted to converse privately with the foreign national under arrest or detention. The phrase "converse privately" was initially included in Sir Fitzmaurice's original draft, but was struck from the ILC's draft during its deliberations.⁷³ Another issue was whether foreign nationals could be held *incommunicado* for a short period of time at the beginning of an investigation, as was the

appropriate authorities of the receiving state shall immediately inform a consular officer of the sending state about the arrest or detention in other form of a national of the sending state.").

⁶⁴ See *Summary Records of the 534th Meeting*, *supra* note 56, at 42.

⁶⁵ *Id.* at 42-43 (see statements by Mr. Hsu (China), Mr. Edmonds (United States), Mr. Verdross (Austria), Mr. Sandstrom (Sweden), Mr. Scelle (France), and Mr. Ago (Italy).

⁶⁶ *Id.* at 42.

⁶⁷ *Id.* at 43. Mr. Tunkin from the U.S.S.R. also argued strongly for inclusion of a reference to local laws, stating that for national security reasons, consuls might not be allowed access to certain areas. *Id.* at 44.

⁶⁸ See *Report of the International Law Commission to the General Assembly*, art. 6, 15 U.N. GAOR Supp. (No. 9) at 9, U.N. Doc. A/4425 (1960), reprinted in [1960] 2 Y.B. Int'l L. Comm'n 151-52, U.N. Doc. A/CN.4/SER.A/1960/Add.1 [hereinafter 1960 Draft Article 6]. (In earlier drafts and meetings, article 6 was referred to as additional article 30A. See *Summary Records of the 586th Meeting*, [1961] 1 Y.B. Int'l L. Comm'n 32, note a, U.N. Doc. A/CN.4/SER.A/1961.

⁶⁹ See Report of the United States Delegation, *supra* note 58, at 59.

⁷⁰ See *Summary Records of the 536th Meeting*, *supra* note 61 at 55.

⁷¹ Suggestions for the timeframe in which consular notice should be given varied widely. For example, the representative from the Netherlands suggested that notice must be given within one month at the latest. See *Summary Records of the 587th Meeting*, *supra* note 41, at 33. By contrast, Mr. Edmonds from the United States suggested that a foreign national should not be detained *incommunicado* for more than 48-72 hours. See, e.g., *Summary Records of the 586th Meeting*, *supra* note 69 at 32.

⁷² VCCR, *supra* note 20, at art. 36.

⁷³ 1960 Draft Article 6, *supra* note 69. Mr. Edmonds from the United States was particularly concerned that consular officers be able to speak privately with prisoners in order to provide effective assistance, but was ultimately overruled in favor of more general language. *Summary Records of the 534th Meeting*, *supra* note 56, at 42 (Statement by Mr. Edmonds).

Swiss practice.⁷⁴ During the negotiations, there was vigorous debate on the issue of whether local laws or international law should prevail in the event of a conflict.⁷⁵ Some delegates expressed concern that if local laws were allowed to prevail without qualification the right of consular notification would be completely nullified.⁷⁶ Eventually, a compromise was reached whereby consular officers must comply with local laws provided those laws did not act to nullify the effectiveness of consular communication.⁷⁷

Fourth and finally, there was some debate regarding the period of time during which consulates should be given access to detained persons. Some delegates suggested that consular access was only necessary prior to trial to ensure that the foreign national understood the legal proceedings and received a fair hearing, but other delegates insisted that it was extremely important that consular officers be allowed to visit their foreign nationals in prison to ensure that they were being treated at least as well as nationals of the home country.⁷⁸ The ILC draft took the position that competent consular officials would have the right to visit a national of the sending state who is in prison, custody, or detention both before conviction and after judgment.⁷⁹ This language was largely retained in the final version of the VCCR.⁸⁰

Mr. Edmonds, the ILC representative from the United States, summed up the importance of the right of consular access as follows:

[T]he protection of human rights by consuls in respect of their nationals should be the primary consideration for the [International Law] Commission. The fact that, under the laws of some States, it was possible to isolate an accused person from his own lawyer was all the more a reason to safeguard the right of his consul to visit him. In many respects, to a person who was often ignorant of the local language and laws, a visit by his consul was more important than that of a lawyer.⁸¹

⁷⁴ See *id.* at 46 (Statement of Mr. Bartos).

⁷⁵ See e.g., *Summary Records of the 536th Meeting*, *supra* note 61, at 52. See also U.N. Conference on Consular Relations, *Twelfth plenary meeting*, *supra* note 29, at 40.

⁷⁶ See U.N. Conference on Consular Relations, *Twelfth plenary meeting*, *supra* note 29, at 42 (Statement by United States and Tunisia).

⁷⁷ The final language of Article 36 of the VCCR 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.” VCCR, *supra* note 20, at art. 36(2).

⁷⁸ See e.g., *Summary Records of the 537th Meeting*, [1960] 1 Y.B. Int’l L. Comm’n 60, U.N. Doc. A/CN.4/SER.A/1960 (Statement by Mr. Edmonds).

⁷⁹ United Nations Conference on Consular Relations, Mar. 4-Apr. 22 1963, *Draft articles on consular relations adopted by the International Law Commission at its thirteenth session*, art. 36, U.N. Doc. A/CONF.25/16/Add.1.

⁸⁰ See VCCR, *supra* note 20, art. 36(1)(c).

⁸¹ *Summary Records of the 534th Meeting*, *supra* note 56, at 47 (Statement by Mr. Edmonds). Some delegates agreed with Mr. Edmonds that the issue should be viewed as one of human rights (see Statement by Mr. Bartos of Yugoslavia, *id.* at 46); but others suggested that the issue was solely about the ability of consular officers to assist their nationals. *Summary Records of the 535th Meeting*, [1960] 1 Y.B. Int’l L. Comm’n 48-49, U.N. Doc. A/CN.4/SER.A/1960 (Statement by Mr. Fitzmaurice).

IV. The Continuing Importance of Consular Relations Law Today

A. Litigation at the International Court of Justice

Issues relating to consular notification continue to be extremely important today. The United States has been sued at the International Court of Justice (ICJ) three times in just the past decade for violations of Article 36 of the VCCR – by Paraguay in *Breard*,⁸² by Germany in *LaGrand*,⁸³ and most recently by Mexico in *Avena*, involving 54 Mexican nationals who were on death row in the United States.⁸⁴ In virtually all of the underlying cases, the appropriate state authorities failed to inform the foreign defendants of their right to have their consulates notified of their arrest and detention without delay and failed to notify the appropriate consular officers. The home States of the detained nationals sued the United States for those failures at the ICJ. Because the United States did not deny its failure to give proper consular notification in most cases, the disputes at the ICJ largely revolved around the appropriate remedy.⁸⁵ In all three ICJ cases, the defendants had not raised the government's failure to notify them of their right to consular notification until after trial and conviction, at least in part because they had not been notified that they had such a right.⁸⁶ The United States took the position that the foreign defendants could not raise this claim on appeal due to various state procedural default rules, which require all issues to be first raised at trial.⁸⁷

Not surprisingly in light of the United States' admissions, the ICJ found that the United States had violated its obligations under the Vienna Convention by failing to inform the foreign defendants, without delay, of their right to have their consulates notified of their arrest and detention.⁸⁸ As to the appropriate remedy, the ICJ stated that the United States has an obligation to provide, by means of its own choosing, review and reconsideration of the affected Mexican nationals' cases with a view to ascertaining whether the violation of the Vienna Convention caused actual prejudice to the defendant.⁸⁹ The ICJ further stated that state procedural default rules should not bar that

⁸² Vienna Convention on Consular Relations (*Breard*) (Para. v. U.S.) 1998 I.C.J. 248 (Apr. 9).

⁸³ *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

⁸⁴ See Case Concerning *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31) [hereinafter *Avena*]. Mexico originally brought its claim on behalf of 54 Mexican nationals, but subsequently amended the claim to include only 51 Mexican nationals. See *id.* at 27, 29.

⁸⁵ In *Avena*, the United States did not deny its failure to give the consular notification in 47 of the 51 cases. See *id.* at 46. With respect to the remaining *Avena* defendants, the United States asserted that the defendants had claimed U.S. citizenship and, thus, the authorities did not believe they were dealing with foreign nationals. However, the U.S. largely failed to prove these allegations, and the U.S. claims were rejected by the ICJ. See *id.* at 40-46; see also *LaGrand*, 2001 I.C.J. at 20-21; *Breard*, 1998 I.C.J. at 253.

⁸⁶ See *Avena*, 2004 I.C.J. at 52-53, 57 (describing the timing when consular notification was given, if ever). See also *LaGrand*, 2001 I.C.J. at 23 (right to notification not raised at trial or two subsequent proceedings; *LaGrands* finally learned of right from other sources); *Breard*, 1998 I.C.J. at 249 ("Paraguay learnt by its own means that Mr. Breard was imprisoned in the United States.").

⁸⁷ See *Avena*, 2004 I.C.J. at 55-57; see also *LaGrand*, 2001 I.C.J. at 68-69; *Breard*, 1998 I.C.J. at 249.

⁸⁸ See e.g., *Avena*, 2004 I.C.J. at 53, 71. Because the *Avena* case was the most recent and the most fully litigated of the three ICJ cases, I will focus on it here to illustrate the relevant legal issues.

⁸⁹ *Id.* at 65-66.

reconsideration.⁹⁰ Ultimately, the ICJ did not order the United States to overturn the convictions of the Mexican nationals, but did order the United States to consider whether lack of notice of consular access would have made a difference.⁹¹

B. The United States' Reaction to *Avena*

The United States' response to the *Avena* judgment serves to illuminate some of the unresolved issues in the area of consular notification law that continue to be litigated today. Following the *Avena* decision, then U.S. President Bush decided that it would be in the best interests of the United States to comply with the ICJ's judgment, both to demonstrate the United States' commitment to international law and to ensure reciprocal protections for Americans traveling abroad. Accordingly, he decided to implement the ICJ's judgment by issuing a "Memorandum for the Attorney General" dated February 28, 2005, in which he stated in pertinent part:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the [ICJ in *Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.⁹²

In April 2005, then U.S. Attorney General Alberto Gonzales sent this Presidential Memorandum to the relevant states' attorneys general⁹³ and filed it with state and federal courts where the Mexican nationals' cases were pending, including the case of *Medellin*⁹⁴ out of Texas, which was one of the cases involved in the *Avena* litigation at the ICJ.

The Court of Criminal Appeals of Texas refused to abide by the ICJ's judgment in *Avena* or the Presidential Memorandum, ruling that neither of those documents constituted binding federal law that preempted state procedural default rules.⁹⁵ *Medellin* appealed that decision to the U.S. Supreme Court, which sided with the Texas court in a decision issued in March 2008. The Supreme Court concluded that while the ICJ's judgment constitutes a binding *international* legal obligation for the United States, it is

⁹⁰ *Id.* at 57.

⁹¹ Specifically, the ICJ found "that the appropriate reparation in this case consists in the obligation of the United States to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals" that were the subject of the case. *Id.* at 72.

⁹² President's Memorandum for the Attorney General, Subject: Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html> [hereinafter Presidential Memorandum].

⁹³ See Letter from Alberto Gonzales, U.S. Attorney General, to Greg Abbott, Texas Attorney General (Apr. 5, 2005) in Brief for the United States as Amicus Curiae, *Ex parte* Jose Ernesto Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2005) (No. AP-75,207), 2005 WL 3142648. (The letter can be found in the appendix at A-1).

⁹⁴ *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

⁹⁵ *Ex parte* Jose Ernesto Medellin, No. AP-75,207, 2006 WL 3302639 (Tex. Crim. App., Nov. 15, 2007).

not directly binding on a Texas state court under the U.S. constitutional system.⁹⁶ In addition, the President does not have the authority under the Constitution to make law by way of a Memorandum that pre-empts a state court judgment applying state law.⁹⁷ As a result, Texas proceeded to carry out Medellín's death sentence on August 5, 2008.⁹⁸

Mexico was, of course, displeased with the United States' handling of the matter. Following the U.S. Supreme Court's decision, Mexico filed a diplomatic note of protest for this violation of international law with the U.S. government⁹⁹ and filed an application with the ICJ seeking clarification of the *Avena* judgment.¹⁰⁰ The ICJ dismissed that request for clarification on jurisdictional grounds in January 2009.¹⁰¹ However, the Court stressed that the United States remains under a continuing legal obligation to fully implement the *Avena* decision with respect to all of the Mexican nationals that were the subject of that case. It is likely diplomatic negotiations will continue between the United States and Mexico regarding appropriate reparations for the United States' breach of its obligations under the VCCR. Some of the other Mexican cases that were part of the *Avena* judgment are still pending in other state courts, and it is not clear how these other states will react to these legal developments.

V. Where Are We Today?

A number of interesting legal issues relating to consular notification remain unresolved. Many of these legal uncertainties were foreshadowed by the consular convention negotiations during the Kennedy Administration in the 1960s. In particular, the number of lawsuits based on claimed violations of Article 36 of the VCCR demonstrates that the United States has had difficulty ensuring that state and local law enforcement officers provide proper and prompt consular notification when arresting or detaining foreign nationals. Some of the outstanding issues in those cases include: (1) Is the VCCR a self-executing treaty?¹⁰² (2) If so, and consular notification rights are violated, can an individual sue the responsible local, state or federal government officials for that violation? (3) How soon after arrest and detention must consular notification be given? (4) If a private person can sue the government for failing to provide consular notification without delay, what is the appropriate remedy? (5) Regardless of whether

⁹⁶ *Medellin*, 128 S. Ct. at 1353.

⁹⁷ *Id.*

⁹⁸ Mexican government protests Texas execution, <http://www.cnn.com/2008/CRIME/08/06/mexican.executed/index.html>

⁹⁹ *See id.*

¹⁰⁰ *See* Request for Interpretation of the Judgment of 31 March 2004 in the case concerning *Avena* and Other Mexican Nationals (Mex. V. U.S.), filed June 5, 2008, *available at* www.icj-cij.org. The ICJ issued a provisional order in July 2008 requesting that the United States postpone any executions until it could review Mexico's request for clarification but, obviously, Texas decided not to comply with that request. ICJ Order, July 16, 2008.

¹⁰¹ Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.) 2009 I.C.J. 1, 18 (Judgment) (Jan19).

¹⁰² Under U.S. law, a self-executing treaty is one that is directly enforceable in U.S. courts without the need for implementing legislation. *See Foster v. Neilson*, 27 U.S. 253, 314 (1829). More recently, in *Medellin*, the U.S. Supreme Court stated: "What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification." *Medellin*, 128 S. Ct. at 1353 n.2.

private suits are available, what remedy does the United States owe its treaty partners when it violates the VCCR by failing to provide prompt consular notification?

Thus far, the U.S. Supreme Court has not squarely decided whether the VCCR is self-executing, holding in *Avena* only that the ICJ's judgment is not self-executing and side-stepping the issue of the self-executing nature of the underlying treaty itself.¹⁰³ There is some evidence that the political branches considered the treaty to be self-executing at the time of ratification. When the executive branch submitted the VCCR to the Senate for its advice and consent, State Department Deputy Legal Advisor J. Edward Lyerly testified that: "The Convention is considered entirely self-executive and does not require any implementing or complementing legislation."¹⁰⁴ The Senate gave its advice and consent to the treaty with that understanding. Whether the courts agree with this understanding remains to be seen.

The U.S. Supreme Court also has assumed without deciding that Article 36 of the VCCR does create individually enforceable rights.¹⁰⁵ At least four of the Justices have expressly stated that they would find an individual cause of action for a VCCR Article 36 violation, but the majority has not reached the issue on the merits.¹⁰⁶ It also has been suggested in some lower court cases that an individual may be able to bring a claim for relief on different grounds, such as a suit under the Sixth Amendment to the U.S. Constitution for ineffective assistance of counsel or a suit under other federal laws such as the Alien Tort Statute.¹⁰⁷

The U.S. Supreme Court also has not addressed the issue of how soon after arrest and detention consular notification must be given. In *Avena*, the ICJ held VCCR Article 36(1)(b) satisfied when Texas gave notice to the Mexican consulate five calendar days (three business days) after arresting one defendant, Mr. Hernandez.¹⁰⁸ However, the ICJ also held that Texas breached its separate obligation to notify Mr. Hernandez about his right to consular notification without delay in the first instance.¹⁰⁹ Few U.S. courts have had the opportunity to address the issue.¹¹⁰

The U.S. State Department has offered the following guidance with respect to the timing of the notice: "[Consular] notification should also occur 'without delay' after the foreign national has requested that it be made. The Department of State also considers 'without delay' here to mean that there should be no deliberate delay, and that notification should occur as soon as reasonably possible under the circumstances. The

¹⁰³ *Medellin*, 128 S. Ct. at 1357, n. 4.

⁹⁰ *Id.*, at 1386 (Breyer, J., dissenting) (citing S. Exec. Rep. No. 91-9, at 5 (1969) (Appendix)).

¹⁰⁵ *See Sanchez-Llamas*, 548 U.S. 331, 343 (2006); *Medellin*, 128 S. Ct. at 1357, n.4.

¹⁰⁶ *See Sanchez-Llamas* 548 U.S. at 374, 378 (Breyer, J., dissenting).

¹⁰⁷ 28 U.S.C. § 1350; *see also e.g.*, *Jogi v. Voges*, 480 F.3d 822 (2007).

¹⁰⁸ *Avena*, 2004 I.C.J. at 52.

¹⁰⁹ *See id.* at 54.

¹¹⁰ One notable exception is *United States v. Miranda*, 65 F.Supp.2d 1002 (D. Minn. 1999) (Court held that failure to notify Mexican consulate for two days after arrest violated VCCR under circumstances.)

Department of State would normally expect notification to consular officials to have been made within 24 hours, and certainly within 72 hours.”¹¹¹

With respect to the appropriate remedy, Article 36 of the VCCR states that: “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.”¹¹² Thus far in addressing remedies under the VCCR, the Supreme Court has stated that suppression of evidence is not an appropriate remedy,¹¹³ but has not yet provided guidance as to what would be an acceptable remedy to give Article 36 rights the “full effect” to which they are entitled.

Finally, it is not clear what reparation the United States owes to its treaty partners when it breaches its obligations under the VCCR. In past cases such as *Breard*, *LaGrand*, and *Avena*, the United States has offered an apology and a promise to work harder to prevent future violations.¹¹⁴ During the *Avena* litigation, Mexico expressed its dissatisfaction with these remedies, but no agreement has been reached between the U.S. and Mexico as to the appropriate reparation for the established treaty violations in *Avena*.

In conversations the author has had with various consular officers, they have expressed bitter disappointment with the United States’ perceived inability or unwillingness to abide by its international obligations in this regard and wonder whether they are receiving the intended benefit of these consular conventions. And, of course, the inability or unwillingness of the United States to provide a meaningful remedy for treaty violations has implications for the millions of Americans who travel abroad each year and rely on their right to contact the U.S. consulate for assistance if they find themselves in trouble.¹¹⁵

VI. Conclusion

The administration of President John F. Kennedy devoted considerable resources to the negotiation and successful conclusion of treaties governing consular relations. One of the primary concerns driving this effort was the protection of American citizens when they are arrested or detained abroad. President Kennedy and his staff undoubtedly would be disappointed to know that, 45 years later, the United States is still struggling to

¹¹¹ See U.S. Dept. of State, Consular Notification and Access 20 (2003), available at http://travel.state.gov/consul_notify.html.

¹¹² VCCR, *supra* note 20, at art. 36(2).

¹¹³ *Sanchez-Llamas*, 548 U.S. at 14. (“Suppression would be a vastly disproportionate remedy for an Article 36 violation.”).

¹¹⁴ See, e.g., *Avena*, 2004 I.C.J. at 55-56.

¹¹⁵ Over the last several years, between 3,000 and 6,000 Americans were arrested or detained abroad each year. Kevin Herbert, “Threat to Citizens Overseas,” in *THE TERRORIST THREAT TO AMERICAN PRESENCE ABROAD: A REPORT OF A CONSULTATION OF THE CRITICAL INCIDENT ANALYSIS GROUP AND THE INSTITUTE FOR GLOBAL POLICY RESEARCH* 17 (1999), available at http://www.healthsystem.virginia.edu/internet/ciag/publications/report_terrorist_threat_abroad_c1999.pdf.

See also Christopher Reynolds, *Arrests of Americans in Tijuana up in 2008, but drop in other cities*, L.A. TIMES, Feb. 3, 2009, available at <http://travel.latimes.com/articles/la-tr-ultimatearrested8-2009feb08>.

implement these rights in a meaningful way. One can only hope that through diplomatic negotiations, strategic litigation, and educational outreach, the United States will improve its implementation of consular notification rights in the future.