

CHAPTER FOUR

FINDING AND ANALYSIS

A. **Mandatory Consular Notification in the Diplomatic and Consular Relations within the State**

Indonesia is a state which has numerous residents who are working, living, and having education abroad, and due to that it is very importance to create Mandatory Consular Notification with other states. The Mandatory Consular Notification will provide guarantees for respectable consular notification procedures to all countries that have ratified article 36 of the VCCR 1963.⁴⁶

The consequences of implementing mandatory consular notification is citizens will be able to get consular access from consular officers without delay. Consular notice turns out to be compulsory if there is an agreement between two nations. There are several capacities of consular to facilitating the exercise of consular function relating to nationals of the sending State based on Article 36 of the Vienna Convention on Consular Relations 1963:

- (a) Consular officers shall be permitted to communicate with citizens of the sending State and to have access to them. Citizens of the sending state shall have the similar freedom with and access to

⁴⁶ Craig Forcece, 2006, "The Capacity to Protect: Diplomatic Protection of Dual Nationals in the War on Terror", *European Journal of International Law*, Vol. 17, No. 2, New York, Oxford University Press, p. 374.

consular officers of the sending state;

- (b) The capable authorities of the receiving state without delay to notify the consular of the sending state that the citizens are arrested or committed to prison or custody pending trial or is detained in any other manner;
- (c) Consular officers shall have the right to visit their citizens of the sending state who is in prison, guardianship or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending state who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from acting on behalf of a national who is in prison, custody or detention of the expressly opposes such action.

Mandatory Consular Notification can exclusively guarantee the Indonesian Government's capacity to ensure its residents, and in addition, it can prevent unnecessary cases that will happened.⁴⁷ A consular notification based on the Vienna Convention on Consular Relations 1963 has three principles, namely:

- a. Principle of Obligation;

⁴⁷ Malcolm D. Evans, 2014, *International Law First Edition*, Oxford, Oxford University Press, p. 391.

What distinguishes the existence of a Mandatory Consular Notification agreement is the level of state obligations. The state has more binding obligations regarding the delivery of notification of the occurrence of arrests and detention without delay.

b. *Pacta Sunt Servanda* Principle;⁴⁸

The emergence of a Mandatory Consular Notification is based on a binding agreement between the sending country and the recipient country, either before or after the investigation.

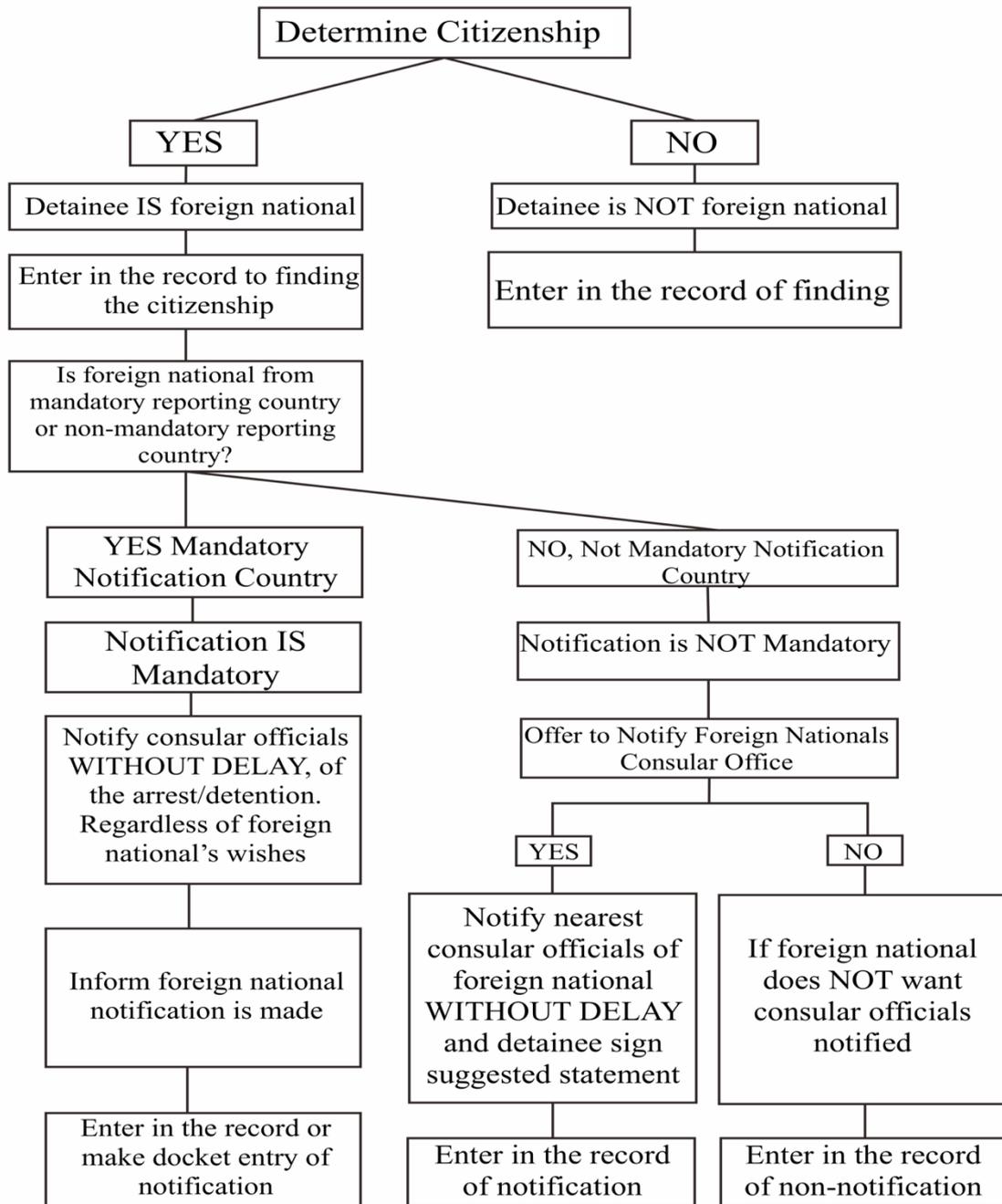
c. Reciprocity Principle.

The state, through its consular officer, must notify consular notifications with certainty, and treat foreigners with equal treatment when arrested and detained. In this case, Indonesia will be represented by the Ministry of Foreign Affairs and the Directorate of Indonesian Citizens Protection and Indonesian Legal Entities. The consular officer must also ensure that the country does the same.

This is a diagram showing the procedure of consular notification for foreign national who get arrested or in detention (Figure 4.1).

⁴⁸ The Vienna Convention on the Law of Treaties 1969 in Article 26.

Figure 4.1 The Procedure of Consular Notification⁴⁹



⁴⁹ Source: Department Foreign Affairs Republic of Indonesia.

Based on the diagram, it can be concluded that there are several steps to follow when a foreign national is detained or arrested:

1. It is very important that determination of citizenship is recorded. Courts must ensure that the court records all information about determining citizenship, advice or rights, and actions taken. Courts that do not have records must record all information that establishes citizenship, including the response of the accused, advice or rights, and actions taken. Also, the warning form must include a warning to the Vienna Convention if a foreign national is arrested or detained.
2. Determining the citizenship of the defendant. This can be done by asking the place of birth of the defendant, whether the defendant was born from the recipient country or not. In the absence of other conflicting information, it means the defendant has a passport or other travel documents.
3. If the national country of foreign citizenship is not in the list of notifications, it is mandatory for the next part:
 - a. Offer without delay, to notify foreign national consular officials of arrest/detention.⁵⁰

⁵⁰ Art. 36 Para. 1, Vienna Convention on Consular Relation 1963.

- b. If the foreign national asks that the consular notification be given, notify the nearest consular officials of the foreign national's country of citizenship without delay.⁵¹
4. If the nationality of a foreign national is in the list of mandatory notification, the notification is required:
- c. Notify the consular official closest to the country, without delay, about the arrest/detention regardless of the wishes of the foreign national, depending on conditions of communication.⁵²
 - a. Inform foreign countries that the recipient country is forming this notification.

The steps above are carried out based on the conducts of countries both with mandatory consular notification and without mandatory consular notification. Consular notification is not only given to citizens affected by legal problems but also to inform citizens of sending countries who have died.

Cases of death of foreigners will give more burden to consular officials. This is because consular officials must notify relatives of the corpse, arrange autopsy issues if necessary, prepare for funerals, cremate the body of the corpse, take care of guardianship issues from the corpse's assets, and fill out

⁵¹ Art. 36 Para. 2, Vienna Convention on Consular Relation 1963.

⁵² Although the phrase "depending on conditions of communication" is not explained, a reasonable interpretation of the phrase in context would be that whether notice is given in one, two or three days depends on what is reasonable under the circumstances.

reports to authorized officers.⁵³ If a diplomatic or consular official die, both are still attached to immunity for a certain period or until the body is dispatched by the recipient country back to the country of origin.

After getting consular notifications, the residents will get consular access. There are several Consular Access Rights, such as:⁵⁴

- Consular visits. Under conditions requiring notice, or when a foreign national is kept in a military restriction office, the Consul has the privilege to visit the citizens immediately. Visits will be managed by imprisonment office guidelines.
- To communicate among Consul and the citizens. Whether or not a foreign national is confined, he/she will reserve a privilege to convey orally, telephonically, or recorded as a hard copy with the consul.
- The consul will give full chance to defend the interests of the residents. The consul has right to meet, to advise, and to coordinate with the legal representation. The consul or other authorities of the foreign nation will be treated with the dignity and civility according to his office.

⁵³ Luke T. Lee, *Op. Cit*, p. 145.

⁵⁴ Article 36 Vienna Convention on Consular Relations 1963.

1. Definition and Legal Basis of Mandatory Consular Notification

The right to get notifications and access is reflected in Article 36 of the Vienna Convention on Consular Relations 1963, which was widely accepted as an international practice standard by participating countries.

Article 36 of the Vienna Convention on Consular Relations stated:

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

- a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
- b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
- c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse

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

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

The Vienna Convention on Consular Relations 1963 did not specify in detail the definition or work system of the Mandatory Consular Notification. However, Article 36 of the Vienna Convention on Consular Relations 1963 can be interpreted and it can be concluded that Mandatory Consular Notification are:

1. Consular notification is facilities that give by international law to the consul or consular officers of the sending States to communicate with their nationals in the receiving States; and
2. Consular notification is rights of nationals who are arrested and detention to get assistance from their Consul.

From these definitions above, determine that Mandatory Consular Notification is an agreement between the sending States and receiving States about consular notification.⁵⁵ Or in another word Mandatory Consular Notification is a way to maximize the realization of consular notification which respectable procedure and more detail than arrangement on Vienna Conventions on Consular Relations 1963.⁵⁶ Consular notification is not always about deaths, guardianship or trusteeship, wrecks, and air accidents, birth, and insurance, but also concerning detention or arrest.⁵⁷

The Vienna Convention on Consular Relations 1963 Art. 36 and Law Number 24 of 2000 on International Treaties becomes legal basis for the government to agree with other States to create Mandatory Consular Notification to protect the interests of its citizens abroad. Mandatory Consular Notification is a freedom for the state, which is formed by bilateral agreement and outlined in the form of a written agreement. The

⁵⁵ Departemen Luar Negeri Direktorat Perlindungan WNI-BHI, 2006, "Mandatory Consular Notification", Papers presented on Dissemination of Legal Protection for Indonesia Worker in Abroad, p. 1.

⁵⁶ Amelya Agustina, *Op. Cit.*, p. 324.

⁵⁷ Following are the contents of Article 37 of The Vienna Convention on Consular Relations 1963: If the relevant information is available to the competent authorities of the receiving state, they shall have the duty authorities;

- (a) In the case of the death of a national of sending state, to inform without delay the consular post in whose district the death occurred;
- (b) To inform the competent consular posts without delay, where does the appointment of a guardian or other person lack a full capacity who is a national of sending state. The giving information hall, however, will have prejudice to the operation of the receiving state regarding appointments;
- (c) If a vessel, having the nationality of the sending state, is registered in the receiving state as an accident on the receiving state. To inform without delaying the nearest consular post to the scene of the occurrence.

written form of Mandatory Consular Notification certainly brings its consequences, namely a consular notification is more compulsory, and its implementation is carried out without regard to the request of the country concerned.⁵⁸

2. Scope and Principles of Mandatory Consular Notification

In general, Mandatory Consular Notification between two countries regulate the same thing as the articles written in the Vienna Convention on Consular Relations 1963, but it is formulated for things that are more specific depending on the wishes of the country concerned. For example, Mandatory Consular Notification between Indonesia and the Philippines regulates several specific things including:⁵⁹

- a. Basic principles;
- b. Implementation of consular functions within or outside the consular area;
- c. Basic principles of consular notification;
- d. Protection of minors and physical limitations;
- e. Assistance to shipwrecks and aircraft from sending countries;
- f. Regular meetings or consultations between parties;
- g. Amendment provisions, and

⁵⁸ Luke T. Lee, 1991, *Consular Law and Practice 2nd Edition*, New York, Oxford University Press, p. 155.

⁵⁹ These points are contained in the Mandatory Consular Notification between Indonesia and the Philippines.

h. Deadline for agreement.

From these points, it can be seen that mandatory consular notification is considered important because includes obligations that are more detailed than the obligations contained in the Vienna Convention on Consular Relations 1963 Article 36. Mandatory Consular Notification will maximize the implementation of procedures and details.

There are three principles of Mandatory Consular Notification, such as:⁶⁰

1. Obligatory

Regardless of the wishes of foreign nationals who is arrested or in detention without delay.

2. Mandatory Consular Notification is based on the agreement between sending States and receiving States (after or before investigation).

3. Reciprocity Principle

The entitled officer has a conviction that consular notification has to be done and the nationals have to get the same treatment when they are in detention or arrested.

⁶⁰ Departemen Luar Negeri, *Op. Cit.*

B. The Importance of Mandatory Consular Notification for Consular Relations between Indonesia and Other Foreign Countries

1. Background of the Emergence of Mandatory Consular Notification

Consular relations had been established since a long time ago than diplomatic relations.⁶¹ Consular and diplomatic relations practices were originally governed by customary international law. Especially for consular relation, the regulation base on bilateral agreements between States.⁶²

Nevertheless, in 1955 International Law Commission (ILC) decided to codify the determinate of International Law concern the consular relations. The General Assembly of the UN decided to conduct a codification conference in Vienna. As a result, this conference follows up the acceptance of the Vienna Convention on Diplomatic Relations 1961. On 24 April 1963, the Vienna Convention on Consular Relations 1963 was born.⁶³ In this convention we know about consular notification that will have relationship with Mandatory Consular Notification. In the field of

⁶¹ Amelya Agustina, 2014, "The Important of Mandatory Consular Notification Between Indonesia and Other Foreign States", *Mimbar Hukum Faculty of Law, Yogyakarta, Universitas Gajah Mada*, p. 321.

⁶² Michael John Garcia, 2004, Vienna Convention on Consular Relations: Overview of U.S. Implementation and International Court of Justice (ICJ) Interpretation of Consular Notification Requirements, *Congressional Research Service, The Library of Congress*, p. 2.

⁶³ Amelya Agustina, *Op. Cit.*, p. 323.

relations between states, two issues were identified, namely diplomatic relations and consular relations.⁶⁴

As known in the previous discussion that the task of protection is more carried out in consular functions with the legal basis of the Vienna Convention on Consular Relations 1963.⁶⁵ The Convention also gives freedom to the state to initiate agreements related to diplomatic protection and consular for its citizens.⁶⁶ At first, the protection of citizens was carried out with consular notices as stipulated in Article 36 of the Vienna Convention on Consular Relations 1963.⁶⁷

Nevertheless, many countries violated the provisions of this article, which ultimately formed a more specific agreement. The country applied its national laws to foreigners without giving notifications to consular representatives in their countries. This kind of thing indeed has injured the rights of foreign citizens in the form of assistance, assistance from translators, and so forth. Mandatory Consular Notification was first initiated by the United States of America.⁶⁸

However, the US was proven to have repeatedly violated Article 36 of the 1963 Vienna Convention against foreigners who committed crimes

⁶⁴ Anthony N. Bishop, 2002, "The Unenforceable Rights to Consular Notification and Access in the United States: What's Changed Since the La Grand Case", *Houston Journal of International Law* Vol. 25, Texas, University of Houston Law Centre, p. 45.

⁶⁵ U.S Supreme Court, 2007, "Medellin v Texas", *Cornell Law Journal*, p. 95, taken from <https://www.law.cornell.edu/supremecourt/text/552/491>, accessed on March 23th, 2019 at 6 pm.

⁶⁶ Widodo, *Op.Cit.*, p. 60.

⁶⁷ John B. Quigley, *Op.Cit.*, p. 7.

⁶⁸ Amelya Agustina, *Op.Cit.*, p. 324.

in their territory. The violation occurred even though the United States had ratified the Vienna Convention on Consular Relations in 1963 in 1969.⁶⁹

The violations of the United States are described in the following cases:

a. The case of *La Grand* (the United States vs Germany)

In the case of *La Grand* which occurred in 1986, the United States sentenced Karl La Grand and Walter La Grand, two German citizens who were charged with the murder of bank officers and attempted robbery in the state of Arizona. The following year, the two La Grand brothers were found guilty and sentenced to death. Germany then tried to reopen the case and settle it through diplomatic channels but was rejected by the United States. In 1999 the United States carried out the execution of Karl La Grand.

The day after the execution was carried out, Germany submitted a motion for temporary action to the International Court of Justice (ICJ). The day after the submission of the motion, ICJ called on the United States to postpone the execution of Walter La Grand until there was a further verdict. Germany filed a lawsuit against the United States in the

⁶⁹ Cindy Galway Buys, *et al.*, 2011, "Do unto Others: The Importance of Better Compliance with Consular Notification Rights", *Duke Journal of Comparative & International Law*, Vol. 21 No. 461, North Carolina, Duke University School of Law, p. 486.

argument that the United States had failed to notify the German government by Article 36 of The Vienna Convention on Consular Relations 1963.⁷⁰

However, on these allegations, the United States argued in the Procedural Default Doctrine. According to this legal principle, federal courts cannot examine the substance of cases that have been carried out before the court if the applicant fails to follow court procedures. That is, the defendants should have been aware of their rights before entering the trial and then asked the court.

If the trial is carried out and the verdict has been determined, but the defendant does not demand his rights, the defendant's right will be deemed lost, and the higher court cannot examine the defendant's claim so that the doctrine that has become a fundamental rule of US criminal procedure has caused La Grand brothers to lose their rights because too late to realize their rights.⁷¹

In the end, the ICJ judge ruled that the United States could not use the provisions of the Procedural Default Doctrine as an excuse not to implement Article 36 of the Vienna Convention

⁷⁰ International Court of Justice, 1999, “La Grand Case (Germany v United States of America): Summary of Judgements and Orders”, taken from <https://www.icj-cij.org/files/case-related/104/7728.pdf>, accessed on May 6th, 2019 at 8 pm.

⁷¹ Curtiz A. Badley, , 2006, “Enforcing The Avena Decision on U.S Courts”, *Harvard Journal of Law & Public Policy*, Vol. 30, No. 1, Massachusetts, Harvard School of Law, p. 124.

on Consular Relations 1963 so that the United States had violated international law. But in this case, despite being found guilty, ICJ was unable to change the death sentence that the United States had imposed on the La Grand brothers so that the two brothers were still executed.⁷²

b. Breard Case (the United States vs Paraguay)

In the case of Breard which occurred in 1992, the United States sentenced Angel Francisco Breard, a citizen of Paraguay to death for alleged murder and attempted rape of US citizens Ruth Dickie. Virginia Police found Angel Breard's passport, but the US government advised the court to hide the discovery of the passport. Also, the United States did not allow the Consular Official of Paraguay to aid Angel Breard.⁷³

At the first trial, Angel Breard was sentenced to fine and death sentence. After that Angel Breard proposed Habeas Relief⁷⁴ and stated that the United States allegedly violated the Vienna Convention on Consular Relations 1963 at the time of its previous arrest by not informing that as citizens of Paraguay

⁷² International Court of Justice, 1999, *Op. Cit.*

⁷³ International Court of Justice, 1998, "Vienna Convention on Consular Relations (Paraguay v United States of America): Summary of Judgements and Orders", taken from <https://www.icj-cij.org/files/case-related/99/7601.pdf> accessed on May 6th, 2019 at 4:45 pm.

⁷⁴ Habeas Relief or *Habeas Corpus* is a concept originating from the Anglo Saxon justice system, where the concept gives the suspect or defendant the right to prosecute officials who make detention (police or prosecutors) to prove that the detention is not illegal and is in accordance with the provisions apply.

he had the right to contact his country's consular officer. But the federal district court rejected Angel Breard's lawsuit because of the default procedural doctrine as happened in the La Grand case. The International Court of Justice ruled that the United States had been proven to violate Article 36 of The Vienna Convention on Consular Relations 1963, and considered the United States to free Angel Breard from the death penalty.⁷⁵

However, the ICJ ruling is not an obligation for the United States and is only limited to the consideration of district court. The Angel Breard case continued until the cassation level and ended on Supreme Court voting where Angel Breard lost three votes, and his clemency application was rejected. It was 2.5 hours after voting that finally Angel Breard remained sentenced to death with lethal injection on 14 April 1998.

c. The Avena Case (the United States vs Mexico)

In the case of Avena that occurred in 2003, the United States through several states of California, Texas, Illinois, Arizona, Florida, Ohio, Nevada, Oklahoma, and Oregon sentenced 54 Mexican citizens to death. The imposition of the death sentence was carried out without consular notice to

⁷⁵ International Court of Justice (1998), *Op. Cit.*

Mexico's diplomatic and consular representatives in the United States.⁷⁶

Against this punishment, the Mexican government finally brought the case to the International Court of Justice because the United States violated Articles 36 and 37 of the Vienna Convention on Consular Relations 1963 concerning diplomatic notice and the provision of consular protection to Mexican citizens. In the end, the ICJ gave the following decision:

- i. Stating that the United States has violated Article 36 paragraph (1) (b) the Vienna Convention on Consular Relations 1963 by not immediately informing the detention of 51 Mexican citizens;
- ii. Stating that the United States has violated Article 36 paragraph (1) (b) the Vienna Convention on Consular Relations 1963 by not properly notifying Mexican consular representatives regarding the detention of 49 Mexican citizens resulting in the unavailability of adequate assistance as provided for in the Vienna Convention on Consular Relations 1963;

⁷⁶ Melda Kamil Ariadno and Iman Rizani, 2006, "Case Concerning Avena and other Mexican Nationals", *Indonesian Journal of International Law*, Vol. 3, No. 3, Jakarta, Universitas Indonesia Press, p. 443.

- iii. Stating that the United States has violated Article 36 paragraph (1) (a) and (b) the Vienna Convention on Consular Relations 1963 in the case of the detention of 49 Mexican citizens, where the United States prevented Mexico from communicating and having access to and visiting its citizens while in detention;
- iv. Stating that the United States has violated Article 36 paragraph (1) (c) the Vienna Convention on Consular Relations 1963 where in terms of the detention of 34 Mexican citizens, the United States prevented the Mexican side from providing legal assistance to its citizens;
- v. Stating that the United States has violated Article 36 paragraph (1) (c) the Vienna Convention on Consular Relations 1963 to review and reconsider the demands and punishments of Mr. Caesar Roberto Fierro Reyna, Mr. Roberto Moreno Ramos, and Mr. Osvaldo Torrs Aguilera;
- vi. Stating that the United States is obliged to provide appropriate compensation, to review and reconsider the penalties given to Mexican citizens as provided for in

Article 46 of the Vienna Convention on Consular Relations 1963.⁷⁷

As well known, international law does not have an executive body to enforce sentences, so the ICJ can only decide that the United States has violated international law, paid compensation, and gave orders to review the verdict, but could not change the death penalty to be dropped by the United States because it contradicts the principle of sovereignty, it can be seen that the two countries must base foreign relations on every issue involving citizens of other countries. Violations of the provisions of the convention by other parties do not cause a loss of the obligation of the party to implement the provisions of the convention.⁷⁸

From that history, the United States then decided to form a separate agreement which was later called Mandatory Consular Notification. Until now, the United States has a Mandatory Consular Notification agreement with 57 countries.⁷⁹ This agreement was then imitated by almost all countries in the world to maximize protection for citizens who are abroad.

⁷⁷ International Court of Justice, 2003, “Summary of Judgement of Case Concerning Avena and other Mexican Nationals (Mexico v United States of America)”, taken from <https://www.icj-cij.org/files/case-related/128/13801.pdf> accessed on May 6th, 2019 at 8:15 pm.

⁷⁸ *Ibid.*

⁷⁹ United States Department of State, “Consular Notification and Access”, taken from <https://travel.state.gov/content/travel/en/consularnotification/QuarantinedForeignNationals/counties-and-jurisdictions-with-mandatory-notifications.html> accessed on May 6th, 2019 at 8:30 pm.

2. Obstacles in the Implementation of Mandatory Consular Notification

Discussing Mandatory Consular Notification likewise identified with the receiving States and sending States. Mandatory Consular Notification is an international convention (bilateral agreement) that have several barriers, such as:

a. Good Faith;

Since Mandatory Consular Notification is an bilateral agreement, good faith is an important point. If the two countries do not run the Mandatory Consular Notification with the good faith, the Mandatory Consular Notification will not work well too.

The principle of good faith is based on the principle of *Pacta Sunt Servanda* as contained in the 1969 Vienna Convention concerning the Agreement Law Article 26. If a country does not implement the principle of good faith in their country, then the Mandatory Consular Notification function will not run well.

b. Differences in language and culture between Indonesia and other countries;⁸⁰

Culture is a basis that will indirectly form a legal system that is different from one country to another. An example is the culture of the *kafalah* system in Saudi Arabia which considers that every

⁸⁰ Cindy Galway Buys, *Op. Cit.*

worker is part of the employer's property. This kind of assumption causes some rules such as domestic workers must not to leave the house, they cannot return to their home countries without permission from their employers. A culture like this often prevent the performance of consular officers in carrying out their obligations.⁸¹

Meanwhile, language can be an obstacle to effective communication and increasing the need for consular access appropriately; this is because every time listening to foreign languages requires a good interpretation, which does not only involve words but also the behavior and cultural background of the foreign people. This is usually understood by people who understand the culture and customs of the foreign country.

Translation usually cannot be done literally, and if the translator is not well trained, the interpretation can be wrong. For illustration, take the case of Cirila Baltazar Cruz, an indigenous woman from the state of Oaxaca in Mexico, who speaks neither Spanish nor English.⁸²

She was confirmed incapable to raise her child in the state of Mississippi because the Spanish interpreter could not speak with

⁸¹ Susan Berk-Seligson, 2009, "Coerced Confessions: The Discourse of Bilingual Police Interrogations", *The International Journal of Speech, Language, and the Law*, New York, Equinox Publishing, p. 171.

⁸² Tim Padgett & Dolly Mascareñas, 2009, "Can a Mother Lose Her Child Because She Doesn't Speak English", taken from <http://content.time.com/time/nation/article/0,8599,1918941,00.html>, accessed on May 12th, 2019 at 7 pm.

her. But Ms. Cruz could not understand the interpreter because she only communicates an indigenous tongue. Her lack of interaction and understanding was interpreted as a mental disability.⁸³

- c. Partner countries have not been willing to cooperate in the Mandatory Consular Notification field with Indonesia;

The willingness of other countries to form Mandatory Consular Notification with Indonesia is one of the biggest factors that inhibit the formation of Mandatory Consular Notifications. So far, partner countries have been reluctant to form Mandatory Consular Notifications with Indonesia because the obligation to provide consular notifications has been written in the Vienna Convention on Consular Relations 1963.⁸⁴

For this reason, Indonesia must be able to convince partner countries to cooperate in the Mandatory Consular Notification field. One of the differences in the legal system between Indonesia and partner countries is the existence of the Privacy Act policy. Certain countries still, have a Privacy Act policy that serves to protect the confidentiality of its citizens or foreign nationals, while the establishment of the Mandatory Consular

⁸³ Confidential Files of the Consulate General of Mexico, Chicago (on file at the Consulate Representation)

⁸⁴ Sabina Veneziano, 2008, "The Right to Consular Notification: The Cultural Bridge to a Foreign National's Due Process Rights", *Georgetown Journal of International Law*, Washington DC, Georgetown Law, p. 509.

Notification, means that the Privacy Act policy must be excluded, and this is what partner countries often do not want to do.⁸⁵

3. Protection of the Indonesian Government through Mandatory Consular Notification

The Indonesian government as one of the ratifying conventions on diplomatic and consular still feels that it is not enough to refer to Article 36 of the 1963 Vienna Convention. Indonesia continues to intensify cooperation in the Mandatory Consular Notification with various countries for optimal protection of Indonesian citizens abroad. Indonesia has not yet had a Mandatory Consular Notification with a country with the highest concentration of Indonesian Migrant Worker. Meanwhile there are still many Indonesian citizens who are threatened with capital punishment in countries such as Saudi Arabia, Malaysia and China. Indonesia continues to approach other countries to approve the establishment of the Mandatory Consular Notification, even though the approach has been rejected.

Until now, Indonesia only has Mandatory Consular Notification agreements with Australia, Brunei Darussalam, the Philippines, Costa Rica⁸⁶ and Panama⁸⁷, which are not the countries with the highest

⁸⁵ Ahmad Almaududy Amri, 2012, "Foreign Affairs And Defence Ministers Meeting Indonesia – Australia: Upaya dalam Meningkatkan Hubungan Bilateral di Bidang Keamanan", Thesis Program Pascasarjana Ilmu Hubungan Internasional Universitas Indonesia, Jakarta, p. 43.

⁸⁶ The Jakarta Post, 2015, RI, "Costa Rica sign framework cooperation agreement", taken from <https://www.thejakartapost.com/news/2015/08/23/ri-costa-rica-sign-framework-cooperation-agreement.html> accessed on July 10th, 2019 at 1 pm.

⁸⁷ The Jakarta Post, 2015, RI, "Panama agree to boost relations", taken from <https://www.thejakartapost.com/news/2015/08/24/ri-panama-agree-boost-relations.html> accessed on July 10th, 2019 at 2 pm.

concentration of Indonesia Migrant Worker. Nevertheless, Indonesia continues to intensify further discussions to form Mandatory Consular Notification together with several countries such as Malaysia, Jordan, Yemen, Taiwan, and etc. Regarding Malaysia, the planned establishment of the Mandatory Consular Notification is done by forming a team of Eminent Person Group (EPG) which is useful for creating understanding between the two countries. The EPG team between Indonesia and Malaysia consists of experts, community leaders, scholars, cultural experts and scholars.

Although up to now only 5 (five) countries have held MCNs with Indonesia and these five countries are not countries with large numbers of migrant workers, the effort to realize the Mandatory Consular Notification remains important. This is due to the position of Indonesia with a large number of citizens working abroad so that they have a big chance of getting into trouble there. With Mandatory Consular Notification, the enactment of Article 36 of the 1963 Vienna Convention will be stronger, and efforts to protect migrant workers will become easier.

In addition, this is based on the experience of Indonesia with several countries in the Middle East such as Saudi Arabia and the United Arab Emirates. These countries often have legal issues that affect migrant workers but are not quick to report to Indonesian representatives there.

The effectiveness of the implementation of the Mandatory Consular Notification agreement can be exemplified from the provision of consular

notifications from the Indonesian government to the Philippines in the case of illegal fishermen. As many as 544 foreign fishermen were arrested for fishing illegally in Indonesian waters. After the 544 fishermen were arrested, the Ministry of Foreign Affairs sent officials from the Directorate of International Treaties and the Consular Directorate to assist the process of verifying the fishermen. The results of the verification showed that the majority of the fishermen came from Malaysia and the Philippines.

Furthermore, the Ministry of Foreign Affairs immediately conducted a consular notification to the Embassies of the two countries in Jakarta.⁸⁸ This is a form of implementing Indonesia's consular notification to Malaysia even though the two countries do not have a Mandatory Consular Notification agreement. The implementation of obligations was also applied to the Philippines which has a Mandatory Consular Notification with Indonesia on February 24th, 2014.

On the other hand, the effectiveness of the Mandatory Consular Notification is quite evident from Indonesian and Australian diplomatic relations. On May 16th, 2007 Australian customs vessels arrested as many as 49 fishermen from six Indonesian fishing vessels captured in waters near the Ashmore Marine Park in the Timor Sea. But the Indonesian Embassy in Canberra and the Indonesian Consulate in Darwin just get

⁸⁸ Bayu Galih, 2014, "Kementrian Luar Negeri Bantu Verifikasi 544 Nelayan Asing di Kalimantan", taken from <https://nasional.kompas.com/read/2014/11/27/16260501/Kementerian.Luar.Negeri.Bantu.Verifikasi.544.Nelayan.Asing.di.Kalimantan%20pada%2026%20Juli%202016> accessed on July 8th, 2019 at 6 pm.

notification of apprehension from the Australian government, but not in detailed who were get arrested or detention. One week later, the Indonesian Consular in Darwin managed to contact one of the fishermen and planned to find out more information about the name of the ship, the number and name of the crew and the catching coordinates. Such detailed information had never been mentioned in an arrest notification even though it had been agreed upon by the governments of both countries.⁸⁹

Australia's good faith regarding the implementation of the Mandatory Consular Notification agreement with Indonesia was seen in the Australian government's recommendation to amend the Migration Act 1958 so that every underage individual would get access to consular assistance as soon as possible after his arrival in Australia. After the establishment of a Mandatory Consular Notification agreement between Indonesia and Australia, a consular notification must be sent by each party if there are problematic citizens within 3 days; this was also conveyed by the Minister of Foreign Affairs and Trade of Australia.⁹⁰ The recommendation for the amendment of the 1958 Migration Act was motivated by the large number of Indonesian fishermen who were

⁸⁹ Bambang, 2007, "Konsulat RI Darwin Gali Informasi Penangkapan 49 Nelayan", taken from <https://www.antaraneews.com/berita/63533/konsulat-ri-darwin-gali-informasi-penangkapan-49-nelayan> accessed on July 8th, 2019 at 7 pm.

⁹⁰ Parliament of Australia, 2010, "Detention of Indonesian minors in Australia", taken from https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/indonesianminors/index accessed on July 9th, 2019 at 8 pm.

underage and arrested by Australian authorities without informing them of access to consular assistance from the Indonesian Consulate in Australia.

In the case of Tuti Tursilawati, aside of several capacities of consular related to nationals of the sending State as stated in Article 36 of the Vienna Convention on Consular Relations 1963, creating bilateral agreement on Mandatory Consular Notification (MCN) with Saudi Arabia is very important. Formally, Mandatory Consular Notification will be the legal basis for Indonesia to help and give proper protection to the nationals. Without Mandatory Consular Notification, Indonesia are not able to protect the nationals from any cases that happened abroad, especially the criminal cases.