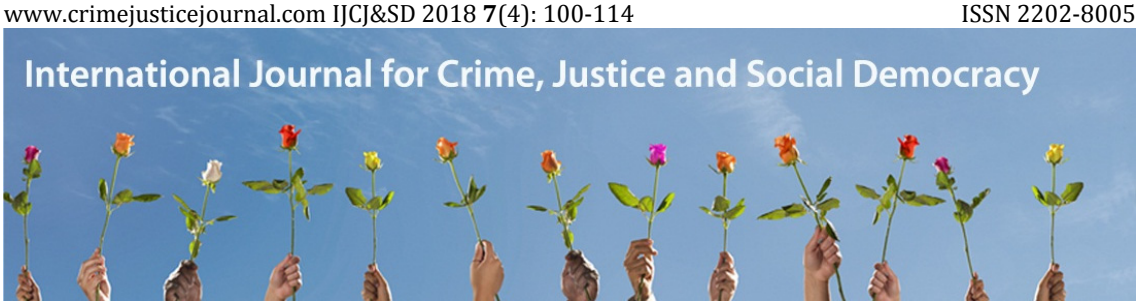
www.crimejusticejournal.com IJCJ&SD 2018 **7**(4): 100-114 ISSN 2202-8005




# Southern Criminology, Law and the 'Right' to Consular Notification in Australia, New Zealand and the United States

**Sally Kennedy, Ian Warren**
Deakin University, Australia

**Abstract**

This paper investigates the implementation of Article 36 of the Vienna Convention on Consular Relations in Australia, New Zealand and the United States (US) by using a Southern approach to examining law. We describe the incorporation of Article 36 from a defendant-centred perspective under Australian and New Zealand laws governing police procedure, and the commensurate jurisdictional tensions it has generated in the US. We then empirically analyse 16 non-capital US cases to identify the type of offence, the nationality and perceived English-speaking competency of the foreign suspect, and the point at which the alleged Article 36 violation is canvassed in legal arguments. This analysis highlights the importance of a defendant-centred Southern criminology of law in critically assessing the implementation of international legal requirements into domestic criminal justice practice.

**Keywords**

Southern criminology; legal bracketing; consular assistance; Vienna Convention on Consular Relations; foreign nationals; police procedure.

*Please cite this article as:*
Kennedy S and Warren I (2018) Southern criminology, law and the 'right' to consular notification in Australia, New Zealand and the United States. *International Journal for Crime, Justice and Social Democracy* 7(4): 100-114. DOI: 10.5204/ijcjsd.v7i4.1082.

## Introduction

Southern criminology's emphasis on 'power relations embedded in the hierarchical production of criminological knowledge' (Carrington, Hogg and Sozzo 2016: 2) is well-suited to the critical examination of international and national responses to alleged crimes by foreign nationals. Broader crimmigration strategies (Bosworth and Kaufman 2011) reflect contemporary forms of global legal pluralism (Berman 2012), consisting of 'autonomous … international treaty norms and many autonomous sets of domestic criminal norms with quite distinctive points of authority' (Boister 2015: 14) that often lack clear guidance or accountability for law-enforcement decision-making (Bowling and Sheptycki 2015). Foreign nationals in pre-trial or post-conviction custody often bear the brunt of highly questionable domestic crimmigration policies that are regulated in distinct ways at varying legal scales (Dorsett and McVeigh 2012; Valverde 2015) under a combination of international crime control and human rights treaties (Andreas and Nadelmann 2006).

Consular notification is an increasingly significant yet under-researched branch of diplomatic law that directly shapes domestic police procedure. Statistics on the number of foreign nationals investigated, charged with, convicted of, imprisoned for, or victimised by crime are rare (Klein 2011; c.f. Venditto and Mouzos 2006). However, in Australia each year, up to ten million tourists (Tourism Australia 2017) and one million registered foreign workers (Australian Government, Department of Home Affairs 2017) could be eligible for assistance from 119 foreign consulates located throughout the country (Department of Foreign Affairs and Trade n.d.). An average of four daily requests for some form of consular assistance is made by Australian sole or dual citizens touring, working or residing abroad temporarily or permanently (Warren and Palmer 2015: 5-6). Most involve advice on how to deal with a lapsed visa or passport. However, consular offices also provide assistance for accusations of serious criminal offending and victimisation affecting their nationals, as well as more complex claims for diplomatic or political asylum and related legal immunities (Lavander 2014; Lee and Quigley 2008; Warren and Palmer 2015; Wojcik 2013). This defendant-centred (Gless 2015) emphasis can avert the possibility 'a local problem' will evolve into a more serious 'international one' (Loader and Percy 2012: 218) with bi- or multi-lateral political and economic implications.

This paper examines the distinct methods of incorporating Article 36 of the Vienna Convention on Consular Relations (VCCR 1963:2005) into Australian, New Zealand and United States (US) law, while developing a defendant-centred Southern criminology of law. First, we explain our Southern approach to law (Warren and Palmer 2018) and its applicability to key elements of the Article 36 provisions. Second, we explain Australian and New Zealand legislation governing consular notification, and describe available judicial rulings examining its enforcement. Third, we summarise US scholarly and judicial arguments that 'bracket' (Blomley 2014) Article 36 within a contested jurisdictional 'dialogue' between the International Court of Justice (ICJ), the US Supreme Court, and state criminal trial and appeal courts (Berman 2012; Rogoff 2006). We then outline the results of a preliminary empirical investigation into how salient facts about the alleged crime, the foreign suspect's background, and the nature of the police encounter are classified in a sample of 16 non-capital cases that denied the foreign national's post-conviction arguments. We conclude by highlighting the importance of a defendant-centred Southern criminology of law when critically examining the incorporation of international law into domestic criminal procedure.

## Southern criminology, law and Article 36 of the VCCR

The VCCR is an example of global consensus-building aimed at protecting foreign nationals in unfamiliar criminal justice systems (Lee and Quigley 2008). However, domestic legislatures and courts ultimately determine whether any international legal issue is 'bracketed' as a procedural or jurisdictional requirement (Dorsett and McVeigh 2012; Valverde 2015), or whether these issues remain completely excluded and 'outside of law' (Blomley 2014: 136). By interpreting key

facts and relevant legal principles 'more or less independently of their surrounding context', domestic institutions attempt to 'stabilise and fix a boundary' for the permissible scope of international legal protection within domestic law (Blomley 2014: 135). A Southern criminology of law interrogates the potentially selective, biased, prejudicial or counterintuitive impacts of these processes on crime suspects, law enforcement personnel and others immediately affected by their implementation (Warren and Palmer 2018).

Article 36 is considered a self-executing requirement that applies automatically on ratification (Howell 2013) and confers specific rights on consular officials *vis-á-vis* each ratifying nation (Buys, Pollock and Pellicer 2011). It is commonly viewed as placing a positive obligation on police to ensure any foreign national in custody is informed of their right to consular assistance (Stransky 2007: 54). Article 36 stipulates the 'receiving state' must, 'without delay', notify 'the consular post of the sending state' when one of its nationals is 'arrested or committed to prison or to custody pending trial or is detained in any other manner' (VCCR 1963: 2005). Most supplementary bi- and multi-lateral treaties specify that notification must occur within a maximum number of days or hours (Buys, Pollock and Pellicer 2011: 464-466; Lee and Quigley 2008). Foreign suspects can receive private consular visits and request help to obtain independent legal representation or communicate with family and friends (Art 36.1 (a) and (c) VCCR 1963: 2005), but are only obliged to accept assistance in a small number of jurisdictions.

In Australia and New Zealand, Article 36 supplements common law 'guidelines for the conduct of police officers when interrogating Aboriginal persons and … migrants' in the presence of an interpreter or 'prisoner's friend' (R v Anunga and Others; R v Wheeler 1976: 413-415). When, where and how these rights are communicated and enforced is of 'vital importance' (New Zealand Law Commission 1994: 4) in averting potential misunderstandings flowing from the 'extreme imbalance of power' facing Indigenous people (Douglas 1998: 29) and foreign nationals in police custody. These spatial and temporal issues are also of growing importance in critical socio-legal inquiry (Blomley 2014; Valverde 2015), and are intentionally or inadvertently magnified by broader social attitudes towards racial difference or crimmigration.

The US jurisdictional focus in this article examines whether 'decisions of international tribunals may intrude into the normal operation of … domestic legal systems' (Rogoff 2006: 408). This emphasis turns on macro questions of international political comity (Stransky 2007; Warren and Palmer 2015: 292), which are complicated when federal authorities ratify international treaties, yet most criminal offences are investigated and prosecuted by state or provincial agencies (Garland 2013; Howell 2013: 1354; James and Warren 2010). Although potentially having the same legal effects when a foreign national is denied consular assistance, our analysis suggests procedural or jurisdictional bracketing can have significant implications on ensuring formal legal accountability for routine police practice.

**Consular notification in Australia and New Zealand**

This section reveals slight variations in the incorporation of the VCCR after Australia ratified this Convention on 12 February 1973 and New Zealand on 10 September 1974 (United Nations Treaty Collection 2016). Most Australian jurisdictions expressly incorporate consular notification into modified cautioning requirements aimed at protecting children and young people, Aboriginal and Torres Strait Islanders, persons from culturally and linguistically diverse backgrounds, and people with mental, developmental, visual or other impairments from unfair or abusive police tactics (Bartels 2011: 2). In New Zealand and Western Australia, consular notification is implied by provisions allowing all suspects the right to 'an interpreter or other qualified person' (ss. 10; 137-138 *Criminal Investigation Act 2006* (WA)) or 'legal representation and *habeas corpus* review of the legality of detention' (ss. 22-25 *Bill of Rights Act 1990* (NZ)). These provisions serve the same function as Australian federal laws obliging police to inform foreign suspects of the right to consular notification and assistance (s. 23P *Crimes Act 1914* (Cth); Quigley, Aceves and Shank

2010: 162-163), which coexists with the right to contact a friend, relative, legal practitioner or interpreter, and a general requirement to be 'treated with humanity and … respect for human dignity' while in custody (ss. 23G, 23N and 23Q *Crimes Act 1914* (Cth); Queensland Police 2016: 30). In three Australian states, Article 36 is incorporated into similar cautioning provisions (see s. 464F *Crimes Act 1958* (Vic); s. 124 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW); s. 434 *Police Powers and Responsibilities Act 2000* (Qld)) that oblige police to communicate these 'rights' and 'help' foreign suspects who wish to 'speak with a consular official … in private' (New South Wales Police Force n.d.: 1).

Police guidelines (Bartels 2011) and operational discretion can temper these communicative obligations if it appears delays in providing assistance will contribute to the destruction of evidence, witness tampering, or threats to public safety (s. 23L *Crimes Act 1914* (Cth)). In New South Wales, the written caution informs suspects that 'investigating police do not have to wait for more than 2 hours' for the consular official to arrive before commencing an interview (New South Wales Police Force n.d.: 1). Federal provisions allowing third-party communication by 'telephone, telex, fax or other electronic means' potentially offset such time delays (s. 3ZQC(3)(B) *Crimes Act 1914* (Cth)).

Incriminating evidence, including confessions proffered when no consular officer, translator or legal representative is present, can be excluded at trial if deemed involuntarily, unreliable or obtained via deliberate or systematic police misconduct (R v Anunga and others; R v Wheeler and others (1976) 11 ALR 412). A retrial can also be ordered if such evidence contributed significantly to a wrongful conviction (R v Swaffield; Pavic v R [1998] 192 CLR 159). However, recent legislative reforms have incrementally eroded common law admissibility standards (Gray 2013), with five leading Australian rulings examining the consular notification provisions supporting this trend.

Between 1997 and 2001, four federal drug trafficking cases considered the admissibility of evidence obtained after police ignored a foreign suspect's request for third-party assistance (Tang Seng Kiah v R [2001] NTCCA 1) or failed to issue the caution due to concerns over the possible destruction of physical evidence (R v Kok Cheng Tan [2001] WASC 275). Three resulted in retrials due to the prejudicial impact of the evidence, with one successful claim involving a foreign suspect who received no caution, knew little about Australian criminal procedure, and experienced 'argumentative, aggressive and oppressive' questioning (R v Su [1997] 1 VR 1 para 58; Quigley, Aceves and Shank 2010: 165-168). A fourth case admitted incriminating statements based on video evidence suggesting the foreign national understood the caution and was interviewed voluntarily, despite some confusion over whether he felt he should contact his consulate, his wife, legal counsel, or all three (Foo v The Queen [2001] NTCCA 2 paras 38-45). These cases indicate Australian courts bracket consular notification as a positive obligation on police to provide foreign nationals an 'opportunity' to 'seek [formal] advice and assistance', communicate with 'relatives and friends … in his or her native language', and 'enter into the interview' without 'improper pressure' (Tang Seng Kiah v R [2001] NTCCA 1 para 66). This also has important reciprocal consequences for any 'Australian national held in custody in a foreign non-English speaking country without access to an Australian consular office' (Tang Seng Kiah v R [2001] NTCCA 1 paras 49 and 66).

Only one reported case has examined these requirements since 2001. Ade Sutiawan Bin Sulaeman v R ([2013] NSWCCA 283) involved an interview conducted by a Royal Australian Navy Lieutenant on board a Suspected Irregular Entry Vessel (SIEV) that was attempting to enter Australian territorial waters near Christmas Island. The questions were contained on a series of translation cards authorised by the Australian Fisheries Management Authority (AFMA), and an Indonesian crewmember made several non-verbal gestures indicating he 'understood meaning and effect of the caution' (Ade Sutiawan Bin Sulaeman v R [2013] NSWCCA 283 para 74) and believed 57 Middle Eastern passengers on board were irregular migrants destined for Australia.

No consular official, interpreter or legal representative was on board the SIEV. These communications were ruled admissible as the affirmative gestures showed a clear 'understanding of the questions on the AFMA cards and the responses he gave' (Ade Sutiawan Bin Sulaeman v R [2013] NSWCCA 283 para 142), with the protections under s.23P of the *Crimes Act 1914* (Cth) justifiably modified in 2010 to assist such offshore investigations into aggravated people smuggling offences (see Warren and Palmer 2015: 31-35; 38-39).

This outcome is a significant departure from R v Kok Cheng Tan ([2001] WASC 275), which challenged the admissibility of physical evidence and incriminating statements obtained after police searched a hotel room pending issuance of a telephone warrant. Illicit drugs and a mobile phone were admissible because police justifiably feared their destruction pending notification of the warrant. However, incriminating statements made by one foreign suspect were excluded, as the decision to commence the interview in the absence of an interpreter and without the caution being administered involved a 'deliberate disregard of the applicant's statutory rights' given his evident 'difficulties in understanding English', and the lack of 'urgency or risk to the evidential material' (R v Kok Cheng Tan [2001] WASC 275 paras 58-59). This more stringent view of 'urgency' can be linked to broader crimmigration debates to explain the contrary outcome in Ade Sutiawan Bin Sulaeman v R ([2013] NSWCCA 283).

Despite recommendations for a specific consular notification provision (New Zealand Law Commission 1994), the *Bill of Rights Act 1990* (NZ) contains a general third-party notification requirement available to all suspects in police custody. While some jurisdictions specifically exempt road traffic offences from consular notification (s. 464F *Crimes Act 1958* (Vic)), the only publicly available New Zealand case examined the nature of 'detention' and offence seriousness contemplated by Articles 11 and 36 of the VCCR when deciding the admissibility of a breathalyser reading from a Chinese national informed of his right to obtain legal assistance, but not consular assistance, at a routine traffic stop (Bin Zhang v Police [2009] NZAR 217; Dunworth 2011). The Wellington High Court ruled the VCCR contemplated 'ongoing support of the foreign national in the prosecution of criminal charges', rather than an unqualified right to 'on the spot legal advice from the consular post' (Bin Zhang v Police [2009] NZAR 217 para 45). Whereas the 'right to counsel' can provide meaningful assistance during 'transitory' forms of 'detention', such as 'evidential breath testing', 'the foreign national cannot expect to obtain legal advice from the consular post' (Bin Zhang v Police [2009] NZAR 217 para 46). As the next section demonstrates, US jurisdictional debates on consular notification make only speculative references to the quality of assistance in the specific contexts of police detention.

**Article 36 and US legal bracketing**

Until Article 36 is incorporated into federal or state policing legislation, convicted foreign nationals must prove a lack of consular assistance caused 'actual prejudice' during an investigation or trial (Broughton 2012: 206). After successive requests by Paraguay, Germany and Mexico pending the execution of their nationals for capital offences, the ICJ stipulated Article 36 should operate 'in parallel with the reading of the "Miranda rights"' and, if this requirement is contravened, state and federal law should offer appropriate opportunities for 'review and reconsideration of the conviction and sentence' (Mexico v United States of America 2004: 69; 73; Howell 2013; Shiek 2006; Stransky 2007). However, Garcia v Texas (2011) indicates the Supreme Court's jurisdictional emphasis does not attempt to broker middle ground between the ICJ and state courts regarding the acceptable scope of Article 36 (Berman 2012: 307-318).

Garcia was a Mexican national convicted of the rape and murder of a 16-year-old girl in Texas. He had lived in the US since childhood and first became aware of the consular notification requirement when talking with another death row inmate (Moss 2012). His application for a temporary stay of execution was denied by a 5-4 Supreme Court majority, which found no clear evidence his conviction 'was prejudiced by the Vienna Convention violation', his remaining

appeals had no 'prospect of success', and proposed federal laws incorporating Article 36 were mere 'hypothetical legislation' with no legal implications (Garcia v Texas (2011) 131 S Ct 2866: 2868). These factors characterise the broader jurisdictional tension between the ICJ and the US Supreme Court that brackets out consideration of the experiential contexts of foreign nationals' encounters with police and justice officials, and ultimately preserves state autonomy over their regulation (Howell 2013; Mallory 2016).

Before and since Garcia, US debates have focused almost exclusively on the impact of Article 36 in capital cases immediately pending a foreign national's execution (Moss 2012; Stransky 2007), while a small number of states incorporate consular notification into police procedure with no legal consequences for non-compliance (Howell 2013). Below, we document 16 non-capital cases involving alleged Article 36 violations dating from 1 January 2010 to the Garcia ruling on 7 July 2011. Our concern is to identify how the legal impact of the types of crime and contexts of police or pre-trial custody are bracketed under the US jurisdictional approach, and its comparability to the Australian and New Zealand procedural emphasis.

**US non-capital Article 36 claims, January 2010-July 2011**

Table 1 summarises the charges, sentences and facts in six cases (37.5% of the 16) reviewing non-capital homicide convictions.

**Table 1: US homicide cases raising Article 36, January 2010-July 2011**

| *Case, date and jurisdiction* | *Offences* | *Sentence* | *Relevant facts* |
|---|---|---|---|
| State of New Jersey v Lin et al.<br>6 Apr 2010 NJ | Murder (x4), attempted murder (x2), felony murder (x2), kidnapping (x2), burglary, attempted arson, weapons offences | 4 life terms + 40-years and 120-140-years parole ineligibility | 5 co-accused gang members, 2 raised VCCR claims |
| Baires v USA<br>16 Apr 2010 VA | Murder, conspiracy to commit murder, unlawful possession and illegal use of firearm during a crime | Life | Gang related racketeering, illegal aliens, interpreters needed |
| State of New Mexico v Peralta<br>25 May 2010 NM | Second degree murder, evidence tampering, intimidation of witness | Unspecified | US resident for 16 years, interviewed in English and Spanish |
| State of Ohio v Alhajjeh<br>8 Jul 2010 OH | Murder, felonious assault, tampering with evidence | 20-years to life | Rights conveyed in English and Arabic, not guilty plea changed to no contest before trial |
| Argota v Miller<br>25 Aug 2010 OK | Attempted murder | 20-years + US$10,000 fine | Work visa, severe injuries to victim |
| State of New Jersey v Knight<br>6 Jan 2011 NJ | First degree aggravated manslaughter | 30-years | Extradition from Jamaica, English language proficiency |

Two involved gang-related homicides resulting in life imprisonment terms with no possibility for parole for each co-offender. One joint appeal by six Chinese gang members contested multiple felony-murder, murder, kidnapping and attempted arson convictions, with two suspects unsuccessfully raising Article 36 violations (State of New Jersey v Lin, Zhu, Feng, Lin, Lau and Lin 2010 NJ Super Unpub LEXIS 699). State of Ohio v Alhajjeh (2010 Ohio App LEXIS 2660) involved a dual Swedish and Jordanian national convicted of murdering his father-in-law after a dispute at the family's business. In Argota v Miller (2010 US Dist LEXIS 104767), a Cuban national on a temporary work visa was sentenced to 20-years' imprisonment and fined US$10,000 for

attempted murder after extensive trial arguments examined his intention during the incident. Another case involved a plea agreement and notional 30-year imprisonment term to avoid trial for first-degree murder (State of New Jersey v Knight, 2011 NJ Super Unpub LEXIS 37).

Table 2 documents the charges, sentences and key facts in ten remaining cases in this sample.

**Table 2: US non-homicide cases raising Article 36, January 2010-July 2011**

| *Case, date and jurisdiction* | *Offences* | *Sentence* | *Relevant facts* |
|---|---|---|---|
| USA v Tull<br>15 Jun 2010 NE | Marijuana possession with intent to distribute | 6.5-years | 20-years permanent resident alien |
| Castro-Carlozama v USA<br>16 Jun 2010 NY | Possession and intent to distribute over 1 kg heroin | 10-years | Prior convictions, interpreters needed |
| Martin v USA<br>25 Aug 2010 IL | Wire fraud | 37-months + 5-yrs supervised release | Legal resident alien facing deportation |
| The People of the Virgin Islands v Milosavljevic<br>16 Sept 2010 VI | Forgery, obtaining money by false pretences, embezzlement | Awaiting trial | Temporary work visa |
| Gordon v The City of New York Police Dept 84th Precinct et al.<br>15 Nov 2010 NY | Unspecified | Indeterminate term of 2- to 6-years | US3million civil rights damages claimed |
| Commonwealth v Gautreaux<br>20 Jan 2011 MA | Three prior arrests for Class A drug possession, assault and battery (x2), breach of protection order, threats to offend; Rearrested 5-years later but charges dismissed | 11-months suspended for 18-months; Deportation for subsequent arrest | Moved to USA aged 14; primary language Spanish; no interpreter at plea hearing |
| Lawal v USA<br>4 Mar 2011 MD | Possession of over 1kg heroin with intent to distribute | 9-years + 5-yrs supervised release | 2 co-defendants |
| USA v Jackson<br>8 Mar 2011 TX | Possession of 41kg marijuana with intent to distribute | 33-months + 3-yrs supervised release | 3 co-defendants, resident alien for over 20 years |
| USA v Pujols-Tineo<br>11 Mar 2011 RI | Possession of over 500g cocaine with intent to distribute | 18-years | Illegal alien deported twice for drug and violence convictions |
| Quintero-Hernandez v USA<br>15 Jun 2011 NC | Illegal re-entry of deported alien /aggravated felon | 46-months + 3-yrs supervised release | Illegal alien |

Six (37.5% of the 16) cases involved drug 'possession', 'intent to distribute', 'conspiracy' and allied offences, with sentences ranging from an 11-month suspended imprisonment term and immediate deportation (Commonwealth v Gautreaux (2011) 941 NE2d 616), to 18-years' imprisonment imposed on a Dominican national convicted of conspiracy to distribute cocaine and illegal re-entry after contravening a prior deportation order (United States of America v Pujols-Tineo 2011 US Dist LEXIS 25112). One case involved a guilty plea for a single count of wire fraud resulting in a 37-month imprisonment term after six additional charges were dismissed (Martin v United States of America 2010 US Dist LEXIS 87706). A Serbian national temporarily working

in the Virgin Islands raised the only pre-trial Article 36 claim in relation to several counts of forgery, obtaining money by false pretences and embezzlement (People of the Virgin Islands v Milosavljevic 2010 VI LEXIS 65). Only one case involved a Mexican national, who unsuccessfully used Article 36 to challenge convictions for aggravated felony and illegal re-entry (Quintero-Hernandez v United States of America 2011 US Dist LEXIS 63469). Finally, Gordon v The City of New York Police Department 84th Precinct et al. (2010 US Dist LEXIS 122200) involved an unsuccessful claim for civil rights damages against multiple federal and state agencies by a foreign national subjected to indeterminate detention before his deportation for unspecified offences.

Table 3 documents the nationality of the foreign suspect and the time the alleged Article 36 violation was recorded, where each was discernible.

**Table 3. US Article 36 claims, January 2010-July 2011, by country of citizenship and timing of notification**

| *Offence type* | *Case name and date* | *Nationality* | *Timing of Article 36 notification* |
|---|---|---|---|
| **Non-capital Homicide** | State of New Jersey v Lin et al. 6 Apr 2010 | China | Post-conviction after initial appeal |
| | Baires v USA 16 Apr 2010 | El Salvador | Consulate contacted two-months after arrest and eight-months before trial |
| | State of New Mexico v Peralta 25 May 2010 | Honduras | Unspecified pre-trial |
| | State of Ohio v Alhajjeh 8 Jul 2010 | Sweden and Jordan | Unspecified post-conviction claim; notified at arraignment; argued statements wrongfully admitted at trial |
| | Argota v Miller 25 Aug 2010 | Cuba | Unspecified post-conviction claim |
| | State of New Jersey v Knight 6 Jan 2011 | Jamaica | Arraignment |
| **Drugs** | USA v Tull 15 Jun 2010 | Guyana | Post-conviction after initial appeal |
| | Castro-Carlozama v USA 16 Jun 2010 | Colombia | Unspecified post-conviction claim |
| | Commonwealth v Gautreaux 20 Jan 2011 | Dominican Republic | Unspecified post-conviction claim for retrial |
| | Lawal v USA 4 Mar 2011 | Ghana | Unspecified post-conviction claim |
| | USA v Jackson 8 Mar 2011 | Jamaica | One-day after arrest at initial court appearance before counsel appointed |
| | USA v Pujols-Tineo 11 Mar 2011 | Dominican Republic | Accused's request to police and counsel denied |
| **Fraud** | Martin v USA 25 Aug 2010 | Sierra Leone | Unspecified post-conviction claim; Art 36 not raised at trial or first appeal |
| | The People of the Virgin Islands v Milosavljevic 16 Sept 2010 | Serbia | Consulate contacted by friend three-days after arrest |
| **Illegal Re-entry** | Quintero-Hernandez v USA 15 Jun 2011 | Mexico | Unspecified post-conviction claim; suspect unaware of VCCR before trial |
| **Not specified** | Gordon v The City of New York Police Department 84th Precinct et al. 15 Nov 2010 | Trinidad & Tobago | Accused's request to police at time of arrest denied |

The majority of foreign suspects in this sample were from Central or South America (56.25%) where Spanish (66.7%) or English (33.3%) are recognised national languages. Two European claimants held Serbian and dual Swedish-Jordanian citizenship respectively. Aside from the Chinese gang, two cases involved West African nationals from countries where English is the recognised language. This relative balance between English and non-English speaking foreign nationals has broader impacts on political comity, especially given the Southern criminological dimensions of US extraterritorial drug enforcement activity (Carrington, Hogg and Sozzo 2016; Warren and Palmer 2015: 233-289). As with most capital cases (Shiek 2006), foreign nationals in this sample generally became aware of Article 36 after conviction, with only two cases involving requests for consular assistance that were subsequently denied by police. However, case records are also vague on the timing of most alleged Article 36 violations, which reflects the permeation of the jurisdictional issues examined by the ICJ and the US Supreme Court into post-conviction state appeal courts.

Each case considers whether a lack of consular notification is sufficient to justify a judicial remedy given the suspect's language skills and personal vulnerabilities (Rogoff 2006). The following documents how these contextual issues are bracketed alongside four intersecting aspects of the broader jurisdictional dialogue between the ICJ and the US Supreme Court (Howell 2013) to limit the prospect of judicial intervention in these non-capital post-conviction appeals.

### *The 'right' to consular notification*

Claims an Article 36 violation results in substantial prejudice are commonly rejected as US federal legislation and 'the Constitution does not guarantee any right to consular access or assistance' (Argota v Miller 2010 US Dist LEXIS 104767: 44). State courts often refer to the language of Article 36 and established federal or state precedents to conclude 'the Convention does not create individually enforceable rights' (Argota v Miller 2010 US Dist LEXIS 104767: 44; People of the Virgin Islands v Milosavljevic 2010 VI LEXIS 65 paras 5-7; United States of America v Jackson 2011 US Dist LEXIS 2377: 13), but does place a 'responsibility for notification and advisement on "the competent authorities" of the jurisdiction in which the person is arrested or detained' (People of the Virgin Islands v Milosavljevic 2010 VI LEXIS 65 para 10). While post-conviction review claims seeking remedies for an Article 36 violation are given 'respectful consideration', they have no recognised legal basis unless general principles of fairness were compromised, as 'a decision of the ICJ is not binding' (Commonwealth v Gautreaux (2011) 941 NE2d 616: 625). Further, if Article 36 is not raised during pre-trial or trial arguments, it is 'procedurally barred from consideration' on appeal (United States of America v Jackson 2011 US Dist LEXIS 2377: 5).

State review courts openly question the accuracy of claims police failed to communicate the right to consular assistance, or that such failures prejudiced the final verdict (Lawal v United States of America 2011 US Dist LEXIS 22214). An appeal by a Jamaican national convicted of possessing 41 kilograms of marijuana with intent to distribute, demonstrates the onus for seeking consular assistance rests primarily with the foreign national, and legal remedies are unavailable if the right to consular notification is not recognised under federal or state law. This case brackets Article 36 as a non-binding choice police, legal counsel or arraignment courts can convey at their discretion, or foreign nationals can request but not positively assert. Hence:

> [i]f Jackson was truly interested in assistance from the Jamaican consul, nothing prohibited Jackson from writing to the consulate or asking his trial counsel to do so. (United States of America v Jackson 2011 US Dist LEXIS 2377: 11)

There is also no guarantee consular assistance would be useful in navigating the complexities of the US criminal justice process. Rather, notification is bracketed as a discretionary choice enabling the consulate to determine whether assistance should be provided if a request is made

by police, other justice officials, or the foreign suspect. Thus, in United States of America v Pujols-Tineo:

> [t]he El Salvadoran Consulate was notified of petitioner's arrest eight months prior to petitioner's trial, more than ample time … to provide investigative, translative, or other pretrial assistance had it chosen to do so. Yet, this record reflects that no efforts were undertaken by the El Salvadoran government to communicate with petitioner or assist him in any way. (United States of America v Pujols-Tineo 2011 US Dist LEXIS 25112: 17)

State courts deny individually enforceable status to Article 36 by affirming that 'rights under the Vienna Convention are not the equivalent of constitutional rights … and need not be explained at the time of arraignment' (State of Ohio v Alhajjeh 2010 Ohio App LEXIS 2660 para 18). Therefore, any potential remedies, such as the exclusion of prejudicial evidence, must conform to recognised domestic laws, which involve speculative assessments of how third-party assistance might have changed a trial outcome by altering the focus of an investigation, a suspect's plea, or counsel's legal arguments.

### *Procedural default and ineffective counsel*

The 'procedural default' rule prevents continuous post-conviction appeals when new facts or legal issues emerge. The ICJ has criticised the circular effects of this requirement, as many foreign nationals and consulates only become aware of an Article 36 violation after conviction (Shiek 2006). This means: '… the defendant is effectively barred from raising the issue of the violation of his [sic] rights under Article 36 … and is limited to seeking the vindication of his rights under the United States Constitution' (Mexico v United States 2004: 63).

Our sample indicates post-conviction review courts readily question attempts 'to get around' procedural default by claiming 'counsel was ineffective' for not raising the prejudicial impacts of an Article 36 violation during the trial or previous appeals (Martin v United States of America 2010 US Dist LEXIS 87706: 19). These arguments routinely fail because Article 36 is not considered an independently enforceable legal right, and it is virtually impossible to prove consular assistance would have led to alternate legal strategies or altered the trial outcome had counsel been more vigilant (United States of America v Pujols-Tineo 2011 US Dist LEXIS 25112).

For example, a Sierra Leonean national convicted of wire fraud could only provide a 'conclusory assertion that his counsel was ineffective for failing to notify him of his Article 36 rights', and offered no 'credible indication of facts reasonably available to him to … establish prejudice' (Martin v United States of America 2010 US Dist LEXIS 87706: 19-20). Similarly, a Guyanese national with 20-years' residency in the US could not substantiate 'the highly dubious proposition that counsel's performance was deficient' by 'amorphously' asserting it deprived him of an essential '[c]ultural bridge' for negotiating the US 'legal machinery' (United States of America v Tull 2010 US Dist LEXIS 59436: 2; 5). Finally, a Cuban national convicted and sentenced to 20-years' imprisonment for attempted murder could not prove he 'would have availed himself of his right to seek consular assistance had he known of that right', or that:

> the Cuban consulate would have rendered such assistance or that any assistance rendered would have affected the trial outcome in Petitioner's favor. (Argota v Miller 2010 US Dist LEXIS 104767: 33-34)

### *Excluding evidence*

Evidence can be excluded if police questioning or the conduct of an investigation involved clear procedural anomalies. However, 'a violation of the *Vienna Convention* does not normally warrant the remedy of suppression' (United States of America v Tull 2010 US Dist LEXIS 59436: 8), with

statements made in absence of a consular representative automatically deemed admissible unless general rules justify their exclusion during pre-trial evidentiary hearings (State v Peralta 2010 NM App Unpub LEXIS 232), or on appeal. In contrast to the Australian Anunga guidelines, specific procedural protections for certain populations, including foreign nationals, are not usually recognised under US law. Therefore, a Honduran national appealing convictions for second-degree murder and witness tampering could not cite precedents suggesting foreign nationals were more likely to make involuntary or prejudicial statements to police than any other class of vulnerable suspect (State v Peralta 2010 NM App Unpub LEXIS 232: 6). Similarly, in reviewing the convictions of a Dominican citizen who had lived in the US for nine years but had 'never become fluent in English' (Commonwealth v Gautreaux (2011) 941 NE2d 616: 618), the court concluded:

> [f]oreign nationals arrested and detained in the United States are provided with the same constitutional protections as United States citizens, including, in the defendant's circumstances, the right to the prompt appointment of an attorney to represent him throughout the proceedings. (Commonwealth v Gautreaux (2011) 941 NE2d 616: 626)

These rulings extend to Miranda waivers, which are commonly offered to suspects before police questioning. Thus, a Jamaican national appealing a manslaughter conviction could not prove he 'would not have signed those forms or given his statement if he had been informed he could contact the Jamaican consulate' (State of New Jersey v Knight 2011 NJ Super Unpub LEXIS 37: 6) after he was initially apprehended by Jamaican authorities and waived the right to contest extradition to the US. An arraignment judge later informed Knight he could seek consular assistance, but post-conviction review found he had 'not established that he was prejudiced' or needed 'consular assistance to understand the English language' (State of New Jersey v Knight 2011 NJ Super Unpub LEXIS 37: 6-7). This case clearly invokes Article 36 to test whether state courts are willing to contradict the Supreme Court by recognising a protective right to consular assistance in non-capital cases.

Similarly, in State of Ohio v Alhajjeh (2010 Ohio App LEXIS 2660), a dual Swedish-Jordanian national sought to review the effect of a waiver signed without the presence of a Jordanian consular official. While Alhajjeh claimed his statements were involuntary, the court found no discernible 'language barrier impeded' his comprehension of the waiver (State of Ohio v Alhajjeh, 2010 Ohio App LEXIS 2660 para 50). Alhajjeh also spoke English as a child and Cleveland Police provided an Arabic interpreter at various points during the interview, including the time the Miranda waiver was voluntarily signed.

### *Establishing prejudice*

Claims the applicant 'need not show prejudice' or substantial disadvantage for an Article 36 violation are commonly rejected (People of the Virgin Islands v Milosavljevic 2010 VI LEXIS 65 para 12), as this provision 'merely provides for consular notification of a foreign national's arrest; it does not guarantee intervention by the consulate' (Quintero-Hernandez v United States of America 2011 US Dist LEXIS 63469: 4). Actual prejudice is only established with proof that consular notification would have altered a 'guilty plea' (Quintero-Hernandez v United States of America 2011 US Dist LEXIS 63469: 4), or when: '… concrete areas in which assistance from consular officials, even assuming it had been forthcoming, might have significantly affected the manner in which his defense was conducted' (Castro-Carlozama v United States of America 2010 US Dist LEXIS 80458: 11). There is no prejudice if police deny a request for assistance or notification is delayed for several months after arrest, as there is no guarantee the consulate would have 'responded, offered assistance, or opposed petitioner's continued detention', or that any advice would have changed the trial outcome (Baires v United States of America (2010) 707 F Supp 2d 656: 664). This reasoning also extends to decisions involving the post-conviction

deportation of a foreign national. Thus, in Gordon v The City of New York Police Department 84th Precinct et al. (2010 US Dist LEXIS 122200: 4), there was no evidence supporting 'a civil rights action for [US$3 million] damages either directly under the Convention' or US law after New York municipal police and agents for the Departments of Homeland Security and Immigration and Customs Enforcement denied a foreign suspect's request for consular assistance. Without additional proof, claims that 'consular officials would have helped' a foreign suspect to 'navigate the US legal system and overcome language difficulties' (Castro-Carlozama v United States of America 2010 US Dist LEXIS 80458: 9-10) are mere assertions that do not justify a formal remedy in absence of specific federal or state legislation to the contrary.

## Conclusion

Article 36 of the VCCR recognises foreign nationals can experience disadvantage in unfamiliar justice systems. Our Southern criminological approach uses a defendant-centred perspective to examine how the impact of consular notification is often 'placed outside of law', yet simultaneously remains a central 'product of law' (Blomley 2014: 136). For example, Australian case law examines the nature of police cautioning to determine the admissibility of evidence, but only the New Zealand case of Bin Zhang considers the limited value of consular notification in fleeting forms of police detention. In direct contrast, the US jurisdictional schism between the ICJ and US federal and state courts (Berman 2012) overlooks the immediate '[s]patial particularities' of police encounters with foreign nationals entirely, which are 'erased in pursuit of a universal space of equality' (Blomley 2014: 137) under generic legal requirements applicable to all people. This form of legal bracketing places an almost impossible onus on foreign nationals to prove consular assistance would have altered the investigative focus, legal arguments or trial outcome.

The concept of the 'prisoner's friend' under Australia's Anunga guidelines is a useful example of Southern procedural law that reflects the pastoral value of third-party assistance. Our preliminary study suggests that linguistic competence does not necessarily equate with a full understanding of foreign policing or justice procedures. However, available remedies are limited regardless of whether consular notification is bracketed as a procedural or jurisdictional issue. For example, Australian crimmigration strategies are gradually eroding admissibility standards to facilitate immediate forms of evidence collection regardless of the context of the police encounter or the foreign suspect's wellbeing. This is also evident in our US sample: there are no specific remedies for alleged contraventions of an international obligation and the US Supreme Court is unwilling to formally recognise pending state or federal congressional action. These issues become more salient when the spatial and temporal dynamics of police encounters with foreign nationals are emphasised in the critical examination of judicial decision-making (Blomley 2014; Valverde 2015). We suggest this defendant-centred emphasis is crucial to the development of a Southern criminology of law that recognises the complex and diverse ways international legal requirements can be incorporated into domestic policing, pre-trial and post-conviction accountability mechanisms available to foreign nationals suspected of, or victimised, by crime.

*Correspondence:* Sally Kennedy, Doctoral Candidate, Faculty of Arts and Education, School of Humanities and Social Sciences, Geelong Waurn Ponds Campus, Deakin University, 75 Pigdons Road, Waurn Ponds 3216 Victoria, Australia. Email: s.kennedy@deakin.edu.au

## References

Andreas P and Nadelmann E (2006) *Policing the Globe: Criminalisation and Crime Control in International Relations*. New York: Oxford University Press.

Australian Government, Department of Home Affairs (2017) *Work in Australia - Statistics*. Available at https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/work-in-australia (accessed 24 January 2018).

Bartels L (2011) Police interviews with vulnerable adult suspects. *Research in Practice*, No. 21. Canberra, Australian Capital Territory: Australian Institute of Criminology.

Berman PS (2012) *Global Legal Pluralism: A Jurisprudence of Law beyond Borders.* Cambridge, England: Cambridge University Press.

Blomley N (2014) Disentangling law: The practice of legal bracketing. *Annual Review of Law and Social Science* 10: 133-148. DOI: 10.1146/annurev-lawsocsci-110413-030719.

Boister N (2015) Further reflections on the concept of transnational criminal law. *Transnational Legal Theory* 6(1): 9-30. DOI: 10.1080/20414005.2015.1042232.

Bosworth M and Kaufman E (2011) Foreigners in a carceral age: Immigration and imprisonment in the United States. *Stanford Law and Policy Review* 22(2): 429-454.

Bowling B and Sheptycki J (2015) Global policing and transnational rule with law. *Transnational Legal Theory* 6(1): 141-173. DOI: 10.1080/20414005.2015.1042235.

Broughton JR (2012) Federalism, harm, and the politics of *Garcia v Texas*. *Syracuse Law Review* 62(2): 199-207.

Buys CG, Pollock SD and Pellicer IN (2011) Do unto others: The importance of better compliance with consular notification rights. *Duke Journal of Comparative and International Law* 21(3): 461-501.

Carrington K, Hogg R and Sozzo M (2016) Southern criminology. *British Journal of Criminology* 56(1): 1-20. DOI: 10.1093/bjc/azv083.

Department of Foreign Affairs and Trade (n.d.) Foreign embassies and consulates in Australia. Available at http://protocol.dfat.gov.au/Consulate/list.rails (accessed 24 January 2018).

Dorsett S and McVeigh S (2012) *Jurisdiction*. Abingdon, England: Routledge.

Douglas H (1998) The cultural specificity of evidence: The current scope and relevance of the *Anunga* guidelines. *UNSW Law Journal* 21(1): 27-54.

Dunworth T (2011) The influence of international law in New Zealand: Some reflections. In Morris C, Boston J and Butler P (eds) *Reconstituting the Constitution*: 319-335. Berlin: Springer-Verlag.

Garland D (2013) Penality and the penal state. *Criminology* 51(3): 475-517. DOI: 10.1111/1745-9125.12015.

Gless S (2015) Bird's-eye view and worm's eye view: Towards a defendant-based approach in transnational criminal law. *Transnational Legal Theory* 6(1): 117-140. DOI: 10.1080/20414005.2015.1042233.

Gray A (2013) Constitutionally heeding the right to silence in Australia. *Monash University Law Review* 39(1): 156-180.

Howell NM (2013) A proposal for US implementation of the Vienna Convention's consular notification requirement. *UCLA Law Review* 60(5): 1326-1381.

James S and Warren I (2010) Australian police responses to transnational crime. In Eterno JA and Das DK (eds) *Police Practices in Global Perspective*: 131-172. Lanham, Maryland: Rowman and Littlefield.

Klein N (2011) David Hicks, Stern Hu, Scott Rush, Jock Palfreeman and the legal parameters of Australia's protection of its citizens abroad. *Melbourne University Law Review* 35(1): 134-164.

Lavander T (2014) Using the Julian Assange dispute to address international law's failure to address the right of diplomatic asylum. *Brooklyn Journal of International Law* 39(1): 443-486.

Lee LT and Quigley J (2008) *Consular Law and Practice*, 3rd edn. Oxford, England: Oxford University Press.

Loader I and Percy S (2012) Bringing the 'outside' in and the 'inside' out: Crossing the criminology/IR divide. *Global Crime* 13(4): 213-218. DOI: 10.1080/17440572.2012.715402.

Mallory C (2016) Abolitionists at home and abroad: A right to consular assistance and the death penalty. *Melbourne Journal of International Law* 17(1): 51-82.

Moss N (2012) Don't mess with Texas: *Garcia v. Texas* and the Supreme Court's inversion of the supremacy clause. *Loyola University of Chicago International Law Review* 9(2): 347-369.

New South Wales Police Force (n.d.) Caution and Summary of Part 9 of the Law Enforcement (Powers & Responsibilities) Act 2002. Available at http://www.idrs.org.au/education/getting-arrested-kit-resources/4_cautionAndSummary_part9LEPRA.pdf (accessed 14 October 2016).

New Zealand Law Commission (1994) *Police Questioning*. Wellington, New Zealand: The Law Commission.

Queensland Police (2016) *Operational Procedures Manual*. Queensland Government.

Quigley J, Aceves WJ and Shank A (2010) *The Law of Consular Access: A Documentary Guide*. Milton Park and New York: Routledge.

Rogoff MA (2006) Application of treaties and the decisions of international tribunals in the United States and France: Reflections on recent practice. *Maine Law Review* 58(2): 406-471.

Shiek M (2006) From *Breard* to *Medellin*: Supreme Court inaction or ICJ activism in the field of international law? *California Law Review* 94(2): 531-573.

Stransky SG (2007) *Sanchez-Llamas v Oregon*: A missed opportunity in treaty interpretation. *St Thomas Law Review* 20(1): 25-68.

Tourism Australia (2017) International visitor arrivals. *Tourism Statistics.* Available at http://www.tourism.australia.com/en/markets-and-research/tourism-statistics/international-visitor-arrivals.html (accessed 24 January 2018).

United Nations Treaty Collection (2016) Chapter III. Privileges and immunities, diplomatic and consular relations, etc. *Status Report.* Available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&clang=_en#10 (accessed 12 November 2016).

Valverde M (2015) *Chronotopes of Law: Jurisdiction, Scale and Governance*. Abingdon, England: Routledge.

Venditto J and Mouzos J (2006) The murder of overseas visitors to Australia. *Trends & Issues in Crime and Criminal Justice* 316*.* Canberra, Australian Capital Territory: Australian Institute of Criminology.

Warren I and Palmer D (2015) *Global Criminology*. Sydney, New South Wales: Law Book Company/Thomson Reuters.

Warren I and Palmer D (2018) Southern criminology, zonal banning and the language of urban crime prevention. In Carrington K, Hogg R, Scott J and Sozzo M (eds) *The Palgrave Handbook of Criminology and the Global South*: 183-201. Cham, Switzerland: Palgrave.

Wojcik ME (2013) Consular notification for dual nationals. *Southern Illinois University Law Journal* 38(1): 73-92.

**Treaties cited**

United Nations (1963:2005) Vienna Convention on Consular Relations. Available at http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf (accessed 6 October 2016).

**Legislation cited**

Bill of Rights Act 1990 (NZ).

Crimes Act 1914 (Cth).

Crimes Act 1958 (Vic).

Criminal Investigation Act 2006 (WA).

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW).

Police Powers and Responsibilities Act 2000 (Qld).

**Cases cited**

Ade Sutiawan Bin Sulaeman v R [2013] NSWCCA 283 (14 November 2013).

Argota v Miller (2010) US Dist LEXIS 104767 (25 August 2010).

Baires v United States of America [2010] 707 F Supp 2d 656 (16 April 2010).

Bin Zhang v Police [2009] NZAR 217 (25 January 2008).

Castro-Carlozama v United States of America (2010) US Dist LEXIS 80458 (16 June 2010).

Commonwealth v Gautreaux [2011] 941 NE2d 616 (20 January 2011).

Foo v The Queen [2001] NTCCA 2 (6 June 2001).

Garcia v Texas [2011] 131 S Ct 2866 (7 July 2011).

Gordon v The City of New York Police Department 84th Precinct; Shield; US Department of Homeland Security; Immigration and Customs Enforcement; Agent Boyce T and Agent Santiago E (2010) US Dist LEXIS 122200 (15 November 2010).

Lawal v United States of America (2011) US Dist LEXIS 22214 (4 March 2011).

Martin v United States of America (2010) US Dist LEXIS 87706 (25 August 2010).

Mexico v United States of America (Avena and Other Mexican Nationals) (Judgment) [2004] International Court of Justice (31 March 2004).

People of the Virgin Islands v Milosavljevic (2010) VI LEXIS 65 (16 September 2010).

Quintero-Hernandez v United States of America (2011) US Dist LEXIS 63469 (15 June 2011).

R v Anunga and others; R v Wheeler and others (1976) 11 ALR 412 (30 April 1976).

R v Kok Cheng Tan [2001] WASC 275 (5 October 2001).

R v Su [1997] 1 VR 1 (15 December 1995).

R v Swaffield; Pavic v R [1998] 192 CLR 159 (20 January 1998).

State v Peralta (2010) NM App Unpub LEXIS 232 (25 May 2010).

State of New Jersey v Knight (2011) NJ Super Unpub LEXIS 37 (6 January 2011).

State of New Jersey v Lin, Zhu, Feng, Lin, Lau and Lin (2010) NJ Super Unpub LEXIS 699 (6 April 2010).

State of Ohio v Alhajjeh (2010) Ohio App LEXIS 2660 (8 July 2010).

Tang Seng Kiah v R [2001] NTCCA 1 (8 March 2001).

United States of America v Jackson (2011) US Dist LEXIS 2377 (8 March 2011).

United States of America v Pujols-Tineo (2011) US Dist LEXIS 25112 (11 March 2011).

United States of America v Tull (2010) US Dist LEXIS 59436 (15 June 2010).