ABOLITIONISTS AT HOME AND ABROAD: A RIGHT TO CONSULAR ASSISTANCE AND THE DEATH PENALTY

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The provision of consular assistance is critical to nationals who face criminal proceedings abroad which may result in the death penalty. In recent years the importance of a detained foreign national accessing consular authorities from their home state has been recognised as both a human right and an individual right in international law. Despite this, the question of whether there is an obligation on the national's home state to provide consular assistance has yet to be answered. This article makes a case for the emergence of such a right to consular assistance in capital cases for nationals of states which have abolished the death penalty. With reference to both the International Covenant on Civil and Political Rights *and the* European Convention on Human Rights*, the article locates this emerging right within a state's positive obligation to protect life. It is recognised that for any such emerging right to be meaningful it must be capable of being enforced. The article therefore addresses the particular challenges of extraterritorially applying a right to consular assistance and proposes the return to a previous, more flexible, understanding of extraterritorial human rights obligations on consular agents.*

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I INTRODUCTION

> In countries where the death penalty remains, those victims die at the hands of that state but more importantly they are left to die by their own home states.[1]

On 29 April 2015, with the eyes of the world watching, Indonesia executed eight individuals for drug trafficking offences. This episode generated global

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1 Felicity Gerry, 'Death or Freedom?' on *Criminal Law and Justice Weekly* (3 April 2015) <https://perma.cc/JS6S-GYV2>.

media attention as, in many ways, it was a global event. Seven of those executed were foreign nationals from Australia, Brazil and Nigeria.[2] In episodes like this, when a national of one state is facing execution in another, one of the main questions to arise is whether that national's home state has done enough to assist them. This is most powerfully discussed in states that on principled, policy or moral grounds have abolished the death penalty as a form of criminal punishment. The attention generated in these episodes most regularly focuses on the latter parts of trial proceedings or after the national has already been sentenced to death. In recent years, however, focus has turned to the earlier stages of the matter and specifically to the point in time when the national's home state can first offer help through the provision of consular assistance.

The ability for a foreign defendant in a capital case to communicate with their home state's consular authorities has now been recognised as an individual right in international law,[3] and perhaps even a human right.[4] Given this, it might appear natural for there to exist a concurrent right for a national to receive consular assistance from the authorities of their home state when facing the death penalty abroad, and yet this is not the case. This article sets out to establish a case for the emergence of a human right for individuals from states which have abolished the death penalty ('abolitionist states') to receive consular assistance when facing the possibility of execution abroad.[5] It attempts to locate this right within the international legal framework, to address its content and form and to consider the wider problems which its application may encounter.

The article is structured as follows. In Part II we briefly establish the substance and understanding of consular assistance in modern international law. In order to recognise the need for a right to consular assistance Part III employs academic literature and domestic and international jurisprudence to illustrate the critical contribution which consular agents can make in death penalty cases. Part IV then generates a case for an obligation on abolitionist states to provide consular assistance to nationals from within the international human rights framework. Part V concludes by identifying the central obstacle of enforceability that arises from the inherently extraterritorial application of any such right, and then addressing that problem.

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[2] Paul Toohey, 'Bali Nine Executions: How the Deaths of Andrew Chan and Myuran Sukumaran Happened', *news.com.au* (online), 29 April 2015 <https://perma.cc/G8NX-R2LT>; Joe Cochrane, 'Indonesia Executes 8, Including 7 Foreigners, Convicted on Drug Charges', *The New York Times* (online), 28 April 2015 <https://perma.cc/9R5R-3JJL>; Claire Phipps, 'Who Were the Eight People Executed by Indonesia?', *The Guardian* (online), 29 April 2015 <https://perma.cc/WWA9-R7NX>.

[3] See, eg, *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466 ('*LaGrand*'); *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [2004] ICJ Rep 12 ('*Avena*').

[4] See *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Advisory Opinion)* [1999] Inter-Am Court HR (ser A) No 16.

[5] An individual who is facing execution is one who has been accused of committing a crime which may result in the imposition of the death penalty. As a result, the right to consular assistance commences from the moment an individual is detained for questioning and continues until either their execution, or alternative resolution of their case.

II DEFINING CONSULAR ASSISTANCE

Despite consular relations being practised between peoples since 'ancient times', there remains a degree of uncertainty as to its meaning, scope and legal foundation.[6] This Part seeks to disentangle some of these issues in order to establish a platform for their discussion later in the article. At its most basic level consular assistance refers to the provision of support, help and guidance that the authorities of a state give to their nationals abroad.[7] This assistance is described as the 'consul's most basic function'[8] and is the first to appear in a non-exhaustive list in the principal treaty on consular law, the *Vienna Convention on Consular Relations 1963* ('*VCCR*').[9] Drafted at a time of great cataloguing of international legal rules, the *VCCR* is said to have 'codified hundreds of years of consular practice'.[10] It currently has 177 state parties and is widely considered as forming declaratory international law.[11]

While consular agents hold some responsibility for the commercial and economic endeavours of their home state,[12] assistance is most commonly understood to arise when an individual is in difficulty or distress abroad.[13] There are specific provisions to deal with such circumstances, as art 5 of the *VCCR* provides for a series of actions which may be performed by a consular agent for

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6 *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967) Preamble ('*VCCR*'). Lee and Quigley have noted that '[u]ntil the adoption of the *Vienna Convention on Consular Relations* in 1963, consular relations were governed by a small number of customary rules of international law': Luke T Lee and John B Quigley, *Consular Law and Practice* (Oxford University Press, 3rd ed, 2008) 16. For an account of the historical foundations of consular relations, see D C M Platt, *The Cinderella Service: British Consuls since 1825* (Longman, 1971); Jaroslav Zourek, Special Rapporteur, *Consular Intercourse and Immunities*, UN Doc A/CN.4/108 (15 April 1957), in [1957] II *Yearbook of the International Law Commission* 71 ('*Report on Consular Intercourse and Immunities*').

7 Margaret Mendenhall, 'A Case for Consular Notification: Treaty Obligation as a Matter of Life or Death' (2001) 8 *Southwestern Journal of Law & Trade in the Americas* 335, 342.

8 Lee and Quigley, above n 6, 116.

9 *VCCR* art 5(a).

10 Cindy Galway Buys, 'Reflections on the 50th Anniversary of the *Vienna Convention on Consular Relations*' (2013) 38 *Southern Illinois University Law Journal* 57, 57. The codification of consular intercourse and immunities was one of 14 initial topics provisionally considered for codification by the International Law Commission in 1949: *Report of the International Law Commission on the Work of Its First Session*, UNGAOR, 4th sess, Supp No 10, UN Docs A/CN.4/13 and Corr. 1–3 (12 April 1949) [16].

11 Antônio Augusto Cançado Trindade, 'The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case-Law and Practice' (2007) 6 *Chinese Journal of International Law* 1, 3.

12 *VCCR* arts 5(b)–(c), (k)–(l).

13 The United Kingdom defines its consular service as 'the part of the UK Government to which British nationals turn when they encounter serious problems overseas, from lost passports to kidnapping, arrest or the death of a loved one. It acts as an emergency service in the event of a crisis abroad and will arrange evacuation for British nationals. It also provides comprehensive travel advice and warnings, as well as more routine documentary and registration services for expatriates. With a broad range of services focused on nationals abroad, it is the main way in which the British public comes into contact with the Foreign and Commonwealth Office (FCO), and it provides unique and vital services to British nationals overseas': Foreign Affairs Committee, *Support for British Nationals Abroad: The Consular Service*, House of Commons Paper No HC 516, Session 2014–15 (2014) 14 [5] ('*Support for British Nationals Abroad: The Consular Service*'). See also Lord Goldsmith, 'Citizenship: Our Common Bond' (Report of the Citizenship Review, United Kingdom Ministry of Justice, 2008) 34 [38].

the purpose of 'helping and assisting nationals'.[14] For example, one such function concerns safeguarding the interests of minors and those lacking full capacity,[15] while others refer to assistance in the transmission of documents[16] and with legal representation.[17] In addition, art 5(m) contains a 'catch-all' provision allowing for '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'.[18] Alongside the list found in art 5 of the *VCCR*, consular functions may also be prescribed through the issuance of consular instructions, in custom, bilateral treaty and national law.[19] Therefore, as G R Berridge aptly notes, the work of consular officials is 'famously rich in variety'.[20] The breadth of these functions enables consular agents to take a range of actions in order to support a national facing the death penalty abroad.

A particularly important distinction to be made is between consular assistance and diplomatic protection. Although the purposes of both practices are to assist a national abroad, a series of critical differences exist between them. First, diplomatic protection is only engaged once an 'internationally wrongful act' has caused injury to a national, while consular assistance is not time-restricted and normally commences as soon as a national is in distress and reaches out for help.[21] Annemarieke Künzli appropriately summarises this difference, noting that consular assistance plays a preventive role, assisting nationals when they are in danger or distress, while diplomatic protection takes on a more remedial nature.[22] Secondly, consular assistance tends to be provided to a national directly by representatives of their home state and with the consent of the forum state, whereas diplomatic protection involves representations of a more political nature, at intergovernmental level.[23] Thus the relationship between state and individual is very different, with consular assistance being traditionally more intimate in nature. As a consequence, the third distinction is that, generally speaking, a diplomatic agent is a political representative while a consular agent

14 *VCCR* art 5(e).
15 Ibid art 5(h).
16 Ibid art 5(j).
17 Ibid art 5(i).
18 Ibid art 5(m).
19 Lee and Quigley, above n 6, 107.
20 G R Berridge, *Diplomacy: Theory and Practice* (Palgrave Macmillan, 4th ed, 2010) 130.
21 Diplomatic protection was defined in the 2006 International Law Commission draft articles on the subject as follows: 'diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility'. International Law Commission, *Diplomatic Protection: Titles and Texts of the Draft Articles on Diplomatic Protection Adopted by the Drafting Committee on Second Reading*, UN GAOR, 58th sess, UN Doc A/CN.4/L.684 (19 May 2006) art 1.
22 Annemarieke Künzli, 'Exercising Diplomatic Protection: The Fine Line between Litigation, Demarches and Consular Assistance' (2006) 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 321, 331–2.
23 See Berridge, above n 20, 128–9.

has no such function.[24] The result is that consular and diplomatic agents can have widely different roles.[25]

In the context of death penalty cases this distinction can have major practical implications on interstate relationships. Diplomatic protections are usually only invoked late in the episode once an individual has been sentenced to death. These representations can lead to tensions between the respective governments, particularly if there is heightened media attention or if there are questions about the fairness of the trial where the death sentence was passed.[26] As will be illustrated, effective consular assistance at an early stage can avoid these contentious diplomatic disputes by helping the national avoid the imposition of the death penalty in the first place.

The reason for articulating the distinction here is because there is a tendency for both topics to be addressed together.[27] It is a distinction that Künzli has noted as causing confusion amongst both government officials and legal scholars alike.[28] There is some explanation for an overlap between the two in that, as Jan Melissen notes, 'the traditional contradistinction between separate consular and diplomatic worlds is in fact well beyond its "sell-by" date'.[29] Moreover, the *VCCR* allows for a certain degree of overlap between diplomatic and consular functions. Article 2(2) notes that the establishment of diplomatic relations will also imply the establishment of consular relations,[30] art 3 allows diplomatic missions to exercise consular functions in certain circumstances[31] and art 17 allows consular agents to exercise diplomatic functions.[32] Nonetheless, when a diplomatic agent provides consular assistance they do just that and no more.

Perhaps the greatest distinction in consular affairs concerns variances in the legal position of consular assistance between states. The main distinction here is between states which have legally enshrined consular assistance as a right and those who provide it only as a matter of policy given to nationals as a privilege or grace, and solely at the discretion of the state.[33] For the former group, Christopher Tran describes consular assistance as usually being given 'as of

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24 Künzli, above n 22, 321.

25 These differences are manifested in 'their appointment, the form of their credentials, their assumption of office and their attributes': *Report on Consular Intercourse and Immunities*, UN Doc A/CN.4/108, 79 [68].

26 After the execution of their nationals in Indonesia in January 2015, both Brazil and the Netherlands withdrew their ambassadors from Jakarta: 'Brazil and Netherlands Recall Indonesia Ambassadors over Drug Executions', *The Guardian* (online), 18 January 2015 <https://perma.cc/FLX4-HJAR>.

27 Writing on the obligation for abolitionist states to refrain from assisting in the use of the death penalty, Malkani positions consular assistance within the wider heading of diplomatic protection: Bharat Malkani, 'The Obligation to Refrain from Assisting the Use of the Death Penalty' (2013) 62 *International & Comparative Law Quarterly* 523, 539–41.

28 Künzli, above n 22, 331.

29 Jan Melissen, 'The Consular Dimension of Diplomacy' in Jan Melissen and Ana Mar Fernández (eds), *Consular Affairs and Diplomacy* (Martinus Nijhoff, 2011) 1, 2.

30 *VCCR* art 2(2).

31 Ibid arts 3, 70.

32 Ibid art 17.

33 'Grace' is used by Lee and Quigley, above n 6, 117. See also Christina M Cerna, 'The Right to Consular Notification as a Human Right' (2008) 31 *Suffolk Transnational Law Review* 419, 419–21.

right', and 'almost always provided as of course'.[34] Luke Lee and John Quigley rely on a weight of cross-jurisdictional research to illustrate how, particularly when a national is arrested abroad, an obligation towards them is recognised by their home state.[35] Elsewhere, Quigley charts examples of how consular assistance is legally recognised in different jurisdictions, including through legislation, as a constitutional right and as an administrative regulation.[36] From this, he contends that the provision of consular assistance is increasingly regarded as an obligation.[37]

Maaike Okano-Heijmans takes the opposite view, noting that although states have a responsibility to their nationals abroad 'most countries do not grant citizens the legal *right* to consular assistance'.[38] Examples of states which take this position include the United Kingdom and Canada where, instead of being enshrined as a legal right, consular assistance is treated as a matter of policy and is provided through the exercise of the royal prerogative.[39] Although not provided as of right in these states, decisions relating to consular assistance can be challenged under judicial review proceedings, most regularly through recourse to the doctrine of legitimate expectations.[40]

Given that some states provide consular assistance as a legal right, while others still recognise its enforceability through principles of judicial review, there may be cause to question whether a wider right to consular assistance in death penalty cases would be useful. The merits in recognising such a right would be threefold. First, it would ensure uniform commitment between all abolitionist states and not simply those who have already enshrined such assistance as a legal right. For many states the recognition of such an obligation would make little practical difference to how they already act when informed that a national is facing criminal charges abroad that may result in the death penalty. For those who are unreasonably slow to respond, or who do not provide consular assistance at all, the obligation would act to ensure their compliance. Secondly, once an obligation is established, focus could then turn to perhaps the more interesting question of what is included in such a right. Is it mere advice and assistance, or should the state take further actions as necessary, such as locating an appropriate legal representative or interpreter and submitting an amicus curiae brief? Thirdly, and linked to the former benefit, in establishing the obligation on states, a development would then take place whereby states would

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34 Christopher Tran, 'Revisiting Allegiance and Diplomatic Protection' [2012] *Public Law* 197, 202.

35 Lee and Quigley, above n 6, 134.

36 John B Quigley, '*Vienna Convention on Consular Relations*: In Retrospect and into the Future' (2013) 38 *Southern Illinois University Law Journal* 1, 17–18.

37 Ibid 17.

38 Maaike Okano-Heijmans, 'Changes in Consular Assistance and the Emergence of Consular Diplomacy' in Jan Melissen and Ana Mar Fernández (eds), *Consular Affairs and Diplomacy* (Martinus Nijhoff, 2011) 21, 26 (emphasis in original).

39 The UK Foreign and Commonwealth Office guide to nationals abroad clearly states this: 'Generally, there is no legal right to consular assistance. All assistance provided is at our discretion'. Foreign and Commonwealth Office, *Support for British Nationals Abroad: A Guide* (United Kingdom, 2014) 4 ('*Support for British Nationals Abroad: A Guide*').

40 See, eg, *Khadr v Canada (Minister of Foreign Affairs)* [2004] FC 1145 (18 August 2004); *R v Secretary of State for Foreign and Commonwealth Affairs*; *ex parte Butt* (1999) 116 ILR 607 (EWHC Admin).

be held to account for breaching the obligation and would have a responsibility to report on the nature of assistance which they currently provide so as to fulfil the obligation. This in turn would give rise to an understanding of best practices which could be followed by abolitionist and retentionist states alike.

As this Part has illustrated, there are variations in the meaning, scope and legal foundation of consular assistance. This is hardly surprising. The topic has received much less analysis than its counterpart of diplomatic protection. Current academic literature on consular affairs is described by Melissen as being 'rather thinly scattered',[41] with the area itself being a 'much-neglected study'.[42] Despite this, one area of consular assistance which has received intensive scrutiny in recent years is that which concerns a national's access to a consular official when they are detained. It is to this access, and the critical contribution consular assistance makes to nationals in this situation, which we now turn.

III THE CRITICAL ROLE OF CONSULAR ASSISTANCE IN DEATH PENALTY CASES

The departure point for this analysis is recognition of the inherent challenges that foreign nationals encounter in establishing a coherent defence against criminal prosecutions in an alien jurisdiction. Not only do these individuals face difficulty understanding unfamiliar legal principles, but often do so while concurrently facing cultural, linguistic and emotional obstacles. S Adele Shank and John Quigley have highlighted that, when combined, this places foreign nationals at a natural disadvantage when accused of a capital offence.[43] Fair Trials International has echoed this in a submission to the UK Foreign Affairs Committee, noting that these challenges make foreign nationals on death row particularly 'vulnerable'.[44] Christof Heyns, United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions ('UNSRESAE') concurs, observing that available statistics illustrate that foreign nationals 'remain disproportionately affected by the death penalty in several States'.[45]

The importance of consular assistance to foreign nationals in this situation has been recognised by a host of commentators. Mark Kadish and Charles Olson have listed some of the positive influences which effective consular assistance can have for nationals detained abroad. These include mitigating 'the harm caused by language and cultural barriers'; forming a 'cultural bridge'; explaining 'substantive and procedural rights'; and providing both translators and 'contact information for lawyers'.[46] Malcolm Shaw adds that consular agents also conduct their functions through 'visiting prisons and contacting local

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41 Melissen, above n 29, 1.

42 Ibid.

43 S Adele Shank and John Quigley, 'Foreigners on Texas's Death Row and the Right of Access to a Consul' (1995) 26 *St Mary's Law Journal* 719, 720.

44 Fair Trials International, Submission No CON0015 to the Parliament of the United Kingdom, *Written Evidence from Fair Trials International*, 13 May 2014, [1].

45 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, GA Res 67/168, UN GAOR, 70th sess, Agenda Item 73(b), UN Doc A/70/304 (7 August 2015) [76] ('*Report of the Special Rapporteur*').

46 Mark J Kadish and Charles C Olson, '*Sanchez-Llamas v Oregon* and Article 36 of the *Vienna Convention on Consular Relations*: The Supreme Court, the Right to Consul, and Remediation' (2006) 27 *Michigan Journal of International Law* 1185, 1188.

authorities'.[47] Shank and Quigley develop this by noting that, in their visits, agents can determine if the national has faced physical abuse and whether they are being detained in adequate conditions.[48] They also suggest that the mere involvement of consular agents may encourage local authorities to follow proper procedures.[49] Margaret Mendenhall contributes an often unseen provision of 'comfort and communication' to the national while they are in strange surroundings.[50] Combined, these actions go some way to mitigating against the inherent challenges foreign nationals face in criminal prosecutions.

The importance of consular assistance for a detained foreign national when facing criminal charges is recognised in art 36 of the *VCCR*, sub-s (1) of which states:

> *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 …
>
> (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 judgement …

This provision has been thoroughly juridified, largely in relation to the poor compliance record of the United States with observing this right to consular access.[51] An indirect benefit of this litigation is that it has allowed for an insight into the critical need for the provision of consular assistance to foreign nationals facing capital charges. The US case of *Breard* provides an example of the dangers a foreign national faces when they are not afforded consular

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47 Malcolm N Shaw, *International Law* (Cambridge University Press, 5th ed, 2003) 688.

48 Shank and Quigley, above n 43, 736.

49 Ibid 721.

50 Mendenhall, above n 7, 347.

51 Cançado Trindade, above n 11, 15. It has been noted that in the decade until 2010 almost 400 cases had been lodged in US Federal Courts by individuals claiming that their right to consular access had been violated. See Cindy Galway Buys, Scott D Pollock and Ioana Navarette Pellicer, 'Do unto Others: The Importance of Better Compliance with Consular Notification Rights' (2011) 21 *Duke Journal of Comparative and International Law* 461, 461.

assistance.[52] Angel Breard was a Paraguayan national who was sentenced to death in Virginia in 1992 for attempted rape and murder.[53] On his arrest Breard was not notified of his right to seek consular assistance. It would not be until after his trial and conviction that Paraguayan authorities even became aware of his detention. Without such assistance to provide guidance on the nuances of the American legal system, Breard made a series of ill-considered decisions that greatly increased the likelihood that he would face execution. Most notable of these was his decision to refuse a plea bargain which would have seen him receive a life sentence. On the mistaken belief that the jury would be sympathetic to his honesty and his new commitment to a religious faith, Breard pleaded not guilty and proceeded to trial where he waived his right to not incriminate himself, confessed to the facts of the crime and explained to the jury that he had only committed the offences as his father-in-law had placed him under a satanic curse.[54] Unreceptive to this mistaken strategy, the jury found him guilty and he was sentenced to death.

On finally learning of Breard's detention, Paraguayan officials petitioned both domestic and international courts for recognition of the breach of art 36. The impact of the lack of consular assistance was concisely highlighted in Paraguay's submission to the International Court of Justice ('ICJ'):

> Mr Breard's refusal of the plea offer against the advice of court-appointed counsel and his insistence on serving as a witness to his religious faith resulted from his lack of understanding of the significant cultural differences between the Paraguayan and United States legal systems. He was, in particular, entirely unfamiliar with the practice of plea bargaining. Mr Breard neither understood nor trusted his court-appointed trial counsel. Similarly, trial counsel could not understand or appreciate Mr Breard's belief that leniency would result from his confession to the jury.[55]

In *Breard* the acute damage caused by a lack of consular assistance was inflicted at the pre-trial stage when he rejected the plea bargain which would have ultimately spared his life. This illustrates the importance of consular assistance at the earliest stages of criminal proceedings, a point which has been noted by the British government who have identified that 'this is when the issue of life or death is most readily resolved'.[56] For instance, if a consular official is able to engage with the national at the earliest stages of the investigation they can explain to them any procedural rights in the forum state, such as the right to silence, use of mitigating factors in sentencing, and indeed the nature of plea bargaining.[57]

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52 'Memorial of Paraguay', *Vienna Convention on Consular Relations* (*Paraguay v United States of America*) [1998] ICJ Pleadings 89. For an insightful discussion of this case, see Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (Allen Lane, 2005) xii–xvi.

53 Breard also carried nationality of Argentina, however it was the Paraguayan authorities who provided diplomatic representations on his behalf in this case.

54 'Memorial of Paraguay', *Vienna Convention on Consular Relations* (*Paraguay v United States of America*) [1998] ICJ Pleadings 89, 98 [2.8].

55 Ibid 99 [2.11].

56 Clive Stafford Smith, *Assisting European Citizens Facing Execution outside the European Union* (Briefing Paper No EXPO/B/DROI/2010/08, European Parliament, Directorate-General for External Policies of the Union, Policy Department, 2010) 10.

57 Malkani, above n 27, 536.

Breard was executed before the ICJ could fully deliberate on the extent of art 36 and the breach of his 'right to consular access'.[58] Despite this, a strikingly similar case soon followed, again from the United States.[59] That case, the landmark judgment of *LaGrand*, concerned the execution of two German brothers who had been found guilty of murder, armed robbery and kidnapping in Arizona.[60] Germany brought the case against the United States to the ICJ on the basis that, again, the defendants were not made aware of their right to consular assistance at any stage before or during trial.[61] The ICJ ruled in favour of Germany, importantly noting that the benefit conferred in art 36 was not only a state's right, but that it had created individual rights which had been breached.[62] In pleading the case Germany had gone even further to suggest that art 36 not only conferred a right on individuals, but that the right was a specific human right.[63] The Court deftly sidestepped this issue by instead noting that it had already found a violation of an individual right and so did not need to consider the recognition of a human right to consular access. Christian Tams has applauded the Court for this approach in 'prudently avoiding a politicization of the dispute'.[64] Nonetheless, he highlights the decision as an affirmation that 'under modern international law, individual rights need not necessarily derive from classical human rights treaties, but are a pervasive phenomenon'.[65]

The question of a human right to consular access was revisited a short time later in the *Avena* case. On this occasion Mexico asserted at the ICJ that the United States had breached the fundamental human rights of 51 Mexican nationals on death row by failing to protect their right to consular access.[66] Again the Court recognised an individual right but refused to pass definitive judgment on the possibility of a human right to consular access:

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58 *Vienna Convention on Consular Relations (Paraguay v United States of America) (Provisional Measures)* [1998] ICJ Rep 248, 256 [29] ('*Paraguay v United States*'). The ICJ had issued provisional measures requesting that no further action was taken against Mr Breard until after the merits hearing: *Paraguay v United States* [1998] ICJ Rep 248, 258 [41]. The US Supreme Court had concurrently considered the case and refused Mr Breard's appeal: *Breard v Greene*, 523 US 371, 371 (1998). He was subsequently executed. The case was ultimately resolved with the US issuing an apology to the Paraguayan government and people for the failure to notify consular authorities, and the Paraguayan government withdrew its complaint from the ICJ: Mark Warren, *Foreign Nationals News and Developments — Previous Years* (8 March 2005) Death Penalty Information Centre <https://perma.cc/29PD-E5YW>.

59 At the time the United States was emerging as a 'notorious violator' of this Article. Marshall J Ray, 'The Right to Consul and the Right to Counsel: A Critical Re-Examining of *State v Martinez-Rodriguez*' (2007) 37 *New Mexico Law Review* 701, 703. Cançado Trindade has also referred to the United States as a 'a persistent violator of the relevant provisions of the 1963 *Vienna Convention on Consular Relations*': Cançado Trindade, above n 11, 15. Buys notes however that '[t]he United States is by no means alone in struggling with implementation of the consular notification requirements of the *VCCR*': Buys, above n 10, 71.

60 *LaGrand* [2001] ICJ Rep 466, 475 [14].

61 Ibid 494 [77].

62 Ibid.

63 Ibid 494 [78].

64 Christian J Tams, 'Consular Assistance: Rights, Remedies and Responsibility: Comments on the ICJ's Judgment in the *LaGrand* Case' (2002) 13 *European Journal of International Law* 1257, 1257.

65 Ibid.

66 *Avena* [2004] ICJ Rep 12, 33 [35].

> Whether or not the *Vienna Convention* rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the *Convention*, nor any indication in the *travaux préparatoires*, support the conclusion that Mexico draws from its contention in that regard.[67]

Despite this finding, a human right to consular access has been recognised elsewhere. In 1985, a UN General Assembly Resolution recognised an alien's right to communicate with their consulate.[68] This was done in the *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live*.[69] More recently, alongside making representations to the ICJ, Mexico sought an advisory opinion from the Inter-American Court of Human Rights ('IACtHR') on the status of consular access. Here, the Court unanimously held that the right to consular access '*concerns* the protection of the rights of a national of the sending State and is part of the body of international human rights law'.[70] Specifically the IACtHR held that the right for a detained national to receive information on consular assistance informed the wider right to a fair trial under art 14 of the *International Covenant on Civil and Political Rights* ('*ICCPR*') and that where this was in breach in a case concerning the death penalty there could also be a breach of the right to life under art 6(2).[71] Thus the Court not only recognised the right as forming part of the wider body of international human rights law, but recognised that in breaching art 36 a state could concurrently breach the specific right to life and to a fair trial.[72] This is useful for the purposes of formulating a right to receive consular assistance from a home state in that, as with a right to consular access, it establishes that such a right may be located in pre-existing human rights protections.

A regular counterargument to the assertion that consular access is a human right is the fact that, as noted in Part II, some states still provide consular assistance on a discretionary basis. Christina Cerna has articulated this argument:

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67 Ibid 52 [124].

68 *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live*, GA RES 40/144, UN GAOR, 116th plen mtg, UN Doc A/RES/40/144 (13 December 1985) art 10.

69 Ibid. It has also been recognised at the General Assembly on two further occasions: see *Protection of Migrants*, GA Res 54/166, UN GAOR, 54th sess, Agenda Item 116(b), UN Doc A/RES/54/166 (24 February 2000) para 4; *Protection of Migrants*, GA Res 55/92, UN GAOR, 55th sess, Agenda Item 114(b), UN Doc A/RES/55/92 (26 February 2001) para 5.

70 *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Advisory Opinion)* [1999] Inter-Am Court HR (ser A) No 16, [141] (emphasis in original).

71 Ibid.

72 This has been reiterated by the UN *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*: 'The denial of the right to consular notification and access is a violation of due process and the execution of a foreign national deprived of such rights constitutes an arbitrary deprivation of life, in contravention of articles 6 and 14 of the *International Covenant on Civil and Political Rights*'. *Report of the Special Rapporteur*, UN Doc A/70/304, 19 [93].

> If consular assistance is a 'human' right and not merely a 'treaty' right, one would expect that the obligation of the alien's state to actually provide the alien with assistance should be more than purely discretionary with the State.[73]

This argument is predicated on the current lack of recognition for a human right to consular assistance in death penalty cases which this article is seeking to remedy. Admittedly however, any such human right will need to be derived from existing treaty-based rights.

Before moving on to this discussion of a human right to consular assistance, it is worthwhile noting that the question of whether a national has an individual right in international law to receive consular assistance from his/her home state has not yet been directly considered by a court. The issue was touched upon, but not resolved, in the Canadian case of *Khadr*. Omar Khadr had been captured by US forces in Afghanistan and detained at Guantanamo Bay, Cuba. In this case, a strike-out application and the first of a number involving Khadr, the applicant's family sought for the provision of both diplomatic protection and consular assistance by Canadian officials for him while he was detained.[74] They did so by referring to the state's obligations under the *Canadian Charter of Rights and Freedoms*, the doctrine of legitimate expectations and customary international law. In addressing the application, Justice von Finckenstein found a possible cause of action in both the doctrine of legitimate expectations and at international law.[75] The basis for the international law argument was that, following *LaGrand*, an international custom may exist for nationals to receive certain forms of consular assistance from their home state.[76] This aspect of the litigation did not continue to a full hearing and so the opportunity for a domestic court's recognition of a customary international law obligation to consular assistance was lost.[77] It could be argued that recognition of such a right in customary international law may be difficult to substantiate, particularly given that some states still provide consular assistance as a privilege.[78] Such an approach would probably not meet the *opinio juris* required for a custom, or at least position certain states as objectors.

Whether an individual right to consular assistance exists in international treaty law is also doubtful. Reflecting on the *VCCR*, from which the individual right to consular access has been derived, there is little evidence to suggest that the treaty was intended to confer an individual right onto nationals to receive consular

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73 Cerna, above n 33, 421.

74 See, eg, *Khadr v Canada (Minister of Justice)* [2005] FC 1076 (8 August 2005); *Khadr v Canada (Minister of Justice)* [2006] FC 509 (25 April 2006); *Khadr v Canada (Minister of Justice)* [2007] FC 182 (10 May 2007); *Canada (Minister of Justice) v Khadr* [2008] 2 SCR 125; John Currie, '*Khadr*'s Twist on *Hape*: Tortured Determinations of the Extraterritorial Reach of the Canadian *Charter*' (2008) 46 *Canadian Yearbook of International Law* 307.

75 *Khadr v Canada (Minister of Foreign Affairs)* [2004] FC 1145 (18 August 2004) [22] (von Finckenstein J).

76 Justice von Finckenstein noted: 'Specifically, the International Court of Justice's decision in *LaGrand* states that the *VCCR* does create individual rights to the services requested by the Applicants in this case. The Applicants should also have the opportunity to present evidence that an international custom has also evolved with regards to the provision of certain consular services'. Ibid [27] (citations omitted).

77 *Khadr v Canada (Prime Minister)* [2009] FC 405 (23 April 2009) [24] (O'Reilly J).

78 The United Kingdom perhaps being the main example. See Part II above for further discussion of this.

assistance from their home state. Although it was clearly drafted in order to facilitate the performance of consular functions, it was very much done so at an interstate level and without direct consideration of the individual. The only individual rights which can be derived from the treaty are those which are granted to consular agents and their associates in order to facilitate performance of their roles,[79] and those found in art 36 pertaining to consular access.[80] During the drafting of the treaty it was specifically noted how art 36 was different from other provisions in this vein. It was said to have 'introduced a novelty to the convention by defining the rights of the nationals of the sending States and not, as stated in paragraph 1 of the commentary, the rights of consular officials'.[81] This suggests that no other clause or enumeration within the treaty was reserved for the individual rights of the sending state's nationals.

Having established the critical need for consular assistance in death penalty cases, and with no apparent recourse in international consular law for an individual right to receive such assistance from a home state, it is ultimately necessary to search for the source of such a right in international human rights law.

IV LOCATING THE EMERGING HUMAN RIGHT TO CONSULAR ASSISTANCE FOR THOSE FACING THE DEATH PENALTY

The need for consular support in death penalty cases has also been recognised by the UNSRESAE. In his August 2015 report, Christof Heyns recognised a responsibility on abolitionist states to provide such assistance. He stated:

> If it can empirically be shown that the provision of consular assistance can materially diminish the likelihood of the imposition of a death sentence (and the statistics made available by Governments with specialist programmes suggests that this is the case), then a Government that, when notified, does not take all reasonable steps to provide adequate consular assistance can arguably be said to have failed in its duty of due diligence to protect its nationals from arbitrary deprivations of life.[82]

This Part aims to provide the legal foundation in international human rights treaty law for this emerging right to consular assistance for nationals facing the prospect of the death penalty abroad. Once established, Part V will consider the inherent difficulties in enforcing any such obligation.

A useful starting point in locating this obligation is a remark on the distinction the article makes between abolitionist and retentionist states. The argument being

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79 Generally *VCCR* arts 28–53 contain provisions protecting either the office or the individual consul.

80 *VCCR* art 36.

81 *United Nations Conference on Consular Relations: Consideration of the Draft Articles on Consular Relations Adopted by the International Law Commission at Its Thirteenth Session*, 15th mtg, UN Doc A/CONF.25/6 (14 March 1963) [37] (Sayed Mohammed Hosni (Kuwait)).

82 *Report of the Special Rapporteur*, UN Doc A/70/304, [109]. See also Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, GA Res 65/2008, UNGAOR, 67th sess, Agenda Item 70(b), UN Doc A/67/275 (9 August 2012) [68]–[97]. Heyns further notes that '[s]tates that have abolished the death penalty should take all reasonable steps to ensure that their citizens do not face the imposition of the death penalty overseas': *Report of the Special Rapporteur*, UN Doc A/70/304, [119].

made is that there is an emerging right to consular assistance in death penalty cases for nationals of abolitionist states. This is not to say that retentionist states may not also have an obligation to provide consular assistance to their nationals abroad, with such an obligation being derived from existing commitments in international treaty law. Indeed, it is perhaps surprising to note that some retentionist governments provide an exceptional level of assistance to nationals facing execution abroad.[83] Instead the distinction made in this article is due to the incipient nature of *any* right to consular assistance. If such an emerging right exists then there is little doubt that its development is more advanced amongst abolitionist states than their retentionist counterparts. More importantly, as will be illustrated in this Part, the legal foundation for such a right to consular assistance is located within states' commitments to provisions of international treaty law. Some of these commitments refer specifically to treaties which prohibit the death penalty. With the corresponding obligation arising from these legal commitments, which retentionist states are unlikely to have made, the argument that such states owe an obligation to provide consular assistance is much weaker.

Two further comments should be made on this distinction. First, for the same reason as that provided in relation to retentionist states, the case for the existence of an emerging right to consular assistance is stronger for nationals of states which have abolished the death penalty de facto and de jure, than those who have only abolished it in practice but not law.[84] The second comment is that dividing responsibilities in such a manner is permissible, and indeed is the current practice of the UNSRESAE.[85] In his most recent report Christof Heyns has divided consideration of obligations between abolitionist and retentionist states.[86] Such divisions have been particularly useful in identifying that abolitionist states' obligations do not end once the death penalty is eliminated from domestic practice.

A *The Death Penalty in International Law*

The death penalty is now in retreat globally.[87] Although many states retain it as a form of criminal punishment, the list of states that actually practise capital

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83 Kate Lamb, 'Bali Nine: Indonesia Has Death Penalty Double Standard, Says Brother of Spared Maid', *The Guardian* (online), 16 February 2015 <https://perma.cc/K9NC-F2VX>.

84 Although the Special Rapporteur also takes this position, he has noted that obligations could potentially extend to de facto abolitionists: *Report of the Special Rapporteur*, UN Doc A/70/304, [98].

85 Ibid.

86 Ibid [19]. Previously, rapporteurs have also been inclined to identify obligations, but this has largely been in relation to retentionist states: see Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc E/CN.4/2005/7 (22 December 2004) [88].

87 Saul Lehrfreund and Parvais Jabbar, 'Constitutional Developments and the Restriction of the Death Penalty — Judicial Activism in the Commonwealth' (2013) 5 *European Human Rights Law Review* 512, 512.

punishment is shrinking.[88] This progressive movement towards abolition is in line with the preservation of the right to life in the international human rights framework. This may seem perplexing as both the *ICCPR* and the *European Convention on Human Rights* ('*ECHR*') give legal effect to the retention of the death penalty. Over time, however, this textual recognition has been eroded.

Article 6(2) of the *ICCPR* states:

> In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present *Covenant* and to the *Convention on the Prevention and Punishment of the Crime of Genocide*. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.[89]

This provision recognises from the outset that the obligation applies to those 'countries who have not abolished the death penalty', thereby only allowing for the use of execution by those who had retained the punishment at the time of signature. It is also clearly an exception to the general right to life enshrined in art 6(1). Moreover the text also denotes that the death penalty can only be used for the 'most serious crimes', thereby pinning the legality of the execution on a subjective basis that can be, and has been, restricted over time.

It has been noted that:

> At the time of adoption of the *Covenant*, States expected the category of permissible capital offences to narrow over the years, meaning that they could not enumerate those offences without limiting any future development.[90]

The definition of 'most serious crimes' has now been reduced to only cover intentional killing through murder.[91] Importantly for the context of the current discussion, the use of the death penalty for drug offences is not permissible under international law.[92] As a large number of foreign nationals who face execution abroad are charged with drug offences, it is worthwhile making this connection to highlight that the execution of these individuals amounts to a breach of international law.[93]

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88 Human Rights Council, *Question of the Death Penalty: Report of the Secretary-General*, UN GAOR, 27th sess, Agenda Items 2 and 3, UN Doc A/HRC/27/23 (30 June 2014). Some that retain the death penalty have expanded the circumstances in which the death penalty can be used. For instance, in 2013–14 the death penalty was expanded in Algeria, Brunei, Bahrain, Bangladesh, India, the Maldives, Nigeria, Papua New Guinea, Sudan and the United States: at [16].

89 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6(2) ('*ICCPR*').

90 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, GA Res 65/208, UN GAOR, 67th sess, Agenda Item 70(b), UN Doc A/67/275 (9 August 2012) [40]. See also at [39]–[44].

91 Ibid [35].

92 Ibid [36].

93 Tom Brooks-Pollock, 'Indonesia Executions: Frenchman Serge Atlaoui Faces Death by Firing Squad after Court Rejects Final Appeal against Sentence for Drugs Trafficking', *The Independent* (online), 22 June 2015 <https://perma.cc/6ZGN-2BBJ>; Michael Safi, 'Bali Nine Pair among Eight Executed for Drug Offences in Indonesia', *The Guardian* (online), 29 April 2015 <https://perma.cc/3HLU-VCSA>.

Ultimately the requirement under international law, and the movement of states more generally, is towards a progressive abolition of the death penalty.[94] Abolitionist states indicate their recognition of this through signing and ratifying the *Second Optional Protocol to the International Covenant on Civil and Political Rights* ('*Second Optional Protocol*').[95] This protocol not only pledges a total elimination of the death penalty domestically, but also includes a commitment to work towards its global abolition. In the preamble to the protocol, states affirm that they are '[d]esirous to undertake hereby an international commitment to abolish the death penalty'.[96] Eric Neumayer has described this text in particular as an affirmation that the death penalty 'cannot be regarded as an internal domestic affair' and thus requires global action.[97] With currently 81 states parties, the *Second Optional Protocol* is the clearest commitment in treaty law that a state can make to the abolitionist agenda.

The progressive abolition of the death penalty has been recognised to the greatest extent in the European human rights system. Similar to *ICCPR* art 6(2), art 2(1) of the *ECHR* initially recognised the legal practice of capital punishment:

> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.[98]

In 1983, a sufficiently strong abolitionist movement was able to effectuate the drafting of *Protocol 6* to the *ECHR* which moved Europe a step closer to total abolition. The preamble to this protocol notes that several member states had undergone an evolution that had formed 'a general tendency in favour of abolition of the death penalty'.[99] This protocol still retained the possibility of the use of the death penalty in times of war,[100] and so the abolitionist movement in Europe continued to pursue total eradication. This goal was achieved in 2002 with the drafting of *Protocol 13* which abolishes the death penalty in all circumstances. [101] Notably *Protocol 13* does so by making reference to

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94 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, GA Res 67/168, UN GAOR, 69th sess, Agenda Item 69(b), UN Doc A/69/265 (6 August 2014) [90].

95 *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

96 Ibid Preamble.

97 Eric Neumayer, 'Death Penalty Abolition and the Ratification of the *Second Optional Protocol*' (2008) 12 *International Journal of Human Right*s 3, 5.

98 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 2(1) ('*ECHR*').

99 *Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, opened for signature 28 April 1983, CETS No 114 (entered into force 1 March 1985) Preamble ('*Protocol 6*').

100 Ibid art 2.

101 *Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances*, opened for signature 3 May 2002, CETS No 187 (entered into force 1 July 2003) ('*Protocol 13*').

strengthening the right to life in art 2.[102] It is here within the right to life where an emerging obligation of consular assistance will most naturally sit.

The case law of the European Court of Human Rights ('ECtHR') has been equally progressive in terms of abolition. The Court has handed down a series of seminal cases that have restricted contracting parties' involvement in the death penalty. Bharat Malkani compellingly uses these advancements in the case law to argue that abolitionist states are obligated to refrain from assisting the use of the death penalty in retentionist states.[103] For instance, in *Soering* the Court found that the extradition of a German national from the United Kingdom to the United States, where he may face exposure to a lengthy period on death row, was sufficient to breach the prohibition on inhuman and degrading treatment.[104] In *Bader* the Court found that extradition to a state where an individual may be executed after facing an unfair trial would give rise to breaches of arts 2 and 3.[105] In *Öcalan* the Court concluded that the death penalty, except in times of war, had become an unacceptable form of punishment within Europe.[106] The progressively abolitionist jurisprudence of the ECtHR reached its apex in the case of *Al-Saadoon*.[107] This application involved the transfer of two men held by British forces in Iraq to the newly formed governmental authorities after the 2003 invasion. The men were alleged to have committed war crimes which brought with them the possibility of execution by hanging. With reference to the wide support for *Protocols 6* and *13*, and the state practice in observing the moratorium on the death penalty, the Court found that art 2 had been amended 'so as to prohibit the death penalty in all circumstances'.[108]

B *Establishing an Obligation*

It is contended here that the conditions created by the progressively abolitionist nature of the *ICCPR* and *ECHR* have laid the foundation for an emerging obligation to provide consular assistance to nationals of abolitionist states. While provisions in both treaties will be referred to here, there is a natural imbalance in favour of *ECHR* jurisprudence given the prolific nature of the ECtHR in addressing human rights issues. In an interpretive sense, the emergence of a right to consular assistance has come about as both the *ICCPR* and *ECHR* use the doctrine of the living instrument to construe treaty provisions in light of modern-day conditions. *Al-Saadoon* is a clear example of the living instrument in application in the European human rights system, going as far as to eliminate a textual provision from the *ECHR*. In interpreting the *ICCPR* the Human Rights Committee ('HRC') has been equally as willing to apply the doctrine of the living instrument to obligations concerning the death penalty. This is best illustrated in the 2003 decision of *Judge v Canada* where the HRC

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102 The Preamble noted: 'Wishing to strengthen the protection of the right to life guaranteed by the *Convention for the Protection of Human Rights and Fundamental Freedoms* signed at Rome on 4 November 1950'.

103 Malkani, above n 27.

104 *Soering v United Kingdom* (1989) 161 Eur Court HR (ser A) 58–9 [111].

105 *Bader v Sweden* [2005] XI Eur Court HR 75, 90 [47]–[48].

106 *Öcalan v Turkey* [2005] IV Eur Court HR 131.

107 *Al-Saadoon v United Kingdom* [2010] II Eur Court HR 61.

108 Ibid 126 [120].

recognised an obligation on abolitionist states of non-refoulement where it was reasonably anticipated that the individual would be sentenced to death, unless the state had sought assurances that the death sentence would not be used.[109] In doing so the Committee reversed its own previous opinion of 1993 in *Kindler v Canada* where it had found unqualified removals to a retentionist state permissible.[110] The HRC revised its approach by stating that 'the *Covenant* should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions'.[111] The use of this teleological and progressive interpretative approach suggests that new obligations on abolitionist states can be recognised in light of modern circumstances.

In order to consider how an obligation to provide consular assistance in death penalty cases has emerged in the right to life it is necessary to identify, and apply, the characteristics that are taken into account when courts use the doctrine of the living instrument. Identifying these indicators, however, is not an easy task as, to borrow the words of Sir Nicholas Bratza, the former President of the ECtHR, the application of the living instrument is not an 'exact science'.[112] Nonetheless from analysis of the case law and leading academic literature on the living instrument it is possible to categorise three key indicators that courts use when ascertaining whether the doctrine should be applied to interpret provisions.

The first of these is that any change that the Court makes must be 'incremental and evolutionary rather than revolutionary'.[113] This implies that, perhaps in order to allay the fears of the more conservative participants in the system of protection, any enhancement must be marginal rather than crucial. Baroness Hale at the UK Supreme Court subscribes to this approach, stating that any change must be 'predictable'.[114] The development of a human right to consular assistance — particularly for states which have already abolished the death penalty — certainly would be a marginal evolution and in line with the progressively abolitionist nature of international human rights law. Moreover, given growing acceptance of a human right to consular access within the right to life, the emergence of any such right would be equally predictable.

The second characteristic is that rights must be interpreted 'in the light of present day conditions'.[115] In both *Öcalan* and *Al-Saadoon* the ECtHR relied heavily upon a general opposition to the death penalty within Europe. Amongst other indicators, the Court illustrated this by pointing to the number of signatories to *Protocol 13*. Equally relevant in an international context would be the number of states which have signed the *Second Optional Protocol*.

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109 Human Rights Committee, *Views: Communication No 829/1998*, UN Doc CCPR/C/78/D/829/1998 (13 August 2003) [10.4] ('*Judge v Canada*').

110 Human Rights Committee, *Views: Communication No 470/1991*, UN Doc CCPR/C/48/D/470/1991 (25 September 1991, adopted 30 July 1993) [14.6] ('*Kindler v Canada*').

111 *Judge v Canada*, UN Doc CCPR/C/78/D/829/1998, [10.3].

112 Nicholas Bratza, 'Living Instrument or Dead Letter — The Future of the *European Convention on Human Rights*' (2014) 2 *European Human Rights Law Review* 116, 124.

113 Ibid 123.

114 Baroness Hale, 'Beanstalk or Living Instrument? How Tall Can the *ECHR* Grow?' (Speech delivered at the Gray's Inn Reading, Gresham College, London, 16 June 2011) <https://perma.cc/9SY4-SNU3>.

115 *Tyrer v United Kingdom* (1978) 26 Eur Court HR (ser A) 15 [31] ('*Tyrer*').

The picture which this presents at both a regional and global level is a general strengthening of the abolitionist movement. At a more basic level, human rights standards across the globe lean towards a higher standard of protection.[116] This dual recognition makes the argument for a human right to consular assistance more compelling.

Thirdly, the Court looks to 'developments and commonly accepted standards'.[117] This has been interpreted by the ECtHR to mean a common European standard,[118] or intention.[119] In recent times, however, the Court has also looked to developments and common standards internationally, thus bringing in law and practice from domestic and international bodies.[120] The argument for a right to consular assistance sits naturally here as state practice already illustrates that, on the whole, when notified, states will take positive steps to assist nationals facing execution abroad. Indeed, when discussing whether states should provide diplomatic protection to nationals facing the death penalty Malkani has appropriately remarked that 'it is difficult to think of a "good" reason for not offering protection'.[121] The culmination of this analysis is that there is a strong case to be made for the recognition of a right to consular assistance within the wider right to life in the *ICCPR* and *ECHR*, when read concurrently with the relevant abolitionist protocols (*Second Optional Protocol*, *ECHR Protocols 6* and *13*).

C *The Substance of a Right to Consular Assistance*

In practice, any such right would take the form of a positive obligation on states to protect the right to life through the provision of consular assistance. The ECtHR has interpreted the positive obligation to protect life broadly,[122] so as to apply 'in the context of any activity, whether public or not, in which the right to life may be at stake'.[123] Although the positive obligation to protect life would be applicable to any case involving the death penalty, the argument would be particularly strong in relation to the obligation to prevent 'unlawful killing'. While the ECtHR has understood this previously as an obligation to prevent

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116 In *Demir v Turkey* the Court noted that it was necessary 'to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies': *Demir v Turkey* [2008] V Eur Court HR 395, 439 [146]. The same sentiment was reiterated by the UNHCR in *Saadi*: 'rights were given a broad construction and … limitations were narrowly construed, in a manner which gave practical and effective protection to human rights, and as a living instrument, in the light of present day conditions and in accordance with developments in international law so as to reflect the increasingly high standard being required in the area of the protection of human rights'. *Saadi v United Kingdom* [2008] I Eur Court HR 31, 57 [55].

117 *Tyrer* (1978) 26 Eur Court HR (ser A) 15–16 [31].

118 George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press, 2013) 106, 109.

119 Hale, above n 114.

120 Alastair Mowbray, 'An Examination of the European Court of Human Rights' Approach to Overruling Its Previous Case Law' (2009) 9 *Human Rights Law Review* 179, 194–7.

121 Malkani, above n 27, 541.

122 *LCB v United Kingdom* [1998] III Eur Court HR 1390, 1403 [36].

123 *Öneryildiz v Turkey* [2004] XII Eur Court HR 79, 110 [71].

unlawful killing by private individuals, an argument could certainly be made that the execution of nationals for crimes which do not meet the 'most serious' threshold, for instance drug smuggling and blasphemy, would also require a positive obligation on states to provide effective consular assistance in order to avoid a breach of international law.

Given the broad range of functions which a consular agent can take to assist a national facing execution abroad, it would be difficult to construct an exhaustive list of actions which are entailed in a right to consular assistance. As the provision of consular assistance will involve the expenditure of capital, it is also necessary to establish a level of protection which can be achieved by all states. After all, a large number of developing nations are abolitionist[124] and it would be unrealistic to expect that these states could offer the same external assistance to nationals abroad as their developed counterparts. A limited interpretation of the substance of any such right would require, at the very least, consular agents to provide advice and assistance to nationals when requested, and if necessary, assist them in locating adequate legal representation and interpreters. Beyond this, compelling arguments can also be made for the provision of funding for legal representation, the filing of amicus curiae briefs and assistance in obtaining mitigating evidence. A difficult balancing act is required to be drawn between assistance and services that can readily be provided by the state, and those that, for policy or legal reasons, are beyond the scope of reasonable assistance. This limitation of expectations has been recognised by the ECtHR which has caveated the scope of positive obligations so that they 'must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities'.[125] This qualification will be perfectly appropriate in situations involving consular officials and nationals detained overseas.

In issuing guiding principles on the positive obligation in the right to life the ECtHR has noted that the requirement on states is to 'take appropriate steps to safeguard the lives of those within its *jurisdiction*'.[126] Having constructed an argument in this Part in favour of an emerging right to consular assistance for nationals of abolitionist states, Part V will review how this jurisdictional prerequisite is the principal obstacle to the enforcement of any such right.

V Extraterritorial Obligations in the Enforcement of a Right to Consular Assistance

By its very definition consular assistance is provided to nationals outside of the territory of their home state. Framing a human right to receive consular assistance in death penalty cases therefore requires recognition that human rights obligations follow consular agents extraterritorially. Herein lies the principal difficulty in enforcing a right to consular assistance. This Part demonstrates that difficulty and proposes a solution for its remedy.

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124 For a useful map on retentionist and abolitionist nations, see Death Penalty Information Center, *Abolitionist and Retentionist Countries* (31 December 2015) <https://perma.cc/XL7Q-4XZ2>.

125 *Kontrova v Slovakia* (European Court of Human Rights, Fourth Section, Application No 7510/04, 31 May 2007) [49].

126 Ibid [49] (emphasis added).

A *The Extraterritorial Application of the* ICCPR *and* ECHR

The geographic scope of both the *ICCPR* and *ECHR* is defined by application clauses within the respective treaties. States parties' obligations in the *ICCPR* are limited through art 2 to 'all individuals within its territory and subject to its jurisdiction'.[127] The HRC has interpreted that these obligations apply to all branches of state agents and governmental authorities, meaning that there is no specific bar to consular agents in holding an obligation to provide assistance.[128] As obligations under the *ICCPR* only extend to individuals within a state's 'territory and subject to its jurisdiction', the extent to which a consular agent's responsibilities are engaged is limited.[129] The HRC has interpreted this provision to mean that

> a State party must respect and ensure the rights laid down in the *Covenant* to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.[130]

The parallel geographic application of the *ECHR* is defined by art 1 of the treaty which reads:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this *Convention*.[131]

The Grand Chamber of the ECtHR has highlighted the importance of the exercise of 'jurisdiction' in the context it is expressed in art 1 of the *ECHR*:

> The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the *Convention*.[132]

This clarification is appropriate for the scope of both treaties. For a state to owe an obligation to an individual, and for an individual to be able to enforce that obligation, or seek redress for a violation, they must first establish that they were either within the 'territory and subject to its jurisdiction' (*ICCPR*), or within the 'jurisdiction' (*ECHR*) of the state at the relevant time of injury. The prerequisite exercise of jurisdiction has been interpreted to arise extraterritorially

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127 *ICCPR* art 2(1): 'Each State Party to the present *Covenant* undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present *Covenant*, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Gondek notes that the use of the word 'territory' was at the insistence of the US: Michał Gondek, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009) 76. King considers the extraterritorial application of the *ICCPR* in Hugh King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 *Human Rights Law Review* 521, 522–30.

128 'All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level — national, regional or local — are in a position to engage the responsibility of the State Party': Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [4] ('*General Comment No 31*').

129 *ICCPR* art 2(1).

130 *General Comment No 31*, UN Doc CCPR/C/21/Rev.1/Add.13, [10].

131 *ECHR* art 1.

132 *Ilaşcu v Moldova* [2004] VII Eur Court HR 179, 262 [311].

in two manners: through the control of territory, known as spatial jurisdiction, and through the exercise of authority and control over people, known as personal jurisdiction.[133] Consular agents will most commonly exercise jurisdiction over nationals abroad following personal principles.

B *Extraterritorial Obligations and Consular Agents*

As the leading global treaties protecting the civil and political rights of individuals, the *ICCPR* and *ECHR* have a long history of informing one another on principles, meanings and interpretations.[134] For the purposes of this evaluation on the extraterritorial right to consular assistance it is the jurisprudence of the *ECHR* which will receive primary consideration. Two reasons are given for this. First, as all 47 contracting parties to the *ECHR* have abolished the death penalty, there is merit in using its system of enforcement as an illustration of the difficulties in extraterritorially applying a right to consular assistance in death penalty cases. It is particularly useful as the right to consular assistance is most likely to apply to these states as abolitionists. The second reason is the seminal importance that the interpretation of *ECHR* art 1 has had in the understanding of the extraterritorial application of human rights more generally. The significance of art 1 case law has led Marko Milanović to state that the *ECHR* 'contains the prototype jurisdiction clause'.[135] Similarly Olivier De Schutter observes that the Strasbourg Court is 'a laboratory for the understanding of the evolving notion of "jurisdiction" in the era of globalization'.[136] Barbara Miltner concurs, stating that the ECtHR's interpretation is so important that it contributes 'to the sense that *any* judgment on the issue would be closely watched'.[137]

A positive starting point for enforcing a right to consular assistance is that the ECtHR has long recognised that treaty obligations can extend extraterritorially to diplomatic and consular agents. The first case concerning the extraterritorial application of the *ECHR*, *X v Federal Republic of Germany*, is illustrative of this.[138] Involving both accusations of espionage and a challenge to a duel, the facts of this early 1960s case have been appropriately described as 'bizarre in the extreme'.[139] The applicant alleged that as a result of personal disagreements with

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133 Wilde has utilised the 'personal' and 'spatial' distinctions in his work on art 1: Ralph Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2005) 26 *Michigan Journal of International Law* 739, 741.

134 The drafting of both treaties commenced contemporaneously. Indeed Gondek has described the respect *ECHR* drafters awarded to the drafting at the UN as 'striking': Gondek, above n 127, 84. The ECtHR has borrowed from the HRC interpretations of jurisdiction: see, eg, *Issa* where the Court used statements made in the HRC opinion of *Lopez Burgos v Uruguay*. *Issa v Turkey* (European Court of Human Rights, Second Section, Application No 31821/96, 16 November 2004) [71]

135 Marko Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *Human Rights Law Review* 411, 413.

136 Olivier De Schutter, 'Globalization and Jurisdiction: Lessons from the *European Convention on Human Rights*' (Working Paper No 9, Center for Human Rights and Global Justice, 2005) 7.

137 Barbara Miltner, 'Revisiting Extraterritoriality after *Al-Skeini*: The *ECHR* and Its Lessons' (2012) 33 *Michigan Journal of International Law* 693, 694.

138 *X v Federal Republic of Germany* (1965) 8 Eur Comm HR 158.

139 *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643, 657 (Lord Phillips).

the German consul in Morocco he had inter alia lost his title of nobility, been deported, suffered a loss of property and his wife had lost her employment.[140] Although the application was ultimately dismissed on the grounds of being manifestly ill-founded, the now defunct European Commission on Human Rights ('ECommHR') still considered whether the applicant would otherwise have fallen within German jurisdiction. It noted that:

> *Whereas*, in certain respects, the nationals of a Contracting State are within its 'jurisdiction' even when domiciled or resident abroad; whereas, in particular, the diplomatic and consular representatives of their country of origin perform certain duties with regard to them which may, in certain circumstances, make that country liable in respect of the *Convention*.[141]

This 'nationality' basis for jurisdiction echoes that found in public international law.[142] As a doctrine, it would suggest that art 1 jurisdiction, and thus human rights obligations, could potentially travel extraterritorially to any national of a contracting party anywhere in the world. Although attractive, any such interpretation would prove impractical to enforce as it would simply be impossible for a state to protect the rights of its citizens at all times, and anywhere they were located. There is also the risk that such an interpretation could suggest that nationals of a sending state would be rights holders, while non-nationals would not. Milanović has described such an approach to extraterritorial rights protection as a 'fallacy'.[143] It would also be incompatible with the universal principles upon which both the *ECHR* and *ICCPR* are founded to singularly define the extraterritorial application of human rights obligations on a basis of nationality.[144]

This interpretation would also give rise to particular problems in the practice of consular affairs. This is because many states have signed multilateral and bilateral agreements whereby they share consular responsibilities with one another. For instance, if a member state of the European Union does not have a consular outpost in the country where an EU citizen is located, that citizen has a right to seek assistance from any other EU member which has consular

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140 *X v Federal Republic of Germany* (1965) 8 Eur Comm HR 158, 160, 162.

141 Ibid 168 (emphasis in original).

142 Wallace defines it writing that '[a] state may exercise jurisdiction over any of its nationals wherever they may be and in respect of offences committed abroad': Rebecca M M Wallace, *International Law* (Sweet & Maxwell, 3rd ed, 1997) 114. Lowe and Staker remark that '[s]tates have an undisputed right to extend the application of their laws to their citizens (that is, those who have the nationality of the State), wherever they may be': Vaughan Lowe and Christopher Staker, 'Jurisdiction' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 3rd ed, 2010) 323. Triggs adds that '[a] state has competence to prosecute and punish its nationals solely on the basis of their nationality': Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2006) 351.

143 Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011) 81.

144 *ECHR* Preamble: 'Considering the *Universal Declaration of Human Rights* proclaimed by the General Assembly of the United Nations on 10th December 1948; Considering that this *Declaration* aims at securing the universal and effective recognition and observance of the Rights therein declared'. *ICCPR* Preamble: 'Recognizing that, in accordance with the *Universal Declaration of Human Rights*, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights'.

authorities in that state.[145] UK authorities also provide consular assistance to nationals of Commonwealth states in countries where their home state does not have a consular outpost,[146] while other close allies have similar sharing arrangements.[147] In light of this, it is worth noting that the emerging human right on states to provide consular assistance cannot be framed only for their nationals, but to the nationals of any state who they have the authority to provide consular assistance to. Naturally this may give rise to an exceptional situation where a citizen of a retentionist state is owed a human right to consular assistance from an abolitionist state.[148] If such a scenario were to arise, the obligation to provide consular assistance could still apply given that its source is derived from the abolitionist state's legal commitments and not from the identity of the rights holder.

The question of obligations on consular agents was addressed again by the ECtHR in the 1970s case of *X v United Kingdom*.[149] This application concerned a complaint by a British mother, whose child had been taken to Jordan by her Jordanian father. The applicant requested that the British consul in Amman obtain custody of her daughter. The consulate took what actions were open to it including reporting on the child's wellbeing, providing a list of lawyers practising in Jordan and registering the daughter on her mother's passport. The applicant saw these actions as unsatisfactory and alleged a violation of the right to family life.[150] Similar to the earlier *X v Federal Republic of Germany* case, this application was being brought directly against the home state for alleged breaches of obligations owed by that state to their nationals. The Commission found this application to be manifestly ill-founded and yet still recognised the potential for the personal extension of jurisdiction by a consular agent.[151] It did

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145 *Council Directive 2015/637 of 20 April 2015 on the Coordination and Cooperation Measures to Facilitate Consular Protection for Unrepresented Citizens of the Union in Third Countries and Repealing Decision 95/553/EC* [2015] OJ L 106/1, arts 4, 6, 7(1).

146 United Kingdom guidance states that '[w]e may also help Commonwealth nationals in non-Commonwealth countries where they do not have any diplomatic or consular representation, but will normally ask their nearest embassy to provide any ongoing assistance required': *Support for British Nationals Abroad: A Guide*, above n 39, 5.

147 See, eg, *Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of Canada for Sharing Consular Services Abroad* (signed and entered into force 7 August 1986) [1986] ATS 18.

148 Malaysia currently retains the death penalty while the United Kingdom has abolished its practice de jure and de facto. If a Malaysian national was facing criminal charges in a state where Malaysia lacked a consular outpost, the national may receive consular assistance from the United Kingdom. That being said, it would be more likely for Malaysian consular officials to travel to the national from the nearest outpost in a different state.

149 *X v United Kingdom* (1977) 12 Eur Comm HR 73.

150 *ECHR* art 8.

151 'Therefore, in the present case the Commission is satisfied that even though the alleged failure of the consular authorities to do all in their power to help the applicant occurred outside the territory of the United Kingdom, it was still "within the jurisdiction" within the meaning of Article I of the *Convention*': *X v United Kingdom* (1977) 12 Eur Comm HR 73, 74.

so by following other contemporary interpretations of art 1 jurisdiction where it had been stated that:[152]

> The acts of State officials, including diplomatic or consular agents, bring persons and property under the jurisdiction of that State, to the extent that they exercise their authority in respect of these persons or that property.[153]

The operative wording for extraterritorial obligations therefore changed from 'jurisdiction' to 'authority'. The Commission went on to clarify when an individual would fall within the exercise of a consular agent's authority, stating that '[i]nsofar as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged'.[154]

This broad understanding was followed by the Commission over a decade later in the next, and final, case to directly consider obligations on diplomatic and consular agents, *V v Denmark*.[155] Intent on leaving East Germany, a group of individuals including the applicant entered the premises of the Danish embassy in East Berlin and requested negotiations with East German authorities concerning permits to leave the country.[156] At the request of the Danish ambassador, East German police entered the embassy and removed them from the building. They were held in custody for a number of days and some, including the applicant, were subsequently sentenced to conditional imprisonment for their actions. When released the applicant alleged that the actions of the Danish ambassador in calling the East German police had violated his rights under the *ECHR*. Thus, unlike the two former cases this application involved an allegation that a consular agent of another state had violated the applicant's rights. Nonetheless, it still bears significance as it establishes how consular officials owe human rights obligations. Again the ECommHR found the exercise of jurisdiction but did not recognise a violation of the *ECHR*. The Commission instead noted that the applicant's detention had come at the hands of East German authorities and could not be wholly attributed to the Danish ambassador.[157] Most notable perhaps is that in this case the Commission had the opportunity to make a finding of jurisdiction based on the de facto spatial control a state exercises over its embassy and consulate offices and yet instead selected to follow the broader personal jurisdiction which had been applied in *X v United Kingdom*.[158]

On the understanding of this early jurisprudence there would be little difficulty in establishing a human right to consular assistance for nationals of an abolitionist state. By specifically following the approach in *X v United Kingdom* it could be asserted that a consular agent exercised 'authority' over a national detained on capital charges abroad. That authority would arise either through the act of the consular agent in providing assistance, or their omission in failing to

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152 *Cyprus v Turkey* (1975) 2 Eur Comm HR 125, 136.
153 *X v United Kingdom* (1977) 12 Eur Comm HR 73, 73.
154 Ibid 74.
155 *V v Denmark* (1993) 15 Eur Comm HR 28.
156 Ibid.
157 Ibid 29.
158 *X v United Kingdom* (1977) 12 Eur Comm HR 73.

do so, which directly affected the national's right to life by increasing the prospects of them facing execution.

Two further cases heard by the ECtHR have touched on the understanding of jurisdiction exercised by consular agents and influenced the scope of how a consular agent establishes a jurisdictional link. The first of these is the seminal *Banković* judgment which concerned the death of several civilians in a NATO bombing raid on a radio–television station in Belgrade during the Balkan conflict.[159] The significance of this judgment was that it was the first major interpretation of the *ECHR*'s extraterritoriality by the newly established Grand Chamber of the ECtHR.[160] In a unanimous decision, the ECtHR ruled jurisdiction to be 'primarily territorial'[161] subject to a series of interpretations that included 'the activities of its diplomatic or consular agents abroad'.[162] There is merit in the fact that while other bases of jurisdiction fell by the wayside due to the Court's narrow territorial interpretation in *Banković*, the recognition that diplomatic and consular agents could still owe obligations remained strong. Also notable here is that the Court in *Banković* failed to link the understanding of jurisdiction with the 'authority' test which had been applied in the earlier cases, instead positioning it in a wider understanding of extraterritorial actions which are accepted in customary international law.[163]

The second case is that of *Al-Skeini*.[164] Similar to *Banković*, this case was both a seminal judgment of a unanimous Grand Chamber and it did not involve consular agents directly. The application has been widely lauded as adjusting some of the more restrictive interpretations in the *Banković* decision.[165] In it the ECtHR found that UK forces had exercised jurisdiction over six individuals who died during security operations in south-east Iraq in the course of their occupation of that region. The case came at the end of a decade of stifling indecision and confusion in the ECtHR on the understanding of art 1 jurisdiction. In providing its decision the Court sought to clarify the extraterritorial application of the *ECHR* through elucidating the '[g]eneral principles relevant to jurisdiction under Article 1 of the *Convention*'.[166] In doing so it again recognised

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159 *Banković v Belgium* [2001] XII Eur Court HR 333, 340 [6]–[11] ('*Banković*').

160 Grand Chamber cases are always heard before 17 judges, including the national judge of the state accused of the human rights violation. See European Court of Human Rights, *Frequently Asked Questions: The Grand Chamber* <https://perma.cc/Q4AM-5Q43>.

161 Banković [2001] XII Eur Court HR 333, 335.

162 Ibid 356.

163 Ibid 351–6 [59]–[73].

164 *Al-Skeini v United Kingdom* [2011] IV Eur Court HR 99 ('*Al-Skeini*').

165 See Marko Milanović, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (2012) 23 *European Journal of International Law* 121; Conall Mallory, 'European Court of Human Rights *Al-Skeini and Others v United Kingdom* (Application No 55721/07) Judgment of 7 July 2011' (2012) 61 *International and Comparative Law Quarterly* 301, 304; Miltner, above n 137, 694.

166 *Al-Skeini* [2011] IV Eur Court HR 99, 166 [130].

that diplomatic and consular agents could hold extraterritorial obligations, this time indicating a specific test for these agents. It held:

> it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others …[167]

This reading of jurisdiction exercised by diplomatic and consular agents simply shatters the relative consistency and coherence provided in earlier cases. Not only did the Court depart from the sole use of 'authority' as the basis for the jurisdictional connection, but in doing so it also introduced a prerequisite of 'control' into the understanding. Through use of the word 'and' instead of 'or' at the end of this final sentence the Court indicated that, not only does an individual have to be within the authority of consular agents, something which is intelligible following *X v United Kingdom*, but that they must also be within their control. The obvious problem here is that consular agents have no *authority* to exercise *control* of individuals while in a foreign state.

The ECtHR may have included control in the test for jurisdiction as a response to the nature of the extraterritorial cases arriving at the ECtHR. In the period between *Banković* and *Al-Skeini* the Court had considered a range of cases involving the use of force by military agents. The rise of cases involving shootings,[168] detention on the high seas[169] and in foreign states,[170] aerial bombings[171] and allegations of torture,[172] had altered the narrative surrounding art 1 in that the ECtHR was no longer concerned with a mix of both military and non-military cases, but almost entirely focused on the actions of the armed forces of European states abroad. This could possibly explain how the notion of 'control', a characteristic which fits far more naturally in considerations of military actions, managed to slip into the art 1 test for consular agents.

Ultimately, however, it may be even more likely that the presence of 'control' in the Court's statement of principles on diplomatic and consular agents was simply made without consideration of its implications. As consular agents have no power or authority to exercise control over individuals they come into contact with it is difficult to identify a reason why 'control' was included. At the drafting of the *VCCR* it was noted that some consular officials had been found to molest political refugees from their home state.[173] Even if one expands an understanding of 'control' to its widest possible meaning, it is not entirely clear how an action

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167 Ibid 167 [134].

168 See, eg, *Andreou v Turkey* (European Court of Human Rights, Fourth Section, Application No 45653/99, 3 June 2008); *Solomou v Turkey* (European Court of Human Rights, Fourth Section, Application No 36832/97, 24 June 2008); *Isaak v Turkey* (European Court of Human Rights, Third Section, Application No 44587/98, 28 September 2006).

169 See, eg, *Medvedyev v France* [2010] III Eur Court HR 61.

170 See, eg, *Al-Jedda v United Kingdom* [2011] IV Eur Court HR 305.

171 See, eg, *Pad v Turkey* (European Court of Human Rights, Third Section, Application No 60167/00, 28 June 2007).

172 See, eg, *Issa v Turkey* (European Court of Human Rights, Second Section, Application No 31821/96, 16 November 2004) 588.

173 United Nations Conference on Consular Relations, *Consideration of the Draft Articles on Consular Relations Adopted by the International Law Commission at its Thirteenth Session*, 2nd Comm, 16th mtg, UN Doc A/CONF.25/6 (15 March 1963) [5] (Evans (United Kingdom)).

like this would give rise to a jurisdictional link. Control equally would not have assisted any of the applicants in the earlier ECommHR jurisprudence.[174]

Moreover, later in the statement of principles in *Al-Skeini* the Court notes that state agents can exercise personal jurisdiction through the use of force. It stated: 'the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's art 1 jurisdiction'.[175] If the Court intended that consular agents would create a jurisdictional link when it exercised physical control over individuals, then it would have been sufficient to abstract that from this guiding principle, and not include it in a section that appears to be reserved for the actions of diplomatic and consular authorities. It is possible that the Court intended for two different meanings of control: one for diplomatic and consular agents and one for military agents. However if that is the case then the Court has embedded inconsistency at a point in time when attempting to articulate clarity on the 'general principles' of jurisdiction in art 1.

Whether included by error or intent, the presence of control has radically limited the situations in which a consular agent will owe human rights obligations. This is exemplified best with reference to the UK Supreme Court's application of the jurisdiction test from *Al-Skeini* in the case of *Sandiford*.[176] This case concerned a UK national who was convicted of drug trafficking offences in Bali in 2012. Mrs Sandiford, who suffers from both physical and mental health conditions, admitted the offences at trial and cooperated with Indonesian police leading to the arrest of four others. She contended throughout proceedings that she was carrying 10 packets of cocaine when arrested at Bali's airport because a member of a drug syndicate had threatened to kill her son if she did not. At trial the prosecutor sought a punishment of 15 years' imprisonment; however, pursuant to Indonesia's notoriously strict approach to foreign drug smugglers, the court handed down a sentence of death by firing squad. Sandiford appealed against the death sentence and concurrently brought litigation in UK courts seeking an order for the government to locate and pay for suitable legal representation for her appeal proceedings.[177] Her claim was therefore based on the right to a fair trial and not the right to life.[178] For this right to be operative extraterritorially Mrs Sandiford had to first establish that she was within UK jurisdiction for the purposes of art 1. Faced with the competing jurisprudence of the ECtHR and ECommHR, the Supreme Court unsurprisingly followed the most recent understanding in *Al-Skeini* that had been deemed to be the most authoritative exposition of the extraterritorial application of the *ECHR* by the ECtHR,[179] the UK Supreme Court[180] and the Master of the Rolls in the Court of

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174 That is, unless that control was to mean control over premises and not people — only then would it have helped the applicants in *V v Denmark*.

175 *Al-Skeini* [2011] IV Eur Court HR 99, 168 [136].

176 *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44 (16 July 2014) [32] (Lord Carnwath and Lord Mance) ('*Sandiford*').

177 Ibid.

178 *ECHR* art 6.

179 *Chagos Islanders v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 35622/04, 11 December 2012) [70].

Appeal.[181] Analysing the jurisdictional link, the Court held that the applicant had 'been apprehended, convicted and tried for drug smuggling in Indonesia. If one asks, by reference to any common-sense formulation, under whose authority or control she is, the answer is: that of the Indonesian authorities'.[182] Clearly the Court was influenced by the fact that it was Indonesian, and not British authorities, who had exercised direct 'control' over her.

The implications of this redefined interpretation of jurisdiction from *Al-Skeini* are crippling on any emerging human right to consular assistance. Although the incipient right may exist within the substantive right to life, in effect, it will not give rise to a legal obligation practically enforceable against states until such times as a clearer extraterritorial connection is established. Within the *ICCPR* system, the use of 'anyone within the power or effective control' as an interpretation for the extraterritorial extension of obligations is only marginally better, the notion of 'power' being perhaps more flexible than that of 'control', and use of 'or' instead of 'and' suggesting the possibility of a disjunctive reading of this test. Nonetheless, the present interpretation in both treaties could leave any human right to consular assistance practically unenforceable.

C *Realigning Extraterritorial Obligations on Consular Authorities*

The issue of the extraterritorial application of human rights more generally is as contentious as it is complex. Both courts and legal commentators alike have struggled between normative and practical considerations in attempting to ascertain a coherent understanding of when a state is subject to human rights obligations while abroad. Most recently, the extension of extraterritorial human rights obligations into military affairs has resulted in a backlash against judicial opinions.[183] In an area filled with complex influences, it would be far too simplistic to reduce the debate to two positions and yet the major conceptual conflict is between states which fear extraterritorial obligations will open the floodgates to impractical obligations and infinite litigation, and individuals who see the extraterritorial protection of human rights as being a state's natural, moral responsibility. This conflict is perhaps even more contentious when positive human rights obligations are at issue. Yet, in the narrowly defined area of human rights obligations to those facing the death penalty abroad, it is contended that there is a jurisdictional interpretation available which could bridge the gap between substance and practice.

The starting point for this contention is that the Grand Chamber in *Al-Skeini* was correct to identify a bespoke test for extraterritorial jurisdiction to be applied to diplomatic and consular agents. Attempting to apply a universal test for all

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180 *Smith v Ministry of Defence* [2013] UKSC 41 (19 June 2013) [46] (Lord Hope DP). It has also been recognised and relied upon by the Special Rapporteur: Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, GA Res 67/168, UN GAOR, 68th sess, Agenda Item 69(b), UN Doc A/68/382 (13 September 2013) [46].

181 Lord Dyson, 'The Extraterritorial Application of the *European Convention on Human Rights*: Now on a Firmer Footing, But Is It a Sound One?' (Speech delivered at the University of Essex, Colchester, 30 January 2014).

182 *Sandiford* [2014] UKSC 44 (16 July 2014) [32] (Lord Carnwath and Lord Mance).

183 See Thomas Tugendhat and Laura Croft, 'The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power' (Report, Policy Exchange, 2013) <https://perma.cc/43GE-6CS6>.

state agents ranging from the drone operative to the consular official does not reflect the realities of modern-day international relations, or interaction between the state and individuals. Judge Giovanni Bonello of the ECtHR has noted his frustration at the practice of attempting to apply notions of jurisdiction between wholly varying situations stating:

> In my view, this relentless search for eminently tangential case-law is as fruitful and fulfilling as trying to solve one crossword puzzle with the clues of another.[184]

In light of this, the proposal made here is for the understanding of the extraterritorial extension of jurisdiction by consular agents to return to the previous test that had functioned adequately. Thus, instead of taking an entirely new approach to jurisdiction, the ECtHR, or indeed the HRC, would be better placed to simply return to the test used in *X v United Kingdom* where jurisdiction could arise when a state 'affect[s] such persons or property by their acts or omissions'.[185] In an interpretative sense, this understanding of jurisdiction would sit as naturally within the *ICCPR* recourse to 'power' as it does within the *ECHR* use of 'authority'.

The concern for states with this approach would be that such a broad interpretation would burden consular authorities with a wide range of human rights obligations that could only be discharged through an increase in expenditure.[186] As the argument would go, if 'affect' was the operative word then obligations would not only extend to the provision of consular assistance in death penalty cases, but may also include issues of repatriation, forced marriage, child abduction and property rights. In the *Sandiford* case this 'floodgates' argument was evidently a concern for the UK Supreme Court who stated if jurisdiction were found:

> Logically, article 6 would be engaged in respect of every criminal charge, however serious or minor, brought against a British citizen in any overseas country in the world. Article 6 would become a compulsory world-wide legal aid scheme for impecunious British citizens abroad, presumably even for those who had decided to live permanently abroad.[187]

This concern is combined with the contemporary challenge which consular services face in managing the expectations of what their agents can provide to citizens. The growth in media technology has brought about a greater understanding of what services consular officials can offer. Okano-Heijmans also notes that '[c]itizens are becoming increasingly assertive, the media more engaged and news reporting more international'.[188]

Although certainly having merit, these concerns may be overstated given the particular nuances surrounding the extraterritorial application of human rights. The *ECHR* system of extraterritorial rights protection in particular has evolved to

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184 *Al-Skeini* [2011] IV Eur Court HR 99, 195 [30] (Judge Bonello).

185 *X v United Kingdom* (1977) 12 Eur Comm HR 73, 74.

186 This concern cannot be understated. In 2013 alone the UK Foreign and Commonwealth Office dealt with over 450 000 consular customers. This included 17 000 who received direct personal assistance: *Support for British Nationals Abroad: The Consular Service*, above n 13, 3.

187 *Sandiford* [2014] UKSC 44 (16 July 2014) [33] (Lord Carnwath and Lord Mance).

188 Okano-Heijmans, above n 38, 21.

frame a different level of obligations between spatial and personal jurisdiction. The exercise of spatial jurisdiction requires complete adherence to the *ECHR* and all of its rights.[189] Personal jurisdiction, on the other hand, allows for a division whereby

> the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the *Convention* that are relevant to the situation of that individual. In this sense, therefore, the *Convention* rights can be 'divided and tailored'.[190]

By delimiting the application of obligations to those 'relevant to the situation' consular agents may not be overburdened by positive human rights obligations which they simply cannot fulfil without incurring heavy expenses. As Miltner notes, the Court can now 'cherry-pick' which rights are applicable to the given situation.[191] Rights can also be tailored internally so that some obligations contained within them are not applicable extraterritorially. The concern remains that developing states may find any increased requirement to provide consular assistance to be an unreasonable financial burden. Perhaps as a departure point for any future interpretation of the right to consular assistance, courts and monitoring bodies could therefore focus on the perceived harm caused to an individual if a right was not provided. This would then suggest that an extraterritorial human right to consular assistance in death penalty cases would be recognised, whereas more trivial complaints would not.

The concern for states would then turn to what level of help would fulfil a right to consular assistance in death penalty cases. Would normal assistance at a police station or in a prison meet that threshold? Or would it need to be more invested and include, for instance, funding for legal representation, the submission of amicus curiae briefs and help in obtaining mitigating statements?[192] These are ultimately questions of the substantive application of the right to consular assistance and, of course, obligations of this nature can be discharged by a state if accused of a violation. It should be remembered that although jurisdiction was found in *X v Federal Republic of Germany*, *X v United Kingdom* and *V v Denmark*, the ECommHR continued in these cases to find that the relevant states' obligations under the *ECHR* had not been breached. With a framework in place for the balancing of the competing interests of states and the individual, the emergence of a human right to consular assistance in death penalty cases should not be seen as containing an impractical ideal.

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189 *Al-Skeini* [2011] IV Eur Court HR 99, 169 [138].

190 Ibid 168 [137].

191 Miltner, above n 137, 697.

192 In the *Sandiford* case it became apparent that the United Kingdom provided this level of support to some nationals facing the death penalty abroad. For one individual facing capital punishment charges in the United States the Foreign and Commonwealth Office spent over US$25 000 for the preparation of two briefs in 2003 and 2005. In a 2010 case a similar amount was spent on a submission for a different national facing charges in the United States. In Indonesia in 2012, the Foreign and Commonwealth Office had spent £17 000 preparing a brief for another UK national facing the death penalty for drug smuggling offences. *Sandiford* [2014] UKSC 44 (16 July 2014) [47] (Lord Carnwath and Lord Mance).

VI CONCLUSION

The provision of consular assistance for nationals facing execution abroad can prove to be the difference between life and death; between a long custodial sentence and the firing squad; between freedom and a potential miscarriage of justice. For many abolitionist states the emergence of a right to consular assistance will require no change in policy or procedure given that they already take major steps to assist nationals facing the death penalty abroad.[193] The emergence of this right may therefore only act to serve as an oversight for states, meaning that its real value is in consideration of whether it is being complied with and what nature of assistance is given. For the right to be meaningful, however, it requires a framework of enforceability that is currently absent. Given the contemporary understanding of extraterritorial human rights obligation, both within the *ECHR* and *ICCPR* systems of protection, there is little scope to attach obligations to consular officials with regard to nationals facing execution in a foreign state. A reaffirmation of previous understandings of extraterritorial obligations is needed for this right to be realised.

193 Amongst others, Mexico, Germany and Spain all provide financial support for legal representation of their nationals facing execution: Evidence to Foreign Affairs Committee, House of Commons, United Kingdom, 13 May 2014, [3.7] (Reprieve); *Support for British Nationals Abroad: The Consular Service*, above n 13, 56.