Chapter 1

Evolution of Foreign Service Activities in Treaties and National Legislation



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Abstract

This study examines the chief trends in recent changes in diplomatic law, driven by the evolution of international law – most notably, the development of human rights protection systems that profoundly affect the internal legal order of states – as well as the demands of economic development and the increasing international movement of individuals. The analysis focuses on selected changes in consular law norms at both the international and domestic levels. These include issues such as access to consuls for persons deprived of liberty, civil status records, notarial functions, legalisation of documents, maritime activities, administrative tasks, and voting abroad. In principle, the scope of consular functions may be modified and expanded to meet the needs of the receiving state, provided the functions are grounded in international law or are not opposed by the receiving state. Considering the breadth of the subject, this analysis is confined to selected consular functions where the evolution of norms is particularly evident.

Keywords: diplomatic protection, consular care, consular legalisation of foreign documents, right of access to the consul, civil status consular acts, election-related consular activities, maritime activities of consuls

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1. Introduction

Both diplomatic and consular laws are among the oldest branches of cross-border legal frameworks. However, these two fields differ significantly in their construction. Diplomatic law is a classical field of international law, whereas consular law extends beyond the bounds of international law. This is because consular law results from the interplay between international law and the domestic legal systems of both the sending and receiving states, which jointly determine the legal status and scope of consular activity.

A defining characteristic of any field of law is its evolution over time, although the pace and extent of change are not uniform. Importantly, international law exhibits a relatively high degree of permanence over time. This is largely because the creators and addressees of its norms are typically the same entities – sovereign states. The process of developing written international law is inherently lengthy and often involves complex international negotiations, even when codifying existing customary norms.[1] Consequently, fields such as diplomatic law are characterised by a fundamental stability in their norms.

Consular law, while incorporating general norms of an institutional nature (e.g. immunities or the appointment of consuls) grounded in international law, is predominantly based on domestic law and thus, subject to considerable variability over time. This variability primarily pertains to all activities performed by consuls on behalf of the sending state within the territory of the receiving state. Despite occurring in the receiving state, these administrative and civil law services are *de jure* performed within the legal jurisdiction of the sending state, that is, according to the rules of this state's legal system. Any change in the legal framework of the sending state that governs these activities typically results in an automatic adjustment in the scope of consular duties. Consequently, changes in the consular law norms of a particular sending state are often a direct and predictable outcome of amendments to its civil or administrative laws. Therefore, these changes are neither rare nor unexpected.

Moreover, the scope of changes in consular law is shaped by international law, and particularly in recent decades, European law. International legal norms often contribute to enhancing the protection of individuals through consular activities, thereby raising protective standards. This aligns with the evolving, human-centred transformation of the institution of diplomatic protection. However, international law also plays an eliminative role in some areas of consular activity. It can render certain consular functions superfluous by introducing liberalised solutions in legal

1 The development of customary law within classical international law relies on the enduring application of specific practices that gradually acquire legal recognition. In the areas under analysis, this repetition and longevity are particularly evident, as the foreign services of certain nations have engaged in these practices for centuries – a subject that has been extensively examined in scholarly research.

transactions, such as those governed by treaty-based arrangements. These developments significantly modify the scope of a state's consular obligations over time.

Notably, although the scope of legal obligations under diplomatic law, as prescribed by international law, is generally uniform or nearly identical across states, the scope of obligations under consular norms varies considerably. In practice, these obligations differ significantly in various bilateral relationships. This disparity stems from the differing nature of the sources of law governing the two fields.

2. Sources of Diplomatic Law Versus Sources of Consular Law

Diplomatic law is characterised by its reliance on a single primary treaty source. The Vienna Convention on Diplomatic Relations[2] serves as a foundational document of a quasi-constitutional nature in this field. It addresses all institutional aspects of diplomatic practice, including the establishment of diplomatic relations, appointment and ranks of heads of missions, size of diplomatic personnel, as well as immunities, privileges, and facilities.

However, the Convention does not provide a detailed regulation of diplomatic functions – it only defines them in broad terms. This lack of specificity is not surprising, considering that the tasks of diplomats are often shaped by political considerations[3] and conducted with a degree of discretion. The nature of these activities makes it difficult to formalise or publicise their mechanisms, assuming such mechanisms exist at all in a precise or repeatable form. Diplomatic functions are inherently adaptive, responding to current needs, and influenced by a range of factors. Consequently, it is unsurprising that neither the Convention nor any other instrument of international law establishes a detailed catalogue of diplomatic functions. Additionally, bilateral diplomatic conventions, unlike their consular counterparts, do not play a role in diplomatic law. At most, states may enter into brief bilateral agreements to establish diplomatic relations, however, once executed, these agreements typically lack independent normative value.

2 Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961 (UNTS 1965, vol. 500, No. 7310, pp. 95–222).

3 German jurisprudence has historically employed the concept of political appraisal when addressing foreign service activities. See Judgement of the Reichsgericht, 22 June 1937, ref. III 213/36, Fontes Juris Gentium, vol. II, p. 77.

Customary international law naturally plays a significant role in diplomatic law, particularly in addressing issues not fully regulated by the Vienna Convention.[4] However, regarding diplomatic functions, the existence of precise customary law norms is difficult to assert.

An exception to the sources of law outlined above is found in regional treaties within the Latin American region, specifically concerning the institution of diplomatic asylum.[5] These treaties represent a unique and specialised source of law. Nonetheless, their lack of precision, combined with the inherently political nature of asylum, raises numerous interpretative challenges – as evident in both state practice[6] and international jurisprudence.[7]

The role of domestic law in diplomatic law is limited, serving primarily to implement and occasionally elaborate on international law norms. For instance, the domestic norms of the sending state[8] typically govern diplomatic ranks and the appointment process for heads of mission. However, the domestic norms of the receiving

4 For example, the recognition of a diplomat as *persona non grata* (in the ordinary mode, which equires the diplomat's departure from the receiving state within a reasonable period – typically interpreted as 2-3 weeks) is only partially regulated under Art. 9 of the Vienna Convention. Additionally, states sometimes employ the 'extraordinary mode', rooted in international customary law, which mandates immediate departure from the receiving state, typically within 24–48 hours (Satow, 1922, p. 378). In such extraordinary cases, the deadline is occasionally explicitly stipulated (Sutor, 2019, p. 217).

5 Simultaneously, it is noteworthy that within the doctrine, there is an effort to distinguish the classical right of 'diplomatic asylum' (droit d'asile), which grants protection to individuals facing political persecution, from the 'right of refuge' (droit de refuge), which is often collective and temporary in nature, applied in emergency situations (Salmon, 1996, pp. 233 et seq.). However, the underlying mechanism remains identical, and in practice, it is impossible to differentiate these forms of assistance within a diplomatic mission (as was the case during the provision of asylum in the Spanish Civil War of the 1930s – see: von Glahn, 1965, pp. 246–247). Therefore, Professor Moore's observation on the ambiguity of the concept appears to remain pertinent: 'No legal term in common use is perhaps so lacking in uniformity and accuracy of definition as the 'right of asylum'' (Moore, 1906, p. 291).

6 See UN General Assembly, Question of Diplomatic Asylum: Report of the Secretary-General, 22 September 1975, A/10139 (Part II).

7 See Asylum Case (*Colombia v. Peru*), Judgement of 20 November 1950, ICJ Rep. 1950, pp. 266–389; Request for Interpretation of the Judgement of 20 November 1950 in the Asylum Case, Judgement of 27 November 1950, ICJ Rep. 1950, pp. 395–404; Haya de la Torre Case (*Colombia v. Peru*), Judgement of 13 June 1951, ICJ Rep. 1951, pp. 71–83. Currently, the issue of diplomatic asylum is once again before the International Court of Justice (ICJ). Two cases, essentially involving a claim and counterclaim (Embassy of Mexico in Quito (*Mexico v. Ecuador*) and Glas Espinel (*Ecuador v. Mexico*) were registered in 2024 and are under consideration in 2025.

8 See, for example: the Polish Act of 21 January 2021, on Foreign Service (consolidated text: Official Journal – Polish promulgator of legal acts, 2024, item 1691).

state generally mirror international law provisions related to immunities, privileges, and entitlements, ensuring proper application of these norms at the national level.[9]

The development of overly complex domestic laws in this area can create barriers, potentially resulting in contradictions with international law or an inability to effectively address situations within the international legal framework.[10] Such complications may ultimately diminish a state's capacity to fully leverage international legal norms. Therefore, considering the normative simplicity of the diplomatic law system, combined with the ever-changing nature of political practices among states, significant evolution of norms governing diplomatic functions is unlikely. Instead, only minor adjustments to their scope can reasonably be anticipated.

Consular law differs significantly from diplomatic law in terms of its legal sources. As an area of international law, consular law exemplifies a multi-source framework. The Vienna Convention on Consular Relations,[11] often considered fundamental to this field, plays a markedly different role from the Vienna Convention on Diplomatic Relations. Although the Diplomatic Convention serves as a comprehensive treaty regulating diplomatic matters universally,[12] the Consular Convention is not universally applied in many bilateral state arrangements. In such cases, detailed consular issues are addressed through bilateral consular conventions, which are particularly numerous among Central European countries.[13] These conventions contain precise provisions ensuring the performance of various consular functions, which are intended to assist citizens and linked to the execution of the sending state's domestic laws. In the absence of a bilateral agreement, customary international law norms directly govern consular functions. These norms are partly reflected in the European

9 See, for instance: the relevant provisions of the Polish Code of Civil Procedure (Journal of Laws of 2024, item 1568, Arts. 1111–1115), which address immunities, including diplomatic immunities. By contrast, the Hungarian Code of Civil Procedure (2016. évi CXXX, törvény a polgári perrendtartásról) states in Art. 632 that 'this act shall not affect the scope of diplomatic or other immunity or the specific procedural rules pertaining to diplomatic or other immunity'.

10 For example, the emerging restrictions in the sending state's domestic law regarding the appointment of the same person as the head of mission for other states effectively limit the sending state's own actions concerning norms established by public international law (see Art. 6 of the Vienna Convention on Diplomatic Relations).

11 UNTS 1969, vol. 596, No. 8638, p. 261.

12 Except, as noted earlier, for the specific details concerning diplomatic asylum.

13 For example, Poland has 40 bilateral consular conventions, many of which were concluded after the Vienna Convention entered into force with respect to Poland. Similarly, Czechia, despite being much smaller than Poland, has a comparable number of such agreements (see: Fenyk and Ondruš, 1997, pp. 146–147). Russia, by contrast, has approximately 80 such conventions (Plotnikova, 1999, p. 25). Virtually every country worldwide has at least a few such agreements; even those that have not concluded new ones since their accession to the Vienna Convention (e.g. Germany) continue to maintain and effectively apply bilateral treaties concluded earlier.

Convention on Consular Functions,[14] although the formal scope[15] of this treaty remains limited.[16]

The Vienna Convention on Consular Relations does not explicitly regulate the mechanisms for performing consular functions. Instead, it identifies certain functions requiring notification from the receiving state to the sending state's consul. These include the detention of a citizen of the sending state (Art. 36), cases involving unprotected minors, the death of a citizen, or accidents involving ships or aircraft (Art. 37). In this context, the Convention frames such functions as privileges of the consul to receive relevant information. Despite its lack of detailed procedural rules, the Vienna Convention on Consular Relations is significant as it lists and classifies consular functions.[17] It distinguishes between two categories: those guaranteed by international law, which do not require the receiving state's consent, and those requiring at least tacit consent or the absence of objection from the receiving state.[18]

The traditional classification of consular functions divides them into two categories: *jus protectionis* and *jus avocandi* (sovereign acts of the state); *jus protectionis* refers to assistance activities primarily aimed at safeguarding the interests of the sending state's citizens and, occasionally, the interests of the state itself; *jus avocandi* involves the execution of sovereign acts of the sending state within the legal framework of the receiving state. Although this division does not meet the strict criteria of a logically separable classification – meaning the boundary between these two types of activities is not always clear – most actions can be readily categorised. For instance, *jus protectionis* actions are distinctly protective in nature, providing assistance to citizens of the sending state who are in need. In contrast, *jus avocandi* actions involve the application of the sending state's laws by an accredited official within the receiving state's territory. These actions are aimed at resolving legal-administrative or civil-law matters significant to the sending state's legal system. Notably, their application is not strictly limited to the sending state's citizens. Such actions may also grant individuals from the receiving state or third countries access to the sending state's legal system within the context of the receiving state.[19]

14 European Convention on Consular Functions (European Treat Series ETS 1967, No. 061).

15 Maryan Green, 1972, pp. 176–178.

16 At present, this agreement is binding on only five countries worldwide (having entered into force on 9 June 2011 – it is not binding on Poland or Hungary). Nonetheless, this Convention should, to a significant extent, be regarded as reflecting customary international law. Conversely, the additional protocols to this Convention – Protocol to the European Convention on Consular Functions concerning the Protection of Refugees (ETS No. 061A) and Protocol to the European Convention on Consular Functions relating to Consular Functions in respect of Civil Aircraft (ETS No. 061B) – have not entered into force. The first protocol has received only three of the five required ratifications, while the second has obtained only two.

17 This convention aimed to formalise and institutionalise matters concerning consular relations. During the preliminary negotiations, it was agreed that the exercise of consular functions would not be codified within this framework, leaving such issues to a potential future convention. The European Convention on Consular Functions later attempted to address and supplement these aspects.

18 Xílotl Ramirez, 1987, pp. 134–135.

19 Some of these activities are even explicitly designated for non-citizens, such as visa-related activities.

The performance of consular functions by the foreign service of the sending state does not necessarily impose an obligation on the receiving state to guarantee their execution. For certain functions, at least tacit acceptance by the receiving state is required.[20] This principle is sometimes referred to as the 'Danish clause'. Consular functions governed by the Danish clause are contrasted with those guaranteed by international law, which the receiving state has no authority to influence. In general, functions guaranteed by international law are often associated with *jus protectionis*, whereas those subject to the Danish clause typically fall under *jus avocandi*. However, this is not a strict rule, as some *jus avocandi* functions are also guaranteed by international law.[21]

Moreover, the above distinction influences the legal basis and the manner in which these functions evolve. The development of *jus protectionis* functions, guaranteed by international law, primarily depends on changes to the relevant international legal norms. In contrast, the evolution of *jus avocandi* functions is largely driven by changes in the domestic law of the sending state.

3. Diplomatic Functions

The evolution of diplomatic law has been driven by the development of other branches of international law, particularly the human rights protection system, which is deeply embedded within the domestic legal orders of states. Consequently, diplomatic law exhibits a degree of evolutionary variability that is otherwise uncommon in its traditional norms. The evolving mechanisms of human rights protection have necessitated the extension of diplomatic protection to increasingly diverse situations, often previously unrelated to traditional diplomatic practices. However, owing to the shared functions of foreign services (both diplomatic and consular), such activities are predominantly integrated into the framework of consular assistance.

This evolution has led to a clear expansion not only in the scope of assistance provided, but also in the range of individuals protected. Diplomatic assistance, previously limited to certain categories, now extends to personal situations that were historically excluded. Consequently, this expansion can create conflicts with domestic

20 In practice, this approval is granted by the receiving state through an *exequatur* issued by the receiving state's Ministry of Foreign Affairs to the consul of the sending state, based on the consul's letters of credentials.

21 For example, these include visa and passport functions, the performance of which by the receiving state's consul is, in principle, guaranteed by the norms of customary international law (as reflected in Art. 5(d) of the 1963 Vienna Convention on Consular Relations). These functions are not necessarily equated with assistance activities, although passport-related actions can sometimes be interpreted in this way (see: Lauterpacht, 1947, pp. 336–340). Conversely, other document-issuing activities, such as visas or national identification cards, are definitively not of this nature.

law. For example, if diplomatic protection is extended to individuals from a third state or the receiving state owing to their connections to the sending state, the receiving state's involvement and potential objections become inevitable.

Thus, the standard of protection has become somewhat distorted. Notably, the distinction between diplomatic and consular assistance has never been particularly clear in legal doctrine. For instance, E. Denza highlights the absence of a definitive boundary between diplomatic and consular functions,[22] particularly in matters of assistance.[23] Earlier legal scholars also questioned the practicality of separating these two forms of protective activities. They rejected the traditional view that consular activity was limited by an inability to engage with central authorities.[24] Today, the notion that consuls act solely for the benefit of individuals and diplomats exclusively for the benefit of the entire community has been largely abandoned. While older doctrine confined consular activity to the local level[25] – implicitly reserving central-level actions for diplomats[26] – the Vienna Convention on Consular Relations, particularly in Art. 38, has partially erased these limitations.[27] The Convention has broadened the scope of potential consular intervention,[28] by expanding the consular offices' capacity to engage directly with central authorities.

The division of the assistance-related activities of the foreign service based on *diritto di reclamo* (the right to address the authorities of the receiving state) has become increasingly outdated.[29] Today, the distinction between diplomatic and consular protection, particularly in relation to violations of international law and the methods of implementing protection at the national level, reveals significant differences. Specifically, diplomatic protection typically requires the exhaustion of domestic remedies as a prerequisite,[30] whereas consular protection does not depend on this requirement and can be pursued independently of such exhaustion.

In older Polish doctrine, the distinction between diplomatic and consular activities was often framed within the broader context of their general characteristics.

22 Denza, 2008, p. 33.

23 However, B. Sen regards consular assistance activities – particularly those involving consular contact with persons deprived of liberty – as a component of diplomatic protection (Sen, 1979, p. 342).

24 Stowell, 1909, pp. 62–63.

25 Local intervention and appearance before local courts within the consular district are evident from the respective formulations of Art. IX in the regulations drafted by the International Law Institute for the consular agents conventions of 1889 and 1896, as well as in the draft Art. 5 of the U.S. codification.

26 Thuleweit, 1928, p. 6.

27 While communication with central authorities under this provision was indeed subject to possible treaty and customary restrictions, its introduction in practice marked a significant change in the scope under analysis, effectively blurring the distinctions between consular and diplomatic functions in this regard.

28 Maresca, 1966, pp. 366–367.

29 Ibid., p. 356.

30 Ibid., pp. 359–360. Similarly, the 'clean hands' principle may apply as a condition for the application of rules governing diplomatic protection, whereas it does not extend to the rules governing consular aid.

Diplomatic activity was viewed as comprehensive,[31] including all disputes and possessing a 'creative' nature, whereas consular activity was considered selective, focused on specific cases, and of an 'executive' nature.[32] Moreover, the concept of consular protection, when interpreted purely historically, is virtually non-existent. The institution of the consul evolved from a private-law role (as an advisor to foreign merchants) into a public-law institution, gradually assuming – and sometimes exclusively performing – diplomatic functions related to advancing state interests abroad. In essence, modern consular assistance functions are an extension of what were once considered diplomatic functions.

Considering the above, a fundamental shift in the model of diplomatic assistance to citizens abroad has become apparent. Today, such assistance is generally provided without a clear distinction between diplomatic and consular standards. What was considered a natural distinction half a century ago has now been significantly blurred. This shift has been influenced, in part, by the increasing integration of foreign services in many countries. In many legal systems, the distinction between diplomatic and consular services has effectively disappeared. Consequently, the standards for diplomatic assistance[33] – at least to the extent they are observable externally[34] – are often based on consular frameworks.

However, diplomatic interventions can, in at least two instances, extend beyond the scope of consular activities. First, diplomatic intervention may not be limited to individual cases. For example, diplomats, following traditions of protecting persecuted religious groups,[35] may intervene on behalf of persecuted or marginalised minorities within a society. However, such interventions are typically justified by political objectives and broader considerations rather than strictly legal or individualised concerns.

The development of the human rights protection system has revealed new, previously unrecognised levels of violations within individual countries. This evolution

31 Libera (1958, p. 10) observes that a citizen is generally never the subject of a diplomat's interest, even when a consul is present in the district.

32 Sarna, 1928, p. 49.

33 See Vermeer-Künzli, 2007, pp. 48–49.

34 Certainly, as noted, many diplomatic activities are challenging to classify and assess owing to their inherently political nature.

35 This is most evident in 17th- and 18th-century source texts that outline diplomatic duties. For example, F. de Callières, in his renowned work 'The Art of Diplomacy' ('De la manière de négocier avec les souverains', first published in 1716), highlights certain diplomatic duties that would be classified as consular protection today. He writes: '[A minister] ought to protect all the subjects of his master, who are in the same country with him; to procure for them, in his house, the free exercise of religion which the Prince whom he serves possesses; to let them take shelter in his house when they are under any misfortune, and unjustly persecuted; to adjust all the differences and quarrels that happen among them; to relieve them in their wants; and to live with them in the same manner as a good father lives with his children' (de Callières, 1983, p. 183). Interestingly, Nahlik (1971, p. 77) notes that providing diplomatic assistance to co-religionists (when the sovereign's official religion differed) was considered praiseworthy, whereas protecting one's own subjects was regarded as improper (sic!).

has created potential opportunities for protective diplomatic interventions that would have been inconceivable centuries or even decades ago. However, whether a straightforward correlation exists in this regard is doubtful. Instead, the modern assumption that all states are 'civilised' – a notion that is arguably a legal fiction, particularly when considering examples such as parts of the Islamic world – has influenced the direction of international legal norms. These norms, grounded in the principle of non-intervention in the internal affairs of sovereign states, often counteract potential diplomatic interventions, such as those aimed at protecting persecuted Christian communities. Paradoxically, this legal fiction has contributed to a significant civilisational regression in addressing such issues.[36]

Such interventions, whether at a group or individual level, are generally not undertaken by consuls. This is because consular protective activities are typically limited to assisting citizens of the sending state in individual situations, within the boundaries set by relevant international law norms.

It is important to emphasise that diplomatic intervention may occur when consular efforts prove insufficient or ineffective. The scope of such interventions is often kept confidential. For instance, diplomatic interventions are commonly observed in cases where European or U.S. citizens face the death penalty or severe corporal punishment in certain Asian countries after knowingly or unknowingly becoming involved in drug trafficking.[37] Diplomatic practice offers numerous examples of similar situations.[38]

The general trend in changes within diplomatic protection – and perhaps even more so in consular activity[39] – reflects a departure from the classical understanding of protection. According to Art. 1 of the 2006 draft by the International Law Commission,[40]

36 The right to intervene on religious grounds, such as in cases of persecution of co-religionists, has historically been considered an exception to the principle of non-intervention (Mamiani, 1862, pp. 201 et seq.).

37 Diplomatic intervention can enable the reclassification of charges and, depending on the prominence of the state involved and the public response to the case (and thus its *de facto* political significance), can even lead to the suspension of criminal prosecution and the extraction of those arrested from the receiving state.

38 A classic example is the intervention by the UK in the Muhammad teddy bear case in 2007. This involved extraordinary diplomatic efforts in response to allegations against a British citizen, an English teacher, in the notorious Muhammad teddy bear blasphemy case in Sudan. (The case ended, as a result of the sharp intervention of British diplomacy, with the apology of the citizen by the Sudanese president – however, she was forced to leave the country for her own sake). See: Lee and Quigley, 2008, pp. 121, 160.

39 This is evident, for example, in the provisions of the EU directive and, consequently, in the solutions adopted by European countries as part of its implementation.

40 Notwithstanding some doctrinal criticism of the ILC's work on this matter and the content of the draft itself (see: Sandorski, 2006, pp. 28–31), it can generally be regarded as reflecting customary law to a significant extent.

> 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.[41]

This traditional reasoning remains evident in recent International Court of Justice (ICJ) rulings, such as the Diallo case, which dealt with consular activity.[42] However, contemporary practice reveals an expanded scope of protection. This includes not only citizens, but also non-citizens with personal ties (e.g. family members of citizens) or material ties (e.g. residency) to the protecting state.[43] Additionally, such assistance – particularly in cases of mass evacuation during emergencies – frequently includes groups of foreigners from the Euro-Atlantic cultural sphere. Paradoxically, these modern standards, in their updated form, echo the mechanisms of jurisdictional assistance from the capitulation era.[44]

The above considerations do not alter the fundamental premise that, under international law, a state's obligation to assist its citizens abroad is an obligation of means, not an obligation of result. Thus, the sending state is not legally bound under classical international law (without addressing potential obligations under domestic or European law) to provide actual assistance to its citizens abroad. However, the receiving state is obliged under international law not to hinder diplomatic assistance on its territory when it involves the citizen of the sending state. Yet, there is no corresponding international legal obligation requiring the state of nationality to provide assistance. Any perceived changes in this regard are, in my view, illusory. Clearly, at the level of domestic law (e.g. a country's constitution),[45] there may indeed be provisions obligating the state to protect its citizens abroad. However, such obligations are not guaranteed under the framework of international law.

Another institution of diplomatic law worth mentioning – one that is particularly specific as it has no parallel in consular regulation – is diplomatic asylum. Although this institution, rooted in history and tracing back to the sacred temple asylums

41 Official Records of the General Assembly, 61st Session, Supplement No. 10, A/61/10.

42 The ICJ explicitly considers 'protection' as an action aimed at holding another state accountable for a violation of law (including increasingly expansive human rights) committed by that state against a natural or legal person over whom the intervening state exercises protection based on a bond of citizenship or affiliation (see ICJ Reports, Diallo judgement of 24 May 2007 – Preliminary Objections, paras. 39, 40).

43 See, for example: Art. 22 of the Austrian Consular Act (Bundesgesetz vom 22. Mai 2019 über die Wahrnehmung konsularischer Aufgaben [Konsulargesetz- KonsG] StF: BGBl. I Nr. 40/2019 (NR: GP XXVI AB 512 S. 70. BR: AB 10161 S.892.).

44 Staude, 1900, pp. 23–26. For example, under the 1535 capitulation, the French consul in Turkey provided assistance to any Christians who were not subjects of the sultan.

45 Such a provision is characteristic of nearly all constitutions in Central and Eastern European countries (for instance, it appears in Art. 36 of the Polish Constitution).

of antiquity,[46] is inherently humanitarian in nature, its contemporary legal impact appears to be rather limited. The ongoing dispute in international law over the legitimacy of diplomatic asylum – persisting even within the Latin American context, where it has a treaty basis, let alone in the universal sphere – ensures that its application, and particularly any potential expansion of its scope, faces significant resistance from states whose nationals seek asylum. Historically, diplomatic asylum has always been used, although in limited circumstances, as a protective mechanism. It has not only served individuals accused of political crimes, but also those persecuted for various reasons, including issues of broad political significance, such as the persecution of entire national groups.[47]

Remodelling diplomatic asylum in this direction cannot be explicitly ruled out, although it appears unlikely.[48] Moreover, the limited technical and financial capacities of diplomatic missions weigh against such changes. Evidently, the scale of diplomatic asylum is, and likely will remain, small in the foreseeable future. Moreover, it would be challenging to identify a cohesive group of countries supporting such changes *in abstracto*. However, in special situations, increased acceptance of diplomatic asylum often arises spontaneously, irrespective of time or place.[49] Nevertheless, it appears improbable that this fascinating institution of diplomatic law will undergo significant evolution in the near future, particularly in a way that would lead to substantial changes in the norms of international law.

4. Consular Functions

4.1. Access to the Consul for a Person Deprived of Liberty as the Primary Mechanism of Consular Assistance

In consular law, legal and human factors play a role similar to their counterparts in diplomatic law. However, consular activities – being public and, unlike diplomatic

46 See Bolesta-Koziebrodzki, 1952, p. 56; Jakab, 2016, p. 17; Burczak, 2005, pp. 27–36; Mossakowski, 2000, pp. 58 et seq.; Traulsen, 2004, pp. 9–85.

47 For example, in the 1990s, the Polish Embassy in Jakarta, Indonesia, provided assistance on two occasions within its premises to several individuals from then Indonesian-occupied East Timor. This diplomatic asylum was later transformed into territorial asylum – although not in the country granting the diplomatic asylum – as the asylum seekers were transported to Portugal. See: Sutor, 2010, pp. 270–271.

48 See Värk, 2012, p. 257; Thebes, 2012, pp. 913–914; Den Heijer, 2013, p. 400.

49 A notable example is the extensive use of diplomatic asylum by nearly 40 diplomatic missions in Madrid during the Spanish Civil War of 1936–37. These missions, including embassies and legations from 36 countries, provided assistance to more than 12,000 people, with significant support from the communists. Among the leaders in this effort was the Republic of Poland, whose diplomatic mission sheltered 400 individuals during this period. See Ciechanowski, 2000, p. 551.

activities, less influenced by foreign policy considerations – tend to exhibit greater predictability in their evolution. In particular, consular activities of an assistance-related nature, such as consular aid and consular protection, have significantly advanced in recent years through the development of the right of access to the consul.

Historically, these actions in international law originated from the consul's judicial role under the framework of consular jurisdiction, which was a widespread institution in international law from the 10th century and, in some contexts, persisted into the second half of the 20th century (including arrangements based on capitulation treaties).[50] Under this system, consuls were often guaranteed access to their state's citizens who were deprived of liberty, particularly in cases where consular jurisdiction extended to criminal matters, enabling consuls to exercise judicial authority over such individuals. Despite the decline and eventual disappearance of the jurisdictional basis for these practices, the mechanisms ensuring consular access to detained citizens have not vanished. However, the purpose of the consul's involvement shifted – from judicial functions to provision of aid. Today, consuls are informed of the detention of a citizen to enable them to undertake protective activities, if necessary.

Although historically these issues were unquestioned, individualising the right of access to the consul has become prominent in recent years, significantly increasing the procedural importance of this matter. Provisions concerning the right of access to the consul for persons deprived of liberty, as regulated by Art. 36 of the Vienna Convention on Consular Relations of 24 April 1963, have become a recurring topic in the jurisprudence of the International Court of Justice (ICJ) over the past two decades. Five cases have been initiated on this issue,[51] four of which resulted in substantive rulings. However, it is noteworthy that, despite the uniformity of the legal norm at issue – rooted in consular law and forming part of the criminal process frameworks of the Convention's state parties – the seriousness of the cases and the scope of legal problems raised in these disputes varied significantly. In general, international jurisprudence has helped establish certain standards for consular assistance. For instance, it has underscored the necessity for the receiving state to notify consular officials before a person deprived of liberty is formally charged and brought to trial.

From a doctrinal perspective of international law, the most distinctive cases concerning the right of access to the consul were the last two: the Diallo and Jadhav

50 See Lippmann, 1898, p. 135; Martens, 1874, p. 433; and Piggott, 1907, passim.

51 Breard, Case concerning the Vienna Convention on Consular Relations (*Paraguay v. United States of America*), Order of Provisional Measures, 9 April 1998 (subsequently withdrawn); LaGrand Case (*Germany v. USA*) – Judgement, 27 June 2001, General List No. 104; Case Concerning Avena and Other Mexican Nationals (*Mexico v. USA*) – Judgement, 31 March 2004, General List No. 128; Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), Judgement of 30 November 2010, General List No. 103; Jadhav Case (*India v. Pakistan*), Judgement, 17 July 2019, General List No. 168.

cases.[52] Unlike the first three cases on this subject handled by the ICJ – all against the United States – these later cases involved different states and presented unique legal issues. The earlier cases against the United States primarily centred on implementing international law at the domestic level, although this was not the sole jurisprudential issue, and they were somewhat repetitive in the legal questions analysed. In contrast, the Diallo and Jadhav cases differed significantly in the nature of the problems they addressed, making them particularly valuable for academic research. The earlier cases also attracted substantial public attention, largely owing to their association with the death penalty in the USA.[53] In these cases, the failure to provide consular notification was invoked as a basis to reopen proceedings, typically expecting to avoid the imposition of the same penalty upon retrial – although with no success. In contrast, in the Diallo case, the crime was economic in nature, and the issue of the death penalty was absent. The Jadhav case did involve the death penalty,[54] however, the matter was less central to the legal arguments.[55]

52 The considerations in this section are based in part on the text by the author – see: Czubik, 2021, pp. 213–236.

53 However, this view is mistaken, as the normative scope of the provisions being complained of applied equally to any form of deprivation of liberty involving a foreigner – whether connected with suspected minor crimes or violations of migration laws – and not solely to deprivation of liberty in cases leading to the imposition of the death penalty. Such a misconception could easily arise from the numerous reports and in-depth analyses in the scientific press regarding cases such as Breard, LaGrand, or Avena.

54 In contrast, this issue was not decisive in the Diallo case, where the criminal acts underlying the mitted consular notification were primarily political and economic in nature. Moreover, owing to its multifaceted nature, the case is rarely associated in public opinion with the problem of consular notification. An important added value of the Diallo case was the affirmation of the formal necessity of notification, even in situations where the fact that a foreigner has been deprived of liberty is widely known within the country.

55 Indeed, this marginalisation is 'compensated' for by an extensive (94-page) separate opinion by Judge Cançado Trindade, presented as a type of manifesto. This opinion, characterised by a fair dose of postmodern mannerism and limited scientific value (apart from its foundation in opposing the death penalty), was drafted on the occasion of the 20th anniversary of the 1999 Inter-American Court of Human Rights Advisory Opinion. (See: Inter-American Court of Human Rights Advisory Opinion OC-16/99 of 1 October 1999 Requested by the United Mexican States: The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Available at: https://hrlibrary.umn.edu/iachr/series_a/OC-16ingles-sinfirmas.html (Accessed: 17 February 2026)).

This was owing to the unique nature of the conviction, as the individual in question was not a common criminal.[56]

The issue of the right of access to the consul provides a valuable comparative framework for examining the relationship between the Vienna Convention on Consular Relations and bilateral consular agreements. The regulation of this right differs between the Vienna Convention and bilateral treaties. Specifically, consular notification under bilateral agreements – irrespective of their date of adoption[57] – typically diverges from the mechanism established in the Vienna Convention. Under Art. 36 of the Vienna Convention, the mechanism is conditional (optional), meaning that notification to the consul depends on the request or consent of the individual deprived of liberty.[58] In contrast, bilateral agreements generally establish mechanisms that do not make consular notification contingent on the individual's consent. Instead, these agreements prioritise a technical approach, often mandating notification within precise time limits specified in the treaty. Interestingly, mandatory notification reflects a historically established legal and customary standard, whereas the optional notification mechanism introduced by the Vienna Convention represents a more modern innovation.[59] This approach, which ties the individual's entitlement to their willingness to cooperate with the consul, was designed to streamline the

56 The Jadhav case raised the issue of the application of consular notification in instances involving the detention of a spy. Irrespective of the ruling, the case should be viewed as having been incorrectly decided. The ICJ failed to consider the existence of a bilateral agreement between the parties concerning consular notification obligations. This agreement, rather than Art. 36 of the Vienna Convention, should have been applied. Notably, the bilateral agreement's jurisdiction, which extended beyond the provisions of the Vienna Convention, would have resulted in the ICJ lacking jurisdiction over the case. Furthermore, in determining the necessity of immediate notification of deprivation of liberty, the ICJ did not adequately address the fact that the starting point for the time limit should be the date when it was established that the detainee was a citizen of a specific foreign state – a determination that was particularly challenging in Mr Jadhav's case.

57 There are only sporadic instances of bilateral agreements providing for optional rather than mandatory consular notification. For example, Poland has concluded such an agreement with Australia (Agreement on Consular Relations between the Republic of Poland and Australia, dated 7 May 1991 – text available in the online treaty database of the Ministry of Foreign Affairs). However, this agreement has not entered into force.

58 The proper implementation of the right of access to a consul, as outlined in Art. 36 of the Vienna Convention, requires that once a citizen of the sending state is deprived of liberty in the receiving state, the authorities of the receiving state must promptly inform the individual of their right to request consular notification. If the detained foreign national desires such contact, the authorities of the receiving state must immediately notify the consul of the sending state about the detention of their citizen.

59 Subsequently, other international treaties – particularly those where consular matters were ambiguously regulated – began to adopt this solution. However, in strictly consular agreements, the standard practice, even after the Vienna Convention came into force, was mandatory notification. The best example of this is the European Convention on Consular Functions of 1967, which explicitly provides for mandatory notification in Art. 6. In exceptionally rare cases, optional provisions appeared in bilateral treaties concluded before the adoption of the Vienna Convention. See: Lee and Quigley, 2008, p. 143, note 24; cf. Whomersley, 1985, p. 265.

process of providing consular aid and avoid situations where it would be unproductive because the individual clearly does not wish to cooperate with the consul.

When the Vienna Convention was adopted, as a treaty addressing primarily the institutional rather than the functional aspects of consular law, it was clear that bilateral treaties – long a tradition in interstate relations – would retain their significance. It was essentially assumed that the broad spectrum of interstate relations involving consular functions would continue to require regulation through separate agreements, primarily the traditionally concluded bilateral consular conventions. The Vienna Convention largely left many aspects of consular practice unaddressed, omitting significant issues of consular activity entirely. Consequently, the continued validity of the full range of bilateral agreements concluded prior to a state's accession to the Vienna Convention was a natural and expected outcome. Moreover, many states continued to conclude bilateral conventions after acceding to the Vienna Convention – a logical and understandable practice considering the Convention's limited scope of application.

The Vienna Convention explicitly addressed other treaties governing consular law in Art. 73. This provision recognised both agreements binding on states-parties before the Convention's adoption – affirming the continued validity of existing arrangements – and agreements that states-parties may conclude in the future, whether on a bilateral or multilateral basis, after becoming bound by the Convention's provisions. Consequently, a bilateral agreement that functions as a *lex specialis* in relation to the Vienna Convention's provisions (including those concerning the consul's right of access to a person deprived of liberty) is permissible as long as its provisions confirm, supplement, or expand the scope of the Convention's application.[60]

It is important to consider the provisions of the Vienna Convention on the Law of Treaties,[61] particularly Art. 41, which governs agreements that modify multilateral treaties between only some of the parties, and to assess whether such modifications conflict with Art. 73 of the Vienna Convention on Consular Relations. Art. 73 of the Consular Convention, when viewed through the lens of Art. 41 of the Convention on the Law of Treaties, outlines the scope of modifications that are permissible – or at least not prohibited – under a multilateral treaty. These include agreements that confirm, supplement, or expand the provisions of the Convention, provided that they do not impair the rights of other parties under the treaty or hinder their ability to fulfil their obligations. As a general rule, treaty practice dictates that amendments of a 'confirmatory, supplementary, or elaborative' nature must not repeal or alter provisions in a manner incompatible with the effective realisation of the treaty's object

60 See Declaration of Judge Iwasawa (Jadhav case), para. 13. The judge observed that even if the 2008 bilateral agreement restricted access to consular assistance for individuals suspected of espionage, its application was nonetheless precluded by Art. 36 of the Vienna Convention, owing to the provisions of Art. 73 of the Vienna Convention.

61 UNTS 1980, vol. 1155, No. 18232, pp. 331–513.

and purpose. Thus, from a teleological perspective, the contents of Art. 73 and Art. 41 can generally be regarded as compatible.

However, it is worth considering whether Art. 41 of the Vienna Convention on the Law of Treaties grants parties engaging in treaty-making broader options[62] than those allowed under Art. 73 of the Vienna Convention on Consular Relations. This question is significant because Art. 41 does not explicitly emphasise the full dispositiveness of the standard it provides, a point typically reflected in phrases such as 'unless the treaty provides otherwise'.[63] However, it appears that Art. 41, while allowing for the possibility of modification through bilateral agreements – or the prohibition of such modifications within the treaty – implicitly assumes that the treaty may also permit modifications under specific conditions. This interpretation is logical, as establishing a right to modify a multilateral treaty inherently allows for the possibility of conditioning such modifications within the treaty itself. This reasoning is justifiable if one does not interpret Art. 73 of the Vienna Convention on Consular Relations rigidly as a prohibition against modification.

It is worth examining whether the provisions of Art. 73 of the Vienna Convention on Consular Relations and Art. 41 of the Vienna Convention on the Law of Treaties have fundamentally different scopes of application and pertain to distinct factual situations. Art. 73 generally does not allow for the modification of the Vienna Convention through bilateral agreements, if 'modification' is understood as a change to the essential substance of the rights and obligations established by the treaty. Such an understanding of modification appears consistent with Art. 41 of the Vienna Convention on the Law of Treaties. Consequently, Art. 41 is arguably inapplicable to the regime of the Vienna Convention on Consular Relations, as it pertains to treaties that explicitly permit modification or make it explicitly impermissible. In contrast, Art. 73 of the Vienna Convention on Consular Relations effectively allows only agreements that confirm, supplement, or expand its provisions. Here, 'supplement',

62 See Sawicki, 1998, p. 39.

63 Regarding treaties permitting modification, such a statement appears in Art. 41(2), which addresses the obligation of parties concluding a modifying treaty to notify other parties of their intention to conclude the agreement and of the modifications it introduces. Within this context, it is debatable whether Art. 73 of the Vienna Convention should be interpreted as a provision enabling treaty modification while simultaneously providing a special mechanism that does not require notification to other states parties. This is particularly questionable considering that Art. 41 stipulates such an obligation unless the treaty explicitly provides otherwise – and it is difficult to interpret the silence of Art. 73 as 'providing otherwise'. In practice, states do not notify other parties to the Vienna Convention about their bilateral consular agreements. Furthermore, the norm arising from Art. 41(2) in conjunction with para. 1(a) appears to apply only to specific modifications explicitly provided for in a treaty, where the normative layer undergoes a distinct determination, leading to effects clearly different from those of the original treaty. This does not extend to general modifications within the scope of the basic treaty that do not impact the effectiveness of its norms. Notably, bilateral consular conventions are predominantly designed to regulate issues that are generally unaffected by the Vienna Convention, such as classic consular functions. Their areas of overlap with the Vienna Convention typically align with its provisions and objectives, rather than contradict or diverge from them.

'expand', or 'extend' imply introducing additional measures that do not alter the original provisions in a way that affects their fundamental purpose or essence. Thus, Art. 73 prohibits modifications that would undermine the core purpose or integrity of the original provisions.

The adoption of the clear and unambiguous interpretation outlined above is not strongly supported by state practice, which generally regards as permissible modifications that go significantly beyond merely confirming, supplementing, or expanding the content of the Vienna Convention on Consular Relations. Consular law is replete with examples of such modifications referring to Art. 36, and legal scholarship has the tools to analyse the extensive state practice in this area.[64] Moreover, this practice is reflected in national laws, which often impose specific obligations on the authorities of receiving states. In general, states approach Art. 73 with a relatively liberal perspective, treating it as allowing any *legis specialis* modifications arising from bilateral treaties. In practice, these modifications frequently extend well beyond the mere confirmation, supplementation, or expansion of the provisions of Art. 36 of the Vienna Convention.[65] The sheer scale of bilateral treaties addressing consular matters worldwide raises the question of whether Art. 73 of the Vienna Convention has been effectively rendered obsolete (*desuetudo*), even from its inception. This de facto erosion could be attributed to the widespread acceptance of a customary norm permitting the conclusion of bilateral agreements that substantially interfere with or depart from the provisions of the Vienna Convention.

In bilateral agreements, states commonly adopt a mandatory notification mechanism. From the perspective of Art. 73 of the Vienna Convention on Consular Relations, this effectively eliminates the individual's right to initiate consular notification, as provided in Art. 36(1)(b) of the Convention. Introducing a mandatory notification obligation renders the individual's right to decide on the initiation of consular notification largely illusory.[66] Although this approach may raise ethical concerns of both legal and human dimensions,[67] it is procedurally sound. From the

64 Representatives of the doctrine addressing this issue generally support the concept that, in situations of conflicting norms, the provisions of bilateral conventions take precedence, often at the expense of the individual's rights. See: Aceves, 1998, p. 266; cf. Springrose, 1999, pp. 186, 189. Additionally, Marcantonatos (1974, p. 170) explicitly emphasises full compliance with Art. 73(2) of the Vienna Convention, noting the substitution of the optional mode for the obligatory mode. This approach reflects the common practice of states entering into bilateral agreements.

65 Cf. Kho, 1994–1995, pp. 275–276.

66 Bilateral conventions, including some concluded by Poland, occasionally introduce an obligation to inform the individual about the notification made (thereby recognising the individual's right to be informed about it). However, these provisions do not establish any right for the individual to initiate relevant actions by the receiving state. From a procedural perspective, this is essentially a normatively empty solution, as it imposes no substantive procedural obligations. Nonetheless, such provisions are not uncommon. Cf. Art. 31(2) of the Polish-Iraqi Consular Convention (Journal of Laws 1982, No. 27, item 194).

67 Certainly, there may be individuals deprived of liberty who explicitly do not wish for such notification (e.g. refugees or similar cases). In some situations, this could harm their sense of security or even pose a threat to their family members remaining in their country of citizenship.

standpoint of procedural guarantees, such mandatory notification ensures the consul's participation in the criminal process and facilitates the aid or protective actions provided for under national and international law. As such, this solution cannot be considered defective.

Another commonly employed solution in bilateral agreements is the specification of the deadline for notifying the consul of the detainee's state of nationality. This approach is used in various ways, ranging from immediate notification to more flexible timelines.[68] Some agreements drastically shorten the notification deadline, requiring it to be completed within 24 or 48 hours after detention; others significantly extend the deadline, often reflecting the peculiarities or technological capabilities of the states parties at the time the treaties were concluded.[69] However, such measures do not undermine the essence of consular notification. In this context, the ICJ has rightly emphasised that, as a general rule, notification should occur before procedural decisions are made that could affect the detainee's status or result in charges being brought against them. This timing ensures that the individual has the opportunity to clarify their procedural position and respond appropriately, safeguarding their rights within the legal process.[70]

In future, we are certain to witness a form of competition between the optional and mandatory models of the right of access to a consul by individuals deprived of liberty. Both models have their advantages and disadvantages. The mandatory model undoubtedly provides stronger protection for the individual, assuming they wish to contact the consul. Further, it reduces the potential for abuse by the receiving state, which is more likely with the optional model, where authorities could claim that the detainee was unwilling to notify the consul.[71] However, the optional model better

68 See Sawicki, 1998, p. 132; Płachta, 2003, pp. 106 et seq.; Williams, 1980, pp. 240–241. The most common practice among states is a three-day deadline for notification.

69 Hence, it is not surprising to find notification deadlines of up to three weeks in agreements with developing countries. In the 1960s and 1970s, when many of these agreements were concluded, such countries often lacked the technical means to make notifications within shorter timeframes. For instance, the Polish–Iraqi Convention provides for a seven-day notification deadline. Furthermore, even today, the procedures for transmitting official correspondence in territorially extensive countries (e.g. Brazil) frequently result in missed deadlines. This issue was starkly evident during the 2020 Polish presidential election, particularly with postal voting abroad (see: Supreme Court Order I NSW 93/20 of 27 July 2020, regarding Z.J.J.'s election protest against the election of the President of the Republic of Poland).

70 However, this does not imply immediacy or the necessity of notification prior to any hearing (see: Avena Judgement, para. 85). As the ICJ correctly observed in the Jadhav case (Jadhav Case, Judgement, 17 July 2019, para. 113), such assessments must be made *ad casum*, considering the varying circumstances of different foreigners deprived of liberty. However, in that case, the ICJ determined that a delay had occurred. This conclusion is debatable, as the court failed to specify when the receiving state became aware of the spy's actual foreign nationality – from which knowledge the obligation to promptly undertake consular notification would have arisen.

71 The practice surrounding Art. 36 demonstrates that abuses are widespread in some Third World countries. For example, detainees are often informed in a language they do not understand, without access to an interpreter, and their lack of response is interpreted as unwillingness to contact the consul.

safeguards individual rights, including the right to refuse consular notification. Considering the growing recognition of individual rights in international law, this model appears to be increasingly favoured in state practice. This shift often occurs despite the provisions of bilateral agreements, which typically adopt the mandatory model as *lex specialis* and should, in theory, prevail.[72] Thus, although there may be a trend towards strengthening the optional model, the actual scope of the mandatory model's application remains difficult to assess. This is because only violations of the optional notification mechanism under Art. 36 of the 1963 Vienna Convention on Consular Relations have been the subject of international disputes.[73] To date, all cases brought before the International Court of Justice have involved this optional model.

When examining the evolution of norms regarding the right of access to the consul, it is clear that they have become one of the most enduring and reliable elements of international law in ensuring fair criminal proceedings. At first glance, it may appear that the optional model is the widely accepted and dominant solution. However, this perception arises from a particular error in perspective. Public awareness tends to focus on situations where the receiving state fails to provide notification to the foreigner, resulting in the consul being uninformed. Later, the foreigner often identifies the violation of their individual rights and raises it during legal proceedings. In contrast, the mandatory model does not grant an individual right to initiate consular notification – its application occurs exclusively within the sphere of interstate relations. Violations under this model typically remain unknown to both the detained individual and public. Consequently, the mandatory model is less visible, although this does not imply that it is any less effective. Doubtlessly, the European consular protection,[74] while not explicitly adopting either the optional or mandatory model, tends to promote the unification of standards among states.

72 This is evidenced by the adoption of such a model by states in various secondary international conventions and soft law instruments. For example, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988, reflects this approach. Similarly, the Basic International Recommendations on the Treatment of Foreign Prisoners, adopted in 1984 by the United Nations Committee on Crime Prevention and Control, promote these principles. Furthermore, this model is mirrored in multilateral human rights assistance treaties. For instance, Art. 16(7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly resolution 45/158 of 18 December 1990, replicates this framework.

73 If the disputing states are also parties to the Optional Protocol to the 1963 Vienna Convention on Consular Relations, which establishes the compulsory jurisdiction of the International Court of Justice for disputes arising under the Convention, they are obligated to resolve such disputes through the ICJ.

74 Currently, the rules governing consular protection in European countries stem from the implementation of Council Directive (EU) 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 (OJ L 106, 24.4.2015, pp. 1–13). This directive aims to implement the objectives outlined in Art. 20(2)(c) TFEU and Art. 23 TFEU. However, it addresses only consular assistance and does so in a limited and piecemeal manner. Diplomatic protection remains entirely outside the scope of the directive's regulation.

However, it must be acknowledged that the practical application of the right of access to the consul under European consular protection remains limited in scale. Whether notification will be applied in such cases – or applied at all – depends on the receiving state, particularly in the context of third-country regulations governing consular protection.[75]

The influence of the human rights assistance system on the development of consular law norms is clearly evident. Although the consular norms in question do not constitute a human right (they can be regarded as an individual right), they are often considered part of the broader guarantees of a fair trial and are widely perceived as such. However, this perception can be misleading, as it is primarily associated with serious crimes (e.g. those punishable by death penalty). In reality, this perception overlooks the vast majority of cases – numbering in the hundreds of thousands daily – where national consuls worldwide apply Art. 36 of the Vienna Convention or mandatory notification mechanisms.

4.2. Legalisation as an Example of a Disappearing Activity

As late as the 1950s, a significant aspect of consular activity involved responsibilities directly related to trade and customs. Until that time, consuls played a fundamental role in the trade process.[76] These duties ranged from promotional activities, such as fostering economic connections between entities in the receiving and sending states, to more practical tasks that facilitated the exchange of goods between countries. Since the interwar period of the 20th century, efforts had been underway to modify the traditional scope of consular functions connected with foreign trade. Consular activities not only included issuing or certifying (legalising) consular invoices, but also often entailed preliminary customs control, such as estimating the value of exported goods. Consuls were frequently required to assess the value of products for customs purposes, sometimes based on provided samples.[77] These responsibilities were difficult in practice, as they demanded substantial expertise in commodity science, pricing policy, and a thorough understanding of local market

75 A country can completely disregard EU mechanisms, as they are not binding on third (receiving) countries. EU member states should inform third countries about the mechanisms of European consular protection. However, it is noteworthy that the notification of such activities *in favorem tertii*, as outlined in Art. 8 of the Vienna Convention on Consular Relations, may be unrecognised if the notification lacks specificity – that is, when both the assisting state and the state on whose behalf the assistance is provided are not individually identified. This imprecision, coupled with a formula allowing European consular protection based on the choice of the European citizen, can lead to challenges in its recognition.

76 See Horstmann, 1886, pp. 24–25.

77 See United States Consular Regulations. A Practical Guide for Consular Officers and also for Merchants Shipowners and Masters of American Vessels in All Their Consular Transactions, 1868, p. 391. Cf. Lloyd Jones, 1906, p. 8.

prices. Unsurprisingly, there was widespread reluctance among consuls at the time to perform these complex tasks.[78]

The adoption of the Convention relating to the Simplification of Customs Formalities, signed in Geneva on 3 November 1923 (Journal of Laws of 1931, No. 106, item 819), under the auspices of the League of Nations, was met with approval, particularly within the consular community. Art. 11, para. 8 of the Convention stipulated that consular actions should not, in principle (although not mandatorily), apply to certificates of origin for goods. Art. 12, para. 3 further provided that the cost of a visa for consular invoices should be as low as possible. Over the 20-30 years of its implementation, the convention largely contributed to the decline of these onerous consular activities. In addition, many states, aligning with the 'spirit' of the Convention, negotiated bilateral treaties that further liberalised consular activities in this domain.

During this period, specific administrative activities – such as the issuance of documents guaranteeing cross-border movement of goods, sometimes based on inspections – gradually disappeared. Yet consuls continued to issue customs invoices independently. However, to expedite their work, they often accepted such documents issued by local offices or chambers of commerce, merely stamping them with the appropriate seals as proof of authentication. This sealing process – referred to as 'legalisation' – became a critical condition for the acceptance of a foreign document within the legal framework of the sending country. The consular seal ensured the document's transition from the legal jurisdiction of the receiving state to that of the sending state. This process was intrinsically linked to the concept of 'power' or 'evidentiary force', whereby a foreign document, through consular activity, was endowed with the same evidentiary status as a domestic document in the sending country's legal system. Legalisation represented the formal acknowledgment by the receiving state that its public documents could be extended evidentiary validity within the sending state's legal framework, equalising their legal standing with equivalent domestic documents.

The emergence of legalisation mechanisms for foreign documents – initially focused primarily on what would today be classified as commercial and customs documents[79] – served two chief purposes, likely guaranteed in parallel. On the one hand, these mechanisms aimed to ensure the security of legal transactions. The legalisation clause, functioning as a form of *exequatur* for foreign documents, acted as a guarantee of their acceptance. Although such acceptance was often unreliable in practice, the clause provided some level of assurance regarding the evidentiary, formal, and, in certain jurisdictions, substantive legal aspects of the document and the actions it reflected. Using a foreign legalised document, its holder acquired a

78 Cf. Regulation Prescribed for the Use of the Consular Service of the United States, 1881, p. 215.

79 See the terminology used in Art. 1 of the Hague Abolition Convention, where this term is explicitly utilised. Notably, the terminology in question also aligns with that used in the GATT.

sense of enforceability of the rights to the goods specified in the document within the territory of its intended use – a sense that was sometimes not entirely justified by the actual circumstances or the presumed scope of its validity. On the other hand, states benefited financially from this process by collecting fees for legalisation. Thus, these activities served dual purposes: fiscal and protective. In essence, they resembled customs duties, which *ab initio* had analogous objectives.[80] Over time, the scope of such consular activities expanded to include documents pertaining to other civil or administrative legal actions intended to have effect in the sending state. This type of activity remains a distinct feature of consular practice to this day. The core consular functions related to commercial and customs matters have, as a result of numerous international initiatives, largely become a thing of the past.[81]

As a rule, the receiving state determines the extent to which a foreign document must be legalised. In some cases, the legalisation of all foreign documents is required;[82] in others, this requirement is tied to the principle of reciprocity,[83] limited to certain categories of documents,[84] or entirely waived. In the latter scenario, foreign public documents are recognised with evidentiary power equivalent to domestic documents without any need for legalisation.[85] Consequently, there are significant differences worldwide in how countries approach the recognition of foreign documents' evidentiary force relative to domestic ones. In countries where all official documents are granted equal probative force *ex lege*, consular services typically do not engage in the practice of applying legalisation measures.

80 Bartoszewicz, 1998, p. 89.

81 The legal system under the General Agreement on Tariffs and Trade (GATT), and now the World Trade Organization (WTO), has adopted specific legal arrangements exempting certain documents from legalisation requirements – see GATT Art. VIII. Cf. the Recommendation of 7 November 1952 on the Abolition of Consular Formalities and Code of Standard Practices (GATT Basic Instruments and Selected Documents, First Supplement). See also: Czubik, 2004, pp. 100–107. Bilateral agreements introduced additional liberalisation mechanisms, which not only abolished the legalisation requirement but also provided, for example, free legalisation of certain categories of documents –an arrangement that was economically unprofitable. For instance, Arts. 1 and 2 of the 1934 Belgian–Bulgarian Agreement (Agreement Between Belgium and Bulgaria Concerning the Issue and Legalisation Free of Charge of Copies of Entries in the Civil Register on Behalf of Indigent Persons and Concerning the Legalisation Free of Charge of Copies of Similar Entries Made on Behalf of the Public Authorities, Sofia, 26 October 1934, LNTS of 1934–1935, vol. CLV, item 3572) provided for free legalisation of certain documents for indigent persons and public authorities. However, this agreement did not address the issue of customs or commercial documents.

82 This is exemplified by the German legal framework (Sec. 438 of the Zivilprozessordnung of 1877) and the Hungarian legal framework (Art. 593 of the Code of Civil Procedure).

83 For instance, in the Austrian model, Sec. 293 para. 2 of the Zivilprozessordnung of 1895 (Gesetz vom 1. August 1895, über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten, RGBl. Nr. 113/1895) provides a relevant example.

84 This is the case under Polish law – Art. 1138 of the Polish Code of Civil Procedure limits this requirement solely to documents concerning the transfer of ownership of Polish real estate and to documents whose authenticity is contested by a party during the proceedings.

85 This is also the case in Denmark, for example – see Biscottini, 1961, p. 665.

Notably, international law has favoured the elimination of the legalisation requirement since the 19th century. Since then, bilateral agreements on legal aid began to emerge, often abolishing the need for legalisation between states. Modern states, particularly those in Central and Eastern Europe,[86] are typically parties to several or even dozens of such agreements, which effectively remove the requirement for consular legalisation, however, do not prohibit consuls from performing this act upon request. However, in practice, legalisation is generally not conducted for consuls of states bound by these bilateral agreements.

The reduction of legalisation activities has also occurred at a universal level through multilateral conventions aimed at abolishing the requirement to legalise specific (often narrowly defined) categories of documents.[87] The most significant treaty addressing this issue is the Hague Convention of 5 October 1961, adopted under the auspices of the Hague Conference on Private International Law.[88] Officially titled the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents,[89] it applies to nearly all public documents.[90] Rather than abolishing consular legalisation outright, the Convention replaces it with the issuance of apostille certificates by the competent authorities of the state where the document originates. However, the Hague Convention does not apply to relations between states that are parties to a bilateral legal aid agreement providing for the abolition of the legalisation requirement. Such bilateral agreements take precedence as a *lex specialis* over the provisions of the Hague Convention, as explicitly acknowledged in Art. 3(2) of the Convention.

Recently, the issue of abolishing the requirement for document legalisation has also become the subject of European Union regulations.[91] However, the relevant regulation applies only to documents within its specified scope, primarily civil status records and documents related to electoral rights. In addition, nearly every EU legal instrument addressing civil jurisdiction includes provisions exempting all documents

86 Poland, for instance, is bound by legal aid agreements with nearly 40 countries worldwide (including Hungary), which fully abolish the requirement to legalise documents.

87 For example, the ICCS Convention on the Exemption from Legalization of Certain Records and Documents, signed at Athens on 15 September 1977 (ICCS No. 17), provides such provisions. See also: the European Convention on the Abolition of Legalisation of Documents Executed by Diplomatic Agents or Consular Officers (ETS 1968, No. 063).

88 This institution initially functioned as a cyclical international conference starting in 1893 and was not characterised by international legal subjectivity. The decision to transform it into an international organisation was made only after World War II, with the change being definitively implemented in 1955 – see: di Cesari, 2002, pp. 151–153.

89 UNTS 1965, vol. 527, No. 7625, pp. 189–203.

90 Documents excluded from its scope are instead covered by other treaties (e.g. the *Council of Europe Convention* for documents prepared by diplomats or consuls) or by systemic frameworks (e.g. GATT/WTO rules for trade and customs documents).

91 Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No. 1024/2012 (OJ L 200, 26 July 2016, pp. 1–136).

transferred across borders between EU member states from any form of consular legalisation or certification, including apostille clauses under the Hague Convention. These exemptions apply under the conditions set forth in each specific instrument.[92]

4.3. Notarial Activities

International law explicitly permits consuls to perform notarial acts.[93] Although the receiving state theoretically retains direct authority over the scope of such functions and may even oppose some or all these activities by consular officials of the sending state, such opposition is rare in practice. This is largely owing to Art. 5(f) of the 1963 Vienna Convention on Consular Relations, which includes notarial acts, such as civil status acts, under the Danish clause. According to it, the performance of these acts by consuls from the sending state requires at least the tacit approval (i.e. the absence of objection) of the receiving state. Traditionally, the sending state enjoys significant freedom in this regard. Simultaneously, it retains full discretion to either forego such consular functions entirely or limit their practical application to a significant degree.

Analysing Art. 15 of the European Convention on Consular Functions reveals that it allows consuls to perform notarial acts either for the benefit of citizens of the receiving state or for any person, irrespective of nationality, provided the civil law act has legal consequences within the territory of the sending state.[94] This provision appears to align with the principles of customary international law.[95] Certainly, the consul performs these actions according to the law of the sending state, acting as a civil law notary for their own country while operating beyond its borders. Through these activities, the consul facilitates access for interested parties – primarily citizens – to the legal framework of their sending state.

Sending states typically impose limitations on the scope of notarial activities that their consuls can perform. This is often owing to consuls lacking the specialised

92 See Art. 74 of Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 201, 27 July 2012, pp. 107–134).

93 See, for instance: Lee and Quigley, 2008, pp. 228–231; Torroba Sacristan, 1993, pp. 295–350; Núñez Hernández and Martí Martí, 2009, pp. 518–541; Anghel, 1996, pp. 399–402.

94 See Art. 15: '1. A consular officer shall be entitled to draw up or receive in notarial form or in such similar form as may be laid down by the law of the sending State: a acts and contracts concerning exclusively nationals of the sending State; b contracts of marriage provided that at least one of the parties is a national of the sending State; c acts and contracts notwithstanding that none of the parties concerned is a national of the sending State, provided that such acts and contracts relate to property situated within that State or are intended to have effect within that State. 2. The acts and contracts referred to in the preceding paragraph shall have judicial effect in the receiving State only to the extent that there is nothing contrary thereto under the law of that State. 3. When the law of the sending State requires the administration of an oath or affirmation, a consular officer shall be entitled to administer such oath or affirmation'.

95 A very similar provision is found in Polish law under Art. 28 of the Consular Law.

training and resources necessary to undertake the full range of tasks typically associated with civil law notaries in the sending state.

The need to clearly define the boundaries of consular functions is influenced by the potential for citizens to demand specific services that consuls may not be equipped to provide. This often leads to the adoption of statutory regulations that self-limit the scope of consular activity by foreign service officials. However, in most cases, a general regulation granting consuls discretionary authority to decide whether a specific consular action is appropriate – particularly if the same goals can be achieved by other means – is sufficient to address these issues.

Notably, consular activity cannot be directly equated with domestic notarial practices. Access to consular services is often influenced by factors not present in the domestic context,[96] such as logistical challenges or political considerations arising from the relationship between the receiving and sending states. These external factors can significantly impact and, in some cases, restrict consular activity. Hence, situations often arise where applicants are redirected to the legal framework of the receiving state, particularly for tasks that are exceptionally time-consuming or difficult for the consul to perform.[97]

Furthermore, domestic laws vary significantly in how they limit the scope of a consul's notarial activities, typically by defining a closed catalogue of permissible notarial functions. However, a limited catalogue does not necessarily imply a narrow range of functions.[98] States retain the flexibility to expand or modify this catalogue as needed through legislative changes. Consular notarial acts are inherently flexible instruments, applied by individual sending states according to their specific needs – such as the size of their emigrant population or the intensity of legal transactions with foreign countries. Consequently, these practices neither conform to a uniform global standard, nor is there a clear, precise trajectory in the development of consular notarial functions.

96 Under Polish law, certain civil law notary activities require registration in a closed intranet system. This system can only be accessed by notaries or courts within Poland, as access from abroad is restricted for security reasons.

97 Such an effect is achieved by refusing to perform the act. Refusal applies, naturally, to notarial acts that are contrary to the law of the sending state. Additionally, some legal frameworks explicitly provide for the possibility of refusal. For example, Art. 23 of the Belgian Consular Code (Loi portant le Code consulaire (C-2014/15009), 21 December 2013, Belgisch Staatsblad/Moniteur Belge, 21 January 2014, 2nd edn., pp. 4987–5000) allows a consul to refuse to perform a notarial act in cases of factual or legal difficulty. Similarly, Art. 35(2), point 3, of the Polish Consular Law provides the right for a consul to refuse to perform an act if it would require 'disproportionately large expenditures', particularly when the applicant could perform such an act much more easily under the local law of the receiving state.

98 In addition, it should be noted that, alongside typical notarial activities, ancillary activities are performed, which are customarily handled by civil law notaries in sending countries. These include, for example, the deposit of property or documents – see: Art. 72 of the Swiss Ordinance Verordnung vom 7. Oktober 2015 über Schweizer Personen und Institutionen im Ausland (Auslandschweizerverordnung, V-ASG), (AS 2015 3879), text: www.fedlex.admin.ch/eli/cc/2015/654/de). Cf. Arts. 23–24 of the Polish Consular Law.

4.4. Civil Status Acts

Acts of civil status (and those of a similar nature)[99] are commonly regarded as integral to consular practice. However, these are also the consular activities that most frequently encounter opposition from the receiving state. Such opposition, or outright refusal, to permit certain activities is observed even within the European Union and the broader European legal space.

The requirement for the receiving state's consent to perform consular functions related to civil status issues is rooted in the European Convention on Consular Functions.[100] This international law instrument, despite its relatively limited scope of application, represents a successful codification of customary law governing the exercise of consular functions.[101]

Considering the necessity of at least tacit consent from the receiving state to perform actions covered by the Danish clause, the performance or non-performance of such actions by consuls generally does not raise significant issues between states.[102] However, cases do exist – including in Polish practice[103] – where receiving states restrict consuls' ability to perform civil status acts, either wholly or in part. Such restrictions primarily stem from differences in the legal definition of marriage, conditions for its conclusion, or the inclusion of same-sex unions within the concept of marriage. In some cases, restrictions arise from the receiving state's requirement for uniformity in the form of marriage within its territory, which may preclude consular involvement in these matters.[104] Consequently, consular actions related to civil status

99 Notably, civil registration system is not universally adopted worldwide. Many nations do not use a state-run registration system, instead relying on alternative systems maintained by religious authorities. For instance, Poland did not establish civil status registries until the 1940s.

100 European Treaty Series No. 061 – see: Art. 13: '1. A consular officer shall be entitled to: a draw up or record documents on the birth or death of nationals of the sending State or any other documents concerning the civil status of such nationals; b celebrate a marriage, provided that at least one of the parties is a national of the sending State, that neither of them is a national of the receiving State and that there is nothing in the law of the receiving State which would prevent the celebration of the marriage by the consular officer. 2. The issue of the documents referred to in para. 1.a shall not involve exemption from any obligation imposed by the law of the receiving State'.

101 See, for example: Maftei, 2016, p. 106.

102 This contrasts with certain actions under international law, where states may primarily question the authoritarian nature of specific consular actions (e.g. the issuance of visas) or the classification of actions per analogiam to those not explicitly covered by provisions such as the Danish clause. A notable example is the dispute over consuls issuing national cards, such as Hungarian Cards or Pole Cards, which are considered activities of a passport-visa nature and thus guaranteed by international law. Issues surrounding the Pole Card were highlighted in Belarus and, prior to 2004, in Lithuania by the foreign service of the Republic of Poland.

103 It is worth noting the practical limitations imposed in this regard by Switzerland and Germany. Switzerland does not permit consuls of the Republic of Poland to perform civil status-related actions, except for transmitting Swiss civil status records to Polish civil registration offices. Similarly, Germany does not allow Polish consuls to undertake actions involving the issuance of documents confirming fitness for marriage.

104 See Arroyo Montero, 1991, p. 83.

must be understood as contingent on the receiving state's regulations, and such actions are not performed to the same extent, or at all, in every receiving state.[105]

Moreover, national regulations of sending states concerning consular functions in the field of civil status vary significantly. In some countries, consuls are authorised to prepare civil status records,[106] whereas in others, consuls merely receive declarations (e.g. of marriage) and forward the documents to the national civil status registry. There is no uniform practice in this regard.[107] Typically, consuls also act as intermediaries in transferring foreign civil status records to their home country. These documents are then subject to transcription, whereby the content of the foreign record is transferred into the domestic civil status registry. This process most often results in the creation of a national secondary civil status record.

The extent of potential changes in the field of civil status registration is challenging to predict. Ideological conflicts between states over the concept of marriage, the permissibility of same-sex marriages, and related issues hinder the unification of practices. Although at first glance civil status registration may appear less contentious[108] than, for example, notarial acts, in reality, the opposite is often true. Nevertheless, with the increasing global migration, the volume of consular activities related to civil status is likely to remain substantial. This will be the case even if the number of receiving states that restrict consuls from performing such activities continues to grow. Notably, nearly half of the countries worldwide lack a formal civil status registration system, relying instead on religious records or administrative medical records to serve this purpose. In such states – which generally do not oppose consular activities of this nature on their territory – the consul's role becomes particularly significant.

105 Sometimes the reasons for refusal are political in nature – for example, the United States' refusal to recognise marriages performed before Japanese consuls – see: *Miko Jung v. Rokusaburo Navaya* (47 NYS 2d 48, NY City Dom. Rel.Ct. 1944), American International Law Cases, vol. 10, pp. 176–177.

106 Here it is worth noting the regulations, such as the Romanian Regulament consular 1999 (Hotărârea 760/1999 privind aprobarea Regulamentului consular – Dată act: 16 septembrie 1999, Monitorul Oficial No. 468 of 27 September 1999, amended in Monitorul Oficial No. 778 of 22 November 2010, see Art. 17) or the Belgian Consular Code (Art. 8), which provide for consuls to perform actions related to civil status.

107 For example, in Poland, until the 1980s, consuls of the People's Republic of Poland were authorised to register civil status records under the Decree of 25 September 1945, Law on Civil Status Records (Journal of Laws 1945, No. 48, item 272) and the subsequent Decree of 8 June 1955, Law on Civil Status Records (Journal of Laws 1955, No. 25, item 151). Currently, under the Act of 28 November 2014 – Law on Civil Status Records (i.e. Journal of Laws 2023, item 1378, as amended), and previously under the Act of 29 September 1986 – Law on Civil Status Records (Journal of Laws 1986, No. 36, item 180), consuls are limited to actions involving the transfer of statements and documents to Poland for the preparation of a civil status record by the relevant national office.

108 During the period of capitulation treaties, it was assumed that the grant of jurisdiction in Egypt implicitly included, under the *de maiori ad minus* principle, the authority to perform civil status functions, such as accepting marriage declarations. Cf. McDougall, 1949, pp. 358 et seq.; see also the decision of the German Reichsgericht of 3 March 1930 (279/29 VIII) – FJG, vol. II, pp. 114, 219.

4.5. Administrative Activities

If we assume that consular functions are subject to significant variability over time owing to changes in the internal laws of the sending state, the situation appears different for many administrative actions. Although administrative law frequently evolves in the practice of states, the nature of administrative consular activities remains remarkably stable. The substantive aspects of administrative law conducted by consuls – such as the grounds and conditions for issuing visas, the types of personal identification documents, or passports – are subject to ongoing changes, however, the underlying principles have remained consistent for centuries. For example, the purpose of issuing visas and passports remains the same. The fundamental rules governing these processes have not changed. Similarly, formal adjustments in administrative law, such as introducing appeal procedures against a consul's visa decision (addressed further below), do not substantially alter the core nature of consular functions.

Certainly, the frequency of certain administrative activities may change over time, and in bilateral arrangements between states, some activities may not be performed. However, the essence of these activities remains unchanged, with variations occurring primarily in technical details.[109] Typically, consuls perform administrative actions involving the issuance of documents that confirm the applicant's status, such as citizenship of the sending state or membership in its predominant ethnic group,[110] professional entitlements (e.g. seaman's books), or civil status (e.g. fitness for marriage). Moreover, consuls may facilitate actions related to property rights, such as vehicle or vessel registration, or enable cross-border operations, such as transporting personal weapons or repatriating human remains. These administrative actions,

109 Consuls today are undergoing a significant process of computerisation in their activities, which has notably accelerated procedures for issuing documents, including administrative documents. All activities of a jus avocandi nature (such as administrative and notarial functions) should be regarded as highly susceptible to the application of new technologies. These technologies not only streamline, but also substantially expedite the process of performing such activities.

110 These are national cards, commonly issued in Central European countries, often through consular actions. These cards confirm the holder's affiliation with the national group dominant in the sending state but do not confirm or grant citizenship of the sending state.

alongside the consul's other judicial functions, are among the most frequently performed.[111]

Administrative activities evolve over time, driven by the intensification of integration processes. The consul's authority to issue visas loses practical relevance when visa-free travel agreements are established between countries. Similarly, in the case of passport-free travel and the absence of border controls, the need to issue passports for citizens of the sending state diminishes. The scale of changes in this area in recent years has been substantial. However, as certain activities decline, new responsibilities often emerge, particularly those related to the issuance of travel documents or personal identification. The absence of passport requirements is naturally associated with an increase in activities involving the issuance of identity cards and emergency travel documents,[112] which are essential for enabling travellers to continue their journeys from the receiving state to the sending state in cases where their original documents are lost or stolen.

As a rule, consuls are obliged, after irrefutably establishing a person's citizenship and identity, to issue documents that at least allow for their return to their country of origin. However, visa decisions can be discretionary.[113] In many countries, consuls make such decisions autonomously, with minimal external oversight or judicial review of their correctness.[114] In Europe, it has become standard practice to allow appeals of a consul's negative visa decision to a court. However, considering that

111 These activities are not discussed in this chapter. However, it is noteworthy that, apart from the rarely applied amicable jurisdiction in maritime matters (see further below), consuls generally perform a stable range of functions. These include the transmission and acquisition of documents abroad, the taking of evidence, the recording of testimony from witnesses and parties to proceedings (without using coercive measures), and the transmission of requests for judicial aid. In closely cooperating countries, some judicial aid activities are conducted through direct court-to-court contacts. Nevertheless, the overall scope of these consular functions has remained relatively stable over time, with few foreseeable changes. The consul remains a convenient authority for facilitating voluntary actions in court proceedings. See Art. 26 of the Act of 25 June 2015 – Consular Law (consolidated Journal of Laws 2018, item 2141, as amended); cf. Art. 19 of the Romanian Consular Regulation.

112 European law provides specific solutions in this regard – see Council Directive (EU) 2019/997 of 18 June 2019 establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP (OJ L 163 of 20 June 2019, pp. 1–12). According to this directive, consuls of Member States may issue EU Emergency Travel Documents (ETDs) to unrepresented citizens of other EU countries. These documents are issued based on a unified model and under standardised rules.

113 The practice of U.S. consuls in this regard is particularly notable. See Vroom, 1986, pp. 363 et seq.; Wildes, 1989, pp. 887 et seq.; Hager, 1991, pp. 203 et seq.

114 However, see, among others, the ruling in *USA for the Use of Adelaida Garcia (Jesus Ortiz) v. Vernon McAninch (Paul M. Miller)* Consul General (Consul) of the US at Santo Domingo – Dominican Republic et al. (435 F.Supp.240, E.D.NY, 1977, AILC vol. 26, pp. 266–270). Although the case was premised on the principle that visa denial fell outside the jurisdiction of the court, the court addressed the issue of possible jurisdiction over the consul's actions concerning individual damages. The criminal liability of a foreigner for making false statements to a consul during a visa application is another issue. Under U.S. law, even when the act is committed abroad, it can be jurisdictionally appropriate based on the 'principle of protection'. See *Rocha et al. v. U.S.* (U.S. District Court, Southern District, California, 29 March 1960, Court of Appeals, 2 March 1961; ILR, vol. 32, p. 113).

jurisdiction in such matters typically is assigned to an administrative court in the sending state, the practical likelihood of a citizen of the receiving state successfully challenging a decision is minimal. This standard could be viewed as a superficial assertion of a democratic sending state's commitment to judicial review, even when it concerns actions by state authorities affecting foreigners in a foreign legal context. Clearly, this standard is inherently limited – it is practically impossible to establish any meaningful jurisdiction, such as that of a court in the receiving state, over these matters.

Administrative activities of particular importance in the era of increased global mobility include those related to the transportation of deceased citizens' remains.[115] These activities involve issuing documents necessary for the repatriation of the body to the sending country. The issuance of these documents – an administrative function – often requires preliminary factual actions, such as participating in the identification of the deceased and sealing coffins for cross-border transport. Clearly, these tasks are not among the most agreeable for consuls. Despite this, conventions aimed at eliminating the requirement for consular involvement in the transportation of corpses have not garnered the level of interest from states one may expect.[116]

As of today, 23 European countries, including 17 EU member states (majority of them), participate in the convention framework established by the Council of Europe system, namely the Strasbourg Convention of 26 October 1973.[117] From Central Europe, only the Baltic States, Slovakia, Slovenia, and Czechia are parties to this treaty. In the first decade of the 21st century, the European Commission encouraged 12 EU member states that had not yet joined the convention to do so. However, among these, only Czechia decided to take this step at that time.

The Convention streamlines the process of repatriating the remains of a citizen of a state party from the state party where the death occurred to their home country, eliminating the need for consular acts typically required in such cases. The transportation of the corpse is conducted under the conditions outlined in the Convention, using a special *laissez-passer* certificate. This certificate is prepared strictly according to the model specified in the annex to the Convention. Under this system, the consular certificate that would ordinarily be issued by the consul of the destination

115 The actions of consuls in the transportation of corpses have deep historical roots – see Stuart, 1952, p. 337.

116 Transportation of cadavers in developing countries is subject to heightened scrutiny owing to its frequent use as a cover for drug trafficking. The absence of consular involvement in overseeing these activities is often regarded by states as a greater risk compared with transports conducted based on a laissez-passer issued by the sanitary authorities of the country of origin.

117 Agreement on the Transfer of Corpses, Strasbourg, 26 October 1973, European Treaty Series No. 80.

country is replaced by the *laissez-passer*, which is issued by the competent authorities in the country from which the transport originates.[118]

Liberalisation measures in this field date back to the League of Nations era, with the solutions of the Strasbourg Convention modelled on those of the earlier International Convention on the Transportation of Corpses.[119] The Strasbourg Convention, considered a more modern framework, was adopted to replace the outdated Berlin Convention, as noted in its Explanatory Report.[120] Despite this, the Berlin Convention remains active, with 15 countries, including 9 EU member states, as parties. Notably, Romania, Czechia, and Slovakia from Central Europe are among these. Some countries are parties to both conventions, which offers the broadest liberalisation of regulations in this area. Far from being a defunct agreement, the Berlin Convention saw its most recent accession in 2023, when San Marino became a party.[121] By comparison, the most recent accession to the Strasbourg Convention occurred in 2012, when Czechia joined. Interestingly, current parties to the Berlin Convention include countries outside Europe, such as Congo, Egypt, and Mexico.[122]

Both agreements are highly similar, utilising virtually the same administrative sanitary certificate to replace consular activities. When countries participate in both convention mechanisms (as is the case with Czechia and Slovakia), the provisions of the later Strasbourg Convention are typically applied. Neither agreement precludes the adoption of more liberal rules through bilateral agreements or decisions made with mutual consent in special cases. This is explicitly stated in Art. 10 of the League of Nations-era agreement and Art. 2 of the Council of Europe Convention, which clarify that the conventions set the maximum formal requirements that may be imposed.[123]

118 According to Art. 8 of the Convention, states parties are required to notify the authorities authorised to issue the laissez-passer. However, not all states, including some community states, have fulfilled this obligation (see the list of declarations and notifications: http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=080&CM=8&DF=5/31/2007&CL=ENG&VL=1, as of 1 June 2007). The authorities responsible for issuing the necessary document vary significantly, ranging from local police units, as in Norway, to regional authorities, such as in Austria, and most commonly to central authorities, such as the Ministry of Health or an equivalent institution.

119 The Berlin Convention concerning the Conveyance of Corpses, signed in Berlin on 10 February 1937 (LNTS vol. CLXXXXIX (199), pp. 313–325), provides regulations on the transportation of human remains across borders. For additional details, see https://www.fbiic.gov/public/2008/apr/Disaster_Victim_ID_Guide.pdf.

120 Explanatory Report to the Agreement on the Transfer of Corpses Strasbourg, 26 October 1973. See rm.coe.int/16800c96c9.

121 For information from the depositary, the German Foreign Ministry, see: www.auswaertiges-amt.de/resource/blob/248440/9eec4ac243b61c8dbf2e8702fdb0a089/statusliste-en-data.pdf.

122 Paradoxically, the participation of the latter two, more exotic countries – nations of considerable tourist importance – in this treaty represents a significant contemporary value of the Convention, which was created during the League of Nations era. This relevance is tied to the international passenger traffic that, *nolens volens*, includes the transport of corpses across borders.

123 *Nota bene*, states sometimes use bilateral agreements of a technical nature concerning the transportation of corpses. Such agreements are often initiated by airlines. For instance, Poland has such an agreement with the United States.

In the future, further liberalisation within the European Union in this area can be anticipated. EU regulations may effectively render such consular arrangements obsolete within the Union. However, in relations between an EU country and a non-EU country, the Strasbourg and Berlin Conventions will likely remain relevant mechanisms for liberalisation. A reasonable degree of flexibility in these cases can be achieved by acceding to both treaties, as several EU countries have done. However, Poland and Hungary have thus far refrained from joining these conventions.

4.6. Maritime Activities of Consuls

Historically, consuls' maritime activities in international law were multifaceted,[124] including a combination of functions related to the sending state's activities at sea. They were primarily commercial in nature, but also extended to civil law – such as when a consul facilitated the transfer of ownership of a maritime vessel or the establishment of liens on such property – and even to criminal law, when consuls performed policing duties aboard ships.[125]

These maritime activities experienced a resurgence in international law during the era of capitulation treaties[126] and the age of significant geographical discoveries. These functions incorporated elements of both *jus protectionis* (what Professor Sarna refers to as the right to consular intervention)[127] and *jus avocandi*.

At one time, consular activities included verifying the legitimacy of a ship's flag, which involved issuing flag certificates. Moreover, consuls exercised nautical sanitary authority, had the authority to clear ships commercially, assisted captains and crews in their interactions with local entities, and provided aid in rescuing ships. Specific procedures required interaction with consuls in cases of shipwrecks or collisions, during which consuls often had jurisdictional powers. Further, they acted as intermediaries in securing bottomry loans (taken to complete a voyage, typically at high interest rates and secured by a lien on the ship). In such cases, consuls provided consent on behalf of the sending state, serving as the flag state. Additionally, consuls played a key role in ship condemnation proceedings, which involved the sale of a ship under special circumstances, such as when repairs were deemed impossible. The consul's sovereign powers extended over captains, crew (including the prosecution of

124 See Elias, 1953, p. 34.

125 See the ruling of the German Bundesgerichtshof of 21 June 1962 (III ZR 57/61), issued under Section 33 of the Consular Act. This ruling highlights the strict police authority of consuls over seafarers, including the right to apprehend them and forcibly return them to the ship (Fontes Iuris Gentium, vol. V, p. 91).

126 Often, after the abolition of capitulatory jurisdiction, states incorporated symmetrical provisions for amicable jurisdiction in new consular conventions that were no longer capitulatory in nature. For instance, Japan included such provisions in its consular conventions with Germany and Belgium. Through the application of the most-favoured-nation clause, these powers were subsequently extended to consuls of numerous other states – see: Munch, 1986, p. 765. The Turkish authorities followed an analogous practice – Kunke, 1918, pp. 159–160.

127 Sarna, 1945, pp. 77–78.

deserters), and passengers. Amicable consular jurisdiction in civil cases and criminal jurisdiction over the ship's crew were also widely exercised at that time.[128]

The increasing automation of a seagoing vessel's interactions with its flag port has significantly reduced the role of the consul. Originally, consuls had extremely broad powers in maritime affairs, however, these have been considerably narrowed over time. Nevertheless, unlike various commercial and customs-related activities, maritime activities of an administrative nature have not been fully abolished.[129] However, the contemporary phenomenon of 'flag states' often being artificial constructs, particularly with the widespread use of flags of convenience, has rendered many consular powers envisioned in earlier frameworks practically irrelevant. For states that maintain a merchant fleet under their own flag, consuls primarily engage in administrative tasks, such as issuing documents that confirm seafarers' rights and the status of vessels. Today, the reduction in consular maritime functions stems not so much from international legal norms but rather from diminished reliance on state flags owing to the influence of free-market economics and global economic development. Consequently, these functions have been reduced to basic administrative duties, and even these are conducted by the consuls of only a few countries worldwide.[130]

4.7. Election-related Activities

With the increasing mobility and migration of citizens from sending states – both professional and temporary (such as tourism) – the ability for citizens to vote abroad has become significant in recent years. On the one hand, this practice is considered as a positive way to maintain a citizen's ties with their country of origin. On the other hand, it is criticised as excessively costly, allowing participation in the

128 See U.S. jurisprudence, which on the one hand prohibits coercive measures by consuls, such as the arrest of crew members (In re Aubrey, 26 Fed. 848 E.D.La 1885, AILC, vol. 9, pp. 464–467), while on the other hand recognises the civil law effects of consular actions and the possibility of amicable jurisdiction between captains and crew (The Marie, 40 Fed. 286, D.Ore. 1892, AILC, vol. 9, pp. 468–470).

129 Amicable jurisdiction, in theory, over labour matters between a ship's captain and crew remains applicable in certain cases – see: West India Fruit and Steamship Co. Inc. et al. (U.S., National Labor Relations Board, 16 February 1961, ILR, vol. 34, pp. 69, 75–76), which references the 1938 U.S.-Liberia Consular Convention. This jurisdiction also follows from the wording of some bilateral consular conventions that are in force (Trawczyński, 1988, pp. 105–106). Such provisions are characteristic of older regulations in the internal consular law of various states (Antokoletz, 1948, p. 179). For some Latin American countries, similar regulations date back to the early or mid-20th century. See also: Feller, Hudson, 1933, passim.

130 The Polish consular service, despite Poland's access to the sea, practically does not perform maritime functions. This is largely limited to the operation of commercial vessels and passenger ferries under the Polish flag within the Baltic region. Essentially, the full administrative servicing of these vessels occurs in home ports, eliminating the need for consular activity in cities such as Stockholm, Helsinki, Tallinn, or Riga. Meanwhile, ocean-going vessels owned by Polish legal entities, which are controlled by Polish entities, typically fly the flags of foreign countries.

political system by individuals who, having voluntarily left their home country, may be largely unaware of its current political situation. Consequently, models for voting abroad vary significantly.[131] They range from granting broad entitlements to vote in almost all types of elections, to restricting voting rights to individuals who pay taxes in the sending state, to entirely excluding the possibility of holding elections abroad. In most countries, the impact of votes cast abroad on electoral outcomes is typically minor,[132] although there are notable exceptions.[133]

Such activities require the explicit consent of the receiving state. Without this consent, elections cannot be held abroad.[134] International law does not establish any standards in this area and clarifies that there is no international legal obligation for states to facilitate voting abroad, nor is there a recognised human right to vote from abroad.[135] However, a citizen cannot be restricted from returning to their home country to cast their vote. When elections are conducted in the external voting format, the organisational responsibilities – such as overseeing the voting process, managing follow-up activities such as vote counting, and sending election documentation to the appropriate authorities in the sending state – typically fall to the consular office of the sending state.[136]

The regaining of independence by the states of Central and Eastern Europe reinforced tendencies towards statolatry. The absence of an independent state during the communist era was compensated for by a series of initiatives on a scale unfamiliar to countries whose sovereignty had not been interrupted. These efforts included

131 See Skotnicki, 2012, passim.

132 Poland presents a unique case in this regard. External voting has never had the capacity to influence the overall outcome of Polish elections. The results would have remained unchanged irrespective of whether external voting took place or not.

133 An exception to this general trend is Moldova, where the outcome of the presidential election was significantly influenced by external voting – see: Bucoń, 2020, p. 165.

134 Poland has accumulated significant experience in this area in recent years. The 2020 Polish presidential election occurred during the COVID-19 pandemic, when strict regulations were in effect in many countries. Some countries refused to allow voting altogether, such as Chile (see Order of the Supreme Court of the Republic of Poland of 30 July 2020, I NSW 219/20). Others permitted only correspondence voting, facilitated by consulates, as in the case of Canada (see: Order of the Supreme Court of the Republic of Poland of 27 July 2020, I NSW 1098/20).

135 Judgement of 15 March 2012, *Sitaropoulos & Giakoumopoulos v. Greece*, app. 42202/07.

136 An interesting contrast is provided by the Swiss solution, where the consular service merely forwards the register of voters abroad to Switzerland. Eligible voters can then either receive an election package sent from Switzerland to their foreign address or travel to Switzerland to vote in person – provided they declare their intention to do so at least six weeks before the election, to prevent the package from being dispatched (see: Art. 13 of the Swiss Consular Regulation). Notably, under Swiss law, if voting materials sent abroad on time arrive late or if a returned ballot reaches the electoral municipality too late, the voter cannot derive any legal claim from this delay (see: Art. 12(4) of the same regulation). This system highlights that the principal challenge of voting by mail abroad lies in the performance of foreign postal services, over which consuls of the sending country have no control. A significant number of electoral protests during the 2020 Polish presidential election – organised primarily by correspondence owing to COVID-19 restrictions in many receiving states – concerned the non-delivery of election packages by foreign mail services, as seen in Brazil (see: Order of the Supreme Court of the Republic of Poland of 27 July 2020, I NSW 93/20).

extending diplomatic protection, establishing related obligations, and introducing mechanisms such as voting abroad. At the time, these changes appeared justified, considering the significant migration of job seekers to the wealthier parts of Europe and across the Atlantic. However, after decades, a noticeable loosening of citizens' connections to their home countries is evidenced by, among other things, declining voter turnout. This trend raises questions about the continued relevance of maintaining voting rights for citizens abroad.

In some countries, a significant number of citizens reside in neighbouring countries – referred to as the 'near abroad'. This phenomenon is linked more to border changes following World War I and World War II than to voluntary economic migration. In such cases, the established mechanism of external voting in national elections has strong justification.

Although the democratisation of Euro-Atlantic countries (particularly in Central Europe) has contributed to the development of a certain standard for external voting, each country retains unique approaches and practices.[137] Consequently, the future application and development of external voting mechanisms in individual countries are unlikely to follow a uniform trajectory.

5. Summary

The future direction of changes in the scope of diplomatic and consular functions is difficult to predict with certainty. However, it is likely that the influence of human rights protection norms, particularly those addressing standards for deprivation of liberty, will persist. This would reinforce the existing standards of diplomatic assistance and ensure continued access to consular support for individuals deprived of liberty. Moreover, it is possible that such protections will increasingly extend to categories of individuals beyond the citizens of the sending state, evolving into a standard of protection for citizens of all democratic ('civilised') states. The growing efforts by states to evacuate such individuals en masse suggest that this trend will likely continue. In this context, the conclusion of international agreements – potentially even on a universal scale – can be anticipated.

The future trajectory of diplomatic asylum is more uncertain. Although it is conceivable that the legal and humanitarian policies of sending states may lead to an increased use of this form of asylum, it is difficult to imagine states openly advancing the notion that diplomatic asylum constitutes a universal customary norm under international law.[138]

137 See Krasnowolski, 2015, passim.

138 Although, in fact, the status of diplomatic asylum cannot be entirely ruled out, considering its use in exceptional situations across de facto every region of the world.

Regarding the evolution of consular law, it can be reasonably assumed that the influence of the sending state's domestic law on the scope of consular functions will increase. While the influence of the receiving state's law will not be entirely minimised, a certain reduction in its impact is highly likely. This is because greater computerisation of legal actions – which is expected to continue – will diminish the receiving state's ability to control the scope of functions performed by the consul. Consequently, objections raised by the receiving state when granting exequatur on the consul's letters of commission, particularly regarding functions covered by the Danish clause, are likely to become increasingly rare. Currently, such objections are uncommon and are primarily limited to certain civil status functions. However, as the trend towards automation progresses, such objections will likely become even less frequent.

Computerisation will undoubtedly lead to an expansion in the scope of consular activities, particularly in administrative and legal functions. Through consuls, individuals abroad will increasingly gain access to domestic proceedings that were previously inaccessible. However, in most cases, consuls will act as intermediaries for the issuance of domestic administrative decisions rather than as the issuing authorities. Many countries are also likely to leverage computerisation to expand consular functions related to notarial or civil status matters, although the specifics will depend on the domestic legal frameworks of individual sending states.

Simultaneously, some consular functions will likely disappear from state practice. The near-universal adoption of the Hague Convention on the Abolition of the Requirement of Legalisation for Foreign Public Documents suggests that a fully universal regime in this area will eventually be established. Consequently, consular legalisation of documents will become a thing of the past, joining capitulatory consular jurisdiction – which ceased in the early 1970s[139] – as another significant institution of consular law consigned to history. This shift will likely occur even before the 100th anniversary of the Hague Convention.

Moreover, the consular service may favour the widespread adoption of treaties liberalising the transportation of corpses or, ideally, a single universal treaty addressing this issue. However, the feasibility of such a treaty appears limited, although decisions on this topic at the European Union level remain a plausible possibility.

However, the future of consular electoral functions is difficult to predict. Practices vary significantly among states, and differing trends are evident in individual sending states and in proposed *de lege ferenda* reforms. Countries such as Poland and

139 L.T. Lee considers 1 December 1971, as the date marking the final extinguishment of capitulatory powers, coinciding with Britain's announcement of relinquishing its jurisdictional rights in the Persian Gulf (Lee and Quigley, 2008, pp. 15–16). The U.S. had already relinquished its capitulatory powers earlier, abandoning its jurisdictional rights in Morocco in 1956. Interestingly, as late as 1951, capitulatory arrangements were included in the Treaty of Friendship, Commerce and Navigation between Britain and the Sultanate of Muscat (now Oman), which, as noted by F. Munch (1986, p. 765), was the last capitulatory treaty ever concluded. This treaty, along with all others in the region, expired 20 years later.

Spain, which heavily use external voting mechanisms via their consular services, face considerable domestic criticism of this practice.[140] Critics argue that citizens residing abroad for extended periods, often with minimal connection to their home country's political realities, should not influence electoral outcomes. Conversely, democratic states that entirely forgo external voting mechanisms face criticism for denying their expatriate citizens a voice. Currently, there is no recognised human right to vote abroad. Considering the substantial costs associated with organising such elections and their often negligible impact on domestic politics, it is unlikely that general or even European-level demands for universal external voting rights will materialise in the near future.

140 Bartosik, 2016, p. 205.

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