CENTRE FOR ACADEMIC LEGAL RESEARCH | JOURNAL OF APPLICABLE LAW & JURISPRUDENCE

Volume 1 | Issue 1

"Detention for Security and The Disintegration of Consular Access Rights"

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ABSTRACT

After the terrorist attacks of September 11, 2001, a global trend of widespread and extended detentions on broadly defined national security grounds evolved. Many regulations enacted to combat the growing threat of terrorism directly contradict human rights standards, raising the possibility of torture, discrimination based on national or ethnic origin, and denial of fundamental due process. The development of new security measures has sanctioned the use of indefinite imprisonment without trial and other severe limits on prisoner rights, with a particularly harsh impact on foreign people accused of terrorist activity. One worrying part of these draconian responses deserves more attention than it has received thus far: the widespread denial of timely consular access to foreigners detained in restrictive detention, which is a clear violation of the Vienna Convention on Consular Relations (VCCR) and a slew of other binding treaty obligations. There is compelling evidence that the universality of consular communication and access rights has deteriorated dramatically over the last decade. Nations that have historically been at the forefront of demanding quick consular contact with their own people overseas have used the ill-defined "war on terror" to justify huge denials of consular access to foreigners held within their borders. Strengthening consular protection and effectively responding to denials of consular access are critical components of that balancing process. Rebuilding this protective barrier should thus be a top priority for governments, non-governmental organisations, and private individuals alike. Related domains of international law, such as the expanding collection of multilateral accords addressing terrorism, human rights, and prisoner care, provide important direction and confirmation. International court judgements, as well as treaty monitoring agencies' conclusions, are another source of applicable legislation. Finally, instances of state conduct give real-world proof of the right to consular access as it is, rather than as it should be. This paper will focus on consulates' usual right to aid and defend citizens imprisoned overseas under customary international law.

THE RIGHT OF CONSULAR ACCESS

International law has long recognised consulates' customary duty to aid and defend individuals imprisoned overseas.[1] However, a consulate's capacity to give meaningful assistance is primarily reliant on timely notice of the detention and access to the detainee. Bi-lateral consular treaties started to also include specific information on notification and access by the mid-twentieth century, such as a consul's right to "interview, communicate with, and advise any national" in the host nation, to attend any national "who is imprisoned or detained," and to be "notified immediately by the appropriate authorities" when a national "is confined in prison awaiting trial or otherwise detained in custody within his consular district."[2] Some accords acknowledged an additional sovereign right to "arrange for legal help" for imprisoned citizens, as well as the detainee's right "to correspond with the competent consular official at all times."[3] As influential as these bilateral efforts were in creating the contemporary contours of consular notification and access, they were neither consistent in content nor universal in breadth. The VCCR, which was adopted in 1963, is largely regarded as the formulation of customary international law on the formation, functions, and privileges of consulates.[4] The VCCR is currently recognised by 176 countries, making it one of the most commonly ratified treaties in the world.[5] The signing of the Vienna Convention in 1963 has been described as "undoubtedly the single most important event in the entire history of the consular institution," with the result that "no settlement of consular disputes or regulation of consular relations, whether by treaties or national legislation, can be made without reference or recourse to the Vienna Convention."[6] Its rules on consular notice and access are so important to current consular activities that the US Department of State considers the VCCR to be "widely regarded as the norm of international practise of civilised states, whether or not they are parties to the Convention."[7] Article 36 of the VCCR provides that, upon informed request of a detained foreign individual, the consulate of the sending State shall be notified of the custody "as soon as

[1] The Bello Corrunes, 19 U.S. 152, 168 (1821)
[2] Consular Convention, U.S.-Costa Rica, art. VII, Jan. 12, 1948, 1 U.S.T. 247
[3] Consular Convention, with Protocol of Signature, U.S.-U.K, art. 15, June 6, 1951, 3 U.S.T. 3426 [hereinafter Consular Convention, U.S.-U.K.].
[4] Luke T. Lee, Consular Law And Practice 436 (2d Ed. 1991).
[5] Vienna Convention on Consular Relations, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/doc/Treaties/1967/06/19670608%2010-36%20AM/Ch_III_6p.pdf (last visited September. 4, 2022).
[6] LEE, *supra* note 4, at 27
[7] LEE, *supra* note 4, at 145

possible."[8] The consulate also has the authority to "visit a citizen of the sending State who is in prison, custody, or detention, speak and write with him, and arrange for his legal counsel."[9] There is no time limit for granting consular access; however, it, like the other rights granted, "shall be exercised in accordance with the laws and regulations of the receiving State," provided that these domestic rules "enable full effect to be given to the purposes for which the rights accorded under this article are intended."[10] Article 36 makes no distinction between types of detention: consular access is required in all circumstances when a foreigner is "arrested, sent to prison or custody pending trial, or is detained in any other manner."[11] When the customary norms of treaty interpretation are applied to this formulation, it is clear that the article means exactly what it states. In the absence of qualifying language, treaty law requires that provisions "be interpreted in good faith in accordance with the customary meaning to be ascribed to the terms" used in the treaty, "in their context and in light of their goal and purpose."[12] Article 36 is meant to carry out the primary consular tasks of "safeguarding the interests of the sending State and its nationals in the receiving State... within the limitations recognised by international law," as well as "helping and supporting" those people.[13] As a result, the phrase "detained in any other manner" should be interpreted as requiring consular access to foreign individuals detained in any manner, regardless of the circumstances or charges. Furthermore, the consular right to arrange for the detainee's legal counsel strongly suggests that consular access be allowed at an early enough point in the imprisonment to give that right full impact.

THE VIENNA CONVENTION ON CONSULAR RELATIONS AND SECURITY DETENTIONS

Authorities in the United States detained up to 1,200 foreign people in the weeks following the September 11 attacks.[14] Many were imprisoned without charge and without contact with the outside world, and many were subjected to brutal treatment and severe confinement

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[8] Vienna Convention on Consular Relations art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].
[9] *Id*. art. 36(1)(c).
[10] *Id*. art. 36(2).
[11] *Id*. art. 36(1)(c).
[12] Vienna Convention on the Law of Treaties art. 31(1), May 22, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].
[13] VCCR, *supra* note 8, art. 5(a), (e)
[14] Human Rights Watch [HRW], Presumption of Guilt: Human Rights Abuses of PostSeptember 11 Detainees, at 3 (Aug. 2002), available at http://www.hrw.org/reports/2002/us911/USA0802.pdf (last visited September. 4, 2022).

circumstances.[15] Hundreds of inmates were eventually deported for minor immigration offences, but none were charged with terrorism-related crimes.[16] At least seven nations "made strong objections" over "the State Department's inability to properly inform countries whose citizens were being detained," an apparent breach of the US' VCCR responsibilities.[17] "No one informed us that they were being imprisoned," a Saudi embassy official stated.[18] "We had no idea until we heard from their attorneys or their relatives."[19] At least one person died in captivity, although his embassy was completely ignorant of his incarceration until the media contacted him a week after his death.[20] According to Yemen's envoy, certain US officials "continued to be very covert about the prisoners still being detained."[21] "We believe there is real worry on our part," he stated.[22] "I'm sure Americans would be disturbed if they were treated this way in another nation, particularly in countries that support the United States in its fight against terrorism."[23] More than two months after the first surge of detentions, embassy representatives from Lebanon and Egypt objected that they had still not been provided the names of their citizens who remained in jail, nor had they been informed of the accusations they faced.[24] The US Secretary of State reacted by promising the Egyptian ambassador, albeit belatedly, that those nationals "would be notified of their rights" and that "Egyptian diplomats will be provided access to the prisoners."[25] In December 2006, Kenyan officials detained 150 people from at least eighteen nations in a border security operation half a globe away.[26] Suspected of having ties to terrorist organisations, the prisoners were kept without trial for many weeks and were refused consular access.[27] Ninety individuals were subsequently

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[15] *Id.*
[16] *Id.*
[17] John Donnelly & Wayne Washington, Diplomats Fault Lack of U.S. Notice on Many Detainees, BOSTON GLOBE, Nov. 1, 2001, at A1.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] David E. Sanger, President Defends Secret Tribunals in Terrorist Cases, N.Y. TIMES, Nov. 30, 2001, http://www.nytimes.com/2001/11/30/politics/30CIVI.html. (last visited September. 4, 2022).
[25] *Id.*
[26] HRW, "Why Am I Still Here?" The 2007 Horn of Africa Renditions and the Fate of Those Still Missing, at 2 (Oct. 2008), available at http://www.hrw.org/sites/default/files/reports/eastafrica1008web.pdf (last visited September. 4, 2022).
[27] *Id.*

transferred to Somalia and finally to Ethiopia, where they vanished into covert captivity.[28] Several captives later recounted being interviewed by US intelligence officials throughout their captivity.[29] Despite Canada's best efforts, one of the released inmates, a harmless Canadian businessman, was denied a consular visit for well over a year.[30] Following a terribly unjust trial, he was condemned to life in prison.[31] These and other mass security detentions create critical international law issues. Article 36's notice and access rules appear to be designed to be equally relevant to all types of detention. While the article does not specifically say that its requirements supersede national security regulations, a perceived ambiguity in a treaty's wording necessitates the use of other sources of interpretation, such as its travaux préparatoire.[32] When the drafting history is evaluated, any potential uncertainty dissipates. During the International Law Commission (ILC) debate on the Special Rapporteur on consular immunities' draught articles (which made no mention of consular notification), English jurist Sir Gerald Fitzmaurice proposed a new Article 30A that would guarantee the right to consular notification, communication, and visits "without delay" to nationals who were imprisoned, arrested, or otherwise detained.[33] According to the sponsor, "the suggested wording was already included in a vast number of existing consular treaties," and "failure to follow such responsibilities was the main cause of tension between nations, as well as a source of regular occurrences and great discussion."[34] In response to the proposed modification, Yugoslav jurist Milan Bartos noted that "the practise in the majority of States was to tell the consul on the same day that one of his nationals was detained."[35] Other ILC members noted that requiring timely notice and access "may clash with the penal law of many nations," which allowed for incommunicado incarceration.[36] During the VCCR drafting conference, delegates raised concerns about the "undue delay" language, which was changed by removing the word "undue" to avoid the

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[28] *Id.* at 3.
[29] *Id.*
[30] *Id.* at 18.
[31] Bashir Makhtal: Canadian Citizen Faces Life in Prison after Unfair Trial in Ethiopia, AMNESTY INT'L (Nov. 8, 2012), http://www.amnesty.ca/get-involved/take-action-now/bashir-makhtalcanadian-citizen-faces-life-in-prison-after-unfair-trial. (last visited September. 4, 2022).
[32] VCLT, supra note 12, art. 32.
[33] Summary Records of the 535th Meeting, [1960] 1 Y.B. Int'l L. Comm'n 48, 48, U.N. Doc. A/CN.4/SER.A/1960 [hereinafter 535th Meeting].
[34] *Id.*
[35] Summary Records of the 534th Meeting, [1960] 1 Y.B. Int'l L. Comm'n 42, 46, U.N. Doc. A/CN.4/SER.A/1960 [hereinafter 534th Meeting]
[36] *Id.* at 47.

implication "that some delay was permissible" in consular notification and forwarding communications addressed to the consulate by the detainee.[37] Furthermore, the article's notice and visiting rights were previously subject to the caveat that local rules and regulations "shall not negate these rights."[38] Over the objections of delegates who stated that the wording would "change the criminal legislation and regulations or the criminal procedure of the receiving state," an amendment effectively substituted the "full effect" clause.[39] Based on the common meaning of the phrases used in Article 36 and the drafting history of its provisions, the most probable reading acknowledges a right to consular communication with foreigners detained in any manner. Furthermore, no party to the VCCR has made any reservations or agreements to the contrary.[40] Every treaty in force "is binding upon the parties to it and must be fulfilled by them in good faith," according to the fundamental principle of treaty interpretation, and a party "may not claim the provisions of its domestic law as justification for its failure to implement a treaty."[41] Regardless of whether preventative detention is believed to be legal under the laws of the receiving State, consular workers have a clear right under the VCCR to insist on prompt communication with detained nationals in whatever form of custody. This view is supported by state practise following the passage of the VCCR. Denials of consular access were frequent in Latin America throughout the 1970s and 1980s, for example, when many governments proclaimed states of emergency, suspending civil freedoms and allowing for secret detentions.[42] Other nations, too, insist on timely consular access to detainees, notwithstanding domestic rules that allow for incommunicado incarceration. Two Canadian nationals were detained by the Yugoslav army on their way back to Kosovo following a holiday weekend on the Montenegrin coast in 2000.[43] Within three days of the detention, Canada's Foreign Minister summoned the Yugoslav ambassador to reiterate Canadian demands for "immediate consular access to these individuals" and "emphasised to the

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[37] United Nations Conference on Consular Relations, Mar. 4-Apr. 22, 1963, Official Records, 85, U.N. Doc. A/CONF.25/C.2/L.107 (Vol. II) (Mar. 13, 1963) (United Kingdom: Amendments to Article 36).

[38] U.N. Doc. A/CONF.25/L.34 (Apr. 16, 1963) (USSR: Amendment to article 36).

[39] *Id.* at 38.

[40] Declarations and Reservations, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en (last visited September. 4, 2022).

[41] VCLT, *supra* note 12, arts. 26-27.

[42] Luke T. Lee & John Quigley, Consular Law And Practice 160 (3d Ed. 2008)

[43] Dep't of Foreign Affairs and Int'l Trade, Axworthy Demands Immediate Consular Access to Detained Canadians in Yugoslavia (Aug. 4, 2000), available at http://web.archive.org/web/20010415164645/http://198.103.104.118/minpub/Publication.asp?FileSpec=/Min_PubDocs/103608.htm. (last visited September. 4, 2022).

Yugoslav Foreign Ministry [that] their government is obliged, under the Vienna Convention, to grant Canadian officials immediate consular access to the detainees."[44] In a separate event, a British ambassador told the United Nations Security Council that "the wait of 10 days between arrest and the authorization of consular access was unacceptable," repeating Britain's prior demand that Yugoslav authorities "immediately free the individuals or file charges."[45] The International Court of Justice (ICJ) is the principal judicial authority for the interpretation and implementation of Article 36, and it has obligatory jurisdiction to resolve disputes involving VCCR parties who are also signatories to the treaty's voluntary dispute settlement mechanism.[46] Although the ICJ has resolved essential aspects of Article 36 rights and the remedies that must be given for their infringement, it has not addressed the issue of consular communication with prisoners in preventative or incommunicado detentions directly. However, the ICJ has stated that even the most egregious forms of detention (such as hostage-takings of diplomatic personnel with the implicit approval of the receiving State) are subject to Article 36 requirements and that denials of consular contact "engage the responsibility" of the receiving State "under international law," requiring it to "immediately take all steps to redress the situation."[47] The ICJ also stated that the VCCR enshrines the customary consular function of "protecting, assisting, and safeguarding the interests of nationals," and that the purpose of those functions "is precisely to enable the sending State, through its consulates, to ensure that its nationals are accorded the treatment due to them under the general rules of international law as aliens within the territory of the foreign State."[48] While the International Court of Justice has not defined the precise requirements for timely consular access, nothing in its Article 36 jurisprudence suggests that it would accept an exception to the "detained in any other manner" requirement, let alone countenance a denial of access in cases of internationally unlawful detention. Other international tribunals have examined the nexus between access to consular aid and arbitrary detentions more explicitly. According to the Inter-American Court of Human Rights, foreign detainees have the right to "effective communication with the

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[44] *Id.*
[45] Britain Slams Yugoslavia in Hostage Crisis, HR-NET (Aug. 25, 2008), available at http://www.hri.org/news/balkans/rferl/2000/00-08-25.rferl.html#19 (last visited September. 4, 2022).
[46] Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes art. 1, Apr. 24, 1963, 596 U.N.T.S. 487
[47] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶ 95(2), (3) (May 24)
[48] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Order, 1979 I.C.J. 7, ¶ 19 (Dec. 15).

consular official," and prompt access "constitutes a mechanism to avoid illegal or arbitrary detentions from the very moment of imprisonment while also ensuring the individual right to defence."[49] In another case, the Inter-American Court ruled that denying the right to consular notice violated due process since the consul might aid the detainee in various acts of defence, including "observing the defendant's status while he is imprisoned."[50] Determining whether a delay in consular contact becomes inappropriate may likely rely on the facts of a particular case, including the reasons for the delay, the type of imprisonment involved, and the risk to the detainee's well-being or legal rights. The countdown to an unreasonable delay begins in all situations "from the time he or she is deprived of liberty by a foreign governmental body or authority and is not free to depart."[51] Any confinement without consular access that lasts longer than a few days should be considered an unacceptable violation of Article 36. According to the ICJ, "the clarity of those rules, read in their context, admits of no question."[52]

IMMEDIATE CONSULAR ACCESS: ADDITIONAL LEGAL SOURCES

According to Article 73 of the VCCR, "the provisions of the present Convention shall not affect other international agreements in force," and nothing in the VCCR "shall preclude States from concluding international agreements confirming, supplementing, extending, or amplifying the provisions thereof."[53] Bilateral consular conventions developed following the VCCR are a significant source of authority on states' real knowledge and practise on topics such as consular interaction with prisoners during various types of confinement. At least fifty bilateral consular treaties signed after the VCCR include a specific notice or access timelines. The accords were signed between 1964 and 2008, and they involve thirty-nine parties from every continent, covering a diverse spectrum of political and judicial systems. Within this broad collection of bilateral agreements, no uniform formula for consular notice and access prevails, even among those that employ the VCCR's "without delay" terminology. The lowest maximum timeframe for consular

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[49] Velez Loor v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, InterAm. Ct. H.R. (ser. C) No. 218, ¶ 153 n.157 (Nov. 23, 2010).

[50] Acosta Calderon v. Ecuador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 129, ¶ 3 (June 24, 2005).

[51] 7 U.S. DEP’T OF STATE, Educating, in FOREIGN AFFAIRS MANUAL § 421.2-2 (2004)

[52] LaGrand Case (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, ¶ 77 (June 27).

[53] VCCR, *supra* note 8, art. 73

notice is 48 hours after detention,[54] while the longest is ten days.[55] The maximum period for consular access is three days after detention.[56] The longest time span is fifteen days.[57] A large majority of the fifty accords demand consular notification within three days of arrest. More than a dozen international treaties ratified after the VCCR have provisions to facilitate consular aid for imprisoned foreigners.[58] The series of treaties addressing terrorism-related offences are particularly relevant, as the majority of the state in mandatory terms that detainees must "communicate without delay" with their consular representatives, be "visited by a representative of that State," and that local laws and regulations "must enable full effect to be given to the purposes" for which these rights are granted.[59] None of the anti-terrorism treaties acknowledge or suggest any limits to the rights to consular contact and visits based on national security detentions or other grounds. No country has made any restrictive reservations to any of these clauses.[60] A number of these accords also establish a clear link between the right to rapid consular contact and the provision of other legal rights and safeguards to detained foreigners. The Convention on the Safety of UN and Associated Personnel, for example, clearly combines an accused foreigner's right to immediate consular communication with the right to "fair treatment, a fair trial, and complete protection of his or her rights at all stages of the investigations or procedures."[61] Likewise, the Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism grants four specific due process rights to those facing prosecution, in the following order: the right to immediate consular communication; the right to be visited by a consular representative; the right to be represented by legal counsel of one's own choosing; and the right to be informed of the preceding rights.[62] Consular officers may refer to anti-terrorism treaty visiting rules in circumstances when the detaining state has not ratified the VCCR or does not normally comply with its obligations in security detention cases, but is a party to the anti-terrorism instrument. For example, 166 countries have signed the International Convention for the Suppression of Terrorist

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[54] Consular Convention, Bulg.-Greece, art. 28, Apr. 24, 1973, 965 U.N.T.S. 245
[55] Consular Convention, Bulg.-Fr., art. 33, July 22, 1968, 747 U.N.T.S. 424.
[56] Convention on Consular Functions, Arg.-It., art. 14, Dec. 9, 1987, 1577 U.N.T.S. 219
[57] Consular Convention, Bulg.-Fr., *supra* note 65, art. 33.
[58] Convention on the Safety of United Nations and Associated Personnel art. 17(2), Dec. 9, 1994, 2051 U.N.T.S. 363;
[59] Convention for the Suppression of the Financing of Terrorism art. 9, Dec. 9, 1999, 2178 U.N.T.S. 197;
[60] VCLT, *supra* note 12, art. 31(3)(b).
[61] Convention on the Safety of United Nations and Associated Personnel art. 17, Dec. 9, 1994, 2051 U.N.T.S. 363.
[62] Convention on the Prevention and Combating of Terrorism (Protocol of Algiers) art. 7(3), July 14, 1999, 2219 U.N.T.S. 213.

Bombings, Article 7 of which reaffirms the notice and visiting rights enshrined in VCCR Article 36 (including the "full effect" requirement).[63] This pact binds numerous countries where denial of quick or continuous consular access has been a chronic issue, including Syria, Israel, and Sudan.[64] Access to consular assistance is increasingly recognised in human rights treaty law as critical protection to avoid torture, "disappearances," and other grave abuses when persons are detained in limited confinement. The International Convention for the Protection of All Persons from Enforced Disappearance,[65] for example, has been signed by 93 countries.[66] The Convention's Article 17(1) stipulates that "no one should be detained in secret detention" and provides six basic protections that must be provided by law to prohibit hidden custody.[67] The list contains a promise that "any individual deprived of liberty will be permitted... to correspond with his or her consular authority, in conformity with existing international law, if he or she is a foreigner."[68] The United Nations General Assembly's human rights principles consistently acknowledge the right of all prisoners to prompt consular notice and communication. The United Nations Body of Principles for the Protection of All Persons Detained or Imprisoned[69] provides the most extensive and up-to-date guidelines. Foreign prisoners must be "promptly notified" of their right "to contact by proper means with a consular post or the diplomatic mission of the State of which he is a national..." according to Principle 16(2).[70] These notifications "must be made or authorised to be made without delay," according to Principle 16(4), albeit the competent authority may "delay a notice for a reasonable period if special demands of the inquiry so require."[71] Importantly, Principle 15 states that "communication of the detained or imprisoned individual with the outside world... should not be prohibited for more than a few days," regardless of the delay granted in extraordinary situations.[72] There is little doubt that any prolonged delay or outright denial of consular access

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[63] Convention for the Suppression of Terrorist Bombings art. 7, Dec. 15, 1997, 2149 U.N.T.S. 256

[64] U.S. Dep't of State, Bureau of Consular Affairs, Learn About Your Destination, U.S. PASSPORTS & INT'L TRAVEL

[65] G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006).

[66] International Convention for the Protection of All Persons from Enforced Disappearance, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en (last visited September. 4, 2022).

[67] G.A. Res. 61/177, art. 17(1), U.N. Doc. A/RES/61/177 (Dec. 20, 2006)

[68] *Id.*

[69] G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988). 88.

[70] *Id.* princ. 16(2).

[71] *Id.* princ. 16(4).

[72] *Id.* princ. 15.

would be "in breach of the standards of international law and hence unlawful."[73] That comprehension does not always translate into rapid access to a detainee, as in no wait at all. State practise varies greatly, and some nations demand that the consulate first ask for a visit, while others may opt to notify consulates by letter.[74] Even in the absence of additional security limitations, it may take several days for consular access to be granted. Nonetheless, any delay in granting consular access privileges that last more than a few days, even during security detention, may be grounds for a consular protest or other corrective action.

PROTESTING AND PREVENTING CONSULAR ACCESS VIOLATIONS

Protests against denials of consular access have always been commonplace in state practise; this cycle of protest and reaction shows the emergence of a customary international law norm.[75] For example, the United States has directed its consular posts around the world to file an immediate protest if another country fails to notify the consular post within 72 hours of the arrest of a U.S. citizen, because "prompt notification is the necessary first step in obtaining early access to the arrestee."[76] Posts in countries where VCCR regulations apply are urged to "point to Article 36 of the VCCR in the protest."[77] Detentions for security reasons are no exception to this long-standing rule.[78] When 10 Pakistani students were detained in the UK on suspicion of terrorism planning, Pakistan's High Commissioner in London "filed a formal complaint when British officials refused to provide details of the suspects' names or give Pakistani diplomats consular access to the men."[79] According to an alleged "Whitehall security source," counter-terrorism authorities wanted to conduct preliminary questioning with the guys before providing consular access to them.[80] The charges against the 10 students were eventually withdrawn owing to a lack of evidence, and they

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[73] Biswanath Sen, A Diplomat's Handbook Of International Law And Practice 372 (3d Rev. Ed. 1988).
[74] Declaration of Ambassador Maura A. Harty Concerning State Practice in Implementing Article 36(1) of the Vienna Convention on Consular Relations (Oct. 28, 2003), available at http://www.cesarfierro.info/Harty.PDF. (last visited September. 4, 2022).
[75] LEE, *supra* note 4, at 136.
[76] FOREIGN AFFAIRS MANUAL, *supra* note 51.
[77] FOREIGN AFFAIRS MANUAL, *supra* note 51.
[78] LEE, *supra* note 4, at 148-49, 151-54.
[79] Tim Shipman, Pakistan Condemns Home Office Over Student Terror Arrests, DAILY MAIL (Apr. 16, 2009), http://www.dailymail.co.uk/news/worldnews/article-1170661/Pakistan-condemnsHome-Office-student-terror-arrests.html. (last visited September. 4, 2022).
[80] *Id.*

were sent to the United Kingdom Border Agency for deportation on national security grounds.[81] More than a month after their arrest, they were eventually permitted consular access. When three of the students protested during the consular visit that they were being imprisoned in a maximum security jail with dangerous criminals while awaiting deportation, the High Commissioner persuaded British officials to transfer the students back to their prior detention facility.[82] When Indian officials asked for consular access to a citizen detained on suspicion of participation in a bomb plot at Glasgow Airport, they were met with a similar month-long wait.[83] This disagreement with local authorities over expedited consular access exemplifies the rising tension in many nations between national security legislation and treaty responsibilities. The provisions of the Police and Criminal Evidence Act (PACE) oblige law enforcement officials in the United Kingdom to inform detained or arrested foreigners of their treaty-based right to consular communication and notification "as soon as feasible."[84] A request for consular contact should also be "addressed as soon as possible."[85] Consular personnel may "visit one of their nationals in police detention to talk to them" and "arrange for legal counsel" if the prisoner agrees; those visits "must take place out of the hearing of a police officer."[86] Significantly, "the exercise of rights in [PACE] may not be interfered with," even if the foreign national has been detained under the Terrorism Act of the 2000s highly restrictive provisions.[87] Except for the lack of defined deadlines for when consular access must be allowed, these measures are otherwise highly praiseworthy. Furthermore, the Terrorism Act changes of 2006 raised the permitted term of imprisonment without charge from fourteen to twenty-eight days, with the option of subsequent extensions.[88] That adjustment may have given a fatal blow to determining when it is "practicable" to respond to a request for consular notice and visits. In any case, unlike the extremely explicit (although restricted) notice and access obligations in New Zealand's Terrorism Suppression Act 2002, the wording of the Terrorism Act

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[81] Three Pak Students Shifted to Manchester, NATION (May 21, 2009), http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/Politics/21-May-2009/Three-Pak-students-shiftedto-Manchester (last visited September. 4, 2022).
[82] *Id.*
[83] India Secures Consular Access to Sabeel Ahmed, TIMES INDIA, July 31, 2007
[84] Police and Criminal Evidence Act (PACE) 1984, 1991, c. 60, Code H, § 1.14 (U.K.).
[85] *Id.* Code H, § 7.1.
[86] *Id.* Code H, § 7.3.
[87] *Id.* Code H, n.7A
[88] Home Office, The Terrorism Act 2006, GOV.UK, § 23 (Apr. 26, 2011), https://www.gov.uk/government/publications/the-terrorism-act-2006. (last visited September. 4, 2022).

does nothing to ease any uncertainty or to prohibit purposeful limits on consular visits.[89] In 2011, British diplomats encountered their own timely access difficulty when Eritrea held four British nationals who were providing anti-piracy protection to merchant vessels in the Gulf of Aden and denied all consular contact requests.[90] The Foreign and Commonwealth Office declared five months into their captivity that high-level initiatives to obtain access had been rebuffed, leaving it with "no choice but to take a more direct approach" to addressing the matter.[91] Eritrean ambassadors were barred from leaving the London region, and the embassy was told to stop collecting a tax on Eritrean people living in the UK "immediately and completely."[92] Eritrea issued its own public statement, stating that the four people were likely involved in terrorist, sabotage, and espionage plots.[93] Two days later, the Foreign Office said that the prisoners had been "allowed to depart Eritrea and could be reunited with family and friends," while thanking "the Government of the State of Qatar for facilitating their repatriation."[94] "We remain concerned, however, that the Eritreans never responded to our requests for consular access, and we will continue to raise this subject with them," the statement continued.[95] After the US military attack on its claimed consulate in northern Iraq in January 2007, Iran maintained a similar stance on rapid access. The Iranian Foreign Ministry said, citing the VCCR, that the US had "violated Iran's right by refusing to grant consular access to its people quickly, which is contrary to standards recognised by civilised nations."[96] Iraq freed the five captured Iranians two years later, shortly after they were transferred from the US to Iraqi custody.[97] Malaysian officials gave consular access to more than 100 jailed Filipinos, including eight on terrorist accusations, after two weeks of heavy diplomatic pressure

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[89] Terrorism Suppression Act 2002, § 66(2) (N.Z.), http://www.legislation.govt.nz/act/public/2002/0034/25.0/DLM153345.html.108. (last visited September. 4, 2022).
[90] Foreign & Commonwealth Office, Foreign Office Concern at Being Denied Consular Access to Detainees in Eritrea, (May 26, 2011)
[91] *Id.*
[92] *Id.*
[93] Zoe Flood, Eritrea Accuses Four Detained Britons of 'Espionage' and 'Terrorism,' TELEGRAPH, June 10, 2011, http://www.telegraph.co.uk/news/worldnews/africaandindianocean/eritrea/8568409/Eritrea-accuses-four-detained-Britons-of-espionage-and-terrorism.html. (last visited September. 4, 2022)
[94] Foreign & Commonwealth Office, Foreign Office Welcomes Release of British Men from Eritrea, GOV.UK (June 12, 2001).
[95] *Id.*
[96] Embassy Condemns Detention of Iranian Diplomats by US, PAYVAND IRAN NEWS (May 23, 2007), http://www.payvand.com/news/07/may/1281.html. (last visited September. 4, 2022).
[97] Iranians Held in Iraq Since 2007 Released, CNN (July 9, 2009) http://www.cnn.com/2009/WORLD/meast/07/09/iraq.iranians.released/index.html. (last visited September. 4, 2022).

from the Philippine Foreign Ministry.[98] "We want to provide consular help to our citizens there. That is why we have been pushing on Malaysia granting these Filipinos access under the Vienna Convention on Consular Relations," a Foreign Ministry spokeswoman said, adding that the Foreign Ministry has submitted at least four verbale letters to Malaysia over its request.[99] "It is critical to have full access to the eight and other Filipino detainees... to understand their situation and ensure their rights are upheld," the official said.[100] Addressing consular communication barriers in security detention cases has occasionally helped to break deadlocks between sending and receiving States on a broader range of concerns. This tiny sample of many accessible cases suggests that the efficacy of consular protests is dependent in part on the sending State's tenacity, as well as its readiness to relate the detrimental repercussions of the consular breach to other critical aspects of the bilateral relationship. Furthermore, concerted outreach by impacted nations' consulates to local authorities may promote improved consular notice and access for foreigners caught up in the intensified security measures presently in place throughout the world. Nations may also enter into a formal memorandum of agreement that provides interim solutions to consular concerns.

PRIVACY OF CONSULAR VISITS

Kim Young-hwan, a South Korean democracy activist, was finally permitted a brief visit from a consulate officer after over a month in custody in China.[101] When the consular officer questioned Kim if he had been tortured or ill-treated, he answered, "How can I speak such things here?"[102] Maher Arar, a Canadian citizen, was held by US agents in 2002 despite his innocence.[103] He was

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[98] Angela Casauay, Malaysia Grants PH Access to Detainees, RAPPLER (Mar. 22, 2013), http://www.rappler.com/nation/24391-malaysia-grants-consular-access-to-8-detained-pinoys. (last visited September. 4, 2022).

[99] *Id.*

[100] Malaysia Grants Access to Detained Filipinos in Sabah, SUN STAR, Mar. 22, 2013, http://www.sunstar.com.ph/breaking-news/2013/03/22/malaysia-grants-access-detained-filipinossabah-274238. (last visited September. 4, 2022).

[101] Choe Sang-Hun, Relations Tested in Case of South Korean Activist Detained in China, N.Y. TIMES, May 31, 2012, http://www.nytimes.com/2012/06/01/world/asia/south-korean-democracycampaigner-is-detained-in-china.html.(last visited September. 4, 2022).

[102] *Id.*

[103] Comm'n Of Inquiry Into The Actions Of Can. Officials In Relation To Maher Arar, Report Of The Events Relating To Maher Arar: Analysis And Recommendations 9 (2006), Http://Www.Pch.Gc.Ca/Cs-Kc/Arar/Arar_e.Pd (last visited September. 4, 2022).

refused prompt Canadian consular access[104] despite his request for consular notice and surreptitiously sent to Syria, where he was tortured twice.[105] The Canadian consul in Damascus was permitted limited access to Arar two weeks following his rendition to Syria and reported that he looked to be in fair condition. The circumstances of the consular visit, however, "should have alerted Canadian officials to the potential that Mr. Arar had been tortured when interviewed while detained incommunicado" by the Syrian security service,[106] according to the public investigation into the matter. The visit "was quite controlled, and Mr. Arar's demeanour was meek,"[107] Furthermore, "Syrian authorities were present throughout and insisted that Mr. Arar talk in Arabic, with one of them functioning as a translator," although Arar "gave eye signals conveying that he could not speak freely."[108] Finally, he was forced to make assertions that were "clearly phoney and fabricated."[109] Regrettably, the VCCR does not indicate explicitly that consular visits must be conducted in private. While the inclusion of a privacy obligation was widely supported during ILC debates of the proposed language, it was not included in the document submitted to the treaty conference. Nonetheless, as an authoritative text on consular law and practise notes, the view that Article 36 requires confidentiality of consular visits "is consistent with the purpose of consular communication," because a detainee may be asked about mistreatment and may "make remarks that reflect negatively on the local authorities," prompting reprisals, or may allege "political persecution or national origin discrimination."[110] Discussing these critical issues during a consular visit "is only useful if secrecy is respected."[111] Regrettably, the VCCR does not indicate explicitly that consular visits must be conducted in private. A considerable number of bilateral consular agreements enacted over the last sixty years have provisions preserving some degree of privacy in consular visits, but the criteria are so varied in scope and wording that stating any of them as an agreed worldwide norm would be problematic. Nonetheless, the regularity with which these rules appear suggests that ensuring secrecy for consular interaction with inmates is a generally accepted

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[104] Comm'n Of Inquiry Into The Actions Of Can. Officials In Relation To Maher Arar, Report Of The Events Relating To Maher Arar: Factual Background 187-89 (2006), Http://Www.Pch.Gc.Ca/Cs-Kc/Arar/Arar_v.I_e.Pdf. (last visited September. 4, 2022).

[105] *Id*. at 805-10.

[106] Arar Report Analysis And Recommendations, *supra* note 103, At 33

[107] *Id*.

[108] *Id*.

[109] *Id*.

[110] Lee & Quigley, supra note 42, at 151.

[111] *Id*.

requirement. These treaties' privacy protections are divided into two groups. Articles in the first category expressly grant consular staff the ability to speak privately with detained citizens.[112] The second (and less visible) set of agreements refers to the right to interact with the detainee "in the language of the sending State," which, although not ensuring privacy, may at least ensure that the dialogue does not require the presence of a translator.[113] The recently concluded consular treaty between Japan and China reflects the potential weakness of this last provision as a privacy safeguard, which adds that if the conversation is "in a language other than the language of the receiving State," consular officers "shall orally inform the competent authorities of the receiving State of the content of the conversation translated into the language of the receiving State upon request."[114] Although international instruments broadly acknowledge the right to consular communication and access, neither human rights treaties nor norms on the treatment of detainees specifically recognise a right to private consular visits.[115] As part of its duties under the Convention against Torture, the United Nations Committee Against Torture has advised that Canada (and, by extension, any other country) "insist on unlimited consular access to its citizens who are detained overseas, including provision for unmonitored meetings."[116] Some nations have made private consular visits mandatory or encouraged. According to Australia's instructions to its imprisoned nationals overseas, they may "request that visits with their consular officer be held in private, away from police or prison officials," although cooperation is "at the discretion of local authorities." Interviews with inmates should take place "ideally in private, commensurate with regular security considerations," according to Canadian consulates.[117] The US instructs its consular offices across

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[112] See, e.g., Consular Convention, U.S.-Costa Rica, supra note 7, art. VIII(3) (right to visit and "have private access to" detainee); Consular Convention, U.K.-U.S., supra note 8, art. 16(1) (right of consular officers "to converse privately" with detainees); Consular Convention, Hung.-Cuba, art. 26(1)(c), July 24, 1969, 892 U.N.T.S. 37 (right to "talk privately" with detainee); Consular Convention, Belg.-Turk., art. 35(5), Apr. 28, 1972, 1029 U.N.T.S. 208 (right to converse "even in private").
[113] Examples include: Consular Convention, U.K.-Mong., art. 42(5), Nov. 21, 1975, 1032 U.N.T.S. 62 and Consular Convention with Exchange of Notes, U.S.-China, art. 35(4), Sept. 17, 1980, 33 U.S.T. 2973, 1529 U.N.T.S. 199.
[114] Agreement on Consular Relations Between Japan and the People's Republic of China, art. 8(1)(c), Oct. 24, 2008, U.N. Reg. No. I-50746.
[115] For instance, Article 38(1) of the 1955 U.N. Standard Minimum Rules for the Treatment of Prisoners states only that imprisoned foreign nationals "shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong," with no indication of what a "reasonable facility" consists of. Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663C, Annex I, at 11, U.N. ESCOR, 24th Sess., Supp. No. 1, U.N. Doc. A/CONF/611 (July 31, 1957).
[116] U.N. Comm. Against Torture, Conclusions and Recommendations of the Committee against Torture: Canada, ¶ 5(d), U.N. Doc. CAT/C/CR/34CAN (May 20, 2005).
[117] Lee & Quigley, supra note 42, at 150 n.80

the world to seek a "reasonably quiet dialogue" with the prisoner and to object to any privacy limitations that might "intimidate" the citizen or "hinder the post's fulfilment of lawful consular responsibilities."[118] Although torture victims are generally pressured to inform consular authorities that they are being treated nicely, psychologists and criminologists utilise a variety of nonverbal indicators to establish if a suspect's remarks are untrue or coerced. The professional literature on this issue is exceptional,[119] and many of its results have been integrated into police training tactics. These procedures are easily adapted to circumstances in which a first consular or intelligence service interrogation in the presence of the captors may be the only way to determine the possibility of ill-treatment.

[118] 7 U.S. Dep't Of State, Undue Interference With Communications Between Prisoner And Consular Officer, In Foreign Affairs Manual, Supra Note 61, § 426.2-4.

[119] Gerald R. Miller et. al., Self-Monitoring, Rehearsal, And Deceptive Communication, 10 HUM. COMM. RES. 97 (1983).

CONCLUSION

One of those arguments must undoubtedly centre on the treatment of foreign inmates in security detention facilities. Whatever arguments are advanced for its use, the reality remains that preventative detention restricts detainees the right to contact with the outside world and to effective monitoring of their imprisonment terms and circumstances. Torture, cruelty, and injustice are more likely to flourish with impunity in these dark corners. Protecting and strengthening universal consular access, which is already firmly ingrained in international law, can be among the most effective weapons available to ensure that the basic rights of all imprisoned foreigners are protected. Finally, it is obvious that prisoners in some nations are frequently tortured as part of their first questioning, and that harsh treatment happens in almost every country that permits for extended incommunicado detentions. Unless there is compelling evidence to the contrary, all representatives of the sending State should assume that at-risk detainees have been tortured, despite the individual's own assertions of good treatment, based on authoritative reports on the receiving State's human rights record and other reliable indicators of its typical practises. Restrictions on consular communication privileges are neither unique to any one nation, nor are they a new phenomenon. Many nations' diplomatic services, as well as domestic commissions of inquiry and other professional organisations, have met hurdles to immediate communication with their people in risky detention overseas and have evolved a range of inventive answers. This plurality of viewpoints provides a fertile ground for adapting the ancient vehicle of consular protection to the demands of a new and perilous global world. However, there is a growing acknowledgment of the need for processes that balance legitimate security needs with basic rights safeguards. We disregard denials of consular contact in security detention cases at our risk, lest the legitimate mission of gathering important intelligence on terrorism trumps the human rights principles that make democratic society worthwhile to preserve in the first place. Clearly, there is no scarcity of corrective ideas in Western nations, nor is there any professional reticence to face the problems highlighted in this Article; what may be lacking are the resources and political will required to execute effective changes.