

THE VIENNA CONVENTION ON CONSULAR RELATIONS

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Historical Context

The history of the consular function is largely associated with the development of international trade and the economic interest of States. While the origins of the consular institution can be traced back to ancient Greece, it was not until the twelfth century that the first figure of the consul emerged and developed to its present and more complex structure. In addition, the earliest codes on consular duties were developed throughout the same period, mostly in the form of maritime law compilations.

In the sixteenth and seventeenth centuries, with the foundation of the diplomatic missions in Europe and its subsequent proliferation, a significant shift in consular powers came about, culminating with the publication of the first collection of consular rules (*Ordonnance de la Marine*, Colbert, 1681). The extraordinary increase of consulates during the nineteenth and twentieth centuries revealed the need for a more precise legal framework, particularly concerning the consular service and the legal status of consuls. Later on, the vertiginous changes in social, political and economic activity, as well as the increasing global trends affecting daily life impinged a new challenge for the consular institution: the protection of citizens and the safeguard of their interests.

Some preliminary attempts at the official codification of international consular legislation resulted in the adoption of regional agreements, preceding the pioneer work carried out by the League of Nations on the subject. In spite of the League of Nations' conclusions regarding not only the desirability, but the paramount importance of consular regulation through international instruments, the issue was left pending for nearly twenty years.

Significant Developments in the Negotiating History

In 1949, the United Nations International Law Commission considered the inclusion of consular intercourse and immunities as part of its future codification work.

At its seventh session, held at Geneva, Switzerland, from 2 May to 8 July 1955, the Commission appointed Mr. Jaroslav Zourek as Special Rapporteur to commence the review of the matter and draft a set of provisional rules, based on *jus cogens*, national and international law.

The discussion did not formally start until 1958. The draft set of rules were later divided into four chapters (consular intercourse and immunities; consular privileges and immunities; legal status of honorary consuls and their privileges and immunities; and general provisions), and, accompanied by commentaries, submitted to Member States for their observations at different stages of the negotiation.

At its twelfth session held from 25 April to 1 July 1960, the Commission determined that articles referring to career consuls should also be applicable to honorary consuls. Consequently, the Commission included more comprehensive provisions and inserted some new articles, before provisionally adopting the draft articles and commentaries.

The numerous similarities of the subject to that of diplomatic immunities and intercourse led to the adoption of an accelerated procedure by the Commission on the topic. The 71 draft articles were then submitted to the United Nations General Assembly for information purposes and the vast majority of States decided that they should form the basis of a multilateral instrument codifying consular law.

With a view to adopting a convention on the subject, the Commission recommended that the United Nations General Assembly convene an international conference of plenipotentiaries in March 1963.

The United Nations Conference on Consular Relations was held in Vienna, Austria, from 4 March to 22 April 1963 and was attended by delegates of ninety-five States. After careful consideration of the International Law Commission's text, the final version was prepared for submission to the plenary.

On 24 April 1963, the Conference adopted and opened for signature the Vienna Convention on Consular Relations, the Optional Protocol concerning Acquisition of Nationality and the Optional Protocol concerning the Compulsory Settlement of Disputes. The Convention and both Optional Protocols came into force on 19 March 1967.

Summary of Key Provisions

The Vienna Convention consists of 79 articles, most of which provide for the operation of consulates; outline the functions of consular agents; and address the privileges and immunities granted to consular officials when posted to a foreign country.

A few other articles specify consular officials' duties when citizens of their country face difficulties in a foreign nation.

Of particular interest for the right of individuals is article 36, providing for certain obligations for competent authorities in the case of an arrest or detention of a foreign national, in order to guarantee the inalienable right to counsel and due process through consular notification and effective access to consular protection.

Influence of the Instrument on Subsequent Legal Developments

In recent years, the right to consular notification and access provided for in the Vienna Convention has increasingly been raised in proceedings not only at the domestic and regional levels, but also in international courts.

The first United States case relating to article 36 of the Vienna Convention was *Breard v. Greene* (523 U.S. 371, 1988), followed by numerous claims in United States federal circuit courts of appeals, state supreme courts, and the United States Supreme Court. Interpretations have varied widely, from the non-recognition of fundamental rights

conferred by article 36, where no appropriate remedy is available, to the possibility of individually enforcing those rights.

In 1999, the Inter-American Court of Human Rights issued an advisory opinion, recognizing that article 36 creates individual rights, as a “notable exception to what are essentially States’ rights and obligations accorded elsewhere” in the Convention (*Advisory Opinion of the Inter-American Court of Human Rights: Due Process of Law is a Fundamental Right* (OC-16/99), para. 82).

In 2001, the International Court of Justice in *LaGrand (Germany v. United States of America)* found that where a violation of article 36 occurs, a remedy is due consisting of “review and reconsideration by United States courts of convictions and sentences”, in light of the breach of the Convention.

The *Avena and other Mexican Nationals case (Mexico v. United States of America)* marked a turning point regarding article 36 jurisprudence. The International Court of Justice’s unprecedented decision of 2004 expressly recognized the interdependence of both individual and State’s rights, by asserting that “violations of the rights of the individual under article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual” (*I. C. J Reports 2004, p. 36*).

Moreover, the Court stated that the fact that in this case the ruling concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the *Avena case* do not apply to other foreign nationals finding themselves in similar situations in other countries.

These cases may eventually carry significant consequences for countries legally imposing the death penalty: “That is, only where the most rigorous standards of fairness and legality of international jurisprudence are scrupulously followed.” (Catherine M. Amirfar, “The Avena Case in the International Court of Justice”, in *German Law Journal* No. 4, April, 2004.)

Related Materials

A. Legal Instruments

Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961, United Nations, *Treaty Series*, vol. 500, p. 95.

Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality, Vienna, 24 April 1963, United Nations, *Treaty Series*, vol. vol. 596, p. 469.

Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, Vienna, 24 April 1963, United Nations, *Treaty Series*, vol. 596, p. 487.

B. Jurisprudence

International

International Court of Justice, *The Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998, *I.C.J. Reports 1998*, p. 248 (*Breard*).

International Court of Justice, *The Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Order of 10 November 1998, *I.C.J. Reports 1998*, p.426 (*Breard*).

International Court of Justice, *LaGrand (Germany v. United States of America)*, Judgment, *I. C. J. Reports 2001*, p. 466.

International Court of Justice, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, *I. C. J. Reports 2004*, p. 12.

Inter-American Court of Human Rights, *Advisory Opinion of the Inter-American Court of Human Rights: Due Process of Law is a Fundamental Right* (OC-16/99), 1 October 1999.

National

United States Court of Appeals for the Ninth Circuit, *LaGrand v. Stewart*, 133 F.3d 1253 (1998), 16 January 1998.

United States Supreme Court, *Breard v. Greene*, 523 U.S. 371 (1998), 14 April 1998.

United States Supreme Court, *Sánchez-Llamas v. Oregon*, 548 U.S. 331 (2006), 28 June 2006.

C. Documents

Report of the International Law Commission on the work of its seventh session, 2 May to 8 July 1955 (A/2934, reproduced in Yearbook of the International Law Commission, 1955, vol. II, Chapter IV (A/CN.4/94)).

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General Assembly resolution 1504 (XV) of 12 December 1960 (Report of the International Law Commission covering the work of its twelfth session).

Report of the International Law Commission on the work of its thirteenth session, 1 May to 7 July 1961 (A/4843, and reproduced in Yearbook of the International Law Commission, 1961, vol. II, Chapter II (A/CN.4/141)).

General Assembly resolution 1685 (XVI) of 18 December 1961 (International conference of plenipotentiaries on consular relations).

General Assembly resolution 1813 (XVII) of 18 December 1962 (International conference of plenipotentiaries on consular relations)

Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities, in United Nations Legislative Series, ST/LEG/SER.B/7, United Nations publication, Sales No. 58.V.3,1961.

Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities, in United Nations Legislative Series, ST/LEG/SER.B/13, United Nations publication, Sales No. 63.V.5, 1963.

D. Doctrine

W. J. Aceves, “The Vienna Convention on Consular Relations: A Study of Rights, Wrongs and Remedies”, *Vanderbilt Journal of Transnational Law*, March, 1998.

C. M. Amirfar, “The Avena Case in the International Court of Justice”, in *German Law Journal* No. 4, April, 2004.

C. Sims, J. and L. E. Carter, “Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool”, *Champion* 28, September/October, 1998.

C. S. Harry, “Determining the remedy for violation of Art. 36 of the Vienna Convention on Consular Relations: review, reconsideration, and the clemency process after Avena”, in *George Washington International Law Review*, vol. 38, issue 1, 2006, pp 130-158.

E. Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations*, 2nd ed., Clarendon Press, Oxford, 1998.

J. M. Gómez-Robledo Verduzco, “El caso Avena y otros nacionales mexicanos (México c. Estados Unidos de América) ante la Corte Internacional de Justicia”, *Anuario Mexicano de Derecho Internacional*, vol. V, 2005, pp. 173-220.

L. T. Lee, “The Vienna Convention on Consular Relations”, in *American Journal of International Law*, vol. 62, No. 1, January, 1968, pp. 212-214.

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C. J. Le Mon, “Post-Avena application of the Vienna Convention on Consular Relations by US Courts”, *Leiden Journal of International Law*, vol. 18, issue 2, 2005, pp. 215-236.

S. D. Murphy *United States practice in International Law*, vol. 1: 1999-2001, Cambridge, United Kingdom, Cambridge University Press (2002).

C. Schulte, "Jurisprudence of the International Court of Justice: order issued in the case concerning the Vienna Convention on Consular Relations", *European Journal of International Law*, vol. 9, 1998, pp. 761-762.