Albert Van-Lare, Esq.
The Law Offices of Albert Van-Lare
Suite 510
125 Maiden Lane
NY NY 10038

CONSULAR PROGRAMS AND THE APPLICATION OF VIENNA CONVENTION IN THE UNITED STATES

The Vienna Convention on Consular Relations (VCCR) was adopted in Vienna on April 24, 1963, effective March 19, 1967. See United Nations, Treaty Series, Vol. 596, p. 261. The Treaty was adopted because the nations who were parties to the convention believed that an international convention on consular relations, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their different constitutions and social systems. See Preamble to the Convention.

The VCCR requires parties to the Convention to notify affected Consulates when an agency of one nation arrests or detains a national from another country or removes and detains children who are nationals of that country. The notice aims to enable the Consulate to provide assistance to its citizens in navigating the process or in fighting such arrest or prosecution or the removal of custody of the foreign national's child.

Often, however, U.S. agencies neither give consular officials notice nor act on their legal obligations as a signing party to the VCCR. Moreover, U.S. courts have found that individual foreign nationals cannot claim violation of these rights as a defense against prosecution or removal of children, certainly not without a showing of prejudice from the lack of notification.

Article 36 concerns communication and contact with nationals of the sending state; i.e., foreign nationals in a particular state, and provides as follows:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

a) Consular officers shall be free to communicate with nationals of the

sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

b) If 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. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

c) 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. They shall also have the right to visit any national of the sending State who is in prison, custody, or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody, or detention if he expressly opposes such action.

2. 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.

The Convention also affirmed that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the convention.

The United States signed the treaty on April 24, 1970.[i] The United States Senate has not given its advice and consent to the treaty. The United States considers many of the provisions of the Vienna Convention on the law of treaties to constitute customary international law on the law of treaties.[ii] On March 7, 2005, the then United States Secretary of State Condoleezza Rice in a short letter to Kofi A. Anan, then Secretary General of the United Nations, wrote as follows: I have the honor on behalf of the Government of the United States of America to refer to the Optional

Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, done at Vienna April 24, 1963. This letter constitutes notification by the United States of America that it hereby withdraws from the aforesaid Protocol. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol. Based on the provisions of the letter from Secretary Rice, the United States continues to afford customary diplomatic treatment to consular officers without formally adopting the Vienna Convention.

The U.S. Courts and the Vienna Convention

The United States Supreme Court has not recognized any judicially enforceable rights of individuals under the Vienna Convention. The court has, however, emphasized that such a right, if it were to exist, could not be enforced absent a showing of prejudice.[iii]

The United States Court of Appeals for the Second Circuit has also concluded that "the purpose of the privileges and immunities created by the Convention is not to benefit individuals but to ensure the efficient performance of functions by consular posts." The court "supports the view that the Convention created no judicially enforceable individual rights." See *United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001); *Mora v. State of New York*, 524 F.3d 183, 207-09 (2d Cir. 2008) (finding that violations of the Article 36 consular notification rule did not amount to a tort and could not be vindicated in a civil rights action for damages). The court also concluded that the purpose of Article 36 was to protect a State's right to care for its nationals, not to create an enforceable right in foreign detainees.[iv]

The general position of U.S. courts is that Article 36 does not create any fundamental rights for foreign nationals before U.S. courts.

Garcia v. Texas, 131 S.Ct. 2866 (2011), involved a Mexican national who had lived in the United States since before the age of two. He was convicted of murder. When *Garcia* was before the Supreme Court, some U.S. senators were working on legislation that may have had a bearing on the case and enhanced the role of the Vienna Convention. However, the

U.S. Supreme Court found the Due Process Clause did not prohibit a State from carrying out a lawful judgment in light of not yet enacted legislation that might someday authorize a collateral attack on that judgment. The court cited *Medellín II*, 554 U.S., at 760, 129 S.Ct. 360, which stated that "[t]he beginning premise for any stay ... must be that petitioner's confession was obtained unlawfully," and that "[t]he United States has not wavered in its position that petitioner was not prejudiced by his lack of consular access."

The holding in *Garcia* is an indication that courts may entertain a claim under the Vienna Convention where the party asserting the claim is able to show prejudice.

Another case interpreting the role of prejudice when criminal defendants invoke the Vienna Convention is the New York case *People v. Ortiz*, 17 A.D.3d 190 (2005). In *Ortiz*, defendant was a Mexican national who was convicted of manslaughter and criminal weapon possession based on defendant's statements to police. The Appellate Division of the New York Supreme Court held that police failure to inform defendant of the right to notification to the Mexican Consulate following his arrest was not a circumstance affecting voluntariness of defendant's statements to the police. The court stated it was questionable whether the treaty provision confers judicially enforceable rights upon individuals, as opposed to foreign states.[v] However, the court found that even assuming that the treaty confers such individual rights, a violation of the consular notification provision provides no basis for suppression of a statement.[vi]

Article 37 of the Vienna Convention

Closely related to Article 36 is Article 37 of the Convention.

Article 37 has the following provisions relevant to notification regarding appointment of a guardian or trustee for a minor who is a national of the sending State:

If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:

> (b) To inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the

> interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments;

By the language of Article 37 every child protective action in which a child who is a foreign national is removed from a home will require consular notification.

In the *Matter of Terrance K*, 138 Misc.2d 611 (1988), a New York Family Court had to decide matters involving Article 37 and Article 31 of the Vienna Convention. The father was a diplomat attached to the Republic of Zimbabwe's permanent mission to the United Nations. New York State determined to remove his children due to alleged child abuse. The issue before the court was whether, having received the certification from the United States Government under Article 37 confirming that the named respondents and the children are conferred with full diplomatic immunity, the court could continue to assert jurisdiction for the purposes of continued remand and adjournment. The court found that the court lacked the personal jurisdiction over the parents and children due to their full diplomatic immunity.

The basis of the court's finding of imminent risk or harm to the children was the presence of the children in the home with the respondent-father. At the initiation of proceedings, respondent-father departed to Zimbabwe and was no longer in the home with the children. The children's release was then predicated on certain considerations that were negotiated between the United States Government and the Government of Zimbabwe. The court in this case found a clever way to reach a decision on what may have been a diplomatic case, in which it has no jurisdiction, as opposed to a regular family court case that does not involve respondents with full diplomatic immunity where the court had unquestionable jurisdiction.

Another case that highlights the importance of prejudice to parties invoking the protection of the Vienna Convention is *In Re Interest of Angelica L.*, 277 Neb. 984 (2009). In that case the mother Maria was a national of Guatemala whose parental rights were terminated for her two young children when she was deported to Guatemala. Maria had failed to take her child, Angelica L., for a follow-up doctor's appointment despite a

diagnosis of respiratory syncytial virus (RSV) and her worsening condition, which led to Maria's arrest and deportation.

The letter from the Guatemalan Consulate in Colorado indicated it never received notification concerning Maria's case prior to the commencement of the termination proceedings. The issue before the court was whether the juvenile court properly exercised jurisdiction over the child custody proceedings. ~~The court found that the juvenile court properly exercised jurisdiction because, despite conflicting evidence, the lower court had found that the State properly notified the Guatemalan Consulate~~ The court noted that other jurisdictions have concluded that compliance with the Vienna Convention is not a jurisdictional prerequisite.

In *In re Stephanie M* ., the California Supreme Court concluded that any delay in notice to the Mexican Consulate did not deprive the California court of jurisdiction.[vii] The court interpreted the language of the Vienna Convention to mean that the jurisdiction of the receiving state is permitted to apply its laws to a foreign national and that the operation of the receiving state's law is not dependent upon providing notice as prescribed by the Vienna Convention. The court further noted that other jurisdictions have concluded that state courts do not lose jurisdiction for failing to notify the foreign consulate as required by the Vienna Convention unless the complainant shows that he or she was prejudiced by such failure to notify.

Conclusion

While the United States says that it affords customary diplomatic treatment to consular officers without formally adopting the Vienna Convention and that this includes the notification provisions spoken to in my comments, there are many instances where U.S. agencies do not provide the notification and the courts allow the judgments to stand unless there is a showing of prejudice. The situation for the Cuban consular services is even more difficult due to the lack of Cuban Consulates in major cities in the United States. Combined with the travel constraints the U.S. has placed on Cuban diplomats serving in the U.S., it makes access to Cuban nationals in the U.S. to provide them the customary assistance that consulates carry out, a challenge.

[i] See the U.S. State Department's website,
[ii] See http:// www.state.gov/ s/l/treaty/faqs/70139.htm.
[iii] *Howithi v. Travis*, No. 06 Civ. 3162, 2008 WL 7728648, 15 (2008). See, e.g., *Breard v. Greene*, 523 U.S. 371, 377 (1998); *Medellin v. Dretke*, 544 U.S. 660, 664 (2005) (noting the need to show prejudice even if Article 36 created personally enforceable rights); *Sanchez-Llamas v. Oregon*, 548 U.S. at 335 (holding that even if Article 36 created enforceable right, suppression of evidence would not be available as remedy). See also *Medellin v. Texas*, 552 U.S. 491, 128 S.Ct. 1346, 1357 (2008) (emphasizing need to focus on language of Article 36, without deciding if it is self-executing).
[iv] See *United States v. De La Pava*, supra at 164-65
[v] (*see* e.g. *United States v. De La Pava*, *supra* at 164–166. *see* also *Breard v. Greene, supra* leaving the issue open).
[vi] (*see* e.g. *United States v. Lombera–Camorlinga*, 206 F.3d 882 (9th Cir. 2000), *cert.* denied 531 U..S. 991, 121 S.Ct. 481, 148 L.Ed.2d 455 (2000)).
[vii] 7 Cal. 4th 295, 27 Cal. Rptr.2d 595, 867 P.2d 706 (1994)