

THE UNITED STATES' WITHDRAWAL FROM INTERNATIONAL COURT OF JUSTICE JURISDICTION IN CONSULAR CASES: REASONS AND CONSEQUENCES

JOHN QUIGLEY*

INTRODUCTION

In 2005, the United States withdrew from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes. The Optional Protocol provides for jurisdiction in the International Court of Justice (ICJ) when any state party to the Vienna Convention on Consular Relations (VCCR)¹ seeks to sue another state party for violating it.²

Controversy over VCCR Article 36, which allows a foreign national under arrest to contact a home state consul, prompted the withdrawal. The United States had just lost two cases in the ICJ arising out of situations in which police in the United States had failed to observe consular access for arrested foreign nationals. The withdrawal was a response to those ICJ decisions.

The withdrawal raised questions about the intent of the United States to comply with its obligations under the VCCR. For a number of years, the United States has taken a view of the consequences of non-compliance with VCCR Article 36 that is at odds with the views of other states party to the VCCR. The United States reads VCCR Article 36 as affording less protection for a foreign national whose consular access was not respected than do other states.

Many view the withdrawal as a significant reversal of U.S. policy regarding U.S. participation in international dispute resolution

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* President's Club Professor in Law, Michael E. Moritz College of Law, The Ohio State University. The author is grateful to Professor Annecoos Wiersema for comments on a draft.

1. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

2. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 326, 596 U.N.T.S. 487, 488 [hereinafter Optional Protocol].

mechanisms, particularly the ICJ, since the United States was an early and strong proponent of compulsory dispute settlement for violations of the VCCR.³

The withdrawal limited the ability of the United States to sue other states party to the VCCR for violations of the rights of U.S. consuls and U.S. nationals. Lacking the Optional Protocol as a jurisdictional basis, the United States is not likely to establish jurisdiction over other states for violations of consular access rights or any other aspect of consular law.⁴

The withdrawal also raised legal issues, the most significant of which deals with the validity of the withdrawal. Under international law, it is unclear whether states are free to withdraw from a treaty that does not expressly provide for withdrawal in a so-called “denunciation clause.”⁵ The Optional Protocol contains no such clause.

At the policy level, the withdrawal fueled charges that the United States takes a unilateralist approach to international law. The United States has been at odds with other nations in recent years on issues ranging from military action to environmental protection.⁶ The withdrawal from the VCCR Optional Protocol seemed to some as one more example of a go-it-alone approach by the United States.

This Article examines the reasons for the 2005 withdrawal from the VCCR Optional Protocol, why the United States deemed it appropriate to change course from its earlier position, what the withdrawal means for U.S. compliance with consular access obligations, whether the withdrawal is legally valid, and what it may mean for U.S. compliance with international law and participation in international dispute settlement processes.

I. THE U.S. WITHDRAWAL FROM THE VCCR OPTIONAL PROTOCOL

States that are party to the VCCR have the choice of adhering to the Optional Protocol.⁷ By becoming a party to the Optional Protocol, a state that is already a party to the VCCR gains jurisdiction

3. LUKE T. LEE & JOHN QUIGLEY, *CONSULAR LAW AND PRACTICE* 574-76 (3d ed. 2008).

4. *See infra* § I.

5. *See infra* § VIII(b).

6. *See* Paul Kevin Waterman, Note, *From Kyoto to ANWR: Critiquing the Bush Administration's Withdrawal from the Kyoto Protocol to the Framework Convention on Climate Change*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 749, 759 (2003).

7. *See* Optional Protocol, *supra* note 2, art. 1.

in the ICJ to sue any other state party for any violation of the VCCR, but at the same time, such a state opens itself up to being sued by other states party to the VCCR for any violation of the VCCR.⁸ The operative provision of the Optional Protocol reads:

Disputes arising out of the interpretation or application of the [Vienna] Convention [on Consular Relations] shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.⁹

By adhering to the VCCR and the Optional Protocol, as it did in 1969, the United States gained a right to sue other states for VCCR violations and conversely exposed itself to being sued for VCCR violations by other states that are party to both the VCCR and the Optional Protocol.

The VCCR Optional Protocol provides the principal jurisdictional base whereby the United States sues and can be sued for consular law violations. This is so because the United States is not currently subject to the ICJ's so-called compulsory jurisdiction, under which states that file a declaration with the ICJ may sue other states that have filed such a declaration and, in turn, can be sued by them.¹⁰ Hence, the withdrawal, if valid, effectively insulated the United States from future consular lawsuits but also deprived it of the possibility of suing other states.

U.S. Secretary of State Condoleeza Rice effected the withdrawal in a letter to U.N. Secretary-General Kofi Annan. Annan circulated the letter to the other states party to the Optional Protocol and posted an item about the letter, which he called a "communication," on the website he maintains for activity relating to treaties. The posting read:

On 7 March 2005, the Secretary-General received from the Government of the United States of America, a communication notifying its withdrawal from the Optional Protocol. The communication reads as follows:

"... the Government of the United States of America [refers] to the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, done at Vienna April 24, 1963. This letter constitutes notification by the United States of America that it hereby withdraws from the

8. *See id.*

9. *Id.*

10. *See infra* note 140.

aforesaid Protocol. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol.”¹¹

The United States sent its communication to the U.N. Secretary-General because that official is designated in the Optional Protocol as the depositary agency. That means that states adhering to the Optional Protocol communicate their adherence to the U.N. Secretary-General,¹² who then notifies existing states party of new adherences.¹³

As mentioned previously, some treaties contain a denunciation clause that specifies that states have the right to denounce, or withdraw, from the treaty at their sole discretion, typically with a proviso that they provide notice prior to the date of effectiveness of the denunciation.¹⁴ Denunciation clauses typically designate the depositary agency as the recipient to which a state would communicate its denunciation. The Optional Protocol has no denunciation clause and, hence, no provision about how to communicate a denunciation.¹⁵ The United States nonetheless chose the Secretary-General as the recipient of its communication.

II. SUITS AGAINST THE UNITED STATES IN THE ICJ

ICJ suits against the United States were the precipitating factor in its withdrawal from the Optional Protocol.¹⁶ The United States had been sued in 1998, in 1999, and again in 2003 by states party to the VCCR who alleged violations of VCCR Article 36, which relates to a consul’s role in aiding nationals who are arrested.¹⁷ In each case, jurisdiction was based on the Optional Protocol, and each plaintiff state alleged that the United States had failed to fulfill its consular access obligation toward one or more of its nationals.¹⁸ In the terminology of consular law, the state in which such a person is arrested is called the “receiving state,” since it “receives” a consul of

11. United Nations, *Multilateral Treaties Deposited with the Secretary-General*, ch. 3, § 8 n.1 (Nov. 11, 2008), <http://treaties.un.org/Pages/ParticipationStatus.aspx>.

12. Optional Protocol, *supra* note 2, arts. VI, VII.

13. *Id.* art. IX.

14. The terms “denunciation” and “withdrawal” are used interchangeably in regard to treaties. “Denunciation” is the term used traditionally, but more recently “withdrawal” has come to be used as an equivalent.

15. See Optional Protocol, *supra* note 2.

16. See *infra* § III.

17. See *infra* text accompanying note 19.

18. See *id.*

another state. The national's home state is called the "sending state," since it "sends" its consul. Under VCCR Article 36, when a sending state national is arrested, the receiving state must allow the sending state national and a sending state consul to communicate with each other. VCCR Article 36 reads:

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 also 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 judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

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.¹⁹

In each of the three cases filed against the United States, a state party to the VCCR alleged that its national (or nationals) had been arrested in the United States, but was (or were) not advised, as the last sentence of VCCR Article 36(1)(b) requires, of the right of

19. VCCR, *supra* note 1, art. 36.

consular access.²⁰ In all three instances, these nationals were then convicted of murder and sentenced to death.²¹ These states argued before the ICJ that the violation, which in all but a few instances was not contested by the United States, necessitated some court action to provide a remedy. In two of the three cases, the plaintiff state argued that VCCR Article 36 afforded a right not only to it as a state, but as well to its foreign nationals as individuals, that the foreign national be advised of his or her right, and that this right could be asserted in a court of the receiving state in case of violation.²² The United States took the contrary position before the ICJ, maintaining that while VCCR Article 36 creates rights and obligations between the sending and receiving states, it does not create a right that adheres to the foreign national as an individual. In its view, when a foreign national is not advised about consular access, the rights of the sending state, not the foreign individual, are violated, hence no judicial remedy is required.²³

Courts in the United States, at the urging of the Department of State and Department of Justice, generally have interpreted VCCR Article 36 in line with the U.S. government's view.²⁴ Thus, when foreign nationals have sought a judicial remedy for a violation, state and federal courts in the United States have typically held either that they have no right or that, even if they have a right, they are not entitled to a remedy.²⁵ Other courts have rejected such claims by foreign nationals on the basis that even if they have a right and are entitled to a remedy, prejudice must be found to have flowed from the violation, and because the courts did not find prejudice, the particular foreign national was not entitled to a remedy.²⁶ Still other courts have rejected such claims on the basis of so-called "procedural

20. See *Case Concerning the Vienna Convention on Consular Relations* (Para. v. U.S.), 1998 I.C.J. 248 (Order of Apr. 9); *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (Judgment of June 27); *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31).

21. See *Case Concerning the Vienna Convention* (Order of Apr. 9), 1998 I.C.J. at 249; *LaGrand* (Judgment of June 27), 2001 I.C.J. at 478-80; *Avena* (Judgment of Mar. 31), 2004 I.C.J. at 39.

22. See *LaGrand* (Judgment of June 27), 2001 I.C.J. at 492-93; *Avena* (Judgment of Mar. 31), 2004 I.C.J. at 42-43.

23. See *LaGrand* (Judgment of June 27), 2001 I.C.J. at 493.

24. See, e.g., *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885-86 (9th Cir. 2000); *United States v. Tapia-Mendoza*, 41 F.Supp.2d 1250 (D. Utah 1999).

25. See, e.g., *Lombera-Camorlinga*, 206 F.3d at 885-86.

26. See, e.g., *Tapia-Mendoza*, 41 F.Supp.2d at 1253.

default”— that the claim was filed beyond the stage in the criminal process by which claims of illegality must ordinarily be filed.²⁷

Three states sued the United States in the ICJ after U.S. courts rejected the claims of their foreign nationals, and in each case before the ICJ, the outcome favored the plaintiff state. In the 1998 suit filed by Paraguay over the impending execution of a national, Angel Breard, who had been convicted of murder in Virginia, Paraguay asked for an injunctive ruling, which the ICJ issued, calling on the United States to stop the execution.²⁸ Both Paraguay and Breard asked the U.S. Supreme Court to enforce the ICJ ruling, but it declined.²⁹ Breard had not raised his consular access claim in the courts of Virginia, since his lawyers apparently were not aware of consular access. The U.S. Supreme Court said that federal courts would not consider Breard's consular access claim, since it had not been raised in a Virginia court.³⁰ U.S. Secretary of State Madeleine Albright, stressing the U.S. need to gain consular access for U.S. nationals, asked the Governor of Virginia to postpone the execution, but she did not take the position that Virginia was legally required to do so.³¹ The Governor ignored this request, and Breard was executed. The ICJ continued consideration of the case, even after Breard's execution, but Paraguay dismissed the case some months later, so no final judgment was issued.³²

The 1999 filing by Germany did result in a final judgment. Germany sued over a failure to advise as to consular access in a case involving two German nationals—brothers named LaGrand—who were convicted of murder in Arizona and sentenced to death.³³ One of the two brothers had been executed by the time Germany filed, and the other's execution was imminent. The ICJ again issued an injunctive ruling, instructing the United States to postpone the execution while the case was pending.³⁴ Like Paraguay before it,

27. *See, e.g.*, *State v. Issa*, 93 Ohio St. 3d 49 (2001).

28. *Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 248, 249, 258 (Order of Apr. 9).

29. *See Breard v. Greene*, 523 U.S. 371 (1998).

30. *Id.* at 375.

31. Letter from Madeleine K. Albright to James S. Gilmore (Apr. 13, 1998), in *DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW, 1991-1999* ch. 2 (consular and judicial assistance and related issues, item 16), available at <http://www.state.gov/documents/org-anization/65744.pdf>.

32. *See Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 426, 427 (Order of Nov. 10).

33. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 475, 478-80 (Judgment of June 27).

34. *LaGrand Case (F.R.G. v. U.S.)*, 1999 I.C.J. 9, 16 (Order of Mar. 3).

Germany asked the U.S. Supreme Court to implement the injunctive ruling, but again the Supreme Court declined.³⁵ The second brother was executed. Germany continued with the case before the ICJ, resulting in the ICJ's first judgment in a claim relating to a violation of consular access. The ICJ concluded that VCCR Article 36 gives a right to a foreign national to be advised about consular access, and that when that right is violated, the receiving state must review the case to determine whether a remedy is required.³⁶ Thus, the ICJ rejected the U.S. position both as to a right and as to a remedy.

Germany also asked the ICJ to rule that the United States violated Germany's rights by failing to comply with the injunctive ruling.³⁷ The ICJ had never decided the question of whether such rulings are binding, and the United States argued that they were not. The ICJ agreed with Germany and held the United States liable on the additional ground of failing to comply with the injunctive ruling.³⁸ Hence, on two issues the ICJ found against the United States.

In 2003 Mexico sued on behalf of a much larger number of nationals. It alleged that fifty-four Mexican citizens on death rows in nine states of the United States had not been advised about consular access.³⁹ The ICJ, at Mexico's request, issued an injunction to stop the executions during the pendency of the case of three individuals, for whom execution dates might have been set soon.⁴⁰

Mexico asked the ICJ to rule that the convictions be reviewed.⁴¹ In its response, the United States conceded that, in all but two instances, advice about consular access had not been given.⁴² The United States argued, responding to Mexico's claim, that review of the allegations could be handled in the executive clemency process and need not be done by a court, pointing out that the ICJ had not previously specified which forum should review potential consular access violations.⁴³ The ICJ ruled, however, that a judicial forum was

35. Federal Republic of Germany v. United States, 526 U.S. 111, 112 (1999).

36. *LaGrand*, 2001 I.C.J. at 494 (Judgment of June 27).

37. *Id.* at 498.

38. *Id.* at 516.

39. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 24 (Judgment of Mar. 31). The number for which claims were being made was subsequently reduced to fifty-two. *Id.*

40. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. 77, 90-92 (Order of Feb. 5).

41. *Avena*, 2004 I.C.J. at 55 (Judgment of Mar. 31).

42. *Id.* at 50.

43. *LaGrand Case* (F.R.G. v. U.S.A.), 2001 I.C.J. 466, 514 (June 27).

the most appropriate and that a court in the United States should review the cases of the named Mexican nationals.⁴⁴

Of the Mexican nationals named in the ICJ case, the first to go before the U.S. Supreme Court seeking implementation of the ICJ judgment was José Medellín, then on death row in Texas.⁴⁵ In February 2005, shortly before a scheduled oral argument in the Supreme Court in Medellín's case, President George W. Bush issued a memorandum to the U.S. Attorney-General relaying his position that the cases of the Mexican nationals named in Mexico's suit should be reviewed by courts of the states in which they had been convicted. The President's memorandum stated:

the United States will discharge its international obligations under the decision of the International Court of Justice . . . by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the . . . Mexican nationals addressed in that decision.⁴⁶

A few weeks later, Secretary of State Rice sent her letter, referenced above, to the U.N. Secretary-General to withdraw from the Optional Protocol.

III. DEPARTMENT OF STATE EXPLANATION OF THE WITHDRAWAL

Secretary Rice made clear that it was the content of the ICJ's decisions that led the United States to send the letter of withdrawal: In a statement she explained that while the United States considered the VCCR "extremely important," its objection was to the interpretation by the ICJ: "this particular optional protocol was . . . being interpreted in ways that we thought were inappropriate."⁴⁷ Rice accurately noted that only about 30 percent of the 166 states then party to the VCCR were also parties to the Optional Protocol.⁴⁸

Another State Department spokesperson, Darla Jordan, focused on the content of the ICJ decisions. She said that they interfered with

44. *Avena*, 2004 I.C.J. at 66.

45. *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), *cert. granted*, 543 U.S. 1032 (U.S. Dec. 10, 2004) (No. 04-5928).

46. Brief for the United States as Amicus Curiae Supporting Respondent at 41-42, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). The President's reference to "its international obligations" was to the United States' obligation to comply with an adverse decision of the ICJ, an obligation found in U.N. Charter art. 94.

47. Hugh Dellios, *Rice Reaches across to Mexico; Defends U.S. Quitting Part of Consular Pact*, CHI. TRI., Mar. 11, 2005, at C4.

48. *Id.*

the prerogatives of the courts of U.S. states, especially their imposition of death sentences: “The International Court of Justice has interpreted the Vienna Consular Convention in ways that we had not anticipated that involved state criminal prosecutions and the death penalty, effectively asking the court to supervise our domestic criminal system.”⁴⁹

Jordan further explained that the withdrawal was aimed at: “protecting against future International Court of Justice judgments that might similarly interpret the consular convention or disrupt our domestic criminal system in ways we did not anticipate when we joined the convention.”⁵⁰

At a State Department press briefing, still another spokesperson, J. Adam Ereli, explained more fully the reasons for the U.S. withdrawal from the VCCR Optional Protocol:

QUESTION: Adam, can you discuss a bit about the rationale behind the Administration’s decision to withdraw from the optional protocol to the Geneva [an apparent inadvertent reference to ‘Geneva’ instead of ‘Vienna’] Conventions which give the International Court of Justice a measure of jurisdiction in U.S. capital cases? There’s already criticism that this is part of a continuing trend of unilateralism

MR. ERELI: Right. Well, let me address that latter criticism first. I don’t think anybody should conclude by our decision to withdraw from the optional protocol that we are any less committed to the international system or that we are in any way walking back from international commitments. To the contrary, we remain a part of the Vienna Convention, we remain committed to fulfilling its provisions and we stand by it.

Second of all, the International Court of Justice, pursuant to a dispute referred to it under the optional protocol, rendered a judgment in the *Avena* case dealing with how state courts in the United States handled certain capital cases where foreign nationals claimed consular access. The decision that the ICJ handed down is a decision, frankly, that we don’t agree with.

Yet, in recognition of the optional protocol and our international commitments, the President has determined that the United States will comply with the judgment of the International Court of Justice

49. Charles Lane, *U.S. Quits Pact Used in Capital Cases; Foes of Death Penalty Cite Access to Envoys*, WASH. POST, March 10, 2005, at A1.

50. *Id.*

and that we will review—our state courts will review—the cases that ICJ responded to.

However, we would also note that when we signed up to the optional protocol, it was not anticipated that this—that when you refer a case—cases that would be referred to the ICJ and the ICJ would use the—and the optional protocol would be used to review cases of domestic criminal law.

This is a development, frankly, that we had not anticipated in signing up to the optional protocol and that we, frankly—we—and I would note, you know, 70 percent of the countries that are signatories to the Vienna Convention also decided not to sign up to the optional protocol so it's not just the United States going against everybody else. I mean, we are in a sense joining an existing majority in not participating in the optional protocol and the reason is because we see the optional protocol being used by people or going in directions that was not our intent in getting involved.

I mean, so the bottom line is we believe in the international system, we are a committed participant in the international system, as reflected by our continued commitment to the Vienna Convention and its provisions, as well as our decision to comply with the judgment. But at the same time, we see that in this specific case, and in the use of optional protocol, frankly, the way it's being interpreted, the way it's being used, go against the ideas — the original ideas that we signed up for.

QUESTION: But this protocol came in handy for the United States during the Iran hostage crisis. Then there's criticism that we're now cherry-picking the provisions that we like and don't like, that this might be short-sighted in the long-run.

MR. ERELI: Well, again, I don't think we're cherry-picking. I think that this is a really unexpected and unwelcome precedent where people who don't like decisions of our state courts can use an international court as a court of appeal. And that doesn't make any sense at all. And so what we're talking about is, we've got a system of justice that works in the United States and I don't think you should compare it to other countries, like Iran in 1979. We have a system of justice that works. We have a system of justice that provides people with due process and review of their cases. And it's not appropriate that there be some international court that comes in and can reverse the decisions of our national courts.

...

QUESTION: But why does the United States on the one hand decide to, you know, go along with this ruling to review these cases and then just days later decide to pull back?

MR. ERELI: Because, precisely because, we respect the international system, because we respect the authorities and the jurisdictions of international institutions when we sign up to those international—when we sign up and submit ourselves to those jurisdictions. So it shows that, look, even though we don't like something, even though we think it's wrong, if we submitted ourselves to that jurisdiction freely and according to international obligations, then we will honor those international obligations. I mean, that's why we are complying with the case.

But we're also saying in the future we're going to find other ways to resolve disputes that come under the Vienna Convention other than submitting them to the ICJ. We'll do something else. So we're still committed to the Vienna Convention. We're still committed to upholding its principles and fulfilling our obligations under that convention. What we are saying is when there are questions about that, we'll seek to resolve them in a venue other than the ICJ. Given that the ICJ in this case, as well as the Lagrand case, established a precedent of using this mechanism to affect our domestic legal system.⁵¹

The Department's position, thus, was that the United States would comply with *Avena* but would no longer submit to ICJ jurisdiction, in part because the Department was concerned over the construction given to VCCR Article 36 by the ICJ.

IV. THE CHARGE OF UNILATERALISM

The United States had been subject to frequent criticism for allegedly taking advantage of its position as the remaining superpower and acting unilaterally rather than cooperatively in international affairs. The U.S. stance on consular access, even prior to the 2005 Optional Protocol withdrawal, had put the United States at odds with other states.⁵² Its positions on whether VCCR Article 36 provides for an individual right and whether a consular access

51. *Regular State Department Press Briefing*, Mar. 10, 2005, distributed by FEDERAL NEWS SERVICE.

52. *See, e.g.*, Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Order of April 9); LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (Judgment of June 27); Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31).

violation calls for a judicial remedy had not been echoed by other parties to the VCCR. To the contrary, other states had been vocal in condemning the United States for these positions.⁵³

Foreign governments, starting in the mid-1990s, entered diplomatic protests with the Department of State when their nationals faced execution.⁵⁴ Beyond diplomatic protest, which is a traditional form of objection by one state against another, a number of states also directly approached governors who held the final say as to whether an execution would proceed.⁵⁵ They also filed *amicus curiae* briefs in state and federal courts in support of the claims of foreign nationals for a remedy for a consular access violation.⁵⁶ The filing of briefs by foreign governments is an unusual form of making a position known. It is not done lightly, as it implies criticism of the receiving state.⁵⁷ These filings thus reflected the fact that the U.S. position, which was being followed for the most part by U.S. courts, was on the international radar screen as an issue on which the United States was out of line with other states.

Most states that filed briefs did so in cases involving their own nationals, but some filed in support of nationals of other states, which was an even more unusual measure that further reflects the strength of the view of those states that the United States was out of line.⁵⁸ In addition, foreign states even filed as groups of states, and in one U.S. Supreme Court case, a group of thirteen Latin-American states filed a brief seeking a judicial remedy for a consular access violation.⁵⁹ In the same case, the European Union filed such a brief that was backed not

53. *See infra* notes 55-57.

54. Letter from José del Carmen Ariza, Ambassador of the Dominican Republic, to Warren Christopher, U.S. Sec'y of State (Mar. 15, 1993) (on file with author).

55. Letter from José del Carmen Ariza, Ambassador to the Dominican Republic, to Ann Richards, Governor of Texas (Mar. 15, 1993) (on file with author).

56. *See, e.g.*, *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997) (noting that Mexico filed a brief). *See also* *Standt v. City of New York*, 153 F.Supp.2d 417, 426 (S.D.N.Y. 2001) (listing a number of briefs filed by other states).

57. On protests in support of a co-national, see generally 1 L. OPPENHEIM, *INTERNATIONAL LAW* 786 (8th ed.1955).

58. *See, e.g.*, *Illinois v. Madej*, 739 N.E.2d 423 (Ill. 2000) (noting a brief by Mexico in support of position of Poland in regard to a national of Poland).

59. Brief of Foreign Sovereigns in Support of Petitioner, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). Mexico filed a separate brief in support of petitioner. Brief *Amicus Curiae* of the Government of the United Mexican States in Support of Petitioner Jose Ernesto Medellin, *id.*

only by its then twenty-five member states, but also by an additional twenty-one other European states.⁶⁰

A. The U.S. Position on Rights under VCCR Article 36

No state in the international community, including the closest allies of the United States, strayed from the chorus of criticism or came to the defense of the U.S. positions. These other states, as reflected in their filings, said that VCCR Article 36 guarantees a right to an arrested foreign national, given that VCCR Article 36(1)(b) uses the term “rights” to refer to a foreign national’s consular access. They relied on the ICJ’s conclusion on this point.⁶¹

The United States, in making its argument that no individual right is accorded, cited a phrase in the preamble to the VCCR that reads: “Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States”⁶² It used that language to assert, in advising U.S. courts on how to deal with a consular access violation, that “[t]he right of an individual to communicate with his consular officials is derivative of the sending state’s right to extend consular protection to its nationals,” and therefore the VCCR does not establish “rights of individuals.”⁶³

Preamble clauses may legitimately be used to clarify the meaning of a treaty’s provisions, yet the particular U.S. argument ran up against the fact that the “privileges and immunities” identified in various provisions of the VCCR apply to consular officers, family members, and employees, who enjoy them so that a consulate can carry out its work without excessive interference by the receiving state.⁶⁴ Consular officers are, for example, exempted from paying income tax in the receiving state on the salaries they receive from the

60. Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner, *id.*

61. Brief of Foreign Sovereigns in Support of Petitioner, *id.*; Brief Amicus Curiae of the Government of the United Mexican States in Support of Petitioner Jose Ernesto Medellin, *id.*; Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner, *id.*; see to same effect *LaGrand Case (F.R.G. v. U.S.A.)*, 2001 I.C.J. 466, 494 (June 27).

62. VCCR, *supra* note 1, pmb1.

63. Letter from David Andrews, Legal Adviser, Department of State, to James K. Robinson, Assistant Attorney General, attachment a, at A-3: Department of State Answers to the Questions Posed by the First Circuit in *United States v. Nai Fook Li*, available at <http://www.state.gov/s/l/6151.htm>.

64. See VCCR, *supra* note 1, pmb1.

sending state.⁶⁵ Additionally, they have certain privileges if a criminal case is filed against them,⁶⁶ and their confidential correspondence cannot be read by the receiving state.⁶⁷

Contrary to the assertions of the Department of State in the mid-1990s, this range of applicability of the preamble phrase had been recognized by the Department of State delegation that represented the United States at the 1963 conference at which the VCCR was drafted. The delegation informed the U.S. Senate during the Senate process leading to ratification of the VCCR that this preamble phrase referred to “officers, members of families, and employees” of consular posts.⁶⁸

Moreover, at the 1963 drafting conference it was clear that this preamble phrase did not apply to sending state nationals who might require consular services. The phrase was included in preamble language proposed by six delegations at the conference.⁶⁹ The delegate of Ghana, one of the proponents, explained: “A really appropriate preamble to the convention on consular relations must include a reference to the basis on which consular officials enjoyed certain privileges and immunities.”⁷⁰

The drafters’ concern was that privileges and immunities for consuls was a delicate subject in some third-world states, since in the age of colonialism many European states arranged extensive exemptions from local jurisdiction for their consuls.⁷¹ In those states’ view, and in that of the states who acknowledged the concern, the point of the preamble phrase was to make clear that the privileges

65. *Id.* art. 49.

66. *Id.* arts. 41-42.

67. *Id.* art. 35. *See also* LEE & QUIGLEY, *supra* note 3, at 341-511.

68. Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, Mar. 4-Apr. 22, 1963, in *Vienna Convention on Consular Relations with Optional Protocol*, 91st Cong., 1st Sess., Executive E (U.S. Government Printing Office, Washington 1969) 41, 46.

69. U.N. Conference on Consular Relations, Vienna, Austria, Mar. 4-Apr. 22, 1963, *Argentina, Ceylon, Ghana, India, Indonesia and United Arab Republic: proposed preamble to the Convention*, U.N. Doc. A/CONF.25/C.1/L.71 (Mar. 8, 1963).

70. *Id.*, First Comm., 29th mtg., Mar. 26, 1963, *Consideration of the draft articles on consular relations adopted by the International Law Commission at its Thirteenth Session (A/CONF. 25/6)*, ¶ 10.

71. *See Id.* ¶ 3. Tunisia, which initially opposed inclusion of this preamble phrase, regarded privileges and immunities for consuls as “a necessary evil and differentiation between various classes of persons” that “should certainly be eliminated in an ideal world.” *Id.* at 246. Tunisia, however, went along with the proposal, which was adopted unanimously without vote. *Id.* at 249. On privileges of consuls in the colonial period, *see* LEE & QUIGLEY, *supra* note 3, at 3-25.

and immunities afforded by the VCCR were necessary to ensure that a consulate could carry out its functions.⁷² Thus, Switzerland, speaking in favor of the six-delegation proposal, said that “the convention would serve as a practical guide to . . . consuls throughout the world, and it would be useful to remind them . . . that the purpose of their privileges and immunities was not to benefit individuals, but to ensure the efficient performance of their functions.”⁷³ Germany supported the proposal “since consuls, like diplomatic agents, were state officials, and both enjoyed privileges and immunities.”⁷⁴ Italy, also supporting the proposal, characterized the phrase as “confirming the functional necessity of granting privileges and immunities.”⁷⁵ Hungary, analogizing to a comparable preamble clause in an earlier convention on diplomatic relations, supported the proposal because “persons enjoying privileges and immunities must not use them for their own advantage.”⁷⁶ At the drafting conference, no state suggested that the preamble phrase might negate any right that the VCCR might give to a sending state national.

Nonetheless, when Mexico requested an advisory opinion from the Inter-American Court of Human Rights on the question of consular access violations in capital cases, the Department of State argued that the VCCR preamble language about the purpose of privileges and immunities negated any rights for a foreign national detainee. The Inter-American Court rejected the argument, just as the delegates at the 1963 conference had done. The Court said that the preamble phrase referred to consular officers. It said that it had examined the drafting history of the phrase, which would be the statements of delegates just cited, and that they reflect the fact that it is consular officers, not sending-state nationals, who enjoy “privileges and immunities” under the VCCR.⁷⁷

The Inter-American Court also pointed out that the United States had argued just the opposite as to individual rights when it was in its interest to do so—in the United States’ ICJ case against Iran for

72. See *infra* notes 73-76.

73. *Consideration of the draft articles on consular relations adopted by the International Law Commission at its thirteenth session (A/CONF.25/6)*, *supra* note 70, ¶ 8.

74. *Id.* ¶ 22.

75. *Id.* ¶ 18.

76. *Id.* ¶ 25.

77. *The Right to Information in Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 74 (Oct. 1, 1999).

the hostage-taking at U.S. diplomatic and consular posts.⁷⁸ In that case, filed in 1979, the United States sued Iran for violation of the VCCR on the grounds that consuls were prevented from fulfilling their functions and that U.S. nationals in Iran were deprived of consular services.⁷⁹ In a brief submitted to the ICJ, the United States wrote that the VCCR gives rights to those in need of consular aid, namely foreign nationals present in a receiving state.⁸⁰ The Inter-American Court averred that this earlier position was in contradiction to the one the United States was then urging it to adopt.⁸¹

The fact that the United States resorted to its argument about the meaning of the preamble phrase fueled the unilateralism charge, because it left the impression that the United States was not making genuine contentions but instead was seeking a pretext for violating VCCR Article 36.

B. The U.S. Position on Remedies for a Violation of Consular Access

Nor did other states find plausibility in the U.S. position on remedies for a consular access violation. In international law, whenever a state violates a right, a remedy is required.⁸² *Ubi ius, ibi remedium* (“Where there is a right, there is a remedy”) is a principle at the core of the rule of law, both in domestic law and in international law. How this principle might play out in a particular case might vary, but the United States took a position against any kind of remedy when consular access is violated, other than, perhaps, an apology to the government of the sending state.⁸³ In the briefs filed

78. *Id.* at 47, ¶ 75 (citing Memorial of the Government of the United States of America, United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. Pleadings 174 (Jan. 12, 1980)).

79. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 7, 24-25 (May 24).

80. Memorial of the Government of the United States of America, *supra* note 78.

81. The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, *supra* note 77, at 47, ¶ 75 (“[I]n the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, the United States linked Article 36 of the Vienna Convention on Consular Relations with the rights of the nationals of the sending State.”).

82. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, annex, pt. 2, art. 31, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) (“The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”).

83. See U.S. Department of State to Embassy of Mexico, Sept. 23, 1997, in DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 1991-1999 (2000), available at <http://www.state.gov/documents/organization/65746.pdf> (apologizing for the failure of officials to notify Mario Murphy, a Mexican national, of his right to consular notification); see also Embassy of the United States of America, Statement of the United States of America Concerning the Failure of Consular Notification in the Case of Angel Breard (Nov. 3, 1998), available at <http://www>

by the Latin American states, and by the European Union in the U.S. Supreme Court, one finds refutation of the U.S. position both as to individual rights and as to remedies.⁸⁴

Although the argument pressed most strongly by the United States at the international level to refute any remedy for a consular access violation was, as indicated, that VCCR Article 36 provided no right to the individual, the U.S. Supreme Court focused instead on the remedy aspect. When asked to provide a remedy for a consular access violation, it said that it would assume for the moment that VCCR Article 36 provides a right to consular notification, because, in its view, even if that is so, there is no basis for a judicial remedy.⁸⁵ The Department of State, to be sure, also denied that there was a basis for a judicial remedy, but its main line of argument was that this position flowed from a lack of an individual right.

In the *LaGrand* Case in the ICJ, for example, the Department of State argued that an apology to the sending state suffices as a remedy, but that nothing need be done to change the conviction or sentence of the sending state national.⁸⁶ The ICJ ruled against that position. Referring to the proposition in international law that a wrongful act calls for a remedy, it said that rights of the individual were involved and that “review and reconsideration” must be given to the conviction and sentence in light of the consular access violation.⁸⁷

When Mexico then sued in the ICJ, the United States, having lost on the rights issue and on the issue of whether a remedy is required, argued that the remedy need not be judicial; instead, it contended that a receiving state might handle consular access claims by its procedures for executive clemency.⁸⁸ The ICJ rejected that argument, saying that if a court were presented with a claim of a consular access violation, it must entertain the claim.⁸⁹

.state.gov/documents/organization/65829.pdf (conveying “apologies to the Government and people of Paraguay” for the failure of consular notification for Breard, who had been executed April 14, 1998).

84. Brief of Foreign Sovereigns in Support of Petitioner, *Medeillin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928); Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner, *id.*

85. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 342-50 (2006).

86. *See LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 513 (June 27).

87. *See id.* at 513-14.

88. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 65-66 (Mar. 31).

89. *Id.* at 65-66 (Mar. 31).

In *Sanchez-Llamas v. Oregon*,⁹⁰ the U.S. Supreme Court, not considering itself to be constrained by the rulings of the ICJ, adopted the view of the Department of State that no judicial remedy is required. It said that, for a particular remedy to be required, it needed to be specified in the text of the treaty itself, and since neither VCCR Article 36 nor any other provision of the VCCR specified suppression of an incriminating statement—the remedy sought by Sanchez-Llamas—it need not consider whether it was an appropriate remedy.⁹¹ In the Supreme Court’s analysis, the absence of any provision about remedies in the VCCR threw the matter to domestic law, as to what remedy, if any, was to be given.⁹²

The position that the Supreme Court adopted on remedies in *Sanchez-Llamas v. Oregon* was in direct conflict with the position in international law that a remedy is required where a wrong is committed.⁹³ In treaties, one finds typically a set of obligations but does not find a list of remedies in case those obligations are violated. Nonetheless, remedies are required in international law for violation of a treaty provision. A separate body of international law on remedies deals with that matter, much in the way the law of remedies emerged in the domestic law in England with regard to breach of contract. The relevant body of rules in international law is called the law of state responsibility,⁹⁴ which provides rules on remedy that, in brief, call for restoration of the prior-existing situation if that is physically possible.⁹⁵ Failing the possibility of such restoration, the rules call for money damages.⁹⁶

V. IMPLEMENTATION OF VCCR ARTICLE 36 BY OTHER STATES

The positions that the United States took concerning rights and remedies under VCCR Article 36 left it quite isolated among the states of the world in arguing that VCCR Article 36 gives no right to the individual and that no judicial remedy is required. Since implementation of a treaty by other states is one technique of

90. *Sanchez-Llamas*, 548 U.S. at 353.

91. *Id.* at 346-47.

92. *Id.* at 343.

93. John Quigley, *Must Treaty Violations Be Remedied?: A Critique of Sanchez-Llamas v. Oregon*, 36 GA. J. INT’L & COMP. L. 355, 365-66 (2008).

94. *Gabčikovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, 38 (Sept. 25).

95. G.A. Res. 56/83, annex, pt.2, ch. II, art. 35, U.N. Doc. A/Res/56/83 (Dec. 12, 2001).

96. *Id.* art. 36.

determining a treaty's meaning, the Department of State sought to demonstrate that other states fail to provide judicial remedies for a consular access violation to bolster its position. The Department of State has presented analyses to U.S. courts and has convinced a number of courts that because other states party to the VCCR do not provide remedies, the VCCR does not require U.S. courts to do so either.⁹⁷

The Department of State's analyses of court practices abroad, however, have been inaccurate and incomplete. In a U.S. Court of Appeals case in which a foreign national sought to suppress a confession for failure to advise about consular access, the Department advised the court that the foreign courts do not suppress. "Conversely," the Department stated,

we are aware of two jurisdictions, Italy and Australia, in which courts have rejected requests by individuals for a remedy in the context of a criminal proceeding of a violation of Article 36 of the VCCR. These are the *Yater* case, decided in Italy in 1973, and the *Abbrederis* case, decided in Australia in 1981. Copies of reports of both decisions have been provided to the Department of Justice.⁹⁸

Neither the Australian case nor the Italian case, however, involved a refusal to provide a remedy for a failure to advise about consular access. In *R. v. Abbrederis*, the foreign national sought to suppress a statement made during questioning upon his arrival from abroad at the Sydney International Airport because he was not advised about consular access. After customs personnel found a substance they thought to be heroin, the man made self-incriminating statements.⁹⁹ He sought suppression for failure to advise about consular access. Declining to do so, the Court of Criminal Appeal of New South Wales said:

The objection [by the defendant to the admission of his statement] in my view has no merit. Even giving the fullest weight to the prescriptions in [VCCR] art. 36 I do not see how it can be contended that they in any way affect the carrying out of an investigation by interrogation of a foreign person coming to this country. The article is dealing with freedom of communication between consuls and their nationals. It says nothing touching upon

97. *E.g.* *De Los Santos Mora v. New York*, 524 F.3d 183, 188, 189 n.5 (2008).

98. Letter from David Andrews, Legal Adviser, Department of State, to James K. Robinson, Assistant Attorney General, *supra* note 63, at A-9.

99. *R. v. Abbrederis* (1981) 36 A.L.R. 109 (Austl.), 51 F.L.R 99, 100-01.

the ordinary process of an investigation by way of interrogation. In my view this ground of appeal is not made good.¹⁰⁰

The Court of Criminal Appeal thus reasoned that questioning of a person “coming into this country” is not a detention that entails an obligation to advise about consular access. Since the court considered that there was, in the circumstances, no obligation to advise, the case says nothing about remedies for a failure to advise.¹⁰¹

Also, in *Yater*, a British national convicted of crime in Italy invoked VCCR Article 36 along with an article on consular access found in a bilateral Italy-UK consular treaty.¹⁰² Italian authorities did not notify a British consul about the arrest, but it is not clear from the case report that Yater’s attorney ever asserted that Italian authorities did not inform Yater about consular access. Although the Court of Cassation asked whether there was a violation of either the bilateral treaty or of Article 36 because of the failure to notify a British consul, it did not indicate whether Yater was informed of the right of consular access, or, if he was, whether he requested consular access.¹⁰³ The Court of Cassation, moreover, did not refer to the fact that VCCR Article 36 requires advice about consular access to be given to a detained foreign national. The case is thus of little relevance on the consequences of a failure to inform a foreign national about consular access.¹⁰⁴

In Australia, moreover, cases have been decided by appellate courts suppressing statements or material evidence gained following an arrest where the foreign national was not advised about consular access.¹⁰⁵ These cases are inconsistent with the proposition the State Department derives from *R. v. Abbrederis*.¹⁰⁶ One case involved a

100. *Id.* at 115.

101. *See id.*

102. Cassazione Penal, sez.un., 19 feb. 1973, Guir. It. 1973, II, 464 (translated into English in 77 I.L.R. 541).

103. *Id.* at 542.

104. *Id.*

105. *See infra* notes 106, 113.

106. The Supreme Court, in *Sanchez-Llamas v. Oregon*, sought to discount these cases as having been decided on the basis of the Australian statutory provision that incorporates VCCR Article 36 into domestic Australian law, rather than on VCCR Article 36 itself. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 344 n.3 (2006). The Court’s theory is that Australia went beyond VCCR Article 36 with its statutory provision. The Australian statute did require that advice about consular access be given prior to interrogation, whereas VCCR Article 36 makes no mention of interrogation. But the critical aspect is that the Australian statute mentions nothing about remedy, and the Australian court thought it necessary to devise a remedy, given that there had been a violation of the right to consular access.

Singapore national convicted of importing heroin into Australia.¹⁰⁷ Upon arrest, the authorities did not inform him about consular access, but he himself asked to communicate with a Singapore consul.¹⁰⁸ The authorities did not comply¹⁰⁹ but instead interrogated him and elicited a statement that the prosecution sought to introduce at trial.¹¹⁰ The Northern Territory Court of Criminal Appeal said that an Australian statutory provision implementing Article 36¹¹¹ was silent as to remedy,¹¹² but concluded that “the proper exercise of the discretion” required exclusion of the statement.¹¹³

In another Australian case, authorities seized narcotics from the travel bag of a foreign national detained on suspicion of smuggling drugs into Australia. The authorities did not inform him about consular access.¹¹⁴ The prosecution sought to introduce the narcotics into evidence on the smuggling charge. The Western Australia Supreme Court said that the detention was unlawful for the failure to inform about consular access and suppressed the narcotics evidence.¹¹⁵

Nor has the Department mentioned a 2006 decision of the Constitutional Court of Germany, which calls for consideration of a remedy when consular access is violated. That court viewed consular access as a right that adheres to the individual foreign national.¹¹⁶

Due to a number of factors, there are few reported court cases worldwide in which consular access violations have been raised in the

107. *Tan Seng Kiah v. R.*, (2001) 160 F.L.R 26, 27-28 (Austl.). The Northern Territory is a federal territory rather than a state. Its highest court occupies a place comparable to that of a state.

108. *See id.* at 36.

109. *Id.* at 36.

110. *Id.* at 41.

111. Crimes Act, 1914, 23P (Austl.) (incorporating VCCR Article 36).

112. *Tan Seng Kiah v. R.*, 160 F.L.R. at 37.

113. *Id.* at 42.

114. *R. v. Kok Cheng Tan*, (2001) W.A.S.C. No. 275 (Oct. 5). Breyer characterized this case as an “Australian case considering but declining to suppress evidence based on violation of same statute.” *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 394 (2006) (Breyer, J., dissenting). However, the evidence in question was the narcotics found in the travel bag, and the court did suppress it.

115. *Kok Cheng Tan*, 2001 W.A.S.C. No. 275, ¶ 59.

116. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 19, 2006, 2 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 2115/01 (F.R.G) (*Case of F. & T.*). *See generally* Jana Gogolin, *Avena and Sanchez-Llamas Come to Germany - The German Constitutional Court Upholds Rights under the Vienna Convention on Consular Relations*, 8 GERMAN L. J. 261 (2007) (contrasting *Case of F. & T.* to *Sanchez-Llamas*).

courts.¹¹⁷ For example, in civil law systems, preliminary investigation of a crime is done by an examining magistrate, a law-trained official, who may resolve consular access claims without having a case proceed to court.¹¹⁸

VI. CHANGE IN U.S. INTERESTS IN RELATION TO CONSULAR ACCESS

The reporter who questioned Department of State spokesperson J. Adam Ereli astutely suggested that capital punishment was relevant to the U.S. decision to withdraw from the VCCR Optional Protocol.¹¹⁹ The U.S. Department of Justice understands the importance of compliance with the Protocol in capital cases, as reflected in the requirements it has set for U.S. attorneys who want permission to seek capital punishment of a foreign national for violations of federal criminal law: if a foreign national is being prosecuted, a U.S. attorney must explain whether consular access obligations were respected.¹²⁰ Clearly, the Attorney General is aware that non-observance of consular access obligations may complicate the prosecution of a capital case.

This aspect of the issue further fueled the unilateralism assertion, since, by the mid-1990s, the United States was one of a minority of states that still actively employed capital punishment.¹²¹ The states criticizing the United States for consular access violations were states that did not use capital punishment and that were concerned that their nationals could be executed in the United States.¹²² While they found the U.S. position on the consequences of a consular access violation to be invalid regardless of the punishment, their objections were the most insistent in capital cases. Mexico, as indicated, framed

117. A Canadian trial court declined to suppress an incriminating statement made by a U.S. national following his arrest for murder but did so on the rationale that, in the situation, he was not prejudiced, rather than on a rationale that a remedy is never required. *R. v. Partak*, [2001] 160 C.C.C. (3d) 553, 570 (Can.).

118. *Sanchez-Llamas*, 548 U.S. at 395-96 (Breyer, J., dissenting).

119. *See supra* text accompanying note 51.

120. Submissions from the United States Attorney, 9 USAM 10.080(A)(10) (2007).

121. WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 14-15 (2d ed. 1997) (noting the virtual abolition of capital punishment in Latin America and Europe).

122. *See, e.g.*, Letter from EU Presidency (Ireland) to Susan B. Loving, Chairwoman, Oklahoma Pardon and Parole Board (Apr. 30, 2004) (on file with author) (urging relief for a Mexican national facing execution in Oklahoma, noting the EU view that capital punishment is cruel and inhuman, and protesting non-compliance in that case with consular notification requirements).

its question for an advisory opinion in the Inter-American Court of Human Rights as one of consular access violations in capital cases.¹²³

The reporter's question to Mr. Ereli about Iran highlighted the change in position on the part of the United States¹²⁴ regarding compulsory dispute settlement for consular issues. In the Iran hostage situation in 1979, the United States had used the VCCR as one legal basis for its allegation that Iran acted unlawfully by holding U.S. officials hostage. At the 1963 drafting conference for the VCCR, moreover, the United States had been a prime sponsor of compulsory dispute settlement. At a time when the draft was silent on dispute settlement, the United States introduced a proposal reading: "Any dispute arising from the interpretation or application of this convention shall be submitted at the request of either of the parties to the International Court of Justice unless an alternative method of settlement is agreed upon."¹²⁵ The U.S. delegate explained

that the codification of international law and the formulation of measures to ensure compliance with its provisions should go hand in hand. The response of other delegations to the United States proposal would make it possible to evaluate their support for international law and its enforcement by the principal judicial organ of the United Nations.¹²⁶

The U.S. delegate characterized the proposal as dealing "with one of the most important points connected with the convention on consular relations."¹²⁷ Thus the United States viewed compulsory dispute settlement as critical to the effectiveness of the proposed consular convention, and the U.S. delegate, in effect, issued a challenge to the other states to support compulsory dispute settlement as a demonstration of their commitment to international law.

In 1963, at the time of the drafting conference, the primary U.S. concern in consular matters was that U.S. nationals had on occasion been arrested and detained in the U.S.S.R. without notification of U.S. consuls.¹²⁸ Because it was important for its national interests, the United States sought compulsory dispute settlement as a way of

123. See *supra* text accompanying note 40.

124. See *supra* § III.

125. 2 United Nations Conference on Consular Relations Official Records, Mar. 4-Apr. 22, 1963, *Vienna Conference on Consular Relations*, 61, U.N. Doc. A/CONF.25/C.1/L.70, (Mar. 8, 1963).

126. 1 United Nations Conference on Consular Relations Official Records, Mar. 4-Apr. 22, 1963, *Vienna Conference on Consular Relations*, 249, U.N. Doc. A/CONF.25/6, (Mar. 26, 1963).

127. *Id.*

128. See LEE & QUIGLEY, *supra* note 3, at 142.

protecting U.S. nationals. At the drafting conference, Soviet-bloc states argued unsuccessfully against a judicial remedy in the event of a consular access violation.¹²⁹

A number of states at the conference objected to the U.S. proposal for a compulsory dispute settlement clause in the VCCR but were willing to back a separate document to accompany the VCCR to deal with the issue.¹³⁰ That approach resulted in adoption of the Optional Protocol, which the U.S. ratified.¹³¹ By the 1990s, however, the U.S. interests were different, since by then it was other states making claims of consular access violations against the United States.

VII. A NON-UNILATERALIST EXPLANATION OF THE WITHDRAWAL

While there is much support for the position that the U.S. withdrawal from the VCCR Optional Protocol was a measure undertaken to allow the United States to maintain its idiosyncratic construction of VCCR Article 36, two scholars have suggested a different assessment. Reisman and Arsanjani offer the view that, as of 2005, the United States was complying with its obligations under VCCR Article 36, but withdrawing from the Optional Protocol would protect the United States from suits motivated by concern over capital punishment filed by states for which the consular access issue was secondary. As to U.S. compliance, they write:

The United States had indicated (and the evidence seems to substantiate the good faith of its effort) that it would henceforth try to ensure that the rights available to foreign nationals under Article 36 of the VCCR would be made as operational as the federal government of the United States was capable of making them. This satisfied the obligation under the Convention.¹³²

In contrast to an earlier case that Reisman and Arsanjani cite involving Peru, in which withdrawal from a jurisdictional commitment appeared aimed at allowing Peru to violate various obligations, they

129. See 1 United Nations Conference on Consular Relations Official Records, Mar. 4-Apr. 22, 1963, *Vienna Conference on Consular Relations*, 85, U.N. Doc. A/CONF.25/16, (Apr. 20, 1963) (statement of Mr. Avilov, U.S.S.R.).

130. LEE & QUIGLEY, *supra* note 3, at 577.

131. Optional Protocol, *supra* note 2.

132. W. Michael Reisman & Mahnoush H. Arsanjani, *No Exit? A Preliminary Examination of the Legal Consequences of United States' Notification of Withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations*, in *PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW* 897, 925 (Marcelo G. Kohen ed., 2007).

argue that the withdrawal would not negatively impact U.S. compliance. As an indication of the U.S. commitment to compliance, Reisman and Arsanjani quote a paragraph from the ICJ decision in *LaGrand*, in which the ICJ responded to Germany's request for assurances of non-repetition of U.S. violations of the obligation to inform foreign nationals about consular access. There the ICJ stated that the United States had provided the court with information on its efforts to gain compliance by local law enforcement agencies.¹³³

That paragraph in the *LaGrand* judgment related to efforts by the United States to secure compliance with the obligation to inform foreign nationals about consular access but did not relate to the consequences of non-compliance. The United States did not suggest to the ICJ that in future it would regard a foreign national as enjoying a justiciable right, or that any remedy would be given by courts or any other agency of government. Hence, the United States was not stating that it would apply the VCCR in the manner the ICJ regarded as correct.¹³⁴ To the contrary, the United States has followed its own construction of what is required in the event of a breach of the obligation to inform a foreign national.

Reisman and Arsanjani suggest that, given the U.S. representations to the ICJ about its commitment to compliance,

the essential objective of VCCR Article 36 was fulfilled; exercises of jurisdiction could not likely achieve much more and, if initiated, would probably be covert efforts at securing abolition of the death penalty. It appears likely that the United States felt that states and, increasingly, non-governmental organizations committed to abolitionism, would be able to continue to bring cases allegedly arising under Article 36 of the VCCR to an international tribunal that could well prove to be increasingly abolitionist in its orientation. Given the federal structure of the American system, the proliferation of these cases could have presented serious, if not insoluble domestic legal and political problems for any US government. Hence the decision to preempt the problem by denouncing the Optional Protocol.¹³⁵

To be sure, additional ICJ decisions on consular access in capital cases would present problems for the federal government vis-a-vis the states. Yet the federal government's refusal to comply with VCCR Article 36 may just as well be motivated by a desire to avoid forcing the states to forego executions. That motivation, however, is no

133. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 511-13 (June 27).

134. *See id.*

135. Reisman & Arsanjani, *supra* note 132, at 925.

excuse for failing to comply with a treaty obligation. Even if Reisman and Arsanjani are correct in their assessment that the ICJ is abolitionist in orientation, the ICJ would have no jurisdiction to deal with capital punishment as such. While it might be swayed in decisions on consular access violations by the enormity of the punishment, the ICJ was careful in *Avena* to say that its jurisdiction was limited to the VCCR, which led it to decline Mexico's invitation to analyze a consular access violation as a human rights issue.¹³⁶

Reisman and Arsanjani's statement that the "essential objective of VCCR Article 36 was fulfilled"¹³⁷ overlooked the fact that the United States has been adamant in its refusal to comply with the VCCR in the manner in which the ICJ, the Inter-American Court of Human Rights, and most other states of the world consider it should be applied. The "essential objective" has hardly been fulfilled. Quite the reverse, the United States remains an outlier on the issue of the consequences of a consular access violation.

VIII. VALIDITY OF THE WITHDRAWAL

Apart from the VCCR Optional Protocol, other states have little possibility of establishing jurisdiction over the United States to sue in the ICJ for a consular access violation. The ICJ potentially has jurisdiction over states by declarations they may file, whereby they submit to suit by other states for international law violations generally.¹³⁸ The United States filed such a declaration in 1946, but retracted it in 1986.¹³⁹ That left submission to jurisdiction relating to particular treaties, such as the VCCR Optional Protocol, as the major avenue whereby the United States might sue other states in the ICJ and in turn might be sued. Absent the VCCR Optional Protocol, the possibility that another state might gain jurisdiction over the United States in the ICJ for a consular access violation is remote.

The absence of other potential routes to jurisdiction puts the focus on the validity of the withdrawal. While Department of State spokespersons provided an explanation of why the United States was withdrawing, they did not address the withdrawal's validity. They

136. Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 60-61 (Mar. 31).

137. See *supra* text accompanying note 134.

138. Statute of the International Court of Justice art. 36(2), June 26, 1945, 59 Stat. 1055, 1063 [hereinafter ICJ Statute].

139. United Nations, Multilateral Treaties Deposited with the Secretary-General, *supra* note 11, ch.1, § 4 n.9.

obviously viewed the withdrawal as valid.¹⁴⁰ However, just as contracts in domestic law normally carry an obligation not to rescind unilaterally, so treaties in international law normally must be honored.¹⁴¹

A. ICJ Competence to Determine the Validity of a Withdrawal

In the ICJ context, moreover, when a state that is subject to jurisdiction takes action to exempt itself from jurisdiction, the ICJ views itself as competent to assess whether the action is valid, or whether the state remains subject to jurisdiction.¹⁴² Thus, if a state party to the Optional Protocol were to sue the United States for a consular access violation, relying on the Optional Protocol for jurisdiction and asserting that the withdrawal was invalid, that issue would be open for the ICJ to decide without deference to the U.S. view that the withdrawal was valid. In international practice, international tribunals, including the ICJ, decide their own competence when a dispute arises over a jurisdictional base asserted by the plaintiff state.¹⁴³

A similar situation arose in 1984 for the United States, when it was sued by Nicaragua on the basis of its 1946 declaration whereby the U.S. submitted itself to ICJ jurisdiction for international law matters generally.¹⁴⁴ Three days before Nicaragua filed its application to commence suit, the United States had filed a document with the ICJ saying that it would not view itself as subject to ICJ jurisdiction for a period of two years on disputes “related to events in Central America.”¹⁴⁵

Nicaragua argued that the exemption document did not deprive the ICJ of jurisdiction. The United States argued that the document was within its prerogatives and that the ICJ had no jurisdiction. The

140. In a 2007 press statement, the Department of State characterized the withdrawal as having been done as of right: “we exercised our right to withdraw from the Optional Protocol.” *International Obligations and U.S. Law*, STATES NEWS SERVICE, October 16, 2007 (statement provided by Department of State), <http://www.state.gov>.

141. Vienna Convention on the Law of Treaties art. 26, 1155 U.N.T.S. 33 [hereinafter VCLT].

142. ICJ Statute, *supra* note 138, art. 36(6).

143. See 2 SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT*, 1920-1996, 812 (1997).

144. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392, 395, 398 (Judgment of Nov. 26).

145. *Id.* at 398. See also Ilene R. Cohn, *Nicaragua v. United States: Pre-Seisin Reciprocity and the Race to The Hague*, 46 OHIO ST. L. J. 699 (1985).

ICJ, agreeing with Nicaragua, decided that it had jurisdiction.¹⁴⁶ That case, to be sure, involved a unilateral declaration rather than a treaty submission, but nonetheless, the ICJ's attention to the validity of the declaration indicates that it does not automatically honor a retraction of a state's prior consent to jurisdiction.

B. Withdrawal From a Treaty That Lacks a Denunciation Clause

The validity of a denunciation or withdrawal from a treaty, whether the treaty relates to compulsory dispute settlement or to any other subject, is not a matter within the sole discretion of the state that denounces or withdraws. Rather, one must look at the particular treaty to determine if withdrawal is permitted. One possibility is that the treaty contains a denunciation clause that would provide for freedom to denounce at will. Many treaties include such a clause. A primary reason why such a clause would be included is to encourage states to ratify, since they know that if the commitment they make turns out to be disadvantageous, they are not bound in perpetuity.¹⁴⁷

However, many treaties, including the Optional Protocol, contain no denunciation clause. In such a circumstance, the situation is less clear as to whether withdrawal is permitted. From the theoretical standpoint, the issue poses a dilemma as between two postulates of the international order. On the one hand, states are viewed as sovereignty entities, entitled to take action according to their interests. Haraszti, a Hungarian author writing during the Cold War, viewed treaty denunciation in this light, arguing that if a particular treaty did not resolve the issue, then "denunciation will have to be recognized as following from the principle of international law demanding respect for state sovereignty."¹⁴⁸

On the other hand, international engagements are viewed as binding; otherwise states would have little incentive to enter into them as a means for ordering relations with other states. States are regarded as being required to keep the promises they make via treaty.¹⁴⁹ If they can ratify one day and denounce the next, the obligations assumed may carry little meaning.

146. *Nicaragua*, 1984 I.C.J. at 442.

147. See MCNAIR, *THE LAW OF TREATIES* 510 (1961) (on treaties providing for denunciation).

148. GYÖRGY HARASZTI, *SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES* 264 (1973).

149. VCLT, *supra* note 141, art. 26.

As a technical matter, the argument is that since denunciation clauses are well known to treaty drafters, the omission of such a clause implies that denunciation is prohibited.¹⁵⁰ Denunciation clauses are sufficiently common, especially in multilateral treaties, that one may reasonably infer that the absence of such a clause reflects an intention that denunciation not be permitted. Haraszti, arguing for freedom of denunciation, responds to this argument by saying that the omission of a denunciation clause may be due to negligence or inexperience of a treaty's drafters.¹⁵¹

Neither absolutist position—total freedom to denounce or total prohibition on denunciation—reflects international practice regarding treaties containing no denunciation clause. The most generally recognized rule on the matter is found in the Vienna Convention on the Law of Treaties (VCLT), a widely ratified agreement that regulates major aspects of treaty law. The United States is not a party to the VCLT but regards it, at least for most of its provisions, as reflecting customary international law on treaty issues.¹⁵² VCLT Article 56 is titled *Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal*. It provides:

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
 - (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
 - (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.
2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.¹⁵³

Thus, as a matter of procedure in denouncing, VCLT Article 56(2) requires a time period before a withdrawal would be valid. The United States, in its communication to the U.N. Secretary-General,

150. See ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 290 (2007).

151. HARASZTI, *supra* note 148, at 269.

152. 65 DEP'T ST. BULL. 684, 685 (1971) (report to Senate by Secretary of State William Rogers, stating, "Although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice"); *Chubb v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000); see also HARASZTI, *supra* note 148, at 277 (stating that when denunciation is permitted, "a certain period must be allowed to pass between the notification of denunciation, and the termination of the treaty").

153. VCLT, *supra* note 141, art. 56.

gave no time period, apparently purporting to make its withdrawal effective immediately.¹⁵⁴

On the basic issue of whether a state may denounce, the validity of a withdrawal, according to VCLT Article 56(1), turns on what kind of treaty is involved, and whether one can ascertain the parties' desire even though the text of the treaty was silent. Arnold McNair, author of a mid-century treatise on the law of treaties, said that where a treaty is silent on denunciation, “[i]t is a question of the intention of the parties which can be inferred from the terms of the treaty, the circumstances in which it was concluded, and the nature of the subject-matter.”¹⁵⁵ McNair thus put what is encompassed in the two sub-paragraphs of Article 56(1) into a single concept, namely, the intent of the parties, which could be ascertained through his three-prong test. As to the subject-matter prong, McNair's idea is apparently that with treaties on certain subjects, one may fairly assume that the parties contemplated the possibility of denunciation.¹⁵⁶ VCLT Article 56(1), on the other hand, separates the type of treaty (paragraph 1(b)) from the intent of the parties (paragraph 1(a)). Even if one regards that as a separate basis, it probably does, as McNair suggests, relate to what the parties anticipated about possible denunciation when they entered into the treaty.

C. Whether the States Party to the VCCR Optional Protocol Viewed Denunciation as Possible

VCLT Article 56 is generally read as creating a presumption against a possibility of denunciation in treaties that are silent on the subject.¹⁵⁷ The most natural reading of Article 56 is that a treaty is not subject to denunciation unless one of the two sub-paragraph factors is satisfied. If one cannot ascertain from statements made that there was an intent to allow denunciation and if the treaty by its “nature” does not imply freedom of denunciation, then it is not subject to denunciation.

154. See also 65 DEP'T ST. BULL. 684, 688 (1971) (Secretary of State Rogers stating that a dispute settlement process is required for a withdrawal from a treaty, that a withdrawing state must inform all other parties to the treaty and afford them an opportunity to object).

155. MCNAIR, *supra* note 147, at 511.

156. *Id.* at 513.

157. Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1594 (2005) (stating that art. 56 creates “a rebuttable presumption that states may not unilaterally exit from a treaty that lacks a denunciation or withdrawal clause”).

VCLT Article 56 also seems to require a party seeking to withdraw from a treaty silent as to denunciation to carry a burden: “Since the grounds for justifying withdrawal are expressed as an exception, the onus of establishing that the exception applies lies on the party wishing to withdraw.”¹⁵⁸ The fact that denunciation clauses are written into many treaties is taken to strengthen that presumption, since it is well known to treaty drafters that if they want to make denunciation a possibility they have the option of including a denunciation clause.¹⁵⁹

With the Optional Protocol, there is little in the drafting history to show what the parties may have thought about denunciation. No denunciation clause was proposed, and no delegate mentioned denunciation.¹⁶⁰ What we do have, however, is the U.S. statement, quoted above, about the importance of compulsory dispute settlement.¹⁶¹ The United States, as a proponent of compulsory dispute settlement in the VCCR, viewed it as central to the entire enterprise of concluding a consular treaty. That view of the centrality of compulsory dispute settlement suggests that states, once having agreed to compulsory dispute settlement, should not be free to repudiate it.

As seen above, compulsory dispute settlement was put off to a separate protocol as the VCCR was being drafted. That change might suggest that other states viewed compulsory dispute settlement as less central than did the United States. However, the aim behind the technique of a separate protocol was to maximize participation in the VCCR itself, since it would allow states unwilling to submit to ICJ jurisdiction to become parties to the VCCR without having to reserve to the submission clause.¹⁶² Thus, it may be hazardous to draw conclusions about the centrality of compulsory dispute settlement from the fact it was put into a separate protocol.

158. AUST, *supra* note 150, at 290.

159. *Id.* (“Since it is now very common to include provisions on withdrawal, when a treaty is silent about the matter, it may be that much harder for a party to establish the grounds for the exception.”).

160. *See* 1 United Nations Conference on Consular Relations Official Records, Mar. 4-Apr. 22, 1963, *Vienna Conference on Consular Relations*, 249-51, U.N. Doc. A/CONF.25/6, (Mar. 26, 1963).

161. *See supra* text accompanying note 126.

162. *See* 1 United Nations Conference on Consular Relations Official Records, Mar. 4-Apr. 22, 1963, *Vienna Conference on Consular Relations*, 249-51, U.N. Doc. A/CONF.25/6, (Mar. 26, 1963).

D. Whether the VCCR Optional Protocol by Its Nature is Susceptible of Denunciation

Regarding the VCCR Optional Protocol, there is little basis in the drafting history to show an expression of intent that denunciation should be permitted, which leaves open the question of whether the VCCR Optional Protocol is the type of treaty in which a possibility of denunciation can be assumed. There has been little state practice on the matter, hence it is less than clear what types of treaty imply a freedom of denunciation.¹⁶³ The types of treaties generally thought to imply a right of denunciation are treaties premised on a close relationship between the contracting states. Treaties of alliance, involving perhaps a mutual defense commitment, have been viewed in this light, because a state would not want to commit itself to going to war absent close affinity. Hence, if the two states, once close, drifted apart, then either might denounce.

Another type of treaty in this category is a treaty of friendship, commerce, and navigation, which typically allows nationals of each state to engage in business in the other state on a basis of equality with locals.¹⁶⁴ That agreement is, like a treaty of alliance, premised on good relations between the two states, since the nationals of the other state gain access to markets and trade in the other.¹⁶⁵ A third type is a treaty establishing an international organization. There the concept is that a state need not continue as a member of an organization that may move in directions not to its liking. Even as to these three types of treaties, however, state practice is scant.¹⁶⁶

The ICJ addressed the question of the permissibility of denunciation of a treaty containing no denunciation clause in a dispute between Hungary and Slovakia over a bilateral treaty where the two were to build joint water diversion facilities on the Danube River. After Hungary denounced, the ICJ found the treaty to be of a type that implied that denunciation was not anticipated:

The 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable régime

163. See MCNAIR, *supra* note 147, at 513.

164. See J.L. BRIERLY, *THE LAW OF NATIONS* 331 (1963).

165. *Id.* (stating the treaties of alliance and of commerce are “intended to be susceptible of denunciation even though they contain no express term to that effect”).

166. Kelvin Widdows, *The Unilateral Denunciation of Treaties Containing No Denunciation Clause*, 53 BRIT. Y.B. INT’L L. 83, 96 (1982).

of joint investment and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.¹⁶⁷

Although the VCCR Optional Protocol does not contemplate a joint financial undertaking, it, like the treaty at issue between Hungary and Slovakia, contained no provision regarding its termination. As well, with the VCCR Optional Protocol, there is no “indication that the parties intended to admit the possibility of denunciation or withdrawal.”

Treaties on compulsory dispute settlement have been mentioned by one author as a potential category where a possibility of denunciation may be presumed,¹⁶⁸ but state practice provides little support for the assertion.¹⁶⁹

Aust, nonetheless, argues that dispute settlement treaties are subject to denunciation in absence of a denunciation clause. His rationale is as follows:

This is consistent with the consensual nature of international jurisdiction: a state can be made subject to the jurisdiction of an international court or tribunal only if it consents, either in advance or *ad hoc*. Moreover, states have withdrawn from such optional protocols on dispute settlement to several UN treaties without (at least legal) objection, even when they contain no provision for this.¹⁷⁰

Aust's reliance on an absence of objection when dispute settlement treaties are denounced is questionable. In theory, other states party to the VCCR Optional Protocol might send a diplomatic protest note to the United States if they view the withdrawal as invalid. Or they might communicate their protest to the U.N. Secretary-General as the depositary agency. In rare instances, states have done this when a state party has denounced a treaty lacking a denunciation clause.¹⁷¹ However, there is no established procedure for reacting to a denunciation by another state party.¹⁷² Thus, there is little basis for drawing any conclusion from an absence of formal objection. The matter would most likely be raised, as suggested

167. Gabčikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 62-63 (Sept. 25).

168. AUST, *supra* note 150, at 291 (“It will usually be possible to withdraw from a general treaty for the settlement of disputes between the parties even when it has no withdrawal provision.”).

169. Widdows, *supra* note 166, at 96-98.

170. AUST, *supra* note 150, at 291.

171. See, e.g., United Nations, *supra* note 11, ch. 21, § 1 n.8 (UK objecting that unilateral denunciation of Convention on Territorial Sea and Contiguous Zone is not permitted).

172. On that procedure, see VCLT, *supra* note 141, arts. 19-21.

above, if a state party to the Optional Protocol were to file suit against the United States in the ICJ for a VCCR violation.

Aust asserts that there have been withdrawals from optional protocols to UN treaties but only cites to the U.S. withdrawal from the VCCR Optional Protocol as evidence.¹⁷³ A search by the present author in other treaties of this category revealed no other instances of withdrawal. It is believed that there are no other instances Aust could cite.

Aust also mentions the “consensual nature of international jurisdiction” as a reason that denunciation should be freely allowed from dispute settlement treaties. To be sure, submission to international judicial jurisdiction is at the discretion of a state, but entry into any treaty is at the discretion of the state. Any obligation a state assumes by treaty on any topic is “consensual,” since no state is required to enter into any treaty. Hence Aust’s argument, logically, would lead to the conclusion that any treaty that lacks a denunciation clause may be denounced, a conclusion clearly at odds with VCLT Article 56.

One could perhaps argue that agreeing to compulsory dispute resolution implies a close relation with the other states, thus putting such treaties into the category of those that may be freely denounced. However, many states have agreed, as through the ICJ Statute Article 36(b) procedure for compulsory dispute resolution or through the VCCR Optional Protocol itself to compulsory dispute resolution with a wide variety of states not particularly close to them in any sense.¹⁷⁴

E. Validity of the U.S. Withdrawal from the VCCR Optional Protocol

Since the adoption of the VCLT, there is little state practice on denunciation of treaties containing no denunciation clause.¹⁷⁵ But in the few instances where the issue has arisen, objections have been recorded. In one instance, Senegal purported to withdraw from two “law of the sea” treaties, leading the UK to object that withdrawal

173. AUST, *supra* note 150, at 291 n.68.

174. See United Nations, *supra* note 11, ch. 3, § 10 (listing states with a variety of political orientations as ratifiers of the VCCR Optional Protocol).

175. Reisman & Arsanjani, *supra* note 132, at 913-16. A treaty containing a denunciation clause, the Optional Protocol to the International Covenant on Civil and Political Rights, has been denounced by Jamaica, Guyana, and Trinidad and Tobago. Under that Optional Protocol, states party to the ICCPR agree to allowing for complaints to be filed against them by individual persons before a monitoring committee.

was impermissible.¹⁷⁶ Also, North Korea withdrew from the International Covenant on Civil and Political Rights, drawing objection from the U.N. Secretary-General¹⁷⁷ and from the monitoring committee that oversees implementation.¹⁷⁸

With the VCCR Optional Protocol, there is no indication of an intent to permit denunciation in the drafting history. It also does not readily fall into the category of treaties that can be freely denounced. Were another state party to sue, the United States would need to sustain a burden on these issues, but judging from what international practice has been recorded, the U.S. would face an uphill argument. Its position that the VCCR Optional Protocol can be freely denounced is difficult to sustain on the basis of VCLT Article 56 and international practice.

IX. PRACTICAL CONSEQUENCES OF THE WITHDRAWAL

The U.S. withdrawal from the VCCR Optional Protocol, even if valid, would not affect cases already filed in the ICJ. Under ICJ procedure, future action is possible on cases already filed, even after final judgment, since under the ICJ Statute, a state that is party to a case may seek clarification of a judgment already issued.¹⁷⁹ In 2008, Mexico requested interpretation of the *Avena* judgment before the ICJ, after one of its nationals was scheduled for execution without a review of his conviction.¹⁸⁰ Mexico's request is not precluded by the U.S. withdrawal from the VCCR Optional Protocol.¹⁸¹

176. *Supra* note 172.

177. United Nations, *supra* note 11, ch. 4, § 4 n.8 (“As the Covenant does not contain a withdrawal provision, the Secretariat of the United Nations forwarded on 23 September 1997 an aide-mémoire to the Government of the Democratic People's Republic of Korea explaining the legal position arising from the above notification. As elaborated in this aide-mémoire, the Secretary-General is of the opinion that a withdrawal from the Covenant would not appear possible unless all States Parties to the Covenant agree with such a withdrawal.”).

178. U.N. Human Rights Comm. [UNHRC], *General Comment No Continuity of Obligations*, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997) (taking the position that a human rights treaty creates rights for a population, and that this may not be revoked).

179. ICJ Statute, *supra* note 138, art. 60.

180. Application Instituting Proceedings of Mexico, Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals* (Mex. v. U.S.) (Mex. v. U.S.), (June 5, 2008), available at <http://www.icj-cij.org/docket/files/139/14582.pdf> (last visited Oct. 15, 2008); see also Press Release, Int'l Court of Justice, Mexico files a Request for interpretation of the Judgment of 31 March 2004 in the case concerning *Avena and Other Mexican Nationals* (*Mexico v. United States of America*) and asks for the urgent indication of provisional measures (June 5, 2008), available at <http://www.icj-cij.org/docket/files/139/14578.pdf> (last visited Oct. 15, 2008) (Mexico invoking article 60 of the ICJ Statute).

181. Request for Interpretation of the Judgment of 13 March 2004 in the Case Concerning

Additionally, a state in whose favor the ICJ has ruled may approach the U.N. Security Council, which is empowered to take enforcement measures, if the other state fails to comply with the ruling.¹⁸² That procedure, similarly, is not precluded by a withdrawal for cases already decided.

The United States, as Secretary Rice explained, continues as a party to the VCCR. Withdrawal from the Optional Protocol, she said, would not impact the commitment of the United States to complying with the VCCR and in particular, with Article 36. The Department of State has posted advisory messages for law enforcement agencies stressing that the withdrawal from the Optional Protocol does not diminish their obligation to respect consular access when they arrest foreign nationals.¹⁸³

The U.S. Supreme Court, however, has referred to the withdrawal as support for a more limited construction of VCCR Article 36. In *Bustillo v. Virginia*, the Supreme Court addressed the question of whether it should give weight to the ICJ's view that procedural default rules should not be used to bar consideration of a consular access claim.¹⁸⁴ Deciding that it need not give any weight to the ICJ's view, the Supreme Court referred to the withdrawal as an additional reason for ignoring the ICJ's view:

Moreover, shortly after *Avena*, the United States withdrew from the Optional Protocol concerning Vienna Convention disputes. Whatever the effect of *Avena* and *LaGrand* before this withdrawal, it is doubtful that our courts should give decisive weight to the interpretation of a tribunal whose jurisdiction in this area is no longer recognized by the United States.¹⁸⁵

The withdrawal cannot appropriately be taken to have such an effect. The United States is party to the ICJ Statute and was party to the consular access cases filed by Paraguay, Germany, and Mexico. However the Supreme Court resolves the issue of the weight to be given to ICJ decisions, it should not accord them less weight because of the 2005 withdrawal. Taking that approach will simply make it

Avena and Other Mexican Nationals (Mex. v. U.S.) (Mex. v. U.S.), 2009 I.C.J. _ (Jan. 19), <http://www.icj-cij.org> (where ICJ declined on other grounds to provide a clarification).

182. U.N. Charter art. 94, para 2.

183. See, e.g., Memorandum from U.S. Department of State, Announcement: All Consular Notification Requirements Remain in Effect, *available at* http://travel.state.gov/new-s/news_2155.html (last visited Oct. 15, 2008).

184. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 352-53 (2006).

185. *Id.* at 355.

easier for the Supreme Court to persist in espousing the executive branch's idiosyncratic construction of VCCR Article 36.

A. U.S. Inability to Sue

The withdrawal limits U.S. access to the ICJ on consular issues. One cannot know what events might cause the United States to find it advantageous to sue for a consular law violation, but the possibility can hardly be precluded. In the 1970s, the United States did not expect it would soon be dealing with a hostage-taking at consular offices, but when that did occur in Iran in 1979, one of the first responses of the United States was to file a complaint in the ICJ, using the VCCR Optional Protocol as a jurisdictional ground to allege violations of consular law by Iran.¹⁸⁶ The United States viewed an ICJ decision condemning Iran for the hostage-taking as an important element as it sought to mobilize world opinion in its favor. Iran at the time, explaining the hostage-taking, highlighted the previous history of U.S. actions in Iran, which involved helping overturn a democratically elected government in 1953 and bringing in a government that came to be viewed as oppressive. Iran asked the ICJ not to deal with the U.S. complaint unless it simultaneously considered "more than 25 years of continual interference by the United States in the internal affairs of Iran."¹⁸⁷ The occupation of U.S. diplomatic and consular offices was accompanied by the opening of archives, whose contents were made public to show what the United States had done. Iran sought to put those acts in the context of what it viewed as the United States' improper interference.¹⁸⁸ The unanimous decision the U.S. gained from the ICJ helped marshal sentiment in its favor, over and against such assertions by Iran.

In the present world situation, as in 1979, the United States is resented in many quarters,¹⁸⁹ and it is not difficult to imagine that the United States might experience infringements against its consular posts. Consulates have long been a ready target for demonstrations by locals seeking to draw attention to policies of a sending state. One need only recall actions at Danish diplomatic and consular posts in

186. See Application Instituting Proceedings of United States, United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1982 I.C.J. Pleadings 3, 3-5 (Nov. 29, 1979).

187. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 180 I.C.J. 3, 8-9 (May 24).

188. *Id.*

189. See generally John Quigley, *International Law Violations by the United States in the Middle East as a Factor Behind Anti-American Terrorism*, 63 U. PITT. L. REV. 815 (2002).

reaction to the publication in Denmark of comic strips relating to the Prophet Mohammed. In Beirut, a Danish consulate was set on fire.¹⁹⁰ In 2006, a U.S. foreign service officer working at the U.S. consulate in Karachi, Pakistan, was killed in apparent protest of a scheduled visit to Pakistan by President George W. Bush.¹⁹¹ Such situations implicate the obligations of the receiving state to provide protection.

The United States may be in a position where it desires to sue for a variety of consular law violations, since under the VCCR, consuls enjoy a variety of immunities from local jurisdiction.¹⁹² As of this writing, a dispute remains unresolved between the United States and United Kingdom over the imposition of a “congestion charge,” requiring payment from drivers who commute by car into central London.¹⁹³ The UK expects consuls to pay. The United States refuses to pay, considering the charge as a “tax”—a characterization that would provide an exemption for consuls.¹⁹⁴ The UK regards the charge as a fee comparable to a road toll, which is collectable from consuls under an exception clause that specifies that a fee for services is not a tax.¹⁹⁵ Were the United States to seek to sue the UK in the ICJ, it would probably find no jurisdictional base apart from the VCCR Optional Protocol.

B. The Potential of Responsive Action by Other States

Despite the Department of State’s position that the United States will continue to abide by the VCCR, the United States insists on constructions of VCCR Article 36 that are viewed by a virtually unanimous community of nations as groundless. On the basis of international law principles as generally applied, it is difficult to find justification for the U.S. positions. As the United States, despite its protestations, is viewed by many as being in breach of VCCR Article 36, foreign states continue to protest when foreign nationals are

190. Megan Stack, *Beirut Rioters Attack Church*, L.A. TIMES, Feb. 6, 2006, at A1.

191. Kamran Khan and John Lancaster, *Pakistan Blast Kills U.S. Diplomat*, WASH. POST, Mar. 3, 2006, at A10; Declan Walsh, *Car bombing: Explosion at US consulate in Karachi kills diplomat*, GUARDIAN (London), Mar. 3, 2006, at 22.

192. LEE & QUIGLEY, *supra* note 3, at 339-511.

193. Ben Webster, *US diplomats 'owe £1m in fines'*, TIMES (London), Nov. 29, 2006, at 30.

194. See VCCR, *supra* note 1, art. 49, § 1.

195. See *id.*, art. 49, § 1(e).

arrested and convicted of crime, if advice as to consular access is not given at the time of arrest.¹⁹⁶

While insisting on rights for U.S. nationals under arrest, U.S. consuls have already been confronted with the country's own spotty record of compliance. Such instances have become sufficiently numerous that the Department of State has felt it necessary to provide instruction to U.S. consuls on how to react. The instruction reads that if a receiving state official, upon being asked to facilitate consular access, replies that the United States does not respect the rights of foreign nationals, a consul should say:

- a. Even where this might be true, it does not exempt the host government from its treaty obligations. Two wrongs do not make a right. We should all work toward improved compliance with consular notification obligations.
- b. Given the multinational and multi-ethnic makeup of the U.S., it is difficult to identify a person as a foreign national unless he/she claims such nationality or has appropriate documentation.
- c. Unfortunately, the size and composition of U.S. law enforcement (local, county, State, Federal) make it difficult to ensure that every arresting official understands the obligation to notify foreign consuls.¹⁹⁷

Foreign states may, if they choose, take action against the United States in response to what they view as U.S. non-compliance with VCCR Article 36. Under international law, a state whose rights are violated may undertake countermeasures against the other state.¹⁹⁸ Although a state's countermeasures regarding consular access may be limited because such measures may not affect human rights,¹⁹⁹ other states could take countermeasures affecting, for example, trade relations in a way that could harm U.S. financial interests.

Moreover, other states party to the VCCR may be able to restrict the rights of U.S. nationals within the framework of the VCCR itself, without resorting to countermeasures as such. The VCCR requires states party to treat other states party equally, but with an exception:

1. In the application of the provisions of the present Convention the receiving State shall not discriminate as between States.
2. However, discrimination shall not be regarded as taking place:

196. See, e.g., Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner, *Medellin v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984).

197. 7 U.S. DEPT OF STATE, *Foreign Affairs Manual* § 421.2-3 (2004), available at <http://www.state.gov/documents/organization/86605.pdf>.

198. G.A. Res. 56/83, *supra* note 82, pt. 3, ch. 2, art. 49.

199. *Id.* art. 50.

(a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its consular posts in the sending State[.]²⁰⁰

VCCR Article 72 thus creates the possibility that other states may apply VCCR Article 36 in relation to U.S. nationals in a “restrictive” way if the U.S. applies it in a restrictive way to their nationals. As a result, a state in which a U.S. national is convicted and sentenced to prison without having been advised about consular access might take the position that its courts need not entertain a claim for the consular access violation, because U.S. courts would not entertain such a claim for one of their nationals.

Hopefully, this route will not be taken since states in general prefer to apply treaty provisions relating to individuals in a uniform way, regardless of nationality. The German Constitutional Court, for example, in a decision rendered eighteen months after the U.S. withdrawal from the Optional Protocol, indicated that Germany will apply VCCR Article 36 in the way the ICJ reads it, namely to provide rights for individuals and to afford access to a court for a possible remedy in case of violation.²⁰¹ Germany is likely to afford such rights to U.S. nationals, even if the United States does not afford them to German nationals.

The current U.S. course in regard to the VCCR poses potential risk to the United States in protecting its own interests and in protecting U.S. nationals. The perceived self-interest of the United States in protecting itself from suits may turn out to be less significant than an interest in protecting both itself and U.S. nationals.

X. THE ADVISABILITY OF RE-ADHERENCE TO THE OPTIONAL PROTOCOL

The Department of State clearly is concerned about whether it can adequately represent the interests of U.S. nationals in the face of the U.S. performance under, and attitude toward, VCCR Article 36. The State Department has made representations on occasion, as indicated above, to governors asking for a reprieve on behalf of a condemned foreign national, citing concern for its ability to protect U.S. nationals.²⁰² To date, however, the United States has not been

200. VCCR, *supra* note 1, art. 72, § 1.

201. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sep. 19, 2006, 2 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 2115/01 (¶¶ 65, 68) (F.R.G.).

202. See *supra* § II.

sufficiently concerned to modify its own position, which is at the heart of the problem. The executive branch, notwithstanding the ICJ decisions in the *LaGrand* and *Avena* cases, continues to tell the courts that foreign nationals have no rights under VCCR Article 36 and that courts do not have to consider remedies when consular access obligations are violated.²⁰³ Judicial remedies might have a salutary impact on compliance by police, which might reduce the number of violations.

U.S. state and federal courts, in the main, are deciding claims by foreign nationals of consular access violations in line with the Department of State position. In 2006, as mentioned above, the U.S. Supreme Court declined to suppress an incriminating statement made by a Mexican national.²⁰⁴ In the same ruling, the Supreme Court rejected the consular access claim of a foreign national who raised his claim only in post-conviction proceedings.²⁰⁵ Yet, the ICJ specifically ruled previously in the *LaGrand* case that rules on the timing of presentation of claims may not be used to bar a consular access claim, given that states that have violated an international norm must do what they can to provide redress.²⁰⁶

The U.S. Supreme Court and Department of State's construction of VCCR Article 36 carries the risk that the United States will not only be viewed as being incorrect on a legal matter, but also as disingenuous and as using its power position to disregard the law. The U.S. views have been rejected by two international courts and by the other states party to the VCCR; nonetheless, the Department is not altering its course. In 2008, in an *amicus curiae* brief for the United States, the Department of State again told a U.S. court that the preamble language of the VCCR negates an individual right, and the court relied on that opinion as it denied a claim.²⁰⁷

203. Brief for the United States as Amici Curiae Supporting Petitioner at 29, *Medellin v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984) ("Permitting private judicial enforcement in the absence of action from the President or the Congress would deprive the political branches of the very choice of means that the ICJ intended for them to have. Thus, while petitioner is entitled to review and reconsideration *by virtue of the President's determination*, such review and reconsideration would not be available to petitioner in the absence of the President's determination.").

204. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

205. See *id.*

206. See *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 497-98 (June 27).

207. See *Mora v. New York*, 524 F.3d 183, 196-97 (2d Cir. 2008) (stating that the preamble language reflected the fact that VCCR governs inter-state relations only).

The United States should revise its severely battered construction of VCCR Article 36, both because it would thereby conform to the construction used by other states party and because its own constructions are difficult to square with legal principle. A modification of the U.S. positions along these lines would not only bring the United States into compliance with the obligations it has undertaken towards foreign states and their nationals but would also greatly assist U.S. consuls in protecting U.S. nationals abroad. Ultimately, the United States could enhance respect for the VCCR, and for itself, by retracting its withdrawal from the VCCR Optional Protocol.