

# VIENNA CONVENTION ON CONSULAR RELATIONS: IN RETROSPECT AND INTO THE FUTURE

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## I. ORIGIN AND EARLY IMPLEMENTATION

The Vienna Convention on Consular Relations (VCCR) has proved to be one of the more enduring and important multilateral treaties negotiated under the auspices of the United Nations. Its conclusion was part of an effort undertaken in the early years of the United Nations to put customary international law into treaty form. The drafters of the U.N. Charter identified such an effort as a key task of the new international organization. “The General Assembly shall initiate studies and make recommendations,” the Charter recites, aimed at “encouraging the progressive development of international law and its codification.”<sup>1</sup>

Acting under this mandate, the General Assembly created an International Law Commission (ILC) and tasked it with analyzing customary law on particular issues and, on the basis of states’ practices, to formulate multilateral treaties.<sup>2</sup> In the realm of relations between states, two issues were identified: diplomatic relations and consular relations.<sup>3</sup> Consular relations was identified as early as 1949 as a key issue.<sup>4</sup> U.N. Secretary-General Trygve Lie highlighted the need for uniform regulation of the work of consuls at a time when communication and transport were growing and increased trade could be anticipated.<sup>5</sup> From 1949, the ILC focused on consular relations, and by 1957 the special rapporteur on the topic, Jaroslav Zourek, produced a report containing draft articles.<sup>6</sup> The ILC itself forged Zourek’s draft articles into a draft of its own.<sup>7</sup>

Viewing the work of the ILC as promising, the General Assembly decided to convoke a conference.<sup>8</sup> In the spring of 1963, the U.N. Conference on Consular Relations met in Vienna, with ninety-two states

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1. U.N. Charter art. 13.

2. G.A. Res. 174 (II), at 105, U.N. Doc. A/RES/174(II) (Nov. 21, 1947).

3. LUKE T. LEE & JOHN QUIGLEY, *CONSULAR LAW AND PRACTICE* 22 (3d ed. 2008)

4. U.N. Secretary-General, *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, at 54-56, U.N. Doc. A/CN.4/1/Rev.1 (Feb. 10, 1949).

5. *Id.*

6. Jaroslav Zourek, Special Rapporteur, *Consular Intercourse and Immunities, Report of the Special Rapporteur*, [1957] 2 Y.B. Int’l L. Comm’n 71, U.N. Doc. A/CN.4/SER.A/1957/ADD.1.

7. Rep. of the Int’l Law Comm’n, 12th Sess., Apr. 25-July 1, 1960, U.N. Doc. A/4425; GAOR, 15th Sess., Supp. No. 9 (1960).

8. G.A. Res. 1685 (XVI), at 61-62, U.N. Doc. A/RES/1685(XVI) (Dec. 18, 1961).

participating.<sup>9</sup> Given that many colonial territories had yet to gain independence, this number represented nearly the entirety of the states of the world.<sup>10</sup> A precedent had been set for work on consular relations by the ILC's work on diplomatic relations. An ILC draft on diplomatic relations resulted in a conference of states in Vienna in 1961, leading to the Vienna Convention on Diplomatic Relations (VCDR).<sup>11</sup>

By 1963, a post-war development in international relations was impacting consular relations.<sup>12</sup> The Cold War created a schism among states and created special problems for consular officers.<sup>13</sup> Espionage, or suspicion of espionage, hung over consulates, rendering the position of consular officers precarious.<sup>14</sup> The Cold War divide was evident in Vienna as the ninety-two states perused the ILC's draft consular convention, article by article. This draft would become the VCCR. In the discussions at Vienna as the text of the VCCR was being finalized, the Soviet bloc states were reluctant to allow its provisions to override local law.<sup>15</sup> The Western-developed states pressed for primacy of the VCCR and for mandatory dispute resolution, in order to ensure compliance by states.<sup>16</sup> The United States argued at Vienna for a clause to be contained in the text of the VCCR to let any state party alleging a violation by another state party to take the matter to the International Court of Justice (ICJ).<sup>17</sup> The state party would thus agree in advance that legal action might be taken against it by another state party.

The USSR opposed this approach.<sup>18</sup> It argued that a dispute should fall within the jurisdiction of the ICJ only if both states agreed to submit the particular dispute.<sup>19</sup> A compromise was reached to follow a path that had been taken in the VCDR.<sup>20</sup> Dispute settlement would not be mentioned in the text, but in a separate agreement, termed an Optional Protocol (Protocol).<sup>21</sup> States subscribing to the VCCR would be encouraged, but not

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9. LEE & QUIGLEY, *supra* note 3, at 22.

10. *Id.* at 21-25.

11. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

12. LEE & QUIGLEY, *supra* note 3, at 49.

13. *Id.*

14. *Id.* at 86-87.

15. *Id.* at 168.

16. United Nations Conference on Consular Relations, Mar. 4-Apr. 22, 1963, *Official Records*, 87-89, U.N. Doc. A/CONF.25/16 (Vol. I), (Apr. 20, 1963) (statement of Mr. Cameron, U.S.A.).

17. *Id.*

18. *Id.* at 85 (statement of Mr. Avilov, U.S.S.R.).

19. *Id.*

20. Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, 500 U.N.T.S. 241.

21. Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 596 U.N.T.S. 487.

required, to subscribe to the Protocol. They could adhere to the VCCR without having to file a reservation to a submission clause.<sup>22</sup>

Nonetheless, the resultant VCCR covered the key issues in consular law: the process for appointment and acceptance of consular officers of a sending State, facilitation of their work in the receiving State, and the immunities enjoyed in a receiving State by consular officers and by the sending State for its activities.<sup>23</sup> By 2013, 176 states were party to the VCCR, the most recent being Brunei in May of 2013.<sup>24</sup> The VCCR had largely succeeded in providing a uniform and mutually acceptable set of regulations for consular relations. States seeking to depart from VCCR provisions on particular issues in relation to particular states have been able to do so through bilateral consular treaties.<sup>25</sup> This option, which to a certain extent is inconsistent with the original aim of uniformity, has been found beneficial by certain states on certain issues.<sup>26</sup> Thus, while the VCCR provides a uniform set of rules, it is not a straitjacket.

The VCCR was first invoked in international litigation in 1979, when the United States sued Iran over the forcible sequestration of U.S. diplomatic and consular personnel at the U.S. embassy in Tehran and U.S. consular posts in the Iranian cities of Shiraz and Tabriz.<sup>27</sup> The United States, as a party to both the VCCR and the Protocol, invoked the jurisdiction of the ICJ against Iran.<sup>28</sup> The court had jurisdiction because Iran, like the United States, was party to both the VCCR and the Protocol.<sup>29</sup> Because of the link in the Protocol to the ICJ, the VCCR opened a judicial mechanism that had not formerly existed in consular law, and that mechanism allowed for dealing with an international crisis of high magnitude. Moreover, the Protocol allowed for suit over the sequestration situation before a respected international forum whose judgment might enhance the United States' ability to bring that situation to a peaceful end. This was a major benefit of what was done at Vienna in 1963: the provision of jurisdiction for the compulsory adjudication of disputes over violation of consular law obligations.

The United States argued to the ICJ that the sequestration of U.S. personnel and the failure of the Government of Iran to take action to secure

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22. United Nations Conference on Consular Relations, Mar. 4-Apr. 22, 1963, *Official Records*, 249-51, U.N. Doc. A/CONF.25/16 (Vol. I) (Mar. 26, 1963).

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

24. *Vienna Convention on Consular Relations*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-6&chapter=3&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en) (last visited Nov. 5, 2013).

25. LEE & QUIGLEY, *supra* note 3, at 590-601

26. *Id.* at 18-21.

27. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 11 (May 24).

28. *Id.* at 4.

29. *Id.* at 24.

their release violated the VCCR's provisions that required a receiving State to facilitate the work of consular officers.<sup>30</sup> The existence of treaty provisions facilitated the ICJ's task of ascertaining the legality of the actions of Iran. The ICJ did not need to examine customary law on the subject, a task that might well have come to the same outcome, but that would have been laborious and time-consuming in the face of a situation that called for expeditious resolution. The ICJ found in favor of the United States.<sup>31</sup>

The promise of a ready forum for adjudication of disputes over consular law violations has only been partly fulfilled, however. The Protocol has attracted fewer states than the VCCR itself.<sup>32</sup> As of 2013, the U.N. Secretary-General, who serves as depositary for the VCCR and the Protocol, counted fifty states as party to the Protocol.<sup>33</sup> As will appear below, the Secretary-General's count on states adhering to the Protocol may be short by one state. In any event, as a result of the small number of states adhering to the Protocol and the lack of other readily available bases of jurisdiction, the ICJ has seen few cases by one state party to the VCCR against another alleging a violation of a provision of the VCCR.

Consular activity for many sending States has been impeded in recent years by security considerations.<sup>34</sup> Particularly for states like the United States, which are active on the world stage and engender hostility in certain quarters, security for consular posts and consular personnel works against easy contact with the populace of the receiving State. The 2013 attack on a U.S. consular post in Benghazi, Libya, is an example of the difficulties that states like the United States face in maintaining consular posts.<sup>35</sup> In recent years, consular posts have been moved out of central-city locations and fortified for greater security.<sup>36</sup> These changes have made consular posts less accessible to locals.

While security considerations may inhibit physical contact with the local population in many posts, information technology has enhanced opportunities for contact in a different way. To a certain degree, this technology has compensated for the constraints working against face-to-

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30. *Id.* at 32.

31. *Id.* at 44-45.

32. *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-8&chapter=3&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-8&chapter=3&lang=en) (last visited Nov. 5, 2013) [hereinafter *Optional Protocol*].

33. *Id.*

34. LEE & QUIGLEY, *supra* note 3, at 366-69.

35. Howard LaFranchi, *Ambassador Chris Stevens Killed in Libya: Is Arab Spring Turning Against US?*, CHRISTIAN SCI. MONITOR (Sept. 12, 2012), <http://www.csmonitor.com/USA/Foreign-Policy/2012/0912/Ambassador-Chris-Stevens-killed-in-Libya-Is-Arab-Spring-turning-against-US>.

36. See, e.g., *U.S. Unveils Tanzania Embassy Site*, L.A. TIMES, Aug. 8, 1999, <http://articles.latimes.com/1999/aug/08/news/mn-63712>.

face interaction. Information is now routinely posted on post websites about available services, allowing those in need of consular service, say for an entry visa, to access it remotely. Consular officers can post blogs about the activities of the post, thereby informing the local population about the work of a consulate and putting a human face on its personnel.

The revolution in information technology has also made the law relating to consular matters more readily accessible to lawyers and others. Whereas formerly one needed access to a major library, now journal articles on consular law are available in digital form. So too are treaties, governmental regulations, legislation, and judicial cases. A bibliography of books and articles on consular law is now posted by Oxford University Press as part of the Press's on-line bibliography on international law.<sup>37</sup>

## II. CONSULAR ACCESS FOR SENDING STATE NATIONALS

The role of consuls in providing protection to sending-State nationals under arrest has proved to be one of the more problematic issues covered in the VCCR. Historically, and to the present day, protection of nationals arrested abroad has been a key function of consuls.<sup>38</sup> Arrest in a foreign state presents great difficulties requiring assistance from consular officials. Consuls can ensure the well-being of a sending-State national under arrest by facilitating contact with relatives in the sending State, arranging for legal representation, and following judicial proceedings to monitor compliance with procedural rights by the courts of the receiving State.<sup>39</sup> The receiving State is obligated under the VCCR to facilitate this protection work of consuls.<sup>40</sup> Most significant, the receiving State must inform a foreign national under arrest of the right to communicate with a home-state consul.<sup>41</sup>

The protective work of consuls first came into play in international litigation in the 1979 U.S. suit against Iran over the sequestration of U.S. personnel.<sup>42</sup> As one of its charges against Iran, the United States cited the obligation of a receiving State to facilitate consular access to nationals under arrest.<sup>43</sup> It argued to the ICJ that the sequestration of consular officers made it impossible for U.S. consular officers to provide protection

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37. John Quigley, *Consular Relations*, OXFORD BIBLIOGRAPHIES, <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0014.xml> (last visited Sept. 10, 2013).

38. LEE & QUIGLEY, *supra* note 3, at 116-38.

39. VCCR, *supra* note 23, art. 36.

40. *Id.*

41. *Id.*

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

43. 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 (Nov. 29, 1979).

to U.S. nationals who might have been in need of such.<sup>44</sup> The right of the United States as a sending State to protect its nationals was violated, the United States asserted, as well as the rights of U.S. nationals in Iran to access U.S. consuls.<sup>45</sup> The latter prong of the argument involved an assertion by the United States that, in the realm of consular protection, the VCCR accords rights not only to states, but to individuals as well.<sup>46</sup>

The existence of a uniform system of consular access makes it easier for consuls to demand access and for their requests to be readily understood by officials of a receiving State. An example is the 2010 situation in Israel, in which passengers were detained after being taken off ships seeking to deliver humanitarian items to the Gaza Strip.<sup>47</sup> The ships were forced to dock at an Israeli port, and passengers were taken to holding facilities.<sup>48</sup> Nationals of a number of states were among the detainees.<sup>49</sup> By their accounts, they were not informed about a right of consular access, and those who requested consular access were denied.<sup>50</sup> Consular officers who requested access were reportedly denied.<sup>51</sup> Two days into the incident, the European Union protested to Israel about the incarceration of these nationals and about the violation of the obligation of facilitating consular access.<sup>52</sup> In a protest filed while these foreign nationals remained under detention, it was stated, “The EU calls on Israel to urgently provide member states with consular access to and information about their citizens.”<sup>53</sup> At the same time, consular access was afforded to many of the detainees.<sup>54</sup> In such a situation, the existence of a clear treaty obligation facilitates the efforts of consular officers to gain access. Consular officers were able to point to a clear obligation on Israel as a party to the VCCR. As a party, Israel understood its obligation and did in some measure satisfy it.

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44. *Id.*

45. *Id.*

46. *Id.*

47. SIR GEOFFREY PALMER ET AL., REPORT OF THE SECRETARY-GENERAL’S PANEL OF INQUIRY ON THE 31 MAY 2010 FLOTILLA INCIDENT, at 3 (Sept. 2, 2011), available at [http://www.un.org/News/dh/infocus/middle\\_east/Gaza\\_Flotilla\\_Panel\\_Report.pdf](http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf).

48. *Id.* at 24-25.

49. *Id.* at 5.

50. *Id.* at 25.

51. Press Release, European Union, Declaration by HR Catherine Ashton on Behalf of the EU on the Israeli Military Operation Against the Flotilla (June 3, 2010) [hereinafter Declaration by Catherine Ashton].

52. *Id.*

53. *Id.*

54. PALMER ET AL., *supra* note 47, ¶ 142.

### III. CONSULAR NOTIFICATION COMPLIANCE ACT AND THE QUESTION OF REMEDY

Enforcement of the receiving State's obligation to inform foreign-national detainees about consular access has not been uniform. Enforcement requires implementation in police posts and prosecution offices that may only rarely deal with foreigners. While provisions of many treaties, including most of the provisions of the VCCR, are to be implemented by central government agencies, the VCCR provision on consular access for a detained sending-State national requires the work of local authorities.<sup>55</sup> In the United States, the Department of State works with local authorities to encourage implementation.<sup>56</sup> Nonetheless, many foreign nationals are not informed upon arrest about consular access. This failure then opens challenges lodged in domestic courts by foreign nationals. A foreign national who is convicted of crime may cite the failure of information as a factor undermining the legality of the conviction, but courts may be reluctant to overturn a conviction for this reason.

A bill introducing draft legislation titled Consular Notification Compliance Act (Act) was introduced in the U.S. Senate in 2011.<sup>57</sup> The Act would give federal courts jurisdiction to entertain a habeas corpus petition from a foreign national who is under a death sentence and claims a violation of the obligation of consular notification.<sup>58</sup> To gain relief, the foreign national would be required to prove "actual prejudice" flowing from the violation.<sup>59</sup>

Legislation on consular notification at the federal level is one way to improve compliance. The proposed Act was prompted by the need to implement the ICJ's decision in *Avena and Other Mexican Nationals*, a case brought by Mexico against the United States seeking relief for Mexicans who were under sentence of death for murder in various U.S. states and who had not been informed at the time of arrest about access to a consul of Mexico.<sup>60</sup> The ICJ said that the United States was required to grant "review and reconsideration" in the cases of these Mexican nationals.<sup>61</sup> The U.S. Supreme Court said that the United States was bound

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55. VCCR, *supra* note 23, arts. 36, 38.

56. *See, e.g.*, U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM (2003), *available at* [http://travel.state.gov/pdf/CNA\\_book.pdf](http://travel.state.gov/pdf/CNA_book.pdf).

57. Consular Notification Compliance Act of 2011, S. 1194, 112th Cong. (2011).

58. *Id.* § 4(a)(5).

59. *Id.* § 4(a)(3).

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

61. *Id.* at 72.

by that obligation.<sup>62</sup> The Act would have provided for U.S. district courts to carry out such “review and reconsideration.”<sup>63</sup> It would not have limited its coverage to the Mexican nationals named by Mexico in *Avena*, but the Act would have covered all foreign nationals under sentence of death who had not been informed upon arrest about access to a home-state consul.

Hearings were held on the Act, but no further action was taken. Legislation along the lines of the Act may be useful in securing implementation of consular access rights, but greater attention should be paid by its drafters to the standard of proof when a foreign national asserts that a failure of notification about consular access is grounds for judicial relief from a criminal conviction. In its memorial in the *Avena* case, the Government of Mexico pointed out that courts in the United States have said that

even assuming Article 36 provides for an individual right and creates a fundamental right permitting a judicial remedy such as exclusion, the defendant would still not be entitled to such remedies absent a showing of prejudice; that is, that the violation harmed his interests in such a way as to affect the outcome of the proceedings.<sup>64</sup>

The Government of Mexico argued that the principle of *restitutio in integrum* requires reversal of a conviction whenever a foreign national has not been informed upon arrest about consular access.<sup>65</sup> In other words, any criminal conviction following a failure to inform a foreign national at the time of arrest about consular access should be reversed. The ICJ replied to this argument as follows:

The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.<sup>66</sup>

The ICJ’s analysis was an elaboration on a standard it enunciated in an earlier VCCR case, styled *LaGrand*, which had been brought against the

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62. *Medellín v. Texas*, 552 U.S. 491, 499 (2008).

63. S. 1194.

64. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Memorial of Mexico, at 53 (June 20, 2003), <http://www.icj-cij.org/docket/files/128/8272.pdf>.

65. *Avena*, 2004 I.C.J. at 58.

66. *Id.* at 60.



United States by Germany.<sup>67</sup> The ICJ in *LaGrand* called, in respect of remedy, for action “to allow the review and reconsideration of the conviction and sentence by taking account of the violation.”<sup>68</sup>

It is unfortunate that the ICJ declined to adopt Mexico’s approach on remedy. The international law standard for remedy of a treaty violation is precisely as Mexico asserted. In international law, a hierarchy of remedies has been elaborated.<sup>69</sup> If possible, the party in violation of a treaty breach must restore the prior-existing situation.<sup>70</sup> Only if that is not possible does monetary compensation become sufficient as a remedy.<sup>71</sup> This hierarchy is set out in a document titled Responsibility of States for Internationally Wrongful Acts that was produced by the U.N.s’ ILC and endorsed by the U.N. General Assembly.<sup>72</sup> The document provides as follows:

Article 35. *Restitution*. A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) Is not materially impossible;

(b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.<sup>73</sup>

Nonetheless, the ICJ required a serious inquiry, to be conducted by a court in the receiving State, into the failure to comply with the obligation of consular notification.<sup>74</sup> The proposed Act’s requirement of a finding of “actual prejudice”<sup>75</sup> lacks precision and runs the risk of being read to eviscerate the right of consular access. The risk is that a requirement of prejudice will be read to require a finding that the person would have been acquitted had a consul been involved in the case. Consular access violations are not readily analyzable in terms of their impact. A prejudice standard results in speculation about what a consul might have done, which is unknown in many cases. One cannot know what a consul might have done in a case in which a consul was not involved. The international obligation is to inform the foreign national about consular access; if that is

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67. *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466 (June 27).

68. *Id.* at 514.

69. *See* Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* art. 35.

74. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 65 (Mar. 31).

75. Consular Notification Compliance Act of 2011, S. 1194, 112th Cong. § 4 (2011).

not done and if a consul is not quickly apprised, the case may well proceed in a direction that harms the situation of the foreign national. For example, an attorney may be retained who is less than qualified to deal with the matter. A consulate may be able to identify an attorney with experience dealing with nationals of the particular sending State, who may be better positioned to understand the foreign national's version of events or to access relevant documentary or other evidence that may be available in the sending State. But if the standard is prejudice, a court may be reluctant to conclude that the foreign national would have had a greater chance at trial on an assertion, say, that a different attorney might have done a better job.

Moreover, the Act imposes a burden, apparently a burden of persuasion, on the foreign national to convince a federal court of "actual prejudice."<sup>76</sup> That would mean that if a federal court concludes that it is as likely as not that there was prejudice, it would decide against the foreign national. The ICJ, in calling for review and reconsideration that takes account of the violation, did not suggest that a burden of persuasion be placed on the foreign national.<sup>77</sup> It would be the duty of the federal court to determine prejudice.<sup>78</sup> The foreign national might be required to raise the issue of prejudice, but not to carry the burden to prove it.<sup>79</sup>

In the *Avena* case, Mexico argued "that courts in the United States be prohibited from applying any municipal law doctrine that . . . requires a defendant to make an individualized showing of prejudice as a prerequisite to relief."<sup>80</sup> Mexico was on target with this argument. Requiring a foreign national to prove prejudice imposes a burden that in most instances will be difficult to bear.

The Inter-American Commission on Human Rights was called upon to deal with the remedy issue for one of the Mexican nationals on whose behalf the Government of Mexico brought the *Avena* case to the ICJ. The Mexican national was Cesar Fierro, who was under a sentence of death in the state of Texas.<sup>81</sup> The Commission concluded that the United States must "[p]rovide Mr. Fierro with an effective remedy, which includes a retrial . . . or . . . Mr. Fierro's release."<sup>82</sup> The Commission's approach was more sensible than that reflected in the Act. Fierro's right to be notified about consular access had been violated, and the Commission said that his

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76. *Id.*

77. *See Avena*, 2004 I.C.J. 12.

78. *Id.* at 60.

79. *Id.* at 63.

80. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Memorial of Mexico, at 5 (June 20, 2003), <http://www.icj-cij.org/docket/files/128/8272.pdf>.

81. *Fierro v. United States*, Case 11.331, Inter-Am. Comm'n H.R., Report No. 99/03, OEA/Ser.L/V/II.114, doc. 70 rev. ¶ 1 (2003).

82. *Id.* ¶ 72.

conviction could not stand.<sup>83</sup> To be sure, the Commission noted circumstances in Fierro's situation that suggested that consular participation might have affected the outcome,<sup>84</sup> but the Commission did not insist on those circumstances as necessary to its conclusion about remedy.<sup>85</sup>

Legislation should also be adopted at the state level to ensure compliance with consular notification obligations. It is at the state level where most violations occur, and states are bound by treaties of the United States. It is the states that, for criminal matters, provide rules on errors and their remedies, and there is no reason they should not deal with consular access violations as they do with other errors of process.

Apart from the possibility of federal legislation, the U.S. Attorney General should sue a state like Texas that impedes implementation in a particular case. A state that refuses to allow for reversal of a conviction achieved without compliance with consular notification requirements should be prevented from carrying out a criminal sentence. Such action by the U.S. Attorney General is particularly required in light of the refusal of the U.S. Supreme Court to provide remedies for a consular access violation.<sup>86</sup> Under current case law, a consular access claim is subject to rules found in the law of the particular state for default of issues not raised in a timely fashion.<sup>87</sup> In the face of an admitted consular access violation, courts are under no obligation to provide a remedy.<sup>88</sup> Courts need not enforce, says the U.S. Supreme Court, decisions of the ICJ calling for implementation of consular access rights for particular groups.<sup>89</sup> The U.S. Supreme Court has declined several opportunities to rule on whether Article 36 creates a right,<sup>90</sup> but since it says that no remedy is required, the issue is moot. Cases in the courts of the states and in lower federal courts over the past several years provide no relief to foreign nationals convicted of crime who were not informed about consular access following their arrest.<sup>91</sup> The United States, however, is under an obligation at the international level to implement consular access rights.<sup>92</sup> Lawsuits by the Attorney General against a state provide a way that obligation could be fulfilled.

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83. *Id.*

84. *Id.* ¶ 67.

85. *See id.*

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

87. *Id.*

88. *Id.* at 347.

89. *Medellín v. Texas*, 552 U.S. 491 (2008).

90. *See, e.g.,* *Breard v. Greene*, 523 U.S. 371 (1998).

91. *See, e.g.,* *State v. Ramos*, 297 P.2d 1251 (Okla. Crim. App. 2013).

92. *Medellín*, 522 U.S. at 504.

## IV. CONSULAR ACCESS AS A HUMAN RIGHTS ISSUE

In the *Avena* case, the Government of Mexico supported its argument for restoration of the status quo ante by characterizing consular access as a human rights issue.<sup>93</sup> As related by the ICJ in its judgment:

124. Mexico has further contended that the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Vienna Convention; according to Mexico, this right, as such, is so fundamental that its infringement will *ipso facto* produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right.<sup>94</sup>

The ICJ responded by questioning whether the VCCR identified consular access as a human right:

Whether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the *travaux préparatoires* support the conclusion that Mexico draws from its contention in that regard.<sup>95</sup>

Whether the VCCR itself takes consular access as a human right in addition to being a treaty right, other authorities do regard consular access as a human right. A commission constituted by the Government of Turkey that investigated the Gaza flotilla matter characterized the denial of consular access to the passengers of the vessels as a due process violation.<sup>96</sup> In a list of actions that it found to be human rights infringements, the Turkish Commission included “[d]ue process, including access to legal and consular assistance.”<sup>97</sup> The rationale is that, for a foreign national, consular access is necessary to ensure the fairness of proceedings.

The Inter-American Court of Human Rights (IACHR) addressed consular access not simply as a treaty issue under the VCCR, but as a

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

94. *Id.*

95. *Id.* at 61.

96. PALMER ET AL., *supra* note 47, ¶ 43.

97. *Id.* (citing TURKISH NAT'L COMM'N OF INQUIRY, INTERIM REPORT ON THE ISRAELI ATTACK ON THE HUMANITARIAN AID CONVOY TO GAZA ON 31 MAY 2010 (Sept. 2010)).

matter of due process of law.<sup>98</sup> The IACHR was acting on a request for an advisory opinion, filed by the Government of Mexico.<sup>99</sup> The IACHR said:

121. In the case to which this Advisory Opinion refers, the real situation of the foreign nationals facing criminal proceedings must be considered. Their most precious juridical rights, perhaps even their lives, hang in the balance. In such circumstances, it is obvious that notification of one's right to contact the consular agent of one's country will considerably enhance one's chances of defending oneself and the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried out in accord with the law and with respect for the dignity of the human person.

122. The Court therefore believes that the individual right under analysis in this Advisory Opinion must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial.

123. The inclusion of this right in the Vienna Convention on Consular Relations—and the discussions that took place as it was being drafted—are evidence of a shared understanding that the right to information on consular assistance is a means for the defense of the accused that has repercussions—sometimes decisive repercussions—on enforcement of the accused' other procedural rights.

124. In other words, the individual's right to information, conferred in Article 36(1)(b) of the Vienna Convention on Consular Relations, makes it possible for the right to the due process of law upheld in Article 14 of the International Covenant on Civil and Political Rights, to have practical effects in tangible cases; the minimum guarantees established in Article 14 of the International Covenant can be amplified in the light of other international instruments like the Vienna Convention on Consular Relations, which broadens the scope of the protection afforded to those accused.<sup>100</sup>

The IACHR thus drew the conclusion, from its analysis of consular access as an aspect of due process, that consular participation is necessary to ensure fairness. That means that prejudice of some specific type need not be found before a remedy is required; consular participation is

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98. *See generally* The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999).

99. *Id.* ¶ 1.

100. *Id.* ¶¶ 121-24.

presumed to enhance a foreign national's ability to present an adequate defense to a criminal charge.

## V. CONSULAR ACCESS IN HUMAN RIGHTS INSTRUMENTS

Consular access is widely regarded as a matter of right for a detained foreign national. The U.N. Commission on Human Rights, addressing capital punishment in 2001, "urge[d]" states that apply capital punishment "to observe the safeguards guaranteeing protection of the rights of those facing the death penalty and to comply fully with their international obligations, in particular with those under article 36 of the 1963 Vienna Convention on Consular Relations . . . ." <sup>101</sup>

The U.N. General Assembly adopted a Code of Conduct for Law Enforcement Officials. <sup>102</sup> It requires respect for human rights in the treatment of all persons. <sup>103</sup> The commentary to Article 2 identifies human rights in that context as including a number of human rights treaties, plus the VCCR. <sup>104</sup>

Treaties that call for the prosecution of persons detained on internationally-defined offenses require that the person be afforded consular access. <sup>105</sup> Thus, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment specifies that if a person arrested for violating the Convention is a foreign national, that person "shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national." <sup>106</sup> The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons contains a comparable provision. <sup>107</sup> So too do the International Convention on the Protection of the Rights of All Migrant Workers and Their Families and the International Convention for the Protection of All Persons from Enforced Disappearance. <sup>108</sup> Any foreign national detained for violating these conventions is entitled to consular access. <sup>109</sup>

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101. U.N. Comm'n on Human Rights Res. 2002/77, The Question of the Death Penalty, Mar. 18-Apr. 26, 2002, U.N. ESCOR, 58th Sess., Supp. No. 3, U.N. Doc. E/CN.4/RES/2002/200, at 321 (Apr. 25, 2002).

102. Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, U.N. Doc. A/RES/34/169 (Dec. 17, 1979).

103. *Id.* art. 2.

104. *Id.* art. 2 cmt. (a).

105. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 6, Dec. 10, 1984, 1465 U.N.T.S. 85

106. *Id.*

107. Convention on the Prevention and Punishment of Crimes Against Internationally Protect Persons, Including Diplomatic Agents art. 6(2)(a), Dec. 14, 1973, 1035 U.N.T.S. 167.

108. International Convention on the Protection of the Rights of All Migrant Workers and Their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990) [hereinafter Migrant Workers]; International Convention for the Protection of All Persons from Enforced

The Organization of American States (OAS) has specified as a human rights matter that arrested migrant workers must be afforded consular access.<sup>110</sup> In a resolution of the year 2000, the General Assembly of the OAS referenced

the duty of states to ensure full respect and observance of the 1963 Vienna Convention on Consular Relations, particularly with regard to the right of foreign nationals, regardless of their immigration status, to communicate with a consular official of their own state in case of detention and the obligation of the state in whose territory the detention occurs to inform the foreign national of that right.<sup>111</sup>

In a follow-up resolution in 2006, the General Assembly of the OAS resolved

[t]o reaffirm the duty of states parties to the 1963 Vienna Convention on Consular Relations to comply with that Convention, including the right to communication between consular officers and their nationals in cases of detention and the obligation of the states parties in whose territory the detention occurs to inform the foreign national of that right; and, in that connection, to call the attention of states to Advisory Opinion OC-16/99 of the Inter-American Court of Human Rights and to the ruling of the International Court of Justice of March 31, 2004, in the case of *Avena and Other Mexican Nationals*, on the obligation to comply with Article 36 of the Vienna Convention.<sup>112</sup>

The state practice reflected in all the referenced documents suggests that a right of consular access is protected in the customary law of human rights. The status of consular access as a customary law right will be better entrenched to the extent that courts around the world provide a remedy if consular access is violated. In a U.S. Supreme Court brief, the forty-seven states of the Council of Europe urged that VCCR Article 36 be viewed as creating a right enforceable at the instance of a foreign national whose corresponding right is violated.<sup>113</sup> They also urged that a judicial remedy be provided in such a case.<sup>114</sup> Having urged these positions on the U.S.

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Disappearance, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006) [hereinafter Enforced Disappearance].

109. Migrant Workers, *supra* note 108, art. 16; Enforced Disappearance, *supra* note 108, art. 17.

110. See generally Organization of American States [OAS] General Assembly, *The Human Rights of All Migrant Workers and Their Families*, OEA/Ser.P, AG/Res.1717 (XXX-O/00) (June 5, 2000).

111. *Id.*

112. OAS General Assembly, *The Human Rights of All Migrant Workers and Their Families*, AG/Res. 2224 (XXXVI-O/06) (June 6, 2006).

113. Brief for the European Union and Members of the International Community as Amici Curiae Supporting Petitioner, *Medellín v. Texas*, 552 U.S. 491 (2008) (No. 06-984).

114. *Id.*

Supreme Court, these states are obligating themselves to follow the positions as well. Recently, the Supreme Court of Mexico afforded considerable weight to the VCCR<sup>115</sup> and the German Constitutional Court has as well.<sup>116</sup>

A number of international mechanisms are open to pursue consular access as a human rights issue. The Inter-American Commission on Human Rights, as indicated, has already entertained petitions on this issue and rendered decisions.<sup>117</sup> U.N. member states are subject to Universal Periodic Review in the U.N. Human Rights Council.<sup>118</sup> Any rights violation may be raised by non-governmental organizations or by other states in this process, which is undertaken every four years for each state member of the United Nations.<sup>119</sup> To date, consular access has not been raised in Universal Periodic Review, but there is every reason to do so in the future.

A number of human rights treaties govern criminal trial procedures and could be invoked in the case of consular access violations. The International Covenant on Civil and Political Rights (ICCPR) contains a provision broadly requiring observance of human rights in criminal proceedings.<sup>120</sup> A violation of consular access for a foreign national in detention would constitute a violation of that provision.<sup>121</sup> The Convention on the Rights of the Child requires a state that detains a child on a criminal charge to observe “relevant provisions of international instruments.”<sup>122</sup> The International Convention on the Elimination of All Forms of Racial Discrimination requires states to “assure to everyone within their jurisdiction effective protection and remedies . . . against any acts of racial discrimination.”<sup>123</sup> Thus, if race-based discrimination were involved in a

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115. Amparo Directo en Revision 517/2011. Quejosa: Florence Marie Louise Cassez Crepin, Acuerdo de la Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], correspondiente al día veintitrés de enero de dos mil trece (Mex.), [http://www.scjn.gob.mx/Transparencia/Epocas/Primera%20sala/DecimaEpoca/ADR\\_517-2011\\_PS.pdf](http://www.scjn.gob.mx/Transparencia/Epocas/Primera%20sala/DecimaEpoca/ADR_517-2011_PS.pdf).

116. JOHN QUIGLEY ET AL., THE LAW OF CONSULAR ACCESS: A DOCUMENTARY GUIDE 164-65 (2010).

117. Martinez-Villareal v. United States, Case 11.753, Inter-Am. Comm’n H.R., Report No. 52/02, OEA/Ser.L./V/II.117, doc. 1 (2003); Fierro v. United States, Case 11.331, Inter-Am. Comm’n H.R., Report No. 99/03, OEA/Ser.L./V/II.114, doc. 70 (2003).

118. *Basic Facts About the UPR*, UNITED NATIONS HUM. RTS., <http://www.ohchr.org/en/hrbodies/upr/pages/BasicFacts.aspx> (last visited Sept. 11, 2013).

119. Office of the High Commissioner for Human Rights, *Factsheet: Human Rights Counsel – Universal Periodic Review*, UPR INFO (Nov. 2008) available at <http://www.upr-info.org/IMG/pdf/UPRFactSheetFinal.pdf>.

120. International Covenant on Civil and Political Rights arts. 9, 14, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

121. *Id.*

122. Convention on the Rights of the Child art. 40, Nov. 20, 1989, 1577 U.N.T.S. 3.

123. International Convention on the Elimination of All Forms of Racial Discrimination art. 6, Mar. 7, 1966, 660 U.N.T.S. 195.



particular case of detention of a foreign national, the International Convention would be in play.

States party to human rights treaties are required to report periodically to a committee established under such a treaty. The ICCPR is administered by the Human Rights Committee.<sup>124</sup> The Convention on the Rights of the Child is administered by the Committee on the Rights of the Child.<sup>125</sup> The International Convention on the Elimination of All Forms of Racial Discrimination is administered by the Committee on the Elimination of Racial Discrimination.<sup>126</sup> These committees encourage submissions from anyone when they conduct a periodic review of a state.<sup>127</sup> Each of these treaties is widely ratified. In addition, each of these committees has procedures whereby either another state party or any individual may file a communication alleging a violation.<sup>128</sup> The committee then investigates and issues a view on whether the state in question has violated the treaty. These procedures can be used in the case of a consular access violation.

## VI. OBLIGATION OF A SENDING STATE TO PROTECT DETAINED NATIONALS

A counter-argument to consular access as a due process right under human rights law is that the provision of consular protection is discretionary with the sending State. The VCCR imposes obligations on a receiving State to allow for consular access, but it leaves the actual provision of protection to the discretion of the sending State.<sup>129</sup> Hence, consular access, it is said, differs from lawyer assistance, where a lawyer, once retained, is obliged to assist a client.

Increasingly, however, the provision of consular protection has been regarded as an obligation by sending States. Some states enshrine consular protection as a constitutional right.<sup>130</sup> The Constitution of Hungary provides: “During a legitimate stay abroad every Hungarian citizen is entitled to enjoy the protection of the Republic of Hungary.”<sup>131</sup> Similarly,

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124. *Human Rights Committee*, UNITED NATIONS HUM. RTS., <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (last visited Nov. 6, 2013).

125. *Committee on the Rights of the Child*, OFF. UNITED NATIONS HIGH COMMISSIONER FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/crc/> (last visited Nov. 6, 2013).

126. *Committee on the Elimination of Racial Discrimination*, OFF. UNITED NATIONS HIGH COMMISSIONER FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/cerd/> (last visited Nov. 6, 2013).

127. *See* ICCPR, *supra* note 120, art. 40.

128. *Id.* art. 41.

129. VCCR, *supra* note 23, art. 36.

130. *See, e.g.*, CONSTITUTION OF THE REPUBLIC OF HUNGARY (1989).

131. *Id.* art. 69(3).

the Constitution of Russia provides: “The Russian Federation shall guarantee its citizens protection and patronage abroad.”<sup>132</sup>

Rather than a constitution, some states use legislation to ensure consular protection of their nationals under detention abroad.<sup>133</sup> Estonian legislation provides: “If an Estonian national is detained or is serving a sentence in a consular district, the consular officer or honorary consul shall meet him or her upon a reasoned request from the national or his or her authorized representative, family or other persons close to him or her.”<sup>134</sup> A Swiss statute reads:

*Assistance to Swiss Persons Deprived of Liberty.* When the representative offices learn that a Swiss national has been deprived of liberty without their being informed by the authorities of the receiving State, they shall inquire of these authorities concerning the reasons. If it appears appropriate, or if the interested person requests, they shall seek to enter into communication with that person or to visit that person; they shall see that the person’s defense is assured before any authority.<sup>135</sup>

Still other states use administrative regulation to provide for consular protection.<sup>136</sup> A Mexican presidential decree recites:

It is a priority obligation of members of the Foreign Service to protect the interests of Mexican abroad. To this end they shall lend their good offices, provide consular assistance and protection . . . Consular assistance shall be afforded when necessary to tend to Mexicans and to advise them in their relations with foreign authorities. For these purposes members of the foreign service must . . . visit Mexicans who are detained, imprisoned, hospitalized or in any other form of difficulty, in order to ascertain their needs and to take action.<sup>137</sup>

Some states utilize instructions to their consular officers to ensure that these officers provide consular protection.<sup>138</sup> Thus, a U.S. consul is instructed to explain to U.S. nationals arrested abroad that they are “entitled to claim consular protection abroad, regardless of evidence of guilt, the nature of the alleged crime, or the status of the citizen.”<sup>139</sup> Brazil’s

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132. KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 61(2) (Russ.).

133. *See, e.g.*, Estonia Consular Act, §§ 1-68 (2003) (amended 2004).

134. *Id.* § 57(1).

135. RÈGLEMENT: DU SERVICE DIPLOMATIQUE ET CONSULAIRE SUISSE [REGULATION: SWISS DIPLOMATIC AND CONSULAR SERVICE] Nov. 24, 1967, RS 191.1, art. 17 (Switz.).

136. *See, e.g.*, Reglamento de la Ley del Servicio Exterior Mexicano [Regulation of Mexican Foreign Service Act], Diario Oficial de la Federación [DO], 23 de Agosto de 2002, art. 65 (Mex.).

137. *Id.*

138. QUIGLEY ET AL., *supra* note 116, at 97-101.

139. 7 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 423.3 (2011).

compilation of instructions to its consular officers, in enumerating their obligations, provides: “It shall also fall to the consular post, in the exercise of what is provided by Article 36 of the Vienna Convention on Consular relations: (1) to lend assistance to Brazilians who are involved in criminal processes.”<sup>140</sup>

Many states publish advice to their nationals about services to which they are entitled while abroad and include consular protection in the event of arrest.<sup>141</sup> Thus, Norway advises Norwegians, “In the event that a Norwegian national is arrested in a foreign country, a representative of the local Norwegian foreign service mission will normally visit the person in prison in order to safeguard his or her interests.”<sup>142</sup> An Australian brochure of advice to Australians provides: “If you’re an Australian detained overseas and you request consular assistance, an Australian consular officer will visit you as soon as possible after notification of your detention and once permission is received from the local authorities.”<sup>143</sup>

In Canada, advice of this sort has been taken by courts to impose an obligation under domestic administrative law to provide consular protection. A Canadian imprisoned abroad claimed that the government had failed to provide adequate consular protection.<sup>144</sup> He sued in a federal court of Canada.<sup>145</sup> The court cited a governmental publication titled *A Guide for Canadians Imprisoned Abroad* that asserted that the Canadian government will “make every effort to ensure that” a Canadian detained abroad receives “equitable treatment.”<sup>146</sup> The court ruled that this promise to Canadians created a “legitimate expectation” that consular protection would be provided, hence entitling the particular individual to sue the government.<sup>147</sup>

In Britain, officials made public statements that if a British national were treated unfairly abroad in criminal proceedings the officials would make representations to the government of the receiving State.<sup>148</sup> A British

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140. BRAZ. MINISTRY OF FOREIGN RELATIONS, *MANUAL DE SERVIÇO CONSULAR E JURÍDICO* [MANUAL OF THE CONSULAR AND LEGAL SERVICE] § 3.1.23 (2000).

141. *See, e.g.*, Nor. Ministry of Foreign Affairs, *Assistance to Norwegians Traveling Abroad*, REJERINGEN.NO (Jan. 23, 2003), <http://www.regjeringen.no/nb/dep/ud/dok/veiledninger/2003/Assistance-to-Norwegians-travelling-abroad.html?id=419427>.

142. *Id.*

143. Austl. Dep’t of Foreign Affairs and Trade, *Arrested or in Jail: Consular Visits*, SMARTTRAVELLER.GOV.AU, <http://www.smartraveller.gov.au/tips/arrest-jail.html#arrested> (last visited Sept. 12, 2013).

144. *Khadr v. Canada* (Minister of Foreign Affairs) (2004), [2005] 2 F.C.R. D-25 (Can.).

145. *Id.*

146. *Id.*

147. *Id.*

148. *R (on the application of Abassi and another) v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA (Civ) 1598 [87]-[94] (Eng.).

court said that these statements created a “legitimate expectation” that such representations would in fact be made.<sup>149</sup>

## VII. ADHERENCE TO THE VCCR PROTOCOL

There is need for added encouragement to states party to the VCCR to adhere to the Protocol on Compulsory Settlement of Disputes. It is unfortunate that so few VCCR states subscribe to the Protocol. Without the Protocol, third-party dispute resolution is likely to be rare, given the general unavailability of other paths to third-party resolution either in the ICJ or elsewhere. The Protocol is, arguably, the most important aspect of the treaty regime on consular relations. Given that the norms found in the VCCR itself have in the main entered customary law, one might say that the VCCR has done its work. But if states are not accountable in an international judicial forum, implementation of VCCR obligations is weakened. Political strength comes into play, and weaker states may not be able to convince stronger states to comply if an issue arises.

The United States—one of the stronger states—became a party to the Protocol when it was first sent out for ratification, but in 2005 purported to withdraw.<sup>150</sup> No other state had done so; hence, there was no precedent on whether such a step was lawful. The U.S. withdrawal raised the question whether such withdrawal, or denunciation to use the more traditional term, was legally permissible. It has not been definitively determined whether the Protocol is subject to withdrawal. Some treaties are, while others are not. The U.N. General Assembly could ask the ICJ for an advisory opinion on the matter, or a state seeking to take legal action against the United States in the ICJ over a VCCR violation could initiate such action.

It is the practice of the ICJ to decide on its own competence when matters such as treaty withdrawal are at issue.<sup>151</sup> Thus, the ICJ would decide on the validity of the U.S. denunciation of 2005.<sup>152</sup> 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.<sup>153</sup> If they can ratify one day and denounce the next, the obligations assumed may carry little meaning.

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149. *Id.*

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

151. Statute of the International Court of Justice art. 36(6), June 26, 1945, 33 U.N.T.S. 993.

152. 2 SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005*, 812 (2006).

153. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

The validity of a denunciation from a treaty depends on a reading of the particular treaty. Some treaties contain denunciation clauses that allow a state party to denounce, typically by giving advance notice.<sup>154</sup> Many treaties, however, contain no denunciation clause. The Protocol, for example, contains no such clause. In these circumstances, the situation is less clear as to whether denunciation is permitted. Since denunciation clauses are well-known to treaty drafters, the omission of such a clause implies that denunciation is prohibited. 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.<sup>155</sup>

The Vienna Convention on the Law of Treaties (VCLT) provides a denunciation rule. VCLT Article 56 is titled *Denunciation of or Withdrawal From a Treaty Containing No Provision Regarding Termination, Denunciation or Withdrawal* and provides as follows:

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.<sup>156</sup>

As a matter of procedure in denouncing, VCLT Article 56(2) requires a time period before a withdrawal would be valid.<sup>157</sup> The United States, in its communication to the U.N. Secretary-General, gave no time period, but apparently purported to make its denunciation effective immediately.<sup>158</sup>

Information available from the drafting conference does not reveal an intent to admit the possibility of denunciation. The matter was not discussed; thus, there is no suggestion from the drafting conference that

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154. *Id.* art. 56.

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

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

157. *Id.* art. 56(2).

158. *Optional Protocol*, *supra* note 32, at n.1. The communication read as follows: "This letter constitutes notification by the United States of America that it hereby withdraws from the 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." *Id.*

denunciation would be permissible. The only way denunciation could be found to be permissible is on the basis that a right of denunciation is implied by the nature of the treaty.

VCLT Article 56 is read 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."<sup>159</sup>

There is no state practice on the denunciability of the VCCR Protocol, since the United States was the first to purport to denounce and no other instances have since occurred. 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, are 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 politically, drift apart, then either might lawfully denounce.

Another type of treaty in this category may be treaties of friendship, commerce, and navigation, which typically allow nationals of each state to engage in business in the other on a basis of equality with locals.<sup>160</sup> That disposition is similarly premised on good relations between the two states, since the nationals of the other state gain access to markets and trade in the other.<sup>161</sup> A third type of treaty implying a right of denunciation is a treaty establishing an international organization.<sup>162</sup> 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.<sup>163</sup> Even as to these three types of treaties, however, state practice is scant.<sup>164</sup>

While there is no state practice on denunciation of the VCCR Protocol, there is state practice relating to other treaties. In the few instances where a treaty lacking a denunciation clause has been denounced, objections have been recorded. When Senegal purported to withdraw from the 1958 Convention on Territorial Sea and Contiguous Zone, the United Kingdom communicated to the U.N. Secretary-General as depositary of the Convention its view that denunciation of the Convention was

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159. AUST, *supra* note 155, at 290.

160. J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 331 (6th ed. 1963).

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

162. Kelvin Widdows, *The Unilateral Denunciation of Treaties Containing No Denunciation Clause*, 53 BRIT. Y.B. INT'L L. 83, 98 (1982).

163. *Id.* at 99.

164. *Id.* at 96.

impermissible.<sup>165</sup> When North Korea purported to withdraw from the ICCPR, the Secretary-General replied to North Korea as follows:

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.<sup>166</sup>

Similarly, the Human Rights Committee, which oversees implementation of the ICCPR, expressed the view in a formal statement that a human rights treaty creates rights for a population, that the rights of a population may not be revoked, and that, therefore, the ICCPR may not be denounced.<sup>167</sup>

As to dispute settlement treaties, state practice provides little support for the assertion that they are a type of treaty that may be denounced in the absence of a denunciation clause.<sup>168</sup> Nonetheless, one author, Anthony Aust, argues that they are, rationalizing 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.<sup>169</sup>

Aust's reliance on an absence of objection when dispute settlement treaties are denounced is questionable. In theory, other states party to the VCCR Protocol might send a diplomatic protest note to the United States if they view the withdrawal as invalid. As another option, states might communicate their protest to the U.N. Secretary-General as the depositary

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165. *Convention on the Territorial Sea and Contiguous Zone*, UNITED NATIONS TREATY COLLECTION, n.8 (Dec. 9, 2013), [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=XXI-1&chapter=21&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XXI-1&chapter=21&lang=en) [hereinafter *Territorial Sea*].

166. *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, n.8 (Dec. 9, 2013), [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-4&chapter=4&lang=en%23EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-4&chapter=4&lang=en%23EndDec).

167. U.N. Human Rights Comm., 61st Sess., General Comment No. 26: Continuity of Obligations, U.N. Doc. No. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997).

168. Widdows, *supra* note 162, at 96-98.

169. AUST, *supra* note 155, at 291.

agency, as the United Kingdom did in regard to Senegal.<sup>170</sup> However, there is no established procedure for such, as there is with regard to reservations that other states view as inappropriate.<sup>171</sup> Thus, there is little basis for drawing any conclusion from an absence of formal objection. The matter would most likely be raised, as suggested above, if a state party to the VCCR Protocol filed suit against the United States in the ICJ for a VCCR violation.

Aust asserts that denunciation of a dispute settlement treaty is allowed even in the absence of a denunciation clause.<sup>172</sup> The only instance Aust cites, however, is the U.S. denunciation of the VCCR Protocol.<sup>173</sup> A search by the present author in other treaties of this category revealed no other instances of withdrawal.

Aust also mentions the “consensual nature of international jurisdiction” as a reason that denunciation should be freely allowed from dispute settlement treaties.<sup>174</sup> To be sure, submission to international judicial jurisdiction is at the discretion of a state. That fact, however, is irrelevant to the permissibility of denunciation of a treaty obligation, once undertaken, to submit to compulsory dispute resolution. Any obligation a state assumes by treaty on any topic is “consensual.” No state is required to enter into any treaty; hence, Aust’s argument would logically lead to the conclusion that any treaty that lacks a denunciation clause may be denounced, a conclusion clearly at odds with VCLT Article 56.

The U.S. denunciation of the Protocol is difficult to justify on the basis of the law relating to the denunciation of treaties lacking a denunciation clause. A state seeking to challenge the denunciation by instituting legal action against the United States for a VCCR violation might very well be able to secure a ruling from the ICJ that the denunciation is invalid.

The matter of course could be rendered moot by the United States if it decided to revoke its purported denunciation. The 2005 action was prompted by U.S. displeasure over the *LaGrand* and *Avena* judgments and, in particular, the ICJ’s ruling that “review and reconsideration” are required in a judicial forum when a foreign national is convicted without having been informed about consular access upon arrest.<sup>175</sup> State Department spokesperson Darla Jordan explained: “The International Court of Justice has interpreted the Vienna Consular Convention in ways that we had not

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170. See *Territorial Sea*, *supra* note 165.

171. On that procedure, see VCLT, *supra* note 153, arts. 19-21.

172. AUST, *supra* note 155, at 291.

173. *Id.* at 291 n.68.

174. *Id.* at 291.

175. See generally *LaGrand Case* (Ger. v. U.S.), 2001 I.C.J. 466 (June 27); *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).



anticipated that involved state criminal prosecutions and the death penalty, effectively asking the court to supervise our domestic criminal system.”<sup>176</sup>

Jordan said that 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.”<sup>177</sup>

If implementation of the *Avena* ruling can be resolved in the United States, there might be willingness to reconsider the 2005 action.

### VIII. CONCLUSION

The VCCR has brought improvement in the implementation of consular relations, in particular in ensuring the rights of foreign nationals under detention. Implementation of consular access requires that states be held to account for violations, either before their own courts or in international mechanisms. The right of consular access identified in VCCR Article 36 has become so generalized that today it is recognized as a customary right in the law of human rights. In this way, consular access has been transported into an additional realm of law that has its own mechanisms of implementation. Consular access violations can be challenged in the processes available to contest human rights violations. At the same time, state-to-state enforcement via the VCCR Protocol remains a key route to enforcement of consular access obligations. The international community should promote adherence by more states to the VCCR Protocol. Contrary to the position taken in 2005 by the United States, the judgments of the ICJ in consular access cases have not imposed obligations beyond what is provided by the VCCR. To the contrary, the ICJ has been, if anything, too restrained, in particular on the issue of remedies for a consular access violation. Encouragement to states to adhere to the VCCR Protocol should be a priority for the international community.

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176. 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.

177. *Id.*

