

2022

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Recommended Citation

Kopp, Fabian (2022) "Consulting with Consuls: Virgilio Maldonado Rodríguez and the Right of Consular Access," *Human Rights Brief*. Vol. 25: Iss. 2, Article 9.

Available at: <https://digitalcommons.wcl.american.edu/hrbrief/vol25/iss2/9>

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CONSULTING WITH CONSULS: VIRGILIO MALDONADO RODRÍ- GUEZ AND THE RIGHT OF CONSULAR ACCESS

*by Fabian Kopp**

On April 11, 1996, Virgilio Maldonado Rodríguez, a Mexican national, was arrested in Houston, Texas, for a bank robbery.¹ During his interrogation by police, Mr. Maldonado confessed to an unrelated murder.² This confession served as the basis for the state's conviction of capital murder.³ The state trial court judge subsequently sentenced him death in 1997 and eventually commuted Mr. Maldonado's sentence to life in prison after a series of appeals asserted the police illegally obtained the confession by preventing Mr. Maldonado's exercise of his right to access the Mexican consulate during detention.⁴ The Inter-American Commission on Human Rights (IACHR) took Mr. Maldonado's case to address potential due process, fair trial, and arbitrary detention deficiencies.⁵ After the IACHR review determined that the United States violated his right to consular notification and effective counsel, the United States failed to remedy the deficiencies identified by the IACHR.⁶ As Mr. Maldonado's case demonstrates, foreign nationals' due process rights suffer when consular access is circumscribed.

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¹ *Virgilio Maldonado Rodriguez v. United States of America*, Case 12.871, Inter-Am. Comm'n H.R., Report No. 333/21, OEA/Ser.L/V/II, doc. 343 ¶ 5 (2021).

² *Id.*

³ *Id.*

⁴ *Id.* at ¶¶ 4, 5.

⁵ *Id.* at ¶¶ 1–2, 67.

⁶ *Id.* at ¶ 67.

Mr. Maldonado's IACHR petition alleges that his court-appointed counsel ineffectively represented him during the trial and subsequent appellate process.⁷ Additionally, the petitioners maintain that the police failed to notify Mr. Maldonado of his right to consular notification, in violations of Article 36 of the Vienna Convention on Consular Relations.⁸ In contrast, the United States asserts that Mr. Maldonado received extensive due process protections, multiple layers of judicial review found his counsel effective, and decisions made by counsel at trial and sentencing reflect valid decisions of legal strategy.⁹ Further, the United States insists that the IACHR may not review claims made under the Vienna Convention and that detained individuals do not have the right to demand consular assistance.¹⁰

During its review of Mr. Maldonado's case, the IACHR found that the United States did not ensure he received effective representation, failed in its obligations to notify him of his right to consular notification under Article 36.1 of the Vienna Convention, and used excessive solitary confinement during his time on death row, thereby violating Articles XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man.¹¹ Particularly, the IACHR found Mr. Maldonado's lack of consular access was an instrumental factor in denying due process and a fair trial.¹² Under the Vienna Convention, authorities detaining a foreign national must inform the detained person of their right to consular access and allow detained foreign nationals free and private communication with their consular post upon request.¹³ Here, the United States failed to notify Mr. Maldonado of his Vienna Convention right.¹⁴ Given Mexico's extensive program of consular assistance to its nationals

⁷ *Id.* at ¶ 7.

⁸ *Id.* at ¶ 8.

⁹ *Id.* at ¶¶ 11–13.

¹⁰ *Id.* at ¶ 10.

¹¹ *Id.* at ¶¶ 45, 59 (describing, respectively, the right to a fair trial, right to protection from arbitrary arrest, and the right to due process of law).

¹² *Id.* at ¶¶ 56, 59.

¹³ Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

¹⁴ *Virgilio Maldonado Rodriguez*, Case 12.871 at ¶ 55.

abroad, prompt notification as established in Article 36.1 of the Vienna Convention would have been crucial in avoiding due process violations that occurred during Mr. Maldonado's detention and trial.¹⁵

In recognition of these harms, the IACHR recommended that the United States grant Mr. Maldonado relief in the form of review of his trial and sentence to comply with fair trial, due process, and protection from arbitrary detention guidelines under the American Declaration.¹⁶ Additionally, the IACHR concluded that the United States should review laws, procedures, and practices affecting persons accused of capital crimes; and ensure the effectiveness of legal counsel and consular access.¹⁷

As Mr. Maldonado's case makes clear, foreign nationals' consular access under Article 36 of the Vienna Convention implicate due process and fair trial concerns. These concerns have been the subject of litigation in the IACHR, the Inter-American Court of Human Rights (IACtHR), the International Court of Justice (ICJ), and the U.S. Supreme Court.¹⁸ In 1999, the IACtHR issued the *Information on Consular Assistance* advisory opinion on whether Article 36 of the Vienna Convention could be considered an enforceable grant of human rights under Article 64(1) of the American Convention.¹⁹ In 2004, the ICJ took up the issue of whether a detained foreign national should be informed of their Vienna

Convention rights and the local consular post notified in the *Avena* case.²⁰

In 2005, shortly after the ICJ's conclusions, the United States withdrew from the Optional Protocol concerning Vienna Convention disputes and found the ICJ's interpretation of the Vienna Convention non-binding and unconvincing.²¹ In 2008, the U.S. Supreme Court explicitly prevented domestic enforcement of the ICJ's decision.²² Considering the United States' continued evasion of its obligations under the Vienna Convention, it appears unlikely that foreign nationals will receive consular notification as envisioned under the Vienna Convention, despite the proposal of a number of reforms to implement it as binding law.²³ Without a requirement for the United States to fully comply with the Vienna Convention, the IACHR decision in Mr. Maldonado's case will likely be toothless and the protections afforded as human rights norms under the Vienna Convention will continue to erode within the United States.

¹⁵ *Id.* at ¶¶ 54–58.

¹⁶ *Id.* at ¶ 67.

¹⁷ *Id.*

¹⁸ For example Virgilio Maldonado Rodriguez, Case 12.871 at ¶ 59; The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. ¶ 4 (Oct. 1, 1999) [hereinafter *Information on Consular Assistance Case*]; *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. Rep. 12, ¶ 15 (Mar. 31); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006), indicate consular notification is a key due process concern for detained foreign nationals.

¹⁹ *Information on Consular Assistance Case*, Advisory Opinion OC-16/99, *supra* note 18, at ¶¶ 4, 141 (concluding that the Vienna Convention created an individual right to information that should be protected and the failure to observe the right led to a violation that could lead to juridical consequences).

²⁰ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, I.C.J. Rep. 12 at ¶¶ 15, 153 (finding that Mexican nationals detained in the United States had a right to be informed of their Vienna Convention Art. 36.1 rights, right to timely notification of the Mexican consulate, right to timely communication with consulate officials, and the right for legal representation).

²¹ See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006).

²² *Medellin v. Texas*, 552 U.S. 491, 523, 532 (2008) (finding that neither the ICJ decision nor the President's memorandum were directly enforceable law to override state limitations on habeas petitions).

²³ See, e.g., Yury A. Kolesnikov, *Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solutions*, 40 MCGEORGE L. REV. 179, 217–24 (2016) (arguing that the Vienna Convention should be authoritative law and proposing statutory and executive agreements as methods to implement it as such); Margaret Anne Christie, *Protecting U.S. Citizens Abroad and Bringing the United States into Compliance with the Vienna Convention Post-Medellin*, 46 GA. J. INT'L. & COMP. L. 447, 474–78 (2018) (proposing federal legislation as the best method for ensuring Vienna Convention compliance).