

**TRIAL OF FOREIGN NATIONALS: DISTINCTION BETWEEN
CONSULAR AND DIPLOMATIC ASSISTANCE TOWARD CAPITAL
PUNISHMENT, “A CASE STUDY OF AUSTRALIAN NATIONALS FACING
CAPITAL PUNISHMENT IN INDONESIA”**

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ABSTRACT

The movement of foreign nationals has recently entered a new level of relationship between government. A great number of foreign national's travel or live abroad than before is the main issues. The protection of nationals when they are abroad is accepted as an important function of government. States recognize each other's right to exercise protection over their own nationals. Protection is affected through a consular official assigned assign by the state origin. The state that appoints a consul is called the sending state while the state in which the consul works is called the “receiving” state. Sending state consul visit sending-state nationals in receiving-state jails. However, the question remains on how the government and the foreign nationals fulfilling the right and obligation to one another. One of the common situations is when foreign nationals being detained abroad. Furthermore, how consular and diplomatic functioned toward capital punishment that Herein lays the paradox, I would like to argue on how one country should fulfill its obligations under the international law (Vienna Convention on Diplomatic Relations and Vienna Convention on Consular Relations). Hence, the case illustrates how receiving and sending state fulfilling their responsibilities.

Key Words: *Consular Assistance and Diplomatic Assistance, Foreign Nationals, Capital Punishment*

A. Introduction

The movement of foreign nationals has recently enters a new level of relationship between government. Great number of foreign nationals travels or lives abroad than before is the main issues. At the bottom line, the border seems disappears and this phenomenon does not ignoring the facts that a foreign national still bound by its country jurisdiction and the country where they currently resides. When foreign nationals travel overseas, they have to inform and seek their government assistance.

Protection of nationals when they are abroad is accepted as an important function of government. States recognize each other's right to exercise protection over their own nationals. Protection is effected through a consular official

assigned assign by the state origin. The state that appoints a consul is called the sending state while the state in which the consul works is called the "receiving" state. Sending state consul visit sending-state nationals in receiving-state jails. They may help find legal counsel, attend and observe court proceedings, or assist in locating exculpatory information.¹

However, the questioned remind on how government and the foreign nationals fulfilling the right and obligation to one another. One of the common situation is when foreign nationals being detained abroad. Protection of nationals is a consul's most basic function. While this function has long been important, in recent years it has assumed greater share of a consul's time, and this for two reasons.² First is the high number of foreign nationals who travel or live abroad than was formerly, thereby increasing the need to assist them.³ Second, what may be described as a consul's more technical function.⁴

B. Discussion

B.1. Diplomatic and consular relations

B.1.2. Diplomatic Relations

In its simplest sense diplomacy comprises any means by which states establish or maintain mutual relations, communicate with each other, or carry out political or legal transactions, in each case through their authorized agents. Diplomacy in this sense may exist between states in a state of war or armed conflict with each other, but the concept relates to communication, whether with friendly or hostile purpose, rather than the material forms of economic and military conflict.⁵

Normally, diplomacy involves the exchange of permanent diplomatic mission, and similar permanent, or at least regular, representation is necessary for states to give substance to their membership of the United Nations and other major intergovernmental organization.⁶ Vienna Convention on Diplomatic Relations was based on existing practice and other parts constitute a progressive development of the law.⁷ Article 2 of the Vienna Convention on Diplomatic Relations provides that:

¹ John Quigley, William J.Aceves and S.Adele Shank, *The Law of Consular Access: A Documentary Guide* p.3 (2010), Routledge Research in International Law.

² Luke T Lee & John Quigley, *Consular Law and Practice 3rd Edition*, 2008, p.116

³ *Id.* p.116

⁴ *Id.*

⁵ Ian Brownlie, *Principle of Public International Law Fourth Edition*, 1990, Clarendon Press Oxford, p.346

⁶ *Id.*

⁷ *Id.* p.347 The importance of the principles of law embodied in the Vienna Convention was stress by the International Court of Justice in the case Concerning United States Diplomatic

“The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.”

There is no right of legation in general international law, though all independent states have the capacity to establish diplomatic relations. The mutual consent involvement may be expressed quite informally.⁸ Furthermore, nationality is the link between the individual and his or her state as regard particular benefits and obligations. It is also the vital link between the individual and the benefits of international law.⁹

The essence of diplomatic relations is the exercise by the sending government of state functions on the territory of the receiving state by license of the latter. Having agreed to the establishment of diplomatic relations, the receiving state must take steps to enable the sending state to benefit from the content of the license. The process of giving “full faith and credit” to the license results in body of “privileges and immunities”.¹⁰ The questioned remain on the double aspect of diplomatic representation: the sovereign immunity (immunity *ratione materie*) attaching to official acts of foreign states, and the wider and overlying, yet more conditional, elements of ‘functional’ privileges and immunities of the diplomatic staff and the premises.¹¹ Article 3 of the Vienna Convention on Diplomatic Relations provides:

1. The functions of a diplomatic mission consist *inter alia* in :
 - (a) representing the sending State in the receiving State;
 - (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
 - (c) negotiating with the Government of the receiving State;

and Consular Staff in Tehran (United States of America v. Islamic Republic of Iran, International Court of Justice 24 May 1980) In this case the Government of Iran was held responsible for failing to prevent and for subsequently approving the actions of militants in invading the United States mission in Tehran and holding the diplomatic and consular personal as ‘hostages’.

⁸ *Id.* p.348

⁹ Malcolm N. Shaw, *International Law* Seven Edition, Cambridge 2015 p.588; Furthermore Shaw mentioned that although international law is now moving to a stage whereby individuals may acquire rights free from the interposition of the state, the basic proposition remains that in a state-oriented world system, it is only the through the medium of the state that the individual may obtain the full range of benefits available under international law, and nationality is the key.

¹⁰ Ian Brownlie *Id. at p.348*: At some extend Ian Brownlie further explain that now discredited, for this situation has been that the diplomatic agent and the mission premises were ‘extraterritorial’, in other words for all purposes legally assimilated to the territorial jurisdiction of the sending state.

¹¹ *Id.*

(d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;

(e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

The traditional concept of diplomatic protection embraces a primary rule of conduct and an associated regime of responsibility if the rule be violated. The primary rule will usually be the international minimum standard, which establishes an objective standard of treatment of aliens on a State's territory, distinct from the national standard (the way a State treats its own people).¹²

B. Consular Relations

Consuls are in principle distinct in function and legal status from diplomatic agents. Though agents of the sending state for particular purposes, they are not accorded the type of immunity from the laws and enforcement jurisdiction of the receiving state enjoyed by diplomatic agents. Consular functions are very varied indeed and include the protection of the interest of the sending state and its nationals, the development of economic and cultural relations, the issuing of passports and visas, the administration of the property of nationals of the sending state, the registration of births, deaths, and marriages, and the supervision of vessels and aircraft attributed to the sending state.¹³ On the flip side, protection activity raises a number of legal questions. One is a receiving's State's obligation to permit protection activity. A receiving State must, in general, allow a consul to act on behalf of sending State nationals. That obligation may not apply, however, if the individual is simultaneously a national of the receiving State. When a consul makes representations to a receiving State on behalf of a sending State national, the issues arises of the standard of treatment a receiving State owes to sending State nationals. As for the sending State, the question arises whether it owes its

¹² Colin Warbrick and Dominic McGoldrick, *Current Developments Public International Law Quarterly*, at.726 last access on Nov 9, 2016 17:49 pm

¹³ Ian Brownlie, *Principle of Public International Law Fourth Edition*, 1990, Clarendon Press Oxford, p.361

nationals an obligation to provide protection, or whether it protects them only as a matter of grace.¹⁴

The consular function was regulated by the Vienna Convention on Consular Relations (VCCR) which adopted during conference by the United Nations On April 24, 1963 in Vienna. at the same time the UN conference adopted the text of two ancillary treaties. One was the Optional Protocol Concerning Acquisition of Nationality, which seek to prevent the acquisition of local nationality by consuls and members of their family. The other was the Optional Protocol Concerning Compulsory Settlement of Disputes, which requires states party to the VCCR to submit to the jurisdiction of the International Court of justice (ICJ) if sued by another state party for violation of the VCCR.¹⁵

The Vienna Convention on Consular Relations is an agreement among states whose subject matter – “Consular Relations” – is quintessentially State-to-State. Except for its final provisions, the convention’s articles all have to do with consular post.¹⁶ To ensure the consul’s capacity to assist the national, VCCR article 36 paragraphs 1 communication and contact with nationals of the sending state mentioned as follow¹⁷:

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

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse

¹⁴ *Consular Law and Practice 3rd Edition, Id.* p.116-117

¹⁵ *The Law of Consular Access: A Documentary Guide Id.* p.7

¹⁶ *Id.* p.80

¹⁷ Vienna Convention on Consular Relation (VCCR) article 36 Communication and Contact with Nationals of the Sending State paragraph 1

and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

The critical aspect of Art 36, paragraph 1 is the final sentence of subparagraph (b), namely, the obligation to inform a foreign national of the right of consular access.¹⁸ Art 36 (1) (b) clearly speaks of 'right' of the detained nationals. Those rights are created for a foreign national is buttressed by the activity of States party to the VCCR as they have implemented VCCR Art.36. Most states party that have taken a position on the matter have said that VCCR Art.36 accords rights to a foreign national.¹⁹ Of particular interest for the right of individuals is article 36, providing for certain obligations for competent authorities in the case of an arrest or detention of a foreign national, in order to guarantee the inalienable right to counsel and due process through consular notification and effective access to consular protection.²⁰ Finally, VCCR Article 36 (2) contemplates that the indicated rights of consuls and nationals are to be effectuated within the legal structure of the receiving state, but that the receiving state must ensure that the right can be realized.²¹

"The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

The law relating to consular access is found in a variety of documents issued at the international and national levels. At the national level, one finds a variety of documentary sources on consular access emanating from the different branches of government: legislation adopted by parliamentary bodies, regulations issued by executive branch and opinions rendered by court.²² In some states, the parliament

¹⁸ John Quigley, *Execution of Foreign Nationals in The United States: Pressure from Foreign Governments Against The Death Penalty*, ILSA Journal of International & Comparative Law Vol.4:589 p.591

¹⁹ *Consular Law and Practice 3rd Edition*, Id p.165

²⁰ Juan Manuel Gómez Robledo, *Audio Visual Library of International Law* p.2 www.un.org/law/avl (last visited November 7, 2016)

²¹ *The Law of Consular Access: A Documentary Guide*, Id. p.9

²² *Id.* p.11

adopts a general statute on consul and their functions. This practice is widely known followed in Eastern Europe. This legislation often includes provisions on consular access for arrested nationals. Many other states have no such general statute, but provide prescriptions relating to consular access in criminal procedure laws about arrest.²³

Since police agencies are found in different states at different levels of government, such regulations may be national or local in scope. Police agencies may issue regulations directed to their own officers, instructing them how to deal with foreign nationals when they arrest them. Foreign ministries may issue similar instructions to police for the same purpose.²⁴ Foreign minister also issue instructions to consuls they appoint at the consular post abroad. These instructions inform consuls on how to cope with the various situations that may confront them as they assist nationals under arrest.²⁵

“By definition, the establishment of consular relations between states takes place by mutual consent. The consent given to the establishment of diplomatic relations between two States implies, unless otherwise stated, consent to the establishment of consular relations. The severance of diplomatic relations shall not ipso facto²⁶ involve the severance of consular.²⁷ Consular functions are exercised by consular posts. They are also exercised by diplomatic missions in accordance with the provisions of the present Convention.”²⁸

A major protective function of consuls is to communicate with nationals who are in pre-trial detention on criminal charge, or who have been sentenced to prison after being convicted. This function has assumed growing importance as a result of the growth in travel for employment, business and pleasure.²⁹ Drug offences account for many arrests of foreigners. In 2006, six Australians were sentenced to death in Indonesia for plotting to smuggle heroin to Australia.³⁰

The task of serving nationals is daunting. For less developed States, their limited financial resources represent a serious obstacle. For developed States, cost

²³ *Id.*

²⁴ *Id.* p.12

²⁵ *Id.*

²⁶ *Ipsa facto*, in Latin “by the fact itself or by the very nature of the situation” Black’s Law Dictionary fifth edition 2016, p.428

²⁷ VCCR article 2 “Exercise of Consular Functions and Establishment of A Consular Post.”

²⁸ *Id.* Article 3 VCCR

²⁹ *Id.* at p.139

³⁰ The case will be discussed further on page 13; recent litigation on capital punishment of “Bali Nine Pairs” in the Supreme Court of Indonesia has stressed the obligations on how a state (Australia) provides consular assistance for its national whose committed crimes abroad. *See also* <https://www.theguardian.com/world/2015/apr/26/bali-nine-timeline-of-the-convicted-australian-drug-smugglers-story> for detail timeline (last visited November 8, 2016)

is also a factor. Many countries, conscious over the cost of regular consular posts, have expanded their networks of honorary consulates to provide protection to their nationals.³¹ However, a sending state has a right, over and against the receiving State, to be allowed to performed consular functions. VCCR article 5 (a) regards, as a consular functions, 'protecting in receiving State the interests of the sending State and of its nationals'. An obligation to allow consuls to provide protection to sending State nationals has long been recognized.³²

Consuls may not be entitled to protect a sending State national who rejects the consul's protection for political or other reasons. For some situations, treaties have permitted the exercise of consular protective power over non-willing nationals: treaties pertaining to extraterritorial rights and to the return of deserting seafarers. In the absence of a treaty provision, however, receiving States are typically reticent to accept 'protection' of nationals who do not desire it.³³

If an individual claims to be a victim of the violation of the standard and is unable to obtain redress in the local courts, his State may take action at the international level to seek rectification of what is now a breach of the State's right (the ill-treatment of one of its nationals). As indicated already, according to international law, the State of nationality (and only the State of nationality) may present such a claim; the claim is the State's own (and not an act of agency on behalf of the injured individual) and so it is for the State to decide whether or not to present any claim; while any reparation will be assessed in relation to the injury suffered by the individual, the award is an award to the State.³⁴ For a sending State national who desires protection, consuls are widely regarded as being under an obligation to provide it.³⁵ Even if a sending State is not obliged towards the receiving State to protect a sending State national, it may nonetheless have such an obligation towards the sending State national. Sending States typically do, as indicated, view themselves as owing an obligation to their nationals to provide the kinds of services that fall within the responsibility of consuls.³⁶

A sending State national's right to particular consular service is rarely raised in a judicial context. Consuls are regarded, for example, as required to notify next of kin in the event of the death of a co-national whose relatives are not otherwise aware of the death. However, if this were not done, it is unlikely that relatives

³¹ *Consular Law and Practice 3rd Edition, Id.* p. 117

³² *Id.* p.124 further Luke T Lee & John Quigley giving example of Canada , *Manual 2007*, stating "The right of a consular officer to intervene with local authorities on behalf on Canadian who appears to have been the victim of unlawful (under domestic or international law) discrimination or denial of justice is well established in international law.

³³ *Id.* p.125

³⁴ *Current Developments Public International Law Quarterly, Id.*

³⁵ *Consular Law and Practice 3rd Edition Id.* p.131

³⁶ *Id.* p.134

would seek to sue.³⁷ As for international law, and whether it obliges a sending State to protect its nationals, consular law as a discrete branch of international law does not concern itself with this matter. The issue falls rather under the more general law of State responsibility. States are under obligations to their own nationals under various provisions of human right law. Thus, a State is obliged to permit the entry of a national into the State's territory: 'No one shall be arbitrarily deprived of the right to enter his own country.'³⁸

Consular access to nationals in detention has long been a feature of consular practice. Many bilateral treaties on consular affairs, or on general relations, called for consular access. Consular access to nationals in detention might also be claimed on a 'most favored-nation' rationale, by reference to provisions of a bilateral treaty between the receiving State and a third state.³⁹ Even prior to the VCCR, States routinely instructed their consuls on how to assist arrested nationals. Consuls demanded access even in the absence of a relevant treaty provision.⁴⁰ Consideration of reciprocity motivated States to accept an obligation to allow consular access. Nonetheless, an obligation to allow consular access was accepted as a matter of customary law, at least to the extent of requiring a receiving state to allow either detained national or consular access the other, upon the request of either one. Some states, to be sure, viewed consular access as a practice but not as a matter of obligations.⁴¹

Since the adoption of the VCCR, there has been no disagreement that facilitating consular access to sending State nationals under detention is an obligation for a receiving State. Such was acknowledged even by states that had previously considered consular access as being afforded only as a matter of courtesy. Compliance with the consular access obligation has been strong in instances in which either a detained national or a consul request contact with the other. More problematic has been compliance with the obligation to inform a detained national about consular access. Some states have been more rigorous than others in providing this information. In some instances they have provided this information, but only after a certain delay.⁴² If in a given case a receiving state fails to inform a detained national of the right of consular access, or if it inhibits consuls from access to a detained national, an objection may be raised, either by the detained national or by the consul. If the national is convicted of a criminal offence, they may challenge the validity of the conviction. As for the

³⁷ *Id.*

³⁸ *Id.* p.136

³⁹ *Id.* p.140

⁴⁰ *Id.* p.141

⁴¹ *Id.* p.142

⁴² *Id.* p.159

sending state, it may make representation to the receiving state through diplomatic channels.⁴³

If a sending state is unable to gain resolution by interaction with the receiving State, it may pursue international judicial remedies, if appropriate jurisdiction can be found.⁴⁴ In addition to redress sought by the state, its national may seek redress through whatever process is available in receiving state, typically by raising the matter in the course of the criminal proceedings. If in the criminal cases, where foreign national challenged a conviction, or the introduction of certain evidence, following upon a failure to comply with information about consular access obligations the sending states may assist the national in pursuing such remedies, by representations to government of receiving State, or by participating in legal proceedings as an intervenor or *amicus curiae*, depending on what style of *participation* is afforded by the receiving State.⁴⁵

Finally, a foreign national can seek civil damages from a receiving State or its officials for violation of consular access obligations. A federal court of appeals in the United States said that such a suit may be maintained for VCCR art.36 violation under a US statute that allows redress for deprivation of right secured by laws. Like most treaties, the VCCR does not deal with the consequences of a violation. International norms governing the consequences of a treaty violation are found in the branch of international law known as the law of State responsibility. That body of international law has been invoked by decision makers dealing with violation of consular access obligations and will be cited in the following sections of this chapter.⁴⁶

III.Foreign Nationals Facing Capital Punishment Abroad

A. Bali Nine Case Background

The "Bali Nine"⁴⁷ are a group of Australian citizens who traveled to Bali in April 2005.⁴⁸ The Australian Federal Police (AFP) had alerted Indonesian

⁴³ *Id.*

⁴⁴ *Id.* p.161 Four cases have been filed in the ICJ by sending State alleging VCCR Art.36 violations against their nationals by receiving state. Paraguay filed against the US but withdrew its claim prior to a final judgment. Germany and Mexico filed, also against the US, in cases that did go to final judgment. Guinea filed against the Democratic Republic of Congo, in a case pending as of 2008.

⁴⁵ *Id.*

⁴⁶ *Id.* p.162

⁴⁷ *Bali* is referring to the Bali Island off the East coast of Java that is one of the most popular tourist destinations in the world. Nine is the total number of convicted drug smugglers. The case got the nickname from the local media. he Bali Nine comprised nine young Australians who were arrested in Bali

National Police (INP) officials in Denpasar, the capital of Bali, that the nine Australians were involved in a plan to smuggle heroin out of Bali. The AFP requested that the INP monitor the suspects and help them gather evidence, but also advised the INP to "take whatever action they deem appropriate" if they suspected that any of the Bali Nine were in possession of heroin during the observations.

On April 17th, 2005 Andrew Chan and four others arrested at Denpasar airport; Scott Rush, Michael Czugaj, Renae Lawrence and Martin Stephens found heroin strapped to their bodies.⁴⁹ Myuran Sukumaran, Tan Duc Thanh Nguyen, Si Yi Chen and Matthew Norman are arrested soon after in Kuta, preparing a second shipment. On September 27th, 2005 Prosecutors confirm all nine drug smugglers will be charged with possession and trafficking of heroin, carrying the death penalty. They were charged with violations of Articles 82(1)(a) and 78(1)(b) of Indonesia's Law No. 22 of 1997 (the "Narcotics Law").⁵⁰

On October 11th, 2005 the trials of the 'Bali Nine' begin at district court level.⁵¹ At the Denpasar District court level Andrew Chan and Myuran Sukumaran had death sentence. The other seven sentenced for life terms. They appeals to the High Court level: On April 26th, 2006 Bali Nine's ringleaders Andrew Chan and Myuran Sukumaran were shown no mercy by Bali's High Court. The two key known recruiters, organizers and enforcers of the doomed heroin smuggling operation had their death sentences reconfirmed. On the other hand, five had cut their life sentences to 20 years (Renae Lawrence; Matthew Norman; Si Yi Chen; Michael Czugaj; Tan Duc Thanh Nguyen).⁵²

A different judge upheld the life terms of both Martin Stephens and Scott Rush. At Supreme Court level, Martin Stephens appeals for life imprisonment got

⁴⁸ Rush v. Comm'r of Police (2006) 150 F.C.R. 165, 170 (Austl.)

⁴⁹ Writer cannot find accurate data on how much exactly the total heroin being found by the INP. The INP claim they found 8.3 kilogram of heroin, another source mentioned it was 330 grams, meanwhile U.N. Office on Drugs and Crime (UNODC), 2007 World Drug Report 17 (2007) claim that only stating that only 1 kilogram of cocaine was seized in Indonesia in whole 2005.

⁵⁰ Colman Lynch, *Indonesia's Use Of Capital Punishment For Drug-Trafficking Crimes: Legal Obligations, Extralegal Factors, And The Bali Nine Case*, 2009, Columbia Human Rights Law Review 40:523 p.525-526.

⁵¹ Timeline of Bali Nine can be access via <https://www.theguardian.com/world/2015/apr/26/bali-nine-timeline-of-the-convicted-australian-drug-smugglers-story> last access on October 12 2016, 12.17 pm

⁵² See also, Australian Radio transcript in <http://www.abc.net.au/pm/content/2006/s1625542.htm> last visited on Dec 4th, 2016 at. 13.00 pm; "The Bali High Court Judge who agreed to the sentence reductions for the five is Arsan Pardede. "In an interview in Denpasar today he explained why, saying that the five were only drug couriers and young and they needed another chance to restore their lives. He said that importing drugs to Indonesia was more dangerous than exporting them. He added that the 20-year term given to Schapelle Corby for importing drugs was also taken into consideration."

rejected. On August 26th, 2010 Scott Rush appears in court for his final appeal and resulted his death sentence reduced to life imprisonment.

As for Chan and Sukumaran Indonesia's Supreme Court in Jakarta, or Presidential clemency, are the only avenues of hope. However, the judicial review being refused by the Supreme Court judges as registered on verdict No.122 PK/PID.SUS/2010.⁵³ On 2012, both Chan and Sukumaran seeking appeals for clemency from Yudhoyono administrative.⁵⁴ On 2014 with the elect president Indonesia government authorities linked the resumption of executions to the fact that Indonesia was in a "state of emergency"⁵⁵ with regard to incidents of drug abuse and that some 50 young people were dying daily due to their addiction. The new administration also stated publicly that the government would deny any application for clemency made by people sentenced to death for drug-related crimes saying that "this crime warrants no forgiveness".⁵⁶

On January, 2015, bid of clemency for Chan and Sukumaran being rejected by the President. On February 2015, request for second judicial review rejected. Legal appeal fails when Jakarta court says it cannot examine the Indonesia president's decision to deny clemency. On March 3, 2015 Bali prosecutor Momock Bambang Samiarso says the pair will be transferred on 4 March to a penal island (Nusa Kambangan) to await execution;⁵⁷

B. Australian Perspectives on Capital Punishment of 'Bali Nine'

The public pressure on the Australian government to do something to assist Australian nationals has become significant in relation to Australian nationals who are detained, arrested, convicted and sentenced in foreign criminal justice

⁵³ In February 2007, Chan and Sukumaran submitted an appeal to the Constitutional Court. They claimed that certain provisions in the Narcotics Law which allow capital punishment as an optional penalty for various drug-related crimes, violate Articles 28A and 281(1) of the Indonesian Constitution of 1945 as amended (the "1945 Constitution"), as well as the International Covenant on Civil and Political Rights (the "ICCPR"), all of which protect the right to life. The Constitutional Court rejected the appeal

⁵⁴ Timeline of Bali Nine *Id.*

⁵⁵ See also, Officials President Joko Widodo's speech during the opening of the national coordination meeting on tackling drugs in Jakarta, 4 February 2015, available in Bahasa Indonesia only http://www.setneg.go.id/index.php?option=com_content&task=view&id=8712&Itemid=26 link:

⁵⁶ See also, Amnesty International "Flawed Justice Unfair Trials and Death Penalty in Indonesia" First published in 2015 by Amnesty International Ltd Peter Benenson House 1 Easton Street London WC 1X 0DW United Kingdom; can be accessed at <https://www.amnesty.org/en/documents/asa21/2434/2015/en/>

⁵⁷ Timeline *Id.* April 24th 2015, Embassies representing prisoners on death row summoned to meeting at Cilicap, near the island prison; Chan's and Sukumaran's lawyer Peter Morrissey says it's an "ominous" sign. On April 26 Lawyers say Chan and Sukumaran have been given 72 hours' notice of execution. April 29, 2015: Chan and Sukumaran among eight people executed for drug offences.

system.⁵⁸ Australia tried diplomatic means to avoid capital punishment for the Bali Nine before sentencing occurred. Specifically, in December 2005 Australia's Foreign Minister requested that Indonesia's Attorney General not seek the death penalty in the Bali Nine case. Similar appeals were made by the Australian Embassy in Jakarta to the Indonesian Foreign Minister and by the Australian Attorney General and Minister for Justice and Customs to the Indonesian Attorney General.⁵⁹

Critical in this regard is Australia's right of diplomatic protection, which is the right of a state to take up the claim of one of its nationals and assert his or her rights against another state. The content of this right has shifted slightly in recent years, and additional rights and duties inhere to the state by virtue of different treaties that may be available to provide further protection to Australians overseas.⁶⁰

These treaties include consular agreements, mutual legal assistance treaties and prisoner transfer agreements. In the face of such national court decisions, Australia is left to assert its opposition to the death penalty through diplomatic channels. Australia's position is complicated here because it voiced no opposition to the imposition of the death penalty against Indonesians convicted of the Bali bombing terrorist attack, which killed 202 people, including 88 Australians. To then oppose the death penalty for its own nationals leaves Australia open to charges of inconsistency and hypocrisy.⁶¹ A consistent approach to the imposition of the death penalty would seem likely to render Australia's interventions on behalf of 'Bali Nine' more compelling.⁶²

Countries enter into mutual criminal assistance agreements in order to combat transnational crime, particularly by providing information relevant to criminal prosecutions or investigations. Australia has such an agreement with Indonesia. While mutual criminal assistance treaties are not useful for the protection of individuals abroad, their operation can certainly impact on what happens to those individuals more generally.⁶³ In the early stages of negotiations, Australia's Foreign Minister acknowledged that Indonesia was reluctant to allow its drug trafficking offenders to benefit from more lenient sentences or parole

⁵⁸ Natalie Klein "*Legal Parameters of Australia's Protection of Its Citizens Abroad*" can be access http://law.unimelb.edu.au/data/assets/pdf_file/0003/1703514/35_1_4.pdf (last visited November 7, 2016)

⁵⁹ Colman Lynch, *Id.* p.527

⁶⁰ Natalie Klien *Id.* p.135

⁶¹ *Id.* p.151

⁶² *Id.*

⁶³ *Id.* p.152

conditions in other countries. In particular, it is unlikely that the treaty would be applicable to prisoners on death row.⁶⁴

This case has underlined the difficulties that Australia faces when it seeks to press for its own position on international human rights standards to be applied in other countries, in particular its position on the death penalty. Such arguments may be pursued through a country's national court system. It is only if this avenue has been exhausted that Australia may consider pursuing the matter before an international court.⁶⁵ This latter option is only available if a state has consented to the jurisdiction of an international court. Indonesia, however, has not accepted the compulsory jurisdiction of the International Court of Justice. Diplomatic channels and the exercise of consular rights have been the primary mode for Australia to offer assistance to 'Bali Nine' case.

Outside the Indonesian judicial system, Australia could appeal to the International Court of Justice (ICJ), arguing that the capital punishment of its citizens is an imposition on its sovereignty.⁶⁶ While it might be expected that a government would make energetic representations on behalf of its own citizens who have been sentenced to death in another country, it will hardly help to persuade the local audience when the government does not express similar concern in relation to nationals of other countries who have been sentenced to death or indeed makes comments acquiescing in or even welcoming the imposition of the death penalty on others.⁶⁷

Hence, the condition putting the Australian government in dilemma and it will lead to the inconsistency of Australia perspectives on capital punishment under 'Bali Nine' and 'Bali Bombing' which being supported previously. Likewise, Indonesia has not accepted the compulsory jurisdiction of the International Court of Justice. The only options left for Australia government is to provide assistance on diplomatic channels and the exercise of consular rights.

C. Indonesia Perspectives on Capital Punishment of 'Bali Nine'

⁶⁴ *Id.*

⁶⁵ *Id.* p.153

⁶⁶ *Id.*p.530 Colman further discuss "this was suggested in the case of Van Nguyen, an Australian citizen executed in Singapore in 2005 for drug trafficking, and the Australian government did not support the idea. An ICJ challenge would also face many hurdles. It would be difficult to challenge an Indonesian court's jurisdiction in a case concerning conduct that took place in Indonesia. Moreover, the ICJ has no power to issue binding rulings unless both parties submit to it-it is extremely unlikely that Indonesia would submit to such an arrangement and allow the possibility of an injunction by the ICJ. Following an execution, Australia could claim that the execution was an international wrongful act and seek remedies such as an apology or restitution. Such a claim would be seen as an extreme measure, and is one Australia is unlikely to make."

⁶⁷ Andrew Byrnes, *The Right to Life, The Death Penalty and Human Rights Law: An International and Australian Perspective*; Electronic: SSRN-ID1366566 copy available at: <http://ssrn.com/abstract=1366566> p.40

The Indonesian Constitutional Court's decision on the constitutionality of the death penalty has attracted the most attention from the international community. three Australian citizens involved in a drugs smuggling syndicate, known as 'the Bali 9', and two Indonesian nationals filed for constitutional review of the death penalty contained in the Narcotics Law.⁶⁸

According to the applicants, the imposition of the death penalty was contrary to Article 28A and Article 28 (1) of the Constitution, which states that the right to life is a human right cannot be reduced under any circumstances.⁶⁹

The right to life, the right not to be tortured, the right of freedom of thoughts and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under retroactive law are human rights that cannot be reduced under any circumstances.⁷⁰

The applicants based their arguments on the Universal Declaration of Human Rights (UDHR) and Article 6 of the International Covenant on Civil and Political Rights (ICCPR), as well as several other conventions, such as the current trend in the international community to abolish the death penalty.⁷¹ According to these arguments, the death penalty is contrary to the philosophy of punishment in Indonesia and the deterrent effect of the death penalty in reducing the number of criminal acts is doubtful.⁷²

⁶⁸ Amnesty International, *Id.* p.17 The death penalty has been a part of Indonesia's legal system since before the country's independence in 1945, and can be imposed for a broad range of crimes. However it is usually imposed for murder with deliberate intent and premeditation; drug-related crimes (producing, processing, extracting, converting or making available narcotics); and "terrorism". Under international law, the death penalty can only be imposed for the "most serious crimes" which has been most recently interpreted to refer to "intentional killing"

⁶⁹ Pan Mohamad Faiz, *The Protection Of Civil And Political Rights by The Constitutional Court Of Indonesia*, Indonesia Law Review (2016) 2 : 158-179 ISSN: 2088-8430 | e-ISSN: 2356-2129 web <http://dx.doi.org/10.15742/ilrev.v6n2.230> last access : Nov 13th, 2016 at 1.32 pm; The Indonesian Constitutional Court's decision on the constitutionality of the death penalty has attracted the most attention from the international community. In the Death Penalty (2007) case,(52 Constitutional Court of Republic of Indonesia, "Decision No. 2-3/PUU-V/2007.") three Australian citizens involved in a drugs smuggling syndicate, known as 'the Bali 9', and two Indonesian nationals filed for constitutional review of the death penalty contained in the Narcotics Law. According to the applicants, the imposition of the death penalty was contrary to Article 28A and Article 28I(1) of the Constitution, which states that the right to life is a human right cannot be reduced under any circumstances.

⁷⁰ Constitution of the Republic of Indonesian 1945 , Art. 28I(1)

⁷¹ See Also, John Quigley, *Execution Of Foreign Nationals In The United States: Pressure From Foreign Governments Against The Death Penalty*, ILSA Journal of Int'l & Comparative Law Vol.4 p.589 Quigley mentioned that In Western Europe, not only is capital punishment not practiced, but also the use of capital punishment is deemed a violation of human rights. A European treaty outlawing capital punishment as a human rights violation enjoys wide adherence.

⁷² Pan Mohamad Faiz ; *Id.* p.172

The Constitutional Court found that foreign nationals do not have the legal standing to file a case with the Indonesian Constitutional Court. Given that two of the applicants were Indonesian citizens, however, the Constitutional Court examined the main case and provided legal reasons. The main constitutional question in this case was whether or not human rights, as set forth in Article 28(1) of the Constitution known as non-derogable rights, are absolute rights that cannot be reduced under any circumstance. Based on the original intent of Article 28J of the Constitution, the Court reasoned that everyone has the obligation to respect other's rights in exercising their own human rights, so that human rights, according to the Indonesian Constitution, are not absolute.⁷³

In other words, human rights are subject to limitation as far as the restrictions are established by laws and fulfil fair demand in accordance to Article 28J. The Court referred its arguments to international legal instruments, in particular to Article 6(2) of the ICCPR that explains that the right to life is not absolute, but it can still be applied to 'the most serious crimes in accordance with the law in force at the time of the commission of the crime...' Indeed, Indonesia is not a State party to the Second Optional Protocol of the International Covenant on Civil and Political Rights, which aims to abolish the death penalty.⁷⁴

The next question is whether or not drug crimes constitute one of the most serious crimes and deserving of the death penalty. The Constitutional Court reasoned that Indonesia is obliged to implement international law as a State party to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988). According to the Court, the Narcotics Law imposes the death penalty for limited criminal acts, considered in accordance with Article 3(6) of the Convention, with the objective 'to maximize the effectiveness of law enforcement measures in respect of those offences, and with due regard to the need to deter the commission of such offences.'⁷⁵ Thus, the Court has included

⁷³ Constitutional Court of Indonesia Officials news can be seen <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=10521#.WCisZ2orKUK> last access on Nov 13th, 2016 at 13.48 pm; Constitutional Court of Indonesia "Decision No. No. 2-3/PUU-V/2007 [2007], p.426

⁷⁴ Pan Mohamad Faiz ; *Id.* p.172

⁷⁵ Pan Mohamad Faiz; further analyze that "The Constitutional Court decisions related to the right to life have created pros and cons. Human rights activists are the loudest group opposing the death penalty. Based on the two cases above, the Constitutional Court should be more selective in assessing criminal acts categorized as the most serious crime. The arguments regarding what criteria distinguish the most serious crimes should not be based on national laws and psychological assumptions only, but also held to a standard based on international law. A violent crime of theft, however, cannot be equated with drug crimes, genocide crimes or crimes against humanity classified as the most serious crime. In the future, the Constitutional Court will be faced with different applications for constitutional review of death penalty provisions, which are spread throughout several laws, such as in the Anti-Corruption Law, the Anti-Terrorism Law and the Criminal Code, e.g., crimes against state security or friendly countries, aircraft piracy and

the possession of narcotics as one of the most serious crimes, along with the crime of genocide and crimes against humanity, because these crimes ‘adversely affect the economic, cultural and political foundation of society,’ and also cause ‘a danger of incalculable gravity.’⁷⁶ Therefore, the Court ruled that the death penalty provisions in the Narcotics Law remain constitutional.⁷⁷

However, the decision was not unanimous. One Constitutional Justice argued that foreign nationals should be given legal standing; another Constitutional Justice said that the death penalty provisions in the Narcotics Law were unconstitutional; and two other Constitutional Justices argued that foreign nationals should have legal standing and that the death penalty provisions were contrary to the 1945 Constitution.⁷⁸

C. Conclusions

On final notes, this lead us to the biggest questioned whether Indonesia in case of ‘Bali Nine’ has complied with its obligations under the VCCR? In essence of the critical aspect of Article 36 paragraph 1 is the final sentence of subparagraph (b) namely, the obligation to inform a foreign national of the right of consular access. Indonesia has complied with Australian governments. Indonesia has maintained the communication via the consular access and Australian embassy. Recalling that the AFP was the first one who make the first move to inform the INP. Further and more troublesome gaps appear in the context of agency-to agency cooperation. Law enforcement authorities are regularly in contact with each other on the basis of formal and informal arrangements, and these may be the subject of various forms of regulation, which may include guidelines on the extent of cooperation permitted in (potential) capital cases.⁷⁹ Indonesia as a receiving states has provides Australia nationals a right to communicate with consul properly. By analogy, Australia automatically acknowledges that their nationals were being criminally charge under Indonesia

premeditated murder. Furthermore, the Constitutional Court affirmed that the right to life can be limited under Article 28J of the Constitution, so that the death penalty can be imposed only on the most serious crimes. However, it is clear that the Constitutional Court is oversimplifying in applying the standards or criteria for the most serious crime, as seen in the Constitutional Court decisions in the Death Penalty cases in 2007 and 2012. In this context, the Court should not use the same legal reasons for different types of crimes.” p.173

⁷⁶ Constitutional Court of Republic of Indonesia, “Decision No. 2-3/PUU-V/2007,” p. 426.

⁷⁷ Natalie Zerial argued that this decision is based on the balance between the rights of individuals and the public welfare that become the characteristic of human rights debate in Asia. See Natalie Zerial, “Decision No. 2-3/PUU-V/2007 [2007] (Indonesian Constitutional Court),” *Australian International Law Journal Year 2007 Vol. 14* (2007), p. 217.)

⁷⁸ See also; Dissenting opinions of the Constitutional Justices, Constitutional Court of Republic Indonesia, “Decision No. 2-3/PUU-V/2007,” p. 434-471.

⁷⁹ *Id.* p.38

criminal law. Consular assistance which provided by Australian government can be critical for defendants to gather evidence including presenting mitigating factors in 'Bali Nine' cases. Foreign nationals held in pre-trial detention should be given facilities to communicate with and receive visits from representatives of their government, so that representatives can assist detainees with defense measures such as providing, retaining or monitoring the quality of legal representation, obtaining evidence in the country of origin, and monitoring the conditions under which the accused is held. Which in 'Bali Nine' case.

The role of consuls in assisting nationals stress the importance of assisting incarnated nationals. Consuls may provide a national with the names of local lawyers. Which in the 'Bali Nine' case every member being represented by their very own lawyers during the district court, high court and Supreme Court. Furthermore, the legal representation goes beyond Constitutional Court and bid of clemency before the president of Indonesia. On the flip side, in case of Capital punishment Australia has a right for objection. It is necessary and desirable for Australia to cooperate closely in criminal law enforcement with countries in its immediate region, but the continuing use of the death penalty by some of those countries gives rise to difficult issues.⁸⁰ How far should cooperation be provided where there is a possibility that it may lead to the prosecution of persons for capital offences? The imposition of the death penalty is not a violation of customary international law, although states may sign treaties that prohibit its use under national law. Nonetheless, a death sentence may entail a violation of international human rights law if, for example, it is imposed arbitrarily, due process guarantees are not upheld, or it amounts to inhuman or degrading treatment or punishment.⁸¹

Due process of law, as set forth in the ICCPR, derives from the inherent dignity of the human person. To ensure due process of law, a defendant must be able to assert his rights and defend his interests in the same manner as any other individual. Thus, legal proceedings must recognize and resolve all elements of inequality that may arise in criminal proceedings. Indeed, "the presence of real' disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests."⁸² Article 14 of the ICCPR establishes minimum due process guarantees to those subject to criminal proceedings that can be amplified in light of other international agreements. With respect to detained foreign

⁸⁰ Andrew Byrnes, *Id.* p.37

⁸¹ Natalie Klien *Id.* p.150

⁸² William J. Aceves, *The Right of Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, *The American Journal of International Law*, Vol. 94, No. 3 (Jul., 2000), available online <http://www.jstor.org/stable/2555324>

nationals, the right to communicate with consular officials will significantly contribute to a defense and help to ensure that any proceedings will be accomplished with greater adherence to the law and respect for personal dignity. For these reasons, the Court held that the individual's right to information established in Article 36(1) (b) of the Vienna Convention facilitates effective implementation of the right to due process of law as set forth in Article 14 of the ICCPR.⁸³

And so, under international law, the death penalty can only be imposed for the “most serious crimes” capital punishment and the International Covenant on Civil and Political Rights Art 6(2):

“In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes.” Threshold necessary to satisfy the requirements of Article 6(2) “Most serious crimes” should be interpreted in the most restrictive and exceptional manner possible; The death penalty should only be considered in cases where the crime is intentional, and results in lethal or extremely grave consequences States should repeal legislation allowing capital punishment for economic, non-violent or victimless offences”.

Drug related offences do not meet the threshold of “most serious crimes” under International Human Rights Law. The death penalty, however, raises debatable issues. In any event, the trend toward abolition of the death penalty is clear.⁸⁴ Further, as repeatedly noted by international bodies, drug trafficking does not meet the threshold of “most serious crimes” for which the death penalty can be imposed under international law.

References

- Brownlie, Ian. 1990. *Principle of Public International Law Fourth Edition*, Clarendon Press Oxford
- Quigley, John, Aceves William J. and Shank, S.Adele. 2010. *The Law of Consular Access: A Documentary Guide*, Routledge Research in International Law.
- Lee, Luke T & Quigley, John. 2008. *Consular Law and Practice 3rd Edition*

⁸³ *Id.* “the failure to inform a foreign national of the right to seek consular assistance affects due process guarantees. In cases involving the imposition of the death penalty, this failure also constitutes a violation of the right to be free from arbitrary deprivation of life, as set forth in various agreements. Such violations give rise to international responsibility and the obligation to provide reparations.”

⁸⁴ Ved P. Nanda, *Bases for Refusing International Extradition Requests-Capital Punishment and Torture*; Fordham International Law Journal Vol.23 p.1396

Trial of Foreign Nationals: Distinction Between Consular and Diplomatic Assistance Toward Capital Punishment, "A Case Study Of Australian Nationals Facing Capital Punishment In Indonesia" Afandi Sitamala

Shaw, Malcolm N. 2015. International Law Seven Edition, Cambridge

Warbrick, Colin and McGoldrick, Dominic. *Current Developments Public International Law Quarterly*, at.726 last access on Nov 9, 2016

Quigley, John. *Execution of Foreign Nationals in The United States: Pressure from Foreign Governments Against The Death Penalty*, ILSA Journal of International & Comparative Law Vol.4:589

Robledo, Juan Manuel Gómez. *Audio Visual Library of International Law* p.2 www.un.org/law/avl (last visited November 7, 2016)

Colman Lynch, *Indonesia's Use Of Capital Punishment For Drug-Trafficking Crimes: Legal Obligations, Extralegal Factors, And The Bali Nine Case*, 2009, Columbia Human Rights Law Review 40:523

Timeline of Bali Nine can be access via <https://www.theguardian.com/world/2015/apr/26/bali-nine-timeline-of-the-convicted-australian-drug-smugglers-story> last access on October 12 2016, 12.17 pm

Australian Radio transcript in <http://www.abc.net.au/pm/content/2006/s1625542.htm> last visited on Dec 4th, 2016 at. 13.00 pm; "The Bali High Court Judge who agreed to the sentence reductions for the five is Arsan Pardede Officials President Joko Widodo's speech during the opening of the national coordination meeting on tackling drugs in Jakarta, 4 February 2015, available in Bahasa Indonesia only web link: http://www.setneg.go.id/index.php?option=com_content&task=view&id=8712&Itemid=26

Natalie Klein "Legal Parameters of Australia's Protection of Its Citizens Abroad" can be access http://law.unimelb.edu.au/data/assets/pdf_file/0003/1703514/35_1_4.pdf (last visited November 7, 2016)

Andrew Byrnes, *The Right to Life, The Death Penalty and Human Rights Law: An International and Australian Perspective*; Electronic: SSRN-ID1366566 copy available at: <http://ssrn.com/abstract=1366566>

Pan Mohamad Faiz, *The Protection Of Civil And Political Rights by The Constitutional Court Of Indonesia*, Indonesia Law Review (2016) 2 : 158-179 ISSN: 2088-8430 | e-ISSN: 2356-2129 web <http://dx.doi.org/10.15742/ilrev.v6n2.230> last access : Nov 13th, 2016 at 1.32 pm

John Quigley, *Execution Of Foreign Nationals In The United States: Pressure From Foreign Governments Against The Death Penalty*, ILSA Journal of Int'l & Comparative Law Vol.4

Constitutional Court of Indonesia Officials news can be seen <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=10521#.WCisZ2orKUK> last access on Nov 13th, 2016 at 13.48 pm; Constitutional Court of Indonesia “Decision No. No. 2-3/PUU-V/2007 [2007]”

Constitutional Court of Republic of Indonesia, “Decision No. 2-3/PUU-V/2007,”

Dissenting opinions of the Constitutional Justices, Constitutional Court of Republic Indonesia, “Decision No. 2-3/PUU-V/2007”

William J. Aceves, *The Right of Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, The American Journal of International Law, Vol. 94, No. 3 (Jul., 2000), available online <http://www.jstor.org/stable/2555324>