

A Universal Safeguard:
Providing Consular Assistance
to Nationals in Custody

An Introductory Guide for Consular Officers

This manual was compiled by:

Anne James
The International Justice Project
6535 Manet Court
Woodbridge, VA, USA, 22193
tel: 703-897-7785
www.internationaljusticeproject.org
billbett@aol.com

With research prepared by:

Mark Warren
Human Rights Research
Ottawa, Canada
tel: 613-278-2280
<http://www3.sympatico.ca/aiwarren>
aiwarren@sympatico.ca

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It is an honour to introduce this Guide for consular assistance to nationals in custody, compiled by Anne James, Executive Director of the International Justice Project, with research prepared by Mark Warren of Human Rights Research in Ottawa, Canada.

Based on the 1963 Vienna Convention on Consular Relations, now ratified by over 160 countries, the Guide aims at strengthening the rule of law and human rights relating to consular protection of all people in custody outside their own countries. The Guide is a welcome addition to the consular law literature and fills an urgent need as an indispensable manual for consular officers as well as judicial and law enforcement personnel of the receiving States.

Luke T. Lee

INTRODUCTION: PROTECTING FUNDAMENTAL RIGHTS IN A CHANGING WORLD

“It is evident that the Vienna Convention on Consular Relations recognizes assistance to a national of the sending State for the defence of his rights before the authorities of the host State to be one of the paramount functions of a consular officer...the real situation of the foreign nationals facing criminal proceedings must be considered. Their most precious juridical rights, perhaps even their lives, hang in the balance.”

Inter-American Court of Human Rights, *Advisory Opinion OC-16/99*

In July of 2002, the International Justice Project published *Equal Protection: Consular Assistance and Criminal Justice Procedures in the United States*. Now in its third printing, *Equal Protection* outlines the significance and potential scope of consular assistance in the context of one particular country, with an emphasis on death penalty cases. In response to that publication, several consulates suggested the desirability of also producing an introductory manual that would be more universal in scope and more applicable to consular assistance procedures in any country.

Recent developments point to an ongoing need for all consular services to review and, where necessary, upgrade assistance programs for their nationals detained or imprisoned abroad. In this era of frequent international travel by citizens of all countries, consular officers are facing growing demands for their emergency services. International concerns over acts of terrorism have prompted many nations to enact new security measures, resulting in the widespread and sometimes indiscriminate arrests of foreign nationals. The significance of consular notification and assistance under international law has been the recent subject of landmark rulings by international courts, underscoring the consular rights and obligations of all States.

No introductory guide to universal consular notification and assistance procedures could address every possible circumstance in detail. However, the authors hope that this publication may serve as a source for ideas and advice, both for the training of consular personnel and in the development of consular policies and procedures. Now more than ever before, prompt and effective consular assistance is an indispensable safeguard in a volatile world.

We strongly believe that consular officers, non-governmental organizations and defence attorneys share a common interest in protecting the fundamental human rights of detained foreigners. In our view, it is vitally important to foster closer working relations and mutual understanding between these diverse communities. We therefore encourage your feedback - any suggestions for improving this publication are most welcome.

Please send comments or enquiries to:

The International Justice Project
6535 Manet Court
Woodbridge, VA, USA, 22193
Tel: 703-897-7785
E-mail: billbett@aol.com
www.internationaljusticeproject.org

This guide can also be downloaded at:

<http://www.internationaljusticeproject.org/nationalsResources.cfm#universalSafeguard>

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1. CONSULAR RIGHTS UNDER INTERNATIONAL LAW

Consuls have the right to visit, communicate with and assist their nationals who are detained or imprisoned abroad. Detained nationals have the right to communicate with and seek assistance from their consulate. The overall purpose of consular intervention is to provide any necessary humanitarian, protective, or legal assistance to nationals in custody. Timely consular assistance ensures that foreigners facing prosecution and imprisonment receive fair and equal treatment by the courts and penal authorities.

*“A principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations.”*¹

Few nationals abroad require consular assistance more urgently than those who are arrested and face prosecution in a foreign country. Arrested foreigners are truly “strangers in a strange land”, confronted by an unfamiliar legal system, far from home, and frequently at the mercy of the local authorities.

International law has long recognised that consular officers have the right to visit, communicate with, and assist their nationals who are detained or imprisoned abroad. Indeed, the concept that all States are entitled to protect the interests of their nationals in other countries is a basic principle of international consular law and practice. The right to consular notification, access, and assistance has an impressive pedigree under international law, including United Nations human rights instruments, regional declarations, bilateral or multilateral conventions and international court rulings.

THE VIENNA CONVENTION ON CONSULAR RELATIONS (VCCR)

The Vienna Convention on Consular Relations (VCCR) is a multilateral treaty regulating the rights, privileges, and duties of consulates and consular staff worldwide. Ratified by more than 160 countries, the VCCR is the cornerstone of international consular relations.

Article 36 of the VCCR enshrines the time-honoured right of consuls to communicate with and assist their detained nationals. The article also confers specific rights on detained or imprisoned foreign nationals. These provisions are regarded as the universal norm for consular relations; the same rights and obligations also apply to those nations that have not yet ratified the VCCR, under customary international law.² As the United States Government noted before the International Court of Justice, Article 36 “establishes rights not only for the consular officer, but perhaps more importantly for the nationals of the sending State who are assured access to consular officers and through them to others”.³

¹ *Memorial of the United States to the International Court of Justice, in the Case Concerning United States Diplomatic and Consular Staff in Tehran*, filed in response to the 1979 seizure of the American Embassy in Iran.

² “Customary international law” refers to the body of law based on the established customs and practices of nations, the provisions of which are binding on all nations even in the absence of a ratified treaty.

³ *United States Diplomatic and Consular Staff in Tehran* (U.S.A. v. Iran), I.C.J. Pleadings, at 174.

Article 36 of the VCCR Requires

- The local authorities must inform detained foreigners without delay of their right to have the consulate notified of their detention and their right to communicate with their consulate.
- At the request of the detainee, the authorities must then notify the consular post of the arrest without delay and permit consular access to the detained national.
- Consulates have the right to be promptly informed of the detention at the national's request, to communicate, correspond, and visit with their detained nationals, to arrange for their nationals' legal representation, and to provide other appropriate assistance with the detainee's consent.

These rights of notification, access, and assistance apply at all stages of the legal process from the moment of detention. Local laws must give full effect to these rights.⁴

Article 36 is a legally binding expression of an international consensus; foreign citizens face unique disadvantages when confronted with prosecution and imprisonment under the legal system of another nation. Its provisions ensure that all arrested foreigners have the means at their disposal to prepare an adequate defence and to receive the same treatment before the law as domestic citizens. Consular communication and visits also ensure that imprisoned foreigners are not subjected to discriminatory or abusive treatment while in custody.

In general, any form of detention of the national by authorities of the receiving State would trigger a notification obligation under the Vienna Convention, regardless of the purpose or cause of the custody. "Detention" could be broadly defined as any form of confinement imposed by a governmental authority in which the held person is not free to leave. Aside from arrest on criminal charges, this definition would include: deportation proceedings, commitment proceedings for the mentally ill, protective custody during civil disturbances or any other significant deprivation of liberty.⁵

Rights of Foreign Detainees and Prisoners Under Article 36

- To be **informed without delay** by the arresting authority of the right to consular notification and communication.
- To **choose** whether or not to have the consulate contacted.
- To have the consulate **contacted promptly** by the arresting authority.
- To **communicate freely** with the consulate.
- To **accept or decline** any offered consular assistance.

⁴ The full text of article 36 and other relevant provisions of the VCCR is enclosed as Appendix I.

⁵ From a practical standpoint, a very brief detention followed by release (such as the issuing of a traffic citation to a foreign motorist) might not trigger consular notification or involvement.

Rights of Consular Officers Under Article 36

- To **communicate with** and have **access** to their detained nationals.
- To be **promptly informed** of the detention, at the request of the national.
- To **visit and correspond** with the detainee at all stages of the case.
- To **arrange** for the detainee's **legal representation**.
- To provide other forms of **humanitarian, protective, or legal assistance** with the permission of the detainee.

The right to consular assistance thus serves to protect the fundamental human rights of detained foreign nationals, including the right to equal treatment before the law, the right to a fair trial, and the right not to be subjected to cruel, inhumane, or degrading treatment.

GENERAL FORMS OF CONSULAR ASSISTANCE

Article 5 of the VCCR outlines general consular functions, including several which may apply to assisting detained or imprisoned nationals:

- Protecting the interests of the sending State and of its nationals, within the limits permitted by international law;
- Helping and assisting nationals of the sending State;
- Subject to local procedures, representing or arranging appropriate representation for nationals before the tribunals and other authorities of the receiving State;
- Performing notary or civil registrar functions, subject to local laws and regulations;
- Transmitting judicial and extra-judicial documents or executing commissions to take evidence for the courts of the sending State;
- Safeguarding the interests of minors and other persons lacking full capacity.

The general provisions of Article 5 are sufficiently broad that consulates are authorized to provide far-reaching and diverse forms of assistance to their detained nationals. The actual extent of some consular functions (such as notary services) will vary, depending on local laws and the available resources or policy constraints of individual consulates.

THE PURPOSE OF CONSULAR ASSISTANCE FOR DETAINEES

While consular assistance for detained nationals can take many forms, each intervention serves three basic functions. The first is **humanitarian**: consuls provide detainees with access to the outside world (for example, by communicating with the detainee's family) and ensure that they are provided with basic necessities while incarcerated. A consular presence alleviates the distress of detainees by assuring them that an authority representing their country of citizenship will safeguard their interests.

The second function is **protective**: consular visits help to ensure that foreign nationals are not mistreated in custody. Regular consular visits may in themselves deter misconduct by prison officials. Consular

representatives may also intercede directly with the authorities when it is alleged that the detainee is suffering ill treatment.

The final function is **legal assistance**: consuls acquaint their nationals with the basic procedures under the local legal system, may provide them with lists of local lawyers to defend them and take other appropriate steps to ensure that their nationals receive fair and equal treatment under the laws of the arresting state.

MANDATORY NOTIFICATION OF THE CONSULAR POST

Notification of the consulate is sometimes mandatory, regardless of the wishes of the detainee. Under VCCR Article 37, the consulate must be notified whenever the appointment of a guardian or trustee is being considered for a juvenile national or other person lacking full capacity. This obligation would include cases in which the foreign national may not have been charged with a criminal offence, such as commitment proceedings due to mental illness or other incapacity.

Bilateral consular agreements negotiated between the sending and receiving States may also require mandatory notification of the consulate without delay, typically within 72 hours of the detention. All consular officials should be familiar with the terms of any bilateral consular agreement applicable to their jurisdiction. Specific provisions of bilateral consular agreements may take precedence over the more general obligations created under the VCCR. However, if a bilateral agreement does not address issues such as the right of the national to accept or decline consular assistance, the provisions of Article 36 would then apply as general rules of consular law.

LIMITATIONS ON CONSULAR ASSISTANCE

Consular assistance is **not** intended to immunise foreign nationals from local laws. With the exception of individuals possessing diplomatic or consular immunity, a foreigner arrested abroad is fully subject to the laws and judicial procedures of the receiving State, including all legal punishments that may be imposed for breaches of those laws.

Consular representatives do **not** typically act as substitutes for attorneys; while the consular function is often complementary to that of defence counsel, it does not replace the indispensable role of the detainee's lawyer. In those countries where legal representation is not provided automatically, consular officer should be prepared to obtain the services of an attorney on behalf of a detained national whenever the detainee is unable to do so. A consular officer may also be required to directly represent the national's interests by participating in initial court proceedings, until legal representation has been obtained.⁶

PRIVACY RIGHTS OF DETAINEES

The proposed language of Article 36 in the draft of the Vienna Convention called for mandatory notification of the consular posts in all cases. A number of delegates to the drafting conference expressed concern that this proposal did not address the privacy rights of detainees, or might place an undue burden on the capacities of consulates and local authorities. The article was then amended to make notification of

⁶ For example, in those jurisdictions where legal counsel is not provided automatically, a consular official might be required to represent the national during a bail determination hearing. (Bail determination is the process by which a court may allow a release from custody, in exchange for the payment of a bond guaranteeing the accused person's appearance for trial at a later date).

the consulate mandatory only at the request of the detainee. This provision recognizes that there may be situations in which detained foreign nationals would not want their home government to be informed of their whereabouts or circumstances.⁷

While the adopted language of the article leaves the choice of consular notification up to the individual detainee, compliance with this provision has proven difficult to verify in practice. Consulates learning of detentions from other sources may frequently need to initiate direct contact with detainees to determine their actual wishes, rather than relying on a declaration by the local authorities that the national has declined to seek consular notification. Once the consulate has established conclusively that the national is indeed declining assistance (and is competent to do so), it is incumbent on consular representatives to take no further action. Nonetheless, detainees in such cases should always be informed that they may choose to invoke their consular rights at a later date, and that the consular officer is prepared to render assistance at that time.

THE RIGHT TO CHOOSE OR DECLINE ASSISTANCE

Under Article 36, consuls may not provide any form of assistance that is expressly opposed by the detained person. Foreign nationals in custody always retain the right to accept or decline any form of consular assistance, except in those instances where they are not competent to make an informed decision due to mental or physical incapacity.

DUAL NATIONALS

Cases involving dual or multiple nationality can pose unique problems for consulates, particularly when these nationals are detained in one of their countries of citizenship. Where a person holds citizenship in two or more foreign countries (but is not also a citizen of the receiving State), local authorities are unquestionably required to promptly comply with Article 36 and to contact the consulate(s) at the detainee's request.

However, some nations take the position that dual nationals arrested in one of their countries of citizenship are not entitled to notification of consular rights upon arrest.⁸ Other nations do not recognize the validity of dual nationality for their citizens, thus denying consular access to dual nationals arrested in their country of birth.⁹ Because national laws on citizenship rights can differ greatly, sending States may not always share the receiving State's interpretation of consular obligations. Disputes over consular notification and access for dual nationals arrested in a country of citizenship may require diplomatic efforts to resolve.

When a detainee is a citizen of two or more foreign countries, the respective consular officers should determine which one will take the lead in providing consular assistance. That determination should be made on the basis of the best interests of the national; the country of usual residence will often be in the best position to assist. A certain degree of cooperation and flexibility may thus be called for when establishing consular assistance procedures in these cases.

⁷ A person seeking political asylum, for instance, might be justifiably fearful of reprisals directed at their relatives in their country of origin, if their circumstances became known to the home government.

⁸ One such country is the USA, which interprets Article 36 as not requiring notification to the detainee of consular rights in cases where dual nationals retaining U.S. citizenship are arrested in the United States.

⁹ Viet Nam is one of the countries which does not recognize dual nationality acquired by its citizens. Vietnamese authorities have been reluctant to grant consular access to detainees holding Vietnamese citizenship by birth and that of another country by acquisition.

ASSISTANCE FOR NON-CITIZENS

Consular officers may be authorized to provide various kinds of assistance to some categories of individuals who are non-citizens. For example, consular officers may be designated to provide assistance to the nationals of a country that does not maintain a consular mission in the receiving State.¹⁰ Some consular programs may also extend assistance to the close relatives of citizens, or to individuals who are immigrants in the sending State but who have yet to obtain full citizenship. Since these practices vary widely, consular officials should familiarize themselves with any policies of their home government that may require the provision of assistance to non-citizens.

HONORARY CONSULS

Honorary consuls are prominent local residents representing the consular interests of the appointing nation within a particular city or jurisdiction. Many honorary consuls carry out their tasks with commendable diligence, but not all will have received authorization, training or instructions on consular notification and assistance procedures. Generally entitled to the same access and privileges as other consular representatives, these officials are frequently the nearest source for assistance following an arrest.

At a minimum, honorary consuls should be required to report immediately to the nearest consular mission any such cases that come to their attention. Honorary consuls should be given basic instructions on providing initial or emergency assistance to detainees, until such time as a consular officer can take over responsibility for the case. Consular missions should also authorize and train honorary consuls to carry out visits to detainees, whenever a prompt intervention by a consular representative would not otherwise be possible.

¹⁰ These courtesies are usually extended as a result of reciprocal agreements between the two consular services.

2. LEGAL RIGHTS OF DETAINED FOREIGN NATIONALS

Consular officers should be familiar with legal rights under the local criminal justice system, as well as the differences between local legal procedures and those of the home country. While judicial systems vary widely, all detainees are entitled to the protection of their fundamental human rights. Violations of consular rights may provide grounds for action before domestic or international courts, as well as remedies through diplomatic means.

A core function of consular assistance is to ensure that foreign detainees always have a basic understanding of their legal rights and the criminal justice procedures under the laws of the receiving State. This assistance ensures that detainees are not disadvantaged by unfamiliarity with local legal practices and properly exercise all legal rights available to them. Providing a better understanding of the local legal procedures also serves to alleviate the confusion and distress of foreign nationals confronted with prosecution and possible imprisonment. In order to perform this function effectively, consular officers must have a working understanding of the local justice system and how it differs from procedures in the home country.

Even though the local justice system may provide extensive safeguards to protect the legal rights of people facing criminal charges, timely consular assistance from the initial stage of a case is always vitally important. Concepts fundamental to understanding the local criminal justice process may seem dubious or incomprehensible to a foreign national, who may come from a country using a vastly different judicial system. Simply translating unfamiliar concepts into the native language of the detainee provides no guarantee that these essential rights will be fully understood, or even believed. Few local lawyers, however perceptive, are likely to comprehend the conceptual, linguistic, and cultural barriers confronting foreigners who face prosecution under an unfamiliar legal system.

Criminal justice systems vary widely throughout the world, and may even differ within a single country. Most countries rely on procedures derived from one or more of three broad systems of justice. These procedures differ in crucial respects such as the rights conferred on detained people, the role of a defence attorney, the structure of the trial, and the types of punishment that may be imposed for various offences. For purposes of general comparison only, the major criminal justice systems are summarized below.

COMMON LAW JURISDICTIONS

Common law jurisdictions are those relying on the body of laws and procedures originally developed in England. These jurisdictions would include the United Kingdom itself, many member States of the Commonwealth, and the United States of America. Common law jurisdictions make use of an adversarial process, in which opposing parties, usually represented by counsel, present evidence to an impartial decision-maker (such as a jury) by a process of questioning witnesses under the supervision of a judge. The defendant is presumed to be innocent until proven guilty; defendants are not required to cooperate with the authorities or to establish their innocence. Prosecutors are responsible for gathering evidence against the accused, determining the charge to be brought and presenting the case at trial. Some common

law jurisdictions may employ plea bargaining to resolve cases.¹¹ In order for the adversarial process to function effectively, the resources provided to the defence and the prosecution must be fairly balanced. As a consequence, common law jurisdictions generally place a strong emphasis on safeguards such as the right to legal representation from the initial stages of a case and the right of the accused person to remain silent under questioning.

CIVIL LAW JURISDICTIONS

These jurisdictions rely on the body of law and procedures developed from Roman law. Civil law codes are widely used in continental Europe and in many other countries outside of the English-speaking world, especially those that were colonized by European nations. This system relies on an inquisitorial process, in which an investigating judge or magistrate conducts an inquiry to develop the facts of the case. In civil law systems, judges are responsible for narrowing the legal and factual issues, selecting witnesses, and gathering evidence. Plea bargaining is rare or non-existent. Trials are generally conducted before one or more judges, who determine guilt or innocence and the appropriate sentence based largely on the pre-trial investigation and written declarations. Because the investigation of the case is conducted by an impartial judicial authority, a greater emphasis is placed on the cooperation of the accused in determining the facts. In some jurisdictions, the defendant's failure to cooperate with the investigation may be taken as an indication of guilt or may impact on the severity of their sentence. While the right to an attorney is recognized as an important safeguard, it does not necessarily apply from the moment of arrest (as it would in most common law jurisdictions).

ISLAMIC LAW CODES

Many nations in which Islam is the dominant religion rely to some degree on Islamic law (known as *sharia*), which is based upon the Koran, the sayings of the Prophet, and the body of interpretation by generations of Islamic jurisprudence. Some countries may also apply elements of the *sharia* criminal code, or *hudud*. The classic *sharia* provides for due process of law, including notice of the claim made by the injured person, the right to remain silent, and a presumption of innocence in a fair and public trial before an impartial judge. In all criminal cases, the evidence must be conclusive before a judge can reach a guilty verdict. Accused persons are entitled to be represented by an attorney, although a lawyer may not be provided automatically. Trial procedures include a greater emphasis on the inherent truthfulness of statements made by witnesses under oath and the direct questioning of witnesses by the trial judge. Offences may result in a mandatory punishment prescribed by religious law; plea bargaining is not employed to resolve cases. Because the basis for the law code is a body of religious teachings, the range of unlawful acts may encompass behaviour that is not considered to be criminal in other jurisdictions (such as blasphemy or apostasy).

MIXED OR TRANSITIONAL JURISDICTIONS

It is not unusual for a jurisdiction to draw on several law codes for the administration of justice.¹² Differing judicial systems may function simultaneously in those nations where individual states or

¹¹ Plea bargaining is an agreement negotiated between the prosecution and the defence in which the defendant pleads guilty in exchange for a reduced sentence, thus avoiding the necessity for a trial.

¹² As examples, the state of Louisiana relies on United States common law for criminal prosecutions but retains elements of French civil law for non-criminal proceedings. Courts in Pakistan, where the jurisprudence is influenced by common law principles, also rely on elements derived from Islamic law. Lebanon is a civil law jurisdiction based on French law, but with reference to Islamic principles for family law and property rights.

provinces retain their own criminal law codes.¹³ Still other nations may be experiencing a rapid transition from one form of justice to another, with an inconsistent implementation of those reforms at different levels of the court system. A number of nations with civil law codes based on Marxist legal principles (such as Russia or China) are now introducing common law safeguards protecting the rights of the accused, with results that are not yet uniformly applied in all courts and jurisdictions within the country.

UNDERSTANDING LOCAL RIGHTS AND PROCEDURES

Detained foreigners may have a very imperfect understanding of their own domestic legal system, let alone that of another country. Given the vast array of criminal justice systems world wide, it is hardly surprising that foreign detainees may find local procedures bewildering, or that their confusion can have disastrous legal consequences. For example, a person raised under Islamic law may fail to grasp the crucial need for the immediate services of an attorney in a common law jurisdiction. In some civil law jurisdictions, taking responsibility for one's actions may result in leniency from the court; in Islamic or common law countries, no such consideration will likely be given to a confession on the witness stand.¹⁴

Since most consular officers are not experts in comparative law, the best approach may well be to consult with a qualified local attorney or law professor in order to develop an understanding of the local legal code. Consular officers are encouraged to prepare packages of information on local legal rights and procedures, written in their native language and in non-technical terms, which would then be provided to nationals under detention.¹⁵ The material provided should include the following:

- A basic explanation of the legal rights of accused persons under local law;
- Information on pre-trial procedures, such as arraignment or bail hearings;
- Information on how to obtain legal assistance, including a list of reputable local attorneys practicing criminal law;
- A description of local trial proceedings;
- Information on local penal conditions and rules;
- All information should be presented in a manner that outlines the major differences between local laws or procedures and those of the national's home jurisdiction.¹⁶

Upon meeting or communicating with their consular representative, detainees may be eager for information on the range of punishments that might be imposed for the charges which they face. As with

¹³ Some states in northern Nigeria, for example, have implemented *sharia* law for criminal prosecutions; the remainder of the country is a common law jurisdiction, as is the federal Supreme Court.

¹⁴ As an example of fatal confusion, Paraguayan national Angel Francisco Breard was arrested and charged with capital murder in the U.S. state of Virginia. He insisted on taking the stand during his trial and confessed in open court, mistakenly believing that the court would then be required to show leniency (as it would in Paraguay). Breard was promptly sentenced to death and subsequently executed, despite the failure of the arresting authorities to notify him of his article 36 rights.

¹⁵ As the U.S. Department of State notes: "The purpose of this material is not to usurp the function of legal counsel or encourage a "do it yourself" approach. Rather, it serves the purpose of helping arrestees understand what is happening to them and provides a yardstick against which they can measure an attorney's performance. Such informational material should be updated regularly, and copies forwarded to the [State] Department." *Foreign Affairs Manual*, section 413.4.

¹⁶ Descriptions of legal procedures in the home jurisdiction should be verified for accuracy by a legal advisor within the consular service.

the provisions for basic rights and judicial procedures, punishments for similar offences will vary widely under different legal systems.¹⁷ Where an attorney is not available to answer these questions, consular officers should be sufficiently conversant with the local law code to provide detainees with general information on the range of punishments that might apply to their situation.

See chapter 5 for information on providing assistance following a conviction.

UNIVERSAL HUMAN RIGHTS OF DETAINEES

While the specific legal rights of detainees are dependent on the laws of the receiving State, all detained persons are entitled to full respect for their fundamental human rights. Global and regional human rights instruments safeguard people in custody from abusive or discriminatory treatment and outline the minimum standards necessary for a fair trial and humane incarceration. Some of these international instruments are declarations or rules created by the United Nations or other bodies, which may now be considered as binding under customary international law.¹⁸ Others are multilateral treaties, with binding force from the moment of ratification.¹⁹ Consular officials should be familiar with the general provisions of human rights instruments, as well as the ratification of any binding multilateral human rights conventions by the receiving State.

Respect for human rights provisions may be sadly lacking in some countries, as are mechanisms for the domestic enforcement of treaty-based standards. Nonetheless, these minimum international norms do provide a benchmark for determining acceptable standards of treatment. Their application may also assist in determining whether or not a particular case requires a diplomatic protest or other consular interventions.²⁰

One of the most widely ratified and comprehensive international human rights treaty is the *International Covenant on Civil and Political Rights* (ICCPR). Article 14 of the ICCPR enumerates due process standards relating to criminal proceedings and provides for the following rights:

1. Equality before the courts and tribunals;
2. A fair and public hearing by a competent, independent and impartial tribunal;
3. Presumption of innocence;

¹⁷ For instance, an arrest for consuming alcohol in public (which might not be a criminal act in the home jurisdiction) could result in a minor fine in some countries, while in others it might produce summary deportation or significant prison terms.

¹⁸ All UN member States are expected to comply with the provisions of standards such as the *Universal Declaration of Human Rights* (UDHR). Although not initially considered to be binding, the UDHR is now widely viewed as a statement of international norms and practices, gaining binding force under customary international law.

¹⁹ One such binding treaty is the *American Convention on Human Rights*, which imposes legal obligations on ratifying members of the Organization of American States (OAS).

²⁰ As communications between one nation and another, protests over the mistreatment of a detained national may be more effective and appropriate if reference is made to international human rights obligations rather than domestic law provisions. Along with the provisions of the UDHR and other similar declarations, these international obligations are found in multilateral treaties such as the *International Covenant on Civil and Political Rights*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *International Covenant on Economic, Social and Cultural Rights*.

4. To be informed promptly and in a language the defendant understands of the nature and cause of the charge against him;
5. To have adequate time and facilities for the preparation of his defence and communicate with counsel of his choice;
6. To be tried without undue delay;
7. To be present during the trial;
8. To defend himself in person or through legal assistance of his own choosing, and to have legal assistance assigned to him without payment in any case where the interests of justice so require;
9. To confront the witnesses against him and obtain the attendance of witnesses on his behalf;
10. Review of the conviction and sentence by a higher tribunal;
11. Compensation for wrongful convictions; and
12. Not to be prosecuted twice for the same crime.

For sources of information on human rights standards protecting detainees and prisoners, see chapter 7: Other Resources.

DIPLOMATIC ENFORCEMENT OF CONSULAR RIGHTS

The failure of local authorities to comply with any aspect of Article 36 should be treated as a serious breach of consular rights and obligations, fully deserving of a prompt intervention by the sending State. Breaches should be carefully documented by consulates and brought to the attention of the relevant authorities as soon as possible. Where local authorities are unable or unwilling to address the consulate's concerns, the embassy of the sending State should be informed of the situation. Quite often, representations to the foreign ministry of the receiving State may be in order. The purpose of a diplomatic note or similar formal intervention is threefold: to emphasize the importance placed on consular rights by the sending State, to provide the receiving State with the impetus to ensure non-repetition in the future, and to remedy the situation in the present case.

INTERNATIONAL COURT DECISIONS

Consular officers with responsibility for providing assistance to detained or imprisoned nationals should be aware of international court rulings on consular rights, as well as local practices regarding the litigation of treaty violations through the domestic courts. As awareness of Article 36 provisions continues to spread, it is increasingly likely that individual detainees or their attorneys will seek consular input on the prospects for litigating its violation.

Under international law, the violation of any sovereign treaty right produces an obligation on the offending State to remedy the breach. Several nations have sought remedies for consular rights violations through international courts and tribunals, when diplomatic or domestic legal remedies have proven

ineffectual. The resulting rulings established that Article 36 confers rights not only on consular officers but also on the detained individuals.

Following the executions of two of its citizens in the United States who were not notified of their rights under Article 36, Mexico sought an advisory ruling from the Inter-American Court on Human Rights on the nature of Article 36 obligations. The Court held that the right to consular notification and access is a fundamental human right essential to the protection of due process, the denial of which renders any subsequent execution arbitrary and illegal under international law. The Court also determined that the term “without delay” in Article 36 requires notification of consular rights from the moment of detention, and before any interrogation takes place.²¹

Under the provisions of the VCCR Optional Protocol Concerning the Compulsory Settlement of Disputes, any dispute between parties to the protocol regarding the application or interpretation of the VCCR falls under the compulsory jurisdiction of the International Court of Justice (ICJ), upon an application made to the Court by one of the parties. Approximately 44 nations are parties to the Optional Protocol. More generally, as the judicial arm of the United Nations, the ICJ is responsible for determining the scope and meaning of international treaties submitted to it for binding adjudication by UN member States.

The United States of America was the first nation to exercise the dispute settlement mechanism of the VCCR Optional Protocol, by bringing an action against Iran at the ICJ following the 1979 seizure of the U.S. Embassy in Tehran. The United States argued that the Vienna Convention compelled states to provide consular access and that a breach of this obligation constituted a grave violation of consular practice and acceptable standards of human rights. In its final judgement, the International Court held that Iran had violated the Vienna Convention and other international obligations by failing to permit consular access to the hostages. The Court also ordered Iran to make reparations to the United States.²²

While subsequent international litigation of consular rights has come in the context of death penalty cases, the principles established by these rulings should be viewed as applicable to all circumstances. For example, the ICJ ruled in the LaGrand Case (*Germany v. USA*) that Article 36 confers specific rights on individual nationals as well as on States. Where foreign nationals have been subject to lengthy detention or a severe sentence without notification of their consular rights, the receiving State must provide a forum for the review and reconsideration of their cases. An offending nation may not use the provisions of its domestic legal procedures as justification for its failure to give full effect to these rights. Apologies by the receiving State are not an adequate response to grave violations of consular rights conferred under Article 36.

A failure to provide meaningful remedies for violations of Article 36 may itself give rise to international litigation. In January of 2003, Mexico filed an application with the ICJ instituting proceedings against the United States for systematic and persistent violations of Article 36 provisions. Mexico is seeking a binding remedy for this asserted non-compliance in the cases of more than 50 Mexican citizens currently under sentence of death in the United States.²³

²¹ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Inter-American Court of Human Rights, Advisory Opinion No. OC-16/99, available at: http://www.corteidh.or.cr/Serie_A_ing/Serie_A_16_ing.doc

²² *Case Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 ICJ Rep.3 (Judgement of May 24).

²³ Among other measures, Mexico has asked the Court to order *restitutio in integrum*: as far as possible, the re-establishment of the situation that existed before the wrongful act was committed. The effect of *restitutio* in Mexico's case would be the annulment of the death sentences imposed on its citizens. On 5 February, 2003, the ICJ granted Mexico's request for provisional measures and ordered the USA to take all steps necessary to prevent the imminent execution of three Mexican nationals, pending the Court's final decision on the merits of the case.

DOMESTIC COURT LITIGATION

The direct application of these international rulings through domestic court proceedings may be an available option in some jurisdictions. However, not all justice systems recognize the right of litigants to raise treaty-based claims directly. The constitutional frameworks of many nations require that a ratified treaty must first be the subject of domestic implementing legislation, before the domestic courts obtain jurisdiction.²⁴ In other countries, ratification of the VCCR alone may give domestic courts automatic authority over its enforcement.²⁵ Some nations have directly incorporated Article 36 requirements into their domestic laws regulating police procedures, which may result in domestic court decisions applying remedies for non-observance of consular notification obligations.²⁶

Where judicial remedies for violations of consular rights are not available, the receiving State is nonetheless under a binding international obligation to respect and enforce the consular rights of the sending State and its nationals. Remedies may thus be available by other domestic means, such as an executive amnesty, or through clemency for the affected individual. Diplomatic channels would normally be the first recourse for a consulate to pursue when seeking remedies for non-compliance with the rights of consular notification or access.

²⁴ For example, Canada has ratified the VCCR but has not yet incorporated its provisions into domestic law. As such, it is doubtful that individual petitioners would have standing to raise such a claim in the domestic courts. For comparison, ratifying nations such as Pakistan and Iceland have also adopted incorporating legislation.

²⁵ The United States views the VCCR as “self-executing”, meaning that no implementing legislation is required to give the treaty full domestic effect, including judicial overview and enforcement. Although reluctant to afford remedies, courts in the United States have generally recognized the right of individual litigants to raise such claims.

²⁶ The United Kingdom has incorporated article 36 provisions and other consular notification obligations into its domestic laws (Police and Criminal Evidence Act of 1984, Codes of Conduct), resulting in at least two domestic court decisions enforcing consular notification obligations through the suppression of the defendants’ statements while in custody.

3. CONSULAR ASSISTANCE FOLLOWING DETENTION OR ARREST

Despite local safeguards that may protect the legal rights of the accused, timely consular advice and assistance is always crucially important. The first contact with the detainee establishes the basis for ongoing monitoring and support, the purpose of which is to ensure fair and humane treatment by the local authorities.

In virtually every case, a prompt consular presence serves to reassure the detainee that their interests are protected at a time of great stress, vulnerability and confusion. A rapid consular response following notification of a detention is essential, both to support the national and to impress upon the local authorities the importance which the sending State places on consular assistance. Not all consular officials will be in a position to offer immediate services in person for detained nationals, but all should be prepared to provide some form of assistance immediately to any national facing serious criminal charges.

The mandatory nature of Vienna Convention provisions is no guarantee that a consulate will receive formal notification of a detention in a timely or consistent manner. The first information about a detention may thus come from a variety of sources, including the arresting police, the detainee or family members, defence attorneys, prosecutors, other consulates or media representatives. There may often be a significant delay between the arrest of the national and notification of the consular post, adding to the distress of the detainee.²⁷

Basic consular assistance upon detention or arrest includes:

- Determining from the notifying authority the detainee's identity, the reason for the detention and where the person is detained;
- Promptly speaking with the national by telephone, if an immediate visit is not feasible;
- Carefully explaining the purpose and scope of consular assistance to the detainee;
- Determining the national's situation and offering humanitarian assistance, such as contacting family or friends;
- Informing detainees of their basic legal rights, in terms that they will understand;
- Obtaining the consent of the detainee to provide consular assistance;
- Providing the detainee with information on local legal procedures, including a list of lawyers who could represent them;
- Agreeing to accept calls from the national if their situation requires further intervention and providing information on contacting the consular officer;
- Maintaining ongoing contact with the detainee, by means of periodic visits and correspondence;

²⁷ In a number of well-documented cases in the United States, foreign nationals spent more than a decade under sentence of death without any notification of their right to contact with consular authorities.

- Intervening with the local or national authorities to remedy any violation of the national's legal or human rights, as required.

EXPLAINING CONSULAR ASSISTANCE

Many foreign nationals will have a limited or erroneous understanding of consular assistance. Providing the detainee with a basic explanation of the purpose (and limitations) of consular assistance at the outset may prevent any misunderstandings that could undermine the development of an ongoing relationship.

It is important to recognize that a detainee may initially decline some form of consular assistance and then later decide to accept it. This may be especially relevant in the earliest stages of a case, when distress over their situation may cloud the judgment of people in custody. A common example would be a routine offer by the consular officer to contact the detainee's family, where embarrassment or confusion may initially prompt the national to refuse the offer. It is therefore often necessary for consular officials to provide an explanation of the benefits of any offered assistance as a prelude to seeking the national's approval.

The consular officer should also offer to provide the detainee with necessities such as food, medicine or reading materials, according to the individualized circumstances and within the limits allowed under the local penal regulations. For example, nationals may have special dietary requirements, or may require religious reading materials essential for the practice of their faith. If the national nonetheless opposes the offered assistance, the most important priority is then to ensure that the relationship between the consulate and the detainee is not jeopardized by precipitating an argument. Considerable tact and patience may be called for on the part of consular officers, particularly when the initial decisions of detainees may not appear to be in their own best interests.

LEGAL ASSISTANCE AND ADVICE

Consular officers should normally refrain from discussing the specifics of a case with a detained national, even though detainees may frequently wish to explain their actions or to talk about the circumstances of the alleged crime. The role of the consular officer is to provide support, information and assistance to the detainee, not to offer advice on legal strategies. Detainees should be encouraged to discuss their case with their own attorney and with no one else, unless advised to do so by their lawyer. Under no circumstances should detainees sign any statements or enter into any agreements with the authorities without first consulting with their own legal representative.

There are several reasons why it is generally best to avoid discussions of the case circumstances with the detainee. First, there is always the possibility that consular conversations with detainees may be monitored or overheard; the contents of these conversations might then be used as evidence against the national. Defence attorneys will often be more accepting of the consular presence if they know that consular officials will not discuss case specifics with their client. Furthermore, declining to discuss the circumstances of the alleged crime maintains the impartiality of consular officers and impresses on the national that the purpose of consular assistance is essentially neutral in character. The interest of the consulate is always to ensure that the detainee receives fair, impartial and humane treatment under the legal process of the receiving State.

Neither should consular officers make any promises to detainees concerning the disposition of their case, or guarantee to undertake any service that they may be unable to fulfil. At this early stage, it is essential

both to alleviate the anxiety of the detainee and to build a relationship of trust. However well-intentioned the offer, a failure to provide promised assistance will only damage the credibility and trustworthiness of the consulate.

Consular officers are authorised to arrange for the legal representation of their nationals in custody and to provide any other assistance necessary to ensure that the national's legal rights and interests are protected.

At the outset of a case, this assistance should include providing the detainee with a list of local attorneys who may be able to represent them. It may be of particular importance to provide information on attorneys who are bilingual or from a cultural background similar to that of the national, as well as attorneys experienced in defending clients facing the same type of charges as those facing the national.

Maintaining a comprehensive list of qualified attorneys can be a challenging task, particularly if the consular jurisdiction covers many communities. An initial step could be to develop a list for communities where there are particularly large concentrations of nationals from the sending State. National, state, and local associations of criminal defence attorneys often provide lists of members by community, or a referral service for individuals seeking qualified legal counsel. Other consulates may also be able to recommend defence attorneys based on past cases.

ALLEGATIONS OF ILL-TREATMENT

In the first contact with a prisoner, whether in person or by telephone, the consular officer should establish that the national is not being mistreated. Whenever a detainee alleges coercive treatment or physical abuse, it is imperative that the national receives a consular visit at the earliest possible opportunity. A similar requirement will arise whenever a detainee describes confinement conditions that clearly fall below those required to maintain the safety, health or physical and mental integrity of the detainee. The instructions issued by the U.S. Department of State to its consular officers for such situations could well provide a standard for other services to emulate:

Examination by an Officer

The officer should verify during the initial visit whether there are any marks or signs of abuse such as bruises, scratches, or cuts, bearing in mind, however, that many forms of physical abuse, including systematic torture, are calculated to leave no physical evidence. Torture by electric shock and various forms of "water treatment" are two of the more common forms of torture which normally do not leave marks. Where such methods are alleged to have been used, the personal interview of the prisoner is equally imperative. In all cases of allegations of abuse, it is essential that the officer exercise judgment on the basis of all evidence at hand, including assessment of the prisoner's credibility, in determining the probable veracity of the allegation.

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basis of all evidence at hand, including assessments of the prisoner's credibility, in determining the probable veracity of the allegation.

Examination by Independent Physician in Cases of Abuse

The consular officer should arrange, if possible, to have the prisoner examined by a private medical doctor to determine the extent and probable cause of any injury.

Conditions of Detention

Prison conditions vary widely, particularly from country to country, but also often within a country. At the time of the initial visit to an arrested U.S. citizen, the officer should observe the physical conditions under which the prisoner is being held. If it is determined that the conditions do not meet generally accepted international standards, the consular officer should attempt to obtain improvement through direct intervention with the responsible prison authorities. If this does not achieve results, formal protests at the local, state, or national level should be considered.²⁸

SECURITY CONSIDERATIONS

Given the enhanced security measures now in effect in many countries, consular officers should not take at face value any indication by local authorities that a detainee has waived the right to consular communication and assistance. A consular visit with the detainee is the most certain way of establishing the actual wishes of the national; consular officers always retain the right to visit and correspond with their nationals in custody, even if the detainee has reportedly not requested this contact.

In light of these security measures, consulates should also be aware of the risk that prison authorities may monitor conversations or correspondence between consular officials and detained foreigners, particularly if the detainee is Muslim or from the Middle East. As a general rule, consular officers should not discuss sensitive information with detainees.

Jail or prison authorities may impose reasonable regulations on the time, place, and manner of consular visits to detained foreign nationals. Those regulations cannot be so restrictive that the purpose of consular assistance is defeated: under Article 36, local laws and regulations must give "full effect" to the rights afforded to detainees and to their consular representatives. Even though a consular officer has certain privileges and immunities, the officer must comply with applicable prison security rules, such as submitting to a search of their person. On the other hand, because a consular officer is entitled to be treated with respect, searches should not be unnecessarily intrusive.

DETERMINING NATIONALITY AND OBTAINING CONSENT

The nationality of the detainee should be confirmed during the initial consular visit, in order to establish their entitlement to consular assistance. It is not uncommon for the passports or other identity documents of detainees to have been lost, misplaced or stolen. Where proof of identity is not readily available, the consulate should always continue to provide interim assistance while verifying the citizenship of detainees.

²⁸ This excerpt is taken from the U.S. Department of State *Foreign Affairs Manual*, Section 7, chapter 414.

Consular officers may also need to obtain the consent of the national for gathering and disseminating information about their circumstances, in order to comply with privacy legislation adopted by the sending State. When obtaining a waiver of privacy is required, consular officers should first carefully explain why consent is necessary. For example, it could be pointed out that providing information to the detainee's family or other designated sources of assistance would not be permissible without prior consent.

ONGOING PRE-TRIAL ASSISTANCE

In those cases where the detainee consents to consular assistance and is facing a prolonged period in custody, the consular officer should arrange to visit the national on a regular basis. Wherever possible, the same case officer should visit the national each time, in order to establish the necessary rapport and to better detect any changes in the detainee's circumstances or treatment. The case officer should also be available to answer requests for information from the detainee's next of kin, for example, or to assist in arranging visits from family members.

4. CONSULAR CONTACT WITH LOCAL AUTHORITIES AND DEFENCE ATTORNEYS

Consular assistance includes establishing and maintaining a good relationship with the detaining authorities and with defence attorneys. Consulates should be prepared to resolve problems concerning consular access, treatment in custody or the national's legal representation.

The function of the consulate is always to ensure fair, humane and equal treatment, by working with the detainee, the defence attorney, and local authorities. The consular officer serves as the “cultural bridge” between the defendant and the local legal system. Consular assistance may also take on a protective function, by shielding the national from abusive treatment in custody.

Even in those cases where a foreign national is familiar with local criminal justice procedures, the consulate may still provide an indispensable supporting function. For example, crucial evidence favourable to the defence may exist only in the detainee's home country but lies beyond the reach of defence counsel. The gathering of important documents may require the consulate to correspond with other branches of the home government, or may rely on the notarising function of the consulate for their legal verification.

In most jurisdictions, the respect accorded to consular representatives will go a long way toward resolving problems of consular notification and access. However, consular officers should not wait until a problem arises before establishing ongoing contact with local authorities. Ensuring that police departments, prison officials, prosecutors and bar associations are aware of the rights conferred under Article 36 should be part of the general consular function, through representations made individually or in conjunction with other consulates.

CONTACT WITH LOCAL AUTHORITIES

Once the consular post has been informed of a detention and has received approval from the detainee to provide assistance, the consular case officer should immediately establish and maintain contact with the detaining authorities. As an initial step, the case officer should ask the local authority to:

- Include full contact information for the consulate in the national's case file;
- Provide the national with the contact information;
- Inform the consulate of any changes to the prisoner's status or circumstances, such as transfer to another facility, medical or personal emergencies, court hearings, release, or deportation proceedings.

Consular officers and detained nationals have the right to private communication and correspondence with each other. The consular post should be prepared to bring the following concerns to the attention of

the local authority and, if necessary, to the national authorities:

- Attempts by police or custodial staff to overhear or monitor conversations between consular representatives or detainees;
- Any interference with correspondence between consular representatives and their nationals under any form of detention;
- Any outright denial of consular access to a detained national by police, jail or prison officials;
- Any violation of consular privileges, such as disrespectful treatment or unnecessarily intrusive searches of a consular representative.

Under the general protective and representative functions embodied in Article 5 of the VCCR, consulates should be prepared to raise the following concerns with the local legal authorities:

- A failure of the arresting authority to promptly notify the detainee of their consular rights, in any case where non-notification may have affected the detainee's awareness or exercising of their legal rights from the moment of arrest;
- Any credible reports that the detainee's legal or human rights have not been observed;
- Any irregularities in the prosecution of a case, especially concerns that the national is the victim of discriminatory or unfair treatment (typically, in consultation with the detainee's legal counsel).

Consular officers should also work to correct some common misconceptions by police departments and prison officials about Article 36 obligations:

- Article 36 does *not* require that the consulate be notified automatically of a detention, unless the detainee first requests consular notification. Police should not contact the consulate without authorisation from the national, unless required to do so by a bilateral consular agreement. However, consular officials should always verify that the national has freely relinquished their right to consular notification and assistance, preferably by means of a consular visit.
- Consular rights apply regardless of the immigration status or the length of time that a foreign national has resided in the arresting state.
- Contact between the police and law enforcement agencies in the national's home country does *not* constitute compliance with Article 36 if the consulate has not also been contacted.

WORKING WITH DEFENCE ATTORNEYS

Consular officers should monitor the legal representation provided to their nationals and be willing to assist in resolving any problems or special needs that may arise. Whether they are retained by the national or appointed by the court, attorneys may have little or no familiarity with the cultural background and perceptions of a foreign client. They may need to rely on an interpreter to communicate with their client,

or may not be attuned to important aspects of the national's background, upbringing or mental state. Attorneys may fail to explain the proceedings and the legal issues under review in terms that a foreign client will fully understand. Quite frequently, misunderstandings of various kinds may arise between the defendant and the attorney.

Here again, consular involvement may serve as the "cultural bridge" between the defendant and their attorney, whether retained or appointed. Consular visits and communications with the national may provide important information that would assist in their defence. In a number of cases, for example, consular officers visiting nationals in custody have detected symptoms of mental illness or other impairments which had gone unnoticed by the defence team. More generally, an ongoing consular involvement in the case may be indispensable in ensuring that the national is able to participate fully in the efforts to mount an effective defence.

Courts in many jurisdictions may consider extenuating factors when imposing sentences, including information about the defendant's background or character. Much of this crucial mitigating evidence may exist only in the national's home country and may not be readily available to the defence attorney. Consular involvement is often the most effective way to obtain and vouch for personal information such as medical, scholastic or military records. The consular post may also be called upon to facilitate a visit by the defence team to the national's home country in order to carry out a thorough background investigation and the gathering of mitigating evidence. In some circumstances, the consular post may be asked to provide advice or assistance in obtaining depositions: sworn statements from witnesses residing in the sending State.

While not all cases will require the development of an ongoing relationship with the defence attorney, consulates should be prepared to undertake extended legal assistance where the case circumstances warrant. This would be especially true where the prosecution and conviction of the national might result in a death sentence, life imprisonment, or other serious penalties impairing the physical or mental integrity of the defendant.

In all serious cases, the consular officer should communicate with the defence attorney on a regular basis. The consular post needs to be kept informed of the legal status of the case, just as the attorney requires regular updates on the post's own efforts. A creative and flexible approach to cooperation with the lawyer is often called for. As a basis for discussion, the case officer and the attorney might choose to review the general outline of consular functions provided in Articles 5 and 36 of the VCCR.

Establishing a good working relationship with defence attorneys requires some understanding from both parties about their respective capacities and expectations. In a death penalty case, for example, attorneys must meet strict deadlines at each stage of the legal process and are responsible to their clients in a life-or-death situation. That creates an understandable sense of urgency in their requests for consular assistance and high expectations of the consular post's capacity to respond. It can also create tensions with lawyers not accustomed to the more measured pace of diplomacy.

It is important that the consular post provide the lawyer with a clear understanding of what it is prepared to do on short notice. It may be beneficial to re-evaluate current policies for consular assistance and to prepare a **legal contingency plan** for intervening in a case where Article 36 has been violated, or where the national faces a very serious criminal charge.

Although the available resources may be limited, every consulate should be in a position to:

- Communicate in some form with the detainee, the attorney and the local authorities.

- Provide an affidavit to the lawyer describing the consular services provided to detainees.
- Maintain a case file for each of their nationals in custody and provide pertinent information to the defence attorney.
- Provide diplomatic assistance where necessary, such as by submitting a diplomatic note through the embassy to the foreign ministry of the receiving State, expressing concern over an alleged violation of the VCCR and requesting an investigation of the circumstances.

These four basic functions will provide the defence with the basis for a variety of legal strategies and resources. If other assistance is requested, the lawyer needs to know what is readily available, and the consular post should clarify its policy on additional assistance (which may require approval from the home government).

In some cases, consular officers have determined that the preparation for trial by defence counsel was falling below an acceptable professional standard. Warning signs may include attorneys who appear to be distracted or disinterested during court hearings, fail to visit and consult with their client, file no pre-trial motions or briefs, are evasive or misleading when discussing their case strategy, and are difficult to reach at all times. Consular officers have sometimes seen fit to request that counsel withdraw from a case and have either requested that the courts appoint a new attorney or have retained competent counsel to represent the national.

MONITORING COURT PROCEEDINGS

Particularly in cases where a national is facing serious charges, a consular representative should attend every significant court hearing as well as the trial itself. A consular presence in the courtroom serves to reassure the national that their interests are being protected, while impressing on the local authorities that the sending State is genuinely concerned that its citizens receive fair and even-handed treatment. Monitoring of the proceedings may also alert the consular officer to deficiencies in the national's legal representation or identify discriminatory treatment based on national origin.

Where the legal arguments in a case include the impact of any denial of consular notification or access, a consular representative may be requested to provide a statement or to give testimony. Direct involvement in the proceedings may require a waiver of consular immunity and would ordinarily take place following close consultation with both defence counsel and the foreign ministry of the home government. In many such cases, it will suffice for the consular post to submit an affidavit describing the general forms of assistance routinely provided to its nationals facing criminal prosecution.

Consular officers may have standing to address the sentencing authority directly, either by written correspondence to the presiding judge or by making a declaration in court. This right could be exercised by the consulate in circumstances of particular concern to the home government, such as cases that could result in sentences of death or physical disfigurement. The right of the consular officers to represent the interests of the national before the authorities of the receiving State is a flexible one, which should be interpreted to encompass any form of intervention that is both necessary and permissible under the individual circumstances.

The acquittal or release of a foreign detainee does not necessarily end the consular responsibility. Many

former detainees will require humanitarian assistance in order to return home or to resume their disrupted lives. Some will also require medical or psychiatric treatment, in order to fully recover from the trauma of harsh confinement. Where the private resources of the national are insufficient, a creative and cooperative approach to aftercare may be called for. As one example, the consular post might exert its influence with the local expatriate community to obtain voluntary contributions or services for a fellow-national recently released from custody.

5. ONGOING CONSULAR ASSISTANCE FOR PRISONERS

Consular assistance continues throughout the incarceration of the national. Ongoing prison visits serve the same basic purposes as pre-trial interventions and are an important aspect of consular protection. Some cases will also require consular support following the national's release from custody.

Consular assistance does not end with the conviction and sentencing of the detainee; in many jurisdictions, ongoing consular support will be just as important once a national has been imprisoned. Prison conditions in many countries are very harsh, and foreigners are sometimes particularly vulnerable to abusive or coercive treatment at the hands of guards or fellow-inmates. Even where conditions of confinement are generally humane, medical emergencies, an unexpected transfer to another facility or a sudden deterioration in the prisoner's morale may all require prompt consular intervention to avert serious problems. It should always be remembered that consular assistance is non-judgmental; it is an impartial service provided to the nationals of the sending State, regardless of any offence for which they may have been duly convicted.

PRISON VISITS

Most consular services strive to visit all of their imprisoned nationals on an ongoing basis. While these visits may necessarily be less frequent than those provided before trial, they serve the same basic humanitarian and protective functions. Particular care should be paid to the medical and nutritional needs of imprisoned nationals; in some countries, outside medical or dental assistance, nutritional supplements or even funding for basic foodstuffs may be necessary to prevent a serious deterioration in the prisoner's health. Where the national lacks the means or ability to obtain necessities, the consulate should not hesitate to intervene and assist. As with pre-trial detentions, the consular officers should always be prepared to intervene vigorously with the local authorities whenever the basic human rights of an imprisoned national are abused or neglected.

Ongoing consular visits are crucially important in sustaining the morale and well-being of imprisoned nationals. The provision of reading materials from the home country, assistance with the delivery of letters and other simple acts take on an exaggerated importance for people compelled to live behind bars. Even where prisoners require no specific assistance, a visit from the consulate is a welcome reminder that there is someone who can be trusted to look out for their interests, and that the outside world has not forgotten about their existence.

PROVIDING BASIC INFORMATION TO PRISONERS

All consular officers should provide their imprisoned nationals with a package of information on prison regulations, conditions of parole, work programs and any other relevant material that would facilitate the better integration of the national into the prison society. Many countries have entered into bilateral or multilateral agreements on the transfer of offenders, under which a prisoner may be sent home to serve out their term of imprisonment. The stipulations of these agreements vary widely, but generally require

both the consent of the local penal authority as well as setting out procedures regulating the overall length and type of confinement upon return.²⁹ Consular officials should be fully aware of relevant transfer agreements and should provide any information or assistance necessary for prisoners to apply.

POST-CONVICTION APPEALS

The right to appeal a conviction and sentence exists under virtually every system of justice. Appellate review should be considered as an extension of the arrest and trial: the same obligation exists to ensure that the national receives fair and equal treatment and is fully able to exercise all available legal rights. Cases resulting in very severe sentences may well require the active participation of the consulate throughout the appellate process, notably where the nature of the sentence itself raises serious concerns. Particularly in capital cases, the exhaustion of appellate review may be followed by a final appeal for clemency before the death sentence can be carried out. It is increasingly common for consular representatives to petition executive authorities on humanitarian grounds for the commutation of death sentences, amputations, floggings or other especially severe punishments.

DEATHS IN CUSTODY

Under VCCR Article 37, the local authorities must inform the consular post without delay of any death of a national of the sending State. Whenever a citizen dies in custody, the consular officer should immediately inform the prisoner's next of kin or other designated person and should also report the known details to the home government. If there is any reasonable suspicion that death may have resulted from mistreatment or negligence, the consular officer should immediately request the host government to undertake a full investigation of the cause of death, including the performance of a full post mortem examination. The consular officer may also be required to arrange for the return of the remains, or to extend other services to the family of the deceased national.

CONSULAR ASSISTANCE FOLLOWING RELEASE

Many prisoners will require various forms of consular assistance upon their release. That support will usually be short-term and basic, such as providing replacement travel documents or notifying family members of the national's release. Other cases (particularly following lengthy imprisonment) may require extensive follow-up, such as medical treatment, the provision of temporary housing or the monitoring of deportation proceedings. Recently released prisoners are still nationals in distress abroad; they should be afforded any support that the consulate can offer or arrange for to facilitate their reintegration into society. The case file should thus not be closed until the consulate has determined that the national either does not require further emergency assistance or is no longer within its consular jurisdiction.

²⁹ For example, the Council of Europe's *Convention on the Transfer of Sentenced Persons* has been ratified by over 50 nations, including many non-European countries. Under its provisions, consular officers may be required to verify that the national has consented to the transfer. The receiving State may be bound by the legal nature and duration of the sentence as determined by the sentencing State, or the sentence may be modified to comply with the laws of the receiving State provided that it does not exceed the original sentence imposed. Similar multilateral agreements include the *Inter-American Convention on Sentencing Criminals Abroad*, the *Scheme for the transfer of Convicted Offenders within the Commonwealth* and the *UN Model Treaty on the Transfer of Supervision of Offenders Sentenced or Conditionally Released*.

6. CONSULAR ASSISTANCE IN EXCEPTIONAL CASES

Consular officers may provide any appropriate assistance necessary to ensure that a national facing severe punishment receives fair, equal, and humane treatment, throughout the legal proceedings. Where the sentence or the treatment of the national is inherently inhumane, consular assistance may increase in scope to safeguard the national from irreversible harm. Joint interventions by several consular officers may be called for in cases of special concern to the larger international community.

Some cases are so serious that the consular officer may be called upon to provide a greater range and scope of assistance than would normally be provided. Typical examples would include the detention or imprisonment of nationals resulting in grave or irreversible harm, such as a death sentence, amputation, torture or rape in custody. Although local laws may condone or even require harsh punishments, consular officers are entirely within their rights to appeal for an attenuation of the sentence on humanitarian grounds, or to provide additional assistance necessary to safeguard the national from unacceptable treatment. Determining when and how to provide special assistance would normally be made on the basis of a pre-existing consular policy, or in consultation with the home government.

In a case of special concern, additional forms of consular assistance may be required:

- Providing emergency funding for bail proceedings;
- Interceding with prosecutors to avoid excessive punishment;
- Funding expert witnesses and investigators, where the courts deny adequate resources to the defence;
- Funding or assisting mitigation investigations in the home country;
- Bringing mitigation witnesses to testify;
- If necessary, arranging for the hiring of competent counsel for the accused;
- Retaining an attorney to represent the consular interest;
- Submitting briefs or motions based on any violations of international law;
- Participating directly or indirectly in appellate review;
- Bringing claims before international courts and tribunals
- Petitioning for clemency;
- Hosting press conferences or assisting in publicity.

COOPERATIVE EFFORTS IN SPECIAL CASES

Cases of special concern may also afford opportunities for cooperation between consulates and non-governmental organizations, such as human rights groups or humanitarian agencies. The ill-treatment of a national abroad may prompt considerable media interest in the home country, resulting in enquiries from politicians, religious leaders or other prominent individuals. In essence, the consulate should prepare and carry out a contingency plan whenever a case of exceptional concern arises. The plan should include any necessary provisions for crisis management, such as the temporary reassignment of consular personnel to handle various aspects of the case, and a well-developed strategy for outreach and publicity.

In all likelihood, unacceptable treatment or punishment imposed on any given foreign national could also be of concern to other consular representatives of other nations in the same jurisdiction. Cooperative efforts by consular officers can be especially appropriate in those jurisdictions that apply punishments deemed to be unacceptable to many countries (such as the death penalty), or where foreign nationals as a group are subjected to discriminatory or abusive treatment while in custody.³² Joint interventions by several consulates or home governments may serve to reinforce the principled concern of the larger international community, in a way that a single consular action cannot adequately convey. It should be remembered that human rights standards know no borders or nationalities. When considering appropriate responses in exceptional cases, consulates should review the option of a joint demarche or other collaborative diplomatic actions.

³² A number of cases involving foreign nationals sentenced to death have prompted joint consular responses in countries such as the United States, Saudi Arabia and Viet Nam. In the case of Mexican national Javier Suárez Medina, for example, 14 nations joined with Mexico in submitting a brief to the United States Supreme Court on the crucial importance of article 36 rights and obligations in death penalty cases.

7. STRENGTHENING CONSULAR ASSISTANCE PROGRAMS

“A consular officer may do a variety of things to assist a foreign national. The consular officer may speak with the detained foreign national over the phone and/or arrange one or more consular visits to meet with the detainee about his/her situation and needs. A consular officer may assist in arranging legal representation, monitor the progress of the case, and seek to ensure that the foreign national receives a fair trial (e.g., by working with the detainee's lawyer, communicating with prosecutors, or observing the trial). The consular officer may speak with prison authorities about the detainee's conditions of confinement, and may bring the detainee reading material, food, medicine, or other necessities, if permitted by prison regulations. A consular officer frequently will be in touch with the detainee's family, particularly if they are in the country of origin, to advise them of the detainee's situation, morale, and other relevant information.”³³

REVIEWING YOUR CONSULAR ASSISTANCE PROGRAM

Not all consular officers are endowed with the means to provide the full range of consular assistance described throughout this guide. Nonetheless, each consular mission has the potential to provide the most essential forms of assistance, by ensuring that the available resources are properly directed. All consulates are therefore encouraged to undertake an assessment and evaluation of their current assistance programs. A review of consular policies and procedures might begin with a discussion of the contents of this guide, followed by consideration of a series of relevant questions.

A 12- POINT CHECKLIST FOR CONSULAR ASSISTANCE PROGRAMS

1. What basic advice and information do you provide to detained nationals, either by phone or in person? Do you open a file on every case of arrest or imprisonment reported to the consulate, including data on the time and nature of all communications concerning the case?
2. Are other mission staff aware of the standard advice and information that you provide to detainees? Are honorary consuls trained to provide assistance to detainees, where necessary?
3. Is the advice and information for detainees made available in written form and in your native language?
4. What procedures are in place to respond to consular assistance needs after consular hours of operation, or when the duty officer is unavailable?
5. If your consulate or embassy maintains an Internet site, does it include basic information about the rights of detainees and provide contact information for consular assistance?
6. Do you have a reference copy of your home government's consular assistance policies and procedures, along with any relevant local laws and regulations on consular rights?

³³ U.S. Department of State, *Consular Notification and Access: Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*.

7. Do you maintain an up-to-date list of reputable local defence attorneys, and is that list provided to detainees?
8. Are you confident that local law enforcement agencies are aware of their consular obligations and know how to reach you? Have you developed an ongoing relationship with local police departments, prosecutors, and lawyers' associations?
9. Do you maintain a dialogue with other consulates on consular assistance issues and share ideas or concerns with them?
10. How would you respond to a request for assistance from a defence attorney? For example, could you provide a standard affidavit indicating the forms of assistance that your consulate routinely provides to detained nationals, for use in court? Have you developed a contingency plan for responding to an exceptionally serious case?
11. Are there legal issues relating to consular assistance on which you are unclear and on which you should seek legal advice? For instance, if two or more defendants in a case are co-nationals, how would you render assistance to their respective (but competing) attorneys? If a detained national divulges information about the crime circumstances, what are your legal obligations and privileges in disclosing that information?
12. Lastly, are you confident that your limited resources are directed to providing the most comprehensive possible assistance, relative to the circumstances of each case?

OTHER RESOURCES

Textbook on Consular Law and Practice

Consular Law and Practice, by Luke T. Lee. Oxford University Press, 1991. ISBN: 0198256019

This landmark book provides over 700 pages of authoritative information on the history, scope and development of consular practices world wide. It includes a very detailed section on the development of the VCCR, as well as many examples of consular assistance in action. An essential reference text, this book is available from www.amazon.com and other on-line sources.

Criminal Law Resources on the Internet

The Buffalo Criminal Law Center provides on-line access to criminal law materials on nations throughout the world, including criminal codes, criminal procedure codes, and enforcement codes.

<http://wings.buffalo.edu/law/bclc/resource.htm>

Material from the International Court of Justice

On the LaGrand Case:

<http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>

On Mexico v. United States:

<http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>

Information on Consular Rights, Foreign Nationals and the Death Penalty

Human Rights Research acts as a clearinghouse of information and contacts on consular rights issues in the cases of foreign nationals facing the death penalty. The organisation also provides consulting services to consulates and defence attorneys on consular rights and other international law issues. Its website provides reference documents and resource guides for attorneys and consular officials. For more information, contact Mark Warren: telephone (613) 278-2280: e-mail: aiwarren@sympatico.ca
<http://www3.sympatico.ca/aiwarren>

Human Rights Standards: Fair Trials

The Amnesty International *Fair Trials Manual* offers a comprehensive guide to international norms and standards protecting the basic legal rights of the accused at arrest, trial and appeal:
<http://www.amnesty.org/ailib/intcam/fairtrial/indxftm.htm>

Human Rights Standards: Confinement Conditions

The UN *Standard Minimum Rules for the Treatment of Prisoners* provide detailed guidance on minimum conditions of confinement, the denial of which may constitute cruel or inhuman treatment. The UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* outline standards applicable to all people from the moment of their custody. Both instruments may be cited as evidence of the norms and practices expected of all UN member States:
<http://www1.umn.edu/humanrts/instreet/auogs.htm>

Human Rights: the ICCPR

The International Covenant on Civil and Political Rights is the most comprehensive and widely ratified binding human rights treaty. The full text and ratification list is available at:
<http://www1.umn.edu/humanrts/instreet/auob.htm>

Human Rights: Regional Instruments

Some countries are parties to regional human rights treaties, the provisions of which may extend additional protections to detainees. For access to the texts of all major regional human rights instruments (including lists of ratifying States), see:
<http://www1.umn.edu/humanrts/instreet/auoz.htm>

Human Rights: Other Categories

Other international treaties and agreements may apply to particular situations, such as the detention of juveniles, allegations of torture, the use of the death penalty or discriminatory prosecution. The texts of all

international human rights instruments are linked by category, via the Human Rights Library of the University of Minnesota:

<http://www1.umn.edu/humanrts/instree/ainstls2.htm>

Transfer of Offender Treaties

Council of Europe, Convention on the Transfer of Sentenced Persons

<http://conventions.coe.int/treaty/en/Treaties/Html/112.htm>

Inter-American Convention on Serving Criminal Sentenced Abroad

<http://www.oas.org/juridico/English/treaties/a-57.htm>

UN Model Treaty on the Transfer of Supervision of Offenders

<http://www.hri.ca/uninfo/treaties/52.shtml>

Foreign Affairs Manual, United States Department of State

One section of the Foreign Affairs Manual of the U.S. Department of State (7 FAM 400) provides comprehensive instructions and procedures for United States consular officials. Many of the manual's recommendations regarding assistance to detainees and prisoners would be applicable to other consular services.

<http://foia.state.gov/famdir/Fam/fams.asp?level=2&id=8&fam=0>

Consular Notification Procedures

The U.S. Department of State manual for domestic law enforcement on Article 36 includes common questions and answers, legal framework, notification forms and procedures. While the State Department's interpretation of notification obligations may not always correspond with that of other countries, the manual does provide useful reference material:

http://travel.state.gov/consul_notify.html

APPENDIX: EXCERPTS FROM THE VIENNA CONVENTION ON CONSULAR RELATIONS

Article 5: Consular Functions

Consular functions consist in:

- (a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
- (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;
- (f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;
- (g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession 'mortis causa' in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;
- (h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;
- (i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;
- (j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;
- (m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the inter-national agreements in force between the sending State and the receiving State.

Article 36: Communication and Contact with Nationals of the Sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

- (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
 - (b) if he so requests, 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. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
 - (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 judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.