Addendum to ASIL Insight, President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights
By Frederic L. Kirgis
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On March 7, 2005, U.S. Secretary of State Condoleezza Rice sent a letter to the United Nations Secretary-General, in which she said:

> This letter constitutes notification by the United States of America that it hereby withdraws from the [Consular Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes]. 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.

The Optional Protocol supplied the basis for the ICJ's jurisdiction in the three proceedings against the United States mentioned in the Insight. If the United States is no longer bound by the Optional Protocol, there would be no basis for compulsory ICJ jurisdiction over the United States in similar proceedings.

The Optional Protocol is silent regarding any right to withdraw from it or any procedure to be followed if a party tries to withdraw. It has the status of a treaty. Consequently, one would look to the Vienna Convention on the Law of Treaties (which is itself a treaty) for the relevant international law rules. The substantive provisions of the Vienna Convention on the Law of Treaties are generally recognized as authoritative codifications of customary international law, even for nation-states (like the United States) that are not parties to that Convention. Article 56 of the Vienna Convention on the Law of Treaties says:

> 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:
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> > (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
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> > (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.
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> 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

The U.S. government presumably would argue that, even if it cannot be shown that the parties intended to admit the possibility of withdrawal from the Optional Protocol to the Consular Convention, the nature of any such optional protocol permits withdrawal under section 1(b) above. If so, there is a question whether the withdrawal can be effective until twelve months from its date, under section 2 above. But since section 2 is a procedural provision establishing a specific time limit, and since rules of customary international law are not specific regarding such things as time periods, the time period in section 2 does not apply literally to a country like the United States that is not a party to the Vienna Convention on the Law of Treaties. Nevertheless, section 2 reflects a customary international law principle of reasonable notice before a party withdraws from a treaty. In the words of the ICJ in a case not involving the Consular Convention, the law of treaties "requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity." **[1]** In that case it was held that the United States could not lawfully withdraw its consent to ICJ "compulsory" jurisdiction on three days' notice. **[2]** How much time is reasonable for withdrawal from the Optional Protocol is debatable, but section 2, above, suggests that it might be somewhere around twelve months.

A separate question may arise under the domestic law of the United States. Since the Consular Convention and its Optional Protocol were entered into with the advice and consent of the U.S. Senate, it

could be argued that the Senate must consent to any withdrawal. The U.S. Supreme Court has never decided whether a President must get the Senate¡s consent before he terminates a treaty. The closest it has come was when President Carter terminated the mutual defense treaty with Taiwan. Several Senators and members of the House of Representatives challenged him in court. The case reached the Supreme Court, but it directed the lower court to dismiss the complaint on procedural grounds only. **[3]** This left President Carter¡s action intact. The controversy over his power to terminate the treaty died away, suggesting that Congress may have ultimately acquiesced in his action. **[4]**

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[1] Case Concerning Military and Paramilitary Activities in and against Nicarague (Nicaragua v. United States), para. 63, 1984 ICJ Rep. 392, 24 International Legal Materials 59 (1985) (Jurisdiction of the Court and Admissibility of the Application).
[2] The Court¡s"compulsory¡ jurisdiction emanates from ICJ Statute article 36(2), which says that states parties to the Statute may at any time declare that they recognize the Court¡s jurisdiction as compulsory in certain types of legal disputes.
[3] The case is Goldwater v. Carter, 444 U.S. 996 (1979). Four Justices regarded the matter as a nonjusticiable political question, and one Justice regarded the case as not yet ripe for judicial review.Justice Brennan, in dissent, would have upheld the President¡s power.
[4] On treaty termination under U.S. law, see Louis Henkin, Foreign Affairs and the United States Constitution 211-214 (2d ed. 1996).
