PROCEDURAL LIMITATIONS ON CAPITAL PUNISHMENT: 
THE CASE OF FOREIGN NATIONALS

John Quigley*

I. CONSULAR ACCESS AS AN INDIVIDUAL RIGHT .......... 521
II. ASCERTAINING A DETAINEE’S IDENTITY ................. 522
III. TIMING OF THE COMMUNICATION ...................... 523
IV. THE QUESTION OF REMEDY ........................... 524

A factor that has focused international attention on capital punishment in the United States is the infliction of this punishment on foreign nationals. Because of the decline in the use of capital punishment in many states of the world in recent decades, most foreigners who are subjected to capital punishment in the United States are nationals of an abolitionist jurisdiction. These foreign states typically adopt a negative position towards the imposition of capital punishment on their national, even if the offense is quite serious and the proof of guilt is strong.

The legal issue most frequently raised by a foreign state in this situation has been consular notification. In many instances of the imposition of capital punishment on foreigners, the state of nationality has objected to such punishment on the ground that the individual had not been informed at the time of arrest of the right of access to the protective services of its consuls. Under the Vienna Convention on Consular Relations, a treaty to which 163 states are parties, detaining authorities must inform a foreigner, upon detention, of the right to contact the home state consulate for assistance in preparation of a defense. Police in the United States rarely comply with this obligation, however, resulting in the situation that most foreigners presently under death sentences in the United States were not informed of their right of consular access.

The issue has been raised in courts in the United States, although to date most challenges to imposition of a death sentence have failed on the ground of having been raised too late in the process, after appeals had been exhausted. Both state and federal courts have refused to entertain claims of a failure of

* Professor of Law, Ohio State University. LL.B., M.A., Harvard University. The author has served as counsel to the Government of Mexico in its appearance as amicus curiae in cases in United States courts involving issues raised in this article.
notification about consular access. The courts have invoked the doctrine of procedural default, which requires that most legal issues be raised early in the criminal process, and in any event prior to the post-conviction or habeas corpus stage.¹ The American Branch of the International Law Association has filed amicus curiae briefs in a number of these cases, urging strict compliance with Article 36.

Many of the foreigners sentenced to death in the United States are Mexican nationals, and Mexico has been active in seeking to challenge convictions and death sentences where it has appeared that its national was not informed of the right of consular access. In 1997, Mexico asked the Inter-American Court of Human Rights to issue an advisory opinion on the consular access issue. The Court, an organ of the Organization of American States (OAS), is empowered to issue advisory opinions at the request of a state member of the OAS, on the meaning of provisions in human rights treaties to which American states are parties, even if states in other regions are parties as well.²

The function of consular assistance is to enable foreign nationals to defend themselves properly and thus to ensure that trials are fairly conducted. In its request to the Inter-American Court of Human Rights, Mexico asked not only for interpretation of the right of consular access as found in the Vienna Convention on Consular Relations, but as well for elucidation of the question of whether a failure to inform a detained foreign national of the right of consular access results in a due process defect that, in a capital case, requires reversal of the conviction and death sentence.³

In response to Mexico’s request, the Inter-American Court of Human Rights in 1999 issued an advisory opinion that called for strict compliance with the right of consular access as codified in the Vienna Convention on Consular Relations and that determined that a failure to inform a detained foreign national of that right constituted a due process violation. Focusing on application of the right of consular access in capital cases, the Court found that, consistent with due process, a death sentence rendered in a case in which a foreign national has not been informed of the right of consular access cannot stand. The Court’s analysis is that consular assistance is an element of due process since it allows the foreign national to present a proper defense.⁴

³. Solicitud de opinión consultiva presentada por el Gobierno de los Estados Unidos Mexicanos, Nov. 17, 1997 (distributed by Inter-American Court of Human Rights, no document number).
⁴. Inter-American Court of Human Rights, El derecho a la información sobre la asistencia consular en el marco de las garantías del debido proceso legal, Opinión consultiva OC-16/99/ de 1 de Octubre de 1999, solicitada por los Estados Unidos Mexicanos [hereinafter Advisory Opinion].
I. CONSULAR ACCESS AS AN INDIVIDUAL RIGHT

In the course of its opinion, the Inter-American Court gave its views on a number of issues that have proven controversial in the application of the right of consular access in United States courts. The Court concluded that Article 36 provides a right directly to the individual, a right that the individual therefore may invoke before a domestic court. It referred to language in the preamble to the Vienna Convention on Consular Relations that states that the purpose of the privileges and immunities mentioned in the Convention “is not to benefit individuals, but to ensure the efficient performance of functions by consular posts on behalf of their respective States.” The United States had, to support its argument against enforceable rights on the part of the detained foreign national, stated in its brief to the Inter-American Court that this language shows that there was no intent in the treaty to give a detained foreign national any rights that she or he could enforce judicially.

The Court concluded, however, that the term “individuals” in the preamble refers only to consular officers. In the context in which the term “individual” appears in the preamble, the Court is correct in its interpretation. The Convention is one whose main purpose is to define the role and functions of consuls, and this preambular language is an obvious reference to consuls.

The Court makes one other point in arriving at its conclusion that Article 36 creates a right that may be invoked by the individual. It notes that in the Teheran Hostages Case, the United States referred to the right of foreign nationals to consular access as a right of the individual. It cites, in that regard, the memorial filed by the United States in the Teheran Hostages Case. In the Teheran Hostages Case, the United States invoked the compromissory protocol to the Vienna Convention on Consular Affairs as a basis for jurisdiction over Iran and, in arguing the relevance of the Vienna Convention to the hostage-taking situation, said that Article 36 provides a right to consular officers to fulfill their functions and to foreign nationals to avail themselves of consular services.
The Court also addressed the question, raised specifically by Mexico, whether the right of the individual existed apart from whether the sending state protests the failure of the receiving state to fulfill its obligations. Elaborating on its conclusion that the right is personal to the individual detained foreign national, the Court concluded that such a protest is not required. The right, said the Court, is provided by Article 36 itself as a right adhering to the individual, and therefore it exists irrespective of whether the sending state takes any action in the particular case. This conclusion is in line with the general rule regarding rights of individuals specified in a treaty. It is the treaty that provides the right, hence it is unnecessary for the sending state to protest before the receiving state is under the obligation imposed by the treaty.

While this conclusion may appear so obvious as not to require discussion, the matter has been one of some controversy with regard to Article 36, because the receiving state is under simultaneous and related obligations to the sending state and to the detained national of the sending state. It had been suggested, therefore, that if the receiving state failed to inform the national of the right of consular access, but if the sending state did not protest the failure, then there was no breach by the receiving state. The Court, however, finds no need for action by the sending state before there is a breach by the receiving state.

II. ASCERTAINING A DETAINEE'S IDENTITY

The Court also addresses a matter raised by the United States as a justification for not implementing the right of consular access in certain cases. The United States indicated in its brief to the Inter-American Court that not infrequently the detaining authorities are unaware that the detained person is a foreign national. The Court notes that there may even be cases in which the foreign national seeks to hide the fact of being a foreign national, either out of fear of being deported, or out of concern that the sending state may act against him in some fashion.

The Court states that each case may turn on the particular facts, but it finds the receiving state under an obligation to ascertain the identity of persons it detains. In the Court’s view, a receiving state may not refrain from taking action to ascertain the individual’s nationality and then justify its failure to

12. Advisory Opinion, supra note 4, at ¶ 90.
13. Id. at ¶ 97.
15. Written Observations of the United States of America, supra note 6, at 13.
16. Advisory Opinion, supra note 4, at ¶ 95.
17. Id. at ¶ 96.
inform the individual of the right to consular access on the grounds of a lack of knowledge of an individual’s nationality.  

The Court notes that, given the difficulty in some cases of establishing immediately the person’s nationality, a receiving state should, to ensure compliance with Article 36, routinely inform all detainees at the time of arrest of the rights that detainees enjoy if they happen to be foreigners.

III. TIMING OF THE COMMUNICATION

Mexico had also asked the question of how soon the detaining authorities must inform a foreign national of the right of consular access. Article 36 uses the phrase “without delay.” Mexico raised the question with reference to capital cases only, but the Court said in its reply that it could not distinguish the meaning of “without delay” in a capital case from its meaning in a non-capital case.

Responding to the question, the Court first explained the purpose of informing the foreign national of the right of consular access, describing it as being to allow the detainee to prepare an effective defense. Working from that premise, the Court concluded that the information must be communicated at the time the person is first deprived of liberty, and in any event before the person provides her or his first statement to the authorities.

Although the Court does not go into detail regarding the background for Mexico’s question about the time at which the information must be communicated, in a number of cases in the United States a foreigner has been detained and interrogated without being informed of the right of consular access. The detainee then seeks in court to challenge the admissibility of an incriminating statement made during the interrogation, on grounds of non-compliance with the obligation to inform of the right of consular access. At this point the question arises of whether the authorities were required to provide that information before taking a statement.

One United States district court has said that the information must be communicated immediately upon arrest. A panel of the Ninth Circuit, addressing the question of the admissibility of a foreign national’s incriminating statement made after arrest but before information about the right of consular access was communicated, said that the statement is not admissible as evidence,

18. Id.
19. Id.
20. Id. ¶ 100-01.
22. Id.
at least so long as some prejudice appears to have resulted from the failure to provide this information.24

The Inter-American Court's approach seems to be in line with the intent of the framers of the Vienna Convention. A detainee makes decisions immediately upon arrest that may significantly affect the case, such as whether to make a statement, and whether to retain counsel.

IV. THE QUESTION OF REMEDY

The cases concerning incriminating statements also raise the issue of the required remedy for an Article 36 violation. The question of remedy arises as well when a foreign national is convicted of a crime without being advised of the right of consular access. In a number of cases in United States courts, the convicted person has argued for a reversal of the conviction.

In its Advisory Opinion, the Inter-American Court of Human Rights does not deal in detail with remedies. It took an approach that had been suggested to it in oral argument by Hector Gros-Espiell, a former judge of the court, namely to state the general principles regarding remedies but not to address each procedural posture in which a consular access claim might be made. The Court did, however, make clear that a judicial remedy is required.

Due process, said the Court, requires that an accused that is in a situation of disadvantage be placed on a par with others. Thus, the Court said, an accused who does not know the language in which the proceedings are being conducted must be provided a translator, and an accused who is a foreign national must be informed of the right of consular access.25 The Court said that, for an accused person, "notification of the right to communicate with a consular official of his country will materially improve his possibilities of a defense," and "procedural measures, including those taken by the police, will be done with greater concern for legality and greater respect for the dignity of the person."26 The Court said that the right to be informed of the right of consular access "is a means of defense for the accused that is reflected, on occasion in a determinative way, in the respect shown for his other procedural rights."27

The Court addressed the question of remedies in the specific situation of the imposition of a death penalty, since that was how Mexico formulated the question to the Court. The Court said that the imposition of a death sentence without compliance with the obligation to inform of the right of consular access constituted arbitrary deprivation of life, in violation of the International

24. U.S. v. Lombera-Camorlinga, 170 F.3d 1241 (9th Cir. 1999). This opinion, however, was withdrawn when the Court of Appeals decided to hear the case en banc, 188 F.2d 1177 (9th Cir. 1999).
25. Advisory Opinion, supra note 4, at ¶ 120.
26. Id. ¶ 121.
27. Id. ¶ 123.
Covenant on Civil and Political Rights, and of the American Convention on Human Rights.\(^\text{28}\)

On this point Judge Jackman dissented, taking the view that while a failure to inform a foreign detainee of the right of consular access “may have an adverse, and even a determining, effect on the judicial process to which such a person may be subjected, with result that might amount to a violation of that person’s right to a fair trial,” this is not necessarily so in each instance of a failure to provide the required information.\(^\text{29}\) Judge Jackman wrote that:

It is difficult to see how a provision such as that of Article 36.1(b) of the Convention, which is essentially a right on the part of an alien accused in a criminal matter to be informed of a right to take advantage of the possible availability of consular assistance, can be elevated to the status of a fundamental guarantee, universally eligible as a \textit{conditio sine qua non} for meeting the internationally accepted standards of due process. This is not to gainsay its undoubted utility and importance in the relatively specialized context of the protection of the rights of aliens, nor to relieve states’ parties to the Convention from their duty to comply with their treaty obligation.\(^\text{30}\)

Judge Jackman’s reference to “the possible availability of consular assistance” is stressed to the Court by the United States in its submissions, that a consul has no obligation actually to provide services to a particular co-national, and thus that access to a consul may not in every instance result in consular assistance. The majority, however, was not troubled by this circumstance. The majority’s view evidently is that the right of access is so fundamental that one need not inquire whether consular service, or any particular type of consular service, would have been forthcoming in the particular case.

Making that finding, to be sure, may be so difficult as to undermine protection of the right when it is violated. One can, moreover, infer from the inclusion of the right that the states parties considered it a right of fundamental significance to a detained foreign national. A consul’s functions are so varied that a court cannot realistically inquire what a particular consul might have done. One may not be able to determine after the fact whether, and at what level, the particular foreign state would have provided service to the detainee. Such findings would of course involve considerable speculation. Thus, the majority is on more solid ground in concluding that non-compliance \textit{per se} with Article 36 requires reversal of a conviction.

\(^{28}\) Id. \textsection 137.  
\(^{29}\) \textit{Advisory Opinion}, JACKMAN, supra note 4 (dissenting).  
\(^{30}\) Id.