

# The Vienna Convention on Consular Relations: A Tale of International Law, Federalism, and Criminal Law

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The Vienna Convention on Consular Relations (“VCCR”) is a broadly-adopted treaty that is designed to make sure that one who is arrested or detained outside of his or her home country is told that notification will, upon request, be transmitted to the consulate of the country of nationality. Article 36 of the VCCR requires that notification, if requested by the detainee, be given “without delay.” Unfortunately, although assertion of VCCR rights by and on behalf of United States citizens is common, compliance by the United States with its own VCCR obligations has been very poor. Although the VCCR applies in all cases of detention, most of the attention has been focused on death penalty cases. There are many dozens of foreign nationals on death rows in the United States, almost none of whom were given VCCR notification in a timely manner. In the typical case, the home country did not even learn that its national had been arrested and charged until after a death sentence had been handed down. Other nations have in recent years become increasingly vocal in challenging U.S. violations of the VCCR and in attempting to provide assistance to their nationals facing prosecution in the

United States. Mexico was even successful in obtaining a ruling from the International Court of Justice at the Hague that the United States has violated its treaty obligations and must do more to remedy that situation.

This problem raises not only interesting questions of international law, but also very delicate federalism issues. The United States negotiates treaties, which become effective only after the Senate gives its advice and consent. However, most arrests and criminal prosecutions in the United States are carried out by the states and their subdivisions, not by the federal government. The states have traditionally regarded issues of treaty law as far removed from their area of responsibility, perhaps accounting for the abysmal history of noncompliance with the VCCR. Under the Supremacy Clause of Article VI of the United States Constitution, treaties are part of “the supreme Law of the Land”, so the states are unquestionably bound to comply with the VCCR. But that does not directly answer the question of how the courts should respond when the VCCR has been violated. If a defendant who has not been given timely VCCR notification is convicted, and perhaps sentenced to death, what remedy, if any, is available to the defendant? This question is complicated further by the fact that in recent years Congress has placed much tighter restrictions on all efforts by defendants to use federal habeas corpus actions to challenge their state court convictions, making it necessary to determine whether the procedural restrictions (which, among other things, typically bar presentation of an argument that was not preserved by being properly asserted in the state courts) effectively prevent defendants from obtaining any relief based on VCCR violations.

The Supreme Court most recently grappled with the VCCR when it decided Sanchez-Llamas v. Oregon on June 28, 2006. Without deciding the issue, the Court proceeded on the

assumption that individual defendants could seek judicial relief for VCCR violations. Although the Supreme Court disclaimed any intention to disparage the VCCR, it denied all relief to the claimants who were before the Court. The Court rejected the idea that suppression of an incriminating statement would be an appropriate remedy for a VCCR violation, and found that the procedural barriers to habeas corpus cases barred access to the courts for defendants who failed to raise the VCCR soon enough.

Although the Supreme Court's decision in Sanchez-Llamas was discouraging for those who have been asserting VCCR rights on behalf of criminal defendants, many issues of law and policy remain to be resolved. Since treaties like the VCCR depend for their effectiveness on reciprocal respect among nations, the ability of the United States to continue to use the VCCR to protect Americans depends to a large degree on the degree to which the United States itself complies with the treaty. Although the United States has made some improvements in recent years, full compliance remains a distant goal. VCCR rights plainly remain closely related to the Miranda doctrine, which requires that all those detained for questioning by the police be told that they have a right to remain silent. The Supreme Court did not recognize that for foreign detainees the VCCR may add substantially to the protection provided by Miranda, but it did accept that a foreign national's status and particular circumstances may bear upon the question of whether a confession is truly voluntary. The goal of law enforcement officers will often be to question a detainee and obtain incriminating statements before VCCR notification is given, but questions will continue to be raised about whether such a practice is consistent with the VCCR direction that notice be given "without delay." If VCCR compliance will not generally be enforced by suppressing statements, then the challenge remains of crafting some other

appropriate remedy that will bring the United States into compliance with its treaty obligations. The procedural barriers to bringing VCCR claims through habeas corpus are becoming less significant as more attorneys become aware of the treaty and raise VCCR violations early in the proceedings, even before trial.

Several years ago, the Supreme Court considered its first VCCR case and rejected all claims in a manner that was dismissive of the relevance of the VCCR to criminal prosecutions in the United States. Breard v. Greene, 523 U.S. 371 (1998). The more recent decision in Sanchez-Llamas once again rejects VCCR claims, but this time the Court was closely divided and the approach taken was much more measured. As international law becomes much more relevant to the work of courts in the United States, it is inevitable that the courts will continue to be pressed to find ways to enforce the VCCR as a vital aspect of the Supreme Law of the United States. Continued failure to comply with this important treaty is not only unfair to foreign nationals detained in the United States and inconsistent with the core principles governing criminal prosecutions, but it puts at risk all Americans traveling abroad, who are themselves subject to arrest and detention, and for whom effective consular assistance is crucial.