



Foreign nationals facing the death penalty: the role of consular assistance

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In states which retain capital punishment, empirical research has frequently demonstrated that the risk of being sentenced to death and being executed is significantly higher for the most vulnerable and marginalised members of society. Among those are foreign nationals – including migrant workers, asylum seekers and trafficked persons: in Malaysia alone, as of February 2019, [568 foreign nationals were held on death row](#) – 44% of the total.

Foreign nationals are vulnerable due to the particular barriers they face and inadequate protections. They may be unable to understand the language in which investigations and legal proceedings are conducted; may lack knowledge of their legal rights and the workings of the criminal justice system; and may lack the financial resources to arrange adequate legal representation.

One way in which their disadvantages can be mitigated is through the provision of consular assistance by their ‘home state’. This post provides an overview of the role of consular assistance in death penalty cases, outlining the legal obligations upon host states to facilitate consular assistance and exploring the extent of any corresponding obligations upon home states. Where effective consular assistance is not received, the potential for arbitrariness is likely to be greatly exacerbated.

Facilitating consular assistance

In international law, the key treaty governing the exercise of consular assistance is the [Vienna Convention on Consular Relations, 1963 \(VCCR\)](#), which has been ratified by 182 states. Article 36 of the VCCR provides for the facilitation of consular assistance, permitting communication and access between consular officials of home states and their nationals.^[i] Of particular importance is Article 36(1)(b), which requires that when a foreign national is arrested, detained or pending trial in another state, the authorities of that host state must inform the individual *without delay* that they are entitled to have consular officials informed of their detention, and – if the individual so requests – notify the consulate *without delay*.

Despite the widespread acceptance of the requirement of consular notification as a legal principle, it is not always respected in practice. This is known to have occurred in death penalty cases, including cases in which individuals have been executed without their home states’ officials ever having been made aware of their detention or sentencing. Capital cases in which consular notification has not been enacted, preventing consular assistance, have led to high-profile litigation before international and regional courts, including the International Court of Justice (ICJ), which has jurisdiction to settle disputes between states that have ratified the VCCR.

In its 2001 judgment in [LaGrand \(Germany v. United States of America\)](#), the ICJ addressed a case in which two brothers, German nationals living in the U.S., had been convicted of murder and sentenced to death in Arizona in 1984. The authorities had failed to notify the defendants of their rights to consular notification, and German officials only learned of the case in 1992 after being contacted by the defendants themselves. Barred from contesting the issue due to U.S. procedural law restrictions, both individuals were executed in 1999. The ICJ determined that by failing to inform the defendants without delay of their rights to consular notification, and preventing Germany from providing assistance, the U.S. had breached its obligations under Article 36.



The Peace Palace in The Hague, Netherlands, home of the International Court of Justice

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In 2004, the ICJ gave judgment in a second case against the U.S., [Avena \(Mexico v. United States of America\)](#). *Avena* concerned 52 Mexican nationals who had been sentenced to death in the U.S., with Mexico contesting the lack of (or extremely delayed) consular notification. At issue in the case was precisely when the duty arose for authorities to notify consular officials. In finding against the U.S., the ICJ concluded that the duty to act under Article 36 arose as soon as authorities knew, or had grounds to think, that the individual was a foreign national, and that in 51 of the 52 cases, this had either not happened or had not occurred without delay. The ICJ’s requirement to give ‘review and reconsideration’ to these cases was rejected by the U.S. Supreme Court in 2008, and a number of those named in the case have since been executed.^[ii]

The development of this jurisprudence has served to further clarify host states’ obligations, with the ICJ stating in both *LaGrand* and *Avena* that the obligations under the VCCR were not owed only to other states (in the traditional international law sense),^[iii] but that Article 36 also established rights for individuals.^[iv] When individuals’ VCCR rights are respected by host states, consular assistance can play a pivotal role in the course of the legal proceedings. Contrarily, if they are not, cases can easily progress to execution. Both the [UN Human Rights Committee](#) and the [Inter-American Court on Human Rights](#) have stated that where the right to consular notification has not been properly fulfilled, the imposition of the death penalty constitutes an arbitrary deprivation of the right to life.

Providing consular assistance

While the obligations on host states to facilitate consular assistance are clear as a matter of international law, the obligations on the part of home states are far less established. Despite states’ rights under the VCCR to assist their nationals, there is nothing in the treaty which actually requires that they do provide assistance. In other words, under the VCCR, there is no individual right *to receive* consular assistance. Where a foreign national faces the death penalty, therefore, receipt of consular assistance is contingent on two conditions: firstly, that the host state promptly fulfils their obligations; and secondly, that the home state is willing to respond and to provide support.

In recent years, some experts have argued that home states nonetheless have obligations under international human rights law to provide consular assistance.^[v] In her [2019 report to the General Assembly](#), the UN Special Rapporteur on extrajudicial, summary or arbitrary executions Agnes Callamard posited that the failure to provide adequate consular assistance in death penalty cases could constitute a violation of the home state’s obligation to protect the right to life of their nationals, and that the decision to not provide assistance, or to provide inadequate assistance, could violate the principle of non-discrimination.^[vi] Such arguments remain at a relatively emergent stage, however.

The expectations on the part of home states are further complicated by the fact that there is no agreed standard of what constitutes ‘adequate’ consular assistance – the VCCR provides no guidance on this. Possible forms of support include: providing access to competent legal counsel; financing legal representation; arranging an interpreter; collating information for mental health defences or mitigation; providing basic necessities while in detention; and facilitating contact with family or friends. National policies vary: for example, whereas the Netherlands provides financial assistance for legal representation to those facing the death penalty abroad, the UK does not. In an effort to encourage an international consensus, the Special Rapporteur’s report sets out an extensive list of guidelines detailing actions which, in her view, adequate assistance would require.^[vii]

Where home states do choose to provide substantive assistance, this can have a material impact on the outcome of death penalty cases. For example, Mexico operates an assistance scheme for its nationals facing the death penalty abroad, the Mexican Capital Legal Assistance Program (MCLAP), which has demonstrated significant success in preventing executions. Based on data from MCLAP’s 2012–13 report, the rate of imposition of the death penalty in cases where individuals faced capital charges was just 0.8% for Mexican nationals, whereas the estimated rate for U.S. nationals was 8–14%.^[viii] That effective assistance can make such a difference to individuals’ fates underlines the fact that in its absence, the risk of arbitrariness is unavoidably increased.

It is clear that in practice, the actions of host and home states can often diverge from the ideals of prompt notification and effective assistance. A wide range of factors may play a role in this: for example, *inter alia*, some host states may more readily notify certain, preferred states, or not notify others on a discriminatory basis; while some home states may argue that they lack the financial resources to provide assistance, or may withhold assistance due to competing foreign policy objectives or in the belief that provision of assistance would interfere with the sovereignty of the host state.^[ix] Given that foreign nationals can find themselves caught up in a complex matrix of diplomatic relations, further research in this area could extend beyond the legal aspects of consular assistance to elucidate the motivations behind state practice, which could in turn inform more targeted efforts to reduce this driver of arbitrariness.

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[i] Polak notes that the inclusion of Article 36 in the treaty was a point of contention during the negotiation process, with the provisions being removed from the draft before being restored at the final hour. See: Michael Polak, ‘[The Jadhav case and the right to consular assistance: ‘Confessions’, spies, and remedies in international law](#)’ (2017) 57 Indian Journal of International Law 385, 387.

[ii] See [Medellin v. Texas, 552 US 491 \(2008\)](#), in which the Supreme Court held that the ICJ judgment did not constitute binding federal law. This followed on from the [withdrawal of the U.S. from the Optional Protocol to the Vienna Convention on Consular Relations](#), granting the ICJ jurisdiction to hear VCCR disputes, to avoid future decisions of this kind.

[iii] Polak, ‘The *Jadhav* case’, 387.

[iv] It should be noted that in the context of the ICJ’s decisions, these rights are individual rights under the treaty, rather than human rights *per se*. In other contexts, however, the right to consular assistance has also been understood as a human right, forming part of broader fair trial rights, for example.

[v] See: Conall Mallory, ‘[Abolitionists at Home and Abroad: A Right to Consular Assistance and the Death Penalty](#)’ (2016) 17 Melbourne Journal of International Law 1; David Stewart, ‘[The Emergent Human Right to Consular Notification, Access and Assistance](#)’ in Andreas von Arnould, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights* (CUP 2020); and Frederic Megret, ‘[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* (CUP 2020).

[vi] The Special Rapporteur also argued that in her view, the provision of consular assistance in death penalty cases is an emerging norm of customary international law. See UN General Assembly, ‘[Extrajudicial, summary or arbitrary executions: Note by the Secretary-General](#)’ (20 August 2019) UN Doc A/74/318, para 44.

[vii] *ibid*, paras 63–104.

[viii] Quaker United Nations Office (QUONO), ‘[Children of Parents Sentenced to Death or Executed: Developments, Good Practices and Next Steps](#)’ (August 2014).

[ix] Megret, ‘From a Human Right’, 457.

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