

A Comment on Cases Concerning Consular Protection of the International Court of Justice

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The International Court of Justice (ICJ) has so far heard five cases directly related to the Vienna Convention on Consular Relations (VCCR), in which applicants mainly based their arguments on Article 36 of the Convention. The judgment of the International Court of Justice in the above cases involves at least two sets of relationships: One is the relationship between consular protection and human rights; the other is the relationship between the Convention and bilateral consular agreements. Through the analysis of the above relationships, this article believes that human rights factors have an increasing impact on consular protection and consular relations law will place greater emphasis on the human rights protection.

Keywords: consular protection, human rights, International Court of Justice, VCCR

Consular protection is an important issue in international law. However, the 1963 Vienna Convention on Consular Relations (VCCR, hereinafter “the Convention”) does not directly define “consul” and “consular protection”. Some Chinese scholars believe that consular protection can be divided into broad and narrow senses. Among them, consular protection in broad sense refers to all the services, protections, and assistance that consular duties may provide, as regulated by international treaties, international customs, and domestic regulations. Narrowly defined consular protection refers to the activities of the sending States’ diplomatic or consular agencies (or representatives) in the receiving States to exhaust local administrative or judicial remedies within the limits permitted by international law in order to safeguard the overseas interests of the Sending States and their nationals, legal persons, and other organizations (Xu, 2020, pp. 238-240).

In practice, consular protection may sometimes lead to international disputes, and as a result, recourse to the International Court of Justice (hereinafter “ICJ” or “the Court”) is not uncommon. The latest case is the *Jadhav (India v. Pakistan)* case in 2019. The judgments of the ICJ on consular protection cases are of great significance for deeply interpreting the concept, scope, and conditions of consular protection, analyzing conflicts of interest in this field, and determining its development trends.

Therefore, the first part of this article will briefly introduce the cases concerning consular protection of the ICJ and point out several important issues that exist in consular protection cases. The second part mainly analyzes

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the relationship between consular protection and human rights. The third part tries to comment on the relationship between the Vienna Convention on Consular Relations and bilateral agreements. And the fourth part is the conclusion.

Overview of the Cases Concerning Consular Protection of the International Court of Justice

As of now, the ICJ has heard five cases related to the Vienna Convention on Consular Relations, including the Vienna Convention on Consular Relations (Paraguay v. the United States) in 1998, LaGrand (Germany v. the United States) in 2001, Avena and Other Mexican Nationals (Mexico v. the United States) in 2004, Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States) in 2009, and Jadhav (India v. Pakistan) in 2019.

Although each of these five cases has its own differences, there are also significant commonalities. On one hand, applicants mainly based their arguments on Article 36 of the Vienna Convention on Consular Relations. On the other hand, the backgrounds of those cases are very similar in that the defendants were accused of not informing the foreign suspects of their rights under the Convention, resulting in the alleged encroachment on the right of consular protection.

Article 36 of the Convention is entitled “Communication and Contact With Nationals of the Sending State”, Paragraph 1(b) of which has been cited in all five cases as the main basis of the applicants’ arguments. The contents of Article 36 1(b) are:

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

It is generally believed that Article 36 Paragraph 1(b) of the Convention establishes the right to consular access; however, it seems that no consensus has been arrived at as to whether it can be seen as human right. Although the Court gave a positive answer in the LaGrand that Article 36 of the Convention grants individual rights, it refused to further discuss whether the right of consular access assumed the character of human rights. Therefore, this article will discuss the relationship between consular protection and human rights. Besides, some of the cases involve the relationship between the Convention and bilateral agreements, namely, whether the latter can change the provisions of the Convention. This issue is also related to the human rights aspect of international consular relations law. This article will also discuss this.

Consular Protection and Human Rights

As mentioned earlier, whether the right of consular access stipulated in Article 36 constitutes human rights is a controversial issue in practice. Before the adoption of the Vienna Convention on Consular Relations, consuls usually had the right to communicate with and meet with nationals. Regardless of the existence of a treaty, the right of consular access is accepted as a rule of customary international law or at least as an international practice (Li,

2012, pp. 134-137). In the discussion of the draft convention, the negotiation process surrounding Article 36 on the right of consular access was very tortuous and almost threatened the successful signing of the entire Convention.

The draft Convention is regarded as an absolute obligation for the competent authorities of the receiving State to inform the consular post of the sending State within its consular district if a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. The opposition to this obligation is also recorded, specifically mentioning: The freedom of nationals to communicate with and have access to their consulates came within the scope of Universal Declaration of Human Rights or a convention on establishment of residence rather than of a convention on consular relations (United Nations, 1963, pp. 332-333). The delegation of Italy pointed out that freedom is an essential part of human dignity. If consuls are not informed of restrictions on the personal freedom of nationals abroad, they will be unable to carry out their task of protecting the interests of those nationals and looking after their welfare (United Nations, 1963, p. 338). The final text adopted in Article 36 of the Convention does not directly address its relationship with human rights.

In the *LaGrand* case, Germany argued that the right provided for in Article 36, Paragraph 1(b) of the Convention belongs to the individual rights of nationals of each contracting State. This right can be derived from the usual interpretation of the above provisions, which is also supported by the *travaux préparatoires* of the Convention. In addition, Germany submitted Resolution 40/144 of the United Nations General Assembly which is entitled “United Nations Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live”¹, by saying that the Declaration confirms that the right constitutes an individual right and is considered a human right for foreigners. According to its interpretation of the Convention, the Court concluded that Article 36, Paragraph 1, which by virtue of Article 1 of the Optional Protocol, may be invoked in the Court by the national State of the detained person.² But the Court did not think it is necessary to consider the arguments raised by Germany regarding human rights. In the *Avena* case, the Court reiterated this view.

In the *Jadav* case, India invoked other instruments besides the Vienna Convention on Consular Relations to support its argument that Article 36 of the Vienna Convention on Consular Relations is a facet of due process. First, the Universal Declaration of Human Rights and the Preamble of the United Nations Charter are a recognition of the universality of human rights and the recognition that basic rules of what is generally understood as due process have evolved into principles of international law binding on all States *erga omnes*. Second, the International Covenant on Civil and Political Rights (hereinafter “ICCPR”) explicitly recognizes the principle of due process, which can be fairly regarded as a universal obligation with universal binding force on all States. Third, the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live recognizes that any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national. Fourth, the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment adopted by the General Assembly Resolution of 1988³ recognizes consular access in Principle 16, and the language of this provision suggests that Article 36 has, by 1988, been

¹ Declaration on the Human Rights of Individuals Who Are Not Nationals on the Country in Which They Live, adopted by the UN General Assembly on 13 December 1985, A/RES/40/144.

² *LaGrand* (Germany v. United States of America), Judgment of 27 June 2001, I. C. J. Reports 2001, Para. 78.

³ Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, adopted by the UN General Assembly on 9 December 1988, A/RES/43/173.

considered a principle of international law. According to the instruments mentioned above, India concluded that Article 36 of the Convention constitutes a vital element in the rubric of due process, and as a corollary, any violation of Article 36 results not just in a violation of a rule for conduct between two States, but may result, in the facts of a case, in a violation of the basic inalienable rights of human beings.⁴

It is regrettable that the Court did not comment on this point. Since the relevant parts of the Vienna Convention on Consular Relations and the ICCPR have been widely accepted, they can now be characterized as universal obligations. As Pakistan and India are both parties to the two treaties and since an illegal act may violate multiple treaty obligations, it is reasonable to consider the relationship between the two treaties in this case. The rights stipulated in Article 36 of the Convention are inseparable from those stipulated in Article 14, Paragraph 3 of the ICCPR⁵, as the provisions of Article 36, Paragraph 1(b) create a facet of due process, namely the right of foreigners to defend themselves in a foreign State after being formally informed of the charges, as well as the right to hire lawyers of their own choice. A violation of Article 36 may result in a violation of Article 14, Paragraph 3 of the ICCPR, although a violation of which may not provide relief in all cases, the invocation of State responsibility should take into account the synergistic effect of the two when applied in cases where the violation of Article 36 of the Convention leads to or exacerbates the violation of the rights provided for in Article 14, Paragraph 3 of the ICCPR.

Judge Cançado Trindade supported some of India's arguments in his separate opinion towards the Jadhav case, in which he cited the groundbreaking Inter-American Court of Human Rights (hereinafter "IACtHR")' Advisory Opinion No. 16 (1999) on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. In that case, IACtHR equated the right of notification to consular assistance with the *corpus juris* of human rights, given its close relationship with the rights of due process of law and to a fair trial. Judge Cançado Trindade also argued that, in the absence of consular assistance, there are no guarantees of due process of law and fair trial, and the execution of a death penalty ensuing therefrom is a breach of general and basic principles of international law—such as that of equality and non-discrimination—and of human rights themselves, entailing the international responsibility of the State concerned.⁶

Therefore, he expressed his regret that, in the case of LaGrand, the ICJ found it unnecessary to further consider Germany's argument that the right of the individual to be informed without delay guaranteed by Article 36 (1) of the Convention "has today assumed the character of a human right".⁷ The Jadhav case had provided another occasion to examine the individual rights under Article 36 of the Convention as directly related to the

⁴ Jadhav case, Memorial of the Republic of India, 13 September 2017, Para. 150.

⁵ Article 14, Paragraph 3 of the ICCPR provides that, "3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (1) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (2) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (3) To be tried without undue delay; (4) To be tried in his presence and to defend himself in person or through legal assistance of his own choosing; to be informed if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (5) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (6) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (7) Not to be compelled to testify against himself or to confess guilt.

⁶ Jadhav case, Separate Opinion of Judge Cançado Trindade, Para. 39.

⁷ Jadhav case, Separate Opinion of Judge Cançado Trindade, Para. 30.

human rights to due process of law and a fair trial, but regrettably the ICJ still refused to do so.

With the rapid evolution of international human rights law, the interpretation of other domains of international law should take into consideration the progress and changes which have occurred in the past. The Convention, and especially the right of consular protection, should be interpreted and applied within the framework of the entire legal system. Therefore, the interrelationship between the right of consular protection and the human rights to due process should have been acknowledged.

The Vienna Convention on Consular Relations and Bilateral Consular Agreements

An important feature of consular relations law is that in addition to the existence of the Vienna Convention on Consular Relations as a basic multilateral treaty, many bilateral agreements have also been concluded between States. Therefore, the relationship between the Vienna Convention on Consular Relations and bilateral agreements has become an important issue. Article 73 “Relationship Between the Present Convention and Other International Agreements” of the Convention provides that,

1. The provisions of the present Convention shall not affect other international agreements in force as between States parties to them.
2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.

This provision involves two kinds of relations: One is the relationship between the Convention and the international agreements concluded before it, which considers that it should respect other international agreements in force between the parties; the other is the relationship between the Convention and the international agreements concluded after the Convention, which considers that new international agreements can be concluded to confirm, supplement, extend, or amplify the provisions of the Convention.

The formation of Article 73 of the Convention is not easy. At its meeting in 1958, the International Law Commission (hereinafter “ILC”) began preliminary discussions on the relationship between the proposed convention on consular relations and existing bilateral agreements, which did not involve the relationship between the convention and future bilateral agreements (United Nations, 1958, pp. 200-216).

At its meeting in 1960, the ILC focused on the relationship between the Convention and bilateral agreements and initially formed the preliminary draft of Article 73 of the Convention (United Nations, 1960, pp. 39-40).⁸ Given the significant differences in the practice of consular protection among States, the ILC has collected the opinions and suggestions of various governments on the preliminary draft and divided government opinions into two different viewpoints. Based on this, two alternative provisions have been made and recorded. The content of the first choice is “acceptance of the present articles shall not rule out the possibility of the maintenance in force by the Parties, in their mutual relations, of existing bilateral conventions concerning consular intercourse and immunities, or the conclusion of such conventions in the future”, while the second alternative provision is that “the provisions of the present articles shall not affect bilateral conventions concerning consular intercourse and

⁸ The first draft is presented below: “1. The provisions contained in the present articles shall in no way affect conventions previously concluded between the Contracting Parties and still in force between them. Where conventions regulating consular intercourse and immunities between the Contracting Parties already exist, these articles shall apply solely to questions not governed by the previous conventions. 2. Acceptance of the present articles shall be no impediment to the conclusion in the future of bilateral conventions concerning consular intercourse and immunities.”

immunities concluded previously between the Contracting Parties, and shall not prevent the conclusion of such conventions in the future”.

According to the discussions at the 1961 ILC meeting, it can be seen that the second alternative provision has been preferred. The first choice encounters considerable difficulties. In the first place, it means that any State wishing to ratify or accede to the convention will have to review all its bilateral consular conventions and to ascertain whether the States with which it is bound by those conventions wish to become parties to the multilateral convention. Then, it will have to enter into negotiations with those of the States in question which wish to maintain the existing bilateral conventions in force. For States which in the past have concluded a number of conventions on the subject of consular intercourse and immunities, this obligation will involve a considerable amount of work. Apart from this, there is a risk attached to such negotiations, for any State may later change its mind and decide that it no longer wishes to maintain in force a convention concerning which it has previously taken a contrary view (United Nations, 1961a, pp. 55-75). The second one precisely solves this practical problem, which stipulates that past treaties should be maintained and future treaties should be freely concluded.

At the end of its 1961 meeting, the ILC decided to support the second alternative provision, and also decided not to consider the impact of future bilateral agreements. The final draft of Article 73 is “the provisions of the present articles shall not affect conventions or other international agreements in force as between States parties to them”. The commission also commented:

1. The purpose of this article is to specify that the convention shall not affect international conventions or other agreements concluded between the contracting parties on the subject of consular relations and immunities. It is evident that in that case the multilateral convention will apply solely to questions which are not governed by pre-existing conventions or agreements concluded between the parties. 2. The Commission hopes that the draft articles on consular relations will also provide a basis for any particular conventions on consular relations and immunities which States may see fit to conclude. (United Nations, 1961b, p. 165)

During the 1963 United Nations Conference on Consular Relations, two amendments were proposed in an attempt to fill the gap in the text of Article 73, namely the relationship between the Convention and future international agreements. The first amendment was jointly proposed by the Netherlands, Austria, and Canada,⁹ while the second one was proposed by India and was adopted later. The amendment proposed by India suggests replacing the existing draft provision of Article 73 with the following content: “nothing in the present convention precludes States from concluding bilateral agreements or conventions confirming or supplementing or extending or amplifying the provisions thereof or affect the continuance in force of such conventions”. India notes that this amendment is more satisfactory than that proposed by the Netherlands and others, because it makes it clear that a new convention could supplement, extend, or amplify the provisions of the multilateral convention, but it must not reverse those provisions. It will prevent multilateral conventions from becoming a mere set of model rules

⁹ This amendment proposes to add the following content: The purpose of the amendment is to supplement the text of Article 71 by specifying that not only existing international instruments, but future instruments as well will be unaffected by the multilateral convention. With that amendment, the way will be left open for two or more States to enter into more extensive agreements on the subject of consular relations. States opposing this amendment noted that it does not have any restrictions on the content of future treaties. If two countries can set aside the provisions of the convention at any time and provide conflicting provisions in bilateral agreements, it would be detrimental to the codification of international consular law. The conference prepared an instrument as the basis for future consular treaties, but allowed States to conclude conflicting bilateral agreements at any time that deviated from the provisions of the convention, which was meaningless.

on consular relations, and prevent States free from contracting out of the basic rules of international consular relations law (United Nations, 1963, pp. 233-237). The final outcome of the discussion was to supplement the draft of the ILC with the Indian amendment, which formed the text of the article at the beginning of this chapter and was adopted.

The judgment of the Jadhav case in 2019 has deeply explained the relationship between the Convention and bilateral consular agreements. In this case, Pakistan invoked the provisions of the 2008 Agreement on Consular Access between India and Pakistan: “In case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits”.

Pakistan maintained that it is the 2008 Agreement rather than the Convention that governs the question of consular access between India and Pakistan. In Pakistan’s view, the nature and circumstances of Jadhav’s alleged espionage and terrorist activities bring his arrest squarely within the national security qualification contained in the provisions of the 2008 Agreement. Pakistan thus argues that it was entitled to consider the question of consular access to Mr. Jadhav “on its merits” in the particular circumstances of this case and that the 2008 Agreement can properly be seen as “supplementing” or “amplifying” the provisions of the Vienna Convention on Consular Relations.¹⁰

However, India argued that bilateral treaties cannot modify the rights and obligations which are set out in Article 36 of the Convention. In India’s view, there is nothing in the language of the 2008 Agreement that would suggest that India or Pakistan ever intended to derogate from Article 36 of the Vienna Convention. India maintains that Pakistan’s interpretation would be contrary to Article 73 of the Vienna Convention.¹¹

The Court generally supported India’s view. The Court is of the view that the 2008 Agreement cannot be read as denying consular access in the case of an arrest, detention, or sentence made on political or security grounds, given the importance of the rights concerned in guaranteeing the “humane treatment of nationals of either country arrested, detained or imprisoned in the other country” provided in Article 36 of the Convention.¹²

The Court also noted that the Convention was drafted with a view to establishing, to the extent possible, uniform standards for consular relations. The ordinary meaning of Article 73, Paragraph 2 suggests that it is consistent with the Vienna Convention to conclude only subsequent agreements which confirm, supplement, extend, or amplify the provisions of that instrument, such as agreements which regulate matters not covered by the Convention.¹³

It seems that in the latest practice of the Jadhav case, ICJ adopted the interpretation of the 1963 United Nations Conference on Consular Relations that Article 73 (2) restricts countries from concluding agreements that deviate from the rules of the Convention, that is, bilateral consular agreements concluded later by States parties to the Convention can only confirm, supplement, extend, or amplify the provisions of the Convention, and cannot contradict it. This judgment has an important guiding role for the conclusion of bilateral consular agreements in the future, that is, unlike the general rule that the later treaty is superior to the earlier treaty if a State tries to change the relevant provisions of the Convention with a future bilateral consular agreement, it can only

¹⁰ Jadhav (India v. Pakistan), Judgment, I.C.J. Reports 2019, Para. 92.

¹¹ Jadhav (India v. Pakistan), Judgment, I.C.J. Reports 2019, Para. 93.

¹² Jadhav (India v. Pakistan), Judgment, I.C.J. Reports 2019, Para. 94.

¹³ Jadhav (India v. Pakistan), Judgment, I.C.J. Reports 2019, Para. 96.

“strengthen positively” rather than “contradict negatively”. Fundamentally, this also reflects the impact of human rights factors on consular relations law.

Conclusion

Under the trend of the humanization of international law, the concept of human rights is gradually penetrating into various fields of international law. The introduction of human rights concepts in consular relations law is to incorporate the importance of individual human rights into the traditional consular function of representing sovereign States. Through the consular protection and assistance recognized in multilateral and bilateral conventions, States ensure the full protection of the rights of their nationals abroad, which is even more important in cases involving criminal proceedings. It can be said that consular protection is an important step in protecting the human rights of foreigners.

However, the Court is cautious about the relationship between consular protection and human rights in that it was unwilling to directly recognize the right of consular access assumed the character of human rights. In fact, consular protection is essential to the effectiveness of human rights to due process of law and fair trial. Undoubtedly, foreign suspects can only obtain full procedural equality through consular protection, and therefore, the violation of the right of foreign nationals to receive consular assistance as stipulated in Article 36 of the Convention necessarily means a violation of the human rights to enjoy due process and a fair trial in customary international law. Also, the interpretation of the Court on the relationship between the Convention and bilateral agreements actually reflected the impact of human rights on consular relations law. Therefore, it can be said that human rights factors have an increasing impact on consular protection and consular relations law will place greater emphasis on the human rights protection.

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