

VIENNA CONVENTION ON CONSULAR RELATIONS (VCCR), ARTICLE 36

ARTICLE 36 COMMUNICATION AND CONTACT WITH NATIONALS OF THE SENDING STATE

- (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 also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
 - 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.

OTHER BILATERAL TREATIES

The United States has entered into bilateral treaties with a number of countries that modify the language of Article 36 of the VCCR, typically expanding the rights under the VCCR. In particular, some of the treaties require notification of the appropriate consulate regardless of whether the detainee requests it.

WHO CAN ENFORCE ARTICLE 36 OF THE VCCR AND RELATED TREATIES?

The official enforcement arm is the State Department. The State Department receives assistance from local jails to handle the notification to the consulate.

The criminal court judge can also inform the defendant of the right to have the consulate notified. One difficult issue for judges is whether they can inquire as to the nationality of the defendant. Some defense attorneys have proposed that judges just give general advisement of rights under the VCCR to all defendants and permit a defendant to request that the consulate be notified if the defendant so wishes. The judge can then delay the criminal proceeding to allow time for notification and discussion with consular officials, if requested by the defendant.

RIGHTS OF THE DETAINED PERSON

Notification of a consulate cannot take place unless the defendant provides the information as to his or her immigration status and home country. Under the VCCR, notification may only take place with the consent of the defendant. Some of the bilateral treaties provide for automatic notification of the consulate if the detaining agency knows the home country of the defendant. The defendant, however, is not required to provide that information.

The U.S. Supreme Court has held, in *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) that the right of a non-citizen defendant to have a conviction overturned for failure to be provided with the opportunity to notify and meet with officials from the consulate of the defendant's home country is to be governed by state law. A recent case in New Jersey held that, under New Jersey law, a defendant cannot have a conviction overturned for failure to meet the requirements of the VCCR if that issue is raised for the first time in the post conviction proceeding.

