

# Consular Notification Practice from the Perspective of International Human Rights Protection

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**Abstract:** *The development of the humanization of international law has driven innovations in consular law. Consular treaties traditionally governing consular relations among states have begun to incorporate provisions for the protection of individual rights. Article 36 (1) of the Vienna Convention on Consular Relations is seen as a “rights-empowering” clause, endowing consular notification with dual rights attributes and obligations and triggering consular assistance and protection mechanisms. Bilateral consular practices of states have also led to the customary implementation of mandatory notification duties, with consular notification evolving into a widespread state practice. Human rights documents, represented by the core United Nations human rights treaties, have gradually incorporated consular notification provisions, further reinforcing its procedural value in the human rights law implementation mechanism. In death penalty cases, international human rights bodies have promoted the human rights enhancement of “consular access” through consular notification, with specific recommendations and information-sharing mechanisms that will significantly advance the human rights enhancement process of consular notification.*

**Keywords:** Vienna Convention on Consular Relations ♦ consular notification ♦ consular access ♦ individual rights ♦ human rights enhancement

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The *Vienna Convention on Consular Relations* (VCCR) regulates consular relations between states. The VCCR itself does not stipulate individual rights, but the development of the humanization of international law has had an important impact on interpreting the content of the VCCR. The content of consular notification stipulated in Article 36 of the VCCR has gradually been regarded as provisions that “empower” individuals and have generated state obligations resulting from the empowerment provisions of international law. As consular notification provisions have been incorporated into core human rights treaties, the interaction between the self-contained diplomatic and consular law<sup>1</sup> and the human rights law system has promoted the improvement of the consular notification rules. Moreover, the “human rights enhancement” of consular access has also begun to be implemented. In 2019, the Secretary-General of the United Nations submitted to the General Assembly the report of the Special Rapporteur of the Human Rights Council in accordance with General Assembly Resolution 71/198. The report made it clear that individuals have the right to consular notification and “the detaining state has an obligation to notify foreign detainees of their right to consular assistance.”<sup>2</sup> The home state shall provide consular assistance and access to its nationals sentenced to death abroad. The report also stated that “access to consular assistance is a human right.”<sup>3</sup> The state of origin shall provide a certain standard of consular protection to its nationals facing the death penalty abroad. This is becoming a general practice. Consular

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<sup>1</sup> “Fragmentation of international law: Difficulties arising from the diversification and expansion of international law,” Report of the Study Group of the International Law Commission. A/CN. 4/L.682, April 13, 2006, para. 124.

<sup>2</sup> United Nations, “Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Application of the death penalty to foreign nationals and the provision of consular assistance by the home State,” A/74/318, August 20, 2019, para. 105.

<sup>3</sup> United Nations, “Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Application of the death penalty to foreign nationals and the provision of consular assistance by the home State,” A/74/318, August 20, 2019, para. 31.

notification is the basis for providing consular assistance and consular protection to nationals of a state who are under compulsory measures abroad. There is still controversy in state practices as to whether consular assistance and access have developed into a human right. Existing state practices show that states have an obligation to ensure that individuals who are arrested and detained have the right to notify the consul. This has entered the practice process of customary international law. The individual right to consular notification provides a procedural basis for states to initiate consular assistance, but there is no consistent state practice on whether consuls are obliged to meet with their nationals sentenced to death abroad.

## **I. Establishment of Individual Rights in Consular Law**

The consular notification stipulated in Article 36 (1) of the VCCR is a state right and an individual right. This is the result of the influence of the humanization of international law on consular law. The VCCR is a codification of customary international law and is widely applied around the world.<sup>4</sup> It disclaims any intent to create individual rights, stating that its purpose “is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.” However, with the changes in the existing international order, “There has emerged a humanistic tendency emphasizing people-centeredness in the value orientation of judging right and wrong, and the importance of individuals in international law has tended to increase.”<sup>5</sup> Protecting human rights has become an international trend, posing new challenges to the development of diplomatic and consular law. “Developments of this kind highlight the fact that the difficulties which arise in modern diplomatic relations are not limited to problems on a factual or political level. They are challenges that concern matters of legal interpretation — and at times, even the identification of applicable legal norms to begin with.”<sup>6</sup> The challenges arising from legal interpretation can be solved by the conscious actions of the subjects of international law or by the innovation of the international legal mechanism and system. With a consistent interpretation of Article 36 of the VCCR, international dispute settlement institutions represented by the International Court of Justice (ICJ) have clarified that the VCCR also contains individual rights provisions and has promoted state parties to fully protect such individual rights in their domestic laws.

### **A. Consular notification is an individual right**

To facilitate consular protection of nationals, Article 36 (1) of the VCCR states that consular officers shall be free to communicate with nationals of the sending state and to have access to them. Article 36 (1) (b) specifically provides that the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner if he so requests. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this paragraph. That is to say, when nationals of a state are under compulsory measures, the receiving state has an obligation to notify consuls of the sending state of such facts to protect the right of consuls to communicate and meet with their nationals. Consuls of the sending state have the right to meet with their nationals and provide consular assistance and protection.

According to the provisions of Article 36 (1) of the VCCR, consular notification is an obligation of the receiving state to the sending state. It is not specified whether the receiving state also has an obligation to notify nationals of the sending state, that is, whether the receiving state shall inform foreign nationals of their right to notify their consuls. The

<sup>4</sup> The VCCR currently has 182 state parties; see the official website of the United Nations, accessed July 2, 2024, <https://treaties.un.org/pages/viewDetails.aspx?src=TREATY&mtdsg-no=III-6&chapter=3>.

<sup>5</sup> Huang Huikang, *China's Diplomacy with Chinese Characteristics and International Law* (Beijing: Law Press China, 2019), 107.

<sup>6</sup> Paul Behrens, *Diplomatic Law in a New Millennium* (Oxford: Oxford University Press, 2017), 4.

problem in practice is that if the receiving state not only fails to inform foreign nationals who are under compulsory measures that they have the right to notify their consuls but also fails to fulfill its obligation to notify consuls of the sending state promptly, then the latter will have no way of knowing the fact that compulsory measures are taken against their nationals, and therefore will be unable to conduct consular access to them and provide consular assistance and protection. It can be seen that consular notification is the trigger mechanism for initiating consular assistance and protection. In practice, there is controversy over whether the receiving state bears the obligation to inform foreign nationals of their right to consular notification, the meaning of prompt notification, and whether Article 36 (1) (b) applies to the national security exception.<sup>7</sup> Consular notification practices are inconsistent across states. “The role of consuls in providing protection to sending state nationals under arrest has proved to be one of the more problematic issues covered in the VCCR.”<sup>8</sup> To date, the ICJ has heard five cases involving the interpretation and application of Article 36 (1) of the VCCR, namely: *Vienna Convention on Consular Relations* (Paraguay vs. United States of America) in 1998,<sup>9</sup> *LaGrand* (Germany vs. United States of America) in 2001,<sup>10</sup> *Avena and Other Mexican Nationals* (Mexico vs. United States of America) in 2004,<sup>11</sup> Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals* (Mexico vs. United States of America) (Mexico vs. United States of America) in 2009,<sup>12</sup> and *Jadhav* (India vs. Pakistan) in 2019.<sup>13</sup> Besides, two other cases also involve the interpretation of Article 36 of the VCCR, namely *United States Diplomatic and Consular Staff in Tehran* (United States of America vs. Iran) in 1979<sup>14</sup> and *Ahmadou Sadio Diallo* (Republic of Guinea vs. Democratic Republic of the Congo) in 1998.<sup>15</sup> These cases all revolve around the interpretation and application of Article 36 (1) of the VCCR, which is also considered to be “a problematic provision.”<sup>16</sup> The core focus of the issue is whether consular notification is also an individual right, that is, whether the receiving state bears responsibility for individuals and has an obligation to inform foreign nationals who are under compulsory measures that they have the right to notify their consuls. In the *Ahmadou Sadio Diallo* case, the ICJ further clarified that consular notification is a mandatory obligation and that the state taking arrest measures has an obligation to proactively inform the arrested people of their right to consular access. In certain circumstances, if detainees do not request consular access, it can be reasonably presumed that they have not been informed of this right. Even if consuls learn from other channels that their nationals have been arrested and do not visit them, this does not exempt the state from taking arrest measures from its obligation to notify. In the *LaGrand* and *Avena* cases, Germany and Mexico both argued that the right to consular notification is an individual right and a human right. Although this claim was strongly opposed by the defendant, the United States, which believes that consular notification and access are not an

<sup>7</sup> Cindy Galway Buys, Scott D Pollock and Ioana Navarette Pellicer, “Do Unto Others: The Importance of Better Compliance with Consular Notification Rights,” *Duke Journal of Comparative and International Law* 21 (2011): 461.

<sup>8</sup> John B. Quigley, “Vienna Convention on Consular Relations: In Retrospect and into the Future,” *Southern Illinois University Law Journal*, vol. 38, no. 1 (2013): 5.

<sup>9</sup> *Vienna Convention on Consular Relations* (Paraguay vs. United States of America), Order of April 9, 1998, I.C.J. Reports 1998.

<sup>10</sup> *LaGrand* (Germany vs. United States of America), Judgment, I.C.J. Reports 2001.

<sup>11</sup> *Avena and Other Mexican Nationals* (Mexico vs. United States of America), Judgment, I.C.J. Reports 2004.

<sup>12</sup> Request for Interpretation of the Judgment of March 31, 2004 in the Case Concerning *Avena and Other Mexican Nationals* (Mexico vs. United States of America), Judgment, I.C.J. Reports 2009.

<sup>13</sup> *Jadhav* (India vs. Pakistan), Judgment, I.C.J. Reports 2019.

<sup>14</sup> *United States Diplomatic and Consular Staff in Tehran* (U.S. vs. Iran), 1980 I.C.J. 3 (May 24).

<sup>15</sup> *Ahmadou Sadio Diallo* (Republic of Guinea vs. Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010.

<sup>16</sup> Malcolm N. Shaw, *International Law*, 8<sup>th</sup> edition (Cambridge: Cambridge University Press, 2017), 1146.

individual right, let alone a human right. In the LaGrand case, the ICJ clarified that Article 36 of the VCCR establishes individual rights. It noted that individual rights under international law could also derive from outside the framework of human rights law. The state of nationality of the detained people can invoke these rights in the ICJ in accordance with Article 1 of the Optional Protocol. In the Avena case, the ICJ held that a state's violation of the obligation to notify under Article 36 constitutes an infringement of the rights of the relevant state. The infringement of the latter's rights may constitute an infringement of the individual rights of its nationals. However, the ICJ had never made it clear in its judgment that consular notification and access are human rights. This is because, according to jurisdiction provisions, the ICJ can only rule on the scope of optional compulsory jurisdiction agreed upon by the two parties. Whether the provisions of Article 36 (1) (b) of the VCCR constitute a human right is not within the scope of the ICJ's judgment. The ICJ is not a human rights court. Although its judgments have the principle of modesty, it has played an important role in the development of international human rights law.<sup>17</sup> At the very least, it establishes the existence of individual rights.

In international law, whether consular notification constitutes a human right is controversial. Some scholars have proposed that "Whether an individual right to consular assistance exists in international treaty law is also doubtful."<sup>18</sup> And "not all treaties that mention individuals can be said to be intended to impose rights and obligations directly."<sup>19</sup> However, other scholars believe that "Whether the VCCR itself takes consular access as a human right in addition to being a treaty right, other authorities do regard consular access as a human right."<sup>20</sup> This means that practices in different areas of international law will provide different development ideas for consular notification and access. This difference in understanding reflects that the development of human rights law has had a profound impact on the traditional field of international law. International law is showing a trend of fragmentation, diversification, and constitutionalization.<sup>21</sup> It is paying more and more attention to the overall interests of the international community and the balance between human rights protection and state obligations, as shown in cases such as the Germany vs. Italy case heard by the ICJ.<sup>22</sup>

Subsequent practices of states have shown that the international community has widely accepted that Article 36 of the VCCR is a provision that "empowers" individuals, as reflected in the following aspects: First, the judgments of the ICJ were not opposed by state parties, and all the parties concerned implemented the ICJ's judgments in different ways. Second, no state has made a reservation to the content of Article 36. The VCCR is considered one of the most important multilateral treaties formulated by the United Nations. Historically, the state parties had made different reservations to different articles of the VCCR. However, after the LaGrand case, no state party has made a reservation to Article 36 of the VCCR. The reservation subsequently raised by the United States was limited to the VCCR's jurisdictional provisions only, reflecting the implicit acceptance of the VCCR's state parties to the interpretation and application of Article 36. Third, several state parties of the VCCR, including China, the

<sup>17</sup> Sandy Ghandhi, "Human Rights and the International Court of Justice The Ahmadou Sadio Diallo Case," *Human Rights Law Review*, vol. 11, no. 3 (2011): 527.

<sup>18</sup> Conall Mallory, "Abolitionists at Home and Abroad: A Right To Consular Assistance and The Death Penalty," *Melbourne Journal of International Law*, vol. 17, no. 1 (2016): 62.

<sup>19</sup> Andrew Clapham, *Human Rights Obligations of Non-State Actors*, translated by Chen Huiping et al. (Beijing: Law Press • China, 2006), 94.

<sup>20</sup> John B. Quigley, "Vienna Convention on Consular Relations: In Retrospect and into the Future," *Southern Illinois University Law Journal*, vol. 38, no. 1 (2013): 12.

<sup>21</sup> Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009), 11.

<sup>22</sup> Jurisdictional Immunities of the State (Germany vs. Italy: Greece Intervening), ICJ, Judgment of February 3, 2012.

United Kingdom, Australia, Germany, Hungary, etc., have gradually incorporated the right to consular notification into domestic criminal proceedings, explicitly protecting the right to consular notification of foreign nationals. For example, in the “Interpretation on the Application of the Criminal Procedure Law of the People’s Republic of China” (Fa Shi [2021] No.1), the Supreme People’s Court of China made clear provisions on consular notification and access involved in the trial of foreign-related criminal cases and criminal judicial assistance in Chapters 20 and 21. The United States has been sued twice in the ICJ for the domestic application of the VCCR. As the defendant in the LaGrand and the Avena cases, the United States has encountered many twists and turns in implementing judgments of the ICJ. The U.S. Supreme Court held in the Medellin case<sup>23</sup> that the judgment of the Avena case could not take precedence over the applicable state law. However, some U.S. states, such as California and Oregon, have successively amended their state laws to explicitly include consular notification in the procedural rules.<sup>24</sup>

### **B. Rights and obligations in consular notification**

Considering consular notification as an individual right provides a trigger mechanism for initiating consular access, assistance, and protection. Therefore, consuls can provide consular assistance at the request of their nationals. Also, they can initiate consular protection when the receiving state fails to fulfill its obligations to inform or notify. “An interconnected mechanism is thus established to facilitate the performance of consular protection.”<sup>25</sup> As a result, the consular protection function is given new content. Under Articles 5 and 36 of the VCCR, when a foreign national is arrested or detained pending trial or in custody, or when any other compulsory measures are taken against him, the receiving state bears two obligations to notify, namely, the obligation to notify consuls of the sending state and the obligation to inform the individual who is under compulsory measures that he has the right to notify consuls of his home state.

First, the receiving state has an obligation to notify promptly. The VCCR does not clearly state the existence of such an obligation, nor does it define what is meant by prompt notification. In practice, whether the receiving state notifies and the notification is prompt is the core concern of the sending state’s consuls in carrying out consular protection and assistance. This is also the focus of controversy in the LaGrand, the Avena, and the Jadhav cases, all involving the lack of notification procedures. After compulsory measures are taken against foreign nationals, the receiving state shall be promptly notified of the rights enjoyed by the foreign nationals under the VCCR. Such obligation to notify is unconditional, applies to all foreigners, and cannot invoke the national security exception. As to what is “prompt” notification, the ICJ stated in the Avena case that arresting authorities have an obligation to notify the arrested person of such information when they become aware that the person is a foreign national or have reason to believe that the person may be a foreign national. The “prompt” standard used in consular law is consistent with the “prompt” standard set forth in Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR). “Promptness” means a shorter period of time. While the exact meaning of “promptly” may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest.<sup>26</sup> In practice, some states have concluded bilateral consular treaties, clarified the specific meaning of promptness in the treaties, and strengthened the procedural value of notification.

Second, the receiving state has an obligation to notify the consuls of the sending state promptly. The notification obligation of the receiving state shall meet the prompt standard and

<sup>23</sup> Medellin vs. Texas, 551 U. S. 491 (2008).

<sup>24</sup> Cal. Penal Code § 834 (C) (West 2004); Cal. Penal Code § 5028 (West 2004); Or. Rev. Stat. § 181. 470 (2015); Or. Rev. Stat. § 426. 228 (2015); Nev. Rev. Stat. § 18. 228. 135 (2016); N. C. Gen. Stat. § 122c 344 (West 2017); Fla. Stat. § 901. 26 (2017); Ill. Comp. Stat. 5/103 1 (2016).

<sup>25</sup> Malcolm N. Shaw. *International Law*, 8<sup>th</sup> edition (Cambridge: Cambridge University Press, 2017), 584-585.

<sup>26</sup> Human Rights Committee, General Comment No. 35, CCPR/C/GC/35, para. 33.

be performed in accordance with the notification content agreed upon in the bilateral consular treaty. In practice, the bilateral consular treaties of many states have special provisions on this. For example, the bilateral consular treaties between China and the United States, Australia, New Zealand, Uzbekistan and other states have clearly defined the specific requirements and content of consular notification. Article 9 of China's *Regulations on Consular Protection and Assistance (RCPA)* also specifically points out that China's institutions functioning abroad shall carry out consular protection and assistance through international treaties between China and the host state or those to which both of them are parties. To ensure the realization of individuals' right to consular notification, some states have also introduced mandatory notification obligations and automatic notification obligations in bilateral consular practices. The notification obligation of the receiving state is no longer premised on the request of foreign nationals.

Third, consuls of the sending state have the right to conduct consular access and provide consular assistance. Consuls can provide their nationals with necessary medicines, daily necessities, books, etc., give them spiritual comfort, and supervise whether the practices of the receiving state are in line with humanitarian treatment. Consuls can also provide defense assistance, including introducing their nationals to the legal system of the receiving state, recommending or hiring lawyers on their behalf, keeping money or valuables for them, attending trials or other legal proceedings; assist their nationals in obtaining necessary materials, especially helping them obtain necessary certification documents and related evidence materials from their home state; and provide certificates of consular assistance and consular protection, etc. For example, in the Rangel-Gonzales case<sup>27</sup> heard by a U.S. court, the Consulate General of Mexico in Seattle provided relevant documents to Gonzales, a Mexican national, proving that if Gonzales requested, Mexican Consuls in the United States would assist him in contacting friends or lawyers, and even send a consul to participate in his legal proceedings. The United States Court of Appeals for the Ninth Circuit applied the three-pronged test in the case and ultimately ruled to overturn Gonzalez's conviction.

The attribute of the right to consular notification means more paths for rights relief. If consular notification is merely a state right, only the receiving state can claim rights relief when it fails to fulfill its obligation to notify. That is to say, once it is discovered that the right of the sending state's nationals to consular notification has been violated, its consuls may negotiate with and protest against the receiving state, assist its nationals in seeking domestic legal remedies within the legal framework of the receiving state, and have the right to take diplomatic protection measures when necessary, including using international dispute resolution mechanisms to require the receiving state to assume corresponding international responsibilities. However, if a state's consuls are unaware of the situation, there is no way to initiate consular assistance, consular protection, and diplomatic protection. However, when consular notification is defined as an individual right, the receiving state violates procedural justice if it fails to fulfill its obligation to notify. Therefore, individuals have the right to initiate rights relief procedures by the laws of the receiving state. In other words, individuals have the right to assert their rights by the VCCR.

In the early practice of international law, individuals were considered the "objects" rather than the "subjects" of international law. To the extent that states had any international legal obligations relating to individuals, they were deemed to be obligations owed to the states whose nationality the individuals possessed. This is based on the fact that there were two orders in the international community composed of sovereign states at that time. The two orders create dual facts. The theoretical expression of the dual facts is that individuals are the objects of international law.<sup>28</sup> These two orders are manifested as follows. One is the vertical

<sup>27</sup> 617 F.2d 529 (9<sup>th</sup> Cir. 1980).

<sup>28</sup> Bardo Fassbender and Anne Peters, *The Oxford Handbook of the History of International Law*, translated by Li Mingqian, Liu Jun and Wang Weichen (Shanghai: Shanghai Joint Publishing Company, 2020), 319.

legal order within the state with the constitution as its core framework, and the other is the horizontal order in the international community. The former has centralized power, while the latter has decentralized power. At that time, individuals did not directly get rights and obligations by international law. “The manner in which a state treated its own nationals was not regulated by international law because it did not affect the rights of other states.”<sup>29</sup> However, since the beginning of the 20<sup>th</sup> century, modernity has transformed the narrative style. Individuals have become subjects of rights protection. International human rights law and international humanitarian law have built the framework and foundation for the protection of individual rights in modern international law. In the practice of consular law, the recognition of the individual right to consular notification is derived from the VCCR, which originally applies to consular relations between states. This is a practical example of modern narrative transformation. However, whether this individual right will develop into a universal human right remains to be seen. Judging from the unexceptional applicability of consular notification, the provisions on individual rights in Article 36 (1) of the VCCR imitate the universal applicability of the ICCPR. Although the two belong to different treaty systems, their unexceptional applicability provides an institutional basis for further development.

Whether consular notification is defined as an individual right or a human right depends on the difference in relief measures. If consular notification is defined as an individual right, individuals can only seek legal relief in accordance with the domestic laws of the host state when the individual right is violated. If the host state cannot provide relief under domestic law, individuals can only rely on the diplomatic protection actions of the home state to seek other relief. In other words, if the home state cannot take appropriate diplomatic protection measures, the infringement of the individual right will not be able to obtain legal relief. The conflict between the rights granted to individuals in international law and the provisions of domestic laws of various states has always existed, which is considered a universal reality. “This is no easy task for domestic judiciaries which, especially in criminal cases, tend to covet their national régimes from ‘intrusion’ by norms of public international law.”<sup>30</sup> Some scholars have pointed out that there is uncertainty about individual rights and the discretion of states in implementing treaties. “When a state party to an international treaty fails to implement some of its provisions within its domestic legal order, it may follow that fundamental rights to which individuals would be entitled in the national system of another contracting party fail to accrue to them.”<sup>31</sup> Although each state party can amend its domestic law to strengthen the performance of its obligations under Article 36 of the VCCR, the practices of various states vary greatly, and no unified practice has been formed yet. There is a gap between the practice of the state parties to the VCCR and the judicial dispute settlement practice of the ICJ. Bridging and filling the gap requires further improvement in subsequent treaty practice and national practice.

## **II. The Development in the Content of Consular Notification Arising from Human Rights Law**

Consular notification is regarded as an individual right, reflecting that international human rights law has had a significant impact on the development of diplomatic and consular law. Even if different rules are gradually formed under different branches of international law, they will interact with other areas of international law. “...often with rules which were constructed with quite different purposes in mind, but which exert an impact on the same

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<sup>29</sup> Thomas Buergenthal, Dinah Shelton and David P. Stewart, *International Human Rights in a Nutshell*, translated by Li Zuoheng (Beijing: Law Press China, 2010), 2.

<sup>30</sup> Carsten Hoppe, “Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights,” *The European Journal of International Law*, vol. 18, no. 2 (2007): 318.

<sup>31</sup> Antonio Cassese, *International Law*, translated by Cai Congyan et al. (Beijing: Law Press China, 2009), 308-309.

situation.”<sup>32</sup> These impacts are multifaceted and can be either beneficial or restrictive. In practice, the right to consular notification has been continuously strengthened by various international documents. The obligations of the receiving state have been repeatedly mentioned, and consular notification has become an important procedure to ensure the realization of human rights. For example, the Human Rights Committee has pointed out that<sup>33</sup> other serious procedural flaws not explicitly covered by Article 14 of the ICCPR may still cause the imposition of the death penalty to violate Article 6 of the ICCPR. Typical examples include the failure to promptly inform detained foreign nationals of their right to notify their consuls in accordance with Article 36 of the VCCR. If a foreign national is sentenced to death and fails to avail himself of the above procedure, this may violate Article 6 (1) of the ICCPR.

### **A. Provisions of the three core human rights treaties**

Three of the nine core human rights treaties that have come into force at the United Nations level have consular notification provisions. They are the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereinafter referred to as the “*Convention against Torture*”),<sup>34</sup> the *International Convention for the Protection of All Persons from Enforced Disappearance* (hereinafter referred to as the “*Convention against Enforced Disappearance*”),<sup>35</sup> and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (hereinafter referred to as the “*Migration Convention*”).<sup>36</sup> These three conventions have also developed ways of consular notification in consular law and further improved the content of consular notification.

#### **1. Convention against Torture**

To more effectively combat torture and other cruel, inhuman, and degrading treatment or punishment, the *Convention against Torture* was adopted in 1984. Since the adoption of the *Convention against Torture*, the absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law.<sup>37</sup> The Convention consists of 33 articles, of which Article 5 provides for jurisdiction over crimes of torture. Article 6 clarifies that when any state party takes compulsory measures against a person accused of the crime of “torture,” the state shall guarantee the person’s right to notify his consuls. Article 6 (1) first stipulates that any state party has the right to impose detention measures on a person accused of the crime of torture within the territory under its jurisdiction. Article 6 (3) stipulates the right of a person in custody to obtain consular assistance. The person shall be assisted in communicating immediately with the nearest appropriate representative of the state of which he is a national, or, if he is a stateless person, with the representative of the state where he usually resides. Article 6 (4) makes it clear that when a state has taken a person into custody, it shall immediately notify the state referred to in Article 5 (1) of the fact that such person is in custody and of the circumstances which warrant his detention.

Articles 6 (3) and 6 (4) of the *Convention against Torture* provide for two types of notification of different natures. The notification provided for in Article 6 (3) is similar to the consular notification provided for in Article 36 (1) of the VCCR. In comparison, the provisions of the *Convention against Torture* are more specific, mainly in the following aspects: (1) It clarifies that state parties to the Convention have an obligation to notify if they

<sup>32</sup> Paul Behrens, *Diplomatic Interference and the Law* (Oxford: Hart publishing Ltd, 2016), 262.

<sup>33</sup> Human Rights Committee, General Comment No. 36, CCPR/C/GC/36, September 3, 2019, para. 42.

<sup>34</sup> Adopted by the United Nations General Assembly resolution 39/46 on December 10, 1984. The Convention entered into force on June 26, 1987. The Convention currently has 173 state parties. China signed it on December 12, 1986, and it entered into force for China on October 4, 1988.

<sup>35</sup> Adopted by the United Nations General Assembly resolution 61/177 on December 20, 2006, and entered into force on December 23, 2010. The Convention entered into force on December 23, 2010. Currently, 98 states have signed the Convention, of which 68 have ratified it.

<sup>36</sup> Adopted by the United Nations General Assembly resolution 45/158 on December 18, 1990.

<sup>37</sup> General Comment No. 2 on the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/GC/2 (2008), para. 1.



take compulsory measures against a person accused of committing a crime of torture. (2) A state party has an obligation to notify the state of the nationality of the person who is under compulsory measures or, in the case of a stateless person, to contact the representative of the state of his habitual residence. (3) The representative is based on the principle of the nearest distance, which is generally the consul or other designated person within the consular district. (4) The obligation to notify shall be fulfilled. (5) The prompt notification requirements shall be met. (6) The purpose of notification is to ensure that the person who is under compulsory measures can receive assistance from his home state. The content of Article 6 is basically consistent with the core content of Article 36 of the VCCR, emphasizing the obligation to notify promptly and the protection of the procedural rights of foreign nationals who are under compulsory measures. In comparison, the notification content stipulated in Article 6 of the *Convention against Torture* is more detailed and has been expanded in many aspects, such as the obligation to notify, the principle of notification, and the subject of notification. It can be considered that it has developed the consular notification content in consular law in terms of procedural rules.

## **2. Migration Convention**

The *Migration Convention*, adopted in 1990, aims to protect the rights of all migrant workers and their families, a specific group. As of August 2022, there are 57 state parties to the Convention. The Convention applies to all migrant workers regardless of the legitimacy of their identities because “a general definition of migrant workers is consistent with principles of human rights protection.”<sup>38</sup> As a fundamental human right, the *Migration Convention* applies to the entire migration process of migrant workers and members of their families, including preparation for migration, departure, crossing borders, remunerated activities in the migrated state during the entire period of stay, and returning to their home state or habitual residence. Taking into account that migrant workers are more likely to be discriminated against outside their home states and become a vulnerable group, most of the rights enjoyed by them stipulated in the Convention are related to the obligations assumed by the receiving state. From this point of view, the relationship between migrant workers and the receiving state inevitably involves the consular protection and assistance stipulated in the VCCR.

Parts IV and V of the *Migration Convention* clearly state that all migrant workers and their family members have the right to seek protection and assistance from consular or diplomatic agencies, and if they are arrested or detained, they have the right to contact the consular or diplomatic authorities of their home state. Article 16 of the Convention specifically stipulates that the receiving state has an obligation to ensure consular notification and access. Any verification of the identity of migrant workers or members of their families by law enforcement officers shall be carried out in accordance with the procedures prescribed by law. To ensure that migrant workers and members of their families are not subjected to arbitrary arrest or detention, whether individual or collective, the receiving state has an obligation to inform migrant workers and their families of the reasons for arrest and any charges against them when they are arrested. In practice, the right to consular notification is not effectively guaranteed. “In several states, however, foreign nationals, including migrant workers, have been deprived of protection under the VCCR and sentenced to death without respect for fair trial standards. Foreign nationals, many of whom do not speak the language of the court in which they are being tried, often do not have access to interpreters. The denial of the right to consular notification and access is a violation of due process, and the execution of a foreign national deprived of such rights constitutes an arbitrary deprivation of life, in

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<sup>38</sup> Zhang Aining, “Predicaments and Countermeasures of the Protection of Migrant Workers’ Human Rights — From the Perspective of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,” *Human Rights* 2 (2018): 116-117.

contravention of Articles 6 and 14 of the *International Covenant on Civil and Political Rights*.<sup>39</sup>

Article 16 (7) of the Convention provides detailed provisions on how the receiving state shall fulfill its obligations of consular notification and access: (1) Fulfill the obligation to notify without delay, that is when a migrant worker or a member of his family is arrested or detained before trial or in custody or any other manner, the arrest or detention and the reasons therefore shall be notified without delay, if requested by the person concerned, to consular or diplomatic authorities of his home state or to the consular or diplomatic authorities representing the interests of that state; (2) The state concerned has an obligation to inform without delay, that is, to inform the person concerned of his right to be notified, of the rights provided for in any relevant treaties applicable between the states concerned, and of the right to consular access and visits; (3) The notification shall be made without delay; (4) It is stipulated that consular notification is an individual right. If authorities of a state party fail to fulfill their obligation of consular notification, the person concerned shall have the right to invoke Article 16 (8) and claim that the procedure is illegal; (5) Migrant workers and members of their families who have been illegally arrested or detained have the right to request damages in accordance with Article 16 (9), and this is an enforceable right to compensation.

The provisions of the *Migration Convention* on consular notification have three innovative points. First, it clarifies that consular notification is a procedural right and part of procedural justice. Second, it clarifies that the person concerned can claim damages based on the violation of the principle of due process, which can make up for the problem of damage relief in consular law. Third, it clarifies that the right to consular notification shall not be derogated. “The rights enjoyed by the person concerned under other conventions or bilateral consular treaties cannot be derogated in any way, which is not included in other human rights conventions.”<sup>40</sup> The right to consular notification stipulated in Article 16 (7) (3), of the Convention is a non-derogable right. In practice, to accurately understand and apply the provisions of Article 16 (7) of the Convention, it is also necessary to take the provisions of the VCCR into account and fully examine the practice of bilateral consular treaties. If bilateral consular practices contain measures to strengthen the protection of individual rights, such as mandatory or automatic notification requirements stipulated in the bilateral consular treaties between the receiving state and the home state of the migrant worker, this is in line with the requirement on non-derogable rights stipulated in the *Migration Convention* since such provisions do not derogate the rights of the person concerned but strengthen the obligations of the receiving state. From this point of view, the provisions of the *Migration Convention* are consistent with the provisions of Article 73 of the VCCR, both of which establish minimum standards for consular notification. Whether it is an existing or a newly signed bilateral consular treaty, the contracting parties cannot constitute damage to the VCCR, otherwise the relevant provisions of the treaty cannot be applied. In the *Jadhav case*, the ICJ determined that the 2008 Agreement on Consular Access between Pakistan and India violated the provisions of the VCCR. It can be seen that “the Vienna Convention was drafted with a view to establishing, to the extent possible, uniform standards for consular relations. ...it is consistent with the Vienna Convention to conclude only subsequent agreements which confirm, supplement, extend or amplify the provisions of that instrument...”<sup>41</sup> The requirement that the right cannot be derogated has played an important role in safeguarding the development of

<sup>39</sup> United Nations, “Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions,” A/70/304, August 7, 2015, para. 93.

<sup>40</sup> Zhang Aining, “Protection of Migrant Workers under International Law — A Brief Comment on the ‘Protection of Migrant Workers and Members of Their Families from the Perspective of the International Convention’,” *Chinese Journal of Human Rights* 1 (2020): 83.

<sup>41</sup> *Jadhav case (India vs. Pakistan)*, ICJ, July 17, 2019, Judgment, para. 96.

consular notification and access and has promoted the full protection of individual rights both in consular law and within the framework of human rights protection mechanisms.

### **3. *Convention against Enforced Disappearance***

The *Convention against Enforced Disappearance*, adopted in 2006, stipulates that everyone has the right not to be subjected to enforced disappearance. For criminal suspects under detention or other legal measures, the Convention stipulates that the state parties have an obligation to provide consular notification and guarantee consular access. Article 10 (3) of the Convention stipulates that the state parties shall ensure that the criminal suspect may promptly communicate with the nearest appropriate representative of his home state or, if he is a stateless person, with the representative of the state of his habitual residence. That is to say, the state parties have an obligation to inform criminal suspects of their right to contact their consuls. The Convention emphasizes that no one shall be held in secret detention. To this end, Article 17 (2) of the Convention clarifies the obligations of consular notification and access, requiring state parties to the Convention to ensure that any person deprived of liberty is allowed to communicate with and receive visits from his family, lawyers or any other persons of his choice, subject only to conditions prescribed by law. If the person is a foreigner, he shall be allowed to contact the consular authorities of his home state and have the right to be visited by the consular authorities in accordance with relevant international law.

The uniqueness of the *Convention against Enforced Disappearance* lies in its attempt to establish a domestic law implementation mechanism. In particular, Article 17 of the Convention explicitly requires state parties to incorporate the content of consular notification and access into their national legislation. Furthermore, domestic legislative provisions and practices shall also comply with the requirements of international law. If this mechanism can be effectively implemented, it will greatly promote the legalization of consular notification and access. Existing national practices show that there is still a lack of unified practices in the protection of consular notification and access, and there are even conflicts. The domestic legislative implementation mechanism proposed by the *Convention against Enforced Disappearance* has yet to be implemented.

### **B. Provisions of other human rights instruments**

Some resolutions and declarations adopted by the United Nations will also include consular notification content if they involve criminal justice. These “soft” legal documents are not legally binding but enrich the content and standards of consular notification and access from the perspective of global governance. Specifically, they are summarized as follows. Firstly, they promote the formation of procedural rules for consular notification and strengthen the notification procedure. Secondly, they expand the subjects of consular notification and access from the consulate of the home state and diplomatic missions to international organizations, fully taking into account the feasibility of individual rights. Thirdly, they promote the development of compensation rules and provide different relief ways for infringing individual rights. Fourthly, they promote the provision of global unified standards for states to carry out consular assistance and protection.

*Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*<sup>42</sup> stipulates that detained or imprisoned persons have the right to consular notification. Principle 16 stipulates that if the detained or imprisoned person is a foreigner, he shall be promptly informed of his right to communicate through appropriate ways with the consulate or diplomatic mission of his home state or other states that he has the right to communicate with under international law. If he is a refugee or is otherwise protected by an international organization, he has the right to communicate with representatives of the competent international organization. It is clarified here that the state taking compulsory measures shall fulfill its obligation to promptly inform the person concerned and notify the consul. The entities to be notified include consuls or overseas institutions as well as

<sup>42</sup> Adopted by the United Nations General Assembly resolution 43/173 on December 9, 1988.

international organizations. Principle 35 stipulates that damages caused by violations of the right to consular notification, including acts or omissions, shall be compensated in accordance with existing rules on liability under domestic law. In other words, failure to notify or failure to notify promptly, or failure to meet requirements in notification content may all be grounds for initiating domestic relief procedures. This places clear performance requirements on a state to fulfill its obligation to give proper notification. Although the standards for notification obligations have not yet been effectively established and domestic relief measures have not yet been popularized, the gradual standardization of performance requirements will undoubtedly promote domestic legislation and practice in the process of the rule of law.

The United Nations *Standard Minimum Rules for the Treatment of Prisoners* (also known as the “Nelson Mandela Rules”)<sup>43</sup> adopted by the United Nations in 2015 specifically elaborate on the good principles and practices of prisoner treatment and prison management that are generally recognized by the international community. Rule 62 incorporates the consular assistance clause, expands the scope of persons who can conduct consular access, and stipulates that foreign prisoners shall be allowed reasonable facilities to communicate with diplomatic and consular representatives of their home states. For prisoners who do not have diplomatic or consular representatives in the host state, or who are refugees or stateless persons, the rules clearly state that they have the right to communicate with diplomatic representatives of the state that represent their interests or with national or international organizations responsible for protecting such persons. Similar provisions are also included in the *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*.

*Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels, and Public Participation*<sup>44</sup> stipulates that the rights of consular notification and access stipulated in Article 36 of the VCCR shall be guaranteed and the realization of the rights in Article 36 shall be regarded as part of the rule of law process. Article 5 (b) of the Declaration requires that member states shall ensure that everyone has the right to a fair trial without undue delay by a competent, independent, and impartial tribunal established by law, the right to equal access to judicial remedies with due process guarantees, and, if necessary, access to lawyer and interpreter services, and is ensured to enjoy relevant rights stipulated in the VCCR.

Additionally, the application of consular notification is also stipulated in several documents related to migration issues. For example, the *Global Compact for Safe, Orderly and Regular Migration (GCM)* (hereinafter referred to as the *Global Compact*)<sup>45</sup> adopted in 2018 specifies in detail the obligations and content of consular notification, including that states shall provide legal assistance to migrants as much as possible. Any detention in the context of international migration shall follow due process, not be arbitrary, be based on law, necessity, proportionality, and individual assessment, be conducted by authorized officials and be as short as possible. Article 29 of the *Global Compact* also clarifies that consular notification is part of due process. Consular notification is a right enjoyed by detained migrants in accordance with international law and due process. Detained migrants shall be informed of the reasons for their detention in a language they understand. In other words, state parties not only have an obligation to inform, but also to do so effectively, and to assist them in exercising their rights, including communicating with their consuls or diplomatic missions without delay, and communicating with their legal representatives and family members. Compared to other international documents, the *Global Compact* emphasizes the due process value of consular notification in resolving migration issues and underlines the

<sup>43</sup> The United Nations General Assembly resolution 70/175, A/RES/70/175.

<sup>44</sup> A/RES/70/174.

<sup>45</sup> The United Nations General Assembly resolution 73/195 on December 19, 2018, A/RES/73/195.

connection among consular notification, consular access, consular assistance, and consular protection. To achieve this goal, the *Global Compact* requires state parties to conduct training and be held accountable for violations or abuses of human rights.

### **III. The Process of Human Rights Enhancement Promotes the Improvement of the Right to Consular Notification**

Including consular notification clauses in the three core human rights treaties imposes more explicit notification obligations on state parties. From the perspective of a state's fulfillment of its obligation to inform and notify, the provisions of the three core human rights treaties will greatly promote the legalization and universalization of consular notification procedures.

#### **A. Promoting the legalization of consular notification obligations**

Firstly, including consular notification obligations in human rights law will promote the proceduralization of consular notification rules. The VCCR is a universally applicable international treaty, but its universality does not guarantee that the obligation of consular notification will be universally performed. The Convention does not stipulate procedural norms. The lack of procedural rules has led to great differences and even conflicts in how states conduct the consular notification required by Article 36 (1) (b) of the VCCR. This is one of the reasons why the ICJ has successively heard several cases involving the right to consular notification stipulated in Article 36 of the VCCR in recent years. Some scholars<sup>46</sup> even suggested that relevant provisions of the two Vienna Conventions shall be amended to adapt to the new requirements of modern society for diplomatic and consular law. Currently, it is extremely difficult to amend the two widely applicable international conventions, and any amendment to the provisions of the two conventions may cause new problems. The realization of the obligation to provide consular notification is mainly guaranteed by the domestic legislation and practices of the state parties. The implementation mechanism of human rights treaties provides procedural guarantees for the realization of the right to consular notification. The consistent interpretation of different treaties gives them new practical functions.

Secondly, the implementation mechanism of human rights treaties strengthens the realization of the right to consular notification. Article 36 of the VCCR stipulates that the receiving state shall facilitate consular access and visits by consuls. However, the Convention does not require consuls to provide consular assistance. Whether to provide consular assistance to nationals who are under compulsory measures is a matter for a state to decide at its own discretion. The domestic laws of many states do not stipulate that their consuls have a legal obligation to protect and help their nationals abroad. By incorporating consular notification into the human rights law system, the provisions of the three core human rights conventions stipulate specific measures to emphasize the obligation of the state concerned to inform and notify, and argue that “(a) consular access is a human right, and includes the right to be notified and the right to receive consular assistance; (b) the right places distinct but complementary obligations on both the prosecuting state and the home state of the detainees.”<sup>47</sup> International human rights documents also outline the standards applicable to consular assistance. Through consular access, consuls can monitor the implementation of norms such as the United Nations *Standard Minimum Rules for the Treatment of Prisoners* (the “Nelson Mandela Rules”) and the *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* and promote human rights protection.

Thirdly, the attention paid by international human rights organizations to the rights of persons concerned in specific types of cases, especially cases involving core human rights

<sup>46</sup> Paul Behrens, *Diplomatic Law in a New Millennium* (Oxford: Oxford University Press, 2017).

<sup>47</sup> United Nations, “Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Application of the death penalty to foreign nationals and the provision of consular assistance by the home State,” A/74/318, August 20, 2019, para. 11.

treaties and death penalty cases, can promote the legalization of the rights of persons concerned to consular notification and access in specific types of cases. In a report submitted to the Human Rights Council, the rapporteur proposed linking consular notification with the responsibility to protect the right to life, arguing that “the failure of the home State to provide adequate consular assistance when notified that one of its nationals is facing the death penalty amounts to a violation of its responsibility to protect the right to life.”<sup>48</sup> The report is not legally binding, but its review of the practices of various states and the design of future procedural mechanisms have important exemplary value in promoting conscious actions by various states and promoting an international unified implementation mechanism through international human rights institutions.

### **B. Expanding subjects of consular notification**

By incorporating consular notification clauses into human rights treaties, expanding subjects of consular notification and promoting consular assistance and access from the perspective of protecting individual rights will greatly overcome the limitations of the applicability of consular law.

Consular law is limited in providing consular notification and assistance to stateless persons. The realization of the right to consular notification stipulated in Article 36 of the VCCR is based on nationality, that is, consuls of the sending state use nationality as the basis for providing consular assistance, and the receiving state uses nationality as the basis for consular notification. With the popularization of human mobility, nationality issues have become increasingly complex. Dual nationality, multiple nationality and statelessness have always coexisted. In practice, Article 36 of the VCCR does not provide a realistic solution for consular notification of dual nationals and stateless persons. For example, in the Avena case, after Mexico filed a lawsuit against the United States in the ICJ, Mexico withdrew the request of a Mexican involved in the case because the person had dual nationality, that is, he had both Mexican and American nationality. However, some scholars argue that<sup>49</sup> Mexico’s concession was unnecessary. Because the rights of consular notification under the VCCR belong not only to the detained or arrested individual but also to the country and its consular representatives, consular notification can and should be given even to dual nationals who are arrested or detained in a state that is a party to the VCCR. In some states’ bilateral consular practices, they have drawn on the provisions of the *Draft Articles on Diplomatic Protection (2001)*<sup>50</sup> formulated by the United Nations International Law Commission in 2006 and adopted a more relaxed policy on consular notification of dual nationals to maximize the protection of individual rights under Article 36. However, in realizing the right of stateless persons to consular notification, due to the lack of a bilateral consular treaty basis and the lack of supervision by the international community, the receiving state often uses the reason of being unable to notify as an excuse for not fulfilling its consular notification obligation under Article 36.

The three core human rights treaties have proposed specific solutions to this problem, expanding the notification subjects to the state of residence of persons who are under compulsory measures or other international organizations to facilitate the provision of assistance. For example, Article 6 (3) of the *Convention against Torture* adds two notification subjects. One is representatives of the state of residence of stateless persons who are under compulsory measures; the other is human rights organizations such as the Office of the United Nations High Commissioner for Refugees. Such provisions are extensible and other treaties also have similar provisions. For example, the *Convention on the Prevention and Punishment*

<sup>48</sup>United Nations, “Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Application of the death penalty to foreign nationals and the provision of consular assistance by the home State,” A/74/318, August 20, 2019, para. 11.

<sup>49</sup>Mark E. Wojcik, “Consular Notification for Dual Nationals,” *Southern Illinois University Law Journal*, vol. 38, no. 1 (2013): 73.

<sup>50</sup>Report of the International Law Commission, A/61/10.

of *Crimes against Internationally Protected Persons, including Diplomatic Agents*,<sup>51</sup> adopted in 1973, stipulates that each state party shall define crimes against diplomatic agents and other internationally protected persons as crimes under its domestic law. When compulsory measures are taken, such persons “shall be entitled: (a) To communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to protect his rights or, if he is a stateless person, which he requests and which is willing to protect his rights; and (b) To be visited by a representative of that State.”<sup>52</sup> The *International Convention for the Suppression of Acts of Nuclear Terrorism*,<sup>53</sup> adopted by the United Nations in 2005, also has similar provisions. Article 10 of it stipulates that the state party concerned shall take compulsory measures as may be necessary under its national law. To protect the rights of persons who are under compulsory measures, they shall be entitled to communicate without delay with the nearest appropriate representative of the state of which that person is a national or which is otherwise entitled to protect that person’s rights or, if that person is a stateless person, the state in the territory of which that person habitually resides; to be visited by a representative of that state; to be informed of that person’s right to consular notification and access. The Convention stipulates the obligations. It also stipulates that consular access is not limited to the state of which the person who is under compulsory measures is a national, but also includes the state which is otherwise entitled to protect that person’s rights or, if that person is stateless, the state in the territory of which that person habitually resides.

### C. Strengthening the procedural value of consular notification

The lack of procedural rules in consular law is gradually being corrected by the development of human rights law. As to whether consular notification is a due process right, there are still many doubts in the development of consular law. For example, in the “Avena case,” the ICJ pointed out that the rights protected by the VCCR are individual rights. These rights arise from a treaty that the United States has pledged to abide by and have nothing to do with the United States’ due process rights. In the “Jadhav case,” India claimed that Pakistan had violated the principle of due process.<sup>54</sup> However, the ICJ did not directly respond to this claim in its final judgment, but instead considered it together with legal remedies. The ICJ believed that appropriate remedies in the case were reviewing and reconsidering Jadhav’s conviction and sentence. The violation of the rights set forth in Article 36 (1) of the VCCR, and its implications for the principles of a fair trial, should be fully examined and properly addressed during the review and reconsideration process. The ICJ held that the obligation to provide effective review and reconsideration is “an obligation of result” which “must be performed unconditionally.”

Human rights law provides a different perspective for review and promotes the emphasis on procedural rules in consular law. Consular notification clauses stipulated in Conventions such as the *Migration Convention* and the *Convention against Torture* essentially strengthen the procedural rules and emphasize the receiving state’s obligation to inform and notify promptly. Unlike consular law, “a human rights convention, for its part, is an absolute or ‘integral’ treaty. The obligations it imposes are independent of any expectation of reciprocity or performance on the part of other parties of their obligations.”<sup>55</sup> This widespread practice has established a procedural law mechanism to protect the rights of foreign nationals who are

<sup>51</sup> Adopted by the United Nations General Assembly resolution 3166 (XXVIII) on December 14, 1973. The Convention entered into force on February 20, 1977, and currently has 180 state parties.

<sup>52</sup> The *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, Article 6.

<sup>53</sup> Adopted by the United Nations General Assembly resolution 59/290 on April 13, 2005, A/RES/59/290.

<sup>54</sup> Jadhav case (India vs. Pakistan), para. 126-127.

<sup>55</sup> The United Nations document, A/CN. 4/L.682, “Fragmentation of international law: Difficulties arising from the diversification and expansion of international law,” Report of the Study Group of the International Law Commission, April 13, 2006, para. 312.

under compulsory measures. “International and regional courts and experts have unanimously agreed that consular notification and assistance are minimum fair trial guarantees in death penalty cases and that foreign detainees are entitled to consular assistance.”<sup>56</sup> The Inter-American Court of Human Rights pointed out that<sup>57</sup> the individual’s right to information, conferred in Article 36 (1) (b) of the VCCR, makes it possible for the right to the due process of law upheld in Article 14 of the *International Covenant on Civil and Political Rights*, to have practical effects in tangible cases. A violation of this provision constitutes a violation of the due process principle of Article 14 of the ICCPR. Any violation thereof constitutes an arbitrary deprivation of life. In death penalty cases, any violation of this right may constitute state responsibility and shall be subject to effective remedies. The content of this advisory opinion was later incorporated into the documents of the Organization of American States.<sup>58</sup>

The focus on procedural rules has triggered new practices among states. Since the LaGrand case, some states have incorporated the obligation to inform arrested and detained foreigners of their right to notify their home states’ consuls into domestic legislation and continuously improved the specific content. For example, Australia, the United Kingdom and other countries have successively revised their domestic litigation rules. China’s *Regulations on Consular Protection and Assistance* adopted in 2023 also specifically clarified the responsibilities of China’s overseas institutions to provide consular assistance and protection. The United States has staged a fierce legal and political game within its borders over the domestic enforcement of the LaGrand and Avena cases. To achieve an integrated enforcement model from central legislation to local law enforcement, the United States also drafted the *Consular Notification Compliance Act of 2011*. Although the Act was not adopted finally, several states, including California and Oregon have successively amended their legislation to clarify the consular notification requirements within the state.<sup>59</sup> The U.S. State Department has also formulated the *Consular Notification and Access Manual*<sup>60</sup> in an effort to unify the consular notification rules in law enforcement procedures.

#### **D. Building an international cooperation platform for consular assistance**

The human rights law implementation mechanism and the specific operational norms detailed in some human rights documents provide constructive ideas for establishing an international cooperation platform for consular notification and consular coordination. Traditionally, consular notification and access are generally based on bilateral consular practices, lacking a unified cooperation platform. Furthermore, it is difficult to build consistent standards and practices. However, some human rights organizations are trying to promote the establishment of an integrated mechanism,<sup>61</sup> including but not limited to promoting the formulation and implementation of unified policies to provide consular support to imprisoned foreign nationals, especially those facing execution; establishing a global database of foreign nationals, and establishing an assistance information mechanism. Some international soft law documents have also provided specific practices. For example, the *Global Compact* proposes that state parties shall strengthen consular protection and assistance

<sup>56</sup> John Quigley, *Foreigners on America’s Death Rows: The Legal Combat Over Access to a Consul* (Cambridge: Cambridge University Press, 2018), 222-225.

<sup>57</sup> The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, October 1, 1999, Inter-Am. Ct. H. R. No.16 (1999), para. 123-124.

<sup>58</sup> Resolution 1717 adopted by the General Assembly of the Organization of American States on June 5, 2000, Resolution 2224 adopted on June 6, 2006, etc.

<sup>59</sup> Cal. Penal Code § 834 (c) (West 2004); Cal. Penal Code § 5028 (West 2004); Or. Rev. Stat. § 181. 470 (2015); Or. Rev. Stat. § 426. 228 (2015); Nev. Rev. Stat. § 18. 228. 135 (2016); N. C. Gen. Stat. § 122c 344 (West 2017); Fla. Stat. § 901. 26 (2017); Ill. Comp. Stat. 5/103 1 (2016).

<sup>60</sup> Travel.State.Gov, U.S. Department of State — Bureau of Consular Affairs, accessed April 13, 2024, <https://travel.state.gov/content/travel/en/consularnotification.html>.

<sup>61</sup> United Nations, “Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Application of the death penalty to foreign nationals and the provision of consular assistance by the home State,” A/74/318, August 20, 2019, para. 111.



to their nationals abroad in accordance with international law, train consular officials to identify, protect, and assist nationals abroad in vulnerable situations, including victims of human rights violations or abuses, victims of crime, victims of human trafficking, smuggled migrants with aggravated circumstances, and migrant workers exploited during the recruitment process; encourage the conclusion of bilateral or regional agreements on consular assistance and representation; establish helplines and integrate national digital databases while maintaining privacy rights and protecting personal data. These constructive opinions are all soft constraint mechanisms, and their ultimate realization depends on the conscious actions of each state. If an information-sharing platform can be gradually established for specific types of cases, it may help to achieve consistent practices in consular notification and access.

#### **IV. Rules for Consular Access in the Process of Formation**

Currently, some scholars and institutions are promoting the inclusion of consular access in the process of human rights enhancement. The special rapporteur of the Human Rights Council pointed out that providing a certain standard of consular protection to nationals facing the death penalty overseas is a general and actual practice of many states. “All States are under an international human rights duty to provide an adequate level of consular assistance to their nationals facing the death penalty.”<sup>62</sup> Whether consular access is a human right and whether it can be realized as a human right also depends on whether an individual’s access to consular assistance is a statutory right under domestic law. At the current stage, it is too early to define consular access as a human right to ensure the right of persons facing the death penalty overseas to be notified and to obtain consular assistance because this proposition faces insurmountable difficulties and development dilemmas. The logical dilemma is that the state has an obligation to inform foreigners who are under compulsory measures that they have the right to notify their consuls, and notifying consuls by that state may trigger consular protection, but this does not mean that consular protection will be automatically initiated, nor does it mean that consuls of the sending state will necessarily be able to provide consular assistance and protection to their nationals.

##### **A. Dual legal relations in consular access**

Consular access originates from Articles 5 and 36 of the VCCR. As an important means for a state to protect the interests of its nationals and legal persons, the consular system is specifically stipulated in Article 5 of the Convention that protecting nationals and their overseas interests is the primary duty of consuls, and “protecting nationals being arrested abroad is the core function of consuls.”<sup>63</sup> Article 36 specifically clarifies the rights of consuls to communicate and meet with their nationals. According to Article 36 (1) (c), consular officers shall have the right to visit a national of the sending state who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending state who is in prison, custody or detention in their district in pursuance of a judgement. In other words, the receiving state has a dual obligation: it not only has an obligation to inform foreign nationals who are under compulsory measures that they have the right to notify their consuls, but also has an obligation to guarantee the consuls’ access to their nationals.

The VCCR stipulates that the receiving state has an obligation to ensure consular communications and access. However, the Convention does not stipulate that a state’s consuls have an obligation to meet and assist their nationals. How the sending state conducts consular access is entirely at its discretion. Whether the consuls of the sending state provide consular protection to their nationals who are arrested and detained, and whether they have an obligation to do so are issues under the domestic laws of each state and depend on the

<sup>62</sup> United Nations, “Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Application of the death penalty to foreign nationals and the provision of consular assistance by the home State,” A/74/318, August 20, 2019, para. 63.

<sup>63</sup> Luke T. Lee and John B. Quigley, *Consular Law and Practice*, 3<sup>th</sup> edition (Oxford: Oxford University Press, 2008), 116-138.

provisions or authorizations of the domestic laws of each state. From the perspective of the realization of individual rights in international law, there is tension between states and individuals. “Of course, in the final analysis, it is for each state, within its national legal system, to find the way to best settle conflicts and tensions that may arise between (i) respect for the fundamental rights of individuals at the national level, and (ii) political discretion of governments in the conduct of international affairs.”<sup>64</sup> Whether consuls have an obligation to meet with their nationals who are arrested or detained in the receiving state is a question of domestic law. Consular access is not yet a due process right in human rights law because there is no unified approach on whether sending states have an obligation to protect their nationals detained abroad.

As a traditional content in international law, consular law ensures that effective communication between the sending and receiving states is the primary task in bilateral relations. Therefore, consular law does not stipulate the relationship between the sending state and its nationals to ensure a balance of interests between the sending and receiving states. In practice, there is still uncertainty between individual rights and the discretion of states in implementing treaties. “When a state party to an international treaty fails to implement some of its provisions within its domestic legal order, it may follow that fundamental rights to which individuals would be entitled in the national system of another contracting party fail to accrue to them. This often happens when a foreign state violates international rules granting rights to nationals of a contracting party. In this and similar cases, if the injured state does not take any action to react to a breach of the treaty, and, in particular, fails to exercise diplomatic or judicial protection of its nationals, individuals’ rights may end up being jeopardized. Normally, states enjoy discretionary power in their international transactions; it thus often occurs that individuals’ rights remain unfulfilled at the national level.”<sup>65</sup> Therefore, some scholars believe that “Whether an individual right to consular assistance exists in international treaty law is also doubtful.”<sup>66</sup> The VCCR does not specify whether consular assistance constitutes a state obligation of a state’s consuls toward their nationals in foreign states. Whether it constitutes an obligation depends on the provisions of the domestic laws of each state. In bilateral consular practice, bilateral consular treaties only stipulate functions of consuls of the sending state, including conducting consular visits, regular visits, providing judicial assistance, and temporarily keeping their nationals’ property. As for how consuls carry out their duties of consular protection and assistance in accordance with multilateral or bilateral treaties, these all fall within the scope of domestic laws or policies, and no unified practice has been formed.

### **B. Diversity of state practices**

What responsibilities a state’s consuls bear toward its nationals is a question of domestic law. Consuls carry out consular protection and assistance in accordance with the provisions or authorization of their laws and instructions of their governments. In practice, to further clarify the duties and powers of the consuls, some states have formulated special domestic legislation that specifically stipulates the duties of their consuls, clarifies how consuls perform their duties, the channels for consuls to carry out consular protection, the scope of consular assistance and protection, and the boundaries of consular duties. Some scholars<sup>67</sup> believe that consular protection has been recognized by many states and this includes legislative recognition. Consular protection is a constitutional right and an administrative norm. The constitutions of some states stipulate that their nationals shall be protected. For example, the

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<sup>64</sup> Antonio Cassese, *International Law*, translated by Cai Congyan et al. (Beijing: Law Press China, 2009), 309.

<sup>65</sup> *Ibid.*, 308-309.

<sup>66</sup> Conall Mallory, “Abolitionists at Home and Abroad: A Right To Consular Assistance and The Death Penalty,” *Melbourne Journal of International Law*, vol. 17, no. 1 (2016): 62.

<sup>67</sup> Antonio Cassese, *International Law*, translated by Cai Congyan et al. (Beijing: Law Press China, 2009), 107.

Federal Constitutional Court regards consular protection and assistance as due process, while Venezuela has written consular protection into its constitution. With regard to consular access and assistance, some scholars<sup>68</sup> have reviewed the policies of the United States, the United Kingdom, the Netherlands, Germany, Malaysia, and Indonesia on consular assistance for their nationals. They believe that only Germany and Indonesia have stipulated that their nationals have the right to receive consular assistance when being detained in foreign states. The Federal Constitutional Court regards consular assistance as due process. Finland, Switzerland and other states have also passed special legislation to specify the consuls' obligations to protect and assist their nationals. However, the legislation of these states also stipulates how to provide and whether it is appropriate to provide consular protection and assistance are at the discretion of consular officials. There are no specific operational standards to follow.<sup>69</sup> Article 50 of the *Constitution of the People's Republic of China* stipulates that China shall protect the legitimate rights and interests of Chinese nationals overseas as well as the lawful rights and interests of Chinese nationals who have returned from overseas and of their family members in China of Chinese nationals overseas. The *Regulations on Consular Protection and Assistance* clarify consular duties. In particular, Article 9 specifically stipulates that when compulsory measures are taken against Chinese nationals overseas, China's diplomatic missions abroad will conduct consular visits.

Some states, such as the United Kingdom, the United States, Canada, and the Netherlands, regard consular assistance and protection as a national policy. They believe that states have the right to exercise discretion on whether and how to provide consular protection. States have the responsibility to protect their nationals detained overseas, but this does not give the detained nationals a statutory right to receive consular assistance. For example, in the Butt case,<sup>70</sup> British national Butt was arrested in Yemen. Butt's family asked the British government to take consular assistance and protection measures to intervene in the trial taking place in Yemen because Butt was tortured in Yemen. The British government believed such actions would interfere with Yemen's internal affairs and refused to take further consular and diplomatic protection measures. Butt's family filed a domestic lawsuit in the UK against the UK government for inaction. However, the court held that whether to grant consular protection and diplomatic protection was a matter of policy, as the key content of consular assistance in Article 36 (1) of the VCCR had not been incorporated into British laws. Therefore, there was no violation of legitimate expectations. Consular assistance as a policy makes it difficult to ensure that the UK government takes action to provide consular and diplomatic protection to its nationals in foreign states. Furthermore, the UK government has no legal responsibility (obligation) for not taking action. The preamble of the *Act XLVI of 2001 on Consular Protection*<sup>71</sup> states that this consular law is intended to implement the provisions of the *Constitution of the Republic of Hungary*, to provide consular protection for Hungarian citizens in accordance with international treaties and customary rules on consular relations between states, to enforce and protect the basic human rights of Hungarian citizens and to protect the interests of legal entities in foreign states, as well as to enforce the rights of citizens of the Union (the European Union). According to Article 1 (4) of the Act, the consulate, in carrying out consular protection, shall determine the most appropriate approach by weighing all the circumstances of the particular case and considering local conditions. In other words, how to provide and whether it is appropriate to provide consular protection and

<sup>68</sup> Dewi Avilia, "Consular Assistance for Nationals Detained by a Foreign Government: States, Policies and Practises," *Indonesia Law Review*, vol. 7, no. 1 (2017): 113-134.

<sup>69</sup> Consular Services Act, 498/1999, amended in 2019; 195. 1 Federal Act on Swiss Persons and Institutions Abroad (Swiss Abroad Act, SAA), amended in 2018.

<sup>70</sup> Court of Appeal Civil Division P3 99/6610/4.

<sup>71</sup> Act XLVI of 2001 on Consular Protection, accessed January 9, 2024, <http://www.careproject.eu/database/upload/HU2001konzuli/HU2001konzuliTransEng.pdf>.

assistance are at the discretion of consular officials. There are no specific operational standards to follow.

The diverse practices of various states show that consular access and assistance have not yet developed into statutory individual rights under domestic law, and there are still many uncertainties in the practice of consular access. “The main distinction here is between states which have legally enshrined consular assistance as a right and those who provide it only as a matter of policy given to nationals as a privilege or grace, and solely at the discretion of the state.”<sup>72</sup> A government has the discretion to decide whether to provide consular access and assistance.

#### IV. Conclusion

Traditionally, consular law has been considered a “self-contained regime,” but the humanistic development of general international law has greatly promoted the modernization of consular law. The inclusion of consular notification and access in human rights law means that the protection of individual rights is strengthened from the perspective of human rights protection mechanism; the content of consular notification is enriched; the implementation methods of consular notification and assistance are strengthened; and the procedural value of Article 36 of the VCCR in domestic application is enhanced. Today, efforts to promote the human rights enhancement of “consular access” in specific types of cases are progressing slowly. By formulating consular assistance guidelines and building an international platform and a big database for consular notification and access, progress in consular assistance and protection will be greatly promoted. From this perspective, the implementation mechanism of human rights law has contributed new ideas to the development of consular law, reflecting the non-fragmented practice of international law and highlighting the mutual influence and interaction of various mechanisms of international law. The report to the 20<sup>th</sup> CPC National Congress clearly pointed out: “China shall strengthen its overseas security guarantee capabilities and protect the legitimate rights and interests of Chinese citizens and legal persons overseas.” Article 37 of China’s *Foreign Relations Law* also stipulates that China shall take necessary measures by the law to protect the security and legitimate rights and interests of Chinese citizens overseas. China’s *Regulations on Consular Protection and Assistance* also specifically stipulates the content of consular notification and assistance. It is of important practical significance and value to start with the requirements of legalization of foreign relations, make good use of international law rules of consular notification and access, and accurately understand and apply consular notification and access. From the perspective of fulfilling the consular notification obligation stipulated in Article 36 of the VCCR, China has made specific provisions for fulfilling the consular notification obligation in legislation, judicial, and law enforcement practices, contributing Chinese practice experience to ensuring the realization of individual rights.

(Translated by TAO Yu)

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<sup>72</sup> Conall Mallory, “Abolitionists at Home and Abroad: A Right To Consular Assistance and The Death Penalty,” *Melbourne Journal of International Law*, vol. 17, no. 1 (2016): 55.