A TALE OF TWO REALITIES: FOREIGN NATIONALS, CONSULAR ASSISTANCE, AND THE DEATH PENALTY IN THE USA

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Abstract

There are currently 125 foreign nationals from 32 nations on death row across the USA. Many of them were not advised of their right to consular assistance under Article 36(1)(b) Vienna Convention on Consular Relations (1963) (VCCR). Often, this prejudiced their cases and contributed to their death sentences, as the three examples of foreign nationals provided in this article identifies. Based upon previous decisions by the International Court of Justice (ICJ), these foreign nationals are entitled to a review and reconsideration of their cases. However, to avoid this, in 2005 the USA purported to withdraw from the Optional Protocol to the VCCR, which gives jurisdiction to the ICJ to rule upon breaches of the VCCR. This article contends that are two "realities" at play here: the USA's reality, which is that it cannot be held accountable for breaches of a treaty that confers individual human rights, and the international law reality, which is that the USA is still a party to the VCCR and its Optional Protocol. Through an analysis of Article 56 Vienna Convention on the Law of Treaties (VCLT), it is argued that the withdrawal was invalid and the USA remains under the ICJ's jurisdiction regarding alleged breaches of Article 36(1)(b). Should a state wish to withdraw from such an Optional Protocol, it must withdraw from the treaty in its entirety. This article offers a solution to this problem in the form of a test case being brought before the ICJ to rule upon the validity of the withdrawal.

Key Words: death penalty, international law, consular assistance, USA

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I. Introduction

There are countless arguments calling for the abolition of the death penalty in the USA, based upon serious human rights issues within the capital system. These include racial discrimination, cruel and usual prison conditions, ineffective assistance of counsel, and actual innocence claims, to name just a few.[2] There is another key human rights issue that pervades capital punishment in the USA: foreign nationals and their right to access consular assistance when arrested and charged with a crime.

There are currently 125 foreign nationals from 32 nations on death row across the USA.[3] Many of them were not advised of their right to consular assistance under Article 36(1)(b) Vienna Convention on Consular Relations (1963) (VCCR).[4] Often, this prejudiced their cases and contributed to their death sentences. Furthermore, other foreign nationals have been sent to their death despite not being afforded their right to consular assistance. The Article 36(1)(b) right is now considered to be synonymous with the right to a fair trial and is therefore considered to be an individual human right. Action against the USA has been brought before the International Court of Justice (ICJ) three times on this issue of breaching the Article 36(1)(b) right to consular assistance in death penalty cases.[5] The ICJ has ruled against the USA on this, finding that where a death sentence has been handed down in breach of Article 36(1)(b), those cases must be reviewed and reconsidered by a court of law.[6]

Since the decisions handed down by the ICJ, the USA has purported to withdraw from the Optional Protocol to the VCCR, which gives jurisdiction to the ICJ to rule upon breaches of the VCCR. This article argues that, based upon Article 56 Vienna Convention on the Law of Treaties (VCLT), the withdrawal was invalid and the USA remains under the ICJ's jurisdiction to rule upon any alleged breaches of Article

[2] *See, eg,* David C. Baldus et al., *Monitoring and Evaluating Temporary Death Sentencing Systems: Lessons from Georgia*,18 U.C. Davis L. Rev. 1375 (1985); David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J Crim. L. & Criminology 661 (1983); Chapter five in Franklin E Zimring, *The Contradictions of American Capital Punishment* (OUP, 2003); Matthew C. Altman, *Arbitrariness and the California Death Penalty*, 14 Ohio St. J. Crim. L. 217 (2016); Elizabeth Compa, Cecelia Trenticosta Kappel & Mercedes Montagnes, *Litigating Civil Rights on Death Row: A Louisiana Perspective*, 15 Loy. J. Pub. Int. L. 293 (2014); Stephen B Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crimes but for the Worst Lawyer*, 103 Yale L.J. 1835 (1994); Sarah Lucy Cooper & Daniel Gough, *The Controversy of Clemency and Innocence in America*, 51 Cal. W. L. Rev. 55 (2014).

[3] Correct as at May 15, 2020. Mark Warren, *Foreign Nationals Under Sentence of Death in the U.S.* (Web Page) <https://deathpenaltyinfo.org/death-row/foreign-nationals/foreign-nationals-under-sentence-of-death-in-the-u-s>.

[4] Vienna Convention on Consular Relations ("VCCR"), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[5] Case Concerning Convention on Consular Relations *(Paraguay v US)* 1998 ICJ 248 (Interim Protection Order of 9 April 1998); *LaGrand Case (FRG v US)* 2001 ICJ ¶ 1 ¶ 13 (27 June 2001); Case Concerning Avena and Other Mexican Nationals *(Mexico v US)* Judgment of 31 March 2004.

[6] *LaGrand*, *supra* note 5, at para. 128(7); *Avena*, *supra* note 5, at para. 153(3).

36(1)(b). Furthermore, it is illogical for a state to be a party to a multilateral international agreement that confers individual rights, but to not have a remedy for alleged or actual breaches. In such a case, it is argued that the state must withdraw from the treaty in its entirety, rather than just the relevant Optional Protocol providing judicial oversight.

There are two conflicting "realities" at play here with regards to the VCCR. First, the USA's reality, which is that it cannot be held accountable for breaches of a treaty that confers individual human rights. Second, the international law reality, which is that the USA is still very much a party to the VCCR and its Optional Protocol. In order to suggest a solution to this tale of two realities, this article begins with an overview of the existing litigation surrounding the USA and the VCCR in death penalty cases in Part Two. Part Three then provides examples of three foreign nationals on death row and how the lack of consular assistance affected their capital cases: (1) Siaosi Vanisi, a national of Tonga, (2) Sonny Enraca, a national of the Philippines, and (3) Linda Carty, a national of the United Kingdom of Great Britain and Northern Ireland (UK) and St. Kitts. Part Four outlines the USA's purported withdrawal from the VCCR's Optional Protocol and Part Five argues that this withdrawal was invalid. Part Six finishes by offering a solution offered to this problem in the form of a test case being brought before the ICJ to rule upon the validity of the withdrawal.

II. Article 36(1)(b) VCCR and the United States of America

The VCCR is a multilateral treaty, codifying the practices of consular relations between states.[7] Particularly important, and contentious, is the right to consular assistance under Article 36. Article 36(1)(b) states that:

> [I]f 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.[8]

[7] VCCR, *supra* note 3. Often, states will also have bilateral consular notification treaties in place between them too, although this is outside of the scope of this article.
[8] *Id.* at Article 36(1)(b).

Although the USA is a party to the VCCR, a study carried out by the charity Reprieve between 2009 and 2012 found that 95.1% of foreign nationals on death row in the USA had not been afforded their Article 36 rights.[9] This is particularly concerning given that 'effective consular assistance at an early stage' can prevent a death sentence being imposed in the first instance, avoiding the lengthy and mandatory appeals process in the USA.[10] The issue of the USA being in breach of the VCCR has been such a concern in death penalty cases that three countries have initiated litigation in the ICJ against the USA, namely, Paraguay, Germany, and Mexico.

A. *Breard Case (*Paraguay v. United States*)*

The Breard case involved Angel Francisco Breard, a Paraguayan national,[11] who was convicted in the Commonwealth of Virginia of attempted rape and capital murder in 1993 and was sentenced to death without being afforded his Article 36 rights.[12] Mallory has argued that 'acute damage' was caused by the lack of consular assistance in Breard's case, as he refused to take a pre-trial plea bargain to spare his life and spend his life in prison without the possibility of parole.[13]

When Breard became aware of his Article 36 rights in 1996, he filed for habeas relief in the federal courts citing, for the first time, that his rights under Article 36 VCCR had been breached.[14] However, the federal courts denied his claim on the grounds it was procedurally barred.[15] The rule of procedural default has caused insurmountable problems for foreign nationals on death row in the USA attempting to appeal on the grounds of a breach of Article 36. It is defined as 'a federal rule that, before a state criminal defendant can obtain relief in federal court, the claim must be presented to a state court.'[16] However, this relies upon the trial lawyer's representation being

[9] Reprieve, 'Honored in the Breach: The United States' Failure to Observe its Legal Obligations under the Vienna Convention on Consular Relations (VCCR) in Capital Cases' (November 2012) 4 <www.reprieve.org.uk/wp-content/uploads/2015/01/2013_02_26_PUB-VCCR-Report-WEB-VERSION-KEY-DOC.pdf> accessed 16 September 2020. This data was taken from the 102 foreign nationals on US death row where there was undisputed data.
[10] Conall Mallory, *Abolitionists at Home and Abroad: A Right to Consular Assistance and the Death Penalty*, 17 Melb. J. Intl. L. 51, 59 (2016).
[11] *Paraguay v. US*, *supra* note 5.
[12] *Breard v Greene,* 523 U.S. 371, 372-3 (1998).
[13] Mallory, 'Abolitionists at Home and Abroad', *supra* note 10.
[14] *Breard*, *supra* note 12, at 373.
[15] I*d.* at 372-3.
[16] *LaGrand, supra* note 5, at para. 23, '[i]f a state defendant attempts to raise a new issue in a federal habeas corpus proceeding, the defendant can only do so by showing cause and prejudice. Cause is an external impediment that prevents a defendant from raising a claim and prejudice must be obvious on its face. One important purpose of this rule is to ensure that the state courts have an opportunity to address issues going to the validity of state convictions before the federal courts intervene.'

effective, namely that the lawyer is aware of the foreign national's VCCR rights, which is often not the case.

Paraguay also filed suit in the domestic courts, but the case was struck out.[17] Paraguay then issued proceedings against the USA in the ICJ on 3 April 1998.[18] From the alleged breaches of the VCCR, Paraguay argued that it was entitled to *restitutio in integrum* insofar as any criminal liability against Breard be voided and a new trial granted, with Breard now being aware of his Article 36 rights.[19] Due to Breard's execution date being imminent, on 9 April 1998 the ICJ ordered provisional measures, in line with Article 41 Statute of the International Court of Justice, that the USA should ensure it does not execute Breard pending the outcome of the proceedings before the ICJ.[20]

Subsequently, both Breard and Paraguay brought a case before the Supreme Court of the United States (SCOTUS). On the day of Breard's execution, SCOTUS declined to hear the case and held, *per curiam*, that '[i]t is clear that Breard procedurally defaulted his claim, if any, under the Vienna Convention by failing to raise that claim in the state court.'[21] Both Breard and Paraguay had argued that procedural default did not apply in this case, given that the VCCR was the 'supreme law of the land' according to the Supremacy Clause of the US Constitution.[22] However, the *per curiam* opinion held that was 'plainly incorrect' because, firstly, 'the procedural rules of the forum [s]tate govern the implementation of the treaty in that [s]tate' and, secondly, that whilst treaties may be the supreme law of the land, they must be consistent with the Constitution, which is where the procedural default rule originates.[23] Further, SCOTUS held that even if the claim was not procedurally defaulted, 'it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial.'[24] Harold Hongju Koh, former Assistant Secretary of Democracy Human Rights and Labor, stated that 'it seems

[17] *Republic of Paraguay v Allen,* 134 F. 3d 622 (4th Cir. 1998).
[18] Application of the Republic of Paraguay *(Paraguay v US)* (3 April 1998).
[19] *Id.* at para 25.
[20] *Paraguay v US, supra* note 5, at para. 41.
[21] *Breard*, *supra* note 12, at 375. Justices Stevens, Breyer, and Ginsburg dissented.
[22] *Id.* The United States Constitution, Article VI, Clause 2.
[23] Id. 375-77.
[24] Id. 377.

incredible that the Court did not delay the execution, grant certiorari, and hear plenary briefing and argument, if only out of simple comity to the ICJ.'[25]

Following this decision, then-Secretary of State, Madeleine Albright, sent a letter to the Governor of Virginia requesting a stay of execution for Breard.[26] However, the Governor denied this request and Angel Breard was executed on 14 April 1998.[27] Thereafter, Paraguay filed a notice of discontinuance with the ICJ,[28] and so it did not rule upon whether the USA had breached international law by executing Breard.

B. *LaGrand Case (*Germany v. United States*)*

The second case to come before the ICJ on this issue involved two brothers of German nationality – Karl and Walter LaGrand – who were on Arizona's death row and had not been advised of their Article 36 rights.[29] When Germany became aware that two of its nationals had been sentenced to death abroad, and following failed diplomatic attempts to stay the executions,[30] it took the case to the ICJ to rule upon, arguing that the USA was in breach of international law. By the time Germany issued proceedings, Karl had already been executed and Walter's execution date was set for 3 March 1999, one day after Germany filed its application with the ICJ.[31]

The ICJ, again, ordered provisional measures that the execution of Walter should be stayed.[32] Thereafter, Germany filed a motion with SCOTUS 'or leave to file a bill of complaint…[and] for preliminary injunction' against the USA and the Governor of

[25] Harold Hongju Koh, *Paying "Decent Respect" to the World Opinion on the Death Penalty*, 35 U.C. Davis L. Rev. 1085, 1113 (2002).
[26] *Id.*
[27] Valerie Epps, *Violations of the Vienna Convention on Consular Relations: Time for Remedies*, 11 Willamette J. Intl. L. & Disp. Resol. 1, 4 (2004).
[28] Case Concerning the Vienna Convention on Consular Relations (*Paraguay v. US)* Order of 10 November 1998.
[29] *LaGrand, supra* note 5, at para. 14-15.
[30] *Id.* at para. 26.
[31] *Id.* at para. 29-30.
[32] *LaGrand (FRG v US)* Request for the Indication of Provisional Measures (3 March 1999) para. 29. President Schwebel issued a separate opinion as he was troubled mostly with the fact the Order was granted ex parte and, whilst not opposing the substance of the order, he stated he had 'profound reservations about the procedures followed both by the Applicant and the Court' and noted that 'Germany could have brought its Application years ago, months ago, weeks ago, or days ago'. After Germany was made aware of the execution dates, a number of letters were sent from Germany to the US including from the President of the Federation of Germany to the President of the United States. However, '[t]hese letters referred to German opposition to capital punishment generally, but did not raise the issue of the absence of consular notification in the case of the LaGrands'. Whilst the specific issue of the LaGrand's case was later approached in a further letter just 'two days before the scheduled date of execution of Karl LaGrand it would have made much more diplomatic sense to approach this issue immediately. It would have given the US more time to consider the issue of the LaGrand's impending executions, and the denial of the right to consular assistance, and could have potentially avoided the case before the ICJ. This action – or inaction – by Germany legitimises the admonishment from President Schwebel.

Arizona, due to Walter's execution being scheduled for that evening.[33] SCOTUS denied the motion through a *per curiam* opinion, citing the decision in *Breard*.[34] The Court also criticised Germany for filing the action 'within only two hours of a scheduled execution that was ordered on January 15, 1999, based upon a sentence imposed by Arizona in 1984, about which the Federal Republic of Germany learned in 1992.'[35] However, in his dissenting opinion, Justice Breyer stated he would have granted a stay of execution to give the Court 'time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved.'[36]

Following the denial of Germany's motion, and the Governor of Arizona's refusal to grant clemency, Walter LaGrand was executed on 3 March 1999.[37] However, Germany did not withdraw its application before the ICJ, and public hearings took place between 13-17 November 2000, with judgment being handed down in 2001.[38] The ICJ held that the USA had breached international law and a binding provisional measures order;[39] that the VCCR gives rise to an individual right to consular assistance;[40] and, that similar cases in future should be reviewed and reconsidered by a domestic court.[41]

Furthermore, the ICJ also ruled on the application of the USA's rule of procedural default. Germany contended in its application to the ICJ that the doctrine of procedural default prejudiced the LaGrand brothers in their applications for federal habeas relief.[42] The LaGrand brothers had previously petitioned the District Court of Arizona for habeas relief based in part on the breach of their rights under the VCCR, but, as in Breard's federal appeals, this was denied on the grounds of procedural default, and the Ninth Circuit Court of Appeals upheld this decision.[43] The ICJ adjudicated on this

[33] *The Federal Republic of Germany et al v United States,* 526 U.S. 111, 111 (1999).
[34] *Id.*
[35] *Id.*
[36] *Id.* at 1018.
[37] Epps, *Violations of the Vienna Convention on Consular Relations*, supra note 27, at 4.
[38] *LaGrand*, *supra* note 5.
[39] In *LaGrand,* the ICJ held for the first time that a Provisional Measures Order is binding, *id.* at para. 102. The Restatement provides that '[u]nder international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury', but this would be of little comfort to Walter LaGrand who had been executed two years previously. American Law Institute, *Restatement of the Law (Third) Foreign Relations Law of the United States* (American Law Institute Publishers 1987) §901.
[40] *LaGrand*, *supra* note 5, at para. 77.
[41] *Id.* at para. 128(7).
[42] *Id.* at para. 71.
[43] *LaGrand v Stewart,* 133 F. 3d 1253 (9th Cir., 1998).

point, agreeing with Germany that the application of the procedural default rule in this case prevented the LaGrand brothers from exercising their Article 36 rights and, as such, this was a breach of the USA's obligation to Germany under Article 36(2) VCCR.[44] This decision was in direct conflict with SCOTUS' denial of certiorari in *Breard v. Greene,* wherein it was found that procedural default does still apply in these circumstances.[45] Instead, the ICJ found that, in effect, this meant the LaGrands were never able to benefit from their right to consular assistance.[46]

C. *Avena Case (*Mexico v. United States*)*

Despite assurances from the US government that it was doing all it could to ensure foreign nationals were being advised of their right to consular assistance, two years after the *LaGrand* judgment, Mexico initiated the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)* ('*Avena*') in the ICJ.[47] This case involved fifty-two Mexican nationals on death row across the USA whom Mexico claimed had not been afforded their Article 36 rights and, as such, argued that the principle of *restitutio in integrum* should be applied.[48]

In its judgment handed down on 31 March 2004, the ICJ denied Mexico's appeal for *restitutio in integrum*, but ordered that the USA should review and reconsider the convictions and sentences of fifty-one of the Mexican nationals named in the application.[49] The ICJ ruled that the review of these cases 'should occur within the overall judicial proceedings relating to the individual defendant concerned'[50] and that the procedural default rule should not be used to prevent the individuals relying on their Article 36 right.[51] Furthermore, the ICJ held that, on its own, 'the clemency process, as currently practised within the [USA's] criminal justice system, does not appear to meet the requirements' to satisfy the ICJ judgment.[52]

[44] *LaGrand*, *supra* note 5, at para. 91.
[45] *Breard*, *supra* note 12, at 375-7.
[46] *LaGrand*, *supra* note 5, at para. 91.
[47] *Avena*, *supra* note 5.
[48] *Id.* at paras. 12, 16.
[49] *Id.* at para. 153(3). In the case of Mr Salcido, the US proved to the ICJ's satisfaction 'that he told the arresting officers he was a US citizen and there was no clear evidence that he was also of Mexican nationality'. Therefore, the ICJ found that the US had not breached its duty under Article 36 with regards to Mr Salcido.
[50] *Avena, supra* note 5, at paras. 140-41.
[51] *Id.* at paras. 111-13.
[52] *Id.* at para. 143.

The State of Texas was less than accepting of the *Avena* judgment. The Texas Attorney-General, Greg Abbott 'indicated that, absent recommendations from the federal government, his office had no plans to ask for new trials, new sentencing, or stays of execution.'[53] The federal government did that through President Bush's Memorandum sent to the USA Attorney-General ordering that the state courts must comply with the *Avena* judgment.[54] However, this did little to move the Texan Attorney-General's stance and Abbott's office stated that '[w]e respectfully believe the executive determination exceeds the constitutional bounds for federal authority.'[55] This response shows 'a very "American" suspicion of outside involvement in national sovereign functions,' says Valencia et al.[56] It highlights both the American exceptionalist approach to the influence of international law on the capital system in the USA, and also a more specific 'Texas exceptionalism' towards international law.[57]

D. Medellin v. Texas*: The US Supreme Court's View on Avena*

It was not until 2008 that SCOTUS heard a case concerning a foreign national named in the ICJ's decision in *Avena.* This was the case of *Medellín v. Texas,* involving José Ernesto Medellín (Medellín), a death row inmate in Texas who was not afforded his Article 36 rights.[58]

Based upon the decision of the ICJ in *Avena*, Medellín was working his way through the federal appeals process[59] when President Bush sent the Memorandum to the USA Attorney-General on 28 February 2005, advising that state courts should enforce the *Avena* decision.[60] Medellín then, adhering to the procedural rules of appeal in the USA, petitioned the Texas Court of Criminal Appeals relying upon the President's Memorandum.[61] However, the Texas Court was unmoved by the President's Memorandum and the ICJ's judgment in *Avena* regarding procedural default, and

[53] Reynaldo Anaya Valencia, Craig L. Jackson, Leticia Van de Putte & Rodney Ellis, *Avena and the World Court's Death Penalty Jurisdiction: Addressing the Odd Notions of Texas's Independence from the World*, 23 Yale L. & Pol'y Rev. 455, 456 (2015).
[54] Memorandum for the Attorney General (28 February 2005), App to Pet for Cert 187a [hereinafter referred to as 'President's Memorandum']; Adam Liptak, *Texas Court Ruling Rebuffs Bush and World Court,* New York Times (16 November 2006) <www.nytimes.com/2006/11/16/washington/16death.html?_r=1&oref=slogin>.
[55] Adam Liptak, *U.S. Say It Has Withdrawn from World Judicial Body,* New York Times (10 March 2005) <www.nytimes.com/2005/03/10/politics/us-says-it-has-withdrawn-from-world-judicial-body.html>.
[56] Valencia et. al., *supra* note 54, at 465.
[57] *Glossip v Gross* 135 S. Ct. 2726, 2760-62 (2015) (Breyer J, dissenting). Carol S Steiker, 'Capital Punishment and American Exceptionalism' in Michael Igantieff (ed), *American Exceptionalism and Human Rights* (PUP, 2005) 85-86.
[58] *Medellin v Texas,* 552 U.S. 491, 498 (2008).
[59] The Fifth Circuit had denied his initial appeal and SCOTUS had just granted certiorari, *Medellín v Dretke,* 544 U.S. 660 (2005).
[60] President's Memorandum, *supra* note 54.
[61] *Ex parte Medellín,* 223 S. W. 3d 315 (Tex, 2006).

rejected his appeal.[62] Accordingly, Medellín petitioned SCOTUS for a further writ of certiorari, which was granted.

Chief Justice Roberts delivered the opinion of the Court and noted that '[a]s a signatory to the Optional Protocol, the [USA] agreed to submit disputes arising out of the [VCCR] to the ICJ.'[63] However, the Chief Justice went on to state that Article 94 of the UN Charter provides that States will '*undertake*' to comply with ICJ judgments and, as such, Article 94 'is not a directive to domestic courts' as it 'does not provide that the [USA] "shall" or "must" comply with an ICJ decision.'[64] Through this ruling on the technical wording of the Charter, SCOTUS 'has made compliance [with ICJ decisions on the VCCR] not mandatory but optional.'[65] It has also arguably made compliance with the VCCR in general optional; if the remedy for a breach is not binding, there is nothing to prevent further noncompliance with the VCCR. Regarding the issue of the application of the procedural default rule, SCOTUS referenced its judgment in *Sanchez-Llamas v. Oregon*.[66] Handed down after the *Avena* judgment, but not involving a Mexican national named in the *Avena* case, SCOTUS held in *Sanchez-Llamas* that 'contrary to the ICJ's determination, the [VCCR] did not preclude the application of state default rules.'[67] The reliance on its judgment in *Sanchez-Llamas* reinforced SCOTUS' finding that judicial review was not necessary and that the procedural default rule should still apply.

E. Torres v. Oklahoma *and* Gutierrez v. Nevada: *The US State Court View on* Avena

Notwithstanding the SCOTUS decision in *Medellín,* some state courts in the USA have adhered to the ICJ's judgment in *Avena* and considered it to be binding. The first case to come before a domestic court involving a Mexican national from the *Avena* case was that of Osbaldo Torres Aguilera (Torres), who was due to be executed six weeks after the *Avena* judgment was handed down.[68] In April 2004, one month after the ICJ's

[62] *Id.*
[63] *Medellín*, *supra* note 58, at 507.
[64] *Id.* 508. Emphasis added.
[65] David S. Corbett, *From Breard to Medellin II: The Vienna Convention on Consular Relations in Perspective*, 5 U. St. Thomas L. J. 808, 822 (2008).
[66] *Sanchez-Llamas v Oregon,* 548 U.S. 331 (2006).
[67] *Medellín*, *supra* note 58, at 498.
[68] John Quigley, *Avena and Other Mexican Nationals (Mexico v United States of America): Must Courts Block Executions Because of a Treaty?,* 5 Melb. J. Int'l L. 450, 460 (2004).

decision in *Avena,* Torres issued a second application for post-conviction relief with the Oklahoma Court of Criminal Appeals and appealed for clemency to the Governor of Oklahoma, Brad Henry.[69] The Governor and the Parole Board received letters from the European Union and the Legal Advisor to the State Department, William Taft.[70] The European Union referred to the *Avena* decision as being binding[71] and, while Taft was not as explicit, his letter strongly suggested that the decision should be followed.[72] Thereafter, Governor Henry commuted Torres' death sentence to life without the possibility of parole.[73]

On the same day as the commutation of sentence, the Oklahoma Court of Criminal Appeals stayed Torres' execution and remanded the case for an evidentiary hearing.[74] In a special unpublished concurrence, Judge Chapel held that '[t]here is no question that this [c]ourt is bound by the [VCCR] and Optional Protocol' and '[a]s this [c]ourt is bound by the treaty itself, we are bound to give full faith and credit to the *Avena* decision.'[75] Furthermore, Judge Chapel found that '[t]he [USA] voluntarily and legally entered into a treaty, a contract with over 100 other countries. The [USA] is bound by the terms of the treaty and the State of Oklahoma is obligated by virtue of the Supremacy Clause to give effect to the treaty.'[76] This was a particularly nuanced approach to international law from a state court.[77]

Another key state court decision came through the 2012 case of *Gutierrez v. Nevada,*[78] which involved another Mexican national named in *Avena*. The Supreme Court of Nevada remanded the case for an evidentiary hearing on the grounds of a breach of Gutierrez's Article 36 rights and to allow him the opportunity to show he had been actually prejudiced by not being afforded consular assistance.[79] By way of avoiding

[69] *Torres v State,* 120 P. 3d 1184, 1186 (Okla, 2005). Torres' initial appeal for habeas review on the grounds of a breach of his Article 36 rights had failed. *See,* Heather L. Finstuen, *From the World Court to Oklahoma Court: The Significance of Torres v. State for International Court of Justice Authority, Individual Rights, and the Availability of Remedy in Vienna Convention Disputes*, 58 Okla. L. Rev. 255, 269-70 (2005), citing *Torres v Mullin,* 540 U.S. 1035, 1038 (2003) (Breyer, J, dissenting) (referring to *Torres v Gibson,* No CIV-99-155-R, 73 (W D Oklahoma 23 Aug 2000) (Unpublished Mem Op and Order)).
[70] Valencia et. al., *supra* note 54, at 491.
[71] Quigley, *Avena and Other Mexican Nationals (Mexico v United States of America), supra* note 68, at 460.
[72] Valencia et. al., *supra* note 54, at 491.
[73] *Torres v State*, *supra* note 69, at 1186.
[74] *Torres v State* No PCD-04-442, 2004 WL 3711623 (Okla. Crim. App., 13 May 2004).
[75] *Id.* at 2-3.
[76] *Id.* at 2.
[77] Prior to the *Avena* decision, the Oklahoma Court of Criminal Appeals had denied a claim from a capital Mexican Petitioner on the grounds of a violation of his Article 36 rights on the grounds it was procedurally defaulted, *see Valdez v Oklahoma,* 46 P. 3d 703 (Okla. Crim. App., 2002).
[78] *Gutierrez v Nevada,* No 53506 2012 WL 4355518.
[79] *Id.* at 1.

the SCOTUS precedent, the court in *Gutierrez* distinguished the facts in that case from those in *Medellín v. Texas* and likened them to *Torres v. Oklahoma*, by holding that '[u]nlike *Medellín*…but like *Torres*, Gutierrez arguably suffered actual prejudice due to the lack of consular assistance.'[80] This indicates that the court considered there to be two categories of Article 36 appeal cases: cases where the lack of consular assistance prejudiced the Petitioner, and cases where it did not. However, the *Gutierrez* court also held that 'without an evidentiary hearing, it is not possible to say what assistance the consulate might have provided.'[81] Arguably this would have been the same in the *Medellín* case. Although the facts of the case were different, there would be no way of knowing what assistance would have been provided to Medellín had he been afforded his Article 36 rights, and whether he was therefore prejudiced, thus warranting an evidentiary hearing. Moreover, scholars have taken issue with the requirement for 'prejudice' to be shown before the courts will judicially review and reconsider a case. Shank & Quigley have argued that the requirement of prejudice is 'too strict to comply with Article 36' as the right to consular access is 'an absolute right.'[82] It is clear from the decision in *Avena* that this is not what the ICJ ordered, as the requirement for prejudice also forms part of the 'procedural default' rules, which the ICJ held should not be used to prevent the review and reconsideration of each case.[83] This continues to be an issue for foreign nationals across the USA.

III. Examples of Foreign Nationals on Death Row in the USA

This issue now spans three Administrations, both Republican and Democrat, indicating that this is not an inherently political issue but more broadly a demonstration of American exceptionalism. Part III identifies three examples of foreign nationals currently on death row in the USA and how the lack of consular assistance has affected their case and death sentence: (1) Siaosi Vanisi, a national of Tonga, (2) Sonny Enraca, a national of the Philippines, and (3) Linda Carty, a national of the United Kingdom of Great Britain and Northern Ireland (UK) and St. Kitts.

[80] *Id.* at 2. Emphasis added.
[81] *Id.* at 3.
[82] S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 St Mary's L. J. 719, 751 (1995), citing VCCR, *supra* note Article 36.
[83] *Avena*, *supra* note 5, at para. 134.

A. Siaosi Vanisi (National of Tonga)

Siaosi Vanisi was convicted of the 1998 murder of a police officer in Reno, Nevada, and has been on death row since 1999.[84] He is a Tongan national and was denied his Article 36(1)(b) right to consular assistance. Vanisi attempted to raise this on appeal to the Nevada Supreme Court in 2010, but, as other cases already discussed, his claim was held to be procedurally barred by the court, as he did not raise this on direct appeal.[85] This is in spite of the ICJ specifically ruling upon this issue in both *LaGrand* and *Avena*, holding that the US cannot use the rule of procedural default to prevent its citizens being afforded their rights under the VCCR.[86] Regardless of the procedural bar, the court found that 'the claim is without merit because the evidence presented shows that the Tongan consulate was contacted and refused to provide Vanisi with assistance.'[87] However, there is no clear evidence to corroborate this assertion. Instead, Vanisi claimed that when his trial counsel did eventually contact the consulate, they did not contact the Tongan consulate.[88] Tonga is an abolitionist in practice country, suggesting that it would not approve of one of its nationals being on death row. As Vanisi noted in his brief, 'the Tongan consulate would have helped trial and initial post-conviction counsel conduct an adequate investigation.'[89]

In its brief, the State argued 'that there is no evidence that Vanisi requested authorities to contact the Tongan government.'[90] There are two key issues with this approach. Firstly, the VCCR does not require the person who is charged with an offence to request consular access – that responsibility is firmly upon the state government. Secondly, this appears to directly conflict with the suggestion made by the court that the Tongan consulate was accessed but took no action. There is a very confusing narrative surrounding this that needs to be explored further, potentially by the ICJ.

[84] *Vanisi v State,* 367 P. 3d 830 (Nev, 2010). He also has a severe mental illness - Prior to trial, his lawyer raised concerns about Vanisi's mental health, advising the court that that the prosecution and defense had "received various reports regarding some bizarre behavior" by Vanisi, "[f]rom talking gibberish to washing himself in his own urine to dancing naked." The American Bar Association filed an Amicus Brief in 2019, asking the court not to execute Vanisi, or indeed anyone else with a severe mental illness. *ABA Urges Nevada Supreme Court to Bar Death Penalty for People with Severe Mental Illnesses* Death Penalty Information Center (Oct 17, 2019) <https://deathpenaltyinfo.org/news/aba-urges-nevada-supreme-court-to-bar-death-penalty-for-people-with-severe-mental-illness>.
[85] *Vanisi*, *supra* note 84, at 3.
[86] *See, LaGrand* and *Avena*, *supra* note 5.
[87] I*d.* at 23. Citing *Osagiede v US,* 543 F. 3d 399, 413 (7th Cir., 2008) (holding that in order to succeed on a claim of ineffective assistance of counsel based on an Article 36 violation, a petitioner must demonstrate that the consulate *could have* assisted the petitioner with his case and that the consulate *would have* done so).
[88] *Id.* at 25.
[89] *Vanisi v Baker*, 405 P. 3d 97 (Nev., 2017) Petitioner's Brief 2016 WL 937751, 62 (2016).
[90] I*d.* at 63.

The state also spoke of a 'chain of causation', noting that appointed counsel would have known to contact the authorities, so '[i]f there had been a violation of the Vienna convention, the involvement of lawyers with unlimited access to telephones would represent a break in causal chain.'[91] Again, this is a misapplication of Article 36(1)(b) and suggests that further training is urgently needed across the USA on key international rights.

Furthermore, in 2017, the Nevada Supreme Court again dismissed the claim of a breach of the VCCR, stating that 'Vanisi failed to demonstrate that had trial counsel been successful in contacting the Tongan consular authorities, counsel would have been able to introduce evidence that would have altered the outcome of the trial.'[92] However, this appears to be an inconsistent approach by the Supreme Court of Nevada. As already discussed above, in 2012 in the *Gutierrez* case, the court held that 'without an evidentiary hearing, it is not possible to say what assistance the consulate might have provided.'[93] The same would apply to Vanisi here, so it is puzzling as to why an evidentiary hearing was not granted. The court also made reference to Vanisi's serious mental health issues, stating that '[a]lthough born in Tonga, Vanisi travelled to the United States when he was six years old…Therefore, evidence about attitudes concerning mental health in Tongan culture are of little relevance and have little resonance relative to the information developed from sources in the United States about Vanisi's mental health.'[94] Yet again, this is an incorrect interpretation and application of the VCCR. The amount of time spent in a country is irrelevant, the VCCR protections are in place for all foreign nationals of signatory states to the VCCR.

B. Sonny Enraca (National of the Philippines)

Sonny Enraca has been on death row in California since 1999 when he was convicted of first-degree murder.[95] Enraca is a national of the Philippines and it is uncontested

[91] *Id.* at 23-4.
[92] *Vanisi v Baker*, 405 P. 3d 97 (Nev., 2017).
[93] *Id.* at 3.
[94] *Vanisi v Baker*, *supra* note 92.
[95] *People v Enraca,* 269 P.3d 543, 549 (Cal., 2012).

that he was not afforded his right to consular assistance under Article 36(1)(b).[96] In fact, prior to the consulate of the Philippines being advised of Enraca's capital charge, Enraca had confessed to the murder. It was argued that this confession should be suppressed, as assistance by the Filipino consulate may have given different advice and Enraca may not have confessed. In fact, in an Amicus brief, the Philippines argued that '[c]onsular advice would…have remedied any impression left by the interrogating detectives that it was in Mr. Enraca's best interests to give a statement to the authorities without the presence or guidance of counsel.'[97] However, relying upon the SCOTUS' decision in *Sanchez Llamas*, the California Supreme Court found that 'a consular violation does not, in itself, render a confession inadmissible.'[98] It held that because Enraca 'made his confession while he was being booked, within a few hours of his arrest and several weeks after the murders' that there was no evidence that consular assistance would have prevented the confession.[99] However, this does not seem to portray the full version of events. In fact, Enraca was '[d]enied any contact with a supportive professional (appointed counsel or consular official), [and] pressured by the false choice of needing to talk in the next 48 hours without counsel present or risk losing his "only chance in life."'[100]

As Enraca had appeared to waive his right to counsel during the interrogation, the state argued that '[t]here was simply no demonstrated connection between the violation [of the VCCR] and Enraca's knowing and voluntary waiver of his rights' and also that 'Enraca was 22 years old and, although a Philippine national, he had been in the United States for eight or nine years.'[101] Again, an in Vanisi's case, this is a misinterpretation of the VCCR as the protections are in place for all foreign nationals of signatory states, regardless of the amount of time spent in either country.

The Filipino consulate makes it clear that it takes this very seriously and would have had a keen interest, noting that '[c]onsular officers were mandated to provide immediate assistance to Mr. Enraca at the time of his detention, but were prevented from doing so by the failure of the arresting authorities to comply with their binding

[96] *Id.* at 554.
[97] *Id.* at 22.
[98] *Id.* at 757.
[99] Id.
[100] *People v Enraca,* 269 P.3d 543 (Cal, 2012) Appellant's Supplemental Reply Brief, 9 (2010).
[101] *Id.* at 5.

consular treaty obligations.'[102] Although there is a smaller chance of Enraca being executed, as there is currently a gubernational moratorium in place in the state of California, the government of the Philippines has stated that '[u]nder these circumstances, basic principles of both international and domestic law require the imposition of a remedy that will undo all of the prejudicial consequences of the consular treaty violations.'[103]

C. Linda Carty (National of the United Kingdom and St. Kitts)

Linda Carty has been on death row in Texas since 2002, when she was sentenced to death for the murder and kidnapping of her neighbour, Joanna Rodriguez. Carty is also a British citizen. She was not advised of her right to consular assistance and, ultimately, this prejudiced her case and was a major factor in her death sentence. Carty has now exhausted her appeals and an execution date is expected to be announced at any time.

Once the British government became aware of Carty's death sentence, it hired Baker Botts to represent her pro-bono from April 2004.[104] However, any claims of a breach of her VCCR rights have been denied in both state and federal courts.[105] In the federal district court, Judge Gilmore indicated that because Carty's claims were not raised effectively in the state courts, this put a procedural bar on her fully raising the claims of a breach of her VCCR rights in the federal courts.[106] She also held that the VCCR does not confer individually enforceable rights and concluded that Carty had not 'shown that the Vienna Convention creates a right that can form the basis for habeas relief.'[107] However, it is widely considered that the VCCR does infer individual rights, for example, in *LaGrand* and *Avena*, the ICJ held that the VCCR gives rise to an individual right to consular assistance,[108] as did SCOTUS in *Breard v. Greene*.[109]

[102] *People v Enraca,* 269 P.3d 543 (Cal, 2012) Amicus Curiae Brief the Republic of the Philippines 2010 WL 519370, 3 (2010).
[103] *Id.*
[104] *Id.* at 48. *Carty v Quarterman* No. 06-614, 2008 WL 8104283 at *46 (SD Tex Sept 30 2008).
[105] *Ex Parte Carty* No 877592-A, order (Tex Dist Ct Dec 2 2004); *Ex Parte Carty* No WR-61, 055-01, slip op (Tex Crim App Mar 2 2005); *Carty v Quarterman* No. 06-614, 2008 WL 8104283 (SD Tex Sept 30 2008).
[106] *Carty v Quarterman*, *supra* note 104, at 73.
[107] *Id.* at 74.
[108] *LaGrand*, *supra* note 5, at para. 77; *Avena*, *supra* note 5, at para. 40.
[109] *Breard v Greene*, *supra* note 12, at 376.

Furthermore, the right to consular assistance is now considered to be synonymous with the right to a fair trial,[110] a right that Carty was not afforded.

Judge Gilmore also considered that, even if the court had found the VCCR inferred an individual right to consular assistance, Carty's Article 36 right had not been breached because she had actually been informed of her right to consular assistance by the magistrate on the day after her arrest, and that she signed a form to say she was a citizen of the USA.[111] Judge Gilmore used particularly inflammatory language, stating that Carty 'chose to lie about her citizenship.'[112] Carty has since explained that she did not purposely lie, but that she was 'handed a stack of papers to sign' and she did not read them.[113] Furthermore, as Carty argued, she was known as a foreign national to both the federal Drug Enforcement Agency (due her being a confidential informant) and the government (due to a previous conviction for the theft of an automobile), and her accent would also have suggested that she was not a US citizen.[114] Although Judge Gilmore is correct that the law does not require the state to investigate citizenship,[115] if the state was properly following the US government's VCCR guidance, it would have done all it could to ensure she had access to consular assistance. The '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' which is sent to state law enforcement by the US State Department, provides that:

> If a detainee claims to be a [US] citizen in response to such a question, you generally can rely on that assertion and assume that consular notification requirements are not relevant. If you have reason to doubt that the person you are arresting or detaining is a U.S. citizen, however, you should inquire further about nationality so as to determine whether any consular notification obligations apply. You should keep a written record of whether the individual claimed to be

[110] UN Human Rights Committee, 'Draft General Comment 36' on 'Article 6 Right to Life' (2018) [46]; The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, October 1, 1999, Inter-Am Ct HR (Ser A) No. 16, para. 24 (1999).
[111] *Carty v Quarterman*, *supra* note 104, at 74.
[112] *Id.* at 75.
[113] *Id.*
[114] *Id.* at 76.
[115] *Id.*

> a [US] citizen and of any additional steps you took to determine the individual's nationality.[116]

The guidance also makes it clear that '[i]t is the arresting officer's responsibility to inquire about a person's nationality if there is any reason to believe that he or she is not a [US] citizen.'[117] Therefore, given that Carty was a Drug Enforcement Agency informant, would have been in the criminal system due to her conviction, and because of her St. Kitts accent, her VCCR right was breached contrary to clear State Department Guidance. This guidance also provides that foreign nationals of both the UK and St Kitts are on the 'Mandatory Notification' list, meaning that not only should Carty have been advised of her right to consular assistance, the foreign consulate or embassy should also be notified "without delay…of the arrest or detention" regardless of whether Carty requested it or not.[118]

IV. *The USA's 'Withdrawal' from the VCCR's Optional Protocol*

In 2005 the USA purported to withdraw from the VCCR's Optional Protocol. Article I of the Optional Protocol gives compulsory jurisdiction to the ICJ to rule upon disputes between parties specifically regarding the 'interpretation or application' of the VCCR.[119] In fact it was the USA that 'proposed the Optional Protocol in 1963 and [thereafter] ratified it with the rest of the VCCR in 1969.'[120]

However, following the outcome of the *Avena* case, the USA stated its intention to withdraw from the Optional Protocol by way of a letter from the Secretary of State, Condoleeza Rice, to the UN Secretary-General. It stated that:

> This letter constitutes notification by the United States of America that it hereby withdraws from the [Optional] Protocol. As a consequence of this withdrawal, the

[116] US Department 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 13 (4th ed 2016) <https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA_Manual_4th_Edition_September_2017.pdf>.
[117] *Id.*
[118] *Id.* at 3.
[119] Optional Protocol to Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 487.
[120] Corbett, *From Breard to Medellin II: The Vienna Convention on Consular Relations in Perspective*, *supra* note 65, at 812.

> [US] will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol.[121]

Therefore, the USA claimed that it would no longer be subject to the jurisdiction of the ICJ regarding the interpretation and application of the VCCR. Following the withdrawal, a US State Department spokesperson commented that the ICJ had 'interpreted the [VCCR] 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.'[122] This was a clear indication from the State Department that the withdrawal was a direct retaliation to the three ICJ cases, and that the USA is not willing to forego its national sovereignty regarding the imposition of the death penalty, fuelling the accusations that the USA acts unilaterally on the international stage due to American exceptionalism.[123]

V. *Was the USA's 'Withdrawal' from the Optional Protocol Valid?*

It is of course correct that the Optional Protocol is, by its name, optional. However, once a state becomes a party to a treaty, the *pacta sunt servanda* principle applies, meaning that treaties are binding and states must perform them in good faith, a principle which the VCLT enumerated.[124] This does not mean that states cannot withdraw from a treaty in general, as Helfer has noted, withdrawal or denunciation clauses are 'pervasive' in international treaties.[125] Where there is a withdrawal clause, it will set out the steps needed to be taken for the state to withdraw, clearly indicating that withdrawals are expressly permitted.[126] However, Helfer has also stated that 'occasionally, exit clauses are absent altogether, raising the possibility that exit may be implicitly precluded as a matter of international law.'[127] This is exactly the case with

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[121] Letter from US Secretary of State to UN Secretary-General (7 March 2005) <www.state.gov/documents/organization/87288.pdf>.
[122] Charles Lane, *U.S. Quits Pact Used in Capital Case,s* Washington Post (10 March 2005) <www.washingtonpost.com/wp-dyn/articles/A21981-2005Mar9.html>.
[123] Laurence R. Helfer, *Exiting Treaties*, 91 Va. L. Rev. 1579, 1624 (2005), '[b]y remaining outside these treaties through non-entry or exit, the United States has, according to many observers, cast doubt on its commitment to multilateral cooperation. A significant part of the negative reaction to the United States' non-participation in these treaty regimes can be attributed to resentment of its unique status as a world hegemon and the disproportionate military and economic power it possesses relative to other nations. But another component of the dissatisfaction relates to the perception that the United States, by failing to participate in treaty after treaty, is reaping the benefits of cooperation by others without incurring any corresponding burdens.'
[124] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331; 8 ILM 679 (1969) [hereinafter referred to as 'VCLT'].
[125] Helfer, *supra* note 123, at 1582.
[126] *Id.* at 1588.
[127] *Id.* at 1582.

the Optional Protocol to the VCCR, it does not include a 'denunciation clause' giving an express right to withdrawal.[128]

As there is no express permission provided to allow denunciation of the Optional Protocol, this raises the question of whether a State is legally able to withdraw from it, as the USA intended to. No State party other than the USA has attempted to withdraw from this Optional Protocol, so there is no precedent as to its validity.[129] To muddy the waters further, in 2008 when Mexico requested that the ICJ provide an interpretation on its judgment in *Avena*, it did not provide its view on the validity of the USA's purported withdrawal from the Optional Protocol.[130]

Therefore, what must initially be considered is how a State withdraws from a treaty when there is no denunciation clause. Although the omission of a denunciation clause signifies that withdrawal may be prohibited, it does not automatically mean there is no right to withdraw. Instead, the VCLT must be consulted.[131]

Article 56 VCLT 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.[132]

In terms of Article 56(1)(a), Quigley noted that the *travaux préparatoires* of the Optional Protocol made no mention of a denunciation clause during the drafting.[133] In fact, the USA itself 'viewed [compulsory dispute settlement] as central to the entire enterprise

[128] John Quigley, *The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases*, 19 Duke J. Comp. & Int'l L. 263, 264 (2009).
[129] John Quigley, William J. Aceves & S. Adele Shank, *The Law of Consular Access: A Documentary Guide* (Routledge, 2010) 207.
[130] Request for an Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals *(Mexico v United States of America)*.
[131] VCLT, *supra* note 124, Article 56.
[132] *Id.* at Article 56.
[133] Quigley, *The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases*, *supra* note 128, at 298.

of concluding a consular treaty.'[134] There is no evidence available to show that the drafters intended for withdrawal from the Optional Protocol, indicating that Article 56(1)(a) is not satisfied.

In terms of Article 56(1)(b), the VCCR protects the right to access consular assistance, which does not imply that there would be a right to denunciation as a way of avoiding ensuring consular protection for a detained foreign national. Furthermore, Reisman and Arsanjani have noted that 'there are now problems with the denunciation of treaty provisions on jurisdiction where substantive rights have been provided for individuals.'[135] It is widely considered that the VCCR confers individual rights, the ICJ held as such in *LaGrand* and *Avena*,[136] as has the Inter-American Commission on Human Rights,[137] the UN Human Rights Committee,[138] and even in *Breard v. Greene* SCOTUS held that the VCCR 'arguably confers on an individual the right to consular assistance following arrest,'[139] although SCOTUS overruled this decision in *Medellín*.[140] This suggests that Article 56(1)(b) is not satisfied either.

Aust has argued that '[i]t 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' on the basis that states must consent to be subject to an international jurisdiction.[141] Aust cited the USA's withdrawal from the VCCR Optional Protocol when asserting that '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.'[142] However, as Quigley noted in 2009 and this article has found in 2020, there have been no other withdrawals from similar treaties, meaning that Aust could rely on no other examples to substantiate this assertion. This also goes against the provisions of Article 56 VCLT discussed above.

[134] *Id.* at 294.
[135] 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 Marcelo G. Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law* (Brill, 2007) 904.
[136] *LaGrand*, *supra* note 5, at para. 77; *Avena*, *supra* note 5, at para. 40.
[137] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of* Law Advisory Opinion OC 16/99, *suprra* note 339, at para. 24.
[138] UNHRC, 'General Comment 36' on 'Article 6 Right to Life' (2015) CCPR/C/GC/R.36/Rev.2 [44].
[139] *Breard*, *supra* note 12, at 376.
[140] *Medellín*, *supra* note 58, at FN3.
[141] Anthony Aust, *Modern Treaty Law and Practice* (CUP, 2nd edn, 2007) 291.
[142] *Id.*

Another issue to consider was raised by Reisman and Arsanjani, who found that:

> It appears likely that the [USA] 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.[143]

However, as Quigley correctly stated, this is 'no excuse for failing to comply with a treaty obligation.'[144] Quigley went on to argue that '[e]ven 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.'[145] Indeed, the death penalty was not the point in hand in the VCCR cases adjudicated upon by the ICJ, the key issue was whether or not there had been a breach of a multilateral treaty, with the case being expedited due to the finality an imminent execution presents.

Quigley concluded that the USA's 'position that the VCCR Optional Protocol can be freely denounced is difficult to sustain on the basis of VCLT Article 56 and international practice.'[146] Given that there is no denunciation clause in the Optional Protocol, and considering the finding that the requirements of Article 56 have not been satisfied, this article agrees with Quigley that the USA's purported withdrawal from the Optional Protocol was likely invalid.[147] To substantiate this point, the UN's Office of the High Commissioner for Human Rights (OHCHR) raised concerns about the execution of Medellín 'despite an order to the contrary by the International Court of Justice,'[148] particularly as the '*OHCHR recalled that the [USA] has a legal obligation to comply with decisions of the International Court of Justice.*'[149] This assertion from the OHCHR that the USA's legal obligation under the VCCR is still in place came three years after the US purported to withdraw from the Optional Protocol, suggesting it believed that the withdrawal was invalid.

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[143] Reisman & Arsanjani, 'No Exit', *supra* note 135, at 925.
[144] Quigley, *The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases*, *supra* note 133, at 288-9.
[145] *Id.* at 289.
[146] *Id.* at 298.
[147] *Id.*
[148] UNHRC, 'Compilation of UN Information – United States of America' (12 August 2010) UN Doc A/HRC/WG6/9/USA/2, at para. 25.
[149] *Id.* at para. 26. Emphasis added.

If the USA's withdrawal is invalid, it will still be bound by the Optional Protocol, and will therefore remain under the ICJ's jurisdiction with regards to the VCCR. Alternatively, if the withdrawal from the Optional Protocol is valid and, given that the USA withdrew from the ICJ's general compulsory jurisdiction in 1986,[150] this indicates that regarding consular disputes the USA cannot sue or be sued. This suggests that there are two "realities" at play here: the USA's reality, which is that it cannot be held accountable for breaches of the VCCR, and the international law reality, which is that the USA is still a party to the VCCR and its Optional Protocol. This is an illogical position from the perspective of international practice. A state should not be able to remain a party to a multilateral international agreement that confers individual rights, but not have a remedy for any breaches of that agreement, particularly when there is a remedy prescribed in an Optional Protocol to the agreement. Should a state wish to withdraw from the judicial remedy of a breach, it should withdraw from the treaty in its entirety.

In this case, the USA must decide whether it will remain under the ICJ's jurisdiction regarding the VCCR, or whether it will withdraw from the VCCR in its entirety. There would be severe implications following a complete withdrawal. From the US government's perspective, it would lessen the consular protections that can be afforded to its own citizens. For example, in 'the well-known cases of the three American hikers…arrested in 2009 on charges of spying in Iran, or Amanda Knox, who was arrested and tried for murder in Italy.'[151] Moreover, foreign nationals in the USA, particularly those on death row, will be further negatively impacted as they will no longer be able to rely upon their Article 36 rights. In practice, these two realities cannot continue to be at play simultaneously; action must be taken to confirm whether the USA did withdraw from the Optional Protocol and what the next steps will be for the protection for foreign nations.

VI. *A Possible Solution: ICJ Test Case*

[150] When Nicaragua brought a case against the US before the ICJ in 1985, the US invoked the 'right' under a reservation it had lodged to withdraw from the Statute of the Court, hence removing itself from the compulsory jurisdiction of the ICJ, Restatement, *supra* note 39, at §903 Reporters Note 3.
[151] Cindy Galway Buys, *Reflections on the 50th Anniversary of the Vienna Convention on Consular Relations*, 38 S. Ill. U. L. J. 57, 63 (2013).

In order to solve this problem of the two conflicting realities, a test case should be brought before the ICJ. There are currently 125 foreign nationals from 32 nations on death row across the USA, meaning that there are 32 governments that could potentially bring action against the USA in the ICJ for a breach of the VCCR in a capital case. One of these countries would need to seek review and reconsideration of a foreign national's case by initiating litigation against the USA in the ICJ. An application should be made to the ICJ by the relevant government, asking the World Court to adjudicate upon the USA's breach of Article 36. The ICJ, by way of Article 36(6) Statute of the International Court of Justice, deems itself to be the deciding body when determining a dispute over whether the ICJ has jurisdiction or not.[152] Therefore, an application should be made to the ICJ invoking Article 36(6) and relying upon the lack of a denunciation clause and no grounds under Article 56 VCLT, to prove that the USA has not actually withdrawn from the Optional Protocol. The ICJ would then be able to adjudicate on the validity of the withdrawal through its decision on whether it had jurisdiction or not.

In order for the application to be successful, and to have the case reviewed and reconsidered, there are a number of points the relevant government should consider. The most immediate should be an attempt to avoid litigation altogether. Reparation outside of the ICJ should be sought before proceedings are initiated. Comity between nations, particularly two allies, is important. An attempt to engage with the US Secretary of State and Attorney-General on this matter should be a priority for the relevant government. However, given the Trump Administration's previous disregard of international law,[153] it is not clear that discussions would be fruitful and so proceedings may need to be initiated.

It is likely that, should the ICJ litigation be successful, the relevant government would need to seek implementation of the judgment in the US domestic courts, to either delay the execution or have the case reviewed and reconsidered. Although not a formal

[152] Statute of the International Court of Justice, 59 Stat 1055 (24 October 1945) Article 36(6).
[153] The Trump Administration has withdrawn from UNESCO, the Paris Agreement, and the UN Human Rights Council. US Department of State, *The United States Withdraws from UNESCO* (12 October 2017) <www.state.gov/r/pa/prs/ps/2017/10/274748.htm>; Associated Press *China and California Sign Deal to Work on Climate Change without Trump* The Guardian (7 June 2017) <www.theguardian.com/us-news/2017/jun/07/china-and-california-sign-deal-to-work-on-climate-change-without-trump>; BBC News, *US Quits 'Biased' UN Human Rights Council* (20 June 2018) <www.bbc.co.uk/news/44537372>.

requirement under ICJ precedent, it is notable that the Nevada state court allowed an appeal on the grounds of a VCCR breach, where the breach had prejudiced the petitioner's case.[154] It would form a stronger argument in the domestic courts in the USA if evidence of prejudice could be exampled that directly links to the breach of Article 36(1)(b) in the test case. Furthermore, it was seen in both Paraguay's and Germany's petitions to SCOTUS that the Justices take particular issue with petitions being filed at the eleventh hour before an execution. The test case government should learn from these mistakes and initiate litigation in a timely manner, rather than waiting until the execution date is looming. This would also allow for further action to be taken in the ICJ, should the USA not comply with any judgment it rendered.

VII. *Conclusion*

It is clear that being a foreign national on death row in the USA is an issue of international human rights concern. From the examples provided above, most appeals based upon of a breach of the Article 36(1)(b) VCCR right to consular assistance have fallen on deaf ears in the US courts. This is in spite of the ICJ precedent requiring the review and reconsideration of such cases.[155]

A potential reason why courts in the USA have not heeded the ICJ judgments is because the USA has purported to withdraw from the Optional Protocol to the VCCR, which gives jurisdiction to the ICJ to rule upon breaches of the VCCR. However, there is no evidence to suggest that, based upon Article 56 VCLT, it is possible for the USA to legally withdraw from the Optional Protocol. Rather than leaving vulnerable people, such as the three examples provided, without redress for breaches of fundamental rights, the USA must decide whether it will remain a party to the VCCR and its Optional Protocol, or withdraw from the agreement in its entirety.

To resolve this tale of two realities, this article has argued for a test case to be taken before the ICJ by one of the 32 nations with a national on death row in the USA. This would allow the ICJ to rule upon (1) whether the USA's withdrawal from the Optional

[154] *Gutierrez v Nevada*, *supra* note 2.
[155] *LaGrand*, *supra* note 5, at para. 77 128(7); *Avena*, *supra* note 5, at para. 153(3).

Protocol was valid, and (2) whether the USA breached the VCCR by not advising the relevant foreign national(s) of their Article 36(1)(b) right to consular assistance, and what the remedy should be. The test case government should also be prepared to initiate litigation in the USA to enforce any potential judgment handed down by the ICJ, to ensure that its national is not executed in breach of their fundamental human right to a fair trial.