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THE RIGHT TO CONSULAR ASSISTANCE: DEVELOPMENT, RELATION WITH DUE PROCESS, AND APPLICATION

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ABSTRACT

The article analyses the nature of the right to consular assistance from a historical perspective and the practice of international tribunals. It argues that the right to consular assistance is not a human right since it prescribes no autonomous standard of treatment. Consular assistance is not necessary to compensate for the vulnerability of the detained foreigner since the situation may be restored by the measures under the national legislation of the receiving State. The article explains that there is no obligation under international law to provide consular assistance by the sending State. The receiving State has the duty to perform its obligations under Article 36 of the VCCR once there are grounds to believe that the detainee is a foreign national and the stage of

¹ The views expressed in this article are solely those of the authors and do not reflect the views, positions, or policies of the institutions with which the authors are or were affiliated.

investigation provides for the possibility of notification. The VCCR does not establish an exhaustive list of the requirements for the waiver of the right to consular assistance by the detainee. Its validity is to be assessed in accordance with the standards of the invoked human right.

KEYWORDS

Vienna Convention on Consular Relations, the right to consular assistance, an individual right, the relation between the sending State and its nationals.

INTRODUCTION

A State exists to advance the well-being of its citizens.² It has an obligation to ensure the standards of treatment embodied in various human rights instruments and enable its citizens to fully participate in international society. A State which constantly fails to uphold the well-being of its people is not just not fulfilling its purpose but also constitutes an inefficient form of social organisation.

Consular assistance is a form of extraterritorial exercise of a State jurisdiction, a recognised function for the purposes of commerce, provision of services to nationals and navigation of the interests of the sending State.³ Consular assistance may include, in particular, the notary and civil registrar functions, issuance of identity and travel documents, actions in situations of emergency and assistance to nationals detained abroad.

Although the 1963 Vienna Convention on Consular Relations (hereinafter – VCCR) codified centuries-old practice of consular relations,⁴ the policies and practices of States in relation to the provision of consular assistance to nationals detained abroad still vary significantly. According to the Report of the Fair Trial International on Consular Assistance and Trial Attendance published in 2009, the consistent approach to the treatment of the consular assistance as a State obligation has not yet crystallised. There are States which treat consular assistance merely as a discretionary right of the government, raising the question about its nature and the rationale of the obligations of the State where the national is detained (hereinafter – receiving State) under Article 36 of the VCCR.⁵

In recent years, the right to consular assistance has become the object of doctrinal discourses with regard to its relation to human rights.⁶ Moreover, since 1999 the sentencing of foreign nationals to death has raised attention for international tribunals. In particular, the Inter-American Court of Human Rights (hereinafter – IACHR) and the International Court of Justice (hereinafter – ICJ) have interpreted Article 36 of the

² Nicholas W. Barber, *The Principles of Constitutionalism*, First Edition (Oxford University Press, 2018), 35.

³ Lassa F. Oppenheim, *International Law, a Treatise*, 8th ed., ed. Hersch Lauterpacht (Longman, 1955), 1:830.

⁴ United Nations, *United Nations Conference on Consular Relations, Vienna, 4 March – 22 April 1963: Official Records, Volume I: Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees* (New York: United Nations, 1963), A/CONF.25/16, 1 // https://legal.un.org/diplomaticconferences/1963_cons_relations/docs/english/vol_1.pdf

⁵ Katerina Mantouvalou, *Consular Assistance and Trial Attendance: A Comparative Examination of the American, Australian, British, Dutch and German Ministries of Foreign Affairs* (London: Fair Trial International, 2009), 25.

⁶ Sabina Veneziano, "The Right to Consular Notification: The Cultural Bridge to a Foreign National's Due Process Rights," *Georgetown Journal of International Law* 49 (2018): 503–50; Rodolfo Ribeiro C. Marques, "The Right to Access Consular Assistance and Protection and Its Relevance to the Architecture of a Safe, Orderly, and Regular Migration," *Interventions* 23, No. 2 (2020): 313–25 // <https://doi.org/10.1080/1369801X.2020.1854104>. Andreas von Arnould et al. (eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*, 1st ed. (Cambridge University Press, 2020) // <https://doi.org/10.1017/9781108676106>

VCCR as creating individual rights to consular assistance for the detained national in the receiving State.⁷ Modern doctrinal sources and reports of the United Nations (hereinafter – UN) allege the emergence of the right to consular assistance as a human right in cases of the death penalty, putting forward the argument on the decrease in the probability of execution.⁸

Nevertheless, State practice relating to the status of the right to consular assistance varies significantly to this day. In March 2021, China repeatedly prevented Canadian diplomatic agents and consular officers from attending the trial of Michael Spavor and Michael Kovrig, both Canadian citizens.⁹ In April 2023, the Russian Federation refused the provision of consular services to the national of the United States of America (hereinafter – US) Evan Gershkovich, accusing him of espionage.¹⁰ In addition, the United Kingdom is currently considering the establishment of the obligation to provide consular assistance to its nationals abroad after experiencing hardships in providing consular assistance to Jagtar Singh Johal following the detention in the Republic of India.¹¹

The adjudicative bodies have interpreted differently the requirements to perform the incumbent obligations without delay, to notify the competent consular officer, and to request proof of nationality of the foreign detainee. This lack of uniformity in the practice of international tribunals leaves the interpretation of the material criteria under Article 36 of the VCCR unclear.

Also, such divergence of the approaches in application and even characterisation of the right to consular assistance raises questions as to what standards of treatment are applicable to the detained persons under the relevant human rights treaties, in particular, the requirements for the waiver of the right to consular assistance and the existence of the sending State's obligation to secure such right. How shall the receiving State perform its obligations under Article 36 of the VCCR to secure due process for the detained national? Does the violation of the right to consular assistance necessarily lead to the violation of due process?

The article aims to identify the nature of the right to consular assistance in international law.

To reach this aim, the article is divided into four parts. The first part analyses the historical development of the institute of consular relations. It employs the historical method to define the primary purpose of the emergence of the right to consular assistance. The second part is devoted to the identification of the relation between consular assistance and due process in international law, grounded on doctrinal method, focusing on the conceptual analysis of individual and human rights in international law. The third part analyses the modern State practice to identify whether there is an emerging human right to consular assistance to the nationals detained abroad. It

⁷ "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law," *Inter-American Court of Human Rights* (1999, OC-16/99), 30 // https://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf; *LaGrand* (Germany v. United States of America), [2001], ICJ, Rep. 466, par. 77.

⁸ Conall Mallory, "Abolitionists at Home and Abroad: A Right to Consular Assistance and the Death Penalty," *Melbourne Journal of International Law* 17, No. 1 (2016): 8 // [https://law.unimelb.edu.au/__data/assets/pdf_file/0007/IML Information Note on Consular Assistance](https://law.unimelb.edu.au/__data/assets/pdf_file/0007/IML%20Information%20Note%20on%20Consular%20Assistance%20(2021).pdf) (International Organization for Migration, 2021), 8 // <https://www.iom.int/sites/g/files/tmzbd12616>

⁹ *Why Consular Agreements Mean Nothing in China* | *Safeguard Defenders*, (31 May 2021) // <https://safeguarddefenders.com/en/blog/why-consular-agreements-mean-nothing-china>

¹⁰ *Consular Access and International Law Protections for American Foreign Affairs Correspondents*, (21 April 2023) // https://fedsoc.org/commentary/fedsoc-blog/consular-access-and-international-law-protections-for-american-foreign-affairs-correspondents?utm_source=chatgpt.com

¹¹ *Jagtar Singh Johal*, (30 October 2024) // <https://www.bbc.com/news/articles/ckgdxlklp17vo>

adopts the comparative method to identify the difference in the treatment of consular assistance in domestic legislations. The last part analyses the practice of application of Article 36 of the VCCR using the case-study method to identify the characteristics attributed to consular assistance by international tribunals.

1. THE HISTORIC DEVELOPMENT OF CONSULAR RELATIONS

When it was adopted in 1963, the VCCR codified centuries of the development of the institute of consular relations.¹² It did not develop in isolation from other spheres of social relations, but with their interconnection. The historical recourse will help to understand the context of the emergence of consular assistance to nationals abroad. In particular, it being rooted in sovereignty and reciprocity may demonstrate the necessity of the connection between a State and its nationals. The understanding of this right before the codification in the 20th century may assist in the interpretation of Article 36 of the VCCR.

The concept of consular relations appeared well before the concept of diplomatic relations. Neumann contends that the evidence of consular relations is still to be found in the Neolithic period, during which the trade routes of stones already existed, but no knowledge of the administration of trade is available.¹³ One may argue that Ancient Greece is the origin of the model of modern consular relations. The *prostates* and the *proxenoi* are considered to be the predecessors of the present consuls. *Proxenos* was chosen by the sending State from the nationals of the receiving State to represent its interests in the Greek cities. *Prostates* were assisting in legal and political matters for colonists with the local governments.¹⁴

The term *consul* comes from Latin and was used during the Republic period to refer to heads of State. In the 3rd century BC, the institute of *praetor peregrinus* was established to settle a broad range of disputes of a legal nature, including the question of foreigners.¹⁵ The practice, together with the term, was passed to Middle Age Europe, where some members of city councils were named as *consules*.¹⁶ From the 11th to the 17th centuries, the practice of intermediation of interest between the representatives of the different States significantly grew among the European States that were actively engaged in international trade.¹⁷ Nevertheless, the development of the consular relations system is not tied only to the European Continent.¹⁸ Egyptian trading communities have a history of creating the office of *shabandar* in Malacca in the 14th and 15th centuries, which represented the interests of the merchants before

¹² Cindy Galway Buys, "Reflections on the 50th Anniversary of the Vienna Convention on Consular Relations," *Southern Illinois University Law Journal* 38 (2013): 57.

¹³ Iver B. Neumann, *Diplomatic Tenses: A Social Evolutionary Perspective on Diplomacy* (Manchester: Manchester University Press, 2020), 28.

¹⁴ Luke T Lee, John B Quigley, *Consular Law and Practice*, 3rd ed. (Oxford University Press, 2008), 4.

¹⁵ R. L. Gilbert, "The Origin and History of the Peregrine Praetorship, 242–166 B.C.I.," *Res Judicatae* 7 (1941): 53.

¹⁶ Iver B. Neumann, *supra* note 12, 30.

¹⁷ Biswanath Sen, *A Diplomat's Handbook of International Law and Practice* (Martinus Nijhoff, 1965), 202.

¹⁸ Halvard Leira, Iver B. Neumann, "Judges, Merchants and Envoys; The Growth and Development of the Consular Institution," in *International Diplomacy*, ed. Halvard Leira and Iver B Neumann, I (SAGE, 2013), 3.

the State.¹⁹ There existed "special judges for foreigners among some peoples of India."²⁰

The modern model of consular relations developed during the late 18th and the beginning of the 19th centuries. The Napoleonic Wars were a catalyst for development due to the need to restore the economic situation in Europe.²¹ Precise references to the consular tasks, functions and privileges were being incorporated into the treaties and national legislations, such as the Convention of Pardo between 1769 between France and Spain,²² the Netherlands Consular Regulations of 1786, and the US Consular Service Acts of 1776 and 1792.²³

The functions of the persons performing the role of consuls varied significantly, from the resolution of disputes between classes of population in the Roman Empire,²⁴ to oversight of the trade between colonies and States in the practice of Middle Ages Italian, French, and Spanish cities.²⁵ At some point, it became hard to distinguish between persons performing consular functions and those who were entrusted with a social role to mediate the interests of different social groups. The need for consular relations appeared with the development of international trade. An intermediary party between the representatives of different cultures and traditions is needed to ensure the predictability and clarity of legal relations. The consuls were respected since they possessed knowledge about the cultures and legal systems of foreign States or cities. Essentially, consular mediation emerged due to the contact between groups of distinct traditions. It was endowed with mutual interest and benefits.

As the beneficiaries of the exercise of consular functions are always found in the private sphere, consular relations are not based on the government-to-government model.²⁶ A consul represents the interests of the sending State before the receiving State for the benefit of a private party. Here lies the difference between consular and diplomatic relations. Both are established with the consent of the sovereign States.

¹⁹ Philip D Curtin, *Cross-Cultural Trade in World History*, Studies in Comparative World History (Cambridge: Cambridge University Press, 1984), 130. Professor Curtin's discussion encompasses a broad and diverse group of trading relationships. Drawing on insights from economic history and anthropology, Professor Curtin has attempted to move beyond a Europe-centred view of history, to one that can help us understand the entire range of societies in the human past. Examples have been chosen that illustrate the greatest variety of trading relationships between cultures. The opening chapters look at Africa, while subsequent chapters treat the ancient world, the Mediterranean trade with China, the Asian trade in the east, and European entry into the trade with maritime Asia, the Armenian trade carriers of the seventeenth century, and the North American fur trade. Wide-ranging in its concern and the fruit of exhaustive research, the book is nevertheless written so as to be accessible and stimulating to the specialist and the student alike. "collection-title": "Studies in Comparative World History", "event-place": "Cambridge", "ISBN": "978-0-521-26931-5", "note": "DOI: 10.1017/CBO9780511661198", "publisher": "Cambridge University Press", "publisher-place": "Cambridge", "source": "Cambridge University Press", "title": "Cross-Cultural Trade in World History", "URL": "https://www.cambridge.org/core/books/crosscultural-trade-in-world-history/0FD4DBE86A2B1593ACC355F9D28D8C15", "author": [{"family": "Curtin", "given": "Philip D"}], "accessed": {"date-parts": [{"2025", 1, 11}]}, "issued": {"date-parts": [{"1984"}]}, "locator": "130", "label": "page", "schema": "https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}.

²⁰ Jaroslav Zourek, "Consular Intercourse and Immunities: Report / by Jaroslav Zourek, Special Rapporteur," *Report of the Special Rapporteur of the International Law Commission Report on Consular Intercourse and Immunities* (New York: United Nations, 1957), 73 // [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1957_v2_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1957_v2_e.pdf)

²¹ Iver B. Neumann, *supra* note 12, 26.

²² "International Law Commission, Draft Articles on Consular Relations, with commentaries," *Yearbook of the International Law Commission* Vol. II (1961): 115 // https://legal.un.org/ilc/texts/instruments/english/commentaries/9_2_1961.pdf

²³ Emory R. Johnson, "The Early History of the United States Consular Service. 1776-1792," *Political Science Quarterly* 13, No. 1 (1898): 20 // doi: 10.2307/2140002.

²⁴ Luke T. Lee, John B. Quigley, *supra* note 13, 5.

²⁵ Nail Isufi, "The Legal Nature of Consuls Immunity," *Juridica* 16, No. 1 (2020): 90.

²⁶ John B. Quigley, "Diplomatic and Consular Law in the Age of Empire," *SSRN Electronic Journal* 15 (2023) // doi: 10.2139/ssrn.4507602

Consular and diplomatic officers are appointed by the sending State and hosted by the receiving State. However, the establishment of diplomatic relations between the States usually involves an agreement for the purpose of cooperation, negotiation and resolution of issues of mutual interest in the purely public sphere. The consular services are called upon to ensure individual private interests and settle the conflicts involving the presence of the foreign element. They have no policy consequences and may be maintained between the States with different diplomatic views, in the territories of quasi-states or non-recognised subjects. Due to their close connection and financial consideration, Sweden, in 1906, was the first State to unite consular, diplomatic relations and the Ministry of Foreign Affairs into the foreign service.²⁷ Such an example was followed firstly by the rest of the States, enabling the exercise of consular and diplomatic functions by diplomats.²⁸

Nevertheless, the protection of the personal rights of nationals of the sending State was not the primary object of the consular relation. Such practice began to emerge in the 18th century in treaties incorporating the clause of extraterritoriality. For example, the treaty of Meknes signed between Spain and Morocco in 1799 stipulated "that both sides would judge and punish the crimes of the own subjects committed on the territory of the other."²⁹ The Sino-Russian Treaty of Nerchinsk from 1689 provides for a mutual extraterritorial application according to which the States would exchange criminals.³⁰ The rationale for incorporating the extraterritorial application clauses was to deny the application of the unfavourable local laws and provide for the preferential treatment under the law of the sending State. The existence of such a doctrine was purely contractual,³¹ and despite its decline with the modern development of international law in the 20th century, it managed to transform into a settled practice due to its widespread application among leading economies at that time. For example, the evidence of the protection of individual rights by means of the involvement of a consular office may be found in Article 17 of the Treaty of Tientsin between the UK and China, signed in 1858, establishing:

A British subject having reason to complain of a Chinese must proceed to the Consulate and state his grievance. The Consul will inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Chinese have reason to complain of a British subject, the Consul shall no less listen to his complaint, and endeavour to settle it in a friendly manner. If disputes take place of such a nature that the Consul cannot arrange them amicably, then he shall request the assistance of the Chinese authorities, that they may together examine into the merits of the case and decide it equitably.³²

The Chinese treaties incorporated provisions that would mitigate the conflict of jurisdictions in the case of the application of national criminal legislation to foreigners

²⁷ Iver B. Neumann, *At Home with the Diplomats: Inside a European Foreign Ministry* (Ithaca: Cornell University Press, 2012), 50.

²⁸ Nail Isufi, *supra* note 24, 90.

²⁹ Richard Pennell, "Accommodation between European and Islamic Law in the Western Mediterranean in the Early Nineteenth Century," *British Journal of Middle Eastern Studies* 21, No. 2 (1994): 174.

³⁰ Min Ch'ien T. Z. Tyau, *The Legal Obligations Arising Out of Treaty Relations Between China and Other States* (University of London, 1917), 4.; Luke T. Lee, John B. Quigley, *supra* note 13, 5.

³¹ Sen provides the extensive list of agreement between the states, which establishes the extraterritorial application. Biswanath Sen, *supra* note 16, 244.

³² *The Treaty of Tientsin between the Queen of Great Britain and the Emperor of China* (26 June 1858) // <https://worldjpn.net/documents/texts/pw/18580626.T1E.html>

by establishing the procedure for the consideration of disputes by the consular courts.³³ The development of such a practice of consular mediation also coincided with the rapid development of human rights. The French Declaration of the Rights of Man and of the Citizen and the United States Bill of Rights from 1789 established the basic standards of human treatment, increasing the interest in the extraterritorial application to secure the relevant standards. Before the codification by the VCCR, the protection of individual rights by consular officers was incorporated into a few regional instruments. Article 4 of the 1911 Agreement between Bolivia, Colombia, Ecuador, Peru, and Venezuela, relating to the functions of consuls, established the right of the consular officers to represent the nationals of the sending State before the authorities of the receiving State.³⁴ Article 1 of the 1928 Havana Convention on Consular Agents empowered consular agents to "render to their nationals such assistance and protection as they may need."³⁵ Eventually, during the negotiation on Article 36 of the VCCR, the practice of consular assistance to the detained nationals was perceived as settled practice despite having substantial differences in the manner of its provision.³⁶

Hence, consular assistance, while initially emerged to respond to the need to facilitate the conduct of international trade between ancient States and *poleis* by providing information on the functioning of the foreign cultural and legal systems, only later developed the purpose of protecting the individual rights of the sending State's nationals in the territory of the receiving State. The history of its conduct and codification does not demonstrate its perception by the State as an inherent human right.

2. THE RELATION BETWEEN HUMAN RIGHTS AND CONSULAR ASSISTANCE

Human rights are rights inherent to all humans. Every human is entitled to such rights on the sole basis of being a human. States, as the main subjects of international law, are the guardians of human rights. Human rights are mostly enshrined in treaties that apply territorially and, to a certain extent, extraterritorially. However, most human rights have become part of customary international law and even constitute *jus cogens* norms.

The status of the right to consular assistance is still not defined in international law. What, if any, is the difference between the treatment of consular assistance as a human right and an individual right? How would the recognition of the right to consular assistance as a human right impact the application of the VCCR in the case of the detention of a foreigner abroad?

The aim of Article 36 of the VCCR is to afford the detainee the benefits conferring with their consul, which provides means to satisfy their right to a trial with the proper guarantees.³⁷ The situation of a foreign national detained abroad is characterised by the vulnerability caused by unfamiliarity with the local legal and judicial systems, language, and culture. The provision of consular assistance by the sending State is called upon to compensate for such vulnerability by ensuring the standards of due process. The

³³ Wesley R. Fishel, *The End of Extraterritoriality in China* (University of California Press, 1952), 11.

³⁴ "The Accord between Bolivia, Colombia, Equador, Peru, and Venezuela relative to the functions of the respective consuls in each of the contracting republics," *BFSST* Vol. 107 (18 July 1911): 601 // <https://babel.hathitrust.org/cgi/pt?id=uiug.30112074697969&seq=665>

³⁵ "Havana Convention on Consular Agents," *TS* No. 843 (20 February 1928): Article 1 // <https://history.state.gov/historicaldocuments/frus1928v01/d366>

³⁶ United Nations, *supra* note 3, 339.

³⁷ *Supra* note 6, 30.

connection between the right to consular assistance and due process was recognised during the drafting of Article 36 of the VCCR. Discussing the balance of the rights and obligations between the sending and requested States, different delegations expressed the view that freedom was one of the most valuable possessions of man and must not be restricted unless the restriction was accompanied by the greatest possible safeguards.³⁸ The assistance of a consular officer to a detainee safeguards the standards of treatment in the receiving State. The failure to ensure the provision of consular assistance may lead to a violation of due process.

Commentary to Article 33 of the Articles on Internationally Wrongful Acts finds no difference in the treatment of the right to consular assistance as human or individual for the purposes of reparation. However, it identifies that an individual may be regarded as the ultimate beneficiary.³⁹

The International Organisation for Migration defines the right to consular assistance as a human right under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁴⁰ The Special Reporter stated that "consular assistance is a human right and that the denial of that right by the prosecuting State renders the imposition of the death penalty an arbitrary deprivation of life."⁴¹ However, the doctrine is not unanimous on the status of the right to consular assistance. Mallory supports the interpretation of Article 36 of the VCCR as establishing human rights for the detained nationals facing the death penalty.⁴² Cerna acknowledges the lack of the obligation of the sending State to protect its nationals abroad as evidence of the absence of the status of human rights.⁴³ According to Stewart, the recognition of the right to consular assistance as a human right under Article 36 of the VCCR will not lead to an increase in the efficiency of its protection and requires implementation of the additional international agreement with a mechanism for its effective enforcement.⁴⁴

The individual benefits of Article 36 of the VCCR were stated by the Inter-American Court of Human Rights in Advisory Opinion OC-16/99, requested by the United Mexican States (hereinafter – Mexico). In its application, Mexico sought the minimum standards of judicial protection of the due process for the persons detained abroad under Article 36 of the VCCR.⁴⁵

The argument that Article 36 of the VCCR does not create individual rights is based on the purpose of the VCCR defined in its Preamble, which reads as "the purpose of (consular) privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective states."⁴⁶ The IACHR reaffirmed that despite the object of the VCCR, which is to strike a balance among the States, it does not preclude the Convention from establishing pro-

³⁸ United Nations, *supra* note 3, 37.

³⁹ International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts," *Yearbook of the International Law Commission* Vol. II (Part Two), comment 3 (2001).

⁴⁰ "IML Information Note on Consular Assistance," *International Organization for Migration* (2021): 10 // <https://www.iom.int/sites/g/files/tmzbd12616>

⁴¹ "Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions," *United Nations General Assembly* (2019): 9 // <https://documents.un.org/doc/undoc/gen/n19/257/91/pdf/n1925791.pdf>

⁴² Conall Mallory, *supra* note 7, 10.

⁴³ Christina M Cerna, "The Right to Consular Notification as a Human Right," *Suffolk Transnational Law Review* 31, No. 2 (2008): 422 // <https://go.gale.com/ps/i.do?id=GALE%7CA190373260&sid>

⁴⁴ David P. Stewart, "The Emergent Human Right to Consular Notification, Access and Assistance," in *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*, ed. Andreas von Arnould, Kerstin von der Decken, Mart Susi (Cambridge: Cambridge University Press, 2020), 452.

⁴⁵ *Supra* note 6, 1.

⁴⁶ *Vienna Convention on Consular Relations*, 24 April 1963, 596 United Nations Treaty Series 261, Preamble.

visions designed to protect human rights.⁴⁷ Combining the object of the VCCR with the functions of the consular officers defined in Article 5 of the VCCR, the IACHR concluded that the VCCR aims to ensure the possibility of consular officers to perform their duties within the territory of the receiving State, protect the interests of the sending State and provide consular assistance to the nationals of the sending State. Hence, the IACHR upheld the dualistic approach of the VCCR, affording the sending State the possibility to protect its nationals and their individual right to receive consular assistance in case of detention abroad.

The approach was also adopted by the ICJ in the *LaGrand* judgment, which concerned the dispute between the Federal Republic of Germany (hereinafter – Germany) and the United States of America (hereinafter – US) over two brothers with German nationality sentenced to death in the US for bank robbery. The brothers, being entitled to rights under Article 36 of the VCCR, submitted a claim to the US District Court and later to the Supreme Court of the United States. However, both times, the claims were rejected due to the application of the procedural default rule precluding the possibility to challenge the verdict on the basis of the VCCR in the higher courts if the issue had not been first raised in the proceeding before the lower courts. Germany initiated the proceedings before the ICJ, claiming the violations of Articles 5 and 36 of the VCCR.

The ICJ confirmed that the right to consular assistance creates individual rights enforceable by the State of nationality in the exercise of diplomatic protection.⁴⁸ The provision of consular assistance by the sending State under Article 36 of the VCCR is conditional upon the notification of the consular officer by the receiving State. Although Germany claimed that the right to consular assistance was a human right, the ICJ merely stated that “Article 36, paragraph 1, creates individual rights”.⁴⁹ This is partially explained by the fact that Germany argued that it was possible to enforce the individual rights under Article 36 of the VCCR by the sending State, despite the main beneficiaries of the right to consular assistance being the detained nationals.⁵⁰ It is possible that the Court reached its conclusion based on the lack of a substantial difference in the treatment of the right to consular assistance as an individual right or human right. The reparation of the violation of the right, which was the main issue in *LaGrand*, would not depend on the status of the right.

In the *Avena* case, Mexico claimed the violation of Articles 5 and 36 of the VCCR by the failure of the US to notify the 54 detained Mexican nationals of the right to consular assistance without delay, who were sentenced to death.⁵¹ In its Application, Mexico asked the ICJ to adjudge and declare that the right to consular notification under the Vienna Convention is a human right.⁵² The ICJ interpreted Article 36 of the VCCR in light of its conclusions in the *LaGrand* judgment and found a violation of the duty to notify the detained foreigners of the right to consular assistance.⁵³ However, it also concluded that neither the text nor the object and purpose of the Convention nor any indication in the *travaux préparatoires* demonstrate that the right to consular no-

⁴⁷ *Supra* note 6, 47.

⁴⁸ *LaGrand* (Germany v. United States of America), [2001], ICJ, Rep. 466, par. 77.

⁴⁹ *Ibid.*, par. 77.

⁵⁰ Eulalia W. Petit de Gabriel, “Intertwining Consular and Human Right Law: A European Contribution to the Humanisation of International Law,” *España Jurídica Journal of Law* 22, No. 1 (2021): 19 // doi: 10.18593/ejil.27700

⁵¹ *Avena and Other Mexican Nationals* (Mexico v. United States of America), [2004], ICJ, Rep. 12, par. 12.

⁵² *Avena and Other Mexican Nationals* (Mexico v. United States of America), Application Instituting Proceedings, 9 January 2003, 44, par. 281(5).

⁵³ *Supra* note 50, par. 153(5).

tification and consular communication is a “fundamental human right”.⁵⁴ However, the ICJ did not delve into the reasoning of such conclusion.

In the *Armand Guehi v. United Republic of Tanzania* judgment, the African Court on Human and Peoples’ Rights (hereinafter – African Court) clarified that non-provision of consular assistance does not necessarily amount to a violation of the right to fair trial. Considering the application, in particular, on the breach of Article 7 of the African Charter on Human and Peoples’ Rights due to the impossibility of obtaining the right to consular assistance, the African Court found no violation of the right to a fair trial. The non-provision of consular assistance from the sending State did not affect the ability of the detainee to organise legal representation since he had sufficient knowledge of the language in which he was interviewed.⁵⁵ In this situation, the vulnerability of the detainee was compensated by means other than those established under the national legislation of the receiving State or VCCR, which ensured the possibility of securing due process. Nevertheless, the knowledge of the language cannot be interpreted as a requirement to secure due process for the detained foreigner. Language is only the means by which information about the operation of the local legal and cultural systems can be obtained. The vulnerability can be compensated for by the provision of translation by the receiving State.

At this point, the right to consular assistance aims to establish the safeguard by the presence of the consular officer of the sending State, that the receiving State will respect the standards of treatment under the human rights treaties. Article 36 of the VCCR operates on the presumption of the respect of human rights by the receiving State and establishes not the obligation but only the right of the consular officer to assist the detained national. The consular officer may oversee the conduct of the competent authorities of the receiving State. However, the intervention of the consular officer is of no relevance when the receiving State complies with the requirements of due process. But what, if any, is the difference between individual rights, such as the right to consular assistance, and human rights?

The concept of “individual” refers not to the number of individuals making the right to consular assistance enforceable but to the entitlement of any human being, opposed by the primary aim of the VCCR to regulate the conduct between States. The rights of individuals which do not constitute human rights are also called *simple*⁵⁶ or *ordinary*.⁵⁷ According to Decken and Koch, the distinction lies within the primary aim of human rights to protect human dignity.⁵⁸ The same approach is supported by the UN General Assembly, defining that only those rights can be recognised as human that are “of fundamental character and derive from the inherent dignity and worth of the human person.”⁵⁹ However, the interpretation of human dignity as a primary criterion of human rights can lead to the inclusion of the spectrum of procedural rights which safeguards due process. In this way, the individual right to consular assistance also protects human

⁵⁴ *Supra* note 50, par. 124.

⁵⁵ *Armand Guehi v. United Republic of Tanzania*, African Court on Human and Peoples’ Right (2018, No. 001/2015), 70 // <https://sciendoparsed-data-feed.s3.eu-central-1.amazonaws.com>

⁵⁶ Kerstin von der Decken, Nikolaus Koch, “Recognition of New Human Rights: Phases, Techniques and the Approach of “Differentiated Traditionalism,” in *The Cambridge Handbook of New Human Rights*, ed. Andreas von Arnould, Kerstin von der Decken, Mart Susi, 1st ed. (Cambridge University Press, 2020), 1.

⁵⁷ Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, trans. Jonathan Huston, 1st ed. (Cambridge University Press, 2016), 436.

⁵⁸ Kerstin von der Decken, Nikolaus Koch, *supra* note 43, 1.

⁵⁹ *Setting International Standards in the Field of Human Rights* (New York: United Nations General Assembly, 1987), para. 4(b) // <https://digitallibrary.un.org/record/126473?ln=en&v=pdf>

dignity by ensuring the humanity of treatment associated with human rights. Hence, the purpose criterion is relevant but not necessary.

Peters defines two approaches to the identification of human rights. First, formalistic, establishing the human rights nature only when it is included in the human rights treaties or, alternatively, in the resolution of the General Assembly.⁶⁰ This approach leads to the conclusion that States are the creators of human rights. Moreover, such a solution is not necessary since, for example, the right to nationality established in Article 15 of the Universal Declaration of Human Rights is not commonly recognised as a human right.⁶¹ Second, the substantive criterion provides for the differentiation of the substance of the protection of the right. Only those rights which are indispensable to freedom, democracy, the rule of law, and the ability of the person to realise themselves in society deserve to be recognised as a human right.

The primary object of the right to consular assistance is the protection of the interests of due process. It establishes only the procedural obligations of the receiving State, the performance of which may contribute to the defence of the detainee and oversight by the consular officer of the receiving State. The right to consular assistance does not establish a standard of human treatment that would be different from the standards of due process. As much as legal representation in purely national trials contributes to the defence, due process will be violated only if the lack of legal aid puts the litigant at a distinct disadvantage as compared with the opposing party. Since a consular officer would not have the right to represent the detainee before a court, the right to consular assistance contributes only to the expedient organisation of the defence. In the structure of due process, the right to consular assistance functions as a procedural guarantee designed specifically for foreigners in domestic proceedings. Granting the human right status to the right to consular assistance would contradict the doctrine of universal entitlement⁶² and require the establishment of the presumption of the inherent human vulnerability outside of the State of nationality, which, however, is not possible since it can be compensated by means other than the provision of consular assistance. The interpretation of the VCCR in a way that establishes a human right to consular assistance without the establishment of an autonomous standard of treatment would be revolutionary rather than incremental and evolutionary.⁶³

One should also think about the practical aspect of human rights. If the right to consular assistance possessed the status of a human right, the sending State would have the obligation to provide consular assistance to the detained national via the consular post under Article 36 of the VCCR. The issue would arise because the establishment of the consular relation lies within the discretionary powers and is based on the agreement between the sending and the receiving States.⁶⁴ This raises the issue that discharging the obligations under Article 36 of the VCCR may not be possible if the consular post does not exist within the territory of the receiving State. Moreover, the establishment of the consular post depends on the capabilities of the sending State. It

⁶⁰ Anne Peters, *supra* note 56, 436.

⁶¹ Mónika Ganczer, "The Right to a Nationality as a Human Right?" *Hungarian Yearbook of International Law and European Law* 2, No. 1 (2014): 16 // doi: 10.5553/HYIEL/266627012014002001002

⁶² Frédéric Mégret, "From a Human Right to Invoke Consular Assistance in the Host State to a Human Right to Claim Diplomatic Protection from One's State of Nationality?" in *The Cambridge Handbook of New Human Rights*, ed. Andreas von Arnould, Kerstin von der Decken, and Mart Susi, 1st ed. (Cambridge University Press, 2020), 455.

⁶³ Nicolas Bratza, "Living Instrument or Dead Letter-the Future of the "European Convention on Human Rights," *European Human Rights Law Review* No. 2 (2014): 123 // <https://search.informit.org/doi/10.3316/agispt.20210601047793>

⁶⁴ *Supra* note 45, Article 2.

is unclear whether the lack of personnel or finances for the establishment of a consular post would be perceived as a ground for non-provision of consular assistance to the detained national if such a right were recognised as a human right.

Hence, while the right to consular assistance "is part of the body of international human rights law,"⁶⁵ it is not a human right since it prescribes no standard of treatment that would differ from the standards established by due process. It does not necessarily contribute to the protection of the foreign detainees since the vulnerability may be restored by the measures under national legislation of the receiving State, specifically designed for the detained foreigners.

3. THE TREATMENT OF CONSULAR ASSISTANCE TO NATIONALS ABROAD UNDER STATE PRACTICE

The treatment of the right to consular assistance as a human right, compared to an individual, would change the manner in which it shall be secured. Human rights are associated with the obligation of States to ensure them.⁶⁶ If the right to consular assistance is a human right, one would expect the obligation of the sending State to provide consular assistance to exist, but not the discretionary power of the consular officers. The existence of sufficiently widespread and consistent provisions of national laws may evidence the acceptance of consular assistance as a human right.⁶⁷

The table below demonstrates the national approaches to characterising the right to consular assistance. The selection of the States was guided to ensure diversity of legal systems and geographical locations.

States treating the protection of their nationals abroad as a right		
1.	Hungary	"Every Hungarian citizen shall have the right to enjoy the protection of Hungary during his or her stay abroad." ⁶⁸
2.	The Republic of Nicaragua	"Nicaraguans abroad have the rights to receive support from and protection by the State. This is made effective through its representatives in embassies and consulates." ⁶⁹
3.	The Republic of Poland	"A Polish citizen shall, during a stay abroad, have the right to protection by the Polish State." ⁷⁰
4.	The Republic of the Philippines	"The Commission on Human Rights shall have the following powers and functions: [...] (3) Provide appropriate legal measures for the protection of human rights of all persons within the Philippines, as well as Filipinos residing abroad, and provide for preventive measures and legal aid services to the underprivileged whose human rights have been violated or need protection." ⁷¹

⁶⁵ *Supra* note 6, 64; United Nations, *supra* note 3, 46, 218, 220.

⁶⁶ Frédéric Mégret, *supra* note 61, 456.

⁶⁷ *International Law Commission, Draft Conclusion on Identification of Customary International Law, with Commentaries* Vol. II, pt 2 (2018): 141 // https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf

⁶⁸ *The Fundamental Law of Hungary*, (25 April 2011): Article 27(2) // <https://www.refworld.org/legal/legislation/natlegbod/2011/en/100935>

⁶⁹ *Constitution of the Republic of Nicaragua and Reforms Thereunto*, La Gaceta (No. 5, 19 November 1986, Article 28) // <https://codices.coe.int/codices/documents/constitution>

⁷⁰ *The Constitution of the Republic of Poland, Dziennik Ustaw* (No. 79, 483, 2 April 1997, Article 36) // sejm.gov.pl/prawo/konst/angielski/kon1.htm

⁷¹ *Constitution of the Republic of the Philippines*, Official Gazette (Section 18(3), 2 February 1987) // <https://codices.coe.int/codices/documents/constitution>

5.	The Republic of Zimbabwe	"All Zimbabwean citizens are entitled to the following rights and benefits, in addition to any others granted to them by law (a) to the protection of the State wherever they may be;" ⁷²
6.	The United Kingdom of Great Britain and Northern Ireland	If a British national was treated unfairly abroad in criminal proceedings, the officials would make representations to the government of the receiving State. A British court said that these statements created a "legitimate expectation" that such representations would in fact be made. ⁷³
States treating the protection of their nationals in the basic laws as an obligation		
1.	Bosnia and Herzegovina	"A citizen of Bosnia and Herzegovina abroad shall enjoy the protection of Bosnia and Herzegovina." ⁷⁴
2.	Georgia	"Georgia shall protect its citizen regardless of his/her location." ⁷⁵
3.	Montenegro	"Montenegro shall protect the rights and interests of the Montenegrin citizens." ⁷⁶
4.	Romania	"Romanian citizens while abroad shall enjoy the protection of the Romanian State and shall be bound to fulfil their duties, with the exception of those incompatible with their absence from the country." ⁷⁷
6.	The Democratic Republic of the Congo	"The State protects the legitimate rights and interests of Congolese who are both inside and outside the country." ⁷⁸
7.	The Kingdom of Morocco	"The Kingdom of Morocco shall work towards the protection of the rights and the legitimate interests of Moroccan citizens living abroad, while observing the provisions of international law as well as the relevant laws of their host countries." ⁷⁹
8.	The People's Democratic Republic of Algeria	"The State shall endeavour to protect the rights and the interests of its expatriates in compliance with international law, the conventions concluded with the host or residence countries." ⁸⁰
9.	The Plurinational State of Bolivia	"The Public Defender shall also promote the defence of the rights of the nations and rural native indigenous peoples, of urban and inter-cultural communities, and of Bolivians who are abroad." ⁸¹

⁷² *Constitution of the Republic of Zimbabwe Amendment (No. 20) Act*, Zimbabwe Government Gazette (No. 38, 14 May 2013, Article 35(3) // <https://codices.coe.int/codices/documents/constitution>

⁷³ *R (Abassi and another) v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA (Civ) 1598, 87-94 // <https://www.oxfordlawtrove.com/display/10.1093/he/9780191995729.001.0001/he-9780191995729-chapter-44>

⁷⁴ *Constitution of Bosnia and Herzegovina*, Official Gazette of Bosnia and Herzegovina (No. 25/09, 14 December 1995, Article 7(e) // <https://codices.coe.int/codices/documents/constitution>

⁷⁵ *Constitution of Georgia*, Official Gazette of Georgia (No. 31, 24 August 1995, Article 32(1) // <https://codices.coe.int/codices/documents/constitution>

⁷⁶ *Constitution of Montenegro*, Official Gazette of Montenegro (No. 1/2007, 19 October 2007, Article 12) // <https://codices.coe.int/codices/documents/constitution/5375375a-83ed-4e8a-8e0a-1bba2aa41f27>

⁷⁷ *Constitution of Romania*, Monitorul Oficial (No. 233, 21 November 1991, Article 17) // <https://codices.coe.int/codices/documents/constitution>

⁷⁸ *Constitution of the Democratic Republic of the Congo*, Journal Officiel (No. 5, 18 February 2006, Article 50) // <https://codices.coe.int/codices/documents/constitution>

⁷⁹ *Constitution of the Kingdom of Morocco*, Official Bulletin (No. 5964 bis, 1 July 2011, Article 16) // <https://codices.coe.int/codices/documents/constitution>

⁸⁰ *Constitution of the People's Democratic Republic of Algeria*, Journal Officiel (No. 71, 1 November 2020, Article 29) // <https://codices.coe.int/codices/documents/constitution>

⁸¹ *Constitution of the Plurinational State of Bolivia*, Gaceta Oficial (No. 3, 7 February 2009, Article 218(2) // <https://codices.coe.int/codices/documents/constitution>

10.	The Portuguese Republic	"Portuguese citizens who find themselves or who reside abroad enjoy the state's protection in the exercise of the rights and are subject to the duties that are not incompatible with their absence from the country." ⁸²
11.	The Republic of Djibouti	"The State protects the legitimate rights and interests of the Djiboutian citizens abroad." ⁸³
12.	The Republic of Albania	"The Republic of Albania protects the national rights of the Albanian people who live outside its borders." ⁸⁴
13.	The Republic of Angola	"Angolan citizens residing or finding themselves abroad shall enjoy the rights, freedoms and guarantees and the protection of the state and shall be subject to the duties established in the Constitution and the law." ⁸⁵
14.	The Republic of Armenia	"Citizens of the Republic of Armenia, while outside of the borders of the Republic of Armenia, shall be under the protection of the Republic of Armenia on the basis of international law." ⁸⁶
15.	The Republic of Azerbaijan	"The Republic of Azerbaijan ensures legal protection and patronises citizens of the Republic of Azerbaijan temporarily or permanently living outside the Republic." ⁸⁷
16.	The Republic of Belarus	"A citizen of the Republic of Belarus shall be guaranteed the protection and patronage of the State both on the territory of Belarus and beyond." ⁸⁸
17.	The Republic of Benin	"The State shall protect the rights and legitimate interests of Béninese citizens in a foreign country." ⁸⁹
18.	The Republic of Bulgaria	"Bulgarian citizens staying abroad shall be under the protection of the Republic of Bulgaria." ⁹⁰
19.	The Republic of Colombia	"The Ombudsman will ensure the promotion, exercise and dissemination of human rights, for which it shall perform the following functions: 1. To guide and instruct inhabitants of the national territory and Colombians abroad in the exercise and defence of their rights before the competent authorities or private entities." ⁹¹
20.	The Republic of the Congo	"The State has the duty to provide assistance to all Congolese citizens prosecuted before a foreign or international jurisdiction." ⁹²
21.	The Republic of Croatia	"The Republic of Croatia shall safeguard the rights and interests of its citizens living or residing abroad, and shall promote their ties to their homeland." ⁹³

⁸² *Constitution of the Portuguese Republic*, Diário da República (No. 86, 2 April 1976, Article 14) // <https://codices.coe.int/codices/documents/constitution>

⁸³ *Constitution of the Republic of Djibouti*, Journal Officiel (No. 18, 4 September 1992, Article 19) // <https://codices.coe.int/codices/documents/constitution>

⁸⁴ *Constitution of the Republic of Albania*, Fletorja Zyrtare (No. 28, 21 October 1998, Article 8(1) // <https://codices.coe.int/codices/documents/constitution>

⁸⁵ *Constitution of the Republic of Angola*, Diário da República (No. 4, 21 January 2010, Article 22(2) // <https://codices.coe.int/codices/documents/constitution>

⁸⁶ *Constitution of the Republic of Armenia*, Official Gazette (No. 8, 5 July 1995, Article 47(8) // <https://codices.coe.int/codices/documents/constitution>

⁸⁷ *Constitution of the Republic of Azerbaijan*, Official Gazette (No. [issue not publicly specified], 12 November 1995, Article 53(3) // <https://codices.coe.int/codices/documents/constitution>

⁸⁸ *Constitution of the Republic of Belarus*, Official Gazette (No. [issue not publicly specified], 15 March 1994, Article 10) // <https://codices.coe.int/codices/documents/constitution>

⁸⁹ *Constitution of the Republic of Benin*, (11 December 1990, Article 38) // <https://codices.coe.int/codices/documents/constitution>

⁹⁰ *The Constitution of the Republic of Bulgaria*, Durzhaven Vestnik (12 July 1991, Article 25(5) // <https://codices.coe.int/codices/documents/constitution>

⁹¹ *Constitution of the Republic of Colombia*, Constitutional Gazette (No. 114, 6 July 1991, Article 282(1) // <https://codices.coe.int/codices/documents/constitution>

⁹² *Constitution of the Republic of the Congo*, Journal Officiel (No. 42, 25 October 2015, Article 10) // https://www.constituteproject.org/constitution/Congo_2015

⁹³ *The Constitution of the Republic of Croatia*, Narodne Novine (No. 56, 22 December 1990, Article 10) // <https://codices.coe.int/codices/documents/constitution>

22.	The Republic of Ecuador	"The State, through the relevant entities, shall develop, among others, the following actions for the exercise of the rights of Ecuadorian persons abroad, regardless of their migratory status: 1. The State shall provide them and their families, whether they live abroad or in the country, with assistance; [...] 3. The State shall safeguard their rights when, for any reasons, they have been arrested and imprisoned abroad." ⁹⁴
23.	The Republic of Estonia	"Everyone is entitled to protection by the government and of the law. The Estonian government also protects its citizens." ⁹⁵
24.	The Republic of Kazakhstan	"The Republic shall provide its citizens with protection and assistance outside its borders." ⁹⁶
25.	The Republic of Korea	"It is the duty of the State to protect citizens residing abroad as prescribed by law." ⁹⁷
26.	The Republic of Kosovo	"The Republic of Kosovo protects the interests of its citizens abroad as provided by law." ⁹⁸
27.	The Republic of Latvia	"Everyone having a Latvian passport shall be protected by the State when abroad." ⁹⁹
28.	The Republic of Lithuania	"The State of Lithuania shall protect its citizens abroad." ¹⁰⁰
29.	The Republic of Moldova	"Citizens of the Republic of Moldova shall benefit of the State protection both within the country and abroad." ¹⁰¹
30.	The Republic of the Niger	"The State must protect, abroad, the rights and legitimate interests of the Nigerien citizens." ¹⁰²
31.	The Republic of North Macedonia	"The Republic shall protect the rights and interests of its nationals living or staying abroad." ¹⁰³
32.	The Republic of Serbia	"The Republic of Serbia shall protect the rights and interests of its citizens in abroad." ¹⁰⁴
33.	The Republic of Tajikistan	"A citizen of Tajikistan outside the country shall be protected by the state." ¹⁰⁵
34.	The Republic of Uzbekistan	"The Republic of Uzbekistan shall guarantee defence and protection to all its citizens both on its territory and abroad." ¹⁰⁶

⁹⁴ *Constitution of the Republic of Ecuador*, Official Register (No. 449, 20 October 2008, Article 28) // <https://codices.coe.int/codices/documents/constitution>

⁹⁵ *The Constitution of the Republic of Estonia*, RT (26, 349, 28 June 1992, Article 13) // <https://codices.coe.int/codices/documents/constitution>

⁹⁶ *Constitution of the Republic of Kazakhstan*, Official Gazette (No. 15, 30 August 1995, Article 11(2) // <https://codices.coe.int/codices/documents/constitution>

⁹⁷ *Constitution of the Republic of Korea*, (17 July 1948, Article 2(2) // <https://codices.coe.int/codices/documents/constitution>

⁹⁸ *Constitution of the Republic of Kosovo*, Official Gazette (No. 25, 15 June 2008, Article 15) // <https://codices.coe.int/codices/documents/constitution>

⁹⁹ *The Constitution of the Republic of Latvia*, Valdības Vēstnesis (No. 141, 15 February 1922, Article 98) // <https://codices.coe.int/codices/documents/constitution>

¹⁰⁰ *The Constitution of the Republic of Lithuania*, Lietuvos aidas (No. 220-2, 25 October 1992, Article 13) // <https://codices.coe.int/codices/documents/constitution>

¹⁰¹ *Constitution of the Republic of Moldova*, Monitorul Oficial (No. 1, 29 July 1994, Article 18(1) // <https://codices.coe.int/codices/documents/constitution>

¹⁰² *Constitution of the Republic of Niger*, Journal Officiel (No. 25, 25 November 2010, Article 42) // <https://codices.coe.int/codices/documents/constitution>

¹⁰³ *Constitution of the Republic of North Macedonia*, Official Gazette (No. 52/1991, 17 November 1991, Article 49) // <https://codices.coe.int/codices/documents/constitution>

¹⁰⁴ *Constitution of the Republic of Serbia*, Official Gazette (No. 98/2006, 8 November 2006, Article 13) // <https://codices.coe.int/codices/documents/constitution>

¹⁰⁵ *Constitution of the Republic of Tajikistan*, Official Gazette (No. 23, 6 November 1994, Article 16) // <https://codices.coe.int/codices/documents/constitution>

¹⁰⁶ *Constitution of the Republic of Uzbekistan*, Official Gazette (No. 12, 8 December 1992, Article 23) // <https://codices.coe.int/codices/documents/constitution>

35.	The Russian Federation	"The Russian Federation guarantees its citizens protection and patronage outside its borders." ¹⁰⁷
36.	Ukraine	"Ukraine guarantees care and protection to its citizens who are abroad." ¹⁰⁸
States treating the protection of its national in other domestic laws as an obligation		
1.	Australia	"If you're an Australian detained overseas and you request consular assistance, an Australian consular officer will visit you as soon as possible after notification of your detention and once permission is received from the local authorities." ¹⁰⁹
2.	The Czech Republic	"In cooperation with the supervising post, the honorary consul shall protect the rights and interests of Czech natural and legal persons." ¹¹⁰
3.	Mongolia	"Irrespective of place of residence a citizen of Mongolia shall be under state protection and enjoy protection of his/her rights and legitimate interests according to the law." ¹¹¹
4.	The Federative Republic of Brazil	"It shall also fall to the consular post, in the exercise of what is provided by Article 36 of the Vienna Convention on Consular Relations: (1) to lend assistance to Brazilians who are involved in criminal processes." ¹¹²
5.	The Federative Republic of Germany	Germany is under the obligation to its nationals to protect "their interests vis-a-vis foreign States." ¹¹³
6.	The Hellenic Republic	"1. Within the framework of the responsibilities arising from article 2, paid consular authorities exercise, in their region, the following specific duties, in accordance with the internationally applicable: b) provide all possible assistance to Greek citizens and expatriates" ¹¹⁴
7.	The Kingdom of Norway	"Section 1. Tasks of the Foreign Service The tasks of the Foreign Service are [...] to provide assistance to Norwegian nationals abroad, including assistance in connection with criminal prosecution, accidents, illness and death." ¹¹⁵
8.	The Kingdom of Spain	"1. In order to guarantee the assistance and protection due to Spanish citizens abroad, the Foreign Policy Council shall set up a consular emergency group [...]" ¹¹⁶

¹⁰⁷ *The Constitution of the Russian Federation*, (12 December 1993, Article 61(2) // <https://codices.coe.int/codices/documents/constitution>

¹⁰⁸ *The Constitution of Ukraine*, Відомості Верховної Ради України (No. 30, 141, 28 June 1996, Article 25) // <https://codices.coe.int/codices/documents/constitution>

¹⁰⁹ "Australian Department of Foreign Affairs and Trade, Arrested or in Jail: Consular Visits," *smarttraveller.gov.au* // <https://www.aph.gov.au/DocumentStore.ashx?id=c5a746fa-df63-4c71-b0f0-0f12a5076cd7>

¹¹⁰ *Consular Manual for Honorary Consulate of the Czech Republic*, Consular Functions URL (2015): 3 // https://mzv.gov.cz/file/3490131/Manual_for_HC.pdf

¹¹¹ *Law of Mongolia on Citizenship*, (5 June 1995): Article 3(4) // <https://legalinfo.mn/en/edtl>

¹¹² "Ministry of Foreign Affairs of Brazil, Subsecretariat-General for Brazilian Communities Abroad. Manual de Serviço Consular e Jurídico," [Manual Of The Consular And Legal Service] § 3.1.24 (2010) // https://conhecimento.fgv.br/sites/default/files/concursos/mre/MSCJ_completo-1.pdf

¹¹³ *The Federal Constitutional Court of the Federal Republic of Germany*, Decision of 7 July 1975, BVerfGE 40, 141 1 BvR 274/72 // <https://dejure.org/dienste/vernetzung/rechtsprechung>

¹¹⁴ *Law of Greece No. 4781 on the Organization and Functioning of the Ministry of Foreign Affairs, Council of Hellenes Abroad, Regulation of Issues of International Development Cooperation and Humanitarian Aid and Other Provisions*, Government Gazette (No. 31, 28 February 2021, Article 299) // <https://www.mfa.gr/archive/1/docs>

¹¹⁵ "Foreign Service Act (Lov om utenrikstjenesten)," *Norsk Lovtidend* (13 February 2015): Section 1 // <https://lovdata.no/dokument/NLE/lov/2015-02-13-9>

¹¹⁶ *Law 2/2014 on the Action and Foreign Service of the State*, Official State Gazette (No. 74, 25 March 2014, Article 40) // <https://www.boe.es/buscar/act.php?id=BOE-A-2014-3248>

9.	The Republic of Austria	"Consular protection is that part of consular duties that includes providing assistance in legal protection and emergency situations." ¹¹⁷
10.	The Republic of Finland	"The Finnish diplomatic and consular missions abroad have the responsibility to provide advice, guidance and assistance to consular service recipients." ¹¹⁸
11.	The Republic of Indonesia	"Missions of the Republic of Indonesia are obliged to: [...] Provide a sense of security, protection, and legal aid to Indonesian citizens and Indonesian legal bodies abroad, in conformity with national legislation and international law and practice." ¹¹⁹
12.	The Republic of Slovenia	"Consular protection shall be provided to a reasonable extent in such a way as to ensure the basic protection of the rights and interests of citizens of the Republic of Slovenia, taking into account the international obligations and regulations of the Republic of Slovenia." ¹²⁰
13.	The United Mexican States	"Foreign Service personnel have the priority obligation to protect the interests of Mexicans abroad. To this end, they shall provide their good offices, provide consular assistance and protection, and, if necessary, provide the Secretariat with the elements to decide whether the Mexican State will exercise diplomatic protection." ¹²¹
States not addressing the protection of their nationals abroad in their basic laws		
1.	Barbados	
2.	Belize	
3.	Burkina Faso	
4.	Canada	
5.	Ireland	
6.	Japan	
7.	The Argentine Republic	
8.	The Central African Republic	
9.	The Dominican Republic	
10.	The French Republic	
11.	The Grand Duchy of Luxembourg	
12.	The Hashemite Kingdom of Jordan	
13.	The Islamic Republic of Mauritania	
14.	The Islamic Republic of Pakistan	
15.	The Kingdom of Belgium	
16.	The Kingdom of Denmark	
17.	The Kingdom of the Netherlands	
18.	The Kingdom of Sweden	
19.	The Lebanese Republic	
20.	The Principality of Andorra	
21.	The Principality of Monaco	
22.	The Republic of Cameroon	
23.	The Republic of Chile	
24.	The Republic of Costa Rica	
25.	The Republic of Cyprus	
26.	The Republic of Guinea	

¹¹⁷ *Federal Act on the Performance of Consular Duties (Consular Act – KonsG)*, Federal Law Gazette I (No. 40/2019, 13 February 2019, Article 3(2) // <https://www.ris.bka.gv.at/GeltendeFassung.wxe>

¹¹⁸ *The Republic of Finland provides consular assistance to its nationals as a matter of policy. 'In Distress Abroad', Finland abroad: United Kingdom*, accessed 10 January 2025 // <https://finlandabroad.fi/web/gbr/in-distress-abroad>

¹¹⁹ *Law No. 37 of 1999 on Foreign Relations*, State Gazette of the Republic of Indonesia (No. 68, 14 September 1999, Article 19) // <https://data.santoslolowang.com>

¹²⁰ *Law on Consular Protection (ZKZaš)*, Official Gazette of the Republic of Slovenia (No. 30/18, 17 April 2018, Article 4(1) // <https://pisrs.si/pregledPredpisa?id=ZAKO7694>

¹²¹ *The Regulation of Mexican Foreign Service Act*, Diario Oficial de la Federación (23 August 2002, Article 68) // https://www.dof.gob.mx/nota_detalle.php?codigo=5481136&fecha=28/04/2017#gsc.tab=0

27.	The Republic of Iceland
28.	The Republic of Italy
29.	The Republic of Madagascar
30.	The Republic of Malawi
31.	The Republic of Mali
32.	The Republic of Malta
33.	The Republic of Mauritius
34.	The Republic of Namibia
35.	The Republic of Peru
36.	The Republic of San Marino
37.	The Republic of Senegal
38.	The Republic of Seychelles
39.	The Republic of South Africa
40.	The Republic of Tunisia
41.	The Republic of Türkiye
42.	The Republic of Yemen
43.	The Slovak Republic
44.	The State of Israel
45.	The State of Libya
46.	The State of Palestine
47.	The Swiss Confederation
48.	The Togolese Republic
49.	The United States of America

Despite the prevailing approach of characterising the consular assistance to nationals abroad as the obligation of the sending State among the States which address the status of such assistance in domestic laws, it is not consistent. There are a number of States which define it as their right, and there are States which do not address the question of characterisation of such assistance at all. Additionally, the scope of the obligation of the States establishing the obligation to protect nationals abroad is not sufficiently narrow to conclude with the status of consular assistance, since it may also include diplomatic protection.

Quigley supports the formalistic approach adopted by Article 36 of the VCCR, which is silent on the relation between the sending State and its nationals located abroad, hence providing for the discretion of the consular officers.¹²² However, Lee claims that the question falls under the general law of state responsibility¹²³ and that it is a link of nationality establishing mutual rights and obligations between a State and its nationals, implying the duty to protect abroad.¹²⁴ Yet, the bilateral relation of nationality does not itself provide for the obligation to protect the nationals abroad,¹²⁵ but only signifies the bond of allegiance to a particular State, which may entail the existence of reciprocal rights and duties. The indication of the right of the sending State to provide consular assistance can also be found in the practice of international tribunals. The IACHR, defining the scope of consular assistance that can be provided to the detained national, recognised the discretion of the sending State "should the sending State decide to provide its assistance."¹²⁶

¹²² John B Quigley, "Vienna Convention on Consular Relations: In Retrospect and into the Future," *Southern Illinois University Law Journal* 38, No. 1 (2013): 17 // https://law.siu.edu/_common/documents/law-journal/articles-2013

¹²³ Luke T. Lee, John B. Quigley, *supra* note 13, 136.

¹²⁴ *Ibid.*, par. 131.

¹²⁵ Edwin Borchard, *The Diplomatic Protection of Citizens Abroad: Or, the Law of International Claims* (Banks Law Publishing Company, 1915), 9.

¹²⁶ *Supra* note 6, 86.

Recourse may be given to the long-pending discussions on whether a State of nationality has the right or obligation to exercise diplomatic protection since consular assistance and diplomatic protection, while having substantial differences in their exercise and nature, are two main methods for the protection of the nationals abroad. The regime for the provision of diplomatic protection has been discussed, in particular, in the works of Vattel,¹²⁷ Fauchille,¹²⁸ Oppenheim,¹²⁹ and Borchard,¹³⁰ concluding with opposite arguments on the existence of the obligation. According to the ICJ, "the State must be viewed as the sole judge to decide whether its protection will be granted."¹³¹ Article 2 of the Draft Articles on Diplomatic Protection establishes the *right*, as opposed to the obligation, of a State to exercise diplomatic protection.¹³²

Substantive evidence of the changing nature of diplomatic protection was demonstrated by John R. Dugard, Special Rapporteur of the International Law Commission, in the First Report on Diplomatic Protection,¹³³ which may be summarised as the availability of an effective remedy for the violation of human rights committed by another State depends on the exercise of diplomatic protection. Amerasinghe notes the developing obligation of the State of nationality to consider the exercise of diplomatic protection upon the request of the individual.¹³⁴ Still, the classic view rests on the discretion of the State of nationality to exercise diplomatic protection.

The incompatibility of the existence of the obligation to provide consular assistance is also indicated by the practice of providing consular assistance to dual nationals. During the preparatory works of the VCCR, it was not contested that the principle of master nationality precludes the provision of consular assistance by the State of nationality when the detained national is located in the State of his other nationality.¹³⁵ The State practice follows the same approach. David Wei Dong, a US-Chinese dual national, was refused the provision of a US consular officer by Chinese authorities after his detention on charges of spying for Taiwan.¹³⁶ Zahra Kazemi, an Iranian-Canadian dual national, died in custody in Iran after being detained for taking photos outside of a prison in Teheran, but Iranian authorities refused to provide consular assistance at the request of her son.¹³⁷ Switzerland will provide consular assistance to the dual nationals

¹²⁷ de Vattel Emmerich, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, ed. Bela Kapossy and Richard Whatmore, Book II, Chapter VI (Indianapolis: Liberty Fund, 2008), 161.

¹²⁸ Paul Fauchille, *Traité de Droit International Public*, 1st ed. (Paris: Librairie Arthur Rousseau, 1922), 884.

¹²⁹ Lassa Oppenheim, *International Law: A Treatise*, 4th ed. (Longmans, Green, and Company, 1905), 1:375.

¹³⁰ Edwin Borchard, *supra* note 124, 29.

¹³¹ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, [1970], ICJ, Rep. 3, par. 45.

¹³² International Law Commission, *Draft Articles on Diplomatic Protection, Yearbook of the International Law Commission* Vol. II, pt 2, (2006): 26 // https://legal.un.org/ilc/publications/yearbooks/english/ilc_2006_v2_p2.pdf

¹³³ John Dugard, *First Report on Diplomatic Protection by John R. Dugard, Special Rapporteur* (New York: United Nations, 2000), 216 // https://legal.un.org/ilc/documentation/english/a_cn4_506.pdf

¹³⁴ Chittharanjan F. Amerasinghe, *Diplomatic Protection*, Oxford Monographs in International Law (Oxford University Press, 2008), 88.

¹³⁵ International Law Commission, *Yearbook of the International Law Commission, Vol. I: Summary Records of the Twelfth Session, 25 April–1 July 1960*, A/CN.4/SER.A/1960 (New York: United Nations, 1960), 123 // https://legal.un.org/ilc/publications/yearbooks/english/ilc_1960_v1.pdf

¹³⁶ Edward Cody, "Jailed American Spied For Taiwan, China Says," *Washington Post* (28 July 2004) // <https://www.washingtonpost.com/archive/politics/2004/07/29/>; Chris Buckley, "China Has Arrested American on Suspicion of Spying for Taiwan," *The New York Times* (19 August 2005), sec. U.S. // <https://www.nytimes.com/2005/08/19/world/asia/china-has-arrested-american-on-suspicion-of-spying-for-taiwan.html>

¹³⁷ Walter Arevalo-Ramirez, Robert Joseph Blaise Maclean, "Dual Nationality and International Law in Times of Globalization. Challenges and Opportunities for Consular Assistance and Diplomatic Protection in Recent Cases," *Revista de Direito Internacional* 17, No. 2 (2020): 290 // doi: 10.5102/rdi.v17i2.6451

detained in the State of their other nationality only if such State does not object.¹³⁸ Also, in the *Avena* judgment, the ICJ did not reject the argument of the US that there was no obligation to inform Mexico with respect to dual nationals.¹³⁹ While States still may request consular assistance for the nationals detained in their State of other nationality, the possibilities for the discharge of the obligation would be limited. Each State of nationality may assert its rights on behalf of the national.¹⁴⁰

Hence, state practice indicates the existence of no emerging obligation to provide consular assistance to nationals detained abroad.

4. CONSULAR ASSISTANCE IN PRACTICE

4.1 The Relation Between the Provisions of Article 36 of the VCCR

Article 36(1)(a) of the VCCR establishes the right of consular officers and their nationals to communicate and have mutual access in the territory of the receiving States. It enables the protection of the detained nationals, including “freedom from arbitrary arrest, due process in the determination of legal right and respect for human rights.”¹⁴¹ The drafting history of the Convention provides for a narrower scope of application. The Draft Articles on Consular Relations stipulate that the “nationals of the sending State shall be free to communicate with and to have access to the competent consulate.”¹⁴² The notion of “competent” was understood to mean the consular officer responsible for the area where the national of the sending State is located. However, the current wording contains no restriction on the territoriality of the location of the consular officer. This supports the broader interpretation of the scope of Article 36(1)(a) of the VCCR, applying not only to the cases of the detention of foreign nationals but also establishing the general rule of communication between the consular officers and their nationals in the receiving State. Article 36(1)(c) of the VCCR, granting to the rights to converse and correspond with a detained national, establishes the special rule of communication between the consular officer and the nationals in detention. To ensure these rights, Article 36(1)(b) establishes the obligations of the receiving State to enable the provision of consular assistance by the sending State to a detained national. The failure to fulfil the duties by the receiving State under Article 36(1)(b) of the VCCR shall lead to the violation of the object of protection, the right to consular assistance under Articles 36(1)(a) and Article 36(1)(c) of the VCCR.

However, the findings of the ICJ regarding the structure of Article 36(1) of the VCCR follow a different approach. In the *Jadhav* case, the Republic of India (hereinafter – India) claimed, in particular, the violation of “Article 36, particularly Article 36, paragraph 1(b)”¹⁴³ of the VCCR by the Islamic Republic of Pakistan (hereinafter – Pakistan) by failing to inform the detained national of the right to consular assistance without delay. The ICJ found that, since the notification was made some three weeks after the arrest of the detainee, Pakistan failed to notify India of the detention of its

¹³⁸ *Dual Citizenship*, accessed 10 January 2025 // <https://www.eda.admin.ch/countries/france/en/home/services/citizenship/doppelte-staatsbuergerschaft.html>

¹³⁹ *Supra* note 50, par. 34.

¹⁴⁰ Luke T. Lee, John B. Quigley, *supra* note 13, 126.

¹⁴¹ *Ibid.*, 138.

¹⁴² International Law Commission, *supra* note 21, 112.

¹⁴³ *Jadhav* (India v. Pakistan), [2017], Application Instituting Proceedings, 24, par. 60(2).

national without delay, and thus Pakistan breached Article 36(1)(b) of the VCCR.¹⁴⁴ The Court also found violations of 36(1)(a) and 36(1)(c).¹⁴⁵

The same logic is present in other cases relating to the interpretation of Article 36 of the VCCR. In the *LaGrand* judgment, the ICJ found a breach of Article 36(1)(b) of the VCCR.¹⁴⁶ In the *Avena* judgment, the ICJ found the violations of Article 36(1)(b), as well as Articles 36(1)(a) and (c) of the VCCR.¹⁴⁷ In the *Ahmadou Sadio Diallo* judgment, the ICJ established the infringement of Article 36(1)(b) of the VCCR.¹⁴⁸ Accordingly, the ICJ interpreted Articles 36(1)(a) and (c) together to establish the general right to consular communication and the special rule applicable in the cases of detention in the receiving State. Nevertheless, Article 36(1)(b) does not regulate the individual rights of detained nationals to communicate with the consular officer but establishes the duties of the receiving State to enable the provision of consular assistance. It follows that the violation of the obligations by the receiving State under Article 36(1)(b) does not lead to the violation of individual rights under Articles 36(1)(a) and (c). However, such an approach contradicts the ICJ's conclusion that "Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection."¹⁴⁹ The performance of the obligations by the receiving State under Article 36(1)(b) is a precondition for the fulfilment of the individual right to consular assistance. The sending State has no possibility of providing consular assistance to a national detained abroad if it does not possess the information on such detention.

Hence, Articles 36 (1)(a) and (c) of the VCCR establish the general right to consular assistance and specific rule applicable in the cases of detention in the receiving State, respectively, while Article 36(1)(b) provides for the obligations of the receiving State. Despite the conclusions of the ICJ, the interrelated regime of Article 36 of the VCCR conditions the provision of consular assistance upon the performance by the receiving State of its obligations.

4.2. The Performance of the Obligations of the Receiving State Without Delay

The aim of Article 36(1)(b) is to enable the provision of consular assistance by establishing the positive obligations of the receiving State. In case of the detention of a national of the sending State, the receiving State undertakes three separate obligations to inform the detained national of the right to receive consular assistance, notify the consular post of the detention of the national, and forward any communications addressed from the detainee to the consular officer.

The knowledge of the detained national of the right to consular assistance and the consular officer of the fact of detention are prerequisites for the provision of consular assistance. Article 36 of the VCCR prioritises informing the detained national since the notification to the consular post may be subject to the waiver by the detainee. The obligation arises "once it is realised that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national."¹⁵⁰ It is subject to initiation by the detaining authorities¹⁵¹ and applicable in any form of detention in the

¹⁴⁴ *Jadhav* (India v. Pakistan), [2019], ICJ, Rep. 2019, 449, par. 113.

¹⁴⁵ *Ibid.*, par. 120.

¹⁴⁶ *Supra* note 47, par. 128.

¹⁴⁷ *Supra* note 50, par. 153.

¹⁴⁸ *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), [2010], ICJ, Rep. 2010, par. 165.

¹⁴⁹ *Supra* note 47, par. 30.

¹⁵⁰ *Supra* note 50, par. 63.

¹⁵¹ *Supra* note 147, par. 95.

receiving State.¹⁵² Article 36 of the VCCR operates the presumption of nationality of the detainee, the standard of reasonability, and not the established fact. Although it is the bond of nationality that enables the provision of consular assistance, the nationality of the foreigner will only be proven once it is admitted by the representatives of the sending state. Judge Sebutinde, in her declaration to the *Jadhav* judgment, defined that “while a passport may provide evidence that a person has a particular nationality, it is not a precondition to having such nationality. The determination of an individual’s nationality does not turn on whether that individual has the passport of a particular State.”¹⁵³ The possession of a passport by the detainee satisfies the standard of reasonability, enabling the receiving State to discharge its obligations, but not enough to invoke its responsibility. In the *Avena* judgment, Mexico performed its obligation to prove the nationality of detained persons by the production of birth certificates and declarations of nationality.¹⁵⁴

The obligation to inform the detainee of the right to receive consular assistance shall be performed by the detaining authorities without delay. The broad formulation leaves the timeframe for such notification ambiguous. In principle, the temporal criterion is not subject to narrow interpretation and is designed to allow some margin of appreciation for the purpose of conducting a criminal investigation.¹⁵⁵ Therefore, it should not be understood as requiring immediate notification upon arrest and before interrogation.¹⁵⁶ The ICJ, in the *Avena* judgment, explained that “the duty upon the detaining authorities to give the Article 36, paragraph 1 (b), information to the individual arises once it is realised that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national. Precisely when this may occur will vary with circumstances.”¹⁵⁷ The Court found that the US did not breach its obligation to inform as the detainees affirmatively claimed to be nationals of the US during the arrest, and no indication of foreign nationality existed.¹⁵⁸ However, the ICJ found a violation of the duty to inform without delay with regard to one of the detainees. The defendant was informed of his consular right only 40 hours after the arrest despite the fact that there were indications of his Mexican nationality already at the time of the arrest.¹⁵⁹

If a detained foreign national did not waive the right to consular assistance or requested the notification of the consular post of his nationality, the detaining authority undertakes the duty to notify such authority without delay. Neither the text of Article 36 of the VCCR nor the preparatory works suggest a different interpretation of the temporal criterion without delay in the obligations to inform the detainee of the right to consular assistance and notify the consular post of the detention of the national.¹⁶⁰ The choice of the consular post to be notified is based on the principle of efficiency and shall be performed according to the consular district within which the foreign national was detained. A consular district is an area assigned to a consular post by the sending State with the consent of the receiving State.¹⁶¹ However, the performance of the functions of

¹⁵² *Ibid.*, par. 91.

¹⁵³ *Jadhav* (India v. Pakistan), [2019], ICJ, Rep. 2019, Declaration of Judge Sebutinde, par. 10.

¹⁵⁴ *Supra* note 50, par. 57.

¹⁵⁵ International Law Commission, *supra* note 21, 113.

¹⁵⁶ *Supra* note 50, par. 85.

¹⁵⁷ *Ibid.*, par. 63.

¹⁵⁸ *Ibid.*, paras. 66, 74.

¹⁵⁹ *Ibid.*, par. 89.

¹⁶⁰ *Supra* note 143, par. 113.

¹⁶¹ *Supra* note 45, Article 4.

the consular officers outside of their consular districts raises concern about the compatibility with Article 6 of the VCCR, which establishes that a consular officer has the right to perform their functions outside of the assigned district only in special circumstances and with the consent of the receiving State. The VCCR is silent on the definition of special circumstances. Moreover, the current formulation of Article 6 of the VCCR was not the primary intention of the ILC. In the Draft Article on Consular Relations, Article 6 regulated the exercise of the consular function by consular posts from the receiving State in third States.¹⁶² The current formulation of Article 6 of the VCCR was proposed by Japan during the UN Conference on Consular Relations,¹⁶³ and subsequently adopted to absorb the initial intention and provide the possibility to exercise the consular functions in the cases of a shipwreck or an air crash.¹⁶⁴ Neither drafts were considered to be connected with Article 36 of the VCCR, which may lead to a delay in the provision of consular services in the situation of the location of the detainee outside of the consular district. However, the doctrine supports the approach that Article 36 of the VCCR prevails over the limits established by Article 6 of the VCCR and provides for the obligation of the receiving State to grant consent for the performance of the consular functions in cases where the foreign national is detained outside of the consular districts of the sending State.¹⁶⁵

Under the same conditions, Article 36(1)(b) establishes the obligation of the receiving State to transfer any communications by the national addressed to the consular post while in detention. The obligation is not interrupted by the provision of consular assistance and shall be performed during the location of the foreign national in any form of detention in the receiving State.

Hence, the criterion without delay provides for the performance of the obligations of the receiving State once there are reasonable grounds to think that a person is a foreign national and the stage of investigation allows for the performance of the notification.

4.3. Exceptions to the Application of Article 36 of the VCCR

The duties to notify the consular post of a detainee and transfer the communication may be subject to the detainee's personal waiver. The personal choice is the only ground to limit the provision of consular assistance. In the *Jadhav* case, Pakistan argued that Article 36 of the VCCR is not applicable to the cases of espionage based on the preparatory works and that such exception is granted under customary international law, which is applicable in light of the Preamble of the VCCR that "the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention."¹⁶⁶

Dealing with the first contention, the ICJ analysed preparatory works, the text of Article 36 of the VCCR in the ordinary meaning given to its terms and concluded that while the crimes against national security were analysed to define the appropriate wording of the temporal criterion, nothing in the text of the VCCR or the preparatory

¹⁶² United Nations, *United Nations Conference on Consular Relations, Vienna, 4 March – 22 April 1963: Official Records, Volume II: Annexes, Vienna Convention on Consular Relations, Final Act, Optional Protocols, Resolutions* (New York: United Nations, 1963), A/CONF.25/16/Add.1, 9 // https://legal.un.org/diplomaticconferences/1963_cons_relations

¹⁶³ *Ibid.*, 104.

¹⁶⁴ United Nations, *supra* note 3, 112.

¹⁶⁵ Luke T. Lee, John B. Quigley, *supra* note 13, 181.

¹⁶⁶ *Supra* note 143, par. 87.

works suggests the non-application to the cases of espionage.¹⁶⁷ With regard to the second contention, the ICJ found that Article 36 of the VCCR regulates the questions of consular access to and communication with nationals of the sending State and is silent on the exceptions to the application.¹⁶⁸ Hence, the personal choice of the detainee is the only ground to limit the application of Article 36 of the VCCR.

Article 36 of the VCCR establishes the express opposition of the detainee as a valid ground for non-notification of the sending State. The IACHR also noted that the waiver shall be express.¹⁶⁹ However, the full scope of the procedural requirements to waive the right to consular assistance is not defined and will be established according to the standards of the invoked human rights treaty. Article 6 of the ECHR requires the waiver of any procedural right to be voluntary, informed and not contrary to any public interest.¹⁷⁰ The ECtHR also considered the presence of the legal representative for the validity of the waiver and its performance without compulsion.¹⁷¹ In a similar manner, the International Criminal Court found the waiver of the right to silence valid, performed with the presence of a representative.¹⁷² The International African Commission on Human and Peoples' Rights also requires the waiver to be in writing.¹⁷³

During the stage of detention, Article 36 of the VCCR leaves the criteria for the waiver of the right to consular assistance to the national law of the receiving State. It does not require the presence of the consular officer of the sending State during the exercise of the waiver for the provision of consular services. This raises the question of the possibilities of abuse by the detaining authorities and the effectiveness of due process over the detainee without knowledge of the local language. In case of submission of the application against the receiving State, it would bear the burden of proof over the valid exercise of the waiver to consular assistance. In addition, the requirement for the waiver of consular assistance will be assessed in accordance with the requirements of the invoked human rights treaty.

4.4. Application of the National Law of the Receiving State

The aim of Article 36(2) is to balance the sovereign rights of the receiving State to establish the procedure in which the criminal jurisdiction shall be exercised and ensure the effectiveness of the performance of the rights of the detainee and consular officer under Article 36(1) of the VCCR.

Article 36(2) of the VCCR establishes that the rights afforded to the detainee and consular officer of the sending State in Article 36(1) of the VCCR shall be performed in accordance with the laws and regulations of the receiving State. However, such laws and regulations must enable the full effect of the purpose of the right to consular assistance. The interpretation of the provision provides for the obligation of the receiving State to harmonise procedural laws with the requirements of Article 36(1) of the VCCR and prevent the establishment of national laws which would pose the impossibility or cause unreasonable delay in the performance of rights under Article 36(1) of the VCCR. During the negotiation on Article 36(2) of the VCCR, the central question was the correlation

¹⁶⁷ *Supra* note 143, 86.

¹⁶⁸ *Supra* note, 143, paras. 75, 86.

¹⁶⁹ *Supra* note 6, 89.

¹⁷⁰ *Pfeifer and Plankl v. Austria*, 25 February 1992, § 37, Series A No. 227; *Scoppola v. Italy* (No. 2) [GC], No. 10249/03, § 135, 17 September 2009; *Hermi v. Italy* [GC], No. 18114/02, § 73, ECHR 2006-XII.

¹⁷¹ *Pishchalnikov v. Russia*, No. 7025/04, § 77, 24 September 2009.

¹⁷² Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons, *The Prosecutor v. German Katanga*, ICC-01/04-01/07-3319, par. 52.

¹⁷³ African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (Banjul: African Union, 2003), M(2)(f).

between the national law of the receiving State and the rights under Article 36(1) of the VCCR. The amendments proposed by the UK to change the wording, aiming to support the prevailing nature of international law, were successfully adopted.¹⁷⁴

The practical example of the breach of Article 36(2) of the VCCR is the application of the procedural default rule under US national law, which led to the *LaGrand* and *Avena* judgments and *Breard* Application to the ICJ by Paraguay. The aim of the procedural default rule is to raise claims promptly, advance the finality of judgments, and preclude habeas petitions on the basis of "treaties of the United States if the claim was not raised in state proceedings."¹⁷⁵ If the failure to notify the detainee of the right to consular assistance as the cause of the violation of the right to a fair trial was not raised in a lower national court, such a ground will not be accepted as the basis of the appeal to higher courts. The ICJ, in the *LaGrand* judgment, found that the procedural default rule prevented attaching any legal significance to the impossibility of Germany retaining representation for the detainees.¹⁷⁶ However, it also noted that it was not the procedural default rule but the manner in which it was applied that violated Article 36(1) of the VCCR.¹⁷⁷ By this, the ICJ recognised that the application of the procedural default rule does not necessarily lead to the violation of the right to consular assistance under Article 36(1) of the VCCR. Such situations may occur when the challenge of the judgment of the court of first instance was denied on the basis of the procedural default rule, but the authorities of the receiving State permitted the access of the consular officer of the sending State to exercise the rights under Article 36(1) of the VCCR. However, if the receiving State has not performed its obligations under Article 36(1)(b) of the VCCR until the moment of the submission of the challenge on the judgment of the lower court, the time period would most probably not satisfy the criterion of without delay.

CONCLUSIONS

The primary purpose of consular assistance was not connected to the need to protect the sending States' nationals in the territory of the receiving States. It emerged to address the need to facilitate communication between representatives of different cultures for the benefit of international trade. The institute was not tied to a specific region and existed, despite substantial differences, across different civilisations. The function of the protection of rights appeared only in the 18th century with the dissemination of treaties incorporating the clause of extraterritoriality.

The consular assistance is not a human right since it provides no autonomous standard of treatment that would differ from the protection afforded by due process. The inherent foreign vulnerability of a detained national may be proportionally compensated by the measures under national legislation of the receiving State, such as, in particular, the provision of translation services.

The inconsistency of a State practice confirms the existence of no State's obligation to provide consular assistance to nationals detained abroad. The provision of consular assistance is at the discretion of the receiving State when a dual national is detained in the State of one of his or her nationalities. The establishment of such an

¹⁷⁴ United Nations, *supra* note 3, 348.

¹⁷⁵ *Sanchez-Llamas v. Oregon*, 538 U.S. 331 (2006), 35.

¹⁷⁶ *Supra* note, 47, 35.

¹⁷⁷ *Supra* note, 47, 81

obligation would be contrary to the characterisation of the exercise of diplomatic protection as a right of a State.

Article 36(1)(a) of the VCCR establishes the reciprocal right of consular officers and nationals located abroad to communicate. Article 36(1)(b) provides for the duties to inform the detained national of the right to receive consular assistance, notify the consular post of the foreigner's detention and transfer any communication from the national to the consular post without delay. The temporal criterion does not require the performance of the duties immediately after arrest and before the interrogation, but allows for a reasonable delay. The performance of all the duties of the receiving State and consular rights of the sending State is conditional upon the right of the detainee to waive consular assistance. The law of the receiving State shall give full effect to the rights under Article 36(1) of the VCCR.

BIBLIOGRAPHY

Books

1. Amerasinghe, Chittaranjan F. *Diplomatic Protection*. Oxford Monographs in International Law. Oxford University Press, 2008 // <https://doi.org/10.1093/acprof:oso/9780199212385.001.0001>
2. Barber, Nicholas W. *The Principles of Constitutionalism*. First Edition. Oxford, United Kingdom: Oxford University Press, 2018.
3. Borchard, Edwin. *The Diplomatic Protection of Citizens Abroad: Or, the Law of International Claims*. New York: Banks Law Publishing Company, 1915.
4. Curtin, Philip D. *Cross-Cultural Trade in World History*. Studies in Comparative World History. Cambridge: Cambridge University Press, 1984. <https://doi.org/10.1017/CBO9780511661198>.
5. Emmerich, de Vattel. *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*. Edited by Bela Kapossy and Richard Whatmore. Indianapolis: Liberty Fund, 2008.
6. Fauchille, Paul. *Traité de Droit International Public*. 1st ed. Paris: Librairie Arthur Rousseau, 1922.
7. Fishel, Wesley R. *The End of Extraterritoriality in China*. Los Angeles: University of California Press, 1952.
8. Lee, Luke T., John B. Quigley. *Consular Law and Practice*. 3rd ed. Oxford University Press, 2008.
9. Leira, Halvard, Iver B. Neumann. "Judges, Merchants and Envoys; The Growth and Development of the Consular Institution." In *International Diplomacy*. Edited by Halvard Leira and Iver B. Neumann. Los Angeles: SAGE, 2013, I:113–32.
10. Mégret, Frédéric. "From a Human Right to Invoke Consular Assistance in the Host State to a Human Right to Claim Diplomatic Protection from One's State of Nationality?" In *The Cambridge Handbook of New Human Rights*, edited by Andreas Von Arnould, Kerstin von der Decken, and Mart Susi, 1st ed. Cambridge University Press, 2020, 453–60 // <https://doi.org/10.1017/9781108676106.036>
11. Min Ch'ien T. Z. Tyau. *The Legal Obligations Arising Out of Treaty Relations Between China and Other States*. University of London, 1917.

12. Neumann, Iver B. *At Home with the Diplomats: Inside a European Foreign Ministry*. Ithaca: Cornell University Press, 2012.
13. _____. *Diplomatic Tenses: A Social Evolutionary Perspective on Diplomacy*. Manchester: Manchester University Press, 2020.
14. Oppenheim, Lassa F. *International Law, a Treatise*. Edited by Hersch Lauterpacht. 8th ed. Vol. 1. London: Longman, 1955.
15. _____. *International Law: A Treatise*. 4th ed. Vol. 1. London, New York and Bombay: Longmans, Green, and Company, 1905.
16. Peters, Anne. *Beyond Human Rights: The Legal Status of the Individual in International Law*. Translated by Jonathan Huston. 1st ed. Cambridge University Press, 2016.
17. Sen, Biswanath. *A Diplomat's Handbook of International Law and Practice*. The Hague: Martinus Nijhoff, 1965.
18. Stewart, David P. "The Emergent Human Right to Consular Notification, Access and Assistance." In *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*. Edited by Andreas von Arnould, Kerstin von der Decken, and Mart Susi. Cambridge: Cambridge University Press, 2020, 439–52 // <https://doi.org/10.1017/9781108676106.035>
19. von Arnould, Andreas, et al. (eds.). *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*. 1st ed. Cambridge University Press, 2020 // <https://doi.org/10.1017/9781108676106>
20. von der Decken, Kerstin, Nikolaus Koch. "Recognition of New Human Rights: Phases, Techniques and the Approach of "Differentiated Traditionalism". In *The Cambridge Handbook of New Human Rights, edited by Andreas Von Arnould, Kerstin von der Decken, and Mart Susi*. 1st ed. Cambridge University Press, 2020, 7–20 // <https://doi.org/10.1017/9781108676106.002>

Journal articles

1. Arevalo-Ramirez, Walter, Robert Joseph Blaise Maclean. "Dual Nationality and International Law in Times of Globalization. Challenges and Opportunities for Consular Assistance and Diplomatic Protection in Recent Cases." *Revista de Direito Internacional* 17, No. 2 (2020): 289–307.
2. Bratza, Nicolas. "Living Instrument or Dead Letter-the Future of the "European Convention on Human Rights". *European Human Rights Law Review* No. 2 (2014): 116–28.
3. Cerna, Christina M. "The Right to Consular Notification as a Human Right." *Suffolk Transnational Law Review* 31, No. 2 (2008).
4. Cindy Galway Buys. "Reflections on the 50th Anniversary of the Vienna Convention on Consular Relations." *Southern Illinois University Law Journal* 38 (2013): 57–72.
5. Ganczer, Mónika. "The Right to a Nationality as a Human Right?" *Hungarian Yearbook of International Law and European Law* 2, No. 1 (2014): 15–33 // <https://doi.org/10.5553/HYIEL/266627012014002001002>
6. Gilbert, R. L. "The Origin and History of the Peregrine Praetorship, 242–166 B.C.I." *Res Judicatae* 7 (1941): 50–59.
7. Isufi, Nail. "The Legal Nature of Consuls Immunity." *Juridica* 16, No. 1 (2020): 89–101.

8. Johnson, Emory R. "The Early History of the United States Consular Service. 1776–1792." *Political Science Quarterly* 13, No. 1 (1898): 19–40 // <https://doi.org/10.2307/2140002>
9. Mallory, Conall. "Abolitionists at Home and Abroad: A Right to Consular Assistance and the Death Penalty." *Melbourne Journal of International Law* 17, No. 1 (2016): 1–32.
10. Pennell, Richard. "Accommodation between European and Islamic Law in the Western Mediterranean in the Early Nineteenth Century." *British Journal of Middle Eastern Studies* 21, No. 2 (1994): 159–89.
11. Petit de Gabriel, Eulalia W. "Intertwining Consular and Human Right Law: A European Contribution to the Humanisation of International Law." *Espaço Jurídico Journal of Law* 22, No. 1 (2021): 11–54 // <https://doi.org/10.18593/ejil.27700>.
12. Ribeiro C. Marques, Rodolfo. "The Right to Access Consular Assistance and Protection and Its Relevance to the Architecture of a Safe, Orderly, and Regular Migration." *Interventions* 23, No. 2 (2021): 313–25 // <https://doi.org/10.1080/1369801X.2020.1854104>
13. Quigley, John B. "Diplomatic and Consular Law in the Age of Empire." *SSRN Electronic Journal* (2023) // <https://doi.org/10.2139/ssrn.4507602>
14. _____. "Vienna Convention on Consular Relations: In Retrospect and into the Future." *Southern Illinois University Law Journal* 38, No. 1 (2013): 1–25.
15. Veneziano, Sabina. "The Right to Consular Notification: The Cultural Bridge to a Foreign National's Due Process Rights." *Georgetown Journal of International Law* 49 (2018): 503–50.

LEGAL DOCUMENTS

1. *IML Information Note on Consular Assistance*. International Organization for Migration, 2021.
2. *Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions*. United Nations General Assembly, 2019.
3. *Setting International Standards in the Field of Human Rights*. New York: United Nations General Assembly, 1987.
4. "Australian Department of Foreign Affairs and Trade, Arrested or in Jail: Consular Visits." [smartrtraveller.gov.au](https://www.smartrtraveller.gov.au) // <https://www.aph.gov.au/DocumentStore.ashx?id=c5a746fa-df63-4c71-b0f0-0f12a5076cd7>
5. *Consular Manual for Honorary Consulate of the Czech Republic*. 2015, 3. Consular Functions URL // https://mzv.gov.cz/file/3490131/Manual_for_HC.pdf
6. Dugard, John. *First Report on Diplomatic Protection: Addendum / by John R. Dugard, Special Rapporteur*. New York: United Nations, 2000 // <https://digitallibrary.un.org/record/414523>
7. *Federal Act on the Performance of Consular Duties (Consular Act – KonsG)*. Federal Law Gazette I (No. 40/2019, 13 February 2019, Article 3(2) // <https://www.ris.bka.gv.at/GeltendeFassung.wxe>
8. *Foreign Service Act (Lov om utenrikstjenesten)*. Norsk Lovtidend (13 February 2015, Section 1) // <https://lovdata.no/dokument/NLE/lov/2015-02-13-9>
9. *Havana Convention on Consular Agents*. TS (No. 843, 20 February 1928, Article 1) // <https://history.state.gov/historicaldocuments/frus1928v01/d366>

10. "International Law Commission, Draft Articles on Consular Relations, with commentaries." *Yearbook of the International Law Commission* Vol. II (1961) // https://legal.un.org/ilc/texts/instruments/english/commentaries/9_2_1961.pdf
11. "International Law Commission, Draft Articles on Diplomatic Protection." *Yearbook of the International Law Commission* Vol. I II, pt 2 (2006) // https://legal.un.org/ilc/publications/yearbooks/english/ilc_2006_v2_p2.pdf
12. *International Law Commission, Draft Conclusion on Identification of Customary International Law, with Commentaries*. Vol. II, pt 2 (2018): 141 // https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf
13. "International Law Commission." *Yearbook of the International Law Commission, Vol. I: Summary Records of the Twelfth Session, 25 April – 1 July 1960*. A/CN.4/SER.A/1960. New York: United Nations, 1960 // https://legal.un.org/ilc/publications/yearbooks/english/ilc_1960_v1.pdf
14. *Law 2/2014 on the Action and Foreign Service of the State*. Official State Gazette (No. 74, 25 March 2014, Article 40) // <https://www.boe.es/buscar/act.php?id=BOE-A-2014-3248>
15. *Law No. 37 of 1999 on Foreign Relations*. State Gazette of the Republic of Indonesia (No. 68, 14 September 1999, Article 19) // <https://data.santoslolowang.com>
16. *Law of Greece No. 4781 on the Organization and Functioning of the Ministry of Foreign Affairs. Council of Hellenes Abroad, Regulation of Issues of International Development Cooperation and Humanitarian Aid and Other Provisions*. Government Gazette (No. 31, 28 February 2021, Article 299) // <https://www.mfa.gr/archive/1/docs>
17. *Law of Mongolia on Citizenship*. (5 June 1995): Article 3(4) // <https://legalinfo.mn/en/edtl>
18. *Law on Consular Protection* (ZKZaš). Official Gazette of the Republic of Slovenia (No. 30/18, 17 April 2018, Article 4(1) // <https://pisrs.si/pregledPredpisa?id=ZAKO7694>
19. Mantouvalou, Katerina. *Consular Assistance and Trial Attendance: A Comparative Examination of the American, Australian, British, Dutch and German Ministries of Foreign Affairs*. London: Fair Trial International, 2009.
20. "Ministry of Foreign Affairs of Brazil, Subsecretariat-General for Brazilian Communities Abroad. Manual de Serviço Consular e Jurídico." [Manual of the Consular and Legal Service] § 3.1.24 (2010) // https://conhecimento.fgv.br/sites/default/files/concursos/mre/MSJC_completo-1.pdf
21. *R (Abassi and another) v. Secretary of State for Foreign and Commonwealth Affairs*. [2002] EWCA (Civ) 1598, 87–94 // <https://www.oxfordlawtrove.com/display/10.1093/he/9780191995729.001.0001/he-9780191995729-chapter-44>
22. *The Accord between Bolivia, Colombia, Ecuador, Peru, and Venezuela relative to the functions of the respective consuls in each of the contracting republics*. *BFST* Vol. 107 (18 July 1911): 601 // <https://babel.hathitrust.org/cgi/pt?id=uiug.30112074697969&seq=665>
23. *The Constitution of Bosnia and Herzegovina*. Official Gazette of Bosnia and Herzegovina (No. 25/09, 14 December 1995, Article 7(e) // <https://codices.coe.int/codices/documents/constitution>
24. *The Constitution of Georgia*. Official Gazette of Georgia (No. 31, 24 August 1995, Article 32(1) // <https://codices.coe.int/codices/documents/constitution>

25. *The Constitution of Montenegro*. Official Gazette of Montenegro (No. 1/2007, 19 October 2007, Article 12) // <https://codices.coe.int/codices/documents/constitution/5375375A-83ED-4E8A-8E0A-1BBA2AA41F27#a5375375a-83ed-4e8a-8e0a-1bba2aa41f27>
26. *The Constitution of Romania*. Monitorul Oficial (No. 233, 21 November 1991, Article 17) // <https://codices.coe.int/codices/documents/constitution>
27. *The Constitution of the Democratic Republic of the Congo*. Journal Officiel (No. 5, 18 February 2006, Article 50) // <https://codices.coe.int/codices/documents/constitution>
28. *The Constitution of the Kingdom of Morocco*. Official Bulletin (No. 5964 bis, 1 July 2011, Article 16) // <https://codices.coe.int/codices/documents/constitution>
29. *The Constitution of the People's Democratic Republic of Algeria*. Journal Officiel (No. 71, 1 November 2020, Article 29) // <https://codices.coe.int/codices/documents/constitution>.
30. *The Constitution of the Plurinational State of Bolivia*. Gaceta Oficial (No. 3, 7 February 2009, Article 218(2)) // <https://codices.coe.int/codices/documents/constitution>
31. *The Constitution of the Portuguese Republic*. Diário da República (No. 86, 2 April 1976, Article 14) // <https://codices.coe.int/codices/documents/constitution>
32. *The Constitution of the Republic of Albania*. Fletorja Zyrtare (No. 28, 21 October 1998, Article 8(1)) // <https://codices.coe.int/codices/documents/constitution>
33. *The Constitution of the Republic of Angola*. Diário da República (No. 4, 21 January 2010, Article 22(2)) // <https://codices.coe.int/codices/documents/constitution>
34. *The Constitution of the Republic of Armenia*. Official Gazette (No. 8, 5 July 1995, Article 47(8)) // <https://codices.coe.int/codices/documents/constitution>
35. *The Constitution of the Republic of Azerbaijan*. Official Gazette (No. [issue not publicly specified], 12 November 1995, Article 53(3)) // <https://codices.coe.int/codices/documents/constitution>
36. *The Constitution of the Republic of Belarus*. Official Gazette (No. [issue not publicly specified], 15 March 1994, Article 10) // <https://codices.coe.int/codices/documents/constitution>
37. *The Constitution of the Republic of Benin*. (11 December 1990, Article 38) // <https://codices.coe.int/codices/documents/constitution>
38. *The Constitution of the Republic of Bulgaria*. Durzhaven Vestnik (12 July 1991, Article 25(5)) // <https://codices.coe.int/codices/documents/constitution>
39. *The Constitution of the Republic of Colombia*. Constitutional Gazette (No. 114, 6 July 1991, Article 282(1)) // <https://codices.coe.int/codices/documents/constitution>
40. *The Constitution of the Republic of Croatia*. Narodne Novine (No. 56, 22 December 1990, Article 10) // <https://codices.coe.int/codices/documents/constitution>
41. *The Constitution of the Republic of Djibouti*. Journal Officiel (No. 18, 4 September 1992, Article 19) // <https://codices.coe.int/codices/documents/constitution>
42. *The Constitution of the Republic of Ecuador*. Official Register (No. 449, 20 October 2008, Article 28) // <https://codices.coe.int/codices/documents/constitution>
43. *The Constitution of the Republic of Estonia*. RT (26, 349, 28 June 1992, Article 13) // <https://codices.coe.int/codices/documents/constitution>
44. *The Constitution of the Republic of Kazakhstan*. Official Gazette (No. 15, 30 August 1995, Article 11(2)) // <https://codices.coe.int/codices/documents/constitution>

45. *The Constitution of the Republic of Korea*. 17 July 1948, Article 2(2) // URL: <https://codices.coe.int/codices/documents/constitution>
46. *The Constitution of the Republic of Kosovo*. Official Gazette (No. 25, 15 June 2008, Article 15) // <https://codices.coe.int/codices/documents/constitution>
47. *The Constitution of the Republic of Latvia*. Valdības Vēstnesis (No. 141, 15 February 1922, Article 98) // <https://codices.coe.int/codices/documents/constitution>
48. *The Constitution of the Republic of Lithuania*. Lietuvos Aidas (No. 220-2, 25 October 1992, Article 13) // <https://codices.coe.int/codices/documents/constitution>
49. *The Constitution of the Republic of Moldova*. Monitorul Oficial (No. 1, 29 July 1994, Article 18(1) // <https://codices.coe.int/codices/documents/constitution>
50. *The Constitution of the Republic of Nicaragua and Reforms Thereunto*. La Gaceta (No. 5, 19 November 1986, Article 28) // <https://codices.coe.int/codices/documents/constitution>
51. *The Constitution of the Republic of Niger*. Journal Officiel (No. 25, 25 November 2010, Article 42) // <https://codices.coe.int/codices/documents/constitution>
52. *The Constitution of the Republic of North Macedonia*. Official Gazette (No. 52/1991, 17 November 1991, Article 49) // <https://codices.coe.int/codices/documents/constitution>
53. *The Constitution of the Republic of Poland*. Dziennik Ustaw (No. 79, 483, 2 April 1997, Article 36) // sejm.gov.pl/prawo/konst/angielski/kon1.htm
54. *The Constitution of the Republic of Serbia*. Official Gazette (No. 98/2006, 8 November 2006, Article 13) // URL: <https://codices.coe.int/codices/documents/constitution>
55. *The Constitution of the Republic of Tajikistan*. Official Gazette (No. 23, 6 November 1994, Article 16) // URL: <https://codices.coe.int/codices/documents/constitution>
56. *The Constitution of the Republic of the Congo*. Journal Officiel (No. 42, 25 October 2015, Article 10) // https://www.constituteproject.org/constitution/Congo_2015
57. *The Constitution of the Republic of the Philippines*. Official Gazette (2 February 1987, Section 18(3) // <https://codices.coe.int/codices/documents/constitution>
58. *The Constitution of the Republic of Uzbekistan*. Official Gazette (No. 12, 8 December 1992, Article 23) // <https://codices.coe.int/codices/documents/constitution>
59. *The Constitution of the Republic of Zimbabwe Amendment*. Zimbabwe Government Gazette (No. 38, (No. 20) Act, 14 May 2013, Article 35(3) // <https://codices.coe.int/codices/documents/constitution>
60. *The Constitution of the Russian Federation*. (12 December 1993, Article 61(2) // <https://codices.coe.int/codices/documents/constitution>
61. *The Constitution of Ukraine*. Відомості Верховної Ради України (No. 30, 141, 28 June 1996, Article 25) // <https://codices.coe.int/codices/documents/constitution>
62. *The Federal Constitutional Court of the Federal Republic of Germany*. Decision of 7 July 1975, BVerfGE 40, 141 1 BvR 274/72 // <https://dejure.org/dienste/vernetzung/rechtsprechung>
63. *The Fundamental Law of Hungary*. (25 April 2011, Article 27(2) // <https://www.refworld.org/legal/legislation/natlegbod/2011/en/100935>.
64. *The Regulation of Mexican Foreign Service Act*. Diario Oficial de la Federación (23 August 2002, Article 68) // https://www.dof.gob.mx/nota_detalle.php?codigo=5481136&fecha=28/04/2017#gsc.tab=0

65. *The Republic of Finland provides consular assistance to its nationals as a matter of policy. 'In Distress Abroad', Finland abroad: United Kingdom.* Accessed 10 January 2025 // <https://finlandabroad.fi/web/gbr/in-distress-abroad>.
66. *The Treaty of Tientsin between the Queen of Great Britain and the Emperor of China.* (26 June 1858) // <https://worldjpn.net/documents/texts/pw/18580626.T1E.html>
67. United Nations. *United Nations Conference on Consular Relations, Vienna, 4 March–22 April 1963: Official Records, Volume I: Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees.* New York: United Nations, 1963, A/CONF.25/16 // https://legal.un.org/diplomaticconferences/1963_cons_relations/docs/english/vol_1.pdf
68. United Nations. *United Nations Conference on Consular Relations, Vienna, 4 March–22 April 1963: Official Records, Volume II: Annexes, Vienna Convention on Consular Relations, Final Act, Optional Protocols, Resolutions.* New York: United Nations, 1963, A/CONF.25/16/Add.1 // https://legal.un.org/diplomaticconferences/1963_cons_relations
69. *Vienna Convention on Consular Relations.* 596 United Nations Treaty Series 261 (24 April 1963).
70. Zourek, Jaroslav. "Consular Intercourse and Immunities: Report / by Jaroslav Zourek, Special Rapporteur." *Report of the Special Rapporteur of the International Law Commission Report on Consular Intercourse and Immunities.* New York: United Nations, 1957.

CASES

1. African Commission on Human and Peoples' Rights. *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.* Banjul: African Union, 2003.
2. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, [2010], ICJ, Rep. 2010.
3. *Armand Guehi v. United Republic of Tanzania.* African Court on Human and Peoples' Right, 2018, No. 001/2015, 7 // <https://sciendo-parsed-data-feed.s3.eu-central-1.amazonaws.com>
4. *Avena and Other Mexican Nationals (Mexico v United States of America).* [2004], ICJ, Rep. 12.
5. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain).* [1970], ICJ, Rep. 3, par. 45.
6. *Decision on the Implementation of regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons, The Prosecutor v. German Katanga.* ICC-01/04-01/07-3319.
7. *Hermi v. Italy [GC]*, No. 18114/02, ECHR 2006-XII.
8. *Jadhav (India v. Pakistan).* [2017], Application Instituting Proceedings, par. 24.
9. *LaGrand (Germany v. United States of America).* [2001], ICJ, Rep. 466.
10. *Pfeifer and Plankl v. Austria.* 25 February 1992, Series A No. 227.
11. *Pishchalnikov v. Russia.* No. 7025/04, 24 September 2009.
12. *R (Abassi and another) v. Secretary of State for Foreign and Commonwealth Affairs.* [2002] EWCA (Civ) 1598 // <https://www.oxfordlawtrove.com/display/10.1093/he/9780191995729.001.0001/he-9780191995729-chapter-44>

13. *Sanchez-Llamas v. Oregon*. 538 U.S. 331, 2006.
14. *Scoppola v. Italy (no. 2) [GC]*. No. 10249/03, 17 September 2009.
15. *The Federal Constitutional Court of the Federal Republic of Germany*. Decision of 7 July 1975, BVerfGE 40, 141 1 BvR 274/72 // <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BVerfG&Datum=07.07.1975&Aktenzeichen=1%20BvR%20274/72>
16. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Inter-American Court of Human Rights. 1999, OC-16/99, 30 // https://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf

WEBSITES

1. *Dual Citizenship*. Accessed 10 January 2025 // <https://www.eda.admin.ch/countries/france/en/home/services/citizenship/doppelte-staatsbuergerschaft.html>
2. "Australian Department of Foreign Affairs and Trade, Arrested or in Jail: Consular Visits." *smarttraveller.gov.au* // <https://www.aph.gov.au/DocumentStore.ashx?id=c5a746fa-df63-4c71-b0f0-0f12a5076cd7>
3. Buckley, Chris. "China Has Arrested American on Suspicion of Spying for Taiwan." *The New York Times* 19 (August 2005): sec. U.S. // <https://www.nytimes.com/2005/08/19/world/asia/china-has-arrested-american-on-suspicion-of-spying-for-taiwan.html>
4. Cody, Edward. "Jailed American Spied for Taiwan, China Says." *Washington Post* 28 (July 2004) // <https://www.washingtonpost.com/archive/politics/2004/07/29/jailed-american-spied-for-taiwan-china-says/83e6d5f3-e882-4525-97e7-4eded-bc9579a>
5. *Consular Access And International Law Protections for American Foreign Affairs Correspondents*. (21 April 2023) // https://fedsoc.org/commentary/fedsoc-blog/consular-access-and-international-law-protections-for-american-foreign-affairs-correspondents?utm_source=chatgpt.com
6. "Dual Citizenship." *gov.uk*. Accessed 10 January 2025 // <https://www.gov.uk/dual-citizenship>
7. *Finland abroad: United Kingdom. In Distress Abroad*. Accessed 10 January 2025. // <https://finlandabroad.fi/web/gbr/in-distress-abroad>
8. *Jagtar Singh Johal*. (30 October 2024) // <https://www.bbc.com/news/articles/ckgdxlkpl7vo>
9. "Österreichs digitales Amt. Right to Access Diplomatic and Consular Protection." *Oesterreich.gv.at* Accessed 10 January 2025 // https://www.oesterreich.gv.at/en/themen/eu_und_international/leben_in_der_eu/Seite.2398001.html
10. *Why Consular Agreements Mean Nothing in China | Safeguard Defenders*. (31 May 2021) // <https://safeguarddefenders.com/en/blog/why-consular-agreements-mean-nothing-china>